

TERRORISTS, INFORMANTS, AND BUFFOONS:
THE CASE FOR DOWNWARD DEPARTURE AS A RESPONSE TO
ENTRAPMENT

by
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The question of entrapment has received renewed attention as law enforcement stings have become more and more common in terrorism investigations. While even the judges on certain cases have become convinced that defendants were entrapped, the defense remains a universal failure. This Article suggests that the concept of entrapment remains valuable in the context of terrorism prosecutions, but that juries may not be relied upon to acquit entrapped defendants. A better solution would be extreme sentencing departures on the part of judges, which would protect the purposes of the entrapment doctrine while increasing the likelihood of its success. This Article first looks to the law and purposes of entrapment generally, then addresses the specific contours of entrapment in the context of terrorism investigations. Operational capacity of defendants is identified as a particularly telling aspect of the balancing of purposes in the entrapment doctrine. While this Article shows that operational capacity is already influencing sentencing, true protection of the interests at stake in the entrapment doctrine would be better protected by more severe downward departures, even below statutory minimum sentences.

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INTRODUCTION

On May 20th, 2009, the FBI arrested four men who had placed bombs in front of a synagogue in the Bronx, New York. Early descriptions of the men and their plot were terrifying, describing prison converts with a virulent hatred for America who had not only placed a total of 90 pounds of plastic explosives in front of their target, but had purchased a Stinger missile and at least one gun in their efforts to accomplish a terrorist attack in New York City. Yet, after being touted as an “all too real” example of “the homeland security threats against New York City,”¹ evaluations that the plot was “a very serious threat”² quickly began to lose steam. Within days the case was being discussed as one of many examples in contemporary U.S. counterterrorism where the plot is so strongly guided, if not created by an informant, that entrapment becomes an inevitable line of defense.³ Journalists noted that the defendants had failed even to turn on the timer for one bomb and that an offer of \$250,000 had clearly played into the willingness of the lead defendant to become involved in the plot.⁴ The trial eventually revealed that the defendants were entirely incompetent, unable, for instance, to plug wires into their

¹ Javier C. Hernandez & Al Baker, *4 Accused of Bombing Plot at Bronx Synagogues*, N.Y. TIMES, May 21, 2009, at A1.

² *Id.*

³ See William K. Rashbaum & Kareem Fahim, *Informer’s Role in Bombing Plot*, N.Y. TIMES, May 23, 2009, at A1.

⁴ E.g., A. G. Sulzberger, *Defense Cites Entrapment in Terror Case*, N.Y. TIMES, Mar. 18, 2010, at A22.

bombs (having been provided by the FBI the bombs were, of course, completely inert).⁵ The informant, who had been the subject of entrapment allegations in a prior infamous case,⁶ was revealed as a consistent scam artist, having lied to the judge on a case in which he had been prosecuted for tax violations,⁷ as well as to his former and current FBI handlers, such that FBI documents describing the case (based on information from the informant) were blatantly contradicted by the taped conversations the informant was describing.⁸

The case of the “Newburgh Four”⁹ reinvigorated public debate on entrapment and the government’s use of informants.¹⁰ The public interest has remained as the defense has been discussed for a steadily increasing number of cases, from an alleged plot to assassinate the Saudi Ambassador¹¹ to New York State’s most recent arrest, where FBI agents expressed entrapment concerns.¹² Of course, as news stories have acknowledged, the defense has never been successful in a terrorism prosecution.¹³ Yet the Bronx synagogue bomb plot offered such a stunning

⁵ Transcript of Record at 387–89, *United States v. Cromitie*, 781 F. Supp. 2d 211 (S.D.N.Y. 2011) (No. 09 Cr. 558 (CM)).

⁶ Graham Rayman, *The Alarming Record of the F.B.I.’s Informant in the Bronx Bomb Plot*, VILLAGE VOICE (July 8, 2009), <http://www.villagevoice.com/2009-07-08/news/the-alarming-record-of-the-f-b-i-s-informant-in-the-bronx-bomb-plot/>.

⁷ See Letter from Leonard F. Joy, Exec. Dir., Fed. Defenders of N.Y., to Hon. Colleen McMahon at 4–5, *United States v. Cromitie*, 781 F. Supp. 2d 211 (S.D.N.Y. 2010) (No. 09 Cr. 558 (CM)).

⁸ See Kareem Fahim, *Defense Presses Informer in Synagogue Bomb Case*, N.Y. TIMES, Sept. 21, 2010, at A26.

⁹ Richard Bernstein, *A Defense That Could Be Obsolete*, N.Y. TIMES (Dec. 1, 2010), <http://www.nytimes.com/2010/12/02/us/02iht-letter.html>.

¹⁰ See, e.g., William Glaberson, *Newburgh Terrorism Case May Define When Sting Operations Become Entrapment*, N.Y. TIMES, June 16, 2010, at A25; Malia Wollan & Charlie Savage, *Holder Calls Terrorism Sting Operations ‘Essential’*, N.Y. TIMES (Dec. 11, 2010), <http://www.nytimes.com/2010/12/12/us/politics/12holder-1.html>. Scholarly interest in entrapment and terrorism was already quite apparent. See, e.g., Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687 (2010); Jon Sherman, “A Person Otherwise Innocent”: Policing Entrapment in Preventative, Undercover Counterterrorism Investigations, 11 U. PA. J. CONST. L. 1475 (2009); Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125 (2008).

¹¹ Karen Greenberg, *The FBI-Style Sting in the Tail of the Saudi Ambassador ‘Assassination Plot’*, GUARDIAN (Oct. 13, 2011), <http://www.guardian.co.uk/commentisfree/cifamerica/2011/oct/13/fbi-sting-saudi-ambassador-assassination-plot>.

