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Estimating the Prevalence of Entrapment in Post-9/11 Terrorism Cases

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ESTIMATING THE PREVALENCE OF ENTRAPMENT IN POST-9/11 TERRORISM CASES

JESSE J. NORRIS* &
HANNA GROL-PROKOPCZYK**

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

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

Prior to September 11, 2001, if an agent had suggested opening a terrorism case against someone who was not a member of a terrorist group, who had not attempted to acquire weapons, and who didn't have the means to obtain them, he would have been gently encouraged to look for a more serious threat. An agent who suggested giving such a person a stinger missile or a car full of military-grade plastic explosives would have been sent to counseling. Yet . . . such techniques are now becoming commonplace.

*Michael German, former FBI agent*²

Hamid [Hayat] is a hapless character, but, my God, he isn't a terrorist. The government counted on hysteria, the 1,000-pound gorilla, to be in the room. And it worked.

*James J. Wedick, thirty-five-year veteran of the FBI*³

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¹ Joshua L. Dratel, *The Literal Third Way in Approaching "Material Support for Terrorism": Whatever Happened to 18 U.S.C. § 2339B(C) and the Civil Injunctive Option?*, 57 WAYNE L. REV. 11, 76 (2011) (internal quotation marks omitted).

² Michael German, *Manufacturing Terrorists: How FBI Sting Operations Make Jihadists out of Hapless Malcontents*, REASON, Apr. 2013, at 54, 55.

³ Mark Arax, *The Agent Who Might Have Saved Hamid Hayat*, L.A. TIMES, May 28, 2006, at 42.

How many of the terrorism convictions since September 11, 2001 have been the product of entrapment? Some scholars and journalists have suggested that the number is quite high. One report went so far as to claim that only 1% of terrorism prosecutions involve “real” terrorism. The government’s defenders, at the opposite extreme, come close to saying that entrapment in a terrorism case is a contradiction in terms.

Little empirical basis exists for evaluating these competing claims. Existing literature on terrorism and entrapment is typically based on detailed discussions of a few egregious cases, rather than systematic analysis of the phenomenon. Yet estimating the prevalence of entrapment is critical for evaluating the ethics and effectiveness of contemporary counterterrorism policies.

This Article remedies this dearth of information by creating and analyzing a database of terrorism prosecutions since 9/11 (n=580), and coding each of the cases involving an informant (n=317) for twenty indicators of potential entrapment. An analysis of the database reveals that entrapment indicators are widespread among terrorism cases, and that the most serious cases, involving specific plots to commit attacks, have significantly more indicators. Cases with several indicators account for a sizable proportion of all cases, especially among alleged cases of jihadi and left-wing terrorism. These results show that facts and allegations supporting an entrapment defense are not confined to a small number of cases, but rather are quite widespread in post-9/11 terrorism cases.

The Article also examines the suggestion by a journalist that only 1% of terrorism cases have represented a real security threat. It estimates that the proportion of terrorism prosecutions likely to have thwarted genuine terrorism threats is somewhat higher, though still small—about 9% of all jihadi cases and 5% of jihadi cases involving informants.

In light of these findings, the Article recommends that authorities rethink current counterterrorism strategies, concentrating on passive surveillance instead of attempts to coax law-abiding Muslims into terrorist schemes, and shifting more resources toward preventing right-wing terrorism. Finally, the Article proposes reforms that would require the government to have a reasonable suspicion of criminal activity before inducing a suspect into committing a crime, and that would base the entrapment defense on the defendant’s realistic likelihood of committing an offense without government prompting.

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INTRODUCTION

Entrapment allegations abound in contemporary terrorism cases.⁴ Even in cases in which the defendants themselves do not raise the entrapment defense, legal scholars, journalists, and defense attorneys often argue that government informants are tempting defendants into crimes that would never otherwise have been committed.⁵ Frequently, the claim is not only that the defendant, without an informant's involvement, would never have committed this particular crime, but also that the defendant would never have committed *any* terrorist offense.⁶

This critique appears to have merit, at least with respect to the most egregious cases. The case of James Cromitie, who was prosecuted for plotting to bomb synagogues and shoot down military planes, is a prime example. U.S. District Court Judge Colleen McMahon, in the quote introducing this Article, made clear that she believed Cromitie to have had no ability to carry out any terrorist act whatsoever.⁷ As Judge McMahon wrote in another order, Cromitie “would not have had the slightest idea how to make [a terrorist attack] happen.”⁸ At sentencing, she emphatically stated, “I believe beyond a shadow of a doubt that there would have been no crime here except the government instigated it, planned it, and brought it to fruition.”⁹

Despite these statements, however, Judge McMahon refused to rule that Cromitie was entrapped as a matter of law, and she sentenced him to twenty-five years in prison.¹⁰ The Second Circuit upheld her decision, though only over the vigorous dissent of Chief Judge Dennis Jacobs.¹¹ More broadly, despite attempts to raise the entrapment defense (and the related outrageous

⁴ See, e.g., Eric Schmitt & Charlie Savage, *In U.S. Sting Operations, Questions of Entrapment*, N.Y. TIMES, Nov. 30, 2010, at A23.

⁵ Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429, 446–48 (2012); Sabrina Rubin Erdely, *The Plot Against Occupy: How the Government Turned Five Stoner Misfits into the World's Most Hapless Terrorist Cell*, ROLLING STONE, Sept. 13, 2012, at 68; Rick Perlstein, *How FBI Entrapment Is Inventing 'Terrorists'—and Letting Bad Guys Off the Hook*, ROLLING STONE (May 15, 2012), <http://www.rollingstone.com/politics/news/how-fbi-entrapment-is-inventing-terrorists-and-letting-bad-guys-off-the-hook-20120515>.

⁶ Dratel, *supra* note 1, at 75–76; German, *supra* note 2; Erdely, *supra* note 5, at 75.

⁷ See Dratel, *supra* note 1, at 76.

⁸ *United States v. Cromitie*, No. 09 CR. 558 (CM), 2011 WL 1842219, at *8 (S.D.N.Y. May 10, 2011), *aff'd*, 727 F.3d 194 (2d Cir. 2013).

⁹ *United States v. Cromitie*, 727 F.3d 194, 210 (2d Cir. 2013) (internal quotations omitted) (citing sentencing transcript).

¹⁰ *Cromitie*, 2011 WL 1842219, at *15–16; *Cromitie*, 727 F.3d at 227.

¹¹ *Cromitie*, 727 F.3d at 227–30 (Jacobs, C.J., concurring in part and dissenting in part).

government conduct defense) by several defendants in post-9/11 terrorism cases, not a single one has been successful.¹² The failure of these doctrines may result not from weaknesses in the defendants' cases, but rather from various other factors, including shortcomings in the doctrines themselves.¹³

Due to uncertainty about the entrapment defense's applicability to particular cases, this Article sometimes refers to "entrapment or borderline entrapment." We use the term "borderline entrapment" to signify a case in which entrapment is arguable, because the defendant would probably not have engaged in terrorism without government encouragement, but which may fall short of the legal standards operative in the particular jurisdiction.

For example, even though Cromitie would have never committed an act of terror on his own and had to be offered extraordinary inducements before he finally agreed to participate, the courts did not recognize this as entrapment.¹⁴ Normatively, such cases should be just as problematic as cases in which the entrapment doctrines unquestionably apply, because they indicate that the government has prosecuted, to use Judge Richard Posner's language, an "objectively harmless" person.¹⁵ This violates the policy concerns underlying the entrapment defense, which courts developed to prevent the "manufacturing of crime."¹⁶

Although some legal scholars have noted the apparent presence of entrapment in contemporary terrorism prosecutions, their work has not yet clarified the full extent of entrapment, or borderline entrapment, in these

¹² Francesca Laguardia, *Terrorists, Informants, and Buffoons: The Case for Downward Departure as a Response to Entrapment*, 17 LEWIS & CLARK L. REV. 171 (2013) (noting the universal failure of the entrapment defense in terrorism cases); Richard Bernstein, *A Defense That Could Be Obsolete*, INT'L HERALD TRIB., Dec. 1, 2010, at 2 (noting the fact that no terrorism defendants have been acquitted on entrapment grounds since 9/11).

¹³ See *infra* subpart II.A.

¹⁴ See *Cromitie*, 727 F.3d at 215; Dratel, *supra* note 1, at 66–67, 76.

¹⁵ *United States v. Hollingsworth*, 27 F.3d 1196, 1202 (7th Cir. 1994).

¹⁶ As the U.S. Supreme Court said in *Sherman v. United States*, 356 U.S. 369, 372 (1958):

In *Sorrells v. United States*, 287 U.S. 435, this Court firmly recognized the defense of entrapment in the federal courts. The intervening years have in no way detracted from the principles underlying that decision. The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, 'A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.' 287 U.S. at 442. Then stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations.

cases.¹⁷ Instead, their articles tend to limit themselves to narrative descriptions of the most problematic cases. The same is true for nonacademic publications, such as those by the Center for Human Rights and Global Justice at New York University Law School.¹⁸ Even the first full-length book on terrorism and entrapment, *The Terror Factory: Inside the FBI's Manufactured War on Terror* by Trevor Aaronson, discusses a fairly small number of cases, though more than most sources.¹⁹

Despite this, many observers seem to believe that entrapment is widespread in terrorism cases, and one critic goes so far as to claim that only 1% of terrorism prosecutions represent “real” threats.²⁰ At the other end of the spectrum, some see the government’s approach as a rational, defensible strategy, and suggest that entrapment is virtually impossible in terrorism cases.²¹ This Article takes a solid first step toward evaluating these competing claims, and estimating entrapment’s true prevalence.

This Article analyzes all post-9/11 terrorism prosecutions, in order to identify any cases presenting plausible entrapment claims.²² This enables a more nuanced and thorough assessment of entrapment in terrorism cases, useful for analyzing both individual cases and the government’s prosecutorial practices as a whole.

To estimate the scale of potential entrapment or outrageous government conduct, this Article presents two databases developed by the authors. The first database, encompassing all post-9/11 terrorism prosecutions in U.S. courts, improves on previous databases by excluding cases with only speculative links to terrorism, while including those motivated by right-wing

¹⁷ Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687, 715–32 (2010) (covering eight cases); Jon Sherman, “*A Person Otherwise Innocent*”: Policing Entrapment in Preventative, Undercover Counterterrorism Investigations, 11 U. PA. J. CONST. L. 1475, 1489–99 (2009) (discussing four cases).

¹⁸ CTR. FOR HUMAN RIGHTS & GLOBAL JUST., NYU L. SCHOOL, TARGETED AND ENTRAPPED (2011).

¹⁹ TREVOR AARONSON, *THE TERROR FACTORY: INSIDE THE FBI'S MANUFACTURED WAR ON TERRORISM* (2013). By our count, the book discusses sixteen cases of potential entrapment in terrorism prosecutions.

²⁰ Joshua Holland, *Only 1 Percent of “Terrorists” Caught by the FBI Are Real*, SALON (July 10, 2013, 1:30 PM), http://www.salon.com/2013/07/10/only_1_percent_of_terrorists_caught_by_fbi_are_real_partner/.

²¹ Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125, 142–44 (2008); L. Gordon Crovitz, *Stopping ‘Predisposed’ Terrorists: Is Giving a Fake Bomb to an Eager, Aspiring Jihadist Entrapment?*, WALL ST. J., Oct. 29, 2012, at A12.

²² More specifically, the database includes all terrorism prosecutions in the U.S. court system between September 11, 2001 and September 11, 2014, as long as the offense occurred after September 11, 2001.

or left-wing ideology.²³ It should be noted that, although “terrorism” is a contested term subject to manipulation for political purposes, the Article employs it for the sake of convenience based on the reality of the government’s use of the word to describe a wide variety of ideologically motivated crimes.²⁴ Accordingly, this Article uses a broad definition of terrorism, applying the term to any serious violent or property crime committed to advance a particular ideology (such as, for example, jihadi, left-wing, or right-wing ideology).²⁵

The second, smaller database is composed only of those cases involving an informant or undercover agent before the crime was committed. To estimate the strength of a potential entrapment or outrageous government conduct defense in each case, the Article develops twenty indicators of entrapment or outrageous government conduct, based on the relevant case law and recurrent features from examples of alleged entrapment in terrorism cases. Drawing on court documents and various other sources, we evaluated the cases in the second database to determine whether each of the twenty indicators was present.

The results suggest that entrapment (or borderline entrapment) is quite prevalent within terrorism prosecutions and that the case for entrapment is

²³ The Article speaks of cases or prosecutions rather than convictions, because it includes pending cases as well.

²⁴ For example, observers have questioned whether particular acts, such as ecologically motivated attacks on property, are labeled as terrorism for political reasons, even though such attacks have never resulted in any fatalities. See Jared S. Goodman, *Shielding Corporate Interests from Public Dissent: An Examination of the Undesirability and Unconstitutionality of “Eco-Terrorism” Legislation*, 16 J.L. & POL’Y 823, 835 (2008). More generally, critics have often drawn attention to the politicized manner in which particular groups are defined, or not defined, as terrorists. AARONSON, *supra* note 19, at 236; Tung Yin, *Were Timothy McVeigh and the Unabomber the Only White Terrorists?: Race, Religion, and the Perception of Terrorism*, 4 ALA. C.R. & C.L. L. REV. 33 (2013) (arguing that non-Muslims who commit violent crimes are much less likely to be referred to as terrorists than are Muslims); see also Mark Brown, *Slingshots, Boasts and Booze Don’t Add Up to Terrorism*, CHI. SUN TIMES, Jan. 22, 2014, at 14 (arguing that, in the NATO 3 case, authorities may have sought out activists to label as terrorists in order to chill protesters’ freedom of speech). See generally WILL POTTER, GREEN IS THE NEW RED (2011) (documenting and critically analyzing the depiction of animal-rights activists and environmentalists as terrorists).

²⁵ This definition is somewhat broader than some government definitions, which require a motivation to coerce or intimidate the government or the civilian population. We did not incorporate such a motivation into our definition because it would appear to be superfluous. In that respect, our definition is similar to that used by the Australian government. RICHARD JACKSON ET AL., TERRORISM 102 (2011) (presenting various government definitions of terrorism). Only serious crimes are included, since unlike serious crimes such as murder and arson, low-level offenses such as vandalism and assault are not generally perceived as terrorism.

especially strong among the most serious cases, in which defendants were accused of plotting a specific terrorist attack. Cases with numerous indicators comprise a significant percentage of all informant cases, particularly in jihadi and left-wing cases.²⁶ While the most well-known cases of possible entrapment average more indicators than other cases, they do not represent the majority of the high-scoring cases. These results demonstrate that facts or allegations supporting an entrapment or outrageous government conduct defense are not present only in a small handful of cases, but instead are widely distributed.

Critics of the government appear to be correct that only a small percentage of terrorism prosecutions involve a serious threat to public safety. However, our estimate of the percentage of cases representing a genuine threat of a terrorist attack (about 9% of the cases) is somewhat larger than that of the most extreme critics. The majority of the terrorism prosecutions since 9/11 appear to involve crimes with a relatively attenuated link to domestic public safety (such as donations to foreign terrorist groups or attempts to join them overseas), with a significant minority consisting of plots in which the informant played such a leading role that it is unlikely that the plot (or any other terrorist offense) would have arisen without government involvement.

To supplement these results, a brief analysis of a recently published list of the top sixty terror attacks and thwarted plots reveals that cases with numerous indicators of entrapment constitute a large proportion of these cases.²⁷ This suggests that many of the most widely known and serious cases, touted as successes in the War on Terror, have plausible entrapment claims.

In light of this Article's analysis, and recent research demonstrating that right-wing terrorists are responsible for more violence than jihadis, the government should rethink its focus on targeting law-abiding Muslims for inducement. Instead, the government should shift its resources toward passive surveillance and, at least to some degree, toward the threat of right-wing terrorism. The Article also argues for a requirement that authorities have reasonable suspicion of criminal activity before inducing defendants into crimes, and for a reformed entrapment defense focused on the defendant's likelihood of committing a similar offense without government influence.

²⁶ See *infra* Part IV. The term "jihadi" is used, even though it misleadingly implies that the Islamic concept of jihad is inherently violent, because of both the lack of better alternatives and the fact that terrorists themselves use the term. See Parvez Ahmed, *Terror in the Name of Islam—Unholy War, Not Jihad*, 39 CASE W. RES. J. INT'L L. 759, 783 (2008). "Islamist" could be used instead, but this would incorrectly imply that moderate Islamists support violence. *Id.*

²⁷ See *infra* Part V.C.

Part I of this Article provides background on the relevant legal standards, post-9/11 administrative developments, and previous analyses of entrapment in terrorism cases. Part II clarifies the nature of the indicators developed for this Article, and describes the twenty entrapment indicators. Part III details the methodology used to create the databases. Part IV presents the results of an analysis of both the larger database and of the smaller database of cases involving informants or undercover agents. Part V reflects on the significance of this Article's findings, responds to the claim that only 1% of the terrorism cases represented a genuine threat, and discusses potential administrative and doctrinal reforms that could reduce entrapment abuses. The final section includes a brief conclusion and offers suggestions for future research.

I. BACKGROUND

A. THE FBI'S CHANGE IN STRATEGY

Prior to September 11, 2001, terrorism was not a particularly high priority for the American government in general, or for the FBI in particular.²⁸ 9/11, of course, changed everything. Large swaths of the state apparatus were reorganized to better combat terrorism.²⁹ Much of the FBI's funding shifted to terrorism-related matters, resulting in sharp reductions in the resources and staff devoted to white-collar and organized crime.³⁰

Since the FBI had been blamed for not preventing the 9/11 attacks, it was determined to take a more aggressive approach to terrorism. The FBI's strategy after 9/11 has been described as an "aggressive, proactive, and preventative" approach, identifying "risks to our Nation's security at the

²⁸ Office of the Inspector Gen., Fed. Bureau of Investigation Casework & Human Res. Allocation, Report No. 03-37, Chapter 3: Trends in Resource Utilization FY 1996 Through FY 2001 at 27 (Sept. 2003), available at <http://www.justice.gov/oig/reports/plus/a0333/final.pdf> ("Prior to the 9/11 terrorist attacks, the FBI did not devote a significant portion of its special agent resources to domestic and international terrorism issues."). Although the FBI designated terrorism as its top priority in 1998, the "FBI did not shift human resources accordingly." Nat'l Comm'n on Terrorist Attacks upon the United States, The 9/11 Commission Report 76-77 (2004), available at <http://govinfo.library.unt.edu/911/report/911Report.pdf>.

²⁹ Douglas A. Brook & Cynthia L. King, *Civil Service Reform as National Security: The Homeland Security Act of 2002*, 67 PUBLIC ADMIN. REV. 399, 399 (2007).

³⁰ Eric Lichtblau et al., *FBI Struggling to Handle Wave of Finance Cases*, N.Y. TIMES, Oct. 19, 2008, at A1 (describing how, after 9/11, the FBI transferred about one-third of its agents in criminal programs to terrorism and intelligence roles).

earliest stage possible and to respond with forward-leaning—preventative—prosecutions.”³¹

As a consequence of this shift in strategy, a number of terrorism convictions have resulted from the extensive use of thousands of informants, who tend to be “working off” criminal or immigration charges, compensated financially, or both.³² In many of these cases, informants attempt to induce individuals, often law-abiding Muslim-Americans who express some sympathy for terrorism, to commit terrorist offenses.³³ Several high-profile cases of this nature have led to accusations of entrapment in the media as well as the courtroom.³⁴

In some cases, informants have resorted to extraordinary measures to persuade individuals to engage in terrorism. These have included repeatedly badgering them, offering them jobs, promising hundreds of thousands or even millions of dollars, actively attempting to radicalize them, and even threatening to kill the defendant or commit suicide if he backs out.³⁵ In numerous sting operations, authorities have provided the means needed to commit the crime (such as bombs) to people who would have stood little chance of acquiring them on their own.³⁶

Critics (including FBI agent-turned-whistleblower Michael German) charge that informants and agents, under intense pressure to generate

³¹ Paul J. McNulty, Deputy Attorney General, Dep’t of Justice, Prepared Remarks at the American Enterprise Institute (May 24, 2006), available at http://www.usdoj.gov/archive/dag/speeches/2006/dag_speech_060524.html.

³² AARONSON, *supra* note 19, at 44, 97–98, 100–01, 105–11, 137, 162 (noting that in 2008 the government claimed it had 15,000 informants, and that there are as many as three informants working off the books for every informant officially on the list of 15,000).

³³ *Id.* at 27.

