LAW ENFORCEMENT AND INTELLIGENCE GATHERING IN MUSLIM AND IMMIGRANT COMMUNITIES AFTER 9/11

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ABSTRACT

Since the attacks of September 11, 2001, law enforcement agencies have actively sought partnerships with Muslim communities in the United States. Consistent with community-based policing, these partnerships are designed to persuade members of these communities to share information about possible extremist activity. These cooperative efforts have borne fruit, resulting in important anti-terrorism prosecutions. But during the past several years, law enforcement has begun to use another tactic simultaneously: the FBI and some police departments have placed informants in mosques and other religious institutions to gather intelligence. The government justifies this tactic by asserting that it must take a proactive stance in order to prevent attacks by terrorists from outside the United States, and by so-called homegrown cells from within. The problem is that, when the use of informants in a mosque becomes known in a Muslim community, people within that community—the same people that law enforcement has so assiduously courted as partners against extremism—feel betrayed. This directly and deeply undermines efforts to build partnerships, and the ability to gather intelligence that might flow from those relationships is compromised or lost entirely.

As it stands, the law—whether in the form of Fourth Amendment doctrine, defenses in substantive criminal law, or cases and statutes supporting lawsuits against government surveillance—offers little help in resolving this dilemma. Further, change in either statutes or Supreme Court doctrine that might help address the problem seems vanishingly unlikely. Locally-negotiated agreements on the use of informants

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represent the best alternative route toward both security against terrorists and keeping Muslim communities inclined to assist in anti-terrorism efforts. In these agreements, law enforcement might agree to limit some of its considerable power to use informants in exchange for the continued cooperation of the community. The article discusses how such agreements might be reached, what they might strive to do substantively, and the problems they might encounter.

TABLE OF CONTENTS

INTRODUCTION

In the wake of the terrorist attacks of September 11, 2001, law enforcement at all levels of government realized both the importance of obtaining intelligence to prevent further attacks, and that the most important source of such critical information was—and, in fact, could only be—American Muslim communities[1] themselves. One can see an example of this awakening in a 2006 speech by Robert Mueller, Director of the Federal Bureau of Investigation (FBI).[2] Mueller's address came just after the arrest in Miami of seven men whom Mueller characterized, collectively, as an example of domestic terrorism cells that pose a threat potentially bigger than Al-Qaeda.[3] Mueller told his audience, many of

1. I use the phrases "Muslim community" and "Muslim communities" throughout this article. It is important to note at the outset that this should not lead readers into thinking that Muslims in the United States constitute a monolithic group. This is not the case; Muslims in the United States come from a wide variety of nations and ethnic backgrounds, and often do not act or speak as a single bloc. *See infra* notes 268–70 and accompanying text.

2. Robert S. Mueller, Dir., Fed. Bureau of Investigation, Remarks at the City Club of Cleveland (June 23, 2006), *available at* http://www.fbi.gov/pressrel/speeches/mueller062306.htm.

3. *See id.* ("These homegrown terrorists may prove to be as dangerous as groups like al Qaeda, if not more so.").

whom were Muslim,[4] that the deadliest terrorist attacks after September 11, 2001, both carried out and thwarted, were planned by people raised in the countries they attacked or targeted.[5] If the United States wished to prevent attacks, Mueller said, close cooperation between law enforcement and Muslim communities in the United States would become absolutely vital.[6] Mueller appealed directly to American Muslims for assistance:

> There are those [within American Muslim communities] who view the FBI with suspicion, and we must bridge that gap.... We need to reach the point where you are willing to come forward [to law enforcement] and say, "I have seen or heard something that you need to know." ... The radicalization cycle can only be broken if we stand together against terrorism.[7]

Mueller's comments in 2006 remain accurate today. He saw the situation properly when he said that law enforcement cannot ignore even a remote possibility of homegrown terrorist cells in the United States.[8] This

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4. *See* Mike Tobin, *FBI Chief Warns of Domestic Terrorists in City Club Speech*, CLEV. PLAIN DEALER, June 24, 2006, at A4 (noting that "local Muslims made up a sizable contingent of the 250 people at the sold-out speech").

5. Mueller, *supra* note 2. The seven individuals arrested in Miami had all the characteristics, Mueller said, of a "homegrown terrorist cell." *Id.* As examples of "homegrown" cells overseas, Mueller cited terrorist attacks launched (or aborted by police) in Madrid, London, and Toronto. *Id.* In the United States, he cited the 2006 arrest of three men in Toledo, Ohio, on charges of plotting to smuggle weapons into Iraq. *Id.* It is worth noting that, by the summer of 2007, the government seemed less concerned with homegrown cells and more concerned with Al-Qaeda, because the organization had managed to reconstitute and strengthen itself in ungovernable border areas of Pakistan. *See* NAT'L INTELLIGENCE COUNCIL, NATIONAL INTELLIGENCE ESTIMATE: THE TERRORIST THREAT TO THE U.S. HOMELAND (2007) ("Al-Qa'ida is and will remain the most serious terrorist threat to the Homeland, as its central leadership continues to plan high-impact plots .... We assess the group has protected or regenerated key elements of its Homeland attack capability .... [W]e judge that al-Qa'ida will intensify its efforts to put operatives here."), *available at* http://www.dni.gov/press_releases/20070717_release.pdf. *See also* Karen DeYoung & Walter Pincus, *Al-Qaeda's Gains Keep U.S. at Risk, Report Says; Safe Haven in Pakistan Is Seen as Challenging Counterterrorism Efforts*, WASH. POST, July 18, 2007, at A1 (reporting that a new national intelligence estimate concluded that the United States would face a "persistent and evolving terrorist threat over the next three years" and that Al-Qaeda would remain "the most serious element of that threat"); Scott Shane, *Same People, Same Threat*, N.Y. TIMES, July 18, 2007, at A1 (stating that the "major threat" to the United States is Al-Qaeda, as was true in 2001).

6. *See* Mueller, *supra* note 2 ("We must also build relationships within the Muslim community to counter the spread of extremist ideology."). This assessment—that enforcement can only defend the country against such attacks with the assistance of Muslims—is one with which law enforcement, intelligence, and anti-terrorism officials the world over agree. *See infra* notes 51–60 and accompanying text.

7. Mueller, *supra* note 2.

8. *See id.* ("We need to know the risk factors and the potential targets for criminal and terrorist activity. With this information, we can find and stop homegrown terrorists before they strike.").

remains true even though experts believe that the possibility of such homegrown terrorism in the United States does not approach the risk faced by our allies in Europe.[9] Furthermore, Mueller correctly stated that success in heading off terrorism in America largely depends upon cooperative relationships between Muslim communities and law enforcement. These partnerships have extraordinary importance because they form information pipelines—conduits through which our law enforcement agencies can learn about real, concrete terrorist plots.

Looking at the cases the government has brought against terrorist suspects since September of 2001, one cannot help but notice that Muslim communities have done exactly what Mueller wants: *they have actively brought the FBI and other police agencies crucial information in terrorism cases.* For example, the FBI's six cases in Lackawanna, New York, still stand as some of its greatest anti-terrorism victories. These cases involved a group of six young men of Yemeni descent accused of engaging in terrorist activity by, among other things, attending terrorist training camps.[10] The cases, announced with great fanfare by the FBI and the office of then-Attorney General John Ashcroft,[11] resulted in guilty pleas from, and sentences of up to ten years in prison for, all of the accused.[12] Few people seem to remember that the arrests occurred only because Lackawanna's Yemeni community itself brought the men to the FBI's

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9. *See, e.g.*, EBEN KAPLAN, COUNCIL ON FOREIGN RELATIONS, AMERICAN MUSLIMS AND THE THREAT OF HOMEGROWN TERRORISM (2007), http://www.cfr.org/publication/11509/American_muslims_and_the_threat_of_homegrown_terrorism.html?breadcrumb=%2Fissue%2F24%2Fdefensehomeland_security#2 (declaring that, generally speaking, Muslims integrate into American society more thoroughly than their counterparts in Europe). *See also* Spencer Ackerman, *Religious Protection*, NEW REPUBLIC, Dec. 12, 2005, at 18, 20 (partially attributing lower rates of homegrown Islamic extremism in the United States as compared Europe to the fact that the United States "offers better social and economic opportunities to its Muslim citizens," but mostly to "America's ability to accommodate Islam itself"). While polling data suggests that younger American Muslims are, perhaps surprisingly, accepting of suicide terrorism in defense of Islam, those holding these views still constitute a smaller percentage of the American Arab and Muslim communities than is true in Europe. PEW RESEARCH CTR., MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 53–54 (2007) (polling data reveal that while younger U.S. Muslims are more likely than older Muslim Americans to support suicide bombing in the defense of Islam, absolute levels of support for such extremism among Muslim Americans remains low, especially as compared to Muslims around the world), *available at* http://pewresearch.org/assets/pdf/muslim-americans.pdf.

10. Philip Shenon, *U.S. Says Suspects Awaited an Order for Terror Strike*, N.Y. TIMES, Sept. 15, 2002, at A1.

11. *See generally id.* (reporting on the announcement of the arrests of the Lackawanna Six).

12. Lowell Bergman, *Qaeda Trainee Is Reported Seized in Yemen*, N.Y. TIMES, Jan. 29, 2004, at A23. For an in-depth look at the Lackawanna case, see DINA TEMPLE-RASTON, THE JIHAD NEXT DOOR: THE LACKAWANNA SIX AND ROUGH JUSTICE IN AN AGE OF TERROR (2007).

attention.[13] Without that information, the Lackawanna cell might have remained undiscovered, perhaps with disastrous results. The success of the Lackawanna case (and others like it) explains the strong consensus among law enforcement and security experts, both nationally and internationally, that cooperation and partnership between law enforcement and Muslim communities represent the key to success against terrorists.[14]

But the creation and cultivation of partnerships between law enforcement and Muslim communities does not represent the only effort by the FBI and local police to gather intelligence to prevent terrorism. Over the past several years, the FBI and the New York Police Department have made increasing use of informants—untrained civilians often in legal jeopardy themselves, who receive money or other significant benefits[15]—placing them as spies in Muslim religious and cultural institutions.[16] In at least some cases—for example, in New York City[17] and in Lodi, California[18]—investigations based on the use of informants have resulted in convictions, though some doubt remains about the scope of these victories and the need for these kinds of efforts inside the United States.[19]

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13. *See* Shenon, *supra* note 10 ("Officials said it was information from inside [the Yemeni community in which the suspects lived] that led them to conduct an inquiry there."); *Frontline: Chasing the Sleeper Cell* (PBS television broadcast Oct. 16, 2003) (featuring an interview with the agent in charge of investigation in Lackawanna, who explained that the investigation began after Lackawanna's Yemeni community sent a letter to the FBI's Buffalo office), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/etc/script.html.

14. *See infra* notes 51–67 and accompanying text.

15. I define informants in this way to distinguish them from both trained police officers working undercover and, more importantly for purposes of this article, people who might come forward from inside these communities to pass information on to law enforcement. The latter type of individual might also be called an informant, but her actions present entirely different questions than those discussed here. When law enforcement places its informants into situations or institutions, it deliberately targets these institutions and the individuals within them for investigation. In doing so, law enforcement raises issues regarding the use of power and discretion, the judicial branch's supervision of these efforts, the compliance with rules for the use of this discretion, and, especially, whether the facts should meet some threshold test before police exercise this discretion. When individuals come forward from within these institutions to inform law enforcement, they act not as law enforcement's agents, but rather as concerned citizens who wish, in good faith, to report something suspicious.

16. *See, e.g.*, Andrea Elliott, *As Police Watch for Terrorists, Brooklyn Muslims Feel the Eyes*, N.Y. TIMES, May 27, 2006, at B4 ("It is no secret to the Muslim immigrants of Bay Ridge, Brooklyn, that spies live among them. . . . It is another thing for them to be officially revealed. Over the last several weeks . . . Muslims in Bay Ridge learned that two agents of the police had been planted in the neighborhood and were instrumental to the [prosecution of a fellow Muslim].").

17. *See infra* notes 68–72, 94–103 and accompanying text.

18. *See infra* note 73–75 and accompanying text.

19. *See, e.g.*, Dan Eggen & Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges*, WASH. POST, June 12, 2005, at A1 (reporting that an analysis of the Justice Department's list of terrorism prosecutions indicated that "the government's effort to identify terrorists in the United States has been less successful than authorities have

Despite these doubts, in the last months of the Bush Administration Attorney General Michael Mukasey announced significant changes in FBI rules that would allow for greater use of informants in Muslim cultural and religious institutions.[20] The Attorney General went ahead with these actions despite objections that this would lead to racial profiling in terrorism investigations[21] and would pose a threat to the civil liberties of

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often suggested" and that, in the end, "most cases on the Justice Department list [of terrorism prosecutions] turned out to have no connection to terrorism at all"); John Mueller, *Is There Still a Terrorist Threat?: The Myth of the Omnipresent Enemy*, FOREIGN AFF., Sept.-Oct. 2006, at 2 (asserting that the reason for the lack of any attacks in the United States since September of 2001 is that there are no terrorists in the United States and that those outside the United States do not have the means or the desire to strike from abroad); Scott Shane & Lowell Bergman, *Adding Up the Ounces of Prevention*, N.Y. TIMES, Sept. 10, 2006, § 4, at 1 (quoting a former Central Intelligence Agency officer as stating that "[t]he Miami case is nonsense . . . [t]hose are absolute jokers," and explaining that analysis of the evidence indicates that threat of terrorism inside the United States has been greatly exaggerated by the government).

20. Press Release, U.S. Dep't of Justice, Joint Statement of Attorney General Michael B. Mukasey and FBI Director Robert S. Mueller on the Issuance of the Attorney General Guidelines for Domestic FBI Operations (Oct. 3, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/October/08-opa-890.html. *See also* Memorandum from the Office of the Attorney Gen. to the Heads of Dep't Components 2–3 (Sept. 29, 2008) (explaining that the new guidelines enable the FBI to task "human sources," otherwise known as "informants" or "assets," to seek information about threats to national security in addition to their function under the old guidelines, which was limited to checking leads in ordinary criminal investigations), *available at* http://www.justice.gov/ag/readingroom/ guidelines-memo.pdf.

21. For example, the American Civil Liberties Union expressed "deep concern" because the FBI would now have the power to begin investigations based on the race or ethnicity of suspects. Press Release, Am. Civil Liberties Union, New F.B.I. Guidelines Open Door to Further Abuse (Sept. 12, 2008), *available at* http://www.aclu.org/safefree/general/36732prs20080912.html. The ACLU's executive director accused the Attorney General of "[i]ssuing guidelines that permit racial profiling"; he also complained that "[t]he new guidelines offer no specifics on how the FBI will ensure that race and religion are not used improperly as proxies for suspicion." *Id.* Muslim and Arab communities in the United States also expressed fear of racial and religious profiling. *See, e.g.*, Niraj Warikoo, *FBI Power in Terror Cases Grows*, DETROIT FREE PRESS, Nov. 30, 2008, at 1 (quoting an attorney in Dearborn, Michigan, who has frequently defended Arab Americans in national security cases, as saying, "There is anxiety the Middle Eastern community will be targeted. . . . There is always a danger in the implementation when you give such discretion in the hands of agents."). The Department of Justice attempted to reassure opponents, explaining that the new Guidelines would "work in tandem with the Attorney General's Guidance Regarding the Use of Race by Federal Law Enforcement Agencies," which, according to the Department, "prohibit[s] opening an investigation based solely on an individual's race, ethnicity, or religion." Press Release, U.S. Dep't of Justice, Fact Sheet: Attorney General Consolidated Guidelines for FBI Domestic Operations (Oct. 3, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/October/08-ag-889.html. While this statement is literally true, it omits enough to be deceptive. It fails to mention that the Guidance Regarding the Use of Race contains an exception for any investigation involving national security or immigration matters—precisely the subjects for which the government has used profiling to investigate Muslims and Arab Americans. U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES 2 (2003), *available at* http://www.usdoj.gov/crt/split/documents/guidance_on_race.pdf.

Muslims and Arab Americans.[22]

Using informants in Muslim religious and cultural contexts too frequently and casually damages the FBI's critical and generally successful efforts to build partnerships with Muslim and Arab American communities. It will cause lasting damage to efforts to bring Muslim communities and law enforcement together to build a common cause against extremism, and it will harm efforts to obtain intelligence from these communities through carefully-built cooperative relationships established in the last five years. The reaction of Muslim communities to news of the involvement of informants in terrorism cases has, in fact, seemed especially sharp *precisely because* it comes against a background of police and community efforts to engage in purposeful cooperation. When Muslims learn that the government has used informants, members of these communities feel used and betrayed—not partners of law enforcement, but suspects, each and every one.[23] We can ill afford to damage the possibility that these partnerships can serve as sources of information; they remain our best—perhaps our only—hope for obtaining the intelligence we need to head off the damage of actual terrorist attacks in the future. Constructing these law enforcement/community

22. Little current commentary has addressed the issue of the contemporary use of informants in religious institutions, particularly mosques. The only up-to-date examination of this problem is Tom Lininger, *Sects, Lies and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201 (2004), which I address directly in Section III, *infra*. Other related writings have generally concerned themselves with the Attorney General's guidelines for surveillance. *See, e.g.*, Floyd Abrams, *The First Amendment and the War Against Terrorism*, 5 U. PA. J. CONST. L. 1, 6 n.13 (contrasting then-current Attorney General guidelines with predecessors); William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 26–35, 68–76 (2000) (examining surveillance from the Hoover era through the present, especially Foreign Intelligence Surveillance Act surveillance); David Berry, *The First Amendment and Law Enforcement Infiltration of Political Groups*, 56 S. CAL. REV. 207, 233–36 (1982) (advocating that Congress enact a bill to protect First Amendment rights that current police and FBI practices are compromising); Don Edwards, *Reordering the Priorities of the F.B.I. in Light of the End of the Cold War*, 65 ST. JOHN'S L. REV. 59, 79–84 (1991) (advocating an increased congressional role in regulating the FBI, since FBI self-governance on these matters has not proven effective); Jon T. Elliff, *The Attorney General's Guidelines for F.B.I. Investigations*, 69 CORNELL L. REV. 785, 785 (1985) (comparing Smith and Levi Guidelines); Eric Lardiere, *The Justiciability and Constitutionality of Political Intelligence Gathering*, 30 UCLA L. REV. 976, 1007–34 (1983) (proposing new standards of justiciability for lawsuits challenging the FBI's surveillance practices); David M. Park, *Re-examining the Attorney General's Guidelines for F.B.I. Investigations of Domestic Groups*, 39 ARIZ. L. REV. 769, 772–75 (1997) (examining history of Attorney General guidelines from Levi to Reno); Mitchell S. Rubin, *The F.B.I. and Dissidents: A First Amendment Analysis of Attorney General Smith's 1983 F.B.I. Guidelines on Domestic Security Investigations*, 27 ARIZ. L. REV. 453, 454–55 (1985) (comparing Smith and Levi guidelines); Athan G. Theoharis, *F.B.I. Surveillance: Past and Present*, 69 CORNELL L. REV. 883, 893–94 (1984) (arguing for a "tightly worded" FBI legislative charter).

23. *See infra* Section I.B.

partnerships requires great efforts to build trust;[24] as a result, when the use of informants has come to light, the community perceives this as a betrayal of that trust.

As it now stands, the law provides virtually no legal protection against the use of government informants. The Fourth Amendment imposes no standards for, and does not require any judicial oversight of, police use of informants.[25] Neither substantive criminal law defenses[26] nor civil actions[27] hold any promise of restraining this type of government activity. Therefore, we find ourselves at a sensitive crossroads. On the one hand, we cannot wholly discount the possibility that very small groups of terrorists in our country may attempt to do catastrophic damage. And it remains at least possible that infiltration of these groups by informants *could* prevent a disaster. On the other hand, the unregulated use of informants in mosques and other religious and cultural settings can also do great damage because it poses the risk of cutting off our best possible source of intelligence: the voluntary, cooperative relationships that have developed between law enforcement and Muslim communities.

Both the courts and legislative bodies seem extremely unlikely to move toward greater regulation of police use of informants in this setting,[28] so any initiative must come from somewhere else. Fortunately, the unusual circumstances of the situation may provide an answer. While the idea may seem counterintuitive at first, close study reveals that the interested parties—law enforcement on the one hand and Muslim communities on the other—stand in a unique relationship of reinforcing mutual need. This situation thus presents an exceptional opportunity for the negotiation of cooperative agreements in which both sides might gain. Law enforcement might agree to (at least mildly) restrict its own ability to use informants in the most sensitive situations; in turn, the Muslim community would pledge to continue and, when possible, to increase its voluntary cooperation. All of this could be accomplished through local agreements governing the use of informants that both police and the community could accept. While negotiated limits on law enforcement power represent a novel approach to police regulation, few other possibilities for change seem promising. Even though parties traveling this path would surely encounter formidable obstacles, the status quo offers little hope of averting harm to the different but overlapping goals that law enforcement and Muslim communities have. To state the matter simply, a

24. *See infra* note 37.

25. *See infra* Section II.A.

26. *See infra* Sections II.B.1–2.

27. *See infra* Section II.B.3.

28. *See, e.g.*, William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2158–59 (arguing that the shadow of 9/11 and the "specter" of suicide terrorist attacks hang over any decision involving law enforcement power).

negotiated set of limitations on the use of informants represents the last best chance to salvage the relationships that law enforcement and Muslim communities must have in order to fight terrorism, as well as to use informants judiciously and carefully to infiltrate possible terrorist cells when real danger exists.