¹² Ryan J. Reilly, *FBI Was Concerned NYPD’s ‘Lone Wolf’ Case Raised Issues of Entrapment*, TPMUCKRAKER (November 21, 2011, 3:35 PM), http://tpmmuckraker.talkingpointsmemo.com/2011/11/fbi_was_concerned_nypds_lone_wolf_case_raised_issues_of_entrapment.php. It is also worth noting the allegations of blatant misconduct by one informant in California. See Jerry Markon, *Tension Grows Between Calif. Muslims, FBI after Informant Infiltrates Mosque*, WASHINGTON POST (Dec. 5, 2010, 12:47 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/04/AR2010120403710.html> (detailing a former informant’s claims that the FBI actively trained him to entrap Muslims).

¹³ See, e.g., Glaberson, *supra* note 10.

example of incompetent defendants, such a shocking lack of evidence of predisposition,¹⁴ and such a disturbingly dishonest informant that it seemed to offer the best opportunity for a successful entrapment defense so far seen in a terrorism case. As one paper stated, if this case was not entrapment, what case possibly could be?¹⁵

Naturally, the defense failed.¹⁶ Why did it fail? One reason may be the inability of jurors to get past the heinous nature of the crime. After all, what does it matter that James Cromitie and his co-defendants never would have been able to accomplish this crime without help? What does it matter that they likely would never have thought of committing the crime without help, when jurors stare at a videotape of four men placing bombs outside a building in New York City? In theory, a recruiter could just as easily have convinced and aided these men.¹⁷ In theory, the men might someday have been involved in some other violent crime motivated solely by financial incentives. In theory, the blatantly anti-Semitic remarks bandied about on taped conversations between Cromitie and the informant might someday have blossomed into actual violent motivation. Most importantly, no matter what the motivation was for these men, eventually they placed bombs in a densely packed urban area where, arguably, dozens of people may have been killed. Whether the defendants acted for al Qaeda or for a chance at a quarter-million dollars, any jury is likely to find these acts to be worthy of criminal sanctions.¹⁸

Arguments over entrapment were probably inevitable in the context of the preventive paradigm of terrorism prosecution, and they highlight the fundamental questions of punishment that are raised by that paradigm. The entrapment debate should force legal observers, practitioners and scholars to ask the fundamental questions: who exactly do we want to punish, why, and how much?

Our instincts may answer these questions simplistically—we want to punish terrorists, because terrorists are bad, and a lot—but the extreme punishments available for crimes associated with terrorism demand a more nuanced viewpoint.¹⁹ Moreover, the need for preventive prosecu-

¹⁴ Other than involvement in the act itself.

¹⁵ Glaberson, *supra* note 10.

¹⁶ Kareem Fahim, *4 Convicted of Attempting to Blow Up 2 Synagogues*, N.Y. TIMES, Oct. 19, 2010, at A21.

¹⁷ A theory I take some issue with. See *infra* Part II.

¹⁸ See *infra* note 174 and accompanying text.

¹⁹ Since these cases often involve murder, explosives, or money laundering, they may be subject to extraordinarily stiff penalties. Moreover, the possible use of the Terrorism Sentencing Enhancement means that even more minor crimes may result in shockingly high sentences if associated with terrorism. See U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 3A1.4 (2012). The enhancement results in a twelve-level increase in offense category and automatically moves defendants to the highest available criminal history category. *Id.* In practical terms, this means that defendants who might have been eligible for a sentence of under six months may instead receive as much as three years, while defendants who might have hoped for a sentence of one

tion in the terrorism context leads to fundamental questions as to whether certain defendants would have engaged in the acts for which they are sentenced, if not for government involvement and encouragement. This question goes to the heart of the culpability of defendants in these cases, hence the defense of entrapment, but it also implicates each of the legitimate purposes of punishment enunciated by the Supreme Court—“retribution, deterrence, incapacitation, and rehabilitation.”²⁰

How can a government morally attempt to deter future wrongdoers if at the same time it is enticing those individuals and encouraging dangerous ideologies? Can a defendant be sentenced for purposes of deterrence when his interest in criminality was seemingly caused by government encouragement? Surely such an individual would not legitimately incur the same level of retributive action or require the same length of rehabilitative treatment. And if a defendant was never truly a danger to begin with, surely the need to incapacitate him is minor.

The law and purposes of entrapment become primary in the terrorism context, particularly in the area of terrorism stings, because of the inherent questions as to whether these defendants are as threatening as the label of “terrorism defendant” would suggest they are. In the terrorism context, laughably incompetent criminals of little motivation and few philosophical opinions appear upon arrest as scheming ideological masterminds requiring immediate intervention, only to have those appearances dissipate over the months and years of prosecution that follow. As incompetent and directionless oafs, the harsh sentences aimed at true terror masterminds would seem entirely inapplicable. Yet the question of their capabilities is asked only in press accounts of entrapment cases, and is not offered as a criterion of the entrapment defense as posed to the jury. The jury decides the entrapment question in a single straight up or down vote, yea or nay, based on whether the defendant was ready and willing to engage in activity recommended by a government informant or undercover agent.²¹ As of yet, in spite of Judge Posner’s efforts in the 1990s,²² judges will not charge juries to consider the defendant’s capability or ability to pose an actual threat. Perhaps more importantly, the jury is given only two options—acquit or convict—and entrapment acquittals are rare, bordering on nonexistent, even without the context of videos of

year may find themselves in a category requiring a minimum of just under six years, and a life sentence might be given to a defendant who, based on his crimes and criminal history, would normally have expected to be sentenced to fewer than 10 years, all without any other enhancement applying.

²⁰ *Graham v. Florida*, 130 S. Ct. 2011, 2028 (2010).

²¹ See Fred Warren Bennett, *From Sorrells to Jacobson: Reflections on Six Decades of Entrapment Law, and Related Defenses, in Federal Court*, 27 WAKE FOREST L. REV. 829, 846 n.136 (1992).