³⁴ See generally Trevor Aaronson, *The Informants*, MOTHER JONES, Sept./Oct. 2011, at 30; William Glaberson, *Newburgh Terrorism Case May Define When Sting Operations Become Entrapment*, N.Y. TIMES, June 16, 2010, at A25; Karen Greenberg, *How Terrorist ‘Entrapment’ Ensnarers Us All*, GUARDIAN (US) (Dec. 12, 2011, 12:45 EST), available at <http://www.theguardian.com/commentisfree/cifamerica/2011/dec/12/how-terrorist-entrapment-ensarers-us-all>; Paul Harris, *Fake Terror Plots, Paid Informants: The Tactics of FBI ‘Entrapment’ Questioned*, GUARDIAN (US) (Nov. 16, 2011, 12:33 EST), available at <http://www.theguardian.com/world/2011/nov/16/fbi-entrapment-fake-terror-plots>; Schmitt & Savage, *supra* note 4; David K. Shipler, Opinion, *Terrorist Plots, Hatched by the F.B.I.*, N.Y. TIMES, Apr. 29, 2012, at SR4.

³⁵ *United States v. Shareef*, No. 10 C 7860, 2011 WL 4888877, at *5 (N.D. Ill. Oct. 11, 2011) (describing the informant’s threats to kill the defendant, and kill himself); see *infra* notes 104, 119 and accompanying text (describing inducements and pressure in the *Cromitie* case); see *infra* note 101 and accompanying text (describing an informant’s attempt at radicalizing Siraj); see Erdely, *supra* note 5, at 74 (describing the informant’s offer of a job to the defendants).

³⁶ See AARONSON, *supra* note 19, at 9–11, 32–33.

convictions, are essentially manufacturing terrorism.³⁷ This results, in their view, in convictions that ostensibly justify the FBI's vast counterterrorism budget, but which in fact do nothing to advance public safety. Yet defendants in terrorism cases have only asserted the entrapment defense, or the related defense of outrageous government conduct, in a small number of cases. Neither defense has been successful in blocking a terrorism conviction since 9/11.³⁸

B. THE ENTRAPMENT AND OUTRAGEOUS GOVERNMENT CONDUCT DEFENSES

Under the most prominent formulation of the entrapment defense, entrapment operates as a complete defense if (1) the defendant was induced to commit the crime, and (2) the government fails to prove beyond a reasonable doubt that the defendant was predisposed to commit it.³⁹ In most jurisdictions, courts can also (in response to the defendant's motion) dismiss cases because of "outrageous government conduct"—government actions extreme enough to "shock the conscience" and violate due process.⁴⁰

For the government's conduct to qualify as inducement, the government must do more than simply present an opportunity to commit the crime—it must create a risk of persuading a person to commit the offense who was not already ready to commit it.⁴¹ Once the defendant has produced evidence of inducement, the burden shifts to the prosecution either to rebut this evidence, or to demonstrate beyond a reasonable doubt that the defendant was predisposed prior to the government contact.⁴² However, courts often allow evidence from the defendant's later statements or actions to be considered in the predisposition inquiry, if this conduct is seen as "independent" from government influence.⁴³

There is no standard definition of predisposition, and courts have developed various factors to consider in deciding whether a defendant was

³⁷ See generally German, *supra* note 2, at 54–56.

³⁸ See *supra* note 12 and accompanying text.

³⁹ *Jacobson v. United States*, 503 U.S. 540, 548–49 (1992).

⁴⁰ *United States v. Twigg*, 588 F.2d 373, 377 (3d Cir. 1978); Stephen A. Miller, Comment, *The Case for Preserving the Outrageous Government Conduct Defense*, 91 NW. U. L. REV. 305, 312, 317 (1996).

⁴¹ *United States v. Wright*, 921 F.2d 42, 45 (3d Cir. 1990); *United States v. Yater*, 756 F.2d 1058, 1062 (5th Cir. 1985).

⁴² *Jacobson*, 503 U.S. at 553; *United States v. Burkley*, 591 F.2d 903, 914–15 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 966 (1979).

⁴³ See *Jacobson*, 503 U.S. at 550; *United States v. Silva*, 846 F.2d 352, 356 (6th Cir. 1988).

predisposed. Some courts, for example, consider the following factors in the predisposition analysis:

- (1) the defendant's character or reputation; (2) whether the government initially suggested the criminal activity; (3) whether the defendant engaged in the criminal activity for profit; (4) whether the defendant evidenced a reluctance to commit the offense that was overcome by government persuasion; and (5) the nature of the inducement or persuasion by the government.⁴⁴

In any case, courts agree that when the government simply provides "the opportunity to commit a crime . . . the ready commission of the criminal act amply demonstrates the defendant's predisposition."⁴⁵

The Supreme Court contrasts such a scenario with the facts of *Jacobson v. United States*, in which the defendant did not commit the crime of ordering child pornography until "he had already been the target of 26 months of repeated mailings and communications from Government agents and fictitious organizations."⁴⁶ In that case, the government "not only excited petitioner's interest in sexually explicit materials banned by law but also exerted substantial pressure on petitioner to obtain and read such material as part of a fight against censorship and the infringement of individual rights."⁴⁷ The Supreme Court overturned the conviction, since "[r]ational jurors could not say beyond a reasonable doubt that petitioner possessed the requisite predisposition prior to the Government's investigation and that it existed independent of the Government's many and varied approaches to petitioner."⁴⁸

A minority of jurisdictions employ the "objective" entrapment defense, which focuses only on the nature of the government conduct, without inquiring into the predisposition of the defendant. Under one version of the objective defense, entrapment serves as a complete defense if the government induced the offense by either making false representations that the conduct was legal, or by engaging in methods of persuasion that generate a substantial risk that the offense would be committed by someone otherwise not ready to commit it.⁴⁹ The outrageous government conduct defense, although also based on government action, typically requires the conduct to be "so grossly shocking as to violate the universal sense of justice."⁵⁰ Since courts employ

⁴⁴ *United States v. Hall*, 608 F.3d 340, 343 (7th Cir. 2010) (citation omitted).

⁴⁵ *Jacobson*, 503 U.S. at 550.

⁴⁶ *Id.*

⁴⁷ *Id.* at 552.

⁴⁸ *Id.* at 553.

⁴⁹ HAW. REV. STAT. § 702–237 (West 2014); MODEL PENAL CODE § 2.13.

⁵⁰ *United States v. Bonanno*, 852 F.2d 434, 437 (9th Cir. 1988); see Miller, *supra* note 40, at 322–26 (discussing cases in which this doctrine has been applied to block convictions).

the doctrine infrequently, no specific guidelines have developed to assist courts in applying it.

C. THE PREVALENCE OF ENTRAPMENT

Despite numerous accusations of entrapment, the prevalence of entrapment (or similar abuses) in terrorism cases remains unclear. Determining the prevalence of arguable cases of entrapment is important, however, because if there are very few such cases, they may amount to no more than a few bad apples, with little policy relevance. If, by contrast, such cases are widespread, this would lend urgency to the task of reviewing, and, where appropriate, reforming, current counterterrorism practices. Academic and journalistic approaches alike tend to focus on a small number of particularly egregious and well-known cases.⁵¹ The journalist Trevor Aaronson built a database of 500 terrorism convictions, and his book discusses more cases than other writers on the topic.⁵² However, the book's analysis is still limited to a relatively small number of cases (about sixteen), compared to the overall scale of contemporary terrorism prosecutions.⁵³

A report by Human Rights Watch analyzed twenty-seven domestic terrorism cases, most of which involve potential cases of entrapment.⁵⁴ While this is a larger number of cases than was included in most previous work, it still represents a small proportion of post-9/11 terrorism convictions.⁵⁵ *Inventing Terrorists*, a study by Project SALAM and the National Coalition to Protect Civil Freedoms, examined 399 cases and determined whether each case constituted preventative prosecution or contained elements of preventative prosecution.⁵⁶ Although this study encompassed a large proportion of post-9/11 terrorism convictions, it focused on whether cases fit within their definition of preventative prosecution, rather than investigating

⁵¹ The law review articles with the most detailed treatment of entrapment in terrorism prosecutions discuss eight cases and four cases, respectively. See generally Sherman, *supra* note 17; Said, *supra* note 17.

⁵² Trevor Aaronson, *Profiles in Terror*, MOTHER JONES (last visited on Jan. 31, 2015), [http://www.motherjones.com/fbi-terrorist?tid_4=All&tid=All&date_filter\[value\]\[year\]=&tid_1=All&tid_2=All&tid_5=All&tid_3=All](http://www.motherjones.com/fbi-terrorist?tid_4=All&tid=All&date_filter[value][year]=&tid_1=All&tid_2=All&tid_5=All&tid_3=All).

⁵³ See AARONSON, *supra* note 19 and accompanying text.

⁵⁴ See *Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions*, HUMAN RIGHTS WATCH (July 21, 2014), <http://www.hrw.org/reports/2014/07/21/illusion-justice-0>.

⁵⁵ See *infra* Part IV.A.

⁵⁶ STEPHEN DOWNS & KATHY MANLEY, *INVENTING TERRORISTS* 15 (2014); see also Stephen Downs, *Victims of America's Dirty Wars: Tactics and Reasons from COINTELPRO to the War on Terror*, PROJECT SALAM (Feb. 15, 2012), http://www.projectsalam.org/downloads/victims_of_americas_dirty_wars.pdf (earlier, more descriptive study by one of the same authors).

specific aspects of cases related to the entrapment defense.⁵⁷ For that reason, *Inventing Terrorists* does not estimate the prevalence or seriousness of entrapment allegations in terrorism cases.

Despite the lack of comprehensive research on entrapment and terrorism, distinct views have emerged on the prevalence of entrapment in terrorism cases. At one extreme, journalist Joshua Holland, interpreting his interview with Trevor Aaronson, claims that only 1% of post-9/11 terrorism prosecutions are “real.”⁵⁸ The implied argument is that informant-led sting operations, targeting individuals who would not have otherwise committed an act of terrorism, along with other prosecutions only peripherally connected to terrorism, account for 99% of post-9/11 terrorism prosecutions. On the other end of the spectrum, some observers suggest that there is virtually no such thing as entrapment in terrorism prosecutions, because only those predisposed to commit acts of terror could be induced into committing one.⁵⁹ In the middle, others probably suppose that entrapment may exist, but is confined to a small handful of cases.⁶⁰

Another lacuna in the literature is the relative lack of academic attention to entrapment in alleged cases of right- and left-wing terrorism. Journalistic accounts of these issues have claimed that authorities are targeting environmentalists, animal rights activists, and “Occupy” activists for entrapment, while all but ignoring the more serious threat of far-right terrorism.⁶¹ A recent article, however, depicts a potential case of entrapment among antigovernment militia members in Georgia.⁶² The prevalence and seriousness of entrapment allegations in right- and left-wing terror cases is an open question, which this Article attempts to answer.

II. POTENTIAL ENTRAPMENT INDICATORS

This Part develops twenty entrapment indicators, drawn from the case law on the entrapment and outrageous government conduct defenses, and

⁵⁷ It should also be noted that *Inventing Terrorists* omits any case not included in the DOJ’s database, leaving out over 150 cases included in our database.

⁵⁸ See Holland, *supra* note 20.

⁵⁹ See Stevenson, *supra* note 21, at 44, and Crovitz, *supra* note 21.

⁶⁰ See, e.g., BRIAN MICHAEL JENKINS, RAND CORP., WOULD-BE WARRIORS 10 (2010), available at http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP292.pdf (noting that informants can easily become *agents provocateurs*, prompting defendants to commit crimes they would have never done on their own, but without suggesting that this accounts for a large proportion of cases).

⁶¹ See generally POTTER, *supra* note 24; Erdely, *supra* note 5; Perlstein, *supra* note 5.

⁶² Tom Junod, *Counter-terrorism Is Getting Complicated*, ESQUIRE (Jan. 18, 2012), <http://www.esquire.com/features/waffle-house-terrorists-0212>.

from a review of terrorism cases. These indicators are described below, and the coding criteria for the indicators are presented in Appendix A. This Article presumes that it is possible that the type of government action the entrapment defense was meant to prevent has become relatively widespread in an area of law, even if no court has actually applied the doctrine to block a conviction. We begin this Part by discussing briefly why this assumption is warranted despite potential formalist or practical objections.

A. RESPONDING TO POTENTIAL OBJECTIONS

A strictly formalist analysis might assume that entrapment only exists in those cases in which the defendant asserts the defense, and the judge or jury applies the defense to block the prosecution. Yet proponents of this formalist objection would have difficulty responding to cases in which defendants who are exceedingly unlikely to ever commit a terrorist attack are persuaded by government informants to commit a staged offense, and yet the defense fails or is never raised.

The *Cromitie* case illustrates this phenomenon well. Judge McMahon clearly believed that Cromitie would have never committed a terrorist offense on his own. She acknowledged that he was often hesitant and had to be repeatedly pressured into the crime.⁶³ Despite this, she found that his initial enthusiasm for the idea of committing an act of terror was enough to sustain a finding that he was predisposed.⁶⁴

There is something decidedly absurd about a ruling in which the judge states in no uncertain terms that the defendant was utterly unable to commit the offense and would have never done so on his own, while simultaneously ruling that he was predisposed to commit it. The trial court decision was upheld by the Second Circuit, but not without a spirited and well-reasoned dissent by Chief Judge Dennis Jacobs.⁶⁵

Regardless of whether Judge McMahon correctly applied the law of entrapment as it existed in her jurisdiction, Cromitie's conviction violates the underlying policy principles behind the entrapment defense.⁶⁶ When

⁶³ See *United States v. Cromitie*, No. 09 CR. 558 (CM), 2011 WL 1842219, at *2, *7 (S.D.N.Y. May 10, 2011), *aff'd*, 727 F.3d 194 (2d Cir. 2013).

⁶⁴ *Id.* at *7–*8.

⁶⁵ *United States v. Cromitie*, 727 F.3d 194, 227–30 (2d Cir. 2013) (Jacobs, C.J., dissenting in part and concurring in part) (concluding that Cromitie was entrapped as a matter of law, since the government induced the commission of his offense and he neither had an “already-formed design” nor exhibited a “ready response” to the inducement).

⁶⁶ See *Butts v. United States*, 273 F. 35, 38 (8th Cir. 1921) (“[I]t is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in

government agents or informants persuade someone to engage in terrorism who would have never otherwise done so, this is an example of the “manufacturing of crime” denounced by the Supreme Court.⁶⁷ If Cromitie was as harmless as Judge McMahon believed before he was approached by a government informant, then his prosecution is a prime example of what the doctrine was designed to prevent. Whether or not this can be formally designated as entrapment, it should concern us.

Despite the presence of such cases, the entrapment defense has not been successful in blocking any terrorism conviction since 9/11.⁶⁸ Some may be skeptical of this Article’s approach because it seems difficult to understand how such a phenomenon could exist without at least one court recognizing it. This could be termed the pragmatic objection. Yet there are a number of potential reasons that may explain the apparent failure of the doctrine to block questionable terrorism prosecutions.

First, some defendants with colorable entrapment claims may well have opted for pleading guilty, hoping to receive much shorter sentences than they would have if the defense had failed at trial.⁶⁹

Second, the way the doctrine has developed may have weakened its ability to stop entrapment abuses in the terrorism context. The doctrine arose, in large part, from cases involving crimes based on widespread, oft-repeated behaviors such as selling or using drugs.⁷⁰ Terrorism, by contrast, is an extraordinarily rare crime in the United States,⁷¹ with few, if any, repeat offenders. It is possible that the doctrine is not particularly well suited to ascertaining predisposition among terrorism offenders, given the unusual nature of these crimes. It is also possible that courts have developed increasingly lenient standards for finding predisposition, following the familiar pattern of gradually eroding procedural protections to suit the exigencies of the War on Drugs.⁷²

deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded and lured him to attempt to commit it.”).

⁶⁷ *Sherman v. United States*, 356 U.S. 369, 372 (1958).

⁶⁸ See *supra* note 12 and accompanying text.

⁶⁹ Dru Stevenson, *Entrapment by Numbers*, 16 U. FLA. J.L. & PUB. POL’Y 1, 33–34 nn. 82–83 (2005) (discussing cases in which defendants later claimed ineffective assistance of counsel because their attorneys pressured them to plead guilty, rather than assert the entrapment defense).

⁷⁰ See PAUL MARCUS, *THE ENTRAPMENT DEFENSE* § 1.04 (4th ed. 2009) (discussing the early major cases, most of which had to do with illegal drug or alcohol sales).

⁷¹ CHARLES KURZMAN, *THE MISSING MARTYRS* 14 (2011).

⁷² See generally Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753 (2002); Jason S. Marks, *Mission Impossible? Rescuing the Fourth Amendment from the War on Drugs*, 11 CRIM. JUST. 16 (1996); David Rudovsky, *The Impact of the War on Drugs on Procedural*

Third, in any individual case, the judge, the jury, or both may be so influenced by post-9/11 national anxieties and patriotic fervor that they have great difficulty applying the entrapment defense, in even the most egregious cases.⁷³ That is, anxieties about terrorism, or stereotypes about Muslim terrorists, may make it difficult for factfinders to conclude that defendants were not predisposed to commit the offense. This may well have occurred in the case of Hamid Hayat, who was convicted of attending a terrorist training camp and sentenced to twenty-four years in prison. One juror admitted after the trial that she thought Hayat was innocent and that he had been entrapped, but she felt too intimidated to vote for acquitting him.⁷⁴ Reportedly, only one juror believed Hayat would have actually carried out any act of terrorism.⁷⁵ This should have been enough to preclude a finding of predisposition.

However, as the foreman later put it, the jury did not “want to see the government lose its case,” given “what we know of how people of his background have acted in the past.”⁷⁶ Ultimately, the foreman thought such questions were not suited to juries: “We’re not being asked, ‘Did the defendant commit the crime?’—whether it’s larceny, murder, whatever. Now you’re being asked, ‘Is the defendant capable of doing a crime?’ And I don’t think that that is in the . . . level of understanding of the juror.”⁷⁷

Fourth, well-documented cognitive errors such as hindsight bias or the fundamental attribution error may influence judges and juries to ascribe predisposition to defendants even in inappropriate cases.⁷⁸

Fifth, the fundamental circularity of some versions of the predisposition doctrine, which in practice allow an inference that a defendant was predisposed simply because he was successfully induced to commit the crime, may have doomed the defense to failure in some cases.⁷⁹ As one

Fairness and Racial Equality, 1994 U. CHI. LEGAL F. 237 (1994); Steven Wisotsky, *Crackdown: The Emerging “Drug Exception” to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987).

⁷³ Said, *supra* note 17, at 724 (discussing “the limits of the entrapment defense when a jury is presented with evidence of anti-American views expressed from an Islamist perspective”).

⁷⁴ Demian Bulwa, *Juror Tells of Pressure to Convict Terrorism Suspect: She Tells Judge in Lodi Case She Regrets Her Guilty Vote and Accuses Jury Foreman of Misconduct—Other Panelists Deny It*, S. F. CHRON. (Apr. 28, 2006, 4:00 AM), <http://www.sfgate.com/bayarea/article/SACRAMENTO-Juror-tells-of-pressure-to-convict-2536440.php>.

⁷⁵ Amy Waldman, *Prophetic Justice*, THE ATLANTIC, Oct. 2006, at 82, 92.

⁷⁶ *Id.* at 93.

⁷⁷ *Id.*

⁷⁸ Kevin A. Smith, Note, *Psychology, Factfinding, and Entrapment*, 103 MICH. L. REV. 759, 788 (2005); see Jesse J. Norris, *Why the FBI and the Courts Are Wrong About Terrorism and Entrapment*, 84 MISS. L.J. 1257 (2015).

⁷⁹ Philip Mullock, *The Logic of Entrapment*, 46 U. PITT. L. REV. 739, 750 (1985).

scholar summarizes this distorted view of the doctrine, “[I]f we ask, ‘why did he do it?’ the answer is, ‘because he was predisposed to do it;’ and if we ask, ‘why was he predisposed to do it?’ the answer is, ‘because he did it.’”⁸⁰ Given the possibly tautological nature of the doctrine, we should not assume that a lack of entrapment rulings corresponds to a lack of entrapment abuses.

Finally, government misconduct, whether by police agencies or prosecutors, may have prevented some defendants from accessing discovery that would have supported an entrapment defense.⁸¹ Although there is not evidence of widespread government misconduct in these cases, there are signs that misconduct is occurring. For example, the convictions in the “Detroit Sleeper Cell” case were reversed after it was revealed that prosecutors withheld key information from the defense.⁸²

Furthermore, journalist Trevor Aaronson has shown that the FBI often claims not to have recorded particularly important conversations between the informant and the defendant.⁸³ Former FBI agent James Wedick, a thirty-five-year veteran of the Bureau, suggests that such conversations were left unrecorded not for any legitimate reason, but rather to make it easier to win the case in court.⁸⁴ While this does not prove nefarious motives, it raises the question of whether those conversations were not recorded because of a perceived danger that the recordings could support an entrapment defense.