This article proceeds as follows. Section I discusses recent efforts to build bridges between law enforcement and American Muslim communities and recounts the counter-productive effect the use of informants in these communities has had. Section II examines what the law allows law enforcement to do with informants. Section III explains why we should expect the use of police informants in Muslim communities to persist or even grow; explores the costs of the use of informants to both the community and to security efforts; and concludes that, in light of these factors, some regulation of information practice seems desirable. Finally, Section IV proposes locally-created, informal agreements on accepted practices for the use of informants.

I.
BUILDING BRIDGES BETWEEN MUSLIM COMMUNITIES AND LAW ENFORCEMENT TO GATHER INTELLIGENCE, AND THE USE OF INFORMANTS IN THOSE COMMUNITIES

The first priority in our struggle against terrorism remains the gathering of intelligence. The reason for this is simple but profoundly important. Only through the constant collection and careful analysis of pertinent information can our public safety and security services not just respond to terrorist activity after the fact but stop it before it happens. As with other aspects of anti-terrorism work, different strategies and tactics exist for gathering intelligence, and law enforcement and security officials can choose among the best approaches. It is important, therefore, to take note of the wide agreement among officials about the effectiveness, importance, and centrality of one particular method of intelligence gathering: the creation and cultivation of strong relationships and partnerships between law enforcement and Muslim communities, in order that intelligence flows from these communities to law enforcement as easily as possible.[29] Without these bridges, we lack the necessary connections to receive intelligence from those inclined to give it. Moreover, we find the connections that we do have undermined, or perhaps destroyed, by the perception of betrayal.

29. *See infra* note 35.

A. Bridge Building Between Law Enforcement and Muslim Communities

For at least one reason, the consensus on the importance of building trust-based relationships as a way to fight terror cannot surprise anyone in law enforcement: we know this method works. In fact, building good relations with Muslim communities has paid off against terrorists in the most direct way possible. The Lackawanna case[30] remains a showcase example. The men apprehended in that case, who were characterized by the U.S. Department of Justice as a sleeper cell waiting for the word to put their deadly agenda into action, might have attacked except for the fact that the local Muslim community passed crucial information to the FBI that prompted their investigation. And the Lackawanna case does not stand alone. For example, in the Toledo terrorism case mentioned by FBI Director Robert Mueller in his 2006 speech in Cleveland,[31] the Muslim community played the same kind of critical role. When the FBI announced the indictments of the three individuals in Toledo, Ted Wasky, the FBI's Special Agent in Charge of the Cleveland field office, explicitly acknowledged the help of Toledo's Muslims.[32] Wasky praised the extensive and essential cooperation of members of the local Muslim community in the case, and said that this cooperation resulted in important information flowing to law enforcement.[33] "[The members of the Toledo Muslim community] are the ones who deserve the most credit," Wasky said. "The ability to prevent another terrorist attack cannot be won without the support that the community gave."[34]

The widespread agreement in law enforcement that the cooperation of Muslim communities remains vital to the success of anti-terrorism efforts owes much to the strong consensus in law enforcement, building for at least twenty years, on the basic principles, goals, and benefits of community policing.[35] Law enforcement almost everywhere acknowledges

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30. *See supra* notes 10–14 and accompanying text.

31. *See* Mueller, *supra* note 2.

32. *Toledo's Arab Community Called "Crucial" to Terrorism Investigation*, WTOL.COM, Feb. 21, 2006, http://www.wtol.com/Global/story.asp?S=4533250.

33. *See id.* (quoting Wasky as saying that the local Arab community was "crucial" to the investigation).

34. *Id. See also* Richard B. Schmitt, *Cloud of Suspicion Hangs over Toledo*, L.A. TIMES, Feb. 23, 2006, at A11 ("Toledo's Muslim community has a history of cooperating with law enforcement, which may have been the suspects' undoing. An FBI official credited local Muslim groups Tuesday with providing crucial information that led to the arrests.").

35. *See, e.g.*, KAPLAN, *supra* note 9, at 2 (quoting a fellow for counterterrorism at the Manhattan Institute as saying that "[g]ood community policing—establishing relationships and keeping abreast of trends in a neighborhood 'based on common interests other than terrorism'—underpins any effort to detect a homegrown plot"). To be sure, there are critics of the community policing model who find it wanting in significant ways. *See, e.g.*, Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV.

that police efforts alone cannot make cities and towns safe from crime and criminals; rather, public safety requires a partnership between police and the community that encourages communication about people and events on the ground.[36] Community policing means far more than community relations or shallow, one-off efforts by police agencies to exhibit sensitivity or hear the concerns of the communities they serve. Rather, it requires a deep commitment to the idea that success in public safety efforts of any kind can only occur when strong, positive connections exist between police and those whom they serve—that is, through partnerships based on trust.[37] That type of partnership requires sustained effort by both the police and communities to build trust through establishing relationships and networks with each other, to develop a track record of joint efforts toward common goals, and to respect each other as real partners.[38] The lessons for our anti-terrorism efforts seem clear: if we believe that potential terrorists lurk in our Muslim communities, we must have good communications with them. This requires relationships built on trust—just like everything else in community policing.

If building these relationships between law enforcement and communities usually takes considerable effort, it has been even more difficult to build them between law enforcement and Muslim communities. First, in many jurisdictions prior to September 11, 2001, no relationships existed *at all* between Muslim communities and the FBI and police departments. According to Michael Rolince, a thirty-one-year veteran of the FBI who now works as a counterterrorism consultant in the private sector: "After 9/11, I was of the opinion that we didn't have the kind of inroads [into the Muslim community] that we needed to have." Rolince states that he and his colleagues "didn't know what was in our own backyard" as far as the Muslim population, so they had to begin their efforts from scratch.[39]

As if starting from the very beginning would not be hard enough, any

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1513, 1513–15 (2002) ("[Proponents of community policing] have so far failed to identify a single theory of crime control that is comparable in parsimony and prescriptive richness to the rational-actor model that animates traditional policing strategies. . . . [M]ost of the [community policing] strategies also have at least the potential to disrupt reciprocal cooperation . . . .").

36. *See infra* notes 37–38 and accompanying text.

37. *See, e.g.*, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, UNDERSTANDING COMMUNITY POLICING: A FRAMEWORK FOR ACTION 13 (1994) ("Community policing consists of two complementary core components, *community partnership* and *problem solving*."), *available at* http://www.ncjrs.gov/pdffiles/commp.pdf.

38. For a broader view of the history and future of community policing efforts in the United States, as well as an overview of the importance of trust-based partnerships in such efforts, see generally DAVID A. HARRIS, GOOD COPS: THE CASE FOR PREVENTIVE POLICING (2005).

39. Jeff Kearns, PBS, Frontline, The Enemy Within, Engaging the Muslim Community (Oct. 10, 2006), http://www.pbs.org/wgbh/pages/frontline/enemywithin/reality/muslim.html.

effort to create positive relationships between law enforcement and American Muslims would begin not on a blank slate, but against less-than-positive experiences. Efforts to build relationships came against the background of arrests of many hundreds of Muslims by the FBI after 9/11 on immigration and petty criminal charges, because the authorities suspected the arrestees—without evidence—of connection to the attacks or potential terrorist activity.[40] The government detained these individuals, often for weeks or months and in severe conditions, and denied some of them access to lawyers and family members.[41] The government then kept them confined under a "hold until cleared" policy, effectively turning the presumption of innocence on its head.[42] The FBI followed this with a program of "voluntary" interviews with thousands of young men from Muslim countries to ask whether they had any involvement in terrorism or had any information that might assist the authorities.[43]

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40. *See, e.g.*, OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 1 (2003) (detailing how law enforcement officials had detained, at least for questioning, more than 1200 citizens and aliens nationwide and how many of the individuals questioned were subsequently released without being charged with a criminal or immigration offense), *available at* www.usdoj.gov/oig/special/0306/full.pdf.

41. *Id.*

42. *Id.*

43. *See* Memorandum from the Deputy Attorney Gen. of the U.S. to All U.S. Attorneys and All Members of the Anti-terrorism Task Forces (Nov. 9, 2001) (setting guidelines for interviews regarding international terrorism), *available at* http://www.usdoj.gov/dag/readingroom/terrorism2.htm. *See also* HARRIS, *supra* note 38, at 9–12 (describing the interviews and the harsh criticism they inspired from local police and former federal law enforcement officials). It seems unlikely that such an effort would uncover valuable information. *See, e.g.*, HARRIS, *supra* note 38, at 174 (quoting an attorney who represented several interviewees as saying, "To ask [someone] whether you advocate terrorism? What kind of jackass would say yes?"); Jim McGee, *Ex-FBI Officials Criticize Tactics on Terrorism; Detention of Suspects Not Effective, They Say*, WASH. POST, Nov. 28, 2001, at A1 (quoting a former high-ranking FBI official as saying that the interviews were likely to produce nothing more than "the recipe to Mom's chicken soup"). However, a report by Justice Department officials to then-Attorney General John Ashcroft said that the program helped disrupt potential terrorist activities and also led to meaningful investigative leads. Memorandum from Kenneth L. Wainstein, Dir., Executive Office for U.S. Attorneys, U.S. Dep't of Justice 5–7 (Feb. 26, 2002), *available at* http://www.scribd.com/doc/17819481/T5-B61-VIP-Fdr-22602-Wainstein-Memo-Re-Final-Report-on-Interview-Project-224. But these officials offered no proof of these assertions; two years later, neither the Department of Justice nor the FBI had bothered to analyze the data from the interviews and had no plans to do so. *See* U.S. GEN. ACCOUNTING OFFICE, HOMELAND SECURITY: JUSTICE DEPARTMENT'S PROJECT TO INTERVIEW ALIENS AFTER SEPTEMBER 11, 2001, at 15–16 (2003), *available at* http://www.gao.gov/new.items/d03459.pdf. From their perspective, people within the Muslim community saw the effort as "'one of the most damaging [policies] we've seen'" because it spread fear and confusion in Muslim communities, which might have had the perverse result of making Muslims hesitate to come forward with important information when they did have it. KAPLAN, *supra* note 9, at 2–3 (quoting Hussein Ibish, executive director of the Hala Salaam Maksoud Foundation for

These post-9/11 actions and others by the government thus make it much more difficult for law enforcement to create strong relationships with Muslim communities because they have stimulated not trust in, but fear of, federal law enforcement. A nationwide study in 2006 by the Vera Institute of Justice showed just how deep the gulf between Muslim communities and federal law enforcement has become. The study, funded by the National Institute of Justice and performed over a two-year period, revealed that Arab Americans feared the intrusion of federal policies and practices even more than hate crimes or acts of violence.[44] These findings show just how difficult it will be for law enforcement to secure positive relations with Muslims.[45]

To make matters worse, recall that many Muslims immigrated to the United States from countries that functioned as police states, such as Iraq, Syria, Egypt, and Iran. Individuals from such countries would almost certainly begin any relationship with the police or government officials with a presumption of suspicion. In their native countries, a knock on the door of one's home or business from police or equivalent officials struck terror into the heart, and every whispered conversation discussing the state or its leadership held the potential for victimization by an informant. This made distrust of police endemic in these communities, and the habits and reflexes of mind learned in such an environment would undoubtedly come with immigrants from those places.[46]

But in spite of these obstacles, law enforcement and security officials clearly see the imperative of building, maintaining, and sustaining relationships with their Muslim communities. And this is no accident: they understand that essential rewards can flow from these efforts. Constructing and maintaining these partnerships is absolutely necessary for police/citizen communication; without ongoing, trust-based relationships, fewer avenues and opportunities exist for communication. And less communication means less intelligence will come to the police from those living and working in the community. Again, this insight comes

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Arab-American Leadership).

44. NICOLE J. HENDERSON, CHRISTOPHER W. ORTIZ, NAOMI F. SUGIE & JOEL MILLER, VERA INST. OF JUSTICE, LAW ENFORCEMENT AND ARAB AMERICAN COMMUNITY RELATIONSHIPS AFTER SEPTEMBER 11, 2001: ENGAGEMENT IN A TIME OF UNCERTAINTY 13 (2006), *available at* http://www.vera.org/download?file=147/Arab%2BAmerican%2BCommunity%2BRelations.pdf.

45. Fortunately, the study also shows that Arab American communities have significantly more trust in and better relationships with their local police departments than the FBI or other federal agencies and that efforts to improve relations between these communities and law enforcement are often effective in reducing tensions. *Id.* at 21.

46. *See, e.g.*, Elliott, *supra* note 16 ("Palestinian, Syrian and Egyptian immigrants have long engaged in their own form of surveillance, trying to discern the spies in their midst. It is a habit imported from the countries they left behind, where informers for the security services were common and political freedoms curtailed.").

directly from community policing. Robert Trojanowicz and Bonnie Bucqueroux, two of the foremost champions of community policing, explain that when law-abiding people in communities work with the police and participate in the process of law enforcement, as successful community policing requires, they become much more likely to support enforcement efforts.[47] And among the most important kinds of support is supplying law enforcement with information. Trojanowicz and Bucqueroux call this "the lifeblood of policing."[48] "Without the facts," they assert, "police officers cannot solve problems."[49] Thus the community policing approach brings law enforcement "more and better information" because officials and the community have already established a bond of trust.[50]

Given existing terrorist threats against the United States, nothing trumps the need for intelligence. And the intelligence we need concerning the danger posed by an exceptionally tiny number of radicalized Muslims can almost certainly come from only one source: Muslim communities themselves. Muslims, especially immigrants, will know the relevant language, people, and cultural nuances in ways that will likely enable them to tell the crackpot and the crank from the potentially dangerous person. This makes our Muslim communities essential partners for law enforcement.[51] Without engagement and cooperation with Muslim communities in this country, law enforcement at all levels "believe they will never penetrate the world of homegrown Islamic extremists and potential terrorists the officials are convinced is out there."[52] And, to some degree, this idea has penetrated the highest levels of the federal government. According to Michael Chertoff, Secretary of the Department of Homeland Security under President Bush, "we must build a new level of confidence and trust among the American Muslim community, who are critical partners in protecting our community."[53] Other government

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47. ROBERT TROJANOWICZ & BONNIE BUCQUEROUX, COMMUNITY POLICING: A COMMUNITY PERSPECTIVE, at xiii–xv, 11, 12 (1990).

48. *Id.* at 11.

49. *Id.*

50. *Id.* at 12.

51. *See, e.g.*, Kearns, *supra* note 39 (quoting Deborah Ramirez of Northeastern University as stating that Muslim communities are "'our best allies'" in the fight against terrorism and that "'[w]ithout them we are flying blind'"). *See also* KAPLAN, *supra* note 9, at 2 (quoting Steven Simon, a Senior Fellow at the Council on Foreign Relations, as stating that Muslim Americans are "'a community, ultimately, on whom we will rely for our security'").

52. Karen DeYoung, *Distrust Hinders FBI in Outreach to Muslims*, WASH. POST, Feb. 8, 2007, at A1.

53. *Homeland Security: The Next 5 Years: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 109th Cong. 64 (2006) (statement of Michael Chertoff, Secretary of the U.S. Department of Homeland Security), *available at* http://www.dhs.gov/xnews/testimony/testimony_1158336548990.shtm.

officials both in the United States [54] and abroad[55] agree.

Thus, despite considerable impediments, the FBI and other law enforcement agencies have endeavored to build connections and bridges with Muslims. "We're spending more money on outreach . . . so we can say: 'Please help us. Please look for people who are turning away from institutions to extremism. Please be our eyes and ears,'" said Philip Mudd, deputy director of the FBI's National Security Branch.[56] Obtaining intelligence on the terrorist threat requires building a close relationship with Muslim communities and their leaders.[57]

Local police have also worked hard to build these relationships, and perhaps no department has done more than the New York Police Department (NYPD). For example, as of May 2007, the NYPD had twenty people acting as liaisons to immigrant communities, especially Muslim communities, working to "make inroads and foster trust in the city's kaleidoscopic and widening sea of immigrants, many of them distrustful of the police."[58] The liaison personnel seem to understand what they and the NYPD face. As one liaison commented, "We're aware there's a fear factor; the question is, how do we bridge that?"[59] Given the special importance of police/Muslim relations to questions of security against terrorist attacks, the NYPD has hired two Muslim civilians as liaisons specifically "to do outreach and to train the department's officers in matters of cultural sensitivity."[60]

Despite the substantial residue of mistrust accumulated through events

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54. *See, e.g.*, Richard A. Clarke, *Finding the Sleeper Cells*, N.Y. TIMES, Aug. 14, 2005, § 6 (Magazine), at 16 (quoting former National Counterterrorism Coordinator for the National Security Council stating that alliances with American Muslim communities must be their first priority if they want to head off sleeper cells); Vincent Cannistraro, Former Chief of Operations & Analysis, Central Intelligence Agency Counterterrorism Ctr., and Former Special Assistant for Intelligence, Office of the Sec'y of Def., Remarks at the 26th National Legal Conference on Immigration and Refugee Policy (Apr. 3, 2003) ("[W]hen we alienate communities, particularly immigrant communities, we undermine the very basis of our intelligence collection abilities because we need to have the trust and cooperation of people in those communities.").

55. *See, e.g.*, Glenn Frankel, *Londoners Warily Resuming Their Lives*, WASH. POST, July 10, 2005, at A17 (quoting Sir Ian Blair, head of the London Metropolitan Police and leader of the investigation of the transit bombings in London in the summer of 2005, who said, "It is not the police and it is not the intelligence services who will defeat terrorism; it is communities who defeat terrorism.").

56. DeYoung, *supra* note 52. Interestingly, Mudd was a career CIA officer before coming to the FBI. *Id.*

57. *See generally id.* (describing FBI efforts to reach out to Muslims in order to prevent homegrown terrorism).

58. Cara Buckley, *Liaisons Bear Message from the Police: Trust Us*, N.Y. TIMES, May 31, 2007, at B1 (also noting that the NYPD had added eight new liaisons in a year and a half).

59. *Id.*

60. *Id.*

like the post-9/11 roundups and the "voluntary" interviews,[61] most Muslim communities have begun working with law enforcement.[62] They have supplied invaluable anti-terrorism information and cooperation—witness the Lackawanna and Toledo cases. Muslim citizens and community members have also joined task forces, advisory boards, and multicultural councils with law enforcement, and they have taught classes for police in the basics of Islam and Middle Eastern cultures.[63] They have also served as liaisons between their communities, the FBI, and their local police departments[64]—all in an effort to make our country safe from the threat of terrorism.

Overall, the point could not be simpler or more central to our safety. To protect ourselves against terrorism, we must have the best intelligence about what happens on our own soil. That information will most likely come from our Muslim communities because they will have the contacts, the language skills, and the cultural understandings necessary to know this information. And getting this information communicated to our law enforcement agencies depends on the existence of solid, trust-based relationships between law enforcement and these communities.

B. Informants and the Perception of Betrayal

During the last two years, efforts to cement productive relationships between law enforcement agencies and Muslim communities have undergone severe challenges created by law enforcement itself. This has happened because trials of terrorism cases have revealed that law

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61. *See, e.g.*, DeYoung, *supra* note 52 (asserting that many incidents "have regularly challenged the fragile cooperation that law enforcement and Muslims nationwide are struggling to create after years of mutual suspicion").

62. *See, e.g.*, Michael P. Downing, *Policing Terrorism in the United States: The Los Angeles Police Department's Convergence Strategy*, POLICE CHIEF, Feb. 2009 (describing the "Muslim Forum," a recent initiative of the Los Angeles Police Department wherein the Department meets with local Muslim community leaders to discuss how better to serve and protect their communities), *available at* http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1729&issue_id=22009; Press Release, Ctr. for Homeland Def. & Sec., Jensen's Community Policing Efforts Build Partnerships with Muslim Community (Nov. 2009) (reporting on the St. Paul, Minnesota, Police Department's Muslim Community Outreach program, begun in 2005), *available at* http://www.chds.us/?press/release&id=2302; *FBI-Muslim Cooperation Resulted in Arrests* (NPR Weekend Edition radio broadcast Dec. 12, 2009), *available at* http://www.npr.org/templates/story/story.php?storyId=121374117&ft=1&f=7.

63. *See* HARRIS, *supra* note 38, at 40–41, 46–47, 50–52 (detailing police and Muslim partnerships in Seattle, Wichita, and Chicago); DeYoung, *supra* note 52 (explaining how, at the invitation of local law enforcement departments, Muslims have "join[ed] multicultural advisory boards and [taught] classes in the basics of Islam to agents and police").

64. *E.g.*, Robin Shulman, *Liaison Strives to Bridge Police, Muslim Cultures*, WASH. POST, Jan. 24, 2007, at A2 (explaining how a Muslim man of Turkish descent serves as part-time civilian liaison to the NYPD, both in order "to redeem the name of the police department to Muslims and the reputation of Islam to police officers").

enforcement has inserted informants into the Muslim community, often in mosques, to spy on people and to gather information.[65]

The use of informants by law enforcement is certainly nothing new; the Supreme Court itself ruled on the constitutional status and regulation of informants more than thirty years ago.[66] Thus, one could not feel surprised that police agencies have used informants to gather information on the threat of terrorism. However, when Muslims who had worked with the FBI and their local police departments learned of the informants, they felt not just surprise, but betrayal.[67]

The experience of Muslims in New York City provides a particularly telling example of these feelings of betrayal. In the wake of September 2001, many Muslim leaders joined not just the FBI but their own NYPD to form an alliance against extremists in their communities.[68] In the spring of 2006, however, a trial began in New York City for a young Muslim, Shahawar Matin Siraj, whom the authorities accused of planning to bomb the Herald Square subway station in Manhattan.[69] In the course of the trial, testimony revealed that the NYPD had made extensive use of two informants in the case.[70] Many Muslims felt bitter that the NYPD, which had courted them as allies, had placed informants in their community, even in their houses of worship, and they saw it "as proof that the authorities—both in New York and around the nation—have been aggressive, even underhanded in their approach to Muslims."[71] Those angered felt that the NYPD had talked to them out of both sides of its mouth. On the one hand, they were asked to become the NYPD's partners; on the other, the NYPD obviously had not trusted them, since it sent in spies. "This is a real setback to the bridge building," said Michael Dibarro, a Jordanian immigrant and a former clergy liaison with the NYPD. "We had meaningful meetings. We thought we were going somewhere [positive with our relations with the NYPD]," he said.[72]

The same cycle has also played out elsewhere since 2001. For example, in Lodi, California, a town with a substantial number of Pakistani immigrants, the FBI used an informant to gather evidence against a

65. *See* Kearns, *supra* note 39.