²² See *infra* Part I.C.6.

bombs exploding and expert testimony on the dangerousness of the terror groups defendants thought they were aiding.²³

This Article suggests that entrapment and the question of actual threat posed by individual defendants should therefore be considered at sentencing as well. Part I addresses the law of entrapment and the purposes of the entrapment defense. The conclusion of this analysis is that the essential question of entrapment is whether the defendant is an unwary criminal, i.e., an individual who would have committed the crime eventually with or without government activity. This presupposes some amount of capability, and suggests that the purpose of entrapment doctrine is to allow government inducement of defendants only when those defendants are persons about whom the public has reason to be concerned. Part II then addresses what it is about a terrorism case that makes experts think the case should be taken seriously, i.e., who are the terrorism defendants about whom experts believe the public should be concerned. Part III discusses terrorism cases where the entrapment defense has been raised in the context of these questions, finding that these cases often do not present reasons for the public to be particularly concerned, yet provide reason enough for juries to conclude that defendants were willing to engage in terrorist acts. Addressing also the varying purposes of punishment as sanctioned by the Supreme Court, Part III suggests that the analysis of a defendant's capability should come into play at the level of sentencing, and finds that in fact in some cases it certainly has already via presentence investigation reports.²⁴ Part IV concludes that judges should be encouraged to look not only to the sentencing guidelines and the, perhaps overly harsh, terrorism sentencing enhancement, but also to the relative threat posed by the defendant in front of them, in relation to the broad range of terrorism defendants in the United States.

I. THE LAW OF ENTRAPMENT

Rather than a single, accepted doctrine, the entrapment defense is made up of varying statutory and common-law defenses across the states

²³ See Kevin A. Smith, Note, *Psychology, Factfinding, and Entrapment*, 103 MICH. L. REV. 759, 762–63 (2005).

²⁴ Presentence investigation reports are compiled by the defendant's probation officer, and offer details of the defendant's history and crime that aid a judge in determining whether to sentence the defendant to jail or probation and how long a sentence is appropriate. They further aid the Bureau of Prisons in determining the risks that might be posed by the defendant during his incarceration. See Timothy Bakken, *The Continued Failure of Modern Law to Create Fairness and Efficiency: The Presentence Investigation Report and Its Effect on Justice*, 40 N.Y.L. SCH. L. REV. 363, 364 (1996); Jeanne B. Stinchcombe & Daryl Hippensteel, *Presentence Investigation Reports: A Relevant Justice Model Tool or a Medical Model Relic?*, 12 CRIM. JUST. POL'Y. REV. 164, 165, 170 (2001).

and in the federal courts;²⁵ this is in large part due to the history of the development of entrapment, which originated as a response to the prevalent use of sting operations in the United States, rather than English common law or U.S. constitutional developments.²⁶ It is generally agreed, however, that the entrapment doctrine is best categorized as either “objective” or “subjective” (although some jurisdictions may employ a combination of these two methods).²⁷

A. *Entrapment Law—the Subjective and Objective Tests*

As is suggested by its name, the objective test removes the individual defendant from the entrapment analysis, turning instead to the actions of the government. Under this test, entrapment will be found where government involvement and inducement is so extensive that it creates a likelihood that any reasonable (non-criminally-minded) individual would succumb.²⁸ This makes the individual actions, history, and predisposition of the defendant irrelevant to a determination of entrapment.

It is the subjective test, however, to which the Supreme Court has subscribed.²⁹ The Supreme Court’s subjective test holds two components. First, the defense must show that the government did induce the defendant. In its most simple formulation this may be based on proof that the government initiated the criminal transaction, however at times it has been expressed as requiring inducement that “creates a substantial risk

²⁵ See PAUL MARCUS, *THE ENTRAPMENT DEFENSE* 41–51 (1989); Michael A. DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F. L. REV. 243 (1967).

²⁶ See DeFeo, *supra* note 25, at 250–51; see also Kenneth M. Murchison, *The Entrapment Defense in Federal Courts: Emergence of a Legal Doctrine*, 47 MISS. L.J. 211, 212 (1976); Rebecca Roiphe, *The Serpent Beguiled Me: A History of the Entrapment Defense*, 33 SETON HALL L. REV. 257, 259, 270 (2003). *But see* Paul Marcus, *The Development of Entrapment Law*, 33 WAYNE L. REV. 5, 13 n.43 (1986) (disputing the connection to vice crimes).

²⁷ See, e.g., MARCUS, *supra* note 25, at 41; Damon D. Camp, *Out of the Quagmire After Jacobson v. United States: Towards a More Balanced Entrapment Standard*, 83 J. CRIM. L. & CRIMINOLOGY 1055, 1063–64 (1993); Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 165–66 (1976); Louis Michael Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111, 112 n.3 (1982); Daniel L. Abelson, Comment, *Sentencing Entrapment: An Overview and Analysis*, 86 MARQ. L. REV. 773, 781–86 (2003); John D. Lombardo, Comment, *Causation and “Objective” Entrapment: Toward a Culpability-Centered Approach*, 43 UCLA L. REV. 209, 231–32 (1995); Scott C. Paton, Note, *“The Government Made Me Do It”: A Proposed Approach to Entrapment Under Jacobson v. United States*, 79 CORNELL L. REV. 995, 996 (1994); Susan E. Zale, Note, *People v. Juillet, The Entrapment Test: A Michigan Hybrid*, 1992 DETROIT C. L. REV. 933, 934.

²⁸ See Camp, *supra* note 27, at 1069–70; Paton, *supra* note 27, at 1002–05, 1030–33; Zale, *supra* note 27, at 948.