B. THE NATURE OF THE INDICATORS

This Article does not intend to suggest that the presence of one, or a certain number, of the indicators discussed in the next subpart definitively indicates entrapment, outrageous government conduct, or even the violation of the public policies underlying these doctrines. Rather, due to the variety of ways the entrapment defense is formulated in different jurisdictions within the United States, and the uncertainty of whether the doctrine ought to be applied in any specific case, this Article understands the indicators as raising the likelihood that entrapment, borderline entrapment, or outrageous government conduct took place. As mentioned earlier, borderline entrapment is meant to refer to a case that offends the policy concerns underlying the

⁸⁰ *Id.*

⁸¹ Jackie Lu, *How Terror Changed Justice: A Call to Reform Safeguards That Protect Against Prosecutorial Misconduct*, 14 J.L. & POL’Y 377, 379–80 (2006).

⁸² Bennett L. Gershman, *How Juries Get It Wrong—Anatomy of the Detroit Terror Case*, 44 WASHBURN L.J. 327, 330 (2005). This case was not included in the databases for this Article, because the relevant acts in the case occurred before September 11, 2001.

⁸³ AARONSON, *supra* note 19, at 181–99.

⁸⁴ *Id.* at 195–96.

entrapment doctrine, even if the case may not qualify as entrapment in the particular jurisdiction.

The first ten indicators were derived from relevant case law, and the second ten were developed from recurrent fact patterns observed in a review of the alleged cases of entrapment in terrorism prosecutions. The indicators are not equal in their ability to predict the presence of entrapment. As mentioned in the results subpart below, some of the indicators are more central to most courts' entrapment analyses, and particular indicators may be dispositive in some cases. The coding criteria for the indicators, as presented in Appendix A, were designed to eliminate or minimize overlap between the indicators.

An exhaustive analysis of all the facts of each case, a task far beyond the scope of this Article, would be necessary to make a fully reasoned determination of whether each case is the type of case the entrapment defense was designed to prevent. What this Article's analysis provides is not certainty, but a rough estimation of the extent of facts and allegations that would support an entrapment or outrageous government conduct defense.

C. INDICATORS DERIVED FROM CASE LAW

The case law on entrapment and the outrageous government conduct defense provides a number of indicators.⁸⁵ Each of these are factors that, at least in some jurisdictions, weigh in favor of a finding of entrapment, a finding that the defendant was not predisposed, or a determination that the government's conduct was so outrageous as to warrant dismissal on due process grounds. For the purposes of illustration, one or more brief examples are provided for each indicator. The specific criteria used for coding these cases in the database are provided in Appendix A.

The first ten indicators can be divided into two groupings. The first six "core" indicators correspond to the factors most often used by courts in deciding whether to apply the entrapment defense. The next four (7 through 10) are less central to most courts' analyses and may not be considered by many courts.

⁸⁵ We do not separate the two doctrines for the purposes of the list of indicators. This is because, regardless of which doctrine applies, the result would be the same: the judge would block the prosecution. Furthermore, compiling two lists, one for entrapment and one for outrageous government conduct, would be cumbersome to apply, since there is considerable overlap between the two doctrines as they have been applied by courts.

D. THE CORE SIX ENTRAPMENT FACTORS

1. *No previous terrorism offenses.* One factor in courts' predisposition analyses is the defendant's lack of previous involvement in the same type of crime (which for the purposes of this Article would mean terrorist offenses) before the informant entered the scene.⁸⁶ An additional, though related, consideration sometimes mentioned in the case law is whether the defendant had been a hardworking, model citizen before the informant became involved.⁸⁷

Since this is a particularly widespread indicator in terrorism cases, any number of examples is available. One noteworthy case is that of Mohammed Hossain and Yassin Aref, two immigrants who by all accounts were law-abiding before being targeted for inducement by the FBI. The FBI informant befriended Hossain, at some point mentioning that he was involved in selling arms to terrorists, and later offered Hossain a \$45,000 loan (and a \$5,000 gift) to help with his businesses.⁸⁸ Aref, an imam, witnessed the loan. Both were convicted of material support for terrorism, based on the money laundering allegedly implicit in the transaction.⁸⁹

2. *Government proposed the crime.* If the government agent or informant provided the defendant with the idea for the crime, this weighs against predisposition.⁹⁰ Whether the "criminal design originates with the officials of the Government" has been a key factor for many courts' entrapment analyses.⁹¹

In several of the cases involving terrorist plots, the informants have suggested particular targets. In many other cases, the informant pushes the defendant to plan an attack, while asking the defendant to pick the target himself. In a case involving a bomb plot by five Occupy Cleveland activists (known as the Cleveland Five), the informant himself proposed the idea of blowing up a bridge.⁹²

⁸⁶ *United States v. Reyes*, 239 F.3d 722, 739 (5th Cir. 2001) (listing "demonstrated knowledge or experience with the criminal activity under investigation" and "the character of the defendant, including past criminal history" as factors in the entrapment analysis).

⁸⁷ *Sorrells v. United States*, 287 U.S. 435, 441 (1932) (noting that the defendant was "an industrious, law-abiding citizen" who was "otherwise innocent," until the government agent prevailed upon him to break the law).

⁸⁸ AARONSON, *supra* note 19, at 117, 134.

⁸⁹ *United States v. Aref*, 533 F.3d 72, 76 (2d Cir. 2008).

⁹⁰ *United States v. Navarro*, 737 F.2d 625, 635 (7th Cir. 1984) (including "whether the suggestion of criminal activity was originally made by the Government" as one of five factors for determining predisposition).

⁹¹ For examples, see *Sorrells*, 287 U.S. at 442; *Jacobson v. United States*, 503 U.S. 540 (1992).

⁹² See Perlstein, *supra* note 5.

3. *Informant pressure or persuasion.* If the government agent or informant pressured the defendant to participate in the crime, this weighs against a finding of predisposition, particularly if the pressure was repeated.⁹³ This pressure can range from emotional manipulation to violent threats. In the case of Hamid Hayat, an informant befriended him and then repeatedly harassed him, pressuring him to attend a terrorist training camp in Pakistan.⁹⁴ For example, the informant called him in Pakistan to berate him, in an expletive-filled rant, for his laziness, saying “Be a man. Do something,” and threatening to “force” him by the “throat.”⁹⁵

If this pressure is especially intense or manipulative, it could also support an outrageous government conduct defense.⁹⁶ For example, the informant in Derrick Shareef’s case threatened to slit Shareef’s throat if he backed out of their plot to attack a shopping mall with grenades.⁹⁷ The informant also threatened to commit suicide if Shareef refused to go through with the plan, and made other threats to ensure Shareef agreed to participate in the attack.⁹⁸ In such an extreme case, it would seem reasonable to block the conviction on due process grounds.⁹⁹

Similarly, if the government agent or informant persuaded the defendant that the crime was justified or otherwise appropriate, this should support an entrapment defense.¹⁰⁰ In the case of Matin Siraj (who was convicted of plotting to bomb a subway station), the informant actively attempted to radicalize him, by touting 9/11 conspiracy theories, bemoaning the West’s supposed war on Islam, and showing him pictures of the torture of Iraqi citizens by U.S. troops at Abu Ghraib.¹⁰¹ In another case, eighteen-year-old

⁹³ The repeated nature of the government’s attempts to induce Jacobson is perhaps the most significant indicator of entrapment, or lack of predisposition, identified by the *Jacobson* court.

⁹⁴ *Bio*, WEDICK & ASSOCIATES FBI EXPERT, <http://www.fbiexpert.com/investigative-profile.php> (last visited Apr. 24, 2015) [hereinafter *Wedick Bio*]; Melissa McNamara, *Calif. Man Found Guilty In Terror Case*, CBS NEWS (Apr. 25, 2006, 2:25 PM), <http://www.cbsnews.com/news/calif-man-found-guilty-in-terror-case/>.

⁹⁵ *Wedick Bio*, *supra* note 94.

⁹⁶ *Greene v. United States*, 454 F.2d 783, 787 (9th Cir. 1971) (finding outrageous government conduct when the pressure to commit the crime was a veiled threat).

⁹⁷ *See United States v. Shareef*, No. 10 C 7860, 2011 WL 4888877, at *5 (N.D. Ill. 2011). The government characterized this comment as a “joke.” *Id.*

⁹⁸ *Id.*

⁹⁹ *See supra* note 40 and accompanying text.

¹⁰⁰ *Jacobson v. United States*, 503 U.S. 540, 548 (1992) (“In their zeal to enforce the law, however, Government agents may not originate a criminal design, implant in an innocent person’s mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute.”).

¹⁰¹ ETHAN BROWN, SNITCH 124–26 (2007).

Adel Daoud was persuaded to participate in a terror attack on a Chicago bar in part because the informant told him that a particular foreign imam wanted him to participate and gave his blessing to the attack.¹⁰² If the informant had not invented this imam, it is possible that Daoud would have listened to his own imams, who insisted that violent jihad was inconsistent with Islam.¹⁰³ The informant in the *Cromitie* case encouraged Cromitie's anti-Semitic ramblings by adding his own anecdotes about Jewish domination and claiming that Jews "are responsible for all of the evils in the world."¹⁰⁴

If the informant takes advantage of a defendant's sympathies, friendship, or personal weaknesses (such as poverty or financial problems),¹⁰⁵ this potentially casts doubt on the defendant's predisposition. This can occur if the informant becomes close friends with the defendant, or exploits a preexisting friendship, aiming to take advantage of the friendship to induce the defendant to commit the offense.¹⁰⁶ For example, in Hamid Hayat's case, the informant spent so much time with Hayat that Hayat referred to him as his brother and best friend.¹⁰⁷

A less common method, known in the terminology of espionage as the "honeypot" strategy, involves the informant using the promise of a sexual or romantic relationship to induce the defendant.¹⁰⁸ An example of this allegedly

¹⁰² Kim Janssen, *Alleged Bomber 'Immature'*, CHI. SUN-TIMES, Sept. 18, 2012, at 11.

¹⁰³ *Id.*

¹⁰⁴ Kareem Fahim, *On Tapes, Terror Suspect Brags and Reveals His Hate*, N.Y. TIMES, August 31, 2010, at A17; Laguardia, *supra* note 12, at 203.

¹⁰⁵ *Sherman v. United States*, 356 U.S. 369, 376 (1958) ("[T]he defense of entrapment is designed to overcome" a situation in which "the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted."); *United States v. Dion*, 762 F.2d 674, 689–90 (8th Cir. 1985), *rev'd in part*, 476 U.S. 734 (1986) ("The risk for the government in offering so much money to these ["extremely impoverished"] individuals over a nearly two-and-one-half year period was that many who would never have shot a protected bird would be enticed into doing so."); *State v. Taylor*, 599 P.2d 496, 503 (Utah 1979) ("Extreme pleas of desperate illness or appeals based primarily on sympathy, pity, or close personal friendship, or offers of inordinate sums of money, are examples, depending on an evaluation of the circumstances in each case, of what might constitute prohibited police conduct.").

¹⁰⁶ *Taylor*, 599 P.2d at 504 ("The record is replete with evidence as to defendant's motivation to accommodate Annette Stubbs, viz., his sympathy, his pity, and his close personal relationship with her."); MARCUS, *supra* note 70, § 3.03 ("Creating a personal relationship is a common fact pattern which can lead to entrapment.").

¹⁰⁷ Jeff Barnard, *Friends Unaware of FBI Informant*, THE SPOKESMAN-REVIEW (Spokane, Washington), Apr. 16, 2006, at B6.

¹⁰⁸ *People v. Wisneski*, 292 N.W.2d 196, 199 (Mich. Ct. App. 1980) ("Police encouragement of an agent's use of sex to induce one who is unwilling and unready to commit a crime constitutes entrapment."); HANK PRUNCKUN, COUNTERINTELLIGENCE THEORY AND PRACTICE 199 (2012) (discussing the use of the term "honeypot" to refer to situations in which

occurred in the case of Eric McDavid, who was convicted of plotting “ecoterrorist” bombings.¹⁰⁹ A paid FBI informant, known only as “Anna,” briefly began a romantic relationship with McDavid, but called it off, telling him that it needed to wait until after their “mission.”¹¹⁰

Even when the defendant himself—and not the informant—proposes the idea for the attack, the fact that no plot existed before the informant became involved should weigh against a finding of predisposition. In some cases of this nature, the informant encouraged or pressured the defendant to come up with a plan of action. For example, according to McDavid’s appellate briefing, “Anna” repeatedly urged McDavid and his friends to formulate a plan.¹¹¹ Sami Hassoun (who was prosecuted for trying to plant a bomb near Wrigley Field in Chicago) described in his sentencing memorandum how the informant repeatedly encouraged him to plan a terrorist attack and claimed that Hassoun would be paid millions of dollars for his ideas.¹¹² The defendants in the NATO Three and Cleveland Five cases seemed content to lazily fantasize about (largely unrealistic) potential actions, while the informants took charge, browbeating them into formulating and following through on a specific plan.¹¹³

a sexual relationship is initiated for the purpose of intelligence gathering).

¹⁰⁹ McDavid alleged that Anna tried to “string him along romantically,” in order to successfully induce him to commit the offense. *United States v. McDavid*, 396 F. App’x 365, 369 (9th Cir. 2010). She seems to have done this by responding to his advances by saying that “we need to put the mission first. There’s time for romance later.” Andrea Todd, *The Believers*, ELLE, Apr. 2008, at 266, 323. Alternatively, there are indications they may have begun some kind of romantic relationship, which Anna put on hold until after the “mission.” “McDavid brought up the stalled relationship during a pizza run he made with Anna. ‘She said she wanted to slow it down,’ he told me, ‘in order to do what she wanted to do—the mission—and then pick it up later.’” Dean Kuipers, *Honey Stinger*, OUTSIDE MAGAZINE, Dec. 2012, at 60, 75.

¹¹⁰ See *supra* note 109 and accompanying text.

¹¹¹ See Appellant’s Opening Brief at 14, 20, 21, *United States v. McDavid*, 396 F. App’x 365 (9th Cir. 2010); Kuipers, *supra* note 109, at 71–75.

¹¹² Defendant’s Sentencing Memorandum at 19–20, *United States v. Hassoun*, 10-CR-773-1 (N.D. Ill. 2013).

¹¹³ See Brown, *supra* note 24 (discussing “tapes, which mostly feature Church running off at the mouth about all the trouble he’d like to cause, if he could only figure out how”); Erdely, *supra* note 5; Eric Zorn, *NATO Three Stooges?*, CHANGE OF SUBJECT (Jan. 27, 2014), http://blogs.chicagotribune.com/news_columnists_ezorn/2014/01/nato-three-stooges.html (commenting on the evidence from the tapes, “it really looks as though these mopey wannabes were too baked and aimless ever to have posed a serious terrorist threat to the public,” and “[t]he picture that’s emerging from the coverage is of a trio of inept stoners with inchoate violent impulses and delusions of grandeur and feck who were egged on by undercover cops and then grossly overcharged by an overheated state’s attorney’s office”); *Opening Statements Conclude, Undercover Cop “Gloves” Begins Testimony*, FREE THE NATO 3 (Jan. 21, 2014), <http://freethenato3.wordpress.com/2014/01/21/opening-statements-conclude-undercover-cop-gloves-begins-testimony/>.

If the inducement of the crime occurred over a lengthy time period, this suggests that the defendant was not predisposed to commit the offense, but rather had to be repeatedly encouraged or persuaded to commit it.¹¹⁴ The informant in the Siraj case, for example, spent over two and a half years pretending to be Siraj's jihadist friend before Siraj was arrested and charged.¹¹⁵

4. *Material incentive.* If the government or informant offered money or other material incentives for participating in the crime, this weighs against predisposition.¹¹⁶ This factor is most persuasive when the rewards are excessive compared to what a criminal might normally achieve for committing the crime, absent government involvement.¹¹⁷

For example, James Cromitie only agreed to participate in a terror attack “after a dogged and year-long campaign of nagging, pursuit, and temptation (with money, a business, and a Mercedes-Benz).”¹¹⁸ The government informant told Cromitie, a destitute Walmart employee, that he would pay him \$250,000 to commit the attack.¹¹⁹ The informant also promised, among other things, that he would buy Cromitie a barbershop and pay for a vacation in Puerto Rico.¹²⁰

5. *Defendant's reluctance.* If the defendant was initially or at some point reluctant to participate in the crime, this weighs in favor of entrapment. This has sometimes been described as the most important factor in determining predisposition.¹²¹

¹¹⁴ Although the length of inducement has not been listed as a separate factor, courts have sometimes mentioned it in the course of explaining why the evidence favors the entrapment defense. *Jacobson v. United States*, 503 U.S. 540, 550 (1992) (holding that the predisposition had not been proven, because the defendant had “been the target of 26 months of repeated mailings and communications from Government agents and fictitious organizations” before he was induced to commit the crime).

¹¹⁵ Jennifer Jenkins, *Bay Ridge Terror Case Raises Debate About Entrapment*, THE BROOKLYN INK (Sept. 10, 2010), <http://archives.jrn.columbia.edu/2010-2011/thebrooklynink.com/2010/09/10/14114-bay-ridge-terror-case-raises-debate-about-entrapment/index.html>.

¹¹⁶ *Grossman v. State*, 457 P.2d 226, 230 (Alaska 1969) (“[O]ffers of profit which are grossly disproportionate to what is reasonably expectable in that traffic should not be permitted when those offers would have the effect of overwhelming the self-control of a normal person.”); *State v. Lively*, 921 P.2d 1035, 1046–47 (Wash. 1996) (listing “promises of excessive profits” as a factor in a due process analysis).

¹¹⁷ *Grossman*, 457 P.2d at 230.

¹¹⁸ *United States v. Cromitie*, 727 F.3d 194, 227 (2d Cir. 2013) (Jacobs, C.J., dissenting).

¹¹⁹ *Id.* at 211 (majority opinion).

¹²⁰ *Id.*

¹²¹ *United States v. Busby*, 780 F.2d 804, 807 (9th Cir. 1986).

In the *Cromitie* case, considered by at least one observer to be the single most egregious example of entrapment in terrorism cases,¹²² Cromitie was remarkably reluctant to participate in the terrorist attack, and only succumbed after numerous attempts at persuasion over the course of a year.¹²³ Matin Siraj expressed his reluctance to participate in terrorism by saying that he did not want to cause any deaths, and by claiming that he had to ask his mother for permission.¹²⁴ Connor Stevens, one of the five Occupy Cleveland activists who plotted to blow up a bridge, attempted to back out of the plot, but the informant had at one point said he would fire him if he did so.¹²⁵

6. *Governmental control of the crime.* Whether the government and/or the informant exhibited a high level of control over criminal activity, rather than allowing the crime to happen on its own, has long been a factor in courts' entrapment analyses.¹²⁶ Near-complete government control of the crime is typical in sting operations. In the case of Hemant Lakhani, the informant proposed buying a missile from him, but when Lakhani turned out to be utterly incapable of procuring a missile, the government arranged for a Russian undercover agent to sell him a missile, so that Lakhani could sell it to the informant.¹²⁷ Courts have sometimes held that in such cases, when the government provides the defendant with the goods that the defendant is convicted of selling, entrapment occurred as a matter of law.¹²⁸

¹²² Greenberg, *supra* note 34 (describing the *Cromitie* case as the "most egregious example" of government involvement in creating terrorism offenses).

¹²³ See *United States v. Cromitie*, No. 09 CR. 558 (CM) 2011 WL 1842219, at *2-*6 (S.D.N.Y. May 10, 2011), *aff'd*, 727 F.3d 194 (2d Cir. 2013) ("Cromitie certainly talked the talk of a terrorist. . . . But he was reluctant to walk the walk. . . . Cromitie argues that he repeatedly refused to follow through on what he was saying, and that [he] refused to do anything other than talk about jihad for many, many months. Despite Hussain's prodding, Cromitie failed to introduce Hussain to any 'like-minded brothers' who would participate in a 'sutra team.' He declined to provide any guns, pick any targets, decide what equipment would be needed, come up with any code words, or make any concrete plans. Cromitie expressed reluctance to get involved personally in any attack: He did not want to go to Afghanistan . . . and he was evasive when asked by Hussain if he would 'go to jihad.'").

¹²⁴ STEPHAN SALISBURY, *MOHAMED'S GHOSTS* 182 (2010).

¹²⁵ See Erdely, *supra* note 5, at 75.

¹²⁶ *Sorrells v. United States*, 287 U.S. 435, 451 (1932) (stating that the "controlling question" is "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials"); *State v. Lively*, 921 P.2d 1035, 1046 (Wash. 1996) (listing "whether the government controls the criminal activity or simply allows for the criminal activity to occur" as a factor in determining whether government action in a case offends due process) (internal citation omitted).

¹²⁷ Petra Bartosiewicz, *I.O.U. One Terrorist: Rounding Up "Al Qaeda," One Stooge at a Time*, *HARPER'S MAG.*, Aug. 1, 2005, at 48, 48.

¹²⁸ *United States v. Bueno*, 447 F.2d 903, 905 (5th Cir. 1971).