66. The Supreme Court's decisions in this area are discussed in detail in Section II, *infra*.

67. *See* Kearns, *supra* note 39.

68. *See* Elliott, *supra* note 16 (describing how, over time, "a necessary, if uncomfortable relationship emerged between Muslims and the police watching over them").

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

feckless young Pakistani man and his father, an ice cream truck driver.[73] There had been considerable hard work in Lodi to build law enforcement connections with the Pakistani Muslim community, but the news of the informant's work in Lodi and the bringing of terrorism-related charges against the man and his father based on the informant's work shattered these efforts.[74] According to Taj Khan, one of the leaders in Lodi's Muslim community who has worked hardest to create and solidify positive relationships between Pakistani Muslims and police in Lodi, "We were making tremendous progress in this community, but we've been significantly set back." The damage may be impossible to repair. Khan stressed, "You can't exaggerate the damage done [to our efforts] by the FBI's investigation here."[75]

All of this reveals the essential conflict that arises with the use of informants in our current political climate. We know that we must have the cooperation and trust of Muslim communities to get the intelligence we need in order to have the best possible chance of preventing a terrorist attack. But if law enforcement makes use of informants too often or too casually, it risks undermining the very trust of the Muslim communities that law enforcement needs and that we all, ultimately, depend upon for our safety. If we are not careful, we will end up in a situation that hurts everyone. Some Muslims will, quite understandably, begin to distrust or resent law enforcement, or fear contact with it. This will likely make all of us less safe, because less information on potential threats may flow to the police. At the same time, this also weakens the standing and credibility of those moderate voices within the Muslim community who favor working with police and other authorities.

II.
HOW THE LAW REGULATES THE USE OF INFORMANTS: (ALMOST) ANYTHING GOES

A complete understanding of the context in which law enforcement chooses to use informants requires an appreciation of the law surrounding the use of this tactic. Generally speaking, the Fourth Amendment does not restrain police when they use informants; other methods of restraint, such as the defense of entrapment and civil litigation, have also proven ineffective.

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73. PBS, Frontline, The Enemy Within, Interview: McGregor W. Scott, (Oct. 10, 2006), http://www.pbs.org/wgbh/pages/frontline/enemywithin/interviews/scott.html [hereinafter Interview: McGregor W. Scott].

74. *See* Kearns, *supra* note 39 (describing how many people within Lodi's large Pakistani community are now skeptical of outsiders and reluctant to talk for fear of scrutiny from federal authorities).

75. *Id.*

A. *The Fourth Amendment: No Limits, and How We Came to "Assume the Risk" That Every Person Is a Government Informant*

The Supreme Court ruled on the use of informants in a series of cases in the 1960s and early 1970s. At its inception, this line of decisions focused on the dangers posed by then-new technologies for electronic surveillance.[76] By the time of the final decision in this line of cases, however, the Court had effectively created a broad standard for the use of informants—one that allowed the government to place and make use of informants at any point, and for any reason, without judicial supervision.[77]

In *Lopez v. United States*, the Supreme Court dismissed the claim that the surreptitious tape recording of a conversation amounted to a seizure that violated the Fourth Amendment.[78] In doing so, the Court concluded that the defendant had risked that someone—here, the agent—might record a conversation he assumed would stay secret. "We think the risk that [defendant] took in offering a bribe to [the IRS agent] fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording."[79] In dissent, Justice Brennan objected to the surreptitious nature of the surveillance and denounced its possible chilling effect on free speech,[80] but, like the majority, he also discussed what the agent had done in the language of risk.[81]

The idea of "assumption of the risk"—a concept borrowed from the

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76. *See infra* notes 78–81 and accompanying text.

77. *See infra* notes 86–90 and accompanying text.

78. Lopez v. United States, 373 U.S. 427 (1963). The defendant in *Lopez* tried to bribe an IRS agent, who tape recorded the conversation between them. *Id.* at 430–32. The defendant objected to the government's use of the recorded conversation at trial, arguing that the agent gained access to the defendant's office by deception and had thus "seized" his words illegally. *Id.* at 437. In dismissing the defendant's claim, the Court relied on an earlier case, *On Lee v. United States*, 343 U.S. 747 (1952), in which the Court upheld the use of a secret microphone carried by an informant to transmit his conversations with a defendant to a police officer not on the premises. *Lopez*, 373 U.S. at 438 & n.10.

79. *Lopez*, 373 U.S. at 439.

80. *Id.* at 452 (Brennan, J., dissenting) ("I believe that there is a grave danger of chilling all private, free, and unconstrained communication if secret recordings, turned over to law enforcement officers by one party to a conversation, are competent evidence of any self-incriminating statements the speaker may have made."). But see *Lewis v. United States*, 385 U.S. 206 (1966), a case decided just three years later involving a narcotics purchase by an undercover police officer, in which the Court indicated that the use of electronic surveillance was not the majority's central concern in these cases, even if it was Justice Brennan's. Using an informant, even one who does not have any electronic listening or recording device, the Court held, did not violate the Fourth Amendment. *See generally id.*

81. *Lopez*, 373 U.S. at 465 (Brennan, J., dissenting) ("The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.").

law of torts[82]—seems a curious way to discuss the use of informants. Moreover, adopting this "assumption of the risk" view conceals a significant conceptual question that the Court did nothing to answer: even if we do, in some sense, assume the risk that anyone with whom we discuss private matters might reveal them to others, do we also assume the risk that they would take our words *to the government*, for purposes of investigation and prosecution?

Without ever fully addressing this question, the Court cemented the "assumption of the risk" theory into Fourth Amendment law on informants in *Hoffa v. United States*, in which the government used an informant, whom the defendant's friends had let into the defendant's hotel suite, to gather evidence.[83] The Court found that "no interest legitimately protected by the Fourth Amendment is involved .... [Hoffa], in a word, was not relying on the security of the hotel room; he was relying upon his misplaced confidence that [the informant] would not reveal his wrongdoing."[84] To reinforce the point, the majority quoted Justice Brennan's dissent in *Lopez* to make clear that the risk of betrayal by an informer "'is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.'"[85]

The Court further solidified its doctrine on informants in 1971 in *United States v. White*,[86] a case that involved electronic eavesdropping carried out by an informant without a warrant.[87] If any doubts remained about whether the Fourth Amendment required warrants in order to use informants, *White* put them to rest for good:

> Inescapably, one contemplating illegal activities must realize and *risk* that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or

82. *E.g.*, Knight v. Jewett, 834 P.2d. 696 (Cal. 1992) (holding that the plaintiff was barred from recovery for his sports injury because he assumed a known risk in playing touch football); Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 174 (N.Y. 1929) ("One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary . . . ."). *See generally* DAN B. DOBBS, DOBBS' HORNBOOK ON THE LAW OF TORTS § 211 (2000).

83. Hoffa v. United States, 385 U.S. 293, 296 (1966). The defendant argued that the informant's deception (i.e., the informant never said that he came not as a trusted friend but as an informant) "vitiated" any consent that the defendant may have given for the informant's entry into his hotel rooms. *Id.* at 300. Therefore, listening to the defendant's statements amounted to "an illegal 'search' for verbal evidence." *Id.*

84. *Id.* at 302.

85. *Id.* at 303 (quoting *Lopez*, 373 U.S. 427, 465 (Brennan J., dissenting)).

86. United States v. White, 401 U.S. 745 (1971).

87. The informant did not testify at trial; instead, government agents, who listened to the electronically-gathered communication between defendant and the informant, told the jury what the defendant had said. *Id.* at 746–47.

allays them, or risks what doubts he has, *the risk is his.*[88]

Put another way, the "assumption of the risk" rule made any real Fourth Amendment analysis within the context of the use of informants superfluous. If one must risk betrayal any time one has any communication with another person, the idea of police investigation tempered by the standard of probable cause or scrutinized by a judicial officer in a request for a warrant never enters the discussion. After all, the Fourth Amendment only regulates government conduct—in other words, the actions of the police.[89] Though most informants certainly act as agents of the police, the risk that the defendant's actions will be betrayed to the government is not the result of action by the police or their agents; rather, it simply inheres in the risky actions of the defendant. Because intelligence gathered by informants is categorized as a result of assumed risk rather than a result of police action, the Fourth Amendment does not regulate the gathering of such evidence. Police need no warrants to use informants, and their actions need not measure up to any standard (such as probable cause). Thus the police may use informants as they wish in any case at any stage prior to the initiation of adversary proceedings,[90] with none of the usual types of judicial supervision.

B. Other Limitations on Government Conduct with Respect to Informants

Lopez, *Lewis*, *Hoffa*, and *White* make clear that the government may use informants as it chooses in the investigation phase of any given case,

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88. *Id.* at 752 (emphases added).

89. Burdeau v. McDowell, 256 U.S. 465, 475 (1921) ("The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies . . . .").

90. Under the Sixth Amendment, the government may not use statements deliberately elicited by informants after the initiation of judicial proceedings, when the Sixth Amendment right to counsel attaches. *See* Massiah v. United States, 377 U.S. 201, 205 (1964) ("'Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.'" (quoting People v. Waterman, 175 N.E.2d 445, 448 (N.Y. 1971))). The Court has held that this protection extends to jailhouse informants' deliberate elicitation of statements from defendants, United States v. Henry, 447 U.S. 264 (1980), except in cases where the jailhouse informant is merely a passive listener who does nothing to elicit the statements, Kuhlman v. Wilson, 477 U.S. 436 (1986). Defendants may also have a defense under the Due Process Clause of the Fourteenth Amendment against the use of evidence that was obtained by an informant who herself used coercion or its equivalent to elicit a statement from the defendant. *See* Arizona v. Fulminante, 499 U.S. 279 (1991) (finding that because informant induced defendant's confession by promising him protection from credible threats of physical violence in prison, the statement was coerced and therefore obtained in violation of the Due Process Clause).

without any Fourth Amendment-based justification (e.g., meeting a standard of probable cause) or judicial supervision (e.g., obtaining a warrant). Nonetheless, there exist other plausible legal avenues for regulating informant use. For example, during any trial, the defendant may raise substantive criminal law defenses regarding the use of informants. Specifically, she may argue that the government entrapped her or that the government engaged in conduct so outrageous as to violate the Due Process Clause. She can also argue that the government's conduct creates civil liability.

1. Entrapment

The defense of entrapment may serve as a brake on some types of informant behavior, but only to a limited extent. In the words of Chief Justice Earl Warren, entrapment draws a line "between the trap for the unwary innocent and the trap for the unwary criminal."[91] Entrapment law prohibits the former, but allows the latter. To tell whether any given defendant is an unwary innocent or an unwary criminal, "the thrust of the entrapment defense [focuses] on the intent or predisposition of the defendant to commit the crime."[92] This point has always remained central: as the law has stood for at least thirty-five years, a defendant predisposed to commit the crime cannot claim entrapment simply because the government supplied the opportunity for the defendant to commit the crime. Courts look not at the fact that the government has dirtied its hands by involving itself in criminal activity, but at whether the defendant had the inclination to become involved in the crime irrespective of the government's actions.[93] Most defendants will not benefit from the entrapment defense if they participated in the criminal activity prior to the

91. Sherman v. United States, 365 U.S. 369, 372 (1958).

92. United States v. Russell, 411 U.S. 423, 429 (1973).

93. *See id.* at 434 ("[It does not] seem particularly desirable for the law to grant complete immunity from prosecution to one who himself planned to commit a crime, and then committed it, simply because government undercover agents subjected him to inducements which might have seduced a hypothetical individual who was not so predisposed."). The Supreme Court qualified this rule in 1992 in *Jacobson v. United States*, 503 U.S. 540 (1992), a case in which postal inspectors and members of the U.S. Customs Service used bogus offers of illegal child pornography to contact a man who had purchased such items one time in the past, *before* Congress made possession of this type of material criminal. When the man ordered and received an illegal pornographic magazine in response to one of the government's decoy offers, officers arrested him. *Id.* at 542–47. The Court, which had previously held to the predisposition idea as the cornerstone of the entrapment law, qualified it in *Jacobson* by adding another proof element. When law enforcement "has induced an individual to break the law and the defense of entrapment is at issue . . . the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." *Id.* at 548–49 (citing United States v. Whoie, 925 F.2d 1481, 1483–84 (D.C. Cir. 1991)).

informant becoming involved, or showed any inclination toward it.

Even if informants encouraged the defendant's criminal behavior—egged them on, even pushed them to act—the defendant's entrapment defense may not be successful. Recent terrorism prosecutions involving informants make this clear. For example, in the prosecution of Shahawar Matin Siraj for planning to bomb the Herald Square subway station in New York City, the informant, Osama Eldawoody, deliberately attempted to get Siraj to take the very type of actions that prosecutors said he planned to do. According to the testimony at the trial, Eldawoody, an informant for the NYPD, made persistent efforts to arouse anti-American feelings in Siraj. He allegedly showed Siraj dozens of inflammatory photographs, including images of the abuse of Iraqi prisoners by American soldiers at the Abu Ghraib prison[94] and a video of the fatal shooting of a twelve-year-old boy who died in Gaza during an Israeli-Palestinian battle.[95] According to Siraj, the informant also talked to Siraj about blowing up buildings on Wall Street and convinced him that religious leaders had issued a fatwa—a religious edict—that allowed the killing of American soldiers, police officers, or FBI agents.[96] The facts of the Siraj case paint a picture of the defendant as a suggestible young man—his own lawyer called him a "dimwit"[97]—who was led into making grandiose statements by a desire to impress the informant, a man twice his age. When the talk turned to causing bloodshed, Siraj testified that he broke off the discussion, telling the informant that he needed to ask his mother's permission to participate.[98]

Siraj's lawyers mounted an entrapment defense, but it failed. The evidence the government offered at trial indicated that, long before ever meeting the informant, Siraj had made some statements that indicated his belief in the legitimacy and desirability of violent terrorist action against Americans and Israelis; the court allowed the jury to hear evidence of

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94. William K. Rashbaum, *Defendant Says Police Informer Pushed Him into Bomb Plot*, N.Y. TIMES, May 16, 2006, at B1 [hereinafter Rashbaum, *Defendant Says*] (reporting that informant showed defendant "dozens of images, including pictures of prisoners being abused at the Abu Ghraib prison in Iraq"); William K. Rashbaum, *Terror Case May Offer Clues into Police Use of Informants*, N.Y. TIMES, Apr. 24, 2006, at B1 (reporting defense charges that informant "goaded" defendant into involvement in the bombing plot by showing him inflammatory pictures of Abu Ghraib abuses).

95. Rashbaum, *Defendant Says*, *supra* note 94.

96. *Id.*

97. John Marzulli, *Herald Square Bomb Plotter Gets 30 Years*, N.Y. DAILY NEWS, Jan. 9, 2007 (reporting that defense counsel stated that his client was "a dimwit who was manipulated by a crafty paid informer trying to impress his police handlers").

98. *Id.* ("I told [the informant], 'I don't want to do it.' . . . I told him I wanted to ask my mother's permission."). This may not be quite so outlandish a statement as it first appears. To participate in what is sometimes called non-defensive jihad, the person must obtain the permission of parents. *See* MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM 86 (1955).

these statements to rebut the defense contention that the defendant had no predisposition to commit the crime.[99] Jurors indicated after the trial that the actions of the informant were beside the point; rather, as entrapment law requires, they looked for evidence that the informant had first suggested the violence—that the idea of bombing the Herald Square station "had not originated with Mr. Siraj."[100] Since they did not hear any such evidence, they rejected the defense of entrapment.[101] According to one juror, "to prove entrapment you had to show clear evidence that [the action] was initiated by the informant, that he persuaded [the defendant] to do this, and the [defendant] was not ready and willing to do this."[102] Without that kind of evidence, the jurors said, an entrapment defense failed even if the informant had plainly pushed Siraj.[103]

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99. William K. Rashbaum, *Trial Spotlights Undercover Contact with Bomb Plot Suspect*, N.Y. TIMES, May 17, 2006, at B2 (reporting that court allowed government to offer testimony of undercover detective who had contact with defendant approximately one year before defendant met informant with whom he formed bombing plot, during which contacts defendant expressed approval of suicide bombings by Palestinians against Israelis and the hope that "'America will be attacked very soon'").

100. *See* Jennifer 8. Lee, *Entrapment Evidence Lacking, Jurors Say*, N.Y. TIMES, May 25, 2006, at B7.

101. *See id.* (quoting jurors as saying that the defendant advanced insufficient evidence of entrapment for the jury to accept the defense).

102. *Id.*

103. *See id.* (quoting a juror as saying, "He could have been entrapped back then. We don't have the evidence to prove it at that point."). The conviction of Hamid Hayat, the young man from Lodi, California, is another revealing example of the sorts of actions by informants allowed under the entrapment doctrine. Following the arrests of Hayat and his father, many community members believed that a man who had befriended the suspects was a federal informant. *See* Demian Bulwa, *Muslims in Lodi Believe Mystery Man Who Spoke of Jihad Was a Federal Mole in Terror Investigation*, S.F. CHRON., Aug. 27, 2005, at A1 ("Community members said [the man] . . . sometimes spoke of 'jihad' in what they now believe was an attempt to get others to express radical sentiments."). *See also* Rone Tempest, *FBI Informer Begins His Testimony in Terror Trial*, L.A. TIMES, Feb. 23, 2006, at B1 (stating that Lodi residents who had contact with the putative informant described him as "often an instigator, asking young men about waging jihad and encouraging travelers to Pakistan to bring back firebrand speeches and extremist documents"). That the man was an informant was confirmed in the trial, during which the man testified. Don Thompson, *FBI Informant's Focus Shifted from Mosque to School in Lodi Probe*, MERCED SUN-STAR, Mar. 3, 2006, at 3. The informant's testimony made clear that the informant repeatedly attempted to press Hayat into action. *See id.* (recounting that in June 2003 the informant repeatedly pressed Hayat to attend a terrorist training camp and expressed exasperation when Hayat said he could not do so because the camps no longer operated after the 2001 terrorist attacks). The informant would not accept any "excuse" from the defendant and berated him furiously. "'You're just sitting around doing nothing. . . . You f---ing sleep for half a day. You wake up. You light a f---ing cigarette. You eat. You sleep again. That's all you do. A loafer guy,'" the informant said. Mark Arax, *The Agent Who Might Have Saved Hamid Hayat*, L.A. TIMES, May 28, 2006, at 16. When Hayat asked the informant what he should do, the informant said, "'You sound like a f---ing broken bitch. Come on. Be a man. Do something,'" the informant implored him. *Id.* "'When I come to Pakistan and I see you, I'm going to f---ing force you, get you from your throat and f---ing throw you in the madrassa.'" *Id.* In another call to Pakistan, the informant, who "had long been

As the Siraj case—as well as more run-of-the-mill cases[104]—illustrate, the defense of entrapment rarely results in an acquittal for the defendant. The defense is simply too narrowly focused on the state of mind of the defendant to make much of a difference in most cases.[105] Since it rarely succeeds, entrapment will do little if anything to restrain the government's use of informants.

2. Outrageous Government Conduct

Another defense, related to entrapment, examines whether the government's investigative efforts went too far in an effort to secure a conviction. This idea, usually referred to as the "outrageous government conduct" defense, focuses not on the defendant and her predisposition to commit the crime, but on whether the conduct of the government violated the Due Process Clause of the Fourteenth Amendment. In *United States v. Russell*, Justice Rehnquist explained that the outrageous government conduct defense would present a court "with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking the judicial processes to obtain a conviction."[106] It is worth noting that the Court described this defense as one that the Court "may some day" see, but had

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pushing Hamid [Hayat] to get involved in radical Islamic activities," asserted strongly that Hayat had a duty to join a terrorist training camp. James Bamford, *Looking Beneath the Surface of a Terrorism Case*, N.Y. TIMES, Oct. 10, 2006, at E8 (reviewing the documentary "The Enemy Within," which aired on October 10, 2006, on *Frontline*, a PBS program). "'No, no, no vacation, man,'" the informant said in the recorded phone conversation. *Id.* "'If you—you're sitting there, in Pakistan. You told me: "I'm going to a camp. I'll do that." You're sitting idle. You're wasting time.'" *Id.* Despite this pushing and pulling of the defendant by the government's informant, the jury convicted the defendant. *Id.*

104. *E.g.*, United States v. Pedraza, 27 F.3d 1515 (10th Cir. 1994) (holding that defendants' initiation of contact with undercover agent shows they were not induced to commit criminal activity). *See also* United States v. Nolan-Cooper, 155 F.3d 221, 229–30 (3d Cir. 1998) (finding that defendant's continuing involvement in crime before agent approached her meant that defense of entrapment would not prevent conviction).