²⁹ See *Sherman v. United States*, 356 U.S. 369, 372 (1958); *Sorrells v. United States*, 287 U.S. 435, 442 (1932).

that an undisposed person or otherwise law-abiding citizen would commit the offense.³⁰

The second component is the inquiry into the defendant's predisposition. Once a defendant has shown that the government induced the criminal activity, the prosecution must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. This requires a personalized investigation into the defendant in order to determine that defendant's predisposition to commit the crime.³¹ The most common and most determinative manner of proving the defendant's predisposition is through evidence of prior crimes of a similar nature.³² A defendant who has been convicted of selling drugs repeatedly will have a very hard time arguing that a new indictment for possession with intent to sell illegal narcotics is the product of entrapment, no matter how ridiculous the price offered by law enforcement agents—his prior history of criminal activity shows that he is a criminally-minded individual, to whom the entrapment defense is not meant to apply. Moreover, because predisposition is commonly proven by prior bad acts, and because predisposition is a central aspect of the entrapment question, prosecutors are entitled to far greater leeway than the Federal Rules of Evidence would allow in discussing the defendant's criminal history once the entrapment defense has been raised.³³

Scholarly debate has long focused on the respective failures of these two tests, with a majority of authors stating their preference for the objective test.³⁴ Further argument has been made that the tests should be combined³⁵ or abandoned in favor of either a more searching review into the basis for which an undercover operation was begun, or a stronger de-

³⁰ See, e.g., *United States v. Stanton*, 973 F.2d 608, 610 (8th Cir. 1992) (quoting *United States v. Mendoza-Salgado*, 964 F.2d 993, 1004 (10th Cir. 1992)) (internal quotation marks omitted).

³¹ *Hampton v. United States*, 425 U.S. 484, 488 (1976).

³² Paul Marcus, *Proving Entrapment Under the Predisposition Test*, 14 AM. J. CRIM. L. 53, 81 (1987).

³³ See Brian Thomas Feeney, Note, *Scrutiny for the Serpent: The Court Refines Entrapment Law in Jacobson v. United States*, 42 CATH. U. L. REV. 1027, 1036–37 & n.70 (1993).

³⁴ See, e.g., MARCUS, *supra* note 25, at 106 (“[T]he vast majority of legal scholars regard the objective test favorably.”); Seidman, *supra* note 27, at 115 n.13 (“[C]ommentators have overwhelmingly favored an objective approach focusing on the propriety of the government’s conduct.”); J. Gregory Deis, Note, *Economics, Causation, and the Entrapment Defense*, 2001 U. ILL. L. REV. 1207, 1218; see also Dru Stevenson, *Entrapment and the Problem of Deterring Police Misconduct*, 37 CONN. L. REV. 67, 73 (2004). The Model Penal Code also adopts the objective test. See MODEL PENAL CODE AND COMMENTARIES § 2.13 explanatory n. (1985). In 1973, Congress debated legislatively choosing the objective test. Joseph A. Colquitt, *Rethinking Entrapment*, 41 AM. CRIM. L. REV. 1389, 1390 n.9 (2004).

³⁵ See, e.g., Lombardo, *supra* note 27, at 234–35; Paton, *supra* note 27; Zale, *supra* note 27, at 957, 960.

fense of due process or outrageous government conduct (discussed below).³⁶

B. *Outrageous Government Conduct*

Scholars have advocated for a due process or outrageous-government-conduct defense to entrapment with the idea that it would take the question of entrapment out of the hands of juries, providing a more objecting and less emotional judicial determination.³⁷ The outrageous government conduct defense is, like entrapment, a product of the recent past, yet, unlike entrapment, it has yet to be successfully employed as a complete defense at the Supreme Court level.

The standard originated with a 1951 case involving attacks to the physical integrity of a suspect. In *Rochin v. California* police pumped the stomach of a suspect after he, in response to questions about pills on his nightstand, swallowed the pills rather than answer.³⁸ The Supreme Court found that the actions taken in the case so shocked the conscience that allowing the conviction to stand would violate due process of law.³⁹ But *Rochin* was well-rooted in the law of coerced confessions, and the due process violation was in the admission of this evidence, not in continuing to prosecute after this level of government misconduct.⁴⁰

³⁶ See, e.g., Leslie W. Abramson & Lisa L. Lindeman, *Entrapment and Due Process in the Federal Courts*, 8 AM. J. CRIM. L. 139 (1980); Donald A. Dripps, *At the Borders of the Fourth Amendment: Why a Real Due Process Test Should Replace the Outrageous Government Conduct Defense*, 1993 U. ILL. L. REV. 261; Paul Marcus, *The Due Process Defense in Entrapment Cases: The Journey Back*, 27 AM. CRIM. L. REV. 457, 466–67, 471–72 (1990); Paul Marcus, *Toward an Expanded View of the Due Process Claim in Entrapment Cases*, 6 GA. ST. U. L. REV. 73, 76–77, 82–83 (1989); Edward G. Mascolo, *Due Process, Fundamental Fairness, and Conduct that Shocks the Conscience: The Right Not to Be Enticed or Induced to Crime by Government and Its Agents*, 7 W. NEW ENG. L. REV. 1 (1984); Teri L. Chambers, Note, *United States v. Jacobson: A Call for Reasonable Suspicion of Criminal Activity as a Threshold Limitation on Governmental Sting Operations*, 44 ARK. L. REV. 493 (1991); Jarrod S. Hanson, Comment, *Entrapment in Cyberspace: A Renewed Call for Reasonable Suspicion*, 1996 U. CHI. LEGAL F. 535, 547; Jack B. Harrison, Note, *The Government as Pornographer: Government Sting Operations and Entrapment*, 61 U. CIN. L. REV. 1067 (1993); Maura F. J. Whelan, Comment, *Lead Us Not into (Unwarranted) Temptation: A Proposal to Replace the Entrapment Defense with a Reasonable-Suspicion Requirement*, 133 U. PA. L. REV. 1193 (1985); Michael O. Zabriskie, Comment, *If the Postman Always “Stings” Twice, Who is the Next Target?—An Examination of the Entrapment Theory*, 19 J. CONTEMP. L. 217 (1993).