E. OTHER CASE-LAW-DERIVED FACTORS

7. *Government provided the means.* If the government agent or informant provided the defendant with the money or other means necessary for the crime, this can support a finding of entrapment or outrageous government conduct.¹²⁹ When the physical means are hard to come by, as in the case of bombs, or the defendant has no money, this indicator is of particular relevance.¹³⁰

Examples of this indicator abound. After Hosam Smadi, a nineteen-year-old, was found discussing jihad in an online forum, an undercover FBI agent developed a relationship with him. The agent eventually supplied him with a car bomb, which Smadi agreed to detonate under a Dallas skyscraper.¹³¹ In many similar cases, the government has provided individuals with the equipment needed to carry out attacks.¹³²

8. *Government spoon-feeding.* If the government agent or informant provided the defendant with detailed logistical support to enable to the defendant to carry out the actions needed for the crime, this may weigh against a finding of predisposition.¹³³ This suggests that the defendant would have lacked the know-how to carry out the offense on his or her own.

For example, José Pimentel, a mentally ill convert to Islam who was convicted of attempting to make a pipe bomb for a terrorist attack, had to be given precise instructions for each step of the manufacturing process.¹³⁴ He

¹²⁹ *United States v. Hollingsworth*, 27 F.3d 1196, 1202 (7th Cir. 1994) (“Pickard and Hollingsworth had no prayer of becoming money launderers without the government’s aid. . . . Whatever it takes to become an international money launderer, they did not have it.”); *United States v. Twigg*, 588 F.2d 373, 380 (3d Cir. 1978) (applying the outrageous government conduct doctrine when the government supplied the means); *Greene v. United States*, 454 F.2d 783, 786–87 (9th Cir. 1971) (same).

¹³⁰ *Hollingsworth*, 27 F.3d at 1202–03 (suggesting that lack of means can preclude a finding of predisposition if the defendants would not have been able to acquire the means on their own).

¹³¹ Jason Trahan, *Bomb Plotter Gets 24 Years*, DALLAS MORNING NEWS, Oct. 20, 2010, at A1.

¹³² See AARONSON, *supra* note 19, at 21, 147–49, 170, 177–78.

¹³³ *Commonwealth v. Matthews*, 500 A.2d 853, 857 (Pa. Super. Ct. 1985) (upholding a trial court’s finding of outrageous government conduct when “Defendants were extremely inept in consummating the crime attempted,” and “police not only set the stage for the criminal act but also were principal players thereon without which Defendants could not have acted”) (internal citation omitted); see also *United States v. Arteaga*, 807 F.2d 424, 427 (5th Cir. 1986) (requiring government overinvolvement in the offense and a passive role by the defendant to establish the outrageous government conduct defense).

¹³⁴ William K. Rashbaum & Joseph Goldstein, *Informant’s Role in Terror Case Is Said to Have Deterred F.B.I.*, N.Y. TIMES, Nov. 21, 2011, at A1; Joe Coscarelli, *Accused Terrorist Jose Pimentel Got High with Informant, Needed Help with Everything*, N.Y. MAG. (Nov. 22,

also had trouble performing some of the tasks (such as drilling holes in the pipe) on his own.¹³⁵ The informant offered his apartment as a bomb-making laboratory (since Pimentel lived with his uncle), and the informant went shopping with him to buy the ingredients for the bomb.¹³⁶ The NYPD informant's role in the crime was so pervasive, and Pimentel was viewed as so incompetent, that off-the-record FBI agents reported that the FBI was uninterested in getting involved in the case, due to the likelihood of entrapment.¹³⁷

9. *Defendant's financial motivation.* If there is evidence that the defendant was primarily interested in the money, rather than committing the terrorist act for its own sake, this should weigh against a finding of predisposition in many cases. In nonterrorism entrapment cases, this has been considered an indicator that the defendant was predisposed to commit the crime.¹³⁸ In terrorism cases, however, if the defendant's primary motivation appears to be financial, this raises two questions.

First, is the defendant only cooperating with the informant's terrorist plans in order to reap financial awards? If so, this suggests that he is not predisposed to commit terrorism, but rather finds it hard to turn down an opportunity to make money.¹³⁹ This appears to have been the case with Sami Hassoun, for example, as discussed below.¹⁴⁰ Second, it also raises the question of whether the defendant is attempting to scam the informant out of his or her money, without actually committing the offense. For these reasons,

2011, 8:10 AM), <http://nymag.com/daily/intelligencer/2011/11/jose-pimentel-a-indeed.html>.

¹³⁵ Rashbaum & Goldstein, *supra* note 134.

¹³⁶ Jennifer Peltz, *Jose Pimentel Informant Has Own Legal Woes: Attorney*, HUFFINGTON POST (Nov. 23, 2011, 9:14 AM), http://www.huffingtonpost.com/2011/11/23/jose-pimentel-informant-h_n_1109806.html.

¹³⁷ Rashbaum & Goldstein, *supra* note 134.

¹³⁸ *United States v. Navarro*, 737 F.2d 625, 635 (7th Cir. 1984) (including as one of the five predisposition factors "whether the defendant was engaged in criminal activity for a profit") (internal citation omitted).

¹³⁹ Benjamin Weiser, *Citing Terror Defendants' Motivation, Judge Shows Sentencing Leniency*, N.Y. TIMES, Nov. 23, 2012, at A27 ("At Mr. Issa's sentencing [for a terrorist offense involving a drug deal in Africa], one of his lawyers, Julia L. Gatto, a federal public defender, told [federal district court] Judge Jones that the Malian ambassador to the United States had remarked to her after visiting her client in jail: 'If your country is going to come to my country and offer our young men lots of money to transport drugs or do things criminal, you'd better tell your country to build a lot more prisons, because we are very poor people and it is very hard to pass that up.'").

¹⁴⁰ See *United States v. McDavid*, 396 F. App'x 365, 369 (9th Cir. 2010) ("The third factor is whether there was a profit motive. . . . McDavid seemed motivated by a strongly held anarchic ideology, which is arguably a stronger indicator of predisposition than a profit motive.").

a primarily financial motivation should weigh against predisposition, at least in cases involving crimes, such as terrorist attacks, which ordinarily would never be committed except for ideological reasons.¹⁴¹

When the informant gave Cromitie a camera to engage in surveillance of potential sites for their attack, Cromitie promptly sold the camera for \$50.¹⁴² Ahmed Ferhani, who had led the informant to believe he was buying guns to supply to terrorists, was arrested as the purchase took place. In fact, he was considering selling them for a profit—to non-terrorists.¹⁴³ While being arrested on terrorism charges, he received his first call from a potential buyer.¹⁴⁴ As in the *Pimentel* case, the investigation of Ferhani was so problematic that the FBI reportedly refused to get involved in the case.¹⁴⁵

In the Liberty City Seven case, which involved an alleged plot to bomb the Sears Tower, the informant offered the defendants \$50,000 if they would carry out an attack. One of the defendants, a man described as a “natural-born bullshitter and hustler” who was “recorded in conversation after conversation asking how soon he’ll have the cash,” told the court that he was trying to swindle the informant out of the money.¹⁴⁶

10. *Informant payments/bonus.* If the informant was paid by the government, paid a bonus if a conviction was successfully obtained, or achieved the dismissal of criminal or other charges for his or her services, this gave the informant a strong incentive to successfully induce individuals to commit crimes.¹⁴⁷ This information is not always publicly available, but

¹⁴¹ However, in prosecutions of those potentially well-placed to help terrorists (such as weapons dealers) for crimes other than attacks, a financial motivation should not necessarily count against predisposition. Arguably, in such cases a financial motivation should not weigh in favor of predisposition either, because, as argued below, the predisposition should be reworked so that it is based on the realistic likelihood of the defendant committing similar offenses, rather than an abstract consideration of a defendant’s personal tendencies. The fact that a drug or weapons dealer, already in the business of making money through these sales, had a financial motivation to commit a crime, really tells us little or nothing about whether he or she would have been likely, in the real world, to commit a terrorism offense on his or her own.

¹⁴² Petra Bartosiewicz, *To Catch a Terrorist: The FBI Hunts for the Enemy Within*, HARPER’S MAG., Aug. 2011, at 37, 44.

¹⁴³ John Knefel, *Did the NYPD Entrap Ahmed Ferhani?*, THE NATION, Mar. 5, 2013, at 18, 21.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 18 (noting that the investigations were “based on a premise so shaky that the FBI—no stranger to dubious terror prosecutions—refused to get involved”).

¹⁴⁶ AARONSON, *supra* note 19, at 74–75, 83; Aaronson, *supra* note 34, at 40; Chuck Goudie, *Mission: Blow Up Sears Tower; Sentence: 13 Years*, ABC 7 CHICAGO (Nov. 20, 2009, 4:14 PM), <http://abc7chicago.com/archive/7129306>.

¹⁴⁷ *United States v. Gray*, 626 F. 2d 494, 499 (5th Cir. 1980), *cert. denied*, 449 U.S. 1091

when this factor is present, it raises the risk that the informant manipulated the defendant to concoct or complete the plot. Though this factor is not commonly considered by courts, some courts have dismissed cases in which the informant was promised a bonus upon convicting a particular individual.¹⁴⁸

In one case, the informant was in jail on charges of molesting his stepdaughters when he contacted the FBI, telling them he had information on a plot by members of a right-wing militia.¹⁴⁹ In truth, there was no plot as such, only occasional discussions on a web forum about the desirability of sparking an antigovernment uprising by assassinating federal officials.¹⁵⁰ The informant, released from jail on the FBI's behest, began posting on the website, urging the participants to put their ruminations into action.¹⁵¹

Once the informant finally got them to meet in person and discuss their ideas, the defendants were arrested, and the informant's charges were dropped.¹⁵² In this case, the informant's strong motivation to generate a conviction lends greater credibility to the claim that he manufactured a crime. In a number of other cases, the FBI paid informants significant salaries, even amounting to hundreds of thousands of dollars, as well as arranging for prosecutors to drop various types of criminal and immigration charges.¹⁵³

Some courts have considered whether the government's "sole motive was to obtain a conviction" as a factor in the outrageous government conduct analysis.¹⁵⁴ Although this may well be an appropriate question for courts to consider, we do not include it as an indicator. This is because it calls for a broad conclusion about the government's motives rather than a specific factual characteristic of the case. Many of the twenty indicators, if present in

(1981) (describing "high informant fees" as "suspect," but reserving dismissal for cases in which the fee would only be paid for conviction of a particular defendant); *State v. Glosson*, 462 So. 2d 1082, 1085 (Fla. 1985) (describing a great "potential for abuse" when the informant "had an enormous financial incentive not only to make criminal cases, but also to color his testimony or even commit perjury in pursuit of the contingent fee").

¹⁴⁸ See *Glosson*, 462 So. 2d at 1085.

¹⁴⁹ See Junod, *supra* note 62.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ For example, in the *Hayat* case, the informant was allegedly paid \$250,000. Randal C. Archibold, *Diverging Views of Californian at Terror Trial*, N.Y. TIMES, Feb. 17, 2006, at A14.

¹⁵⁴ *United States v. Gardner*, 658 F. Supp. 1573, 1579 (internal citation omitted) (W.D. Pa. 1987); see also *Sorrells v. United States*, 287 U.S. 435, 442 (1932) (finding the defense of entrapment is available when government officials "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute").

a case, will suggest that the government's (or the informant's) main motivation was to obtain a conviction rather than protect the public.¹⁵⁵

F. INDICATORS DERIVED FROM TERRORISM CASES

The second ten indicators were derived from recurrent features of some of those terrorism cases most commonly criticized as possible entrapment. The first four indicators relate to problematic aspects of the informant's or the government's behavior in a case. The next three indicators involve questionable circumstances regarding the initial targeting of the defendant for inducement. The final three are characteristics of the defendants that raise the risk that entrapment or outrageous government conduct occurred.

1. Problematic Informant or Government Practices

11. *Informant's characteristics.* If there is something suspect about the informant as an individual, such as his personal history or his behavior in the case, which casts doubt on his reliability or shows his predilection towards manipulating others, this should weigh against a finding of predisposition. Since this raises the risk that the informant manipulated the defendant into doing something he or she would never have done independently, it suggests that the policy reasons underlying the entrapment defense may have been violated.

In some cases, the informant is known as a highly charismatic person.¹⁵⁶ This raises the risk that the informant manipulated the defendant into engaging in a terrorist action, even though he otherwise would not have done so. For example, the informant Brandon Darby, a charismatic leftist activist known for his heroics in post-Katrina New Orleans, has been accused of entrapping two much younger men, whom he persuaded to accompany him to protest at the Republican National Convention in Minneapolis.¹⁵⁷ Even if he did not suggest the precise crime the young men are accused of committing

¹⁵⁵ Arguably, if a defendant would have never committed a terror offense without government inducement, then there would be no conceivable public safety motive for inducing the defendant, leaving the bare desire for a conviction as the most plausible motivation. The only exception to this might be the goal of creating general deterrence against would-be terrorist conspirators (which raises its own practical and ethical questions). *See generally* Anthony M. Dillof, *Unraveling Unlawful Entrapment*, 94 J. CRIM. L. & CRIMINOLOGY 827 (2004); Norris, *supra* note 78.

¹⁵⁶ *See* Barnard, *supra* note 107 (describing the informant in the *Hayat* case as a "charmer").

¹⁵⁷ Josh Harkinson, *How a Radical Leftist Became the FBI's BFF*, MOTHER JONES, Sept./Oct. 2011, at 48, 49–50.

(building and planning to use Molotov cocktails), his constant stream of rousing, ultra-radical rhetoric appears to have goaded them into action.

Likewise, if the informant had previously committed fraud or other crimes of dishonesty, this raises the risk that the informant lied to government handlers, portraying the case as more worthy of investigation and inducement than it really was. It also increases the possibility that the informant's testimony is perjured. Several of the informants in major cases have been convicted for fraud (the informants Shaheed Hussain,¹⁵⁸ Mohamed Alanssi,¹⁵⁹ and Shaquille Azir,¹⁶⁰ for example). Another informant continued working for the FBI even after he was found to be lying to the government and failed a lie detector test.¹⁶¹ Robert Childs, a convicted rapist and child molester, was hired by the FBI to serve as an informant in the cases of Abu Khalid Abdul-Latif and Walli Mujahidh, even though Childs had once allegedly stolen thousands of dollars from Abdul-Latif, and even tried to steal Abdul-Latif's wife.¹⁶² Critics, such as former FBI agent Michael German, have noted that the informants often seem to be more dangerous than those they are compensated for ensnaring.¹⁶³

12. *Informant-provided employment or housing.* If the informant provided an unemployed or impoverished defendant with a job, or a homeless defendant with a place to stay, this increases the likelihood that the defendant would not have otherwise committed a terrorist offense. A penniless or homeless person would normally not be in a position to engage in terrorism.¹⁶⁴

¹⁵⁸ United States v. Cromitie, No. 09 CR. 558 (CM), 2011 WL 1842219, at *24 (S.D.N.Y. May 10, 2011), *aff'd*, 727 F.3d 194 (2d Cir. 2013) (reviewing trial evidence about dozens of lies Hussain told to courts, various government agencies, his hotel customers, and the FBI).

¹⁵⁹ William Glaberson, *Terror Case Hinges on a Wobbly Key Player*, N.Y. TIMES, Nov. 27, 2004, at A1 (discussing Alanssi's fraud conviction).

¹⁶⁰ See Erdely, *supra* note 5, at 71 (discussing Azir's history of fraud).

¹⁶¹ AARONSON, *supra* note 19, at 61–62.

¹⁶² Trevor Aaronson, *After Child Rape Conviction, Man Became an FBI Informant and then Committed Crime Again in Florida*, NAPLES DAILY NEWS (Dec. 29, 2014, 5:34 PM), http://www.naplesnews.com/news/crime/after-child-rape-conviction-man-became-an-fbi-informant-and-then-committed-crime-again-in-florida_06700209.

¹⁶³ German, *supra* note 2, at 54 (“[M]any of these frightening plots were almost entirely concocted and engineered by the FBI itself, using corrupt agents provocateurs who often posed a far more serious criminal threat than the dimwitted saps the investigations ultimately netted.”).

¹⁶⁴ The Seventh Circuit's “positional” predisposition test incorporates such factors, determining whether, as a practical matter, a defendant was “in a position without the government's help to become involved in illegal activity.” United States v. Hollingsworth, 27 F.3d 1196, 1200 (7th Cir. 1994).

In such cases, given that informants have strong incentives to help secure convictions, it is likely that the informant provided the job or housing to increase the likelihood of successfully inducing the defendant. It is also possible that the informant used the housing or job to manipulate the defendant, by threatening termination or eviction upon refusal to participate in the offense.

After the defendants in the Cleveland Five case said they were not interested in buying bombs since they had no money, the informant gave them full-time jobs,¹⁶⁵ apparently so that they could afford the explosives and thus participate in the informant's plot to bomb a bridge. As mentioned earlier, the informant threatened to fire one of the defendants if he backed out of the plot.¹⁶⁶ In another example, an informant provided Derrick Shareef, who was practically homeless when the two met, with a place to stay, enabling him to participate in a plot.¹⁶⁷

13. *Informant use or provision of alcohol or drugs.* If the informant used alcohol or drugs with the defendant, or provided the defendant with alcohol or drugs, this can suggest that the informant was attempting to render the defendant easier to induce, or prompt the defendant to make statements that could later be used as predisposition evidence.¹⁶⁸

In the Cleveland Five case, the informant gave the defendants large amounts of alcohol and illegal drugs over a significant time period. Specifically, the informant provided them with a constant supply of beer throughout the workday, and marijuana and prescription medications after work.¹⁶⁹ This suggests that he was using the substances to manipulate the defendants or cloud their judgments. In another example, the undercover police officers accused of entrapping the NATO 3 repeatedly supplied them with alcohol, perhaps to get them talking about potential illegal plans.¹⁷⁰

In addition, José Pimentel, the mentally ill convert to Islam who agreed to construct bombs for a terrorist attack, allegedly smoked marijuana with the

¹⁶⁵ See Erdely, *supra* note 5, at 74.

¹⁶⁶ *Id.* at 75.

¹⁶⁷ See AARONSON, *supra* note 19, at 168; German, *supra* note 2, at 55.

¹⁶⁸ In one case, the Eighth Circuit frowned upon, without creating an explicit rule against, an informant's use of marijuana with the defendant. *United States v. Lard*, 734 F.2d 1290, 1297 (8th Cir. 1984) ("The government agents' overzealous efforts to instigate crime also involved rather extreme and questionable measures—including the smoking of marijuana—to gain Lard's confidence and lure him into committing a crime he was not otherwise ready and willing to commit.").

¹⁶⁹ See Erdely, *supra* note 5, at 74.

¹⁷⁰ *FREE THE NATO 3*, *supra* note 113 (summarizing opening statements in the trial, which was held in late January 2014).

NYPD informant in the case.¹⁷¹ Some of their recorded conversations seem to have taken place while Pimentel was under the influence of the drug,¹⁷² and these conversations may have created the foundation for a finding of predisposition. It seems questionable, to say the least, to rely on a defendant's speech while he or she was intoxicated to rebut an entrapment defense, particularly when the informant was himself a participant in (or the instigator of) the drug use.

14. *Suspect evidentiary practices.* If the informant or law enforcement engaged in a practice that seems aimed at manipulating the evidence to undermine an entrapment defense, this should weigh against a finding of predisposition. In such a case, it is often reasonable to suspect that the informant's government handlers coached the informant on ways to rebut the entrapment defense, by pressuring the defendant to make statements or engage in other activities that could be later used to prove predisposition. Such practices, while not dispositive, are highly suspect, casting doubt on both the integrity of government's prosecution of the case and the defendant's predisposition.¹⁷³ If the defendant was in fact predisposed to commit terrorist crimes, there would be no need to engage in these practices. When particularly serious, evidentiary manipulation might provide the foundation for an outrageous government conduct defense.

In some cases, informants have engaged in rather transparent attempts to cultivate predisposition evidence. For example, in the Fort Dix Five case, which involved a plot to attack U.S. soldiers in New Jersey, the informant repeatedly prompted the defendants to download jihadi videos, which the prosecution would later use to try to indicate predisposition.¹⁷⁴ The informant even provided one defendant with equipment to download the videos.¹⁷⁵ In another case, the undercover FBI agent led the informants in swearing an oath

¹⁷¹ Rashbaum & Goldstein, *supra* note 134 (“And Mr. Pimentel, several of the people said, also smoked marijuana with the confidential informant, and some recordings in which he makes incriminating statements were made after the men had done so.”).

¹⁷² *Id.*

¹⁷³ This assumes, of course, that these tactics are more common in cases in which the government is concerned about an entrapment defense, rather than universally applied strategies. But there is no indication from our research that these practices are universal.

¹⁷⁴ Paul Harris, *Fort Dix Five: ‘If They Did Something, Punish Them. But They’re Innocent Kids’*, THE GUARDIAN (Nov. 16, 2011, 12:34 EST), <http://www.theguardian.com/world/2011/nov/16/fbi-fort-dix-five> (“[The defendants] also claim almost all of the jihadi videos used by the prosecution were downloaded at the instigation of [the informant] Omar.”).