105. The point here is quite simple: the law of entrapment does almost nothing to protect defendants against significant government coercion (that is, pushing the defendant toward the commission of a crime instead of simply providing her the opportunity to commit the crime according to her own predisposition, unaffected by any government pushing and pulling). For a deeper and more nuanced overview and critique of entrapment, see generally Richard H. McAdams, *The Political Economy of Entrapment*, 96 J. CRIM. L. & CRIMINOLOGY 107 (2005) (arguing that the entrapment defense regulates proactive undercover operations by which police manipulate the appearance of criminal opportunities). *See also* Maura F.J. Whelan, *Lead Us Not into (Unwarranted) Temptation: A Proposal to Replace the Entrapment Defense with a Reasonable-Suspicion Requirement*, 133 U. PA. L. REV. 1193 (1985) (arguing that law enforcement officials should be required to demonstrate reasonable suspicion that an individual is engaging in criminal conduct *before* being authorized to test that individual's penchant for illegal transactions).

106. United States v. Russell, 411 U.S. 423, 431–32 (1973).

not seen yet, including in the case before it.[107]

In a subsequent case, the decisive concurring opinion of Justice Powell emphasized the narrowness of the outrageous government conduct doctrine.[108] Cases, Powell said, "in which proof of predisposition is not dispositive will be rare. Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction."[109] He stressed that, particularly in offenses involving possession of contraband, courts should label law enforcement conduct "outrageous" only reluctantly and should give extraordinary deference to law enforcement.[110] Lower courts have responded accordingly, construing the outrageous government conduct defense narrowly and seldom finding that it prevents conviction, even with evidence of considerable government involvement in criminal activity.[111] As one commentator said, "it appears that it will be the rare case where the government's conduct in supervising or operating an informant warrants dismissal of an indictment" on the basis of outrageous government conduct.[112]

3. Civil Litigation

Civil litigation represents another possible strategy to challenge the use of informants. In *Bivens v. Six Unknown Named Agents of Federal*

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107. *Id.* ("The instant case is distinctly not of that breed.").

108. Hampton v. United States, 425 U.S. 484, 491–95 (1976) (Powell, J., concurring).

109. *Id.* at 495 n.7 (Powell, J., concurring).

110. *See id.* ("Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction.").

111. *See, e.g.*, United States v. Myers, 692 F.2d 823 (2d Cir. 1982) (holding that the government's "Abscam" sting operation, in which government operatives posed as Arab sheiks willing to pay bribes for "help" with immigration problems, was not outrageous government conduct violating the Due Process Clause); United States v. DeSapio, 435 F.2d 272 (2d Cir. 1970) (holding that Due Process Clause was not violated even though an informant participated in a conspiracy to extort money and keep proceeds for himself and law enforcement officials were aware of the informant's criminal intentions).

112. 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, 348 (2001). *See also* Daniel V. Ward, *Confidential Informants in National Security Investigations*, 47 B.C. L. REV. 627, 635 (2006) (saying that the Second Circuit "has expressed reluctance to dismiss indictments" based on the outrageous government conduct defense). According to one of the most comprehensive examinations of the use of informants to date, "Courts rarely consider the official use of informants to be outrageous, but it occasionally happens in extreme cases." ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 61 (2009). Natapoff cites as standing virtually alone the case of *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), in which the government's informant proposed the creation and operation of a drug-making lab to a defendant not involved with any such ongoing operation, and in which the government supplied the essential core ingredient for manufacture, obtained the lab location, supplied glassware, and made other chemicals easily available. This, the court said, showed that "the governmental involvement in the criminal activities of this case has reached 'a demonstrable level of outrageousness.'" *Id.* at 380.

Bureau of Narcotics, a case involving a Fourth Amendment challenge, the Supreme Court gave individuals the right to bring suit in federal court when federal actors violate their constitutional rights during a criminal investigation, even if the government ultimately brings no criminal charges.[113] *Bivens* stands as the analogue to 42 U.S.C. § 1983, the statute that created a federal right to sue state and local government officials who violate the constitutional rights of citizens while acting under color of state law.[114] In the 1960s, 1970s, and 1980s, plaintiffs brought numerous lawsuits to address their claims of illegal surveillance and disruption of political groups by police.[115] Federal courts showed some willingness to find for these plaintiffs, perhaps influenced by the revelations of large-scale federal wrongdoing in domestic intelligence gathering uncovered in congressional investigations led by Senator Frank Church.[116]

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113. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

114. *See* 42 U.S.C. § 1983 (2006) (creating a civil action for deprivation of rights, privileges, or immunities secured by the Constitution and laws).

115. According to one commentator, plaintiffs brought lawsuits against approximately seventy-five police agencies for illegal surveillance in the decade between 1964 and 1974. John H.F. Shattuck, *Tilting at the Surveillance Apparatus*, 1 CIV. LIBERTIES REV. 59, 60 (1974). In many cases, the surveillance targeted political and social action groups. *Id.* This included the *Handschu* case in New York, which resulted in a consent decree, see *Handschu v. Special Services Division*, 605 F. Supp. 1384, 1389–93 (S.D.N.Y. 1985) (summarizing the consent decree), and the "Red Squad" case brought by plaintiffs in Chicago, which likewise ended with a consent decree, *Alliance to End Repression v. City of Chicago*, 237 F.3d 799, 800–01 (7th Cir. 2001) (explaining case's history and discussing pertinent provisions of consent decree). Similar controversies arose in Los Angeles, Detroit, and Seattle, among other cities. *See generally* Paul G. Chevigny, *Politics and Law in the Control of Surveillance*, 69 CORNELL L. REV. 735, 767–82 (1984) (discussing cases that challenged police surveillance of political and social organizations in Los Angeles, Seattle, and Detroit).

116. *See* SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, 94TH CONG., INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS (Comm. Print 1976); SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, 94TH CONG., SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS (Comm. Print 1976) (describing how the government often undertook secret surveillance of citizens on the basis of their political beliefs); SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, 94TH CONG., HEARINGS, THE NATIONAL SECURITY AGENCY AND FOURTH AMENDMENT RIGHTS (Comm. Print 1975). This era of wrongdoing by the CIA received new scrutiny in 2007, when Michael Hayden, then the relatively new director of the Agency, made the decision to release the so-called "family jewels" documents—internal memoranda prepared in the 1970s detailing the Agency's many Cold War-era transgressions. *See* Karen DeYoung & Walter Pincus, *CIA Releases Files on Past Misdeeds*, WASH. POST, June 27, 2007, at A1 (reporting on the hundreds of pages of decades-old documents declassified and released by the CIA and how they "chronicle activities including assassination plans, illegal wiretaps and hunts for spies"); Mark Mazzetti & Tim Weiner, *Files on Illegal Spying Show C.I.A. Skeletons from Cold War*, N.Y. TIMES, June 27, 2007, at A1 (describing how the papers "provide evidence of paranoia and occasional incompetence as the agency began a string of illegal spying operations in the 1960s and 1970s").

a) Civil Litigation Against Police Departments for Spying

Another legal strategy that has been employed, and with some success, is suits against local police departments for illegal surveillance activities.[117] After suits in New York and Chicago, the cities' police departments ultimately agreed to settlements that put them under consent decrees supervised by the federal courts, tightly circumscribing their surveillance activities, including the use of informants.

In Chicago, the Alliance to End Repression, the American Civil Liberties Union, and others brought suits to end abuses of civil rights by the so-called "Red Squad" of the Chicago Police Department, which had actively spied upon allegedly subversive groups.[118] The cases were consolidated and eventually settled; as a result, a federal court began supervision of the Chicago Police Department in 1982.[119] In similar circumstances in New York, a federal court began supervisions of the NYPD in 1985 in the *Handschu* case.[120] Both the Chicago and New York cases put restrictions on the use of surveillance, including the use of informants, by these police departments, and required ongoing monitoring of specified departmental activities.[121] Since the settlements took the form of federal court orders with continuing judicial oversight, the courts could enforce the decrees with the contempt power.

Both the Chicago and New York consent decrees stayed in place for almost two decades, but courts have lifted major elements of these orders in the last few years. In the Chicago case, the Court of Appeals for the

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117. This misconduct included the use of informants against law-abiding groups. For example:

> [D]uring the sixties, the unit launched a yearly average of one thousand intensive political investigations of dissident groups and individuals and about six hundred lesser probes . . . . Such investigations, at times, involved the use of undercover agents to infiltrate the organizations . . . . [A]s political ferment grew in the late 1960's, New York City's intelligence unit expanded beyond infiltrating organizations and gathering information . . . . [I]informants and infiltrators were used as *agents provocateurs* to disrupt the activities of political organizations and to facilitate the arrests of organizational activists. It was against this background that the *Handschu* case was filed as a class action in 1971.

Police Surveillance of Political Activity—The History and Current State of the Handschu Decree: Hearing Before the New York Advisory Comm. to the United States Commission on Civil Rights (May 21, 2003) (statement of Arthur N. Eisenberg), *available at* http://www.nyclu.org/node/731.

118. *See* Alliance to End Repression v. City of Chicago, 561 F. Supp 537, 541–44 (N.D. Ill. 1982) (describing history of the litigation and discovery collected against the City of Chicago and the Chicago Police Department).

119. *See id.* at 549–51 (describing the terms of the settlement and the scope of the injunction against the Chicago Police Department).

120. *See* Handschu v. Special Servs. Div., 605 F. Supp. 1384 (S.D.N.Y. 1985) (approving a settlement that dealt with the future use of collection, retention, and dissemination of information by the NYPD), *aff'd*, 787 F.2d 828 (2d Cir. 1986).

121. *See id.* at 1391–92; *Alliance*, 561 F. Supp. at 567, 568–69.

Seventh Circuit reversed a lower court's decision and released the Chicago Police Department from some of the more onerous obligations of the 1981 consent decree.[122] Writing for the court, Judge Richard Posner first asserted that federal courts should not remain supervisors of state and local governmental agencies indefinitely under such consent decrees.[123] Second, Judge Posner said that the original decree had indeed protected the First Amendment rights of citizens, but at too high a price in the potential danger to public safety. The world had changed, with new threats, especially "ideologically motivated terrorism," that might strike both globally and locally.[124] Unless the Chicago Police Department had the increased flexibility it wanted, it could not keep the citizens of Chicago safe.[125] Blending these federalism and public safety points, Posner said, "To continue federal judicial micromanagement of local investigations of domestic and international terrorist activities in Chicago is to undermine the federal system and to trifle with the public safety."[126]

In the *Handschu* case in New York, a drastic reduction in the scope of the consent decree came as a direct response to the terrorist attacks on the city on September 11, 2001. In the wake of those events, the NYPD told the supervising federal district judge that the mandatory guidelines had become too onerous in light of the threat of international terrorism and the increased surveillance needed to meet this challenge.[127] The judge decided that these changed circumstances warranted a substantial scaling back of the requirements of the decree because it "severely handicap[ped] police efforts to gather and utilize information about potential terrorist activity."[128]

Just four years later, the *Handschu* plaintiffs went back to court, this time to challenge the NYPD's routine videotaping of people at public gatherings, without any indication that the people taped would engage in unlawful activity.[129] Judge Haight—the same judge who had lifted most of

122. *See* Alliance to End Repression v. City of Chicago, 237 F.3d 799 (7th Cir. 2001) (holding that the consent decree would be modified to permit the police to protect public safety by allowing them to keep tabs on potential terrorist groups).

123. *See id.* at 801 ("Federal decrees that hand ultimate control of state functions to federal courts 'are not intended to operate in perpetuity.'" (quoting Bd. of Educ. v. Dowell, 498 U.S. 237, 248 (1991))).

124. *Id.* at 802.

125. *See id.* (describing how the decree rendered the police helpless to keep tabs on "incipient terrorist groups"). Judge Posner's words about ideologically-driven terrorism seem prescient: his decision regarding the consent decree came just months before the attacks of September 11, 2001.

126. *Id.*

127. *See* Handschu v. Special Servs. Div., 273 F. Supp. 2d 327, 333–34 (S.D.N.Y. 2003) (outlining the NYPD's motion to modify the guidelines).

128. *Id.* at 340.

129. *See* Jim Dwyer, *Judge Says Police Violated Rules in Videotaping Public Gatherings*, N.Y. TIMES, Feb. 16, 2007, at A1 (reporting on a case challenging the

the *Handschu* requirements just a few years before—issued an order limiting the taping, but did not reimpose any stricter level of supervision.[130] In the meantime, new revelations emerged in 2007: the NYPD engaged in widespread surveillance, including the use of informants and undercover police officers, against numerous activist groups around the country in the run-up to the Republican National Convention, held in New York City in 2004.[131] As of this writing, legal action in that matter remains pending.[132]

Both the *Alliance to End Repression* case in Chicago and the *Handschu* case in New York leave one with the impression that, while litigation to rein in police use of informants remains a possibility, this path seems, to put it mildly, less than promising. In today's post-9/11 climate, it is hard to imagine a federal court issuing directives limiting police use of surveillance activities like the planting of informants.

b) Civil Litigation Against the Federal Government's Use of Informants

There is at least one other possibility for litigation against the use of informants in houses of worship and other religious settings—a claim that the use of this tactic would violate the First Amendment, because it would chill the free exercise of religious belief and practice. Such a claim makes perfect sense considering the real and tangible damage inflicted on religious institutions when law enforcement agencies utilize informants in these settings.[133] But even proponents of First Amendment challenges to the use of informants concede that such lawsuits would face formidable, if not insurmountable, obstacles.[134] First, plaintiffs would have to show that they have standing to sue, which requires (to start with) proof that they suffered some actual or threatened injury as a result of the government's conduct.[135]

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videotaping practice).

130. Handschu v. Special Servs. Div., 475 F. Supp. 2d 331 (S.D.N.Y. 2007).

131. *See* Jim Dwyer, *City Police Spied Broadly Before G.O.P. Convention*, N.Y. TIMES, Mar. 25, 2007, § 1, at 11 (detailing actions by NYPD officers against individuals and groups all over the country dating back to 2003).

132. *See, e.g.*, Schiller v. City of New York, No. 04-CV-07922, 2009 WL 497580 (S.D.N.Y. Feb. 27, 2009) (involving thirty-seven cases that are part of a larger group of cases relating to protests surrounding the 2004 Republican National Convention).

133. *See infra* Section III.B.3.

134. *See, e.g.*, Lininger, *supra* note 22, at 1237–42 (discussing the difficulties involved in a First Amendment lawsuit challenging the use of informants).

135. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 472 (1982) ("[A]t an irreducible minimum, Art. III [of the U.S. Constitution] requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant' . . . ." (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979))). Along with proof of real or threatened injury, plaintiffs would also have to show that the injury comes from the challenged government action and that a

Second, the question would become whether the government could show an interest sufficient to justify its actions. As long as the government bases its actions on policies that are "neutral and of general applicability," courts judge them under the highly deferential rational basis standard, under which almost all government action withstands challenges.[136] According to one commentator, under the rational basis standard, most First Amendment lawsuits challenging the use of informants would have "virtually no chance" to succeed.[137] At least one such case made its way through the federal courts in the past, and the result highlights the difficulties a plaintiff would have to surmount.

During the 1980s, the Immigration and Naturalization Service initiated an investigation of the "Sanctuary Movement" at various churches in Arizona, which allegedly assisted immigrants coming into the United States illegally.[138] As part of the investigation, the government placed paid informants into some of the churches.[139] The investigation resulted in indictments of eleven leaders of the Sanctuary Movement on felony charges; eight were ultimately convicted.[140] A number of the churches that the government had spied on brought suit, arguing that both the use of informants and the informants' actions in their churches chilled the exercise of their religious freedom, observable in the form of, inter alia, reduced membership, decreased contributions to the churches, and cancellation of bible classes.[141] The district court found that the plaintiffs lacked standing, but the Court of Appeals for the Ninth Circuit reversed in pertinent part;[142] with regard to standing, the Ninth Circuit found that the drop in church attendance made plaintiffs' injuries concrete enough, and not merely speculative.[143] On remand, the district court decided that, while

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favorable decision will likely redress the injury. *Id.* In a closely related context, a federal appeals court recently found that plaintiffs alleging that their communications with legal clients, journalistic sources, and the like would suffer a chilling effect were found not to have standing to stop the so-called "Terrorist Surveillance Program," under which the National Security Agency tapped citizens' phones without warrants. ACLU v. Nat'l Sec. Agency, 493 F.3d 644 (6th Cir. 2007).

136. *See* Employment Div. v. Smith, 494 U.S. 872, 890 (1990). Although the *Smith* Court did not explicitly state that it was using a rational basis test, scholars have since inferred that the Court was using such a test. Lininger, *supra* note 22, at 1240 (citing ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 12.3.1 (2d ed. 2002)).

137. Lininger, *supra* note 22, at 1240.

138. *See* Natalie Lile, *The Religious Freedom Restoration Act: Could It Have Helped the Sanctuary Movement?*, 11 GEO. IMMIGR. L.J. 199, 201–03 (1996) (describing the Sanctuary Movement and the subsequent INS investigation).

139. *Id.* at 203. The informants posed as church volunteers and attended and recorded religious meetings. *Id.*

140. *Id.* at 207 n.76.

141. These claims were summarized in the Ninth Circuit's opinion. Presbyterian Church (U.S.A.) v. United States, 870 F.2d 518, 520–22 (9th Cir. 1989).

142. *Id.* at 520.

143. *Id.* at 522. The government had attempted to rely on the Supreme Court's

the chilling effect was real and the government must adhere to the scope of the "invitation" that the informants received to participate in church activities, the government need only have "a good faith purpose for the subject investigation."[144] Under this standard, plaintiffs in mosques in which the government placed informants would have little with which to work. In the present climate, with fervor against terrorism at a high point, courts would likely have no trouble finding a "good faith purpose" for government investigations. It would also be easy for informants to perform actions within the scope of the "invitation" that mosques issue (in theory) to members of the public to come and worship.

C. Internal Regulations

The regulation of the use of informants in religious institutions has also taken the form of internal police agency regulation. Internal police regulation can serve as an effective method of controlling police behavior.[145] The FBI, which has had internal regulations on the use of informants for decades, makes a particularly pertinent example.

During the 1970s, congressional investigations led by Senator Frank Church revealed a long pattern of abusive and illegal domestic surveillance of political, religious, and social groups. According to committee findings, "The Government has often undertaken the secret surveillance of citizens on the basis of their political beliefs, even when those beliefs posed no threat of violence or illegal acts on behalf of a hostile foreign power."[146] Targets of illegal government surveillance included proponents of racial and gender equality and advocates of non-violence, most notably, the

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opinion in *Laird v. Tatum*, 408 U.S. 1, 13–14 (1971), in which the Court had said that a general claim by activists that they could be targeted by government surveillance and, therefore, that their exercise of their First Amendment rights was chilled was too speculative to confer standing. In contrast, the Ninth Circuit said, the plaintiffs in *Presbyterian Church* claimed that congregants hesitated to come and worship, thus impacting the ability of the church to carry out its ministries. *Presbyterian Church*, 870 F.2d at 522. *See also* Olagues v. Russoniello, 797 F.2d 1511, 1518 (9th Cir. 1986) (distinguishing *Laird* because plaintiffs, unlike those in *Laird*, were actual targets of surveillance).

144. Presbyterian Church (U.S.A.) v. United States, 752 F. Supp. 1505, 1516 (D. Ariz. 1990). Of course, this "invitation" is a fiction, premised on the informants' deception of the targets of the investigation; had the informants told the targets that they were not fellow believers or members of the public but government agents, no "invitation" would have been forthcoming.

145. *See* Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 446 (1990) ("[P]olice rulemaking regarding their fourth amendment activities is a highly desirable undertaking.").

146. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, 94TH CONG., INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS 5 (Comm. Print 1976).

Reverend Dr. Martin Luther King.[147] Besides spying on political figures, the federal government also investigated and conducted surveillance on religious groups, including church youth groups and priests' conferences.[148] But, among all of the government's illegal spying tactics, "[t]he most pervasive surveillance technique [was] the informant. In a random sample of domestic intelligence cases, 83% involved informants [while only] 5% involved electronic surveillance."[149] Informants were often used against "peaceful, law-abiding groups," the investigation found, and informants sometimes engaged in violent activity as members of the targeted groups.[150]

These abuses led the Attorney General, Edward Levi, to establish internal guidelines for the use of informants by the FBI. Beginning with the first version of these guidelines, which became known as the Levi Guidelines,[151] the FBI restrained its investigations into political and religious groups by requiring that, to recruit or place informants in such groups, the FBI needed "specific and articulable facts giving reason to believe that an individual or a group is or may be engaged in activities which involve the use of force or violence."[152] In addition, the guidelines required permission from FBI headquarters for any and all full investigations.[153] The bottom line was that the FBI, either through its own sworn agents or through informants, could not infiltrate religious groups without some factual basis to suspect that the persons concerned had taken part, or were about to take part, in a crime.[154]

During succeeding decades, the Department of Justice modified the guidelines several times in reaction to scandals concerning the use of informants,[155] without changing the overall structure and operations of the

147. *Id.* at 9–10.

148. *Id.* at 8.

149. *Id.* at 13.

150. *Id.*

151. OFFICE OF THE ATTORNEY GEN., U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S GUIDELINES ON DOMESTIC SECURITY INVESTIGATIONS (1976), *reprinted in FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong. 50–53 (1977).

152. *Id.* at 51.

153. *Id.*

154. By the end of the 1970s, police departments in a number of states and cities followed the example of the Levi Guidelines, either because of state laws, municipal ordinances, or court decrees in lawsuits. See supra notes 127–42 and accompanying text concerning the *Handschu* and *Alliance to End Repression* cases and related matters.