³⁷ See *supra* note 36.

³⁸ *Rochin v. California*, 342 U.S. 165, 166 (1952). The pills turned out to be morphine. Rochin was convicted of possession of morphine based on the introduction at trial of the not-yet digested pills police recovered by pumping his stomach. *Id.*

³⁹ *Id.* at 172.

⁴⁰ See *id.* at 173 (“It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach. To attempt in this case to distinguish what lawyers call ‘real evidence’

The possibility of a complete defense of outrageous government conduct was introduced in *United States v. Russell*.⁴¹ Although the defense failed, the Supreme Court acknowledged that it might one day succeed if “the conduct of law enforcement agents [were] so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.”⁴²

The defense received similar mixed support three years later when Justice Powell, concurring in another failed entrapment case, argued that a case might exist where government inducement or involvement exhibited behavior so egregious that due process principles might bar the conviction of even a predisposed defendant.⁴³ Justice Powell acknowledged that such cases would be rare and would require “a demonstrable level of outrageousness.”⁴⁴

No Supreme Court case has found a legitimate claim of outrageous government conduct barring conviction for purposes of undue government influence on the crime (i.e. entrapment).⁴⁵ A single Third Circuit case has employed the doctrine to overrule a conviction,⁴⁶ yet that case has been poorly received even in its own circuit and questioned in numerous decisions since.⁴⁷

Yet in spite of its abject failure as a complete defense, calls for acquittals and/or dismissals based on outrageous government conduct abound, much like calls for federal acceptance of the objective test for entrapment.⁴⁸ Efforts in these directions share a desire to make law enforcement more accountable for the control it exhibits in the formation of a criminal enterprise for which defendants will eventually be held responsible, while avoiding jury determinations on the issue. Founded in a rejection of the concept of punishing a defendant for behavior that would

from verbal evidence is to ignore the reasons for excluding coerced confessions.” (footnote omitted). Concurring opinions by Justices Black and Douglas expressly rejected the overall due process language in favor of referring back to the Fifth Amendment protection against self-incrimination. *See id.* at 174–77 (Black, J., concurring); *id.* at 177–79 (Douglas, J., concurring).

⁴¹ 411 U.S. 423 (1973).

⁴² *Id.* at 431–32 (citing *Rochin*, 342 U.S. 165).

⁴³ *Hampton v. United States*, 425 U.S. 484, 492–95 (1976) (Powell, J., concurring in the judgment).

⁴⁴ *Id.* at 495 n.7.

⁴⁵ As Donald Dripps has noted, “*Rochin* involved: (1) flagrant disregard of the Fourth Amendment; (2) brutality to the person; and (3) the extraction of evidence from inside the suspect’s body,” and efforts to use the defense in cases involving merely bodily invasion or flagrant illegality have failed. Dripps, *supra* note 36, at 267–68.

⁴⁶ *United States v. Twigg*, 588 F.2d 373, 381–82 (3d Cir. 1978). Notably, the case did not involve exceptional violence or abuse of a suspect, but simply overarching government involvement and control of an illegal narcotics operation.

⁴⁷ *See, e.g., United States v. Ward*, 793 F.2d 551, 554 (3d Cir. 1986); *United States v. Beverly*, 723 F.2d 11, 12 (3d Cir. 1983); *United States v. Jannotti*, 673 F.2d 578, 610 n.17 (3d Cir. 1982) (en banc).

⁴⁸ *See supra* note 36.

never have occurred without government aid, imagination, and direction, these contrasting theories of entrapment criticize the fishing expedition of government sting operations and attempt to create a more active method of judicial oversight.

To make entrapment a question for a judge, rather than a jury, would mean removing the question of guilt from the jury's bailiwick—something that the Supreme Court has given no hint of being likely to allow in this area. Yet the question of the comparable criminality of convicted defendants and the level of punishment called for in particular cases would naturally fall to a judge. In fact, it is precisely these questions that eventually resulted in the entrapment doctrine.⁴⁹

C. *The Varying Purposes of the Entrapment Doctrine*

As was noted above, the entrapment doctrine originated largely in response to the development of vice crimes and the undercover or “sting” police operations that necessarily accompanied these crimes. “Victimless” crimes by their nature undermine the ability of law enforcement to detect and prosecute violators; without a victim to bring a case or a defendant to police attention, government options are severely limited. For this reason, the increase in criminalization of vice was accompanied by an increase in the use of undercover police officers in order to detect and prosecute without relying on a civilian report.⁵⁰ The fundamental aspect of a police “sting” is the use of an undercover agent, either police officer or police informant, to “create or facilitate the very offense of which the defendant is convicted.”⁵¹ Police involvement in criminal activity, in particular the creation of a crime for which a defendant is eventually prosecuted, brought steadily increasing concern over the course of the 20th century. This concern was itself based on a number of varying rationales, including moral indignation, judicial integrity, the dangers of encouraging criminality, police deterrence, and resource allocation. Each of these has been used to justify the entrapment defense. While the following discussion deals with each separately, it must be noted that these interests have most often been expressed in varying combinations, often without clearly delimiting where one ends and another begins.

1. *Legislative Intent*

Any analysis of the purposes of the law of entrapment must begin with preserving legislative intent, as this is the purpose that has been officially endorsed by the Supreme Court.⁵² In fact, the idea that prosecuting

⁴⁹ Stevenson, *supra* note 34, at 83–88.

⁵⁰ Gerald Dworkin, *The Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime*, 4 LAW & PHIL. 17, 18 (1985); Dru Stevenson, *Entrapment by Numbers*, 16 U. FLA. J.L. & PUB. POL'Y 1, 8–9 (2005).