¹⁷⁵ Ian Lustick, *Fort Dix and Colorado: Pre-emptive Pre-emption in the War on Terror*, PSYSR BLOG (Dec., 24, 2008), <http://www.psyr.org/blog/2008/12/24/fort-dix-and-colorado-pre-emptive-pre-emption-in-the-war-on-terror/> (mentioning that the informant provided them with equipment for downloading the videos).

to Al Qaeda. However, at least one defendant testified that he did not know what he was saying and did not understand the agent's pronunciation of the words Al Qaeda.¹⁷⁶

Another critical evidentiary issue is the informant's failure to record particularly important conversations, the content of which would be important for determining whether the informant radicalized, pressured, or badgered the defendant. The absence of such recordings does not prove nefarious motives or the presence of entrapment. But given the staggering amount of surveillance that is available, the failure to record the most important meetings raises reasonable questions about the strength of the government's case. Aaronson has documented that in a number of cases, the initial several conversations between the informant and the defendant—when persuasion, radicalization, or promise of large material rewards might have occurred—are left unrecorded.¹⁷⁷ As mentioned earlier, longtime FBI agent James Wedick has lent credence to critics' suspicions about this practice.¹⁷⁸

2. *The Initial Targeting of the Defendant*

15. *Defendant targeted for invalid reason.* If a defendant is chosen for inducement (whether by the government or the informant acting independently) for a reason that is shown to be factually incorrect, this should weigh in favor of entrapment or the outrageous government conduct defense. Many cases note that the government should not be in the business of tempting law-abiding citizens who are peacefully minding their own affairs.¹⁷⁹ Invalid justifications for initial targeting decisions might implicate due process rights, if law-abiding individuals have a right not to be coaxed into offenses. In any case, targeting a person for an invalid reason offends the underlying policy concerns behind entrapment doctrine, because if there is

¹⁷⁶ Christine Kearney, *U.S. Doctor Pledged to Al Qaeda for Jihad: Prosecutor*, REUTERS (May 15, 2007), <http://www.reuters.com/assets/print?aid=USN1519624120070516>.

¹⁷⁷ AARONSON, *supra* note 19, at 181–99.

¹⁷⁸ *Id.* at 195.

¹⁷⁹ *Sorrells v. United States*, 287 U.S. 435, 441 (1932) (“It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation Such a gross abuse of authority given for the purpose of detecting and punishing crime, and not for the making of criminals, deserves the severest condemnation”); *United States v. Twigg*, 588 F.2d 373, 381 (3d Cir. 1978) (“This egregious conduct on the part of government agents generated new crimes by the defendant merely for the sake of pressing criminal charges against him when, as far as the record reveals, he was lawfully and peacefully minding his own affairs.”).

no good reason for targeting an individual, this suggests that the person would have been unlikely to commit a similar crime on his or her own.

As an example, the sting operation involving the loan to pizza shop owner Mohamed Hossain appears to have been conceived solely to target his imam, Kurdish refugee Yassin Aref, whose name had been found in a notebook in Iraq next to the work “kak.”¹⁸⁰ In Arabic, “kak” means commander, ostensibly leading the FBI to suspect that Aref may have had a leadership role in some terrorist group.¹⁸¹ In fact, “kak” in Kurdish simply means “brother” and is commonly used as an honorific in that language.¹⁸² No reasonable grounds for Aref’s or Hussain’s targeting have ever been disclosed.

In the *Lakhani* case, the investigation began only because the informant, whom the FBI had previously labeled as “untrustworthy,” told the FBI outlandish lies about Lakhani’s extensive illegal arms sales, and his hundreds of millions of dollars of wealth.¹⁸³ In fact, Lakhani was a low-income, failed businessman with no prior involvement in terrorism, who had only overseen a small number of minor—and completely legal—arms sales.¹⁸⁴ It is difficult to conceive of a defensible reason for targeting such a man.

16. *Defendant targeted for protected speech.* If the informant targeted a defendant primarily for engaging in protected speech, such as voicing support for some terrorist group, this raises the question of whether the informant persuaded the defendant to engage in terrorism even though he would have never done so otherwise. At least in the United States, the number of individuals with pro-terrorist views is far higher than the (extremely small) number of attacks, making the likelihood of a particular terrorism-sympathizer committing an attack incredibly low.¹⁸⁵ Individuals targeted

¹⁸⁰ AARONSON, *supra* note 19, at 121.

¹⁸¹ *Id.*

¹⁸² *Id.*; Marc Santora, Key Evidence Cast in Doubt On a Claim Of Terrorism, N.Y. TIMES, Aug. 18, 2004, available at <http://www.nytimes.com/2004/08/18/nyregion/key-evidence-cast-in-doubt-on-a-claim-of-terrorism.html>. Aref may also have been targeted because the government had mistaken him for an Al Qaeda member named Mohammed Yassin. See DOWNS & MANLEY, *supra* note 56, at B-7.

¹⁸³ United States v. Lakhani, 480 F.3d 171, 174, 176 (3d Cir. 2007) (noting that the informant had previously been “let go” from government service because he was found to be “untrustworthy”); AMITAVA KUMAR, A FOREIGNER CARRYING IN THE CROOK OF HIS ARM A TINY BOMB 37–38 (2010).

¹⁸⁴ *Lakhani*, 480 F.3d at 174 (stating that Lakhani had been engaged in legitimate arms deals); KUMAR, *supra* note 183, at 37–38, 42; Ronald Smothers, *Man Pleads Not Guilty in Plot to Sell Missiles for Terror Use*, N.Y. TIMES, Jan. 10, 2004, at B6 (Lakhani’s attorney stating that Lakhani’s only previous arms deal involved a single armored personnel carrier).

¹⁸⁵ See generally United States v. Cromitie, 727 F.3d 194, 229 (2d Cir. 2013) (Jacobs, C.J., dissenting) (“It therefore is not enough to infer a formed design to commit an act of terror from

solely for their ideological views, with no indication they were planning a terrorist offense, would have been extremely unlikely to commit an attack on their own. Such cases thus offend the policy rationale behind the entrapment doctrine.

For example, Antonio Martinez, a young convert to Islam, was approached by informants after making vague, militant-sounding posts on Facebook (which were devoid of any specific threats).¹⁸⁶ He later agreed to plant a car bomb, though he first had to practice driving, with which he had little experience.¹⁸⁷ Extreme political speech might, under some circumstances, reasonably prompt authorities to place an individual under surveillance. Yet it is hard to understand why such speech alone, in the absence of any planning or intention to engage in terrorism, merits as expensive and intrusive an intervention as a sting operation.¹⁸⁸

For this reason, being targeted for inducement solely because of protected speech should weigh against predisposition. In terms of the five-factor predisposition test used by many courts, this issue could be considered under the “defendant’s character or reputation” factor (since one’s ideological sympathies can be understood as an aspect of one’s character).¹⁸⁹ However, targeting an individual for protected speech alone may fit more comfortably into the outrageous government conduct defense. This would particularly be the case if courts were ever to find that targeting an individual for inducement based on protected speech alone violates the individual’s constitutional rights.

17. *Defendant targeted despite lack of terrorist sympathies.* In some cases, the defendants targeted by informants already had pro-terrorist views.¹⁹⁰ However, there are a number of cases in which there is no evidence

a sense of grievance or an impulse to lash out. These disquiets are common, and in most people will never combust.”); KURZMAN, *supra* note 71, at 29–35 (accounting for the low number of terror attacks, despite a significant amount of sympathy for some terrorists, in part with reference to a “radical sheik” phenomenon, analogous to the ubiquitous Che Guevara imagery, in which many voice support for extremist views while doing nothing about them); Norris, *supra* note 78 (arguing that a pro-terrorist sympathizer in the US who has not already begun to plan an attack is extremely unlikely to ever engage in terrorism).

¹⁸⁶ AARONSON, *supra* note 19, at 20.

¹⁸⁷ *Id.* at 21–22. Martinez’s lack of driving skills casts at least some doubt on his ability to carry out a terrorist attack without government assistance.

¹⁸⁸ See Arax, *supra* note 3, and accompanying text.

¹⁸⁹ This argument runs counter to the tendency of some courts to allow expressions of sympathy for terrorism to be the sole evidentiary basis for a jury’s finding that a person was predisposed beyond a reasonable doubt. Yet sympathy with terrorism alone is such a poor predictor of terrorist activity that it should be insufficient to establish predisposition as a matter of law. See generally Norris, *supra* note 78.

¹⁹⁰ *Cromitie*, 727 F.3d at 212; AARONSON, *supra* note 19, at 10, 184–85, 212.

at all the defendant approved of terrorism, or in which there is evidence that the defendant actually opposed terrorism. There is no legitimate law enforcement purpose for convincing a person without terrorist sympathies to engage in terrorism.¹⁹¹ The likelihood that a particular person with no history of involvement in terrorism, no plans to commit terrorism, and no ideological support for terrorism would commit a terrorist attack without government inducement must be infinitesimally small. Besides supporting the outrageous government conduct defense, this factor should weigh against, and perhaps preclude, a finding of predisposition, at least regarding the crime of planning a terrorist attack.

In the case of Sami Hassoun, there is no indication that he ever had any sympathy for jihadi terrorism, before or after the informant befriended him. His alleged ideological motivations, which revolved around embarrassing the mayor of Chicago, have been aptly described as “fanciful,” and “obscure and unfocused.”¹⁹² Even the prosecution appeared to acknowledge his lack of jihadi ideology.¹⁹³ Hassoun seems to have been motivated mainly by a desire to please the FBI informant—who had become a father figure to him—and to collect the “millions” of dollars promised by the informant.¹⁹⁴ After Hassoun pled guilty, it was revealed that the FBI had been concerned during the investigation that the informant “is or is close to committing entrapment with Sami.”¹⁹⁵

Similarly, Yassin Aref and Mohammed Hossain were targeted for inducement despite the fact that neither ever expressed pro-terrorist views. On the numerous occasions that the informant mentioned violent jihad in his discussions with Hossain, Hossain always spoke against it.¹⁹⁶ Aref, who had

¹⁹¹ There is perhaps one potential exception: if someone is already well placed to help potential terrorists (such as a smuggler of humans or goods, a high-level drug dealer, or a globe-trotting arms trader), and it is important to send a message to people in such positions that dealing with terrorists will be caught and punished harshly. The propriety of sting operations in such cases may still be debatable, but that question is beyond the scope of this Article. See Laguardia, *supra* note 12, at 188 (arguing that “actual radicalization is a necessary aspect of involvement in terrorist activity.”).

¹⁹² Defendant’s Sentencing Memorandum at 16, 19–20, United States v. Hassoun, No. 10-cr-00773 (N.D. Ill. 2013).

¹⁹³ Government’s Sentencing Memorandum at 14–15, United States v. Hassoun, No. 10-cr-00773 (N.D. Ill. 2013) (acknowledging that Hassoun lacked a jihadist motivation).

¹⁹⁴ Defendant’s Sentencing Memorandum, *supra* note 192, at 20.

¹⁹⁵ *FBI: Informant Close to Entrapping Would-Be Bomber*, AP (Feb. 4, 2013, 8:39 PM), <http://bigstory.ap.org/article/fbi-informant-close-entrapping-would-be-bomber>.

¹⁹⁶ Defendant’s Memorandum, United States v. Aref, No. 04-CR-402, 2007 WL 4636585 (N.D.N.Y. 2007) (demonstrating that whenever the informant discussed terrorism, Hossain expressed his opposition to terrorism); United States v. Aref, No. 04-CR-402, 2007 WL 804814, at *7 (N.D.N.Y. Mar. 14, 2007) (concluding that Hossain acted out of greed, rather

far less contact with the informant, also argued against terrorism when the informant broached the topic.¹⁹⁷

G. CHARACTERISTICS OF THE DEFENDANT

The three last indicators—mental illness, youth, and underachiever profile—are similar in that they each constitute ways in which the defendant may have been vulnerable to manipulation by an informant. Of course, youth or mental illness alone does not establish entrapment or lack of predisposition. As with the other indicators, the presence of these indicators should not be viewed as definite proof that the defendants were entrapped, but rather as raising the risk that entrapment-type abuses occurred. Even so, we acknowledge that these three indicators may be weaker predictors of the presence of entrapment than many of the other indicators.¹⁹⁸

than any desire to support terrorism).

¹⁹⁷ As Yassin Aref recounts in his book:

Malik [the informant] secretly tape-recorded our conversations in connection with witnessing the loans, and he tried to draw me into general conversations about terrorism. I told him that I did not know anything about the organizations he claimed to support, and that I had come to this country to raise my family and be an Imam in peace. I said that I did not think violence would bring any benefit in this country, and that suicide bombing is not allowed in Islam; that Muslims in America should obey American law; and that if he wanted to help Muslims in foreign countries he should give his money to women and children who were homeless and without food or shelter, and that way he did not have to help terrorists or other political groups. Malik's statements were just general talk, and he never gave any explanations or details about a specific plot, or asked me to participate in anything illegal. All of the statements, secretly recorded, are part of the record of the trial, and prove I did nothing wrong.

YASSIN AREF, *SON OF MOUNTAINS: MY LIFE AS A KURD AND A TERROR SUSPECT*, at xiv (2008).

¹⁹⁸ In addition, critics might object to these indicators because mental illness, youth, or underachiever status might actually predict terrorist involvement. We would respond to such an objection as follows: While some research suggests that terrorists tend to be young, and that certain types of terrorists are somewhat more likely to be mentally ill or to be loners (a category that overlaps with that of the underachiever), the vast majority of young people, mentally ill people, and loners never get involved in any terrorist activity. RAMÓN SPAALJ, *UNDERSTANDING LONE WOLF TERRORISM* 2, 50–51, 83 (2012) (noting that lone-wolf terrorists are relatively likely to have mental illnesses or personality disorders, or to be socially-isolated); Gary LaFree & Gary Ackerman, *The Empirical Study of Terrorism: Social and Legal Research*, 5 *ANN. REV. L. & SOC. SCI.* 347, 351 (2009) (indicating that terrorism is disproportionately perpetrated by young men). Thus, to the extent that these factors predict terrorism at all, they are extremely weak predictors. It is safe to say that less than one in a hundred thousand young people, mentally ill people, or loners in the U.S. ever come close to committing a terrorist attack. *See infra* Part V.C (concluding that only about thirty defendants in jihadi terrorism cases since 9/11 appear to have been real security threats); *Deadly Attacks Since 9/11*, *NEW AM. FOUND.*, available at <http://securitydata.newamerica.net/extremists/deadly-attacks.html> (listing the deadly terror attacks that have occurred since 9/11, involving a total of forty-three perpetrators). In contrast, if an informant persuaded a law-abiding individual to become involved in terrorism, the fact that the defendant was young, mentally

18. *Mental illness.* If the defendant suffers from a mental illness or impairment, this can potentially raise the risk of entrapment. This would be the case, for example, if a mental illness renders the defendant unable to conceive of or carry out a terrorist attack, or makes the individual more vulnerable to manipulation by the informant. Serious mental illness often impairs daily functioning to the extent that participation in planning a terrorist attack would not be possible. Mental illnesses and intellectual disabilities can also increase suggestibility,¹⁹⁹ making it easier for informants to manipulate individuals to agree to participate in crimes they would not have committed on their own.

As an illustration of lack of functionality, one of Cromitie's codefendants, a paranoid schizophrenic from Haiti, was found with bottles of urine in his room, as he was too afraid to walk across the hall to use the restroom.²⁰⁰ He also believed that Florida was a foreign country, was described as illiterate and "mildly retarded," and had been adjudicated too insane to be deported.²⁰¹ It is difficult to imagine such a person either being recruited by a real terrorist, or committing a terrorist attack on his own. Several other terrorism defendants have suffered from schizophrenia or other major psychiatric disorders.²⁰²

ill, or an underachiever significantly raises the chance that the person was easier to manipulate because of their vulnerable social position. As Human Rights Watch put it in its report, "While it is true that young men and individuals with mental or intellectual disabilities have, on occasion, been involved in terrorism, and therefore cannot be ruled out for investigation, there are special concerns when highly aggressive and invasive police tactics are used on such vulnerable people." HUMAN RIGHTS WATCH, *supra* note 54, at 56.

¹⁹⁹ Solomon M. Fulero & Caroline Everington, *Mental Retardation, Competency to Waive Miranda Rights, and False Confessions*, in INTERROGATIONS, CONFESSIONS AND ENTRAPMENT 163, 170–71 (Daniel Lassiter ed. 2004) (reviewing research demonstrating that mental retardation is associated with greater suggestibility); GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS 372–73 (2003) (finding that paranoid people are more likely to comply with requests from others).

²⁰⁰ Michael Wilson, *In Ex-Convicts' Bomb Case, Steps and Missteps, on Tape*, N.Y. TIMES, May 22, 2009, at A1; *Entrapment or Foiling Terror? FBI's Reliance on Paid Informants Raises Questions about Validity of Terrorism Cases*, DEMOCRACY NOW (Oct. 6, 2010), www.democracynow.org/2010/10/6/entrapment_or_foiling_terror_fbis_reliance.

²⁰¹ Carrie Melago et al., *Newburgh Neighbors Stunned as Cops See Enough Hate to Kill*, N.Y. DAILY NEWS, May 22, 2009, at 5; Paul Harris, *Newburgh Four: Poor, Black, and Jailed Under FBI 'Entrapment' Tactics*, GUARDIAN (Dec. 12, 2011, 11:39 EST), <http://www.theguardian.com/world/2011/dec/12/newburgh-four-fbi-entrapment-terror>; Graham Rayman, *The Alarming Record of the FBI's Informant in the Bronx Bomb Plot*, VILLAGE VOICE (July 8, 2009), <http://www.villagevoice.com/news/the-alarming-record-of-the-fbis-informant-in-the-bronx-bomb-plot-6391427>.

²⁰² See HUMAN RIGHTS WATCH, *supra* note 54, at 31 (describing Cromitie's history of hallucinations, and the mental illnesses of terrorism defendants Rezwana Ferdaus, James Elshafay, and Jeffrey Battle); Lisa Fernandez, *Documents: Alleged San Jose Bomber Suffers*

19. *Youth*. If the defendant is young, this raises the question of whether the government took advantage of an impressionable youth.²⁰³ This is particularly noteworthy when the informant is considerably older, and holds himself out as wealthy and successful. In the case of twenty-two-year-old Matin Siraj, the informant was over twice Siraj's age, described himself as a nuclear engineer from a prominent Egyptian family, and, as noted above, attempted to radicalize Siraj.²⁰⁴ For the purposes of coding, we classified anyone age twenty-four or younger as "young."

20. *Underachiever profile*. In a number of the most compelling examples of possible entrapment in terrorism prosecutions, the defendant fits a similar underachiever profile: a passive and unaccomplished man, often virtually penniless and living with his parents, who is befriended and then induced into a terrorist offense by a paid informant.²⁰⁵ The frequency of this pattern invites a reasonable suspicion that informants are targeting the most impressionable and weak-minded individuals for inducement, rather than those who are likely to commit the offense on their own.²⁰⁶ Judge Richard Posner of the Seventh Circuit, in his well-known opinion in *United States v. Hollingsworth*, described entrapment as occurring when officials "create the offense by exploiting the susceptibility of a weak-minded person."²⁰⁷

When the defendant's history and behavior show him or her to be a passive individual with little self-initiative, or easily influenced by others, this should weigh in favor of entrapment, or against predisposition.²⁰⁸ In any case, if these characteristics lower the risk that the individual would ever

From Mental Illness, NBC BAY AREA (Feb. 8, 2013, 5:04 PM), <http://www.nbcbayarea.com/news/local/Documents-Alleged-San-Jose-Bomber-Suffers-From-Mental-Illness-190471061.html>.

²⁰³ *Miller v. Fenton*, 796 F.2d 598, 606 (3d Cir. 1986) (noting that "a very young, uneducated or weak-minded" individual could be more susceptible to interrogation than a mature person who possesses normal intelligence and at least some secondary education); DAVID ALTSCHULER ET AL., CTR. FOR JUVENILE JUST. REFORM & THE JIM CASEY YOUTH OPPORTUNITIES INITIATIVE, SUPPORTING YOUTH IN TRANSITION TO ADULTHOOD JUSTICE 40 (2009) ("In national opinion polls, when asked at what age children are self-sufficient, the average response is usually around age 24.").

²⁰⁴ BROWN, *supra* note 101, at 124–25; DEMOCRACY NOW, *supra* note 200.

²⁰⁵ AARONSON, *supra* note 19, at 11, 234–35.

²⁰⁶ *United States v. Hollingsworth*, 27 F.3d 1196, 1203 (7th Cir. 1994)

²⁰⁷ *Id.*

²⁰⁸ Some have suggested that a person susceptible to informant manipulation could potentially be recruited by real terrorists, a question that deserves in-depth scrutiny. *See United States v. Cromitie*, 727 F.3d 194, 207–08, 210 n.13 (2d Cir. 2013); *see Norris, supra* note 78. It should suffice to mention now that such a view mistakenly assumes the debatable proposition that real terrorists are interested in recruiting particularly passive, ineffectual and underachieving individuals.

commit an offense on his or her own, this implicates the policy rationale for the entrapment doctrine.