155. In the Abscam sting operation of the late 1970s, a con man working as an informant for the FBI acted as a front man for an FBI corruption probe that eventually ensnared a senator, six members of the House of Representatives, and a number of state and local politicians on corruption charges. *See* United States v. Myers, 527 F. Supp. 1206, 1209–12 (E.D.N.Y. 1981) (describing the Abscam "sting" operation and the related cash payoffs of elected officials), *aff'd*, 692 F.2d 823, 861 (2d Cir. 1982). Following the Abscam scandal, Attorney General Benjamin Civiletti issued new guidelines. OFFICE OF THE

guidelines. In 2002, however, Attorney General John Ashcroft made major changes to the guidelines. Citing the attacks of September 11, 2001, as a justification,[156] Ashcroft issued general guidelines on crimes, racketeering, and terrorism investigations that allowed the use of informants and other types of monitoring in religious and other settings without any predicate of suspicious conduct.[157] From May of 2002 forward, therefore, the FBI no longer needed a basis in fact in order to place

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ATTORNEY GEN., U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S GUIDELINES ON FBI USE OF INFORMANTS AND CONFIDENTIAL SOURCES (1980), *reprinted in* S. REP. NO. 97-682, at 504–16 (1980). *See also* Irvin B. Nathan, *Abscam: A Fair and Effective Method for Fighting Public Corruption, in* ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT 2, 14–15 (Gerald M. Caplan ed., 1983) (describing the Civiletti Guidelines, which established "elaborate review procedures with the Department of Justice and mandate[d] certain criteria designed to minimize any possibility of entrapment or other unfairness to potential defendants"). There were allegations that the informant had used his government-created front business to commit unrelated frauds. *See, e.g.*, Howard Kurtz, *The Sting and the Innocent Bystander*, S.F. CHRON., Oct. 6, 1985, at 17 ("In Abscam, a convicted swindler used the FBI's cover in the successful bribery probe . . . to run his own investment scam, defrauding dozens of at least $150,000."). The pattern of revision following scandal was repeated in the late 1990s, when investigators exposed a far-reaching scandal in Boston involving the FBI and organized crime informants who were protected and allowed to commit many violent crimes. For a lively telling of the details of this scandal, see generally DICK LEHR & GERARD O'NEILL, BLACK MASS: THE TRUE STORY OF AN UNHOLY ALLIANCE BETWEEN THE FBI AND THE IRISH MOB (2001). The ensuing racketeering and extortion case was first litigated in *United States v. Salemme*, 91 F. Supp. 2d 141 (D. Mass. 1999), *rev'd in part sub nom. United States v. Flemmi*, 225 F.3d 78 (1st Cir. 2000). In response to the scandal, Attorney General Janet Reno issued new guidelines. OFFICE OF THE ATTORNEY GEN., U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDELINES REGARDING THE USE OF CONFIDENTIAL INFORMANTS (2001), *available at* http://www.usdoj.gov/ag/readingroom/ciguidelines.htm. The Reno Guidelines superseded both the Levi Guidelines and the Civiletti Guidelines. *Id.* at § I(A)(3).

156. John Ashcroft, U.S. Attorney Gen., Remarks on the Attorney General Guidelines (May 30, 2002), http://www.usdoj.gov/archive/ag/speeches/2002/53002ag preparedremarks.htm.

157. OFFICE OF THE ATTORNEY GEN., U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE, AND TERRORISM INVESTIGATIONS § VI(A)(2) (2002) ("For the purpose of detecting or preventing terrorist activities, the FBI is authorized to visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally."), *available at* http://www.fpdct.org/reference/crimes_racketering_terrorism.pdf. As the language regarding any event that is "open to the public" indicates, the Domestic Security Guidelines were not targeted only at Muslim religious institutions, or even only at religious institutions generally; rather, they allowed this type of spying anywhere the public might be. *See id.* But to say that these regulations simply allow the government's police spies to do what the public does surely misses the crucial difference between the presence of a member of the public and an investigation by a government agent. *See* Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2006-2007 CATO SUP. CT. REV. 23, 69 n.183 (discussing the Supreme Court's statement that there was no real difference between the government and a private party as property owner and stating that "[t]he [Court's] analogy shockingly ignores the Constitution's central premise that the government, being uniquely powerful, is uniquely in need of restraints that would be wholly out of place in our fundamental law's treatment of private parties").

informants in a mosque or a church. Rather, these investigations could be undertaken without any prior reason to suspect any illegal conduct by congregants. In 2008, Attorney General Michael Mukasey reaffirmed the Ashcroft position with the new Attorney General's Guidelines for Domestic FBI Operations.[158] As a result, the use of internal regulation regarding informants, utilized by the FBI itself in years past, no longer presents a viable method for regulating most informant behavior in mosques or any other religious setting.

Thus we 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.[159] 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.

III.
BENEFITS, BUT ALSO COSTS

Given what we know now concerning the terrorist threat we face and the almost unlimited discretion that police have on this issue, it seems certain that the FBI and local police agencies will continue to place informants into Muslim communities to gather intelligence. To some degree, this is not just unavoidable, but also necessary. But it is too simplistic to view this as an unalloyed good—that is, to pretend that one can pursue the benefits of this strategy without incurring costs. We may decide that the benefits we receive outweigh the costs, but we cannot simply assume the truth of this proposition, or, worse yet, pretend that no costs exist. On the contrary, we must acknowledge both costs and benefits, and then attempt to work out the right accommodation between them. Any perspective that includes only the benefits risks an incomplete and

158. *See supra* notes 20–22 and accompanying text.

159. It is worth noting, though, that state law could potentially play an important role in this context. While some state law limiting the use of informants exists, *see infra* note 218 and accompanying text, new laws along these lines seem unlikely to pass now, given current public attitudes regarding terrorism. There has, however, been at least some interest in legislative reform of the use of informants. *See, e.g.*, *Law Enforcement Confidential Informant Practices: Joint Oversight Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security and the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 66–74 (2007) (statement of Alexandra Natapoff, Professor, Loyola Law School) (urging the collection of data on the use of informants at all levels).

therefore incorrect calculus on the question of whether to use this tactic.

A. The Benefit: Using Informants to Address a Risk That We Cannot Discount Entirely

Given the fact that no terrorist attacks have occurred in the United States since September 11, 2001, and that the plots allegedly foiled since then seem much smaller in scale than the 9/11 attacks, one might conclude that no terrorist presence exists on U.S. soil. In fact, at least one authoritative source has seemed to imply just that.[160] Yet even if there is no terrorist presence today, that does not mean that members of new cells could not enter the United States now or in the future. Moreover, we must also ask whether "homegrown terrorists"—people from inside our country, either citizens or long-time residents—might turn to terrorism, as FBI Director Robert Mueller fears.[161] Homegrown terrorism has become a real problem in Western Europe, as demonstrated by the attacks on public transit in London in July of 2005[162] and the assassination of the filmmaker and commentator Theo van Gogh in the Netherlands[163]—both by extremists native to those countries.

Next to the scope of this problem as it presents itself in Western Europe, the United States seems to face far less danger.[164] Nevertheless, we cannot completely discount the possibility of either sleeper cells introduced into our country or homegrown terrorism on our soil. Nor can we say that infiltration by informants could not serve as an effective, even decisive, weapon against such groups. Approximating the risk of another terrorist attack in the United States seems difficult, but, if estimating this risk is not easy, saying no risk exists is impossible, and probably foolhardy. Moreover, we need only look to recent events in this country to see that this is true. For example, the three terror suspects charged in Toledo, Ohio, seemed not to have formed any plan to launch an attack in the

160. In the aftermath of the exhaustive investigation by the independent September 11 Commission, Thomas Kean, Co-chairman of the Commission and former Governor of New Jersey, said flatly that there were no sleeper cells in the United States assisting the 9/11 hijackers and that the attackers had come from overseas. *Frontline: The Enemy Within* (PBS television broadcast Mar. 27, 2006) (statement of Thomas Kean) ("[P]eople talked about cells and sleeper cells and all of that; we didn't find any."), *available at* http://www.pbs.org/wgbh/pages/frontline/enemywithin/interviews/kean.html.

161. *See supra* notes 2–7 and accompanying text.

162. *See* Khevyn Limbajee, BBC News, Politics Show, London: Behind the Face of Terror (July 15, 2005), http://news.bbc.co.uk/2/hi/programmes/politics_show/4681763.stm (reporting that three of the four London bombers were British nationals of Pakistani descent).

163. *See generally* IAN BURUMA, MURDER IN AMSTERDAM: THE DEATH OF THEO VAN GOGH AND THE LIMITS OF TOLERANCE 35 (2006) (describing the murder of van Gogh by a radical Dutch Muslim).

164. *See supra* note 9 and accompanying text.

United States, but federal prosecutors allege that at least one actually traveled to Jordan in a failed attempt to deliver tactical assistance to the anti-American insurgents killing American soldiers in Iraq.[165]

In the spring of 2007, authorities made arrests in two terrorism cases in the New York region, both of which raised the specter of so-called homegrown terrorism. First, in May 2007, six foreign-born men were arrested and charged with plotting an attack on Fort Dix, in New Jersey. Of the six, all lived in the United States—some for more than two decades—highlighting law enforcement's fears about the "homegrown" nature of the danger.[166] Then, in June 2007, four men, including one naturalized American citizen, were arrested and charged with plotting to attack Kennedy Airport in New York City by bombing the jet fuel lines that supply the airport.[167] According to the government's allegations, the leader of the plot was a naturalized American citizen, who hatched the plans, conducted surveillance, and went to Trinidad to seek financing and support from a violent Muslim group.[168] In at least these three cases—the

165. Indictment at 1, United States v. Amawi, No. 3:06CR0719 (N.D. Ohio Feb. 16, 2006) ("1. . . . AMAWI traveled to Jordan in October 2003, and returned to the United States in March 2004. While in Jordan, AMAWI unsuccessfully attempted to enter Iraq to wage violent jihad, or 'holy war,' against the United States and coalition forces.") (on file with author). Note that, at the time of this writing, these remain unproven allegations; no trial has taken place, and no admissions have occurred as part of any plea agreement.

166. *See* Christine Hauser & Anahad O'Connor, *6 Arrested in Plot to Attack Fort Dix*, NYTIMES.COM, May 8, 2007, http://www.nytimes.com/2007/05/08/us/08cnd-dix.html (stating the criminal complaint alleged that the suspects aimed to kill at least a hundred soldiers with rocket propelled grenades); Michael Isikoff & Mark Hosenball, *Terrorists in the File Cabinet?*, NEWSWEEK, May 16, 2007, http://www.newsweek.com/id/39408 (reporting that three Albanian brothers involved in the plot are believed to have entered the United States illegally in 1984 and remained here for two decades afterwards); Dale Russakoff & Dan Eggen, *Six Charged in Plot to Attack Fort Dix*, WASH. POST, May 9, 2007, at A1 (stating that the FBI and the Department of Justice portrayed the defendants "as a leaderless, homegrown cell of immigrants" with "no apparent connection to al-Qaeda or other international terrorist organizations," but who appeared "to be an example of the kind of self-directed sympathizers widely predicted—and feared—by counterterrorism specialists"); *FBI Pins Fort Dix Plot on 'Homegrown' Terrorists* (National Public Radio broadcast May 9, 2007) (reporting that the suspects had been in the United States for years and that they "are thought to have created the jihad mission themselves, without outside support" from Al-Qaeda or other international terrorist groups, and quoting an FBI agent as stating that "[t]hese homegrown terrorists can prove to be as dangerous as any known group, if not more so"), *available at* http://www.npr.org/templates/story/story.php?storyId=10089947; *Six Accused of Plot to Attack Fort Dix* (National Public Radio broadcast May 8, 2007) (reporting that all the suspects lived in the United States and that one was a citizen, two were legal residents, and three had been in the United States illegally), *available at* http://www.npr.org/templates/ story/story.php?storyId=10080637. In December 2008, a jury convicted all of the defendants of conspiracy to kill soldiers but acquitted them of attempted murder. Paul von Zielbauer & Jon Hurdle, *5 Men Are Convicted in Plot on Fort Dix*, N.Y. TIMES, Dec. 23, 2008, at A23.

167. Cara Buckley & William K. Rashbaum, *4 Men Accused of Plot to Blow Up Kennedy Airport Terminals and Fuel Lines*, N.Y. TIMES, June 3, 2007, at A37.

168. *See id.* The plot was almost immediately viewed as "homegrown." *See, e.g.*,

Toledo case, the Fort Dix plot, and the targeting of Kennedy Airport—the authorities used informants to gather crucial facts.[169] In the Fort Dix and Kennedy Airport plots, one can certainly conclude that, had the plots matured, they could have presented some real danger, even if not as much as the terrorists would have liked.[170]

All of this shows that the potential danger of homegrown terrorist plots, though perhaps not great, remains real; in any event, we cannot dismiss it. Since law enforcement has sometimes used informants to nip these nascent dangers in the bud, we should not expect police to abandon this tactic now.

B. The Costs: Crippling Police/Community Cooperation, the Possibility of Abuse, and the Danger of Police Activity in the Areas Crucial to First Amendment Values

1. The Damage to Relations Between Law Enforcement and Muslim Communities

The most important cost of using informants within mosques and other religious institutions remains the damage this tactic may do to law enforcement's ability to receive crucial intelligence and information from the Muslim community. As discussed, law enforcement and intelligence officials agree on the importance of finding common ground between police and Muslim communities.[171] Building relationships that can engender trust with Muslim communities must become a top priority for law enforcement, because police need trusted partners in the Muslim communities if they want intelligence on the activities of anyone in those

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Anthony Faiola & Steven Mufson, *N.Y. Airport Target of Plot, Officials Say*, WASH. POST, June 3, 2007, at A1 (stating that the charges "provided yet more evidence of the threat posed by homegrown terrorists, embittered extremists who hail from the Middle East or, in this case, from the Caribbean and northeastern South America"); Greg Miller & Erika Hayasaki, *Arrests Made in Alleged JFK Plot*, L.A. TIMES, June 3, 2007, at A1 (characterizing the case as "the latest in a series of alleged domestic terrorist threats involving Muslims residing legally in the U.S.").

169. *See* Miller & Hayasaki, *supra* note 168 ("Much of the federal case cites information obtained with the help of an FBI informant . . . ."); Zielbauer & Hurdle, *supra* note 166 ("Prosecution evidence included hundreds of secretly taped conversations between the defendants and F.B.I. informants . . . .").

170. While the desired attack on Kennedy Airport's fuel lines or airport fuel tanks would probably not have resulted in the destruction of the airport, or even of the entire fuel system, and would most likely have caused relatively limited (or no) loss of life, it would have disrupted the U.S. aviation system for at least a short time and perhaps crippled a major U.S. air travel hub for a long period. *See* Buckley & Rashbaum, *supra* note 167 (quoting experts as saying that system of safety valves would have limited the damage); Faiola & Mufson, *supra* note 168 (pointing out that successful completion of the plot might have "resulted in . . . relatively limited loss of life" but quoting a former head of the Transportation Security Administration as saying that it "'could cripple the airlines'").

171. *See supra* notes 51–64 and accompanying text.

communities who might seem suspicious. Members of Muslim communities know the facts on the ground where they live; this makes them the best source of information on suspicious activity. When police and Muslim community members have strong, positive relationships, information concerning suspicious activity can make its way to the police; if police do not have alliances with the people who live in these communities, this diminishes their chances of gaining knowledge of what goes on there.

The foundation for any relationship that will foster communication and, therefore, the sharing of intelligence, is trust, and the use of informants in a community can damage or destroy that trust all too easily.[172] Without that kind of partnership, there exists little chance that real relationships can flourish, and this, in turn, reduces the chances that community members will share the information they have with law enforcement—whether out of fear of or discomfort with police, out of a feeling that they suffer unfair mistreatment like ethnic profiling, or simply because they feel that law enforcement does not have their interests at heart.[173]

Opportunities for intelligence and information gathering are not the only potential benefits of creating relationships with Muslim communities. Another potential benefit is better trained and more sensitive law enforcement officials. For example, former Chicago Police Superintendent Terrance Hillard, who had worked hard to create strong relationships with many minority communities, including Muslims, enlisted members of the Chicago Muslim community to help design training for police officers concerning how they could deal more sensitively and successfully with Muslim airport patrons.[174] The results, including a training video co-written by the police department and a group of Muslims, were applauded by both the Muslim community and the police themselves.[175]

The point is that there is much to gain for everyone in this debate—not just intelligence and information for the police, but also a way to cooperate on many issues of concern to both police and these communities. It is an opportunity that neither the police nor the Muslim

172. The experience of Muslims in New York City provides a particularly telling example of these feelings of betrayal. *See supra* notes 68–72 and accompanying text (discussing how, when Muslims who had worked with the FBI and their local police departments learned of the informants in their communities, they felt not just surprise, but betrayal).

173. *See, e.g.*, Carolyn Marshall, *24-Year Term for Californian in Terrorism Training Case*, N.Y. TIMES, Sept. 11, 2007, at A20 (Quoting the executive director of a Muslim organization as saying that Hamid Hayat's sentencing "'sent a clear message to the Muslim community. You do not speak to an F.B.I. agent unless you have an attorney present.'").

174. HARRIS, *supra* note 38, at 47–52.

175. *Id.* at 51–52.

community should undervalue, and an opportunity that might be lost if law enforcement inserts informants into communities.

2. Abuse in the Use of Informants

Another potential cost of using informants in mosques may come from abuse by law enforcement. Almost any investigative tactic carries with it the potential for abuse. The use of informants, particularly (though not only) in sensitive contexts like religious or political organizations, has proven a perennial source of abuse over many years. Congressional investigations in the 1970s exposed some of these abuses, bringing to light ways in which our own government spied upon Americans whose conduct fell within the zone of First Amendment protection.[176] On account of these abuses, the FBI and the Department of Justice have issued guidelines over the past three decades, beginning with the Levi Guidelines in the 1970s, to address these issues.[177] While the Levi Guidelines allowed the government to spy domestically on First Amendment activities only if there was reason to suspect a crime,[178] under the current guidelines, federal law enforcement now enjoys much wider discretion to spy and use informants.[179]

One might have hoped that the guidelines, whatever drawbacks they might have, would at least have changed the FBI's prior patterns of failing to abide by the Constitution. However, evidence shows that many agents have not been following the FBI's own internal rules. For example, a 2005 report by the Inspector General of the Department of Justice indicated that the FBI continues to fail to follow its guidelines for using informants.[180] In a comprehensive analysis of compliance with all of the FBI's Investigative Guidelines, the Inspector General found, "The most significant problems were failures to comply with the Confidential Informant Guidelines.... [W]e identified *one or more Guidelines violations in 87 percent of the confidential informant files we examined.*"[181]

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176. *See, e.g.*, *supra* notes 146–50 and accompanying text.

177. *See supra* notes 151–59 and accompanying text.

178. *See supra* note 151 and accompanying text.

179. *See supra* notes 20, 144–47 and accompanying text.

180. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE FEDERAL BUREAU OF INVESTIGATION'S COMPLIANCE WITH THE ATTORNEY GENERAL'S INVESTIGATIVE GUIDELINES 2 (2005), *available at* http://www.usdoj.gov/oig/special/0509/final.pdf.

181. *Id.* (emphasis added). It is also worth noting that the FBI does not stand alone in having violated guidelines on the use of surveillance and informants. Recall that the NYPD violated the *Handschu* guidelines even after a federal court relaxed them considerably by videotaping law-abiding people at demonstrations and spying extensively on political and social-cause groups. Handschu v. Special Services Division, 475 F. Supp. 2d 331, 353 (S.D.N.Y. 2007) ("The evidence on this motion indicates that police officers engaged in videotaping and photography which violated the Modified Handschu Guidelines."); Dwyer, *supra* note 129 (reporting that Judge Haight found that "by videotaping people who were exercising their right to free speech and breaking no laws, the Police Department had

This finding is particularly sobering given that the FBI adopted the Guidelines for the express purpose of forcing its own agents to do a better job handling informants and avoiding the many pitfalls and ethical dilemmas that prior scandals illuminated.

Two possible explanations for the FBI's failure to regulate itself with successive sets of guidelines stand out. First, the FBI and the Department of Justice have always said explicitly that the various guidelines create no enforceable rights.[182] That is, the FBI's failure to follow the guidelines does not give any person any legal right to sue over what the FBI did and thus carries no penalty either against the FBI or the individual agent in a lawsuit brought by the victim. This effectively makes the guidelines unenforceable from outside the FBI.

Second, and just as important, the guidelines focus on *how* to use informants;[183] they do not consider *under what circumstances* the government *should* use informants—i.e., with how much justifying evidence, and for what purpose, the government should deploy informants. This omission is especially grave because it is the very issue the Supreme Court's cases on the subject failed to address, since (according to the *Hoffa* and *White* cases) *everyone* "assumes the risk" that *anyone* could be a government informant.[184] Without any rules concerning the circumstances

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ignored the milder limits he had imposed on it in 2003").

182. *E.g.*, OFFICE OF THE ATTORNEY GEN., U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES REGARDING THE USE OF CONFIDENTIAL INFORMANTS § I.H (2002) ("Nothing in these Guidelines is intended to create or does create an enforceable legal right or private right of action by a [confidential informant] or any other person.").

183. *See, e.g.*, *id.* § I.C ("A [Department of Justice Law Enforcement Agency] agent does not have any authority to make any promise or commitment that would prevent the government from prosecuting an individual for criminal activity that is not authorized . . . or that would limit the use of any evidence by the government, without the prior written approval of the [Federal Prosecuting Office] that has primary jurisdiction to prosecute the [confidential informant] for such criminal activity. [An agent] must take the utmost care to avoid giving any person the erroneous impression that he or she has any such authority."); *id.* § II.A.1 ("Prior to utilizing a person as a [confidential informant], a case agent of a [Department of Justice Law Enforcement Agency] shall complete and sign a written Initial Suitability Report and Recommendation, which shall be forwarded to a Field Manager for his or her written approval."); *id.* § II.D.2 ("Prior to utilizing an individual as a High Level Confidential Informant, a case agent of a [Department of Justice Law Enforcement Agency] shall first obtain the written approval of the [Confidential Informant Review Committee]. A Criminal Division representative on the [Confidential Informant Review Committee] who disagrees with a decision to approve the use of an individual as a High Level Confidential Informant may seek review of that decision pursuant to paragraph (I)(G)."); *id.* § III.A.2.a ("A [Department of Justice Law Enforcement Agency] agent shall not: (i) exchange gifts with a [confidential informant]; (ii) provide the [confidential informant] with any thing of more than nominal value; (iii) receive any thing of more than nominal value from a [confidential informant]; or (iv) engage in any business or financial transactions with a [confidential informant]."). Amidst all this necessary but bureaucratic regulation, one searches the guidelines in vain for anything resembling guidance on what types of cases might be appropriate for use of confidential informants.