⁵¹ Bruce Hay, *Sting Operations, Undercover Agents, and Entrapment*, 70 MO. L. REV. 387, 388 (2005).

⁵² See *Sorrells v. United States*, 287 U.S. 435 (1932).

a defendant for a crime first suggested by law enforcement officials was outside of the “spirit of the law” was already in play in 1879, decades before the Supreme Court authorized the defense.⁵³ But it was in 1932, in the case of a defendant charged with violating a prohibition statute, when the Supreme Court stated that it could not be “the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them.”⁵⁴ Although emphatically rejecting any authority to pardon or immunize a guilty defendant, construing the statute to call for the incarceration of an otherwise innocent defendant would be calling for “absurd or glaringly unjust results.”⁵⁵ In other words, the statute had to be construed as if the defendant simply was not the target of that statute and therefore was not guilty.

Legislative intent is still the accepted rationale for the entrapment doctrine, yet over the years it has become apparent that several other purposes underlie the doctrine. The following Sections discuss these purposes.

2. *Moral Indignation*

In *United States v. Becker*, Judge Learned Hand described entrapment as the result of “a spontaneous moral revulsion against using the powers of government to beguile innocent, though ductile, persons into lapses which they might otherwise resist.”⁵⁶ This sentiment has always accompanied the entrapment doctrine, and may well have even predated it. Paul Marcus has dated the origins of the entrapment defense to a decision on whether a witness’s credibility could be challenged in cross-examination by the introduction of questions regarding police involvement in the crime.⁵⁷ One concurring justice based his decision in part on “the plainest principles of duty and justice,” which required that a police officer, when approached by a criminal, attempt to prevent the commission of an offense rather than encourage it.⁵⁸ A case in the Eighth Circuit dating from 1921 (more than ten years before the defense found acceptance in the Supreme Court) refers to behavior that would constitute entrapment as “unconscionable,”⁵⁹ a statement later adopted by the Supreme Court.⁶⁰ Moreover, entrapment decisions have been steeped in the language of evil, temptation, and even seduction. As an example, the Supreme Court’s decision in *Sherman v. United States* described the “evil which the

⁵³ See *O’Brien v. State*, 6 Tex. Ct. App. 665, 668 (1879); see also MARCUS, *supra* note 25, at 11.

⁵⁴ *Sorrells*, 287 U.S. at 448.

⁵⁵ *Id.* at 450.

⁵⁶ *United States v. Becker*, 62 F.2d 1007, 1009 (2d Cir. 1933).

⁵⁷ See Marcus, *supra* note 26, at 9–10.

⁵⁸ *Saunders v. People*, 38 Mich. 218, 222 (1878) (Marston, J., concurring).

⁵⁹ *Butts v. United States*, 273 F. 35, 38 (8th Cir. 1921).

⁶⁰ *Sorrells*, 287 U.S. at 444 (quoting *Butts*, 273 F. at 38).

defense of entrapment is designed to overcome. The government informer *entices* someone [T]he Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted.”⁶¹ The Second Circuit’s earlier opinion in the case (Judge Learned Hand again) had evidenced similar disgust, stating that the question was whether the prosecution had “seduced an innocent person.”⁶²

3. *Judicial Integrity*

The threat entrapment poses to judicial integrity similarly offers a purpose for the entrapment doctrine that predates the doctrine itself. It is on this basis that Justice Brandeis dissented in *Casey v. United States*, a 1928 case rejecting the entrapment defense.⁶³ Justice Brandeis stated that the entrapment defense should be authorized because to do otherwise “would be tantamount to a ratification by the Government of the officers’ unauthorized and unjustifiable conduct.”⁶⁴ He went on to state that an entrapment defense was necessary “[t]o preserve the purity of [the Government’s] courts” from “illegal conduct of its officers.”⁶⁵ This view was echoed by a minority of the Court in *Sorrells*, stating that the true purpose of the entrapment defense was to protect “the purity of government and its processes” and to “protect [the judiciary] and the government from such prostitution of the criminal law.”⁶⁶ The interest in judicial integrity has remained a primary theme in justifications for the entrapment doctrine, although it has also remained a minority viewpoint.⁶⁷

4. *The Dangers of Encouraging Law-Breaking*

The dangers inherent in encouraging criminal behavior have frequently accompanied both a moral revulsion and a concern with judicial integrity, yet its recurrence as a theme in, and justification for, the entrapment doctrine is consistent enough to warrant mentioning independently. Another justification with early beginnings, the concern appears in an 1878 concurrence that exemplifies the moralistic reasoning so often associated with entrapment, as well as the more practical crimi-

⁶¹ *Sherman v. United States*, 356 U.S. 369, 376 (1958) (emphasis added). It is easy to see why this type of indignation appeared in this case, in which a government informer met the defendant at a doctor’s office where the defendant was being treated for his drug addiction. The informer begged the defendant, over several refusals, to sell him drugs, continuously emphasizing his own suffering from withdrawal symptoms. *Id.* at 371.

⁶² *United States v. Sherman*, 200 F.2d 880, 882 (2d Cir. 1952).

⁶³ *Casey v. United States*, 276 U.S. 413 (1928).

⁶⁴ *Id.* at 423–24 (Brandeis, J., dissenting).

⁶⁵ *Id.* at 425.

⁶⁶ *Sorrells v. United States*, 287 U.S. 435, 455, 457 (1932) (Roberts, J., concurring).