For example, Michael Curtis Reynolds, an unemployed forty-seven-year-old with mental problems who lived with his mother, shared his (unrealistic) dream of bombing the Trans-Alaska Pipeline on an internet forum.²⁰⁹ An FBI informant contacted him, offering him explosives and \$40,000, neither of which he stood any chance of acquiring on his own.²¹⁰

III. A DATABASE OF TERRORISM PROSECUTIONS

In order to estimate the prevalence of the entrapment indicators developed in Part II, this Part describes two new databases created by the authors. Previous databases of terrorism cases are not adequate for the purposes of this Article, since they are outdated and either underinclusive or overinclusive. One of the most comprehensive databases, including both convictions and open cases, was compiled by journalist Trevor Aaronson and others, in conjunction with the University of California-Berkeley's Investigative Reporting Program.²¹¹ This database, which was published on the *Mother Jones* website, built on the DOJ's list of terrorism-related convictions, adding more recent convictions that fit the DOJ's inclusion criteria. The database developed for this Article builds on *Mother Jones*'s by including more recent cases, excluding cases that are unrelated or only loosely related to terrorism, and adding cases not originally included in the database.

Mother Jones's database ends in 2011. We updated it by conducting news searches for terrorism arrests in Google News and LexisNexis. This ensured that any terrorism prosecution that began in or after 2011 would be included, as long as it was covered in at least one story in the news media. We also drew on more recent lists of terror attacks and convictions, such as those by the New America Foundation and Charles Kurzman, to avoid missing any cases.²¹² The advantage of using the New America Foundation's database is that, unlike *Mother Jones*'s, it included cases of right-wing terrorism. However, we excluded those cases in the New America Foundation's database in which the alleged perpetrator died before being

²⁰⁹ AARONSON, *supra* note 19, at 9–11.

²¹⁰ *Id.*

²¹¹ See Aaronson, *supra* note 34.

²¹² *Homegrown Extremism, 2001–2015*, NEW AM. FOUND., <http://securitydata.newamerica.net/extremists/analysis.html>; Charles Kurzman, *Muslim-American Terrorism*, CHARLES KURZMAN, <http://kurzman.unc.edu/muslim-american-terrorism/> (last visited Feb. 23, 2015).

prosecuted for the offense. Successful attacks were included, as long as the defendant survived the attack and was charged with an offense.

We excluded a number of cases that were included in the *Mother Jones* database. Since that database built on the DOJ's list of terrorism-related cases, it includes numerous cases with no apparent connection to terrorism, or which are only loosely or speculatively related. The DOJ even classified a case in which the defendants stole a truck full of corn flakes as terrorism-related, perhaps based on an initial belief in the investigation that the defendants (who have Arabic names) may have had some connection to terrorism.²¹³

Such cases were not included in our database, since the purpose of the database is to analyze terrorism convictions and prosecutions in progress, rather than any cases with speculative or tangential connections to terrorism. However, if an individual was charged with a terrorism offense but ultimately was only convicted of a nonterrorism crime, the individual was included in the database. Serious crimes apparently motivated by radical ideologies, such as attacks on police by antigovernment extremists, are included as well, even if authorities did not charge the individual with an offense containing the word "terrorism."

The reason for this is that the database is meant to include all cases involving crimes that fall within current definitions of terrorism, regardless of whether the specific charges contained references to terrorism as such.²¹⁴ A prosecutor may decide whether to employ a terrorism statute, as opposed to other statutes covering the same crime (such as arson or murder statutes), based on a number of considerations, such as the perceived seriousness of the crime, the desired sentence, the predicted difficulty of proving the elements of the offense, or a personal belief that a particular type of crime deserves to

²¹³ *Profiles: Hussein Abuali*, MOTHER JONES, <http://www.motherjones.com/fbi-terrorist/hussein-abuali-stolen-cereal> (last visited Feb. 23, 2015); see Laguardia, *supra* note 12, at 201 ("One audit found that almost no statistics compiled by DOJ's offices in regards to terrorism investigations had been compiled accurately. The audit found that the DOJ had massively under-reported the number of terrorism cases filed in 2002, while over-reporting (by approximately 50%) the number of cases filed in 2003 and 2004. Similar mistakes were found in the reporting of convictions and prosecutions in 2003 and 2004.").

²¹⁴ To accommodate the varying definitions of terrorism, cases were included in the database if they involved serious violent or property crimes committed for ideological reasons. This definition encompasses various crimes often described as terrorism in contemporary society, from environmentally motivated arsons to anti-abortion killings. By defining and using the term in this way, we are not necessarily endorsing the use of the term terrorism to describe all of these crimes. See *supra* note 24 and accompanying text.

be called terrorism.²¹⁵ Omitting cases in which prosecutors did not employ terrorism statutes would arbitrarily restrict the scope of the database.

We also added a number of cases that were not in the DOJ's original list and thus were also missing from the *Mother Jones* database. Curiously, although the government has commonly labeled actions carried out by Animal Liberation Front and Earth Liberation Front as "ecoterrorism,"²¹⁶ ALF- and ELF-related convictions do not appear in the DOJ's database. The same is true for other convictions often portrayed as terrorism but which pertain to left-wing or right-wing activists, rather than Muslims or other members of minority groups. These include, for example, cases in which activists protesting the Republican National Convention in Minnesota were threatened with terrorism charges for building and planning to use Molotov cocktails. Numerous cases of right-wing domestic terrorism associated with antigovernment militias and white supremacist groups, none of which appeared on the DOJ's list, were also included in our database.

In short, the full database includes all terrorism cases in the thirteen years since 9/11, regardless of the type of ideological motivation, while excluding cases with no direct connection to terrorism.²¹⁷ A total of 580 cases were identified meeting these criteria. The purpose of compiling a comprehensive database, rather than focusing solely on cases involving informants or undercover agents, is to produce a useful portrait of the entire field of terrorism cases. Among other things, this enables us to determine what proportion of the prosecutions involved an informant or undercover agent.

To apply the twenty entrapment indicators, we created a smaller database comprised only of those cases in which an informant or undercover agent played a role (n=317). In creating this database, we excluded cases in which an informant interacted with the defendant, or reported a tip to law enforcement, only after the offense had already been committed. Such cases might still be problematic for some reason—for example, a defendant might falsely claim to an informant that he committed some offense, leading to his

²¹⁵ For example, although Timothy McVeigh bombed a federal building with an ideological motive, one homeland security official opined that McVeigh was not a terrorist. POTTER, *supra* note 24, at 47. More generally, the government seems less inclined to label right-wing extremists as terrorists. *Id.* at 44–47.

²¹⁶ *The Threat of Eco-terrorism: Testimony Before the Subcomm. on Forests and Forest Health of the H. Resources Comm.*, 107th Cong. (2002) (testimony of James F. Jarboe, Domestic Terrorism Section Chief, FBI), available at <http://www.fbi.gov/news/testimony/the-threat-of-eco-terrorism>.

²¹⁷ Cases initiated in the court system after September 11, 2014 were not included.

prosecution—but not on account of entrapment or outrageous government conduct.

In order to code the cases, we reviewed court filings, court decisions, legal briefs, news articles, and any other available information regarding each case. Based on this information, we determined whether each indicator applied to the case, using the criteria for each indicator presented in Appendix A. It was not feasible to confine our analysis to facts that were proven at trial or through other official documentation, since few of these cases went to trial or have complete records available to the public.

Because some of these allegations may have been untrue or exaggerated, this coding methodology may overstate somewhat the presence of these indicators. However, this method is most consistent with the purpose of this project, which is to provide an estimation of the overall scale of potential entrapment abuses. It is also possible that the results understate the prevalence of the entrapment indicators, since in many of the cases, there is little or no information available regarding the role of the informant in the offense.

IV. RESULTS

This Part briefly describes the content of the database of post-9/11 terrorism prosecutions, and presents findings about the prevalence of the twenty indicators in those cases in which an informant or undercover agent played a role.

A. AN OVERVIEW OF THE DATABASE: DESCRIPTIVE STATISTICS

Types of terrorism offenses. The full database of post-9/11 terrorism prosecutions contains a total of 580 cases. Table 1 shows the relative frequency of each type of terrorist offense. The cases under “plotting a specific terrorist attack” exclude successful and attempted attacks. Attempted attacks do not include sting operations.

Table 1*Types of Terrorism Offenses in Post-9/11 Terrorism Cases (n=580)*

Type of Terrorism Offense	Percentage of Cases
Plotting a specific terrorist attack	29%
Successful attack	18%
Sending money or other items to terrorists	16%
Traveling abroad to join a terrorist group	9%
Other material support	8%
Training for terrorism on U.S. soil	7%
Arms transactions with terrorist groups	6%
Training for terrorism at foreign camp	5%
Involvement in terrorism abroad	4%
Drug transactions with terrorist groups	3%
Attempted attack	2%

Note: Total exceeds 100% due to rounding and presence of more than one type of charge in some cases.

Ideological motivations. Table 2 summarizes the religious or political ideologies motivating the 580 terrorism cases in the database. The largest proportion of cases (338 or 58%) involved jihadi terrorism. The second largest group (149 or 26%) involved right-wing terrorists, including neo-Nazis and other white supremacists, members of antigovernment militias, adherents of “patriot” or “sovereign citizen” ideology, and anti-abortion extremists.²¹⁸ Forty-four (8%) of cases were motivated by animal rights, environmental, or left-wing ideology. Twenty-eight (5%) concerned Colombian terrorist groups, with three-quarters of these offenses involving *Fuerzas Armadas Revolucionarias de Colombia* (FARC), and the remaining quarter related to right-wing paramilitaries designated as terrorist organizations under American law. Eighteen (3%) of the cases involved alleged South or East Asian terrorists, predominantly the Tamil Tigers of Sri Lanka.

²¹⁸ In addition, two defendants were associated with the Jewish Defense League, which we include in the right-wing category because of its nationalistic orientation.

Table 2*Ideological Motivations in Post-9/11 Terrorism Cases (n=580)*

Ideological Motivation	Percentage of Cases
Jihadi	58%
Right-wing	26%
Left-wing	8%
Colombia-related	5%
South Asian/East Asian-related	3%

The Use of Informants or Undercover Agents. Three hundred and seventeen (55%) of the cases involved an informant or undercover agent before or during the commission of the crime. All of these cases are included in the smaller database.

B. INDICATORS IN THE CASES WITH INFORMANTS OR AGENTS

Zero-scoring cases. Fifty-three of the 317 cases involving informants or government agents are not coded for any of the indicators of entrapment (“zero-scoring cases”). In many cases, this was because of a dearth of information on the role of the informant in the case. In other cases, this was due to the rather minor role of the informant. For example, the informant’s role was sometimes limited to communicating a tip to the authorities. In most of the analyses below, the zero-scoring cases are excluded, in order to focus on cases with sufficient information and nontrivial informant involvement.²¹⁹ However, statistics including zero-scoring cases are regularly provided in the text, in order to display the findings for the entire informant-related database.

Average number of indicators. Table 3 shows the average number of indicators of entrapment by ideological type of terrorism (with zero-scoring cases removed). The average number of indicators per case, overall, is 5.3. To break this down by ideological type, those accused of jihadi terrorism had an average of 6.3 indicators, alleged right-wing terrorists averaged 2.8, left-wing defendants averaged 10.2, Colombia-related defendants averaged 5.0, and alleged Asian terrorists had an average score of 2.1. (With the zero-scoring cases included, these averages are reduced to 4.4 for the whole database, 5.1 for jihadi cases, and 2.2 for right-wing cases.)

²¹⁹ It could be that the zero-scoring cases represent examples of informants being used appropriately. However, it is also possible that, if more information about the zero-scoring cases were available, these cases would on average score higher than the other cases, increasing the overall average number of indicators per case. It is thus unknown whether additional information about these cases would increase or decrease estimates of the strength of entrapment claims in the cases.

Confining the analysis to those cases in which there were specific plots to commit a terrorist attack, the average score is 8.1 for jihadi terrorism, 2.9 for the right-wing plots, and 10.2 for the leftist plots.²²⁰ This suggests that, for jihadi terrorism cases, the more serious cases were more likely to involve entrapment or borderline entrapment. The difference in the average score between jihadi cases not involving plots (5.2) and jihadi cases involving plots (8.1) is statistically significant (two-tailed *t*-test; $p < .0001$).²²¹

The two right-most columns in Table 3 show the average number of the core six indicators of entrapment (i.e., those at the core of prevailing entrapment doctrine) for all cases and for plots only. Whether focusing on all twenty indicators or only the core six, jihadi and left-wing cases featured a higher number of indicators than other cases. Because of the relative lack of information about many of the Asian, Colombian, and right-wing prosecutions, it is possible that this does not reflect underlying differences in the actual presence of entrapment abuses. Future work should analyze in more depth whether particular categories of terrorism appear to have more allegations of egregious abuses.

Table 3

Average Number of Entrapment Indicators by Ideological Type (n=264)

Terrorism Type	Average # of Indicators	Average # of Indicators, Plots Only	Average # of Core Six Indicators	Average # of Core Six Indicators, Plots Only
Jihadi	6.3	8.1	2.9	3.4
Right-wing	2.8	3.0	1.3	1.4
Left-wing	10.2	10.2	4.0	4.0
Colombian	5.0	N/A	3.0	N/A
Asian	2.1	N/A	1.0	N/A
All combined	5.3	6.3	2.5	2.6

Note: Zero-scoring cases were excluded.

High-scoring cases. The case with the most entrapment indicators, that of Sami Hassoun, had fifteen of the twenty indicators. Overall, 36 (14%) of the cases (or 11% if the zero-scoring are included) had ten or more indicators. Ninety-eight (37%) had seven or more indicators (31% including zero-

²²⁰ There are no zero-scoring cases among the left-wing, Asian, or Colombian cases. None of the Asian or Colombian cases involved plots, as that term is used in this Article.

²²¹ The same is true for the difference in mean indicators between plot (6.3 indicators) and non-plot (4.6 indicators) cases across all ideological types ($p < .001$; two-tailed).

scoring cases). It should be noted that 75% of the indicators for all the cases came from the first ten, case-law-derived indicators.

A more conservative estimate of potential entrapment would rely only on the six indicators at the core of entrapment doctrine.²²² The average number of core indicators by ideological type was presented in Table 3, and the prevalence of each of the six core indicators is shown in Table 4. The low percentage of cases coded for reluctance was due to the lack of specific facts in most cases about the defendant's reluctance per se. In contrast, there was often more ample information regarding the informant's efforts to pressure or persuade the defendant. Realistically, in any case in which pressure or persuasion was necessary, some degree of reluctance must have been present as well. Nonetheless, we only coded for reluctance when there were specific facts indicating a defendant's reticence to participate in (or attempt to back out of) a plot.

Table 4

Percentage of Cases with Each of the Core Six Entrapment Indicators
(*n*=264)

Core Six Entrapment Indicators	% of All Cases with the Indicator
1 No previous terrorism offenses or activity	63%
2 Government proposed the crime	50%
3 Informant pressure or persuasion	39%
4 Material incentive	31%
5 Defendant's reluctance	13%
6 Governmental control of the crime	51%

Note: Zero-scoring cases were excluded.

Additional data on the prevalence of the six core indicators are summarized in Table 5, in order to illustrate the number of cases with several of the core indicators. As shown, 50% of all cases had three or more of the core indicators, and 35% had four or more. (These figures drop to 41% and 29%, respectively, if zero-scoring cases are included.) For the jihadi cases, 62% had three or more core indicators (excluding zero-scoring cases).

Analyzing only cases involving specific plots to commit terrorist attacks (and excluding zero-scoring cases), 75% of jihadi cases have three or more of the core six indicators, 13% of the right-wing cases had three or more, and

²²² Factors 1–6 are the factors most commonly used by courts employing the prevailing subjective entrapment standard.

100% of left-wing cases had three or more.²²³ Fifty-one percent of the jihadi cases involving plots had four or more of the core six, and 62% of the left-wing cases (in all of which the defendants were charged with plotting attacks) had four or more.²²⁴

Table 5

*Prevalence of Six Core Entrapment Indicators by Type of Terrorism
(n=264)*

Terrorism Type	% with Three or More Core Indicators	% with Three or More Core Indicators, Plots Only	% with Four or More Core Indicators	% with Four or More Core Indicators, Plots Only
Jihadi	62%	75%	47%	51%
Right-wing	11%	13%	11%	13%
Left-wing	100%	100%	62%	62%
Colombian	70%	N/A	22%	N/A
Asian	5%	N/A	0%	N/A
All combined	50%	53%	35%	36%

Note: Zero-scoring cases were excluded.

An additional analysis that excludes well-known cases is also useful for advancing the argument of this Article that entrapment indicators are widespread among the cases, rather than being confined to a small number of extreme cases. Accordingly, Table 6 presents selected statistics comparing famous and non-famous cases. The most famous cases, most often cited as possible examples of entrapment, include the cases of James Cromitie,²²⁵ Hamid Hayat,²²⁶ Hemant Lakhani,²²⁷ the Fort Dix Five,²²⁸ the Liberty City Seven,²²⁹ and Yassin Aref and Mohammed Hossain.²³⁰

²²³ When zero-scoring plots are included, the percentages drop to 68% of jihadi cases and 11% of right-wing cases.

²²⁴ With zero-scoring cases included, the percentages decrease to 46% of jihadi cases and 11% of right-wing cases.

²²⁵ See *supra* text accompany notes 7–11.

²²⁶ See *supra* text accompanying notes 94–95.

²²⁷ See Bartosiewicz, *supra* note 127.

²²⁸ See Harris, *supra* note 174.

²²⁹ See AARONSON, *supra* note 19, at 74–75, 83; Aaronson, *supra* note 34; Goudie *supra* note 146.

²³⁰ See *supra* text accompanying notes 180–82.

These cases comprise twenty-two defendants, or 12% of the defendants accused of jihadi terrorism in cases involving informants. The famous cases average several more indicators than non-famous cases (11.1 versus 5.5), and they are much more likely to have three or more or four or more of the core six indicators (with all such differences statistically significant; $p = < .0001$, two-tailed). However, the famous cases do not represent most or all of the high-scoring cases: 70% of the cases with four or more of the core six indicators are not famous cases, and 77% of the cases with three or more of the core six indicators are not famous. Thus, a substantial majority of the highest-scoring cases are not well-known cases.

Table 6

Entrapment Indicators for Famous and Non-Famous Jihadi Cases (n=153)

Type of Case	Average # of All Indicators	% of Cases with Three or More Core Indicators	% of Cases with Four or More Core Indicators
Famous jihadi cases	11.1	100%	95%
Non-famous jihadi cases	5.5	56%	39%
All jihadi cases	6.3	62%	47%

Note: Zero-scoring cases were excluded.

V. DISCUSSION OF RESULTS

A. NUMBER OF INDICATORS PER CASE

The cases with the highest number of indicators have the greatest probability of involving entrapment, given the allegations about government or informant conduct in the case. However, it is also possible that some cases have relatively few indicators and yet present persuasive entrapment claims. In addition, some cases would likely have scored higher on the scale if more information had been available for this study. For example, if a defendant pleads guilty, the details of government inducement may never become public. There might also be cases in which the informant exerted an enormous amount of pressure on the defendant, but in which few of the other indicators are present. This does not mean it is a weak case: a single indicator alone could justify a finding of entrapment or outrageous government conduct, depending on the circumstances of the case.

Michael C. Reynolds's case scored for a moderate six indicators (and only two of the core six indicators), but the man's personal background—an unemployed loner, living with his parents, with a history of mental

problems—makes it very unlikely that he could have been resourceful enough to go through with his desire (stated in an online chatroom) to bomb the Trans-Alaska Pipeline, without an informant providing him with the means for the attack.²³¹ Despite the moderate number of indicators and his preexisting desire to commit an attack, it seems highly doubtful that the sting operation actually prevented a terrorist attack from occurring.

That said, this case appears less egregious than some other, higher-scoring cases (such as those of Cromitie,²³² Hassoun,²³³ Hayat,²³⁴ and Shareef²³⁵), in which the government's role in persuading or pressuring the defendant was much more extensive. Thus, while the moderate number of indicators may understate the degree to which the *Reynolds* case violates the policies underlying the entrapment defense, it appropriately serves to distinguish the case from more extreme cases.

It is also possible that there are cases with many indicators that are not problematic. It could be that, despite a large number of indicators, some aspect of the case suggests that the defendant would have likely committed an attack on his own if he had not been ensnared by an informant. In addition, if the allegations or testimony relevant to the entrapment indicators are exaggerated or untrue in a particular case, this would probably indicate the absence of entrapment. However, we did not identify any clearly unproblematic cases with numerous indicators.²³⁶

It should be emphasized again that this indicator analysis is not meant to prove or reliably predict whether a particular case in fact involves entrapment or outrageous government conduct or whether it violates the policies underlying these doctrines. Making such a determination would only be possible through an in-depth examination of the facts of the case, as proven by reliable evidence. The purpose of this study is rather to provide an estimate, in the aggregate, of what proportion of cases involve facts or allegations that would support an entrapment or outrageous government conduct defense, or increase the likelihood that entrapment or outrageous government conduct occurred.