184. *See supra* notes 79–88 and accompanying text.

under which the law should allow law enforcement to use informants, the FBI retains full flexibility without supervision or accountability. Without any standards that the FBI must follow in order to avoid real consequences imposed from the outside, nothing will change and abuses will continue. We would be naive to hope for anything different.

3. The Damage to Religious and Associational Values Caused By Informant Activity in First Amendment-Protected Settings

The use of informants in sensitive settings, such as political meetings or religious services, calls for special care. This may seem obvious, but the findings of investigation after investigation, from the congressional hearings in the 1970s onward,[185] show a remarkably consistent disregard for the damage done by surveillance in these contexts.

Surely, when people suspect their presence, the use of informants can chill the exercise of free speech and the expression of political opinions, particularly unpopular ones. And this seems to be exactly what has happened among many Muslims in the United States because Muslims are fully aware that police and government agencies have infiltrated their communities.[186] When any community knows that informants or undercover police officers have infiltrated it, political discourse (and speech on any topic that may seem even vaguely political) can easily become the first casualty because people begin to understand that they must take care in what they say and to whom they say it. For example, in the wake of the revelations that the NYPD used informants to infiltrate mosques in the Herald Square Case, a Muslim high school senior said that "when you sit down and politics comes to your head, you think, 'Who's around?'"[187] Another man, an assistant teacher at a public high school, said, "It's like a police state here."[188] A Palestinian immigrant said that, because of the presence of informants, "[s]ometimes you look a person in the eye, there's a feeling. You can say anything you want, but don't curse the system. That's what they care about."[189] This kind of self-censorship—not of speech aimed at advocating or planning criminal or terrorist acts but rather of simple discussion of political issues—is directly at odds with the constitutional protection of, and American preference for, robust and open debate on social and political questions.

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185. *See supra* notes 146–58 and accompanying text.

186. For example, in the wake of revelations that the NYPD used informants to infiltrate mosques and other religious institutions in the Herald Square case, a Muslim community activist stated that the police "think we don't know, but we know who they are." Elliott, *supra* note 16.

187. *Id.*

188. *Id.*

189. *Id.*

Among First Amendment-protected venues, most people would certainly think of religious institutions—churches, synagogues, temples, and mosques—as the most sensitive of settings because these institutions provide us with a place to feel open and secure with our beliefs, traditions, and fellow believers.[190] The First Amendment's Free Exercise Clause allows us to freely and openly participate in religious life. Many legal scholars agree that infiltration of religious institutions may indeed have a chilling effect on the exercise of these important rights,[191] and even some former federal law enforcement officials have joined this consensus.[192] Any government actions that potentially intrude on such a place, or on religious activities, should only take place when absolutely necessary, and the government should carry them out as carefully and as narrowly as possible, consistent with a keen awareness of the damage that such an intrusion may cause.

The recent upsurge in surveillance by informants in mosques has brought to light examples of the sort of damage that intrusion into houses of prayer can do, much of it lasting. For example, after a series of terrorism-related arrests in the Portland, Oregon, area, Salma Ahmad of the Bilal Mosque in suburban Beaverton, Oregon, remembers that she and her fellow congregants became aware that the government had planted an informant in their mosque, resulting in some of the arrests.[193] News of the informant's infiltration quickly caused bonds to break down between

190. *See, e.g.*, Lininger, *supra* note 22, at 1236 ("[A] religious service is uniquely sensitive. Worshippers seek refuge in their religious institutions. They seek a setting that is conducive to introspection and spiritual growth. . . . Government intrusion in a religious institution compromises the sense of security that is a necessary condition for the practice of religion.").

191. *See* Mike Bothwell, *Facing God or the Government*—United States v. Aguilar*: A Big Step for Big Brother*, 1990 BYU L. REV. 1003, 1009 ("People generally refrain from open expression of religious views under the eye of the government."); Elliff, *supra* note 22, at 786–87 ("The absence of specific guidelines to control governmental overreaching may lead courts to find that domestic security investigations unduly chill the exercise of constitutional rights."); Rubin, *supra* note 22, at 456 (concluding that government intelligence gathering on religious or political groups "may 'chill' the exercise of a first amendment right to express views in a public forum by individuals or organizations").

192. *See, e.g.*, *Anti-terrorism Investigations and the Fourth Amendment After September 11, 2001: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 37 (2003) (statement of Paul Rosenzweig, former Staff Attorney, Department of Justice) ("There should . . . be a hesitancy in visiting public places and events that are clearly intended to involve the exercise of core First Amendment rights, as the presence of official observers may chill expression."), *available at* http://judiciary.house.gov/Legacy/rosenzweig052003.htm; Adam Liptak, *Traces of Terror: News Analysis; Changing the Standard*, N.Y. TIMES, May 31, 2002, at A1 (quoting a former U.S. Attorney as saying that, without appropriate guidelines, law enforcement could "conduct investigations that had a chilling effect on entirely appropriate lawful expressions of political beliefs, the free exercise of religion and the freedom of assembly").

193. Telephone Interview with Salma Ahmad (Mar. 15, 2007) (transcript on file with the author).

congregants, because news of the presence of the informant, himself a Muslim, "brought mistrust among the brothers in the mosque."[194] This mistrust led people to act in ways contrary to Muslim custom and practice almost immediately. Ms. Ahmad cited two examples to illustrate this point. First, when the news of the informant's presence emerged, the Bilal's traditional congregational bonding "was cut, because you don't know who is going to inform what."[195] Second, Ms. Ahmad relayed how news that informants had been among the people at Bilal directly undermined an important Muslim custom of greeting.[196] Ms. Ahmad feels that this lack of trust in a Muslim community, especially in a mosque, cuts directly against the core of Islam because "in Islam we think you should trust your brother and that [lack of trust] gives them that feeling of alienation."[197]

In March 2004, sometime after the revelation of the presence of informants at Bilal Mosque, federal authorities mistakenly arrested Brandon Mayfield, a local attorney who regularly attended worship services at Bilal, for involvement with the train bombings in Madrid.[198] Mayfield's arrest and several weeks of incarceration without bail (for which the FBI later apologized[199] and settled Mayfield's subsequent lawsuit for two million dollars in damages)[200] became the occasion for the earlier informant-related trauma at Bilal to resurface. Normally, the Bilal community would have rushed to the defense of a fellow worshiper who had been arrested and detained, but knowledge of the use of an informant

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194. *Id.* at 2–3.

195. *Id.* at 1.

196. *Id.* at 3 ("Because when you are in congregations you are suppose [sic] to be one, you love your brother, you hug each other. . . . [But now,] nobody will welcome the new people . . . [because of] the situation and the utmost fear, is gone, that love . . . that trust is gone."). The Muslim command to welcome strangers, Muslims and non-Muslims alike, is one of the highest obligations in Islam—one that applies especially to welcoming strangers to one's mosque. A visitor to a mosque at prayer time must receive a warm and respectful welcome because "the Prophet tells us that when there is a new brother welcome [him], you hug, you kiss." *Id.* at 3.

197. *Id.*

198. Dan Eggen, *U.S. Settles Suit Filed by Ore. Lawyer; $2 Million Will Be Paid for Wrongful Arrest After Madrid Attack*, WASH. POST, Nov. 30, 2006, at A3 (explaining how the FBI bungled a fingerprint match and mistakenly linked Mayfield to a terrorist attack); Les Zaitz, Noelle Crombie, Joseph Rose & Mark Larabee, *Fingerprint Links Oregon with Spain*, OREGONIAN, May 8, 2004, at A1 (detailing the government's argument that Mayfield was involved in the Madrid train bombings on March 11, 2004, and reporting his arrest on a material witness warrant). *See also* Telephone Interview with Salma Ahmad, *supra* note 193, at 4–6 (discussing how Mayfield was a member of the Bilal Mosque).

199. Press Release, Fed. Bureau of Investigation, Statement on Brandon Mayfield Case (May 24, 2004), *available at* http://www.fbi.gov/pressrel/pressrel04/mayfield052404.htm (describing errors in fingerprint analysis implicating Mayfield and apologizing for "the hardships that this matter has caused").

200. *E.g.*, Eggen, *supra* note 198 (discussing the FBI settlement for two million dollars of a lawsuit brought by Mayfield and the FBI's apology).

during the earlier investigation affected the community's usually supportive spirit. "When Brandon was arrested they [sic] was a hesitation of the members of the community to even call the family, or go to Brandon's house to see them," Ms. Ahmad recalled.[201] People said, "'[O]h my God [the FBI] would see my car, they would see my license [plates] that I went to Brandon's.'" Even though they were innocent, Ms. Ahmad and other members of her community feared becoming the subject of government scrutiny and perhaps arrest themselves.[202]

The experiences of Muslims nationwide mirror those of Ms. Ahmad and her fellow worshippers at the Bilal Mosque. Across the country, leaders of mosques have noticed reduced attendance at services.[203] People at mosques have become cautious and wary in expressing themselves to each other.[204] Trust in fellow congregants has subtly but noticeably worn away and been replaced by suspicion.[205] In short, Muslims have begun to fear that merely being present at their houses of worship, or conspicuously expressing their faith and traditions, could bring the full weight of a government investigation down on them.

IV.
FIXING THE PROBLEM: RECOGNIZING MUTUALLY REINFORCING NEEDS

On the one hand, law enforcement wants and badly needs the type of relationships with Muslim communities that would result in mutual cooperation and frequent communication, so as to ensure the maximum possible flow of intelligence on potential terrorist threats from within the

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201. Telephone Interview with Salma Ahmad, *supra* note 193, at 4.

202. *Id.*

203. *See, e.g.*, Lynn Duke, *Worship and Worry; At a Brooklyn Mosque, Muslims Pray in the Shadow of Terrorism*, WASH. POST, Apr. 16, 2003, at C1 (noting that attendance at a Brooklyn mosque has dropped, financial support has dried up, and worshippers live under suspicion because of investigations by police agents); Teresa Watanabe, *Quakers Promote Immigrant Rights; Citing an Increase in Abuses Since the Sept. 11 Attacks, the Group Is Asking Those Who Have Been Victimized to Step Forward*, L.A. TIMES, Nov. 11, 2003, at B6 (noting that law-abiding worshippers in Philadelphia have stayed home for holiday and daily prayer rituals rather than attend services at a mosque that might be under surveillance); *Mosque Attendance Falls After Terrorism Arrests* (National Public Radio broadcast May 30, 2007) (describing how attendance at a New Jersey mosque has plummeted as a result of law enforcement activities), *available at* http://www.npr.org/templates/story/story.php?storyId=10529148.

204. *See, e.g.*, Warren Richey & Linda Feldman, *Has Post-9/11 Dragnet Gone Too Far?*, CHRISTIAN SCI. MONITOR, Sept. 12, 2003, at 1 (quoting one community leader as saying that "'[s]ome people are afraid to cite verses of the Koran that include the word "jihad" when leading prayers, because they think the government is listening'").

205. *See e.g.*, Liptak, *supra* note 192 (quoting a member of the Council on American-Islamic Relations as saying that "[i]t starts to erode some of the trust and good will that exists in [mosques and other religious settings] if you're afraid they have been infiltrated by an undercover agent").

Muslim community. The Muslim community has responded, for the most part, with willing (if at times understandably wary) cooperation. On the other hand, law enforcement has begun to use informants in mosques and other sensitive settings, and the Muslim community's reaction of betrayal threatens to swamp any efforts to create the important positive connections that law enforcement wants and needs. In other words, using informants can produce useful information, but it also produces significant costs in terms of public safety. Faced with such a dilemma, how can we ensure that law enforcement get the benefits of using informants when necessary, while minimizing the costs?

A. Bringing the Use of Informants Under the Warrant Clause and Getting Rid of the Hoffa *and* White *"Assumption of the Risk" Standard*

One solution would begin with the reconsideration of the Supreme Court's decisions in the *Hoffa* and *White* cases, in which the Court declared the Fourth Amendment did not apply to the government's placement and use of informants, thereby giving police unfettered discretion to use informants without having to submit the reasons for their suspicion to independent examination by a court.[206] Ordinarily, obtaining a warrant by meeting the probable cause standard constitutes the sine qua non of general Fourth Amendment jurisprudence, but the Court's holdings in these cases virtually eliminated the warrant requirement in the informant context. Because unfettered police discretion almost inevitably leads to abuse at some point,[207] and because of the sensitivity of placing government spies in homes, political gatherings, or religious institutions, it seems especially wise to have a judge decide whether the available evidence gives the government probable cause to support an intrusion.

Professor Tracey Maclin has made the case for subjecting the use of informants to traditional constitutional restraints, consistent with his belief that "the central meaning of the Fourth Amendment is distrust of police power."[208] Maclin argues:

> [T]he government's authority to use informants and secret agents can and should be controlled by the Warrant Clause of the Fourth Amendment. Police operations involving the planting of informants in a home or the recording of private conversation

206. *See supra* Section II.A.

207. This has certainly proven true in the context of the use of informants. *See supra* notes 149–50 and accompanying text.

208. Tracey Maclin, *Informants and the Fourth Amendment: A Reconsideration*, 74 WASH. U. L.Q. 573, 578 (1996). The complete discretion of police, local or federal, to use informants however and whenever they wish and to pick the targets of this kind of surveillance as they like, Maclin says, "is at odds with the values that inspired the Fourth Amendment." *Id.*

> should be subject to the same [rules] that currently control governmental wiretapping and bugging.[209]

The type of judicial supervision that Maclin recommends would not form any significant barrier to the *legitimate* use of informants because the Supreme Court has stressed that lower courts should understand and apply the probable cause standard in a non-technical, non-legalistic way, through the lens of police officers making common-sense judgments.[210] As a result, requiring a warrant and probable cause would simply recognize that these intrusions have a cost and that they should occur only with a reason.

Moreover, returning to the warrant and probable cause requirements would have the salutary effect of implicitly forcing an overdue reexamination of the "assumption of the risk" doctrine the Court adopted in *Hoffa* and *White*. The idea that we should base the scope of constitutional protection afforded by the Fourth Amendment on a common law tort concept seems antiquated. Moreover, the Supreme Court rejected similar reliance on property concepts in *United States v. Katz*, the case that established the "reasonable expectations of privacy" test as the fountainhead of much of our Fourth Amendment jurisprudence more than forty years ago.[211]

More important, the Supreme Court's use of the "assumption of the risk" idea represents a poor doctrinal choice. Recall that the *Hoffa* Court endorsed the part of Justice Brennan's dissent in *Lopez* in which he spoke of the inherent risk of betrayal in all communication.[212] However, Justice Brennan had also noted that the risks inherent in the use of electronic listening and recording systems threaten to take the danger of betrayal to new heights.[213] By using only the first half of Justice Brennan's thought—

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209. *Id.*

210. United States v. Cortez, 449 U.S. 411, 418 (1980) ("[T]he evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.").

211. United States v. Katz, 389 U.S. 347, 352–53 (1967) (rejecting common law property concepts as the basis for measuring scope of Fourth Amendment because "'[t]he premise that property interests control the right of the Government to search and seize has been discredited'" (quoting Warden v. Hayden, 387 U.S. 294, 304 (1967))).

212. Hoffa v. United States, 385 U.S. 293, 303 (1966) ("'The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.'" (quoting Lopez v. United States, 373 U.S. 427, 465 (1962) (Brennan, J., dissenting))).

213. *Lopez*, 373 U.S. at 450 (Brennan, J., dissenting) ("But the risk [of electronic surveillance] . . . is of a different order. It is the risk that third parties . . . who cannot be shut out of a conversation as conventional eavesdroppers can be, merely by a lowering of voices, or withdrawing to a private place . . . may give independent evidence of any conversation. There is only one way to guard against such a risk, and that is to keep one's mouth shut on all occasions."). *See also id.* at 467 (Brennan, J., dissenting) ("[I]t must be plain that electronic surveillance imports a peculiarly severe danger to the liberties of the person.").

that people with whom we interact can, at any point, betray us—the majorities in *Hoffa* and *White* took his analysis beyond any reasonable interpretation. As Justice Brennan seemed to imply, risk of betrayal by a government-induced, government-placed informant is not the same as the everyday risk that any friend or acquaintance might reveal one's confidences to another person.

The Court's mistake in its Fourth Amendment jurisprudence relating to informant use was legally enshrining the "assumption of the risk" idea *without questioning* whether the risk that anyone may be working as a police informant was a risk with which the Court *should* burden the country's citizens. Some risk may be an unavoidable fact of everyday life in any human society, because gossips will always be with us; perhaps we have only ourselves to blame if we trust them. But when using informants, the government actively and purposely seeks the opportunity to gain knowledge of someone's private business for the purpose of prosecuting her. This may not always be a bad thing, and it may be necessary to catch certain criminals who may cause great damage if left at large. But the Court's perfunctory adoption of the "assumption of the risk" analysis sidestepped any real debate on this question and on the related question of how best to accommodate the conflicting interests that the use of informants inevitably presents in some cases. Instead of questioning the practice, the Court used the "assumption of the risk" language to ratify existing police practice. In his dissenting opinion in *White*, Justice Harlan expressed a desire for a better approach than the "assumption of risk" theory:

> Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules, the customs and values of the past and present. Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society.[214]

The use of informants might be brought under the Warrant Clause of the Fourth Amendment, as Professor Maclin recommends, in one of two ways. First, the Supreme Court could reverse *Hoffa* and *White*, at least insofar as abandoning the "assumption of the risk" principle in favor of treating the use of informants in the same manner as it treats other potential Fourth Amendment intrusions. Legislative action presents a second possibility.[215] Congress and state legislatures can step in and regulate police practices. Even if the Fourth Amendment, as interpreted

214. United States v. White, 401 U.S. 745, 786 (Harlan, J., dissenting).

215. The Constitution sets the floor—the minimum acceptable level—of these rights, but legislatures, including Congress, remain free to provide greater protections. *See infra* notes 216–17 and accompanying text.

by the Supreme Court, does not require that law enforcement's desire to use informants receive any judicial scrutiny or meet any legal standard, Congress can institute such a requirement by passing a statute. Title III of the Omnibus Crime Control and Safe Streets Act,[216] which regulates the use of wiretaps, functions in this way. It is more strict and detailed than mere Fourth Amendment regulation would be, thereby imposing a tighter set of restraints on law enforcement than the Fourth Amendment alone would. Some state laws also impose greater obligations on law enforcement use of electronic eavesdropping than either the Fourth Amendment or the federal Title III statute do.[217] Moreover, several states have imposed legislative curbs specifically on the use of informants, mandating that law enforcement in these jurisdictions only infiltrate First Amendment-sensitive contexts like houses of worship if police have fact-based reasons to suspect involvement in criminal activity.[218]

While legislation at either the federal or state level could impose judicial supervision requirements and legal standards on the use of informants, the enactment of such legislation seems as unlikely in the current political climate as a reversal of the *Hoffa* and *White* cases by the Supreme Court. In 2006, Congress reauthorized the expiring provisions of the Patriot Act[219] with few changes, despite strong opposition.[220] In the fall

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216. 18 U.S.C. §§ 2510–2522 (2006).

217. *See, e.g.*, Maryland Wiretapping and Electronic Surveillance Act, MD. CODE ANN., CTS. & JUD. PROC. §§ 10-401 to -414 (2006). In at least one respect the Act provides broader protection to surveillance targets than Title III of the Omnibus Crime Control and Safe Streets Act, for, unlike the federal statute, Maryland requires consent from all parties to a conversation, not just one, before a conversation may be taped or otherwise intercepted in the absence of a court order authorizing law enforcement officials to conduct a wiretap. Miles v. State, 781 A.2d 787, 798 (Md. 2001).

218. For example, in Indiana, "No criminal justice agency shall collect or maintain information about the political, religious or social views, associations or activities of any individual . . . unless such information directly relates to an investigation of past or threatened criminal acts or activities and there are reasonable grounds to suspect the subject of the information is or may be involved in criminal acts or activities." IND. CODE § 5-2-4-5 (2008). Both Oregon and Pennsylvania have substantially similar statutes. OR. REV. STAT. § 181.575 (2007) ("No law enforcement agency . . . may collect or maintain information about the political, religious or social views, associations or activities of any individual . . . unless such information directly related to an investigation of criminal activities, and there are reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct."); 18 PA. CONS. STAT. ANN. § 9106(b)(2) (West 2000) ("Intelligence information may not be collected or maintained . . . concerning participation in a political, religious or social organization, or in the organization or support of any nonviolent demonstration . . . unless there is a reasonable suspicion that the participation by the subject of information is related to criminal activity . . . .").