⁶⁷ See, e.g., *United States v. Russell*, 411 U.S. 423, 436–39 (1973) (Douglas, J., dissenting) (advocating for Justice Brandeis’s position from *Casey*).

nal concern.⁶⁸ In this early example, Judge Marston warns against encouraging or aiding individuals to commit crime, stating that the job of the police officer, when approached by a criminal is to seek “improvement of the would-be criminal, rather than . . . his farther debasement. . . . Human nature is frail enough at best and requires no encouragement in wrong-doing.”⁶⁹ The concern reappears in Justice Frankfurter’s concurrence in *Sherman*: “Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime.”⁷⁰

5. *Police Deterrence*

Although it is not often expressly stated, the desire to prevent police overreaching is a clear aspect of judicial opinions concerned with any and all of the above issues. The moral disgust expressed by Justice Warren resulted in a statement that “[l]aw enforcement does not require methods such as this,”⁷¹ along with instructions to dismiss the indictment on the basis of entrapment. In the same case, Justice Frankfurter echoed that “certain police conduct to ensnare [a defendant] into further crime is not to be tolerated by an advanced society.”⁷² Scholars seem to almost uniformly agree, some implicitly and others explicitly, that deterrence of police misconduct, or at least judicial oversight of police activity, is a fundamental aspect of the entrapment doctrine.⁷³

6. *Resource Allocation*

Concerns regarding wasted resources are a late but powerful addition to the motivations behind the entrapment doctrine. In 1983, Judge Posner described the dilemma of determining when a sting operation has gone too far in the following manner:

If the police entice someone to commit a crime who would not have done so without their blandishments, and then arrest him and he is prosecuted, convicted, and punished, . . . resources that could and should have been used in an effort to reduce the nation’s unacceptably high crime rate are used instead in the entirely sterile activity of first inciting and then punishing a crime. However, if the police are just inducing someone to commit sooner a crime he would have committed eventually, but to do so in controlled cir-

⁶⁸ *Saunders v. People*, 38 Mich. 218, 221–22 (1878) (Marston, J., concurring).

⁶⁹ *Id.* at 222.

⁷⁰ *Sherman v. United States*, 356 U.S. 369, 384 (1958) (Frankfurter, J., concurring in the result); see also Hay, *supra* note 51, at 399 (“The stirred-up crime itself may cause harm: usually the police try to make an arrest before any real harm is done, but there is no guarantee they will succeed.”).

⁷¹ *Sherman*, 356 U.S. at 376 (majority opinion).

⁷² *Id.* at 382–83 (Frankfurter, J., concurring).

⁷³ See, e.g., Hay, *supra* note 51, at 397 (invites corruption and blackmail); Stevenson, *supra* note 34, at 73; Stevenson, *supra* note 50, at 13–14; Nancy Y.T. Hanewicz, Note, *Jacobson v. United States: The Entrapment Defense and Judicial Supervision of the Criminal Justice System*, 1993 Wis. L. Rev. 1163, 1164–65.

cumstances where the costs to the criminal justice system of apprehension and conviction are minimized, the police are economizing on resources.⁷⁴

It is not too much of a stretch to believe that this concern lay behind Judge Posner's decision in *United States v. Hollingsworth*, referring to the question of whether police had induced a farmer and a dentist to engage in a money laundering scheme in which they never would have had the competence, resources, or connections to engage without government interference.⁷⁵ In that case, Judge Posner argued that a defendant must not only be willing (i.e. predisposed) to commit the crime of which he is accused, but also capable of committing that crime.⁷⁶ There Judge Posner stated:

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.⁷⁷

Judge Posner's startling move in *Hollingsworth* has yet to be fully adopted in other circuits, although the Fifth Circuit appears to be toying with the idea.⁷⁸ The use of resource-allocation arguments to support the entrapment doctrine has found further support outside of the judiciary. Legal scholarship regularly notes wasted resources as a concern justifying some form of entrapment doctrine.⁷⁹

Although concerns regarding resource allocation have yet to be widely accepted in the judiciary as a primary purpose behind the en-

⁷⁴ *United States v. Kaminski*, 703 F.2d 1004, 1010 (7th Cir. 1983) (Posner, C.J., concurring).

⁷⁵ *United States v. Hollingsworth*, 27 F.3d 1196, 1202 (7th Cir. 1994) (en banc).

⁷⁶ *Id.* at 1200. How much of a creation out of whole cloth this requirement is may be debated. *Sorrells* requires that a defendant be "ready and willing" to commit the crime prior to government interference. However, no other circuit has followed Judge Posner, with the exception of a single decision in the Fifth Circuit that was later vacated on other grounds. See *infra* note 78 and accompanying text.

⁷⁷ *Hollingsworth*, 27 F.3d at 1200.

⁷⁸ See, e.g., *United States v. Thickstun*, 110 F.3d 1394, 1397–98 (9th Cir. 1997) (rejecting *Hollingsworth*); *United States v. Zaia*, Nos. 93-1452, 93-1454, 1994 WL 478707, at *3 (6th Cir. Sept. 2, 1994) (same). The Fourth Circuit has entertained the reasoning in dicta while refusing to rule on its basis. See *United States v. Squillacote*, 221 F.3d 542, 567 (4th Cir. 2000). The Fifth Circuit has come close to accepting Posner's reasoning, adopting it in *United States v. Knox*, 112 F.3d 802, 808 (5th Cir. 1997), vacating that holding on preservation grounds in rehearing en banc in *United States v. Brace*, 145 F.3d 247, 256 (5th Cir. 1998), and then mentioning the reasoning again in dicta in *United States v. Ogle*, 328 F.3d 182, 188–90 (5th Cir. 2003).

⁷⁹ See, e.g., Deis, *supra* note 34, at 1225–26; Hay, *supra* note 51, at 398; Richard H. McAdams, *The Political Economy of Entrapment*, 96 J. CRIM. L. & CRIMINOLOGY 107, 158 (2005); Seidman, *supra* note 27, at 143; Ian J. McLoughlin, Note, *The Meaning of Predisposition in Practice*, 79 B.U. L. REV. 1067, 1083–84 (1999); Whelan, *supra* note 36, at 1213.

trapment doctrine, they serve as a useful prism through which to view the primary questions in entrapment cases. In every entrapment case, the question returns: Did police in this case engage in a trap for the unwary criminal or for the unwary innocent? How do we make the distinction between these two? Who do we want our law enforcement agencies to spend their time investigating?