²³¹ See AARONSON, *supra* note 19, at 9–11. He was scored for indicators one, six, seven, eight, eighteen, and twenty.

²³² See *supra* text accompany notes 7–11.

²³³ See *supra* note 192–195.

²³⁴ See *supra* text accompanying notes 94–95.

²³⁵ See *supra* text accompanying notes 97–99.

²³⁶ As noted below, there is one case with a moderate number of indicators that seems relatively likely to have involved a true security threat. See *infra* note 244 and accompanying text.

B. THE PREVALENCE OF ENTRAPMENT, BORDERLINE-ENTRAPMENT, AND OUTRAGEOUS GOVERNMENT CONDUCT

As shown in Part IV using a variety of measures, a significant proportion of all post-9/11 terrorism cases have numerous entrapment indicators. Jihadi and left-wing cases on average have more indicators than other categories. For jihadi cases, actual terrorist plots scored significantly higher than non-plot offenses, suggesting that high-profile, serious cases of jihadi terrorism are more likely than other cases to involve entrapment or outrageous government conduct. The vast majority of jihadi and left-wing cases featuring plots had three or more of the core six indicators of entrapment. While the most famous cases tend to have more indicators, the majority of high-scoring cases are non-famous cases.

These findings demonstrate that facts and allegations raising the probability of entrapment or outrageous government conduct are not limited to the small handful of cases that have gotten the most attention in the popular media and academia. Instead, these indicators, including those most central to courts' entrapment analysis, are widespread among jihadi and left-wing cases generally.

C. HOW MANY POST-9/11 TERRORISM CASES ARE "REAL"?

What of the claim that only 1% of terrorism cases are "real"? The 1% figure comes from Holland's interpretation of Aaronson's claim that only about five of the five hundred terrorism cases since 9/11 involved a real plot by people connected to genuine international terrorists, as opposed to sting operations or cases peripherally related to terrorism.²³⁷ He names the Zazi plot, the attempted Times Square bombing, the underwear bomber, the shoe bomber, and Jose Padilla.²³⁸ Aaronson may not have meant to suggest that only these five cases truly represented a significant public safety threat, but many readers will likely take it to mean precisely that. It is worth taking this idea seriously, given both the high prevalence of informant-led terrorist plots, and the public policy implications of heavy counterterrorism spending, if there are so few "real" plots stopped by the authorities.

²³⁷ See Holland, *supra* note 20. It should be noted that in our full database, which excludes cases only speculatively related to terrorism, 77% of the jihadi cases did not involve plots to commit attacks, and instead represented other terrorist offenses such as terror fundraising or attempts to join terrorist groups. Though these offenses generally have less serious public safety implications than terrorist plots, they still have a connection to terrorism. Thus, they might plausibly be described as "real" terrorism offenses, at least to the extent they were not instigated by informants targeting individuals who would have never committed a terror offense on their own.

²³⁸ *Id.* See AARONSON, *supra* note 19, at 30–31, 91–92.

We now evaluate the idea that there are only a handful of serious public safety threats among post-9/11 prosecutions of jihadi terrorism, by reviewing the plots involving informants that had few or no indicators, and the plots that did not involve informants.²³⁹

The plots named by Aaronson may well be the most serious ones and the only ones closely connected with international terrorism. However, in our assessment, several other terrorism prosecutions appear likely to have stopped real terrorist plots, or at least to have potentially stopped real plots.

First, there are a small number of apparently real plots among the informant cases that had two or fewer indicators. Christopher Paul, Iyman Faris, and Nuradin Abdi did appear to be genuinely involved in terrorism, including specific plots.²⁴⁰ Colleen LaRose and her associates seem to have been independently plotting to assassinate the Danish cartoonist responsible for a drawing of the prophet Mohammed, even if it is unclear how advanced or realistic their planning was.²⁴¹

An additional low-scoring plot involving informants might have represented a real threat, but it is more questionable. The supposed plot to attack the Quantico military base by Daniel Patrick Boyd may have only existed in the conversations between Boyd and a government informant.²⁴² However, if the informant did not initiate the plot, and Boyd was speaking truthfully when he told the informant that Hysen Sherifi was in on the plot, then it is conceivable that the prosecution prevented a real attack.²⁴³ Yet the extensive involvement of informants in the case makes it difficult to tell whether any plot would have existed without them.

Among the plots with a moderate number of indicators, our review of available evidence identifies only one defendant who seems somewhat likely

²³⁹ Right-wing terrorism cases are excluded from this analysis, because less information is often available about those cases and because jihadi terrorism was the focus of the statements by Holland and Aaronson. However, from our initial impression of the data, it seems that a larger proportion of the right-wing cases involved real threats. This is to be expected, given the much lower average number of indicators. It is thus possible that a number of real terrorist attacks by right-wing terrorists were prevented. A detailed analysis of this question would be a promising topic for future research.

²⁴⁰ *Mother Jones Report Scrubs Facts of Terrorists' Predisposition*, INVESTIGATIVE PROJECT ON TERRORISM (Aug. 25, 2011), <http://www.investigativeproject.org/3125/mother-jones-report-scrubs-facts-of-terrorists>.

²⁴¹ Indictment, *United States v. LaRose*, 2:10-cr-00123-PBT (E.D. Pa. 2010). Although informants did play some role in the case, we were not able to find reference to any allegations that the informant invented or pushed along the plot.

²⁴² *FBI Informant Says Triangle Terrorist Cell Leader Intent on Jihad*, WRAL (Sept. 21, 2011), <http://www.wral.com/news/local/story/10163920/>.

²⁴³ *Id.*

to have been plotting a terrorist attack before coming into contact with an informant.²⁴⁴ As part of Nafis's plea agreement, he admitted that he came to the United States with the purpose of committing violent jihad, and the complaint describes him trying to recruit someone into a terrorist plot before any informant entered the scene.²⁴⁵ If these statements are true, the Nafis sting operation may have stopped Nafis from committing a real terrorist attack, if he would have managed on his own to recruit others as needed for the plot, and to acquire the materials necessary to carry it out. When he was approached by informants, his planning was still at an early stage, and he did not have the resources to carry out an attack.

Several plots not involving informants represented apparently credible threats thwarted by the government. Naser Jason Abdo, a former Army soldier, was arrested with numerous bomb-making ingredients and appeared far along in a plot to target American soldiers near Fort Hood, Texas.²⁴⁶ Khalid Aldawsari also seems to have been close to completing a bomb, even if he had not settled on specific plans to use it.²⁴⁷ Ahmed Omar Abu Ali was convicted for plotting attacks against the United States, but the case has been clouded by allegations of torture by his Saudi interrogators.²⁴⁸ Although Abdurahman Alamoudi pled guilty to lesser charges, the government continued to allege that he participated in a Libyan conspiracy to assassinate the Crown Prince of Saudi Arabia.²⁴⁹ Mohammed Jabarah, an Al Qaeda

²⁴⁴ It is interesting to note that even in a case such as that of Amine El-Khalifi, who was unusual in that he agreed to carry out a suicide bomb attack, it is impossible to say whether he was already pursuing terrorism before informants and government agents became involved, because the FBI does not seem to have disclosed anything about his behavior before that time. *Complaint, United States v. Khalifi*, No. 1:12-MJ-87, 2012 WL 517540 (E.D. Va. Feb. 17, 2012). Although this case may have prevented a real terrorist attack, it is not included on the list, because of the lack of information about the role of the informant and the defendant's plans prior to meeting the informant.

²⁴⁵ Press Release, FBI, New York Man Pleads Guilty to Attempting to Bomb New York Federal Reserve Bank in Lower Manhattan (Feb. 7, 2013), *available at* <http://www.fbi.gov/newyork/press-releases/2013/new-york-man-pleads-guilty-to-attempting-to-bomb-new-york-federal-reserve-bank-in-lower-manhattan>.

²⁴⁶ Yochi J. Dreazen, *Thwarted Fort Hood Terror Attack Raises New Questions About Radicalism Within Military*, NAT'L J. (July 28, 2011), <http://www.nationaljournal.com/nationalsecurity/thwarted-fort-hood-terror-attack-raises-new-questions-about-radicalism-within-military-20110728>.

²⁴⁷ James C. McKinley, Jr. & Sarah Wheaton, *Saudi Student to Be Arraigned in Bomb Plot*, N.Y. TIMES, Feb. 25, 2011, <http://www.nytimes.com/2011/02/26/us/26texas.html>.

²⁴⁸ *United States v. Abu Ali*, 528 F.3d 210, 238 (4th Cir. 2008); *The Trial of Ahmed Abu Ali - Findings of Amnesty International's Trial Observation*, AMNESTY INT'L (Dec. 14, 2005), <http://web.archive.org/web/20070617045947/http://web.amnesty.org/library/index/engamr511922005>.

²⁴⁹ Press Release, U.S. Dep't of Just., Abdurahman Alamoudi Sentenced to Jail in

member who worked briefly as a double-agent for the United States, appears to have been plotting the murder of several American agents when he was last arrested.²⁵⁰ The 2005 Los Angeles bomb plot, involving four men who had converted to Islam in prison, also seems to have been a potential threat, though it was stopped at an early stage—they had not yet acquired explosives, and the ringleader was in prison the entire duration of the plot.²⁵¹ It is also possible that the prosecution of Zacarias Moussaoui prevented a terrorist attack, if Moussaoui's claims are to be believed. According to him, he was not involved in planning the 9/11 attacks as alleged, but rather was planning another Al Qaeda attack intended to take place after 9/11.²⁵²

Added to the five “real” threats identified by Aaronson, this amounts to total of sixteen threats at least somewhat likely to have been thwarted by the government's counterterrorism prosecutions. A total of thirty-one defendants were involved in these cases, amounting to approximately 9% of all jihadi terrorism defendants since 9/11 and 5% of the jihadi defendants in cases involving informants.²⁵³

As for the rest of the defendants in jihadi cases involving informants, the offenses seemed to have been so dependent on informants that it is unlikely that the plots would have existed without them. Of course, it is not outside the realm of possibility that some of these defendants might have committed acts of terror on their own, if informants had not induced them to do so—though it seems unlikely, given the extreme rarity of terrorist attacks.²⁵⁴ The likelihood of this possibility, and the question of whether it justifies the practice of using informants to induce suspects to commit terrorist offenses, should be addressed by future research.²⁵⁵

Terrorism Financing Case (Oct. 15, 2004), available at http://www.justice.gov/opa/pr/2004/October/04_crm_698.htm.

²⁵⁰ David B. Caruso, *Terrorist Gets Life in Embassy Plot*, USA TODAY (Jan. 19, 2008, 5:45 AM), http://usatoday30.usatoday.com/news/nation/2008-01-18-688255685_x.htm.

²⁵¹ Andrew Murr, *Guilty Plea in Terror Case*, NEWSWEEK (Dec. 14, 2007, 7:00 PM), <http://www.newsweek.com/guilty-plea-terror-case-95253>.

²⁵² Defendant's Motion to Withdraw Guilty Plea, *United States v. Moussaoui*, No. 01-455-A, 2002 WL 1987964 (E.D. Va. 2006).

²⁵³ Of these 31 defendants' cases, 10 featured informants or undercover agents. Twenty-four of the defendants were allegedly involved in a plot, as this Article employs the term. These 24 defendants encompass 31% of all jihadi defendants in cases involving plots.

²⁵⁴ See Anya Bernstein, *The Hidden Costs of Terrorist Watch Lists*, 61 BUFF. L. REV. 461, 478 (2013) (“Given the practical difficulties of launching a terrorist attack, a person who is incorrectly identified as innocuous [for the purposes of the terrorist watch list], despite having the propensity to commit a violent act, is still quite likely never to do so.”).

²⁵⁵ See generally Norris, *supra* note 78. It is also possible that some of the defendants engaged in behavior prior to the involvement of an informant that indicated that they were likely to carry out an attack, but that the government failed to make the information public for

In short, our estimate of the percentage of “real” terrorism cases (i.e., those representing genuine threats) is substantially higher than Holland’s. Nonetheless, Holland and Aaronson’s overall conclusions have merit. The small number of genuine terrorist threats and attacks stands in sharp contrast to the large number of informant-led prosecutions—prosecutions whose value in enhancing national security is speculative at best, and highly dubious in a significant proportion of cases.

D. ENTRAPMENT AMONG THE HIGHEST-PROFILE TERRORISM CASES

Another way of illustrating the significance of this Article’s indicators analysis is to apply it to published lists of the most high-profile terrorism cases. The Heritage Foundation, a prominent conservative think tank, released a list of sixty terrorist attacks and thwarted terrorist plots.²⁵⁶ Four of these involved foreign court systems, rather than U.S. courts; nine were based on real or attempted attacks; two led to no arrests; and one involved a military tribunal rather than the regular U.S. court system.²⁵⁷ Among the remaining forty-four, ten were not plots, as this Article uses the term, but were other types of terrorism offenses, involving such things as sending money to a terrorist group or attending a terrorist training camp abroad.²⁵⁸

Of the remaining thirty-four cases, ten overlap with the plots identified above as being potentially real threats.²⁵⁹ The average number of indicators for the remaining twenty-four cases is 9.2, suggesting that many of these cases are highly problematic. Eighty-two percent of the forty-four defendants in these twenty-four cases had seven or more indicators of entrapment, and 50% had ten or more. Eighty-six percent had three or more of the core six indicators, and 61% had four or more of the core six.

Thus, a sizable proportion of cases promoted as noteworthy plots thwarted by counterterrorism authorities in fact show numerous indicators of entrapment. This suggests that such lists of “plots” should be regarded with skepticism, since only a small proportion of cases in this list appear to correspond with real threats of terrorist attacks, as opposed to plots driven by informants or less serious terrorism-related offenses.

some reason. Yet it is hard to imagine why such information would not be disclosed, since it would strengthen the case and undermine an entrapment defense.

²⁵⁶ Jessica Zuckerman et al., *60 Terrorist Plots Since 9/11: Continued Lessons in Domestic Counterterrorism*, HERITAGE FOUND. (July 22, 2013), <http://www.heritage.org/research/reports/2013/07/60-terrorist-plots-since-911-continued-lessons-in-domestic-counterterrorism>.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

E. COUNTERTERRORISM POLICY RECOMMENDATIONS

The results of this study, and other available data, suggest that the FBI should implement broad reforms to its counterterrorism strategies. This should involve a focus on passive surveillance rather than actively instigating plots, and at least some shift toward greater attention to the threat of right-wing terrorism.

In particular, the fact that post-9/11 operations have been directed so overwhelmingly at Muslims is problematic, given the comparative statistics on the characteristics and casualties caused by different types of terrorists. A recent study by the New America Foundation found that forty-eight people were killed by right-wing terrorists since 9/11, while forty-five have been killed by jihadi terrorists.²⁶⁰ The study also found that only 6% of the jihadists charged with terrorism offenses since 9/11 had carried out a violent attack before their arrest, while 48% of the right-wing terrorists had done so.²⁶¹ Moreover, only 42% of jihadis acquired a weapon before their arrest, while 89% of the right-wing terrorists possessed weapons (often many of them) when apprehended.²⁶²

In terms of entrapment, alleged right-wing terrorists in this study tended to have few if any indicators, with the exception of at most four plots. This suggests that the government uses informants much less consistently and aggressively against right-wing extremists than against Muslims. It might also mean that a larger proportion of right-wing terrorism cases were genuine threats, as opposed to plots whose creation and execution would have been unlikely without government intervention.

In light of this information and the findings of this Article, the FBI should reconsider its emphasis on targeting law-abiding Muslims for inducement by informants. Instead, federal officials should shift counterterrorism resources at least to some extent toward right-wing groups, and focus on passive surveillance of potential terrorism suspects (to the extent it is legal), rather than active encouragement of terrorist plots. The chance of a particular terrorism sympathizer committing an attack is so small that convictions resulting from plots made possible by informants are exceedingly unlikely to provide any public safety benefit. As others have noted, the focus on instigating plots could even reduce public safety, if funds

²⁶⁰ NEW AM. FOUND., *supra* note 198.

²⁶¹ *Type of Activity*, NEW AM. FOUND., *supra* note 212.

²⁶² *Weapons*, NEW AM. FOUND., *supra* note 212. Jihadis who had acquired weapons were more likely to have obtained them from government informants or agents. Among jihadis who had procured weapons, 72% acquired at least some of them on their own, while 90% of non-jihadis acquired weapons independently. *Id.*

that could have been more effectively spent elsewhere (such as monitoring the Tsarnaev brothers prior to their bombing attack in Boston) are being squandered on pointless sting operations.²⁶³

If this change in strategy does not result in enough convictions to justify current levels of counterterrorism spending, then these funding levels can, and should, be reduced when appropriate. Given the small number of genuine attacks, significant reductions in terrorism spending might already be overdue.²⁶⁴ Some have suggested that the sharp decrease in FBI resources for white collar crime and financial fraud kept the FBI from being able to prevent the financial meltdown of 2008.²⁶⁵

F. SUGGESTED DOCTRINAL REFORMS

The extensive prevalence of the indicators, coupled with the failure so far of either the entrapment or outrageous government conduct defense to stop a single post-9/11 terrorism conviction, suggests that these doctrines have not been effective at preventing or redressing the law enforcement abuses they were designed to confront. As emphasized previously, the results of this study are not intended to provide reliable proof that entrapment or outrageous government conduct has definitely taken place in individual cases. Future work should build on these data to make policy suggestions on more robust grounds.

Nonetheless, it seems very likely that some of the most egregious cases as suggested by the number of indicators—such as those of James Cromitie,²⁶⁶ Sami Hassoun,²⁶⁷ Derrick Shareef,²⁶⁸ and Yassin Aref and Mohammed Hossain²⁶⁹—should have been blocked by the courts. Hossain, Aref, and Hassoun had no sympathy for jihadi terrorism, and would not have

²⁶³ Aziz, *supra* note 5, at 490; Mike Levine, *New Watchdog Report Raises More Questions on Whether Boston Bombings Could Have Been Prevented*, ABC NEWS (Apr. 10, 2014), <http://abcnews.go.com/Blotter/watchdog-report-raises-questions-boston-bombing-prevented/story?id=23283597> (reporting that some sources within the FBI believe that the Boston attacks could have been prevented if the FBI had responded more appropriately to available information, including by more closely investigating the Tsarnaev brothers).

²⁶⁴ See generally JOHN MUELLER & MARK G. STEWART, TERROR, SECURITY, AND MONEY (2011) (concluding, based on risk and cost-benefit analysis, that U.S. counterterrorism spending is too high and should be substantially reduced).

²⁶⁵ William K. Black, *Mueller: I Crippled FBI Effort v. White-Collar Crime, My Successor Will Make It Worse*, HUFFINGTON POST (Aug. 26, 2013, 12:28 PM), http://www.huffingtonpost.com/william-k-black/mueller-i-crippled-fbi-ef_b_3817438.html.

²⁶⁶ See *supra* text accompanying notes 7–11.

²⁶⁷ See *supra* notes 192–195.

²⁶⁸ See *supra* text accompanying notes 96–99.

²⁶⁹ See *supra* text accompanying notes 180–82.

engaged in any terrorism on their own.²⁷⁰ All reasonable observers, including the trial court judge, agree that Cromitie would never have engaged in any terrorist activity whatsoever if the government informant had not set out to persuade him to do so, with promises of large amount of money and repeated pestering over a lengthy time period. The threats by Shareef's informant to kill him, or himself, if Shareef did not participate in the plot, should be extreme enough inducements to uncontroversially qualify as outrageous government conduct.²⁷¹

1. Reasonable Suspicion Requirement

What reforms would most effectively prevent entrapment abuses in terrorism prosecutions? As Professor Wadie Said has suggested, the authorities could simply cease engaging in sting operations targeting suspects for inducement without an "articulable suspicion" that they are already planning terrorist activity.²⁷² This could be accomplished either by an internal change in policy, or by a new legal requirement, imposed by the courts or by Congress, of a reasonable suspicion of criminal activity before deploying informants. Former FBI agent Michael German contends that previous periods of FBI abuses have been corrected once such policies were implemented.²⁷³

Such a change could prevent informants and agents from targeting individuals for invalid or questionable reasons. Data on the reasons informants initially seek to induce suspects is lacking, in large part due to government secrecy. Yet the available information strongly suggests that informants often choose targets based on their impressionability, and thus their likelihood of being induced, rather than their dangerousness (i.e., the likelihood of their actually participating in terrorism).

If the FBI is going to continue employing informants to induce defendants into terrorist offenses, a reasonable suspicion requirement could lead the FBI to choose more worthy targets. As it is now, authorities are under no compulsion to describe or justify the initial decision to target a defendant for inducement. Without even the possibility of close scrutiny of targeting decisions, this decisionmaking process may often focus more on generating convictions than on protecting the public. A reasonable suspicion

²⁷⁰ See *supra* notes 192–97 and accompanying text.