219. USA PATRIOT Improvement and Reauthorization Act, Pub. L. No. 109-177, 120 Stat. 192 (2006).

220. Charles Babington, *Congress Votes to Renew Patriot Act, with Changes*, WASH. POST, Mar. 8, 2006, at A3 (detailing how the Senate voted for renewal of the Act and noting both that strong opposition forced some changes in the legislation and that doubts persist among opponents to the renewal); Sheryl Gay Stolberg, *Patriot Act Revisions Pass House,*

of 2006, Congress passed the Military Commissions Act,[221] which, among other things, withdrew the possibility of using the writ of habeas corpus in cases arising from detention at Guantanamo Bay, Cuba.[222] In addition, the summer of 2007 saw the enactment of legislation that provided additional procedures for the National Security Agency to acquire foreign intelligence through a warrantless wiretapping program.[223] The state laws regulating the use of informants, discussed above, were passed many years ago,[224] and, in more recent years, states have leaned in the other direction, passing their own "Patriot Acts."[225] In all, statutory restraints on the use of informants seem unlikely in today's political climate because a political opponent could easily accuse a legislator advocating such restraints as being soft on terrorism or handcuffing our police and national security forces.

Professor Tom Lininger, a scholar who has recognized the complex and difficult issues presented by the use of informants and other law enforcement surveillance tactics in mosques,[226] agrees that the judicial and legislative routes to reform seem unpromising.[227] He suggests instead the creation of provisions in state codes of legal ethics that would "prohibit prosecutors from supervising the surveillance and infiltration of religious organizations absent a specific suspicion of criminal activity by the

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Sending Measure to President, N.Y. TIMES, Mar. 8, 2006, at A20 (reporting on how the House of Representatives passed the renewal and how critics said that the Act's safeguards did not go far enough); Sheryl Gay Stolberg, *Senate Passes Legislation to Renew Patriot Act*, N.Y. TIMES, Mar. 3, 2006, at A14 (detailing passage of bill by Senate despite some opposition).

221. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

222. 28 U.S.C. § 2241(e) (2006). This aspect of the Military Commissions Act was struck down, however, by the Supreme Court in *Boumediene v. Bush*, 553 U.S. 723 (2008).

223. Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552.

224. The state laws mentioned in note 218, *supra*, were enacted in Indiana in 1977, in Oregon in 1981, and in Pennsylvania in 1979.

225. *See, e.g.*, S. 9, 126th Gen. Assem., Reg. Sess. (Ohio 2005). This bill, known colloquially as "Ohio's Patriot Act," inserted language into state law that, inter alia, required state officials to cooperate with federal officers enforcing the USA PATRIOT Act. Ohio S. 9 § 9.63(A) (2005).

226. Lininger, *supra* note 22.

227. *Id.* at 1262–66 (arguing, inter alia, that the expertise of the legislative branch is not ideal for the undertaking). Professor Lininger also discounts the possibility of using law enforcement's own internal regulations for this purpose. *Id.* at 1267–68. We do not agree on this point. I view internal regulation as, generally, a more successful strategy for regulating police behavior than Professor Lininger does. *See generally* HARRIS, *supra* note 38. Moreover, I view internal regulation as including the kind of local negotiation between police and citizens that I recommend here, *infra* Part IV.B. While I would concede some of the points he makes, for example, the fact that such self-regulation involves a conflict of interest, Lininger, *supra* note 22, at 1267, I view this self interest as necessarily including recognition of the mutually reinforcing interests created by law enforcement's need for cooperation.

organization or its members."[228] He argues that because law enforcement agents increasingly work with and rely upon the advice and consent of prosecutors when conducting investigations,[229] prosecutorial ethics rules could serve a gatekeeping function, stopping law enforcement officers from using intrusive surveillance tactics without a specific suspicion of criminal activity.[230]

Assuming that such a rule would find wide acceptance in the legal community of any particular state,[231] Lininger's idea is promising. The possible transitive effect that ethics codes could have on police conduct make them especially attractive. Ultimately, however, it depends upon the state bar's enforcement of the ethics rules against prosecutors. In other words, the question is what happens after the rule is enacted and a prosecutor declines to follow it, believing in good faith that the rule would undermine her ability to help police and security officials foil potential terrorists. This scenario is probably not so unlikely, given the highly charged nature of anti-terrorism efforts. One wonders whether the bar would have the spine to sanction such a prosecutor. Given bar associations' long history of failing to sanction prosecutors for common misconduct that is nonetheless blatant, even venal,[232] one wonders where

228. Lininger, *supra* note 22, at 1207.

229. *Id.* at 1271–72 ("Especially in the federal system, prosecutors play a significant role in supervising proactive investigations. . . . So great is the involvement of prosecutors in the investigative phase that the Supreme Court has conferred immunity on prosecutors for their good-faith investigative decisions."). *See also* Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723, 724 (1999) ("Public prosecutors in this country have increasingly become involved in the investigative stages of criminal matters during the 20th century."). Like Lininger, Little argues for new rules of ethics to address prosecutors' significant role in the investigation of criminal activity. *See generally id.*

230. *See* Lininger, *supra* note 22, at 1273 ("Because officers are so highly dependent on the involvement of prosecutors in proactive investigations, it should come as no surprise that constraints on prosecutors often have the transitive effect of constraining the police officers involved in a particular investigation.").

231. Professor Lininger argues that state bars include both prosecutors and defense attorneys, as unelected bodies are not as susceptible to political pressures as legislative bodies. Moreover, he says, the rules state bars adopt must have state supreme court approval, assuring that state bars will not overreach. Lininger, *supra* note 22, at 1269. I have no real quarrel with any of these assertions, but I feel it is important to point out that they all represent significant assumptions. A state bar laying out rules might, in the end, take just as conservative a point of view on these issues as government bodies do.

232. *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 143 (2007) (noting that professional discipline of prosecutors by state bar authorities "has proven to be woefully inadequate and ineffective. . . . [R]eferrals [of prosecutors] to state disciplinary authorities have been few and far between. . . . [I]n the relatively few cases that have been referred to state authorities, prosecutors rarely receive serious discipline."); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987) (explaining that, despite rules prohibiting both prosecutorial suppression of exculpatory evidence and falsification of evidence in every state, "disciplinary charges have been brought infrequently and

the courage would come from to sanction these prosecutors. Thus, instituting Professor Lininger's idea would require more than just a significant change in state legal ethics rules. It would also require the institutional backbone necessary to enforce the rules he proposes.[233]

B. An Attainable Alternative: The Negotiated Approach

If change with respect to the use of informants seems unlikely to happen via either judicial or legislative action, there is still another way in which change in how law enforcement uses informants in mosques might yet occur. This solution depends not on raw political power or legal reasoning but on something else: the recognition of how the interests of law enforcement and the community overlap.[234] Viewed correctly, these

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meaningful sanctions rarely applied"); Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 889 (1998) (observing that there is "a notable absence of disciplinary sanctions against prosecutors, even in the most egregious cases"); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 774 (summarizing results of a statistical study as showing "overall trend of infrequent [disciplinary] prosecutions" against prosecutors).

233. Professor Lininger's idea brings to mind another solution, which is less global but perhaps easier to implement. Instead of bar association rules, a successful effort to stem the use of surveillance in mosques and other religious institutions without specific suspicions might be undertaken locally, by individual prosecutors. That is, just as with the local law enforcement/Muslim community negotiations recommended here, *infra* Part IV.B, a local prosecutor—a county district attorney or a federal district's U.S. Attorney—might adopt Professor Lininger's rule as her own internal policy. The prosecutor might declare that she would bring to court no case using these tactics in religious institutions, unless specific suspicion of criminality existed prior to the use of the tactic. This would effectively end the use of informants in cases in which the facts did not satisfy this standard, as long as the prosecutor stood by the policy and enforced it in the face of any attempt by law enforcement to bring a case. Precedent exists for such an approach. Taking the controversy over racial profiling on the highways as a starting point, some prosecutors observed the heavy reliance of officers involved in drug interdiction efforts on the use of consent searches. These searches consistently irritated those drivers subject to them; a disproportionate share of these drivers were African-American and Latino, and the consent searches of members of these minority groups consistently turned up less contraband than the consent searches of white drivers. Seeing all of this, one elected prosecutor in a county in Michigan stated that his office's policy would henceforth require that consent searches have a basis of reasonable suspicion—something that the law does not require. *See* Schneckloth v. Bustamonte, 412 US. 218, 222 (1973) (asserting that police need have no evidence of criminal activity to request consent for a search and that consent given in response is legally sufficient so long as it is given voluntarily). His office would not pursue cases involving consent searches in which the officer could not articulate a fact-based reason to suspect criminal conduct before requesting consent. DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 158–59 (2002).

234. Identifying coinciding interests is an important part of what is sometimes called problem-solving negotiation, in which the parties or their representatives seek out multiple interests so as to identify possible areas of overlap that might allow them to come to some kind of mutual agreement. *See, e.g.*, STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION 170–73 (2001) (identifying ways for lawyers engaged in problem-solving negotiations to find avenues of agreement that may lead to positive-sum outcomes).

mutual interests can serve as the springboard for the negotiation of a set of agreed-upon local practices for using informants. Such negotiation could get law enforcement what it most needs: good (or at least workable) relations with Muslim communities, a continued flow of information from these same communities, and an ability to use informants when a real need exists for them. This process could also get Muslim communities at least some of what they need: a formal recognition of their opposition to the use of informants, as well as protection from some of the most egregious (as they may see it) uses of informants against them. Law enforcement would give up the right to use informants with total freedom, and the community would find itself protected, to a degree, from the possibility that police would place informants into mosques or other religious settings without a solid, fact-based reason.[235] The path would be difficult, fraught with obstacles, and, in certain respects, downright unsatisfactory. But it represents the most promising—and perhaps the only—way forward for both law enforcement and Muslim communities.

1. What the Negotiated Approach Is and What It Might Strive to Attain

a) Description of the Process

What might such a negotiated approach look like? To start, such arrangements would be both *local* and *informal*. Any given mosque or Muslim organization would work toward agreement on the use of informants with its local FBI field office, local agents of the Department of Homeland Security, and the local police department (if the local

235. With its goal of bringing together overlapping interests of opposing parties to create a set of workable administrative rules, my approach owes something to the negotiated rulemaking process that has been used in administrative law contexts, much of it based on the seminal work of Philip Harter. Harter has examined the importance of including groups affected by regulations in the development of those regulations. Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L. J. 1, 18 (1982) ("Groups affected by a regulation need the opportunity to actually participate in its development if they are to have faith in it."). Harter argued that using a negotiated rulemaking process would have intrinsic benefits because the rule that resulted "would be based on the consensus of those who would be affected by it." *Id.* The situation discussed in this article involving the use of informants is obviously somewhat different; there are already existing rules, which give all the power in the situation to the police, in the sense that they alone can decide whether to use informants. The point here is to use a negotiated approach to change those rules into ones that better reflect the overlapping interests of both parties, thereby satisfying not just one party, but both. This dovetails neatly with the central principles of community policing, which requires consultation between police and community stakeholders to set local priorities and parameters for policing and crime prevention. *See, e.g.*, WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS 92 (1990) (explaining that community policing requires "that police be responsive to citizen demands when they decide what local problems are, and set their priorities"); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 958 (2006) (describing how cooperative decisionmaking between police and the communities they serve can reflect neighborhood preferences).

department involves itself in this type of informant-based investigation).[236] A negotiation between locals on both sides of the issue stands the best chance of succeeding, because those involved in the negotiations may know each other from efforts already made to build bridges and connections. The negotiations themselves can serve as trust-building measures, enhancing and strengthening relationships that already exist, or helping to create new relationships. These efforts would be informal in the sense that they would strive not for the imposition of a strict set of legal standards—for example, a free-standing system for procuring "informant warrants"—but rather for a set of agreed-upon practices that the parties would then follow. If one of the parties came to feel that the agreed-upon practices no longer work, the parties could, together, agree to adjust them. Best and most importantly, these practices could be tailored to fit local facts and circumstances—the specific realities that both the community and law enforcement agencies face daily.

Why would any law enforcement agency agree to negotiate away any of its power to use informants as part of an arrangement with precisely the people whom it may want to spy on? The fact that some police agencies already use internal guidelines to—or at least attempt to—limit some of the ways in which they use informants, highlights the idea that limiting agency power to something less than what the Fourth Amendment would allow can in fact represent the best available practice.[237] Given that the FBI, NYPD, and other law enforcement groups want something from the Muslim communities—continued and increased cooperation, especially intelligence on suspicious activities—and given that use of informants in an unregulated fashion puts those very benefits in jeopardy by undermining connections with the community, law enforcement may prove more willing than one might initially assume to engage in such a negotiation.

b) What Might Negotiations Strive to Attain?

What exactly might the Muslim community and the police try to agree upon? Both the interests of the parties and the contours of different types of anti-terror investigations suggest some initial goals.

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236. This may not be an issue for many small police departments, but some large police departments in the United States are extensively involved in this type of intelligence gathering. For example, the NYPD, well known for its intelligence work, has used informants for these matters, most notably in the Herald Square bombing case. *See supra* notes 70–72, 94–103 and accompanying text. *See also* William Finnegan, *The Terrorism Beat: How Is the N.Y.P.D. Defending the City?*, NEW YORKER, July 25, 2005, at 58 (detailing the use of an informant in the Herald Square case).

237. *See supra* notes 151–59 and accompanying text. While the FBI Guidelines generally preserve the Agency's right to conduct surveillance and explicitly purport not to create any rights for those affected by a failure to follow the Guidelines, they nevertheless represent efforts to channel agency discretion toward preferred methods.

i) Passive Versus Active Informants and the Standards for Using Them

First, we must examine the methods by which, and the circumstances within which, law enforcement might use informants. For the sake of simplicity, let us break the methods of using informants—that is, the types of informants—into two categories: passive informants and active informants. In passive informant activity, the informant attends or participates in any activity—goes to a political rally, takes part in a worship service, listens to a speech or a sermon, or the like—to the same extent that any private citizen might. The passive informant observes and reports to the police what she sees and hears. In other words, the passive informant acts as a walking camera and audio recorder,[238] absorbing everything around her and reporting what she sees. The passive informant cannot target any particular individual, and she cannot do anything more than observe. She might interact with other individuals who are present at the scene of the observation, but only in ways that prove necessary to deflect suspicion.

An active informant, on the other hand, would target a particular person or specific group for observation and interaction. She would seek to actively connect with these individuals in an effort to gather evidence of wrongdoing, plotting, or other behavior. An active informant might "work" a targeted individual closely, perhaps befriending the target and her family, as long as the informant did not in any way press the target toward illegal conduct.[239]

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238. The term "walking camera" was actually used in court to describe the NYPD's undercover police officer in the Herald Square bombing case. Elliott, *supra* note 16.

239. Concededly, it may not always be easy to distinguish between passive and active informants and their activity at the margin. The Supreme Court itself must shoulder responsibility for some of this confusion. In *United States v. Henry*, 447 U.S. 264 (1980), the defendant, a suspect in a bank robbery, was in custody and under indictment when an inmate acting as a government informant heard the defendant make incriminating statements. The government then sought to introduce these statements into evidence against the defendant at his trial. The government argued that "the federal agents instructed Nichols not to question Henry about the robbery." *Id.* at 271. In an affidavit, the federal agent involved said that he specifically instructed the informant not to question or initiate any conversations with the defendant about the bank robbery. *Id.* at 271 n.8. But the Supreme Court said that even given these explicit instructions and no evidence that the informant disobeyed them, the informant did not act passively. "[A]ccording to his own testimony, Nichols was not a passive listener; rather, he had 'some conversations with Mr. Henry' while he was in jail and Henry's incriminatory statements were 'the product of this conversation.'" *Id.* at 271. Thus the Court stressed that even a situation in which the informant does little more than listen still constitutes more than passive informant activity. But just six years later, the Court tacked back. In *Kuhlman v. Wilson*, 477 U.S. 436 (1986), the Court declared that, when government agents instruct an informant in a jail merely to listen to a fellow inmate and not to question him, and when the evidence shows that the informant obeyed those instructions and did nothing more to elicit incriminating statements from the inmate, this does not violate the Constitution. The informant in *Kuhlman* had in

The critical distinction between passive and active informants could serve as the basis for negotiating the circumstances under which law enforcement could use informants. The parties could pledge to have informants work only in a strictly passive way, unless and until some proof of activity indicating possible terrorist or criminal behavior emerged during passive observation—exactly as the FBI's rules used to dictate under the Levi Guidelines.[240] The idea would be an informant who would blend in completely and act no differently from any other person present.

Given that we cannot exclude the possibility that religious groups might (knowingly or unknowingly) harbor small groups or individuals bent on terrorism, law enforcement should retain the ability to use informants in these settings, but only passively, as a way to check leads or find out if any activity exists which deserves some greater degree of attention. A negotiated agreement would allow law enforcement to have the presence it sometimes needs, and to have it without any proof of wrongdoing; in other words, they could use passive informants at their discretion, as they may now under existing law. At the same time, law enforcement would agree to exercise this power only passively, so as to minimize intrusion and interference. This arrangement seems like a good idea from both the point of view of law enforcement success, because it allows police and security agencies to look and listen for any indicators of real trouble, and from the point of view of the communities, because they would have assurance that the worship and fellowship that form the core of activities at religious institutions would not encounter government interference or disruption, unless absolutely necessary.[241]

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fact made direct comments to the inmate about the validity of his explanation for the crime, saying that the inmate's "initial version of his participation in the crimes 'didn't sound too good.'" 477 U.S. at 460. This statement did not, in the Court's opinion, make the informant a more-than-passive participant in the conversation, though the statement seems part of an ongoing conversation and could clearly give the impression to the hearer that the person speaking had better say something more convincing. *Id.* This seems to have been the Court of Appeals' take on the interaction. Wilson v. Henderson, 742 F.2d 741, 745 (2d Cir. 1984) ("[S]lowly, but surely, Lee's ongoing verbal intercourse with [respondent] served to exacerbate [respondent's] already troubled state of mind."), *rev'd by* Kuhlman, 477 U.S. at 461. One could not fault readers of the Court's opinions in *Henry* and *Kuhlman* for not understanding the differences between the two cases. In both, federal agents instruct an informant not to question or get involved in conversation with the target of the investigation; in both cases, the informant has at least some minimal discussion with the target. In *Henry*, the Court condemned the action; in *Kuhlman*, it accepted it. For this reason, if no other, we must use our own definition of active and passive informant activity. As described above, passive informants engage in the activity around them, just as anyone else in that context could, but they do nothing more; any informant who does more receives the designation of active informant.

240. *See supra* note 152 and accompanying text.

241. My use of the phrase "minimize intrusion and interference" in this paragraph is deliberate. Distinguishing between passive and active informant use, and requiring an evidentiary basis for the latter, will not eliminate all concerns about the chilling of expressive and associational rights, but it will minimize them. Worshippers and community

Something more would be required for law enforcement to make use of active informants under a negotiated agreement. In particular, the use of active informants would require some evidence. Law enforcement could use active informants only if *some reasonable, fact-based suspicion* existed to link a particular suspect or suspects to engagement in terrorist activity or other criminal conduct. That is, the police would agree not to use an active informant just to make sure nothing is happening. Rather, the use of active informants would require some minimal evidence—something more than a hunch, feeling, or intuition—indicating that illegal activity has been, is, or will be taking place. Police officers involved in any investigation should have little difficulty understanding this reasonable, fact-based suspicion rule because it comes from *Terry v. Ohio*, under which courts have used the same standard to test police officers' decisions to stop and frisk suspects for almost forty years.[242] A system regulating informant use according to whether the facts would support a passive or active informant operation would allow the government to use relatively unintrusive passive informants without seeking permission; more intrusive (i.e., active) informant activity would require fact-based suspicion that terrorist or other criminal activity might be afoot. This bifurcation would give the government the flexibility it needs to gather information or investigate leads, but it would also require some evidence to conduct active informant investigations and limit these investigations to situations potentially posing danger.

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members could feel more (if not entirely) secure that government agents would not intrude into their associational settings, and that if and when they did so, it would only happen when a fact-based reason to do so exists and not as part of a government fishing expedition. Obviously, the concern is not entirely eliminated, but, given that a balance must be struck between First Amendment concerns and legitimate efforts to assure security, this arrangement would come much closer than the status quo to assuring the integrity of these core freedoms.

242. Terry v. Ohio, 392 U.S. 1, 21 (1968) ("And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."). The *Terry* case gave law enforcement a workable, non-technical way of deciding whether they could temporarily detain a suspect and then perform a cursory search of the suspect for weapons. Over the years, the Supreme Court has stressed that the *Terry* reasonable suspicion standard mandates a common sense, practical approach. *See, e.g.*, United States v. Cortez, 449 U.S. 411, 418 (1981) (stating that the assessment is to be based on a totality of the circumstances and that the evidence collected must be seen by those versed in the field of law enforcement). To demonstrate reasonable suspicion, evidence must concern conduct by particular individuals, *id.* (explaining that the demand for particularized suspicion about an individuals lies at the core of the *Terry* requirement), but it need not support proof beyond a reasonable doubt or even probable cause, *see Terry*, 392 U.S. at 24 (explaining the need for law enforcement officers to protect themselves and prospective victims of violence even where they may lack probable cause).

ii) The "Entrapment" Problem: No Encouragement

Second, communities and police departments could use negotiated agreements to address the issue of entrapment. As earlier discussion makes clear, neither the entrapment defense nor its cousin, the claim of outrageous government conduct, does much to safeguard targets of police informants against government or informant overreaching.[243] At worst, entrapment actually permits the government to create crimes as long as the defendant has the appropriate "predispostion."[244]

The lack of protection these defenses provide targeted individuals in practice begins to rankle when viewed with an eye more lay than legal. For example, in Hamid Hayat's case in Lodi, California, the jury convicted Hayat of providing material support or resources to terrorists, even though an informant deliberately and purposely pushed and goaded Hayat to attend a terrorist training camp.[245] Even the U.S. Attorney whose office charged and convicted Hayat stated that he wished that "other things had occurred" during the course of conversations between the informant and Hayat.[246]

Cases like these may not constitute entrapment in the legal sense, but they leave the impression that law enforcement may not play fair in pursuit of a conviction. Put another way, just because the police *can* use informants in this aggressive way without running afoul of entrapment law, does not mean that law enforcement *should* do just that. All Americans want law enforcement to apprehend dangerous terrorists and halt their plans. However, the government's use of overly aggressive and possibly unfair tactics to pursue individuals who seem to pose no real threat to our national security undermines the public's confidence in anti-terror work. Whether right or wrong, these perceptions that the government has not played fair do damage to law enforcement's ability to obtain cooperation from the public.

Thus, as an element of their negotiations, police and Muslim communities could agree that informants would not act in any way to encourage or shape the behavior of those under surveillance, either through incitement or agitation. In some instances, it might be difficult to

243. *See supra* Section II.B.1–2.

244. *See supra* notes 99–105 and accompanying text. Speaking in a strictly legal sense, one can say that no entrapment problem exists and that the defenses of entrapment and outrageous government conduct simply have a narrow focus. In and of itself, this narrowness does not make either of these defenses or the results reached under them wrong.

245. *See supra* note 103 and accompanying text.

246. Interview: McGregor W. Scott, *supra* note 73 (commenting on the informant's recorded efforts to push Hayat to go to a terrorist training camp). Testimony in the Siraj case in New York also showed a naive, impressionable target, led on by an informant using strong suggestiveness. *See supra* notes 94–103 and accompanying text.

tell the difference between encouragement and providing an opportunity for criminal conduct, but an agreed-upon rule against pushing or goading targets would, in most cases, not prove difficult to apply. For example, a rule of this nature would not allow the type of behavior reflected in the testimony in the Hayat case, in which the informant threatened the target and belittled him for failing to go to a terrorist camp.[247]

iii) Use of Informants as a Last (or at Least Latter) Option

When it becomes known or suspected, the placement of informants in religious institutions like mosques does considerable damage. The presence of informants, either real or imagined, can undermine religious custom and practices, undercut the ability of believers to trust each other, and pull apart the social fabric that binds co-religionists together.[248] Given the explicit First Amendment protections provided for the free exercise of religion in the United States[249] and the chilling effect that even the possibility of informant use may have, the use of informants in mosques and other religious settings ought not to occur regularly.

As part of an agreement, communities and local police or the FBI might agree that, because the insertion of informants into religious institutions carries with it significant First Amendment implications and the potential for damage both to individuals and to the whole religious community spied on, the use of informants in religious settings will not be a routine practice. The agreements can establish that law enforcement can use informants in these settings only when other, less intrusive methods either have not worked or could not work, and where use of an informant will most likely produce evidence. Both law enforcement and Muslim communities gain if the use of informants becomes a tactic of last resort (or nearly so) and not a method employed regularly. For many Muslim communities, the use of informants only when other methods will not work will reassure them that they need not fear the presence of informants at every point and that the government will exercise some restraint in using this tactic. It should also maximize the chances that informants will catch those who pose a real danger and minimize the chances that informants

247. *See supra* note 103 and accompanying text. There is a subtle but important difference between regulating the use of active informants and the steps directed in this subsection against entrapment. Regulation of the use of active informants is necessary because, while active informants might attempt in some cases to goad targets into action, their primary goal is to get the targets talking for the purpose of gathering intelligence. In contrast, entrapment cases almost always involve more: the informants in those cases *push* the defendants to engage in criminal activity. Thus both types of informant regulation are necessary.

248. *See supra* Part III.B.3.

249. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

will snare only those most susceptible to persuasion.

iv) Education Across the Divide

Fourth, the parties might agree on a process of mutual education. For its part, law enforcement might educate Muslim groups and congregations so that they could recognize actual suspicious behavior, as opposed to simply relying on hunches about people who have unusual opinions. It has become common for police departments and the FBI to appeal to Muslim communities to report anything suspicious, much as FBI Director Mueller did in the speech quoted at the beginning of this article.[250] While there is no reason to doubt the sincerity of Mueller's exhortation, it was also quite general. It is all very well to ask community members to report their suspicions, and even such a general request may produce leads for law enforcement. It is true that not all leads may actually help law enforcement; this is true even when all the leads in an investigation originate from law enforcement professionals. It seems likely that an untrained member of the public, if asked to provide information to the police about something as unusual as possible terrorist activity, would, in good faith, inevitably produce mostly (if not wholly) useless leads, which officers and agents must then spend their valuable time pursuing. Without some concrete indication of what "suspicious action" means, most lay people would stand little chance of spotting the real thing.

Training communities regarding the types of information that law enforcement agencies want is one way to improve the amount of useful information law enforcement receives. Moreover, the FBI, the Department of Homeland Security, and even local police are in a good position to provide such training. For their part, Muslim communities could educate law enforcement about social and religious customs, particularly habits of language. Considerable amounts of such cultural and religious training regarding the customs and mores of Islam, by Muslims for police and FBI agents, already takes place.[251] Many police chiefs and law enforcement administrators at all levels have expressed enthusiastic support for these efforts and stated that this type of training has greatly enhanced their agencies' capabilities, as well as relationships with the Muslim communities.[252]

Language is a special area of concern that these trainings should

250. *See supra* note 2 and accompanying text.

251. *E.g.*, Buckley, *supra* note 58 (discussing a Turkish imam whom the NYPD hired to give seminars to police officers on "Islam 101").

252. For example, under former Superintendent Terrance Hillard, the Chicago Police Department conducted outreach efforts to Muslim communities; these efforts culminated in a short film for police officers on how to handle Muslim travelers at Chicago's O'Hare International Airport. *See supra* notes 174–75 and accompanying text.

specifically address. Arabic speakers may sometimes express opinions in Arabic in stronger, more vehement ways than one might hear in English; these kinds of comments can hit Western ears as angry, radical, or extremist—even when speakers intend nothing of the sort.[253] While it is true that law enforcement must react vigorously to *any* words expressing an intention to take some illegal or dangerous action, they must also exercise caution, because linguistic, stylistic, and idiomatic differences can give a listener a misleading impression.

A couple of recent examples help illustrate just how important linguistic understanding—or misunderstanding—can be. In Hamid Hayat's trial for, among other things, providing material support for a transnational terrorist act, prosecutors needed to prove that Hayat intended to commit terrorism.[254] To do so, they offered into evidence what became known as "the throat note,"[255] a fragment of paper with Arabic writing on it that police had found in Hayat's wallet when they arrested him.[256] The prosecution first translated the words as "Lord, let us be at their throats, and we ask you to give us refuge from their evil."[257] After the defense protested, the prosecution amended the translation to "Oh Allah, we place you at their throats, and we seek refuge in you from their evil."[258] According to authoritative sources, the defense had been right to object because the passage contained a traditional prayer "reported to have been said by the Prophet [Mohammad] when he feared harm from a group of people."[259] Still, the prosecution told the jury that the note proved that Hayat had the "requisite jihadist intent."[260] In the end, Hayat's intent became the central question in jury deliberations, and the note played a crucial role in persuading the jury to convict him.[261]

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253. As one translator in a domestic terrorism case explained, this intonation is a linguistic and cultural characteristic that some outside the Arab world may not understand. *See* Vanessa Blum, *Translator in Padilla Case Pokes Holes in Prosecution Case*, S. FLA. SUN-SENTINEL, July 23, 2007, at 3B (quoting an Arabic translator as saying, "Arabic is a more flowery language [than English]. They use figures of speech . . . . In English we tend to be more direct."). *See also* Carmen Gentile, *Defense at Padilla Trial Raises a Dispute over Translations*, N.Y. TIMES, July 24, 2007, at A16 (reporting that an Arabic translator testified in a terrorism trial that remarks used in wiretapped conversation were not code for supporting jihad, as government witnesses had asserted, but rather were "references to fund-raising for children whose parents were killed in conflicts like those in Kosovo, Lebanon, and Somalia").

254. Amy Waldman, *Prophetic Justice*, ATLANTIC MONTHLY, Oct. 2006, at 82, 83.

255. *Id.* at 83.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 90 (quoting a professor of Islamic Studies at Hartford Seminary).

260. *Id.* at 82.

261. *See id.* at 92 (recounting how Hayat's "words, more than his deeds" became decisive for the jury).

In the case of accused terrorist Jose Padilla, similar questions about language arose. The government's case against Padilla and two co-defendants relied heavily on hours of wiretapped phone calls, and a government witness testified that Padilla's co-defendants had used "code words" to speak about jihad.[262] An expert witness, an Arabic translator, disagreed; he said that the men were simply speaking indirectly—something common in the Arab world—and not in code.[263]

Police need education so that they can tell the difference between an opinion—even a strongly expressed, non-mainstream, anti-American one—and clues to acts of terrorism. Having such opinions does not necessarily make people dangerous, and American citizens (if not all people living in America) have a right to hold and express such views. A person who says she approves of the actions of Osama Bin Laden, or who expresses her wish that the President of the United States were dead, or who says that America deserved what it got on 9/11, may strike us as intemperate, wrongheaded, or repugnant. But those statements make the person only a holder of repellent and terribly misinformed opinions, not a terrorist. Expressing opinions, even objectionable ones, remains an American right; doing so in a fashion that seems harsh or even aggressive has to do with style and custom of speech, and it does not necessarily make it likely that these opinions will ripen into action.

These four suggestions—distinguishing between active and passive informant activity and regulating accordingly, prohibiting encouragement, using informants only as a last resort, and instituting mutual education—just scratch the surface of what police agencies and the members of American Muslim communities could agree to. Given the local focus of the negotiations, many concerns particular to the jurisdiction might also surface. These focused elements would constitute a major advantage for this process, because the better tailored the process is to its own context, the better its chances for success. The local negotiation of a set of practices acceptable to both sides in the debate presents a workable alternative, and one that takes advantage of mutually reinforcing needs of law enforcement and the Muslim communities in our country, as well as the common need to protect ourselves from terrorism.

2. Obstacles and Shortcomings of the Negotiated Approach

To be sure, the negotiated approach has flaws. It is not a perfect system for accomplishing the twin goals of winning help and intelligence for law enforcement on the one hand, and winning respect for the Muslim

262. Blum, *supra* note 253.

263. *See id.* (reporting that the translator testified that the words and phrases that the prosecution characterized as code "were Arabic expressions with meaning that could be lost in translation").

community on the other. As things stand, no existing solution can put these two objectives perfectly in balance. But while some degree of tension between them seems inevitable, the negotiated approach comes closest to a reasonable balance. Nevertheless, any proponent of this approach must reckon with at least three specific problems.

First, the negotiated approach would carry with it substantial questions concerning enforceability. What if police agree to an arrangement with their Muslim partners, perhaps including the four points described above, but in some particular case decide that they will not abide by it, for what they believe to be good and sufficient reasons? For example, suppose that law enforcement were to hear rumors of suspicion surrounding a very religious foreigner, new to the Muslim community. Besides the religious nature of the person's appearance and practices, no known factual basis for suspicion exists. The police may simply decide that they do not want to take a chance that someone harmful will slip through their fingers, so they decide, without any reasonable suspicion, that the case calls for the use of an active informant. Should this become known, no one—no institution, no court, no judge, no inspector, no arbiter—could do anything to enforce the rules that the police had agreed to with the Muslim community; neither the community nor anyone else would have standing to litigate the matter or any enforceable right to take action. Without any kind of enforcement mechanism, negotiated agreements of the type proposed here would bind the police only in the loosest sense.

Second, it is impossible to ignore the unbalanced power inherent in such a negotiation. Law enforcement does not have to agree to anything; it now has all the power it needs to use informants in any way and at any time it wants, and it need not seek permission from anyone to use this power, least of all from the (Muslim) community under scrutiny. While this unilateral approach clearly has costs,[264] law enforcement may freely ignore them under the status quo if it wishes. Muslim communities, for their parts, have no power to force the police to the bargaining table, and they cannot force any change in police policy. They can only caution the police that, if they perceive informants being used and overused in their religious institutions, many Muslims will become more fearful and less trusting of law enforcement, as well as less likely to approach police with vital information.[265]

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264. *See supra* Section III.B.3.

265. An imbalance of power between parties can potentially leave little room for an outcome that might actually form an acceptable basis for going forward. But this problem is not unfamiliar, especially in the context of negotiation between government units and citizens. *E.g.*, LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE 4–11, 93–94, 101–05, 200–01, 241–43 (1987) (discussing the fact that, once an agreement is ratified, "the negotiating parties must find a way to link the ad hoc, informal agreement they have fashioned to the formal decision-making processes of government"). More to the

Surely, both of these ideas constitute fair criticism. Still, both merely redirect us to the underlying premise of the whole negotiated approach. The police both want and need the cooperation of the community and the crucial intelligence that a cooperative relationship facilitates. If and when law enforcement recognizes this fact, the desire of the police to further the building of such relationships will serve as the enforcement mechanism. This will not always be enough to restrain law enforcement and force it to consistently honor its obligations under a negotiated agreement, but it is preferable to the alternative. It is better than the current "we make the rules" approach, and certainly preferable from the perspective of the community, for which a negotiated arrangement limiting the use of informants can only be an improvement.

Third, the local aspect of the negotiated approach proposed here, explained as one of its strengths, may also constitute a weakness. Because of the stratified nature of law enforcement in the United States, there would be multiple law enforcement entities with which any Muslim community wishing to negotiate an agreement would have to deal. There are local departments for cities and counties, often with overlapping

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point, citizens and public interest advocates often have "concerns about entering negotiations when resources and political power are unequally distributed. . . . Power and politics are essential ingredients in all public disputes, and they cannot be ignored. But consensus-building approaches to dispute resolution place a premium on problem solving rather than 'settling' disputes. . . . When a powerful group commits to work for consensus, it tacitly agrees that raw political power is not a sufficient basis for resolving public disputes. This empowers those who are less politically powerful." *Id.* at 241–43. *See also* STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROGERS & SARAH RUDOLPH COLE, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 513 (2007) ("Instead of the eternally frustrating political and judicial stalemate that often accompanies decisions involving siting of waste-disposal facilities or low-income housing, might it not be more productive to seek negotiated agreement of such disputes?"). One way to deal with this reality of power unequally distributed between negotiating parties is suggested by ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 97–106 (2d ed. 1991), in which the authors advocate developing a "BATNA"—best alternative to a negotiated agreement—as a way to generate power in an unequal bargaining situation:

> No method can guarantee success if all the leverage lies on the other side. . . . People think of negotiating power as being determined by resources like wealth, political connections, physical strength, friends, and military might. In fact, the relative negotiating power of two parties depends primarily upon how attractive to each is the option of not reaching agreement. . . . [But a]ttractive alternatives are not just sitting there waiting for you; you usually have to develop them.

Id. at 97, 102–03.

One alternative to a negotiated agreement that would be useful to increase the leverage of the Muslim community vis-à-vis law enforcement, either within the context of the type of negotiation suggested here or within a situation in which law enforcement refuses to enter into negotiations on the issue of the use of informants, would be to prepare to have the Muslim community reduce or end its cooperative, voluntary contacts with police and the FBI. These contacts are obviously something that law enforcement wants and needs; being prepared to withdraw them (and letting the other side know this) could be an effective way of forcing the discussion along.

jurisdiction. A local police department—even a large one, like the NYPD—could adopt its own policies on these matters. There are also federal agencies, such as the FBI, that play primary anti-terrorism roles. To make matters even more complex, the federal level is itself stratified. The FBI has fifty-six field offices around the country, as well as more than 400 regional agencies in smaller towns and cities.[266] Each one of these field offices reports to FBI headquarters in Washington, D.C., and must follow national FBI policy.[267] Moreover, the FBI itself is only one part of U.S. Department of Justice, which has the final say over FBI policy. As a result, even if a local FBI office wishes to negotiate and agree to a set of limits and rules for the use of informants, it remains less than clear whether it would have the power to do so, or whether FBI headquarters or the Department of Justice would allow it.

This stratification means that any Muslim community wishing to negotiate an agreement of the type I suggest would have to ask some serious questions regarding its negotiations. With which office or offices should they negotiate? Should they contact only the FBI, or also the local police? Finally, would working with the local FBI office and not FBI headquarters (to say nothing of the Department of Justice) be enough? These questions could not go unanswered in any successful implementation.

A fourth concern parallels the third. The phrase "Muslim community" may mislead us into thinking that, even if "law enforcement" may represent many different levels of government, at least the community side of the negotiation would come to the task unified. This vastly underestimates the heterogeneity of Muslim communities in the United States. According to the Pew Research Center, as of 2007, there were approximately 2.35 million Muslims in the United States.[268] As the Pew study makes clear, the Muslim population in the United States is incredibly diverse. "Muslim immigrants to the United States come from at least 68 countries, and have different traditions, practices, doctrines, languages, and beliefs. In addition, large numbers are native-born Americans who have converted to Islam or have returned to the faith . . . ."[269] An estimated sixty-five percent of Muslims living in the United States were born outside the United States; of these, twenty-four percent are from the Arab world, eighteen percent from South Asia, eight percent from Iran, five percent from Europe, and four percent from Africa.[270] With such

266. Federal Bureau of Investigation, About Us—Quick Facts, http://www.fbi.gov/quickfacts.htm (last visited Apr. 15, 2010).

267. Federal Bureau of Investigation, Facts & Figures, http://www.fbi.gov/facts_and_figures/headquarters.htm (last visited Apr. 15, 2010).

268. *See* PEW RESEARCH CTR., *supra* note 9, at 10.

269. *Id.* at 11.

270. *Id.* at 15.

varied backgrounds, no one should describe the Muslim community anywhere, particularly in any large population center, as monolithic. This lack of uniformity creates another set of challenges: each Muslim community within any city or town must negotiate its own agreement(s) with law enforcement, unless it can unite with all or most of the other communities in its area. When communities have differing backgrounds, they may also perceive themselves to have divergent interests, which may make uniting for this purpose quite difficult.

Given these obstacles, the outlook for local control of policy on informant use is decidedly mixed, but it is not hopeless. In the recent past, locally-generated ideas have proven very helpful to the FBI in some sensitive anti-terrorism efforts. For example, after the Department of Justice ordered the FBI to conduct 5000 "voluntary" interviews with young Arab and Muslim men *not* suspected of terrorism in late 2001,[271] many in law enforcement expressed doubts about this plan.[272] More important, many thought that the FBI would endanger the budding relationships it had built with the Arab and Muslim communities after 9/11.[273] When FBI agents and others in Detroit came up with an alternative plan—sending letters to potential interviewees—the Department of Justice showed flexibility and allowed them to try this.[274] The alternative plan was unmistakably successful; the Detroit field office had the highest rate of successfully completed interviews of any office in the nation.[275] Thus, it is certainly possible that the FBI and its governmental parent could negotiate localized solutions to intelligence gathering.

CONCLUSION

The possibility of terrorists on American soil, particularly the prospect of homegrown terrorists, means that we should expect law enforcement to use every legal tool at its disposal to gather intelligence necessary to thwart attacks. Given the law as it now stands, these tools include the almost complete discretion for police to plant and use informants. Thus, we

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271. *See* Memorandum from the Deputy Attorney Gen. of the U.S., *supra* note 43.

272. For some, the plan's legality was questionable. *E.g.*, Fox Butterfield, *Police Are Split on Questioning of Mideast Men*, N.Y. TIMES, Nov. 22, 2001, at A1 (quoting local police chiefs as saying that the program violated laws of their state or civil liberties generally). For others, it was just plain bad anti-terrorism work. *See* McGee, *supra* note 43 (reporting that eight former high-ranking FBI officials, including a former FBI director, criticized the program and doubted that it would produce anything of value).

273. HARRIS, *supra* note 38, at 10. These relationships constituted crucial assets in the struggle against terror, and some FBI agents wanted very much to avoid the damage that would follow if agents began showing up unannounced at the homes and business of the 5000 "nonsuspects." *Id.* at 10–11.

274. *Id.* at 34–35

275. *Id.* at 35.

should expect to see informants do almost anything to succeed in producing cases against targets.

Every person living in this country, whether she is an American citizen or not, has a strong interest in securing the nation against terrorist attacks. However, just because the law says that police *can* use informants at almost any time, in any setting, does not mean that they *should* do so. And the particular contours of the struggle in which we now find ourselves illuminates this can/should distinction as few others have. As the law enforcement officials and intelligence officers in charge of our safety and security know better than almost anyone, our ability to track potential terrorists and stop them before they act depends wholly on the availability of intelligence. Because the best, if not the only, source of crucial intelligence on potential extremists with Islamic backgrounds will continue to be American Muslim communities, we must have solid, well-grounded relationships with these communities, both native and foreign-born.

These relationships are not just a matter of public relations, political correctness, or appeasement. Rather, these communities must feel that they can regard law enforcement as trusted partners, because such relationships create the avenues and opportunities for the passing of critical information from the communities on the ground to law enforcement. The widespread use of informants in Muslim institutions, particularly mosques, will corrode these important relationships by sowing distrust. By causing Muslims to think that the FBI or any other police agency regards them not as trusted partners but as potential suspects, fear displaces trust. Moreover, fear will cause members of the Muslim community to become less likely to come forward with information—just as the members of any community would, given this type of scrutiny. On the one hand, we simply cannot afford for this to happen, but, on the other hand, we know that there will be cases—indeed, from the government's point of view, there already have been cases—in which the use of informants can play a crucial role.

Given these tensions, as well as the mutual interests of law enforcement and Muslim communities in the United States, the situation presents an ideal context in which to try regulating the government's use of informants through local, negotiated agreements on acceptable practices. In at least the four ways identified here, law enforcement and Muslim communities could agree to limit the use of informants, without either ruling out their use or allowing their unrestricted use. Both sides would benefit. While the approach proposed here would certainly face substantial obstacles, it represents a chance to recalibrate an important aspect of the government's power to investigate, while at the same time preserving the sanctity of the community's institutions of worship to the greatest extent possible.