²⁷¹ See *supra* note 35 and accompanying text.

²⁷² See Said, *supra* note 17, at 736 ("The time has almost certainly come to call for not merely a curative or more objective version of entrapment doctrine, but rather a halt to the policy of using informants to investigate terrorism-related cases where no articulable suspicion exists.").

²⁷³ See German, *supra* note 2, at 56.

requirement, mandating dismissal if the investigation began without it, would open the black box of government targeting, preventing government informants from going on fishing expeditions by befriending law-abiding citizens and attempting to gradually win them over to a terrorist ideology.

Arguably, if a person is both law-abiding and has no plans to commit a crime, and there is no reliable evidence otherwise, the Due Process Clause ought to protect such a person from government intrusion designed to induce the person to commit a crime. Prevailing conceptions of personal autonomy and privacy from unnecessary government intrusion would seem to preclude government attempts to manipulate innocents into crime. If courts are unwilling to rule in this way, legislatures should enact reasonable suspicion requirements.²⁷⁴

2. Entrapment Doctrine

Various changes to entrapment doctrine itself could also potentially reduce entrapment-type abuses. Jon Sherman has argued in favor of stricter requirements on these prosecutions, such as excluding most evidence of a defendant's ideological or religious views, and barring prosecution when the informant has radicalized or pressured the defendant.²⁷⁵ These appear to be reasonable suggestions, but due to the nebulousness of entrapment doctrine, it is difficult to imagine courts grafting the specific rules he proposes onto the legal standard. Professor Peter Margulies suggests that employing an "objective" entrapment standard, which focuses on the government's actions rather than the defendant's predisposition, may be more effective than the prevailing subjective standard in redressing entrapment in terrorism cases.²⁷⁶

In contrast, this Article argues in favor of a subjective standard reworked to focus on a defendant's realistic likelihood of committing a similar offense on his or her own.²⁷⁷ Such a standard would, much like Judge Richard Posner's version of the entrapment defense in *Hollingsworth*, require the dismissal of a charge if the defendant would have been unlikely to commit the same kind of crime on his or her own, without the government's influence.²⁷⁸ Although other courts have not adopted Judge Posner's

²⁷⁴ *Jacobson v. United States*, 503 U.S. 540, 557 (1992) (O'Connor, J., dissenting) ("Surely the Court cannot intend to impose such a requirement, for it would mean that the Government must have a reasonable suspicion of criminal activity before it begins an investigation, a condition that we have never before imposed.").

²⁷⁵ See Sherman, *supra* note 17, at 1499–1508.

²⁷⁶ Peter Margulies, *Guantanamo by Other Means: Conspiracy Prosecutions and Law Enforcement Dilemmas After September 11*, 43 GONZ. L. REV. 513, 556 (2008).

²⁷⁷ See Dillof, *supra* note 155, at 894 (advancing a similar argument).

²⁷⁸ *United States v. Hollingsworth*, 27 F.3d 1196, 1200 (7th Cir. 1994):

approach, the leading academic expert on entrapment, Paul Marcus, argues that *Hollingsworth* represents what the Supreme Court really meant in *Jacobson*.²⁷⁹ This doctrine might be phrased as follows: a case must be dismissed on the basis of entrapment if the government induced the defendant to commit the crime, and the prosecution cannot prove beyond a reasonable doubt that the defendant was likely to have committed the same type of crime without the government inducement.²⁸⁰

This alternative doctrine has several advantages. It returns the doctrine to its roots in realism, as opposed to the circularity, and the undisciplined inquiry into the soul, characteristic of current predisposition analysis.²⁸¹ As the doctrine is now, a person such as Cromitie, who talked big (for example, making a number of grandiose claims about his past that are known to be

[T]he Court [in *Jacobson*] clarified the meaning of predisposition. Predisposition is not a purely mental state, the state of being willing to swallow the government's bait. It has positional as well as dispositional force. The dictionary definitions of the word include 'tendency' as well as 'inclination.' The defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so; only then does a sting or other arranged crime take a dangerous person out of circulation. A public official is in a position to take bribes; a drug addict to deal drugs; a gun dealer to engage in illegal gun sales. For these and other traditional targets of stings all that must be shown to establish predisposition and thus defeat the defense of entrapment is willingness to violate the law without extraordinary inducements; ability can be presumed. It is different when the defendant is not in a position without the government's help to become involved in illegal activity. The government 'may not provoke or create a crime, and then punish the criminal, its creature.' *Casey v. United States*, 276 U.S. 413, 423 (1928) (Brandeis, J., dissenting).

²⁷⁹ *The Entrapment Defense: An Interview with Paul Marcus*, 30 OHIO N.U. L. REV. 211, 220–21 (2004) (arguing that *Hollingsworth* got the doctrine "exactly right," and that *Jacobson* clarifies that predisposition asks, "Is [the defendant] likely to have committed the crime without the government involvement?").

²⁸⁰ It is possible that the standard for inducement should be reformed as well. Currently, in many jurisdictions, it requires more than just an opportunity to commit a crime: it must involve some pressure as well. *See, e.g.*, *United States v. Gendron*, 18 F.3d 955, 961 (1st Cir. 1994); *United States v. Andrews*, 765 F.2d 1491, 1499 (11th Cir. 1985); MARCUS, *supra* note 70, at § 2.03A. But what if the government offers an opportunity to a person to commit a crime that is totally beyond the capability of the person, and the person, for whatever reason (perhaps mental deficiency or impulsiveness), agrees immediately without the need for any pressure or persuasion? In such a case, the entrapment defense would fail, even though the prosecution did nothing to promote public safety. Inducement should instead be defined as influencing a person in some way to commit a crime. The second prong of the defense (predisposition, or in our version, realistic likelihood of committing the crime) is the proper place to consider the government's attempts at pressure or persuasion. Such attempts may often be important, but their absence should not always doom an entrapment defense.

²⁸¹ T. Ward Frampton, *Predisposition and Positivism: The Forgotten Foundations of the Entrapment Doctrine*, 103 J. CRIM. L. & CRIMINOLOGY 111, 146 (2013) (arguing that *Hollingsworth* was true to the positivist origins of the doctrine, because it focused on "the actual threat (or lack thereof) posed by the ensnared defendant").

false) but never would have committed any terrorist offense on his own, can forfeit the entrapment defense because his pro-terrorist talk qualifies, however improbable it may sound, as “an already-formed design.”²⁸² Cromitie’s codefendants, even the low-functioning mentally ill one, were also unable to successfully assert the entrapment defense—even though they realistically would have never engaged in any terrorism offense—because of their lack of hesitation.²⁸³ A “ready response” to a criminal opportunity and a lack of reluctance are central factors in current entrapment analyses.²⁸⁴ In a doctrine based on realistic likelihood of committing a similar offense, these might be factors in some analyses, but there is no reason they should be dispositive.

Such a doctrine could also put an end to the tendency for courts to allow juries to rely on the defendant’s sympathy for terrorists alone to justify a finding of predisposition beyond a reasonable doubt. Since the vast majority of people with pro-terrorist views never commit an attack, it seems impossible for a reasonable factfinder to conclude that a defendant would have been likely to commit a similar offense beyond a reasonable doubt simply because of his or her views. With predisposition analysis, it is much easier for that absurd result to happen, because the abstract concept of predisposition has been stretched beyond its pragmatic roots.²⁸⁵ Due to the confusion engendered by courts’ interpretation of the term predisposition, it is better to drop that word from the doctrine altogether, replacing it with unambiguous language.

One reason that a subjective defense is preferable to an objective defense is that courts might apply an objective test too conservatively, blocking only cases which approach the unreasonably high “shocks the conscience” standard used for the outrageous government conduct defense.²⁸⁶ In addition, if a person was likely to have committed a similar crime anyway, then logically, even overreaching government behavior should not mandate the dismissal of the case. It would be a pity if an objective entrapment defense resulted in truly dangerous defendants going free simply because the informant engaged in a particular behavior.²⁸⁷

²⁸² United States v. Cromitie, 727 F.3d 194, 212 (2d Cir. 2013).

²⁸³ *Id.* at 216.

²⁸⁴ See *supra* note 45 and accompanying text.

²⁸⁵ See *supra* note 281 and accompanying text.

²⁸⁶ See *supra* note 40 and accompanying text.

²⁸⁷ United States v. Russell, 411 U.S. 423, 434 (1973) (“Nor does it 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

Another advantage of the reformed version of the subjective defense proposed here is that “objective” considerations of the nature of the government conduct (“the nature of the inducement or persuasion by the government”) can still be factored into the analysis, as is now the case in a commonly applied five-factor predisposition analysis.²⁸⁸ If an informant went to extraordinary lengths to persuade a defendant, this casts doubt on the defendant’s propensity to carry out a similar crime on his or her own.²⁸⁹ In effect, this lets in objective considerations through the back door, resulting in a subjective–objective blend that better accommodates the real-world variety in factual situations.²⁹⁰

not so predisposed.”). Such scenarios are admittedly unlikely to occur, since extreme attempts at pressuring a defendant into a crime should be unnecessary if the defendant was likely to commit such crimes on his or her own. *Interview with Paul Marcus, supra* note 279, at 220.

²⁸⁸ *United States v. Hall*, 608 F.3d 340, 343 (7th Cir. 2010); *see supra* note 44 and accompanying text.

²⁸⁹ *Interview with Paul Marcus, supra* note 279, at 220:

Now it seems to me the Supreme Court here has done a pretty good job because the Justices have retained the majority subjective test so predisposition is still the test. But what they have said is: We are going to look carefully at two things. First, what is predisposition? Just because a person has a predilection for this type of activity does not mean a predisposition. The *real* question is: Whether he would have engaged in the criminal behavior, which is different. And second, we are going to rely much more heavily on an analysis of the government’s behavior. If the government engaged in extensive and intensive inducement, that is a good sign that the defendant was not predisposed because it took such extreme inducement in order to get him to commit the crime. So, in a way, even though the Court still retains the predisposition test, it looks more like a blend because we are putting more reliance on the government behavior than we ever did before.

²⁹⁰ *Id.* Even so, a significant drawback of a subjective entrapment defense, and a good argument for an objective one, is the tendency for judges and juries, like all people, to be influenced by the fundamental attribution error to ascribe people’s behavior to their character even when circumstances are the deciding factor. This is related to the circularity problem—the conclusion that if a defendant was persuaded to go through with a crime, he must have been predisposed. Doing away with the word predisposition might help somewhat, as recommended above. But restrictions on evidence—for example, disallowing factfinders from basing decisions solely on behavior that occurred after the government contact—may ultimately be needed to limit the circular reasoning inherent in subjective approaches. If courts refuse to impose any such restrictions, an objective test, or a subjective–objective hybrid, might be most effective in reducing entrapment abuses. Alternatively, to supplement the subjective entrapment defense, the outrageous government conduct defense could be potentially merged with the objective entrapment defense to create a less imposing-sounding “improper government conduct” defense, encompassing a wider variety of problematic government behavior than either doctrine.

3. Reflections

Despite the potential of such reforms, doctrinal changes may well prove ineffective in prompting courts or juries to police entrapment and outrageous government conduct more vigorously. Juries and judges alike are so reluctant to employ these defenses, and terrorism prosecutions are so fraught with primal fear, that we cannot necessarily expect factfinders to apply the doctrines in appropriate cases, regardless of the specific content of the doctrines. As mentioned earlier, the jury in the *Hayat* case reportedly believed he was entrapped and thus innocent of all charges, but felt compelled to convict because of the seriousness of the terrorism charges.²⁹¹ For this reason, persuading or requiring law enforcement agencies to change their counterterrorism practices might be the only effective strategy for preventing entrapment.

Yet in response to calls for change, the government would probably argue that its current tactics, focused on targeting law-abiding citizens for inducement, are necessary to prevent “lone wolf” attacks.²⁹² While this may seem difficult to accept on the grounds of common sense alone, the belief is strongly held and requires serious engagement to debunk.

Despite the appeal of these proposals for legal and policy reform, the likelihood of their adoption in the current legal and political climate is close to nil. What is needed most of all, in order to stimulate effective reform, is research that convincingly demonstrates—if this is indeed correct—that the FBI’s focus on inducing law-abiding individuals into terrorist schemes is unnecessary, and perhaps even harmful, for our national security.²⁹³ Generating such research should be a most urgent task in any strategy for eliminating the abuses that appear to be commonplace in terrorism prosecutions.

CONCLUSION

Several journalists and scholars have explored the issue of entrapment in terrorism prosecutions, but these accounts have tended to be based on a small number of cases. Estimating the prevalence of entrapment in terrorism cases is important for assessing the effectiveness and ethics of the

²⁹¹ See *supra* notes 74–77 and accompanying text.

²⁹² AARONSON, *supra* note 19, at 26–27, 30. It is also possible that some see such convictions as necessary to promote general deterrence against would-be terrorists, even if the individuals would have been unlikely to themselves engage in terrorism. See *supra* note 154 and accompanying text.

²⁹³ See generally Norris, *supra* note 78.

government's counterterrorism strategy, and for formulating appropriate policy responses.

This Article attempted to fill this need first by constructing a database of post-9/11 terrorism cases, and second by determining the presence of twenty potential entrapment indicators in each of the cases involving an informant or undercover government agent. The Article finds that among 580 post-9/11 terrorism prosecutions, 55% involved an informant or undercover agent in some capacity before the crime was committed. Particularly with regard to jihadi and left-wing defendants, the average case involving informants has numerous indicators of possible entrapment or outrageous government conduct. The more serious cases, involving plots to commit specific terrorist attacks, tend to have even more entrapment indicators. These results strongly suggest that relatively egregious informant practices are not confined to a small number of cases, but are rather widespread, accounting for a significant proportion of cases.

Even so, the results of this study should be interpreted with caution, since lack of information on many cases may understate the prevalence of many indicators, false or exaggerated allegations by defendants may overstate the prevalence of indicators in some cases, and the number of indicators may not always correspond closely with the strength of the entrapment or outrageous government conduct defense.

We also examined the claim by a journalist that only 1% of terrorism convictions represent "real" threats to national security—i.e., genuine plots connected to international terrorism that were thwarted by authorities.²⁹⁴ Based on a review of the informant and noninformant cases, we conclude that the total number of cases appearing to have been genuine threats is higher, but still rather low, representing about 9% of all jihadi defendants and 5% of jihadi defendants in cases involving informants. The remaining jihadi cases either involved less serious crimes, such as attempts to send money to terrorists or to join them overseas, or plots that would have never existed without the informant's involvement.²⁹⁵

Given these results, and the evidence that right-wing extremists are responsible for more violence than jihadis, the Article contends that policymakers should reconsider the government's focus on sting operations targeted at Muslims with no history of ties to terrorism. Instead, the government should redirect its counterterrorism efforts towards passive

²⁹⁴ See Holland, *supra* note 20.

²⁹⁵ Previous research also supports the idea that the majority of terrorism convictions are for relatively minor crimes. Laguardia, *supra* note 12, at 190 ("I identified 585 individuals prosecuted and sentenced in association with terrorism by January 2011. Of those 585, only 66 had been sentenced to 15 years or longer.").

surveillance, while investing more resources in the prevention of right-wing terrorism. A focus on (legal methods of) passive surveillance, rather than actively encouraging the creation of plots, is likely to be a more effective strategy for preventing terrorist attacks, since it would avoid wasting time and money on cases in which defendants would have never engaged in terrorism on their own. This would allow authorities to concentrate on those few cases in which pro-terrorism sympathies begin inspiring concrete plans.

Finally, the Article briefly argues in favor of a reasonable suspicion requirement before inducing an individual to commit a crime, and reformed entrapment defense based on a defendant's realistic likelihood of committing a similar offense without government prompting. Even so, such policy or doctrinal shifts may be relatively ineffective, compared with the preferable step of simply stopping law enforcement from targeting law-abiding Muslims and others for inducement by aggressive informants.

Yet such changes have little chance of occurring, given authorities' strongly held belief in their strategy of preemptive prosecution. For this reason, it is particularly important for scholars to investigate the validity of the government's stated justifications for preemptive prosecutions—for example, the assertion that these defendants would have eventually committed real terror attacks (which could not have been prevented by surveillance) if they had not been ensnared in fake plots. While the facts of many of these cases suggest that this justification is dubious, a more detailed analysis is necessary to allow definitive judgments on the matter.

Beyond this, future research should investigate in more detail the larger field of informant-led terrorism prosecutions, including by examining with more precision the differences between the jihadi cases and other cases. Such research might lend further support to this Article's argument that authorities should shift counterterrorism research toward right-wing extremists, and further corroborate critics' suspicions that the government is disproportionately targeting Muslims, and left-wing activists as well.

APPENDIX A: CODING CRITERIA FOR ENTRAPMENT INDICATORS

Indicator	Coded “Yes” if source information indicates or alleges:
<i>No previous offenses</i>	Defendant had not been charged with a terrorism offense before being contacted by the informant or agent, and Defendant had not already committed, or was not already engaged in or planning, a terrorist offense before being approached by an informant or agent.
<i>Government proposed the crime</i>	The informant or agent proposed to the defendant the idea of the crime, whether the general type of crime or the specific crime.
<i>Government pressure or persuasion</i>	The informant or agent pressured the defendant to engage in the offense, repeatedly asked the defendant to participate, or sought to persuade him or her either that terrorism is justified or to participate in the particular offense.
<i>Material incentive</i>	The informant or agent offered a financial or other material incentive for committing the offense.
<i>Defendant’s reluctance</i>	The defendant at some point expressed reluctance to commit the offense, either verbally or through actions, such as a failure to cooperate with plans or to follow up on communications with the informant.
<i>Governmental control of the crime</i>	The informant or agent controlled to a large degree the circumstances of the crime, beyond simply providing the means. This could include, for example, involvement in planning the details of the crime, arranging for meetings with additional informants or agents, or providing the buyer as well as the seller (in a sting operation for a trafficking offense).
<i>Government provided the means</i>	The informant or agent provided the defendant with the resources, knowledge, or social connections needed to carry out an offense, such as funds to travel, weapons, or a vehicle for transporting a bomb.
<i>Government spoon-feeding</i>	The informant or agent provided the defendant with detailed assistance in carrying out the actions associated with the planning or execution of the offense.
<i>Defendant’s financial motivation</i>	The defendant was motivated to a large extent by the financial or other material rewards promised by the informant or agent.
<i>Informant’s payment/bonus</i>	The informant was paid for his or her services, or received favorable treatment in criminal or administrative matters.

<i>Informant's characteristics</i>	<p>The informant or agent:</p> <ul style="list-style-type: none"> • was known for manipulating others, • was considered charismatic, • had been convicted of crimes involving dishonesty (such as fraud), • had been found to be lying to government officials or others, • had engaged in questionable tactics in previous operations, • had an extensive criminal record, • was suspected of continuing to commit crimes while serving as an informant, • had a serious mental illness, and/or • was considered unreliable by the informant's government handlers.
<i>Informant-provided employment or housing</i>	<p>The informant or agent provided the defendant with a job, housing or a temporary place to stay, or money for housing-related expenses.</p>
<i>Informant use or provision of alcohol or drugs</i>	<p>The informant or agent:</p> <ul style="list-style-type: none"> • provided the defendant, whether as a gift or through a transaction, with alcohol or recreational drugs, • used alcohol or drugs with the defendant, while discussing the offense, and/or • encouraged the defendant to use alcohol or drugs.
<i>Suspect evidentiary practices</i>	<p>The informant or agent sought to elicit statements or prompt actions primarily for the purpose of obtaining predisposition evidence to be used at trial, or failed to record conversations important for ascertaining whether the defendant was entrapped.</p>
<i>Defendant targeted for invalid reason</i>	<p>A primary reason the suspect was targeted for inducement by authorities was invalid (for example, if the person was targeted due to a mistaken identity or false information).</p>
<i>Defendant targeted for speech</i>	<p>The informant or agent targeted the defendant for inducement primarily because of the speech the defendant legally engaged in (such as expressing sympathy for terrorism).</p>
<i>Defendant targeted despite lack of terrorist sympathies</i>	<p>Defendant was not ideologically supportive of terrorism at the time the defendant was first approached by an informant or agent.</p>

<i>Mental illness</i>	Defendant: <ul style="list-style-type: none">• was diagnosed with or being treated for a mental disorder,• was regarded as or suspected of having a mental illness, and/or• engaged in behaviors or experienced symptoms (such as hallucinations) which likely indicate mental illness.
<i>Youth</i>	Defendant was 24 years old or younger at the time of his or her first contact with the informant or agent.
<i>Underachiever profile</i>	Defendant exhibited two or more of the following characteristics or behaviors: <ul style="list-style-type: none">• having few social contacts or friends,• spending nearly all of the day alone in front of a computer,• having no job or a low-paying job,• showing little personal initiative in seeking out social or employment opportunities, or• living with parents or close relatives past the age of 24.