II. WHO IS A PROPER TARGET?

The subject of how to identify the next serious terrorist threat is much debated and full exploration of the topic is beyond the scope of this paper. However, some brief discussion of the lowest common denominator of agreement among theories of radicalization and threat levels is worthwhile in order to determine whether there is some baseline against which to examine law enforcement tactics in terrorism investigations.

Certainly, government “stings”⁸⁰ are a vital aspect of police efforts to prevent terror attacks. First, the sting offers an opportunity to infiltrate a collection of radicalized individuals, possibly leading to an opportunity to gather significant intelligence about the structure of the terrorist organization in the moment. Second, the infiltration of the group offers the government the opportunity to become the sole supplier of weapons to the group. Guns and bombs therefore may be disabled, even while the group ceases looking for other sources of destructive materials. In this way, a group that might have become a serious threat to civilians is completely neutralized, as the government maintains control over the group’s access to threatening devices and stays aware of the goals, targets, and plots of the group. For these reasons, the sting is an irreplaceable aspect of policing homegrown terrorism.

However, the sting also naturally leads to all of the problems described above. In cases where arrests are made before the “crime” actually takes place (i.e. before a would-be terrorist presses a button on a disabled bomb, believing that the bomb is about to explode), doubts arise as to whether the defendant ever meant to go through with the plot. Many defendants claim that they were merely boasting, and were both incapable and uninterested in proceeding with the plot.⁸¹ Other defendants claim to have been trying to scheme money out of the undercover informant or recruiter who found them. In the case of the Liberty City Seven (seven defendants accused of plotting with an undercover agent to at-

⁸⁰ In the words of Bruce Hay: “The defining feature of a sting operation is that through covert means, the authorities create or facilitate the very offense of which the defendant is convicted.” Hay, *supra* note 51, at 388.

⁸¹ See, e.g., Christopher Drew & Eric Lichtblau, *Two Views of Terror Suspects: Die Hards or Dupes*, N.Y. TIMES, July 1, 2006, at A1; A. G. Sulzberger, *Lawyers Dispute Suspects’ Intent in J.F.K. Bomb Plot Trial*, N.Y. TIMES, July 1, 2010, at A29; Paul von Zielbauer, *5 Men Are Convicted in Plot on Fort Dix*, N.Y. TIMES (December 22, 2008), <http://www.nytimes.com/2008/12/22/nyregion/23fortdix.html>.

tack an FBI building, the Sears Tower in Chicago, and various other targets), this defense resulted in acquittals for two defendants and, for the other five defendants, three trials, with the first two trials ending in hung juries.⁸²

Perhaps in response to these problems, the U.S. has seen an increase in cases where FBI informants and undercover agents have allowed the plot to proceed all the way to an attempted bombing. Here is where the question of entrapment arises. Specifically, the need to have complete control over the crime in question leads to doubts as to whether the crime would ever have occurred without the involvement of law enforcement agents. Rather than allow a suspected radical to have access to actual explosives, law enforcement agents maintain careful control over the provision of such devices.⁸³ This level of control necessarily undermines the argument that the defendant could or would have acted on his own. If no terrorist plot was in the making before law enforcement appeared on the scene, and the defendant has shown no ability to independently acquire dangerous materials, how then can prosecutors state for certain that the defendant was willing and ready to act without law enforcement involvement?

Alternately, fears of terror recruitment suggest that perhaps any amount of convincing should be allowable in order to determine who might be willing to be recruited into the cause. Homegrown terrorists do not always simply decide on their own to become part of the global jihad. Instead, individuals have been identified, and more are believed to exist who are as yet unidentified, who help radicalize and organize new recruits.⁸⁴ The fact that such recruiters exist suggests that, in order to be truly preventive, law enforcement might be well served by imitating the recruitment process. In this way, receptive individuals might be identified and incapacitated prior to their being able to cause harm. If this is to be the goal of the terrorist sting, a good amount of convincing, encouraging, egging on, and even radicalizing of individuals may be part of the work of the informant or undercover agent.

Yet if we are to take seriously the idea that law enforcement should spend its resources only on persons who would, of their own accord, have come in contact with genuine criminals and then choose to engage in that criminality, we must have some idea of how this process of recruitment and radicalization works. While there might be reasons to induce and encourage (to some extent) terrorist activity in order to maintain control and seek new avenues of investigation and intelligence gathering, these reasons would not seem to reach further than the actions of actual

⁸² See Damien Cave & Carmen Gentile, *Five Convicted in Plot to Blow Up Sears Tower as Part of Islamic Jihad*, N.Y. TIMES, May 13, 2009, at A19; see also Carmen Gentile, *U.S. Begins Third Effort to Convict 6 in Terror Case*, N.Y. TIMES, Feb. 19, 2009, at A19.

⁸³ See, e.g., Hernandez & Baker, *supra* note 1.

⁸⁴ See Jerrold M. Post et al., *The Terrorists in Their Own Words: Interviews with 35 Incarcerated Middle Eastern Terrorists*, 15 TERRORISM & POL. VIOLENCE 171, 173 (2003).

terrorist recruiters.⁸⁵ The following Section briefly discusses what is known of this process of recruitment.

A. *Where Experts Agree About the Path to Islamist Terrorism—Radicalization*

There is massive disagreement among experts and the intelligence community regarding the process of terrorist recruitment and radicalization. Experts disagree about the role of religion, whether radicalization is helped or hindered by activities within the mosque, whether outward signs of radicalization exist and can be relied on, whether radicalization requires a simple friendship or a hierarchical cell structure, and whether it requires close personal ties or can be completed over the Internet.⁸⁶ Yet one fact is so widely agreed upon that it has avoided mention—this is the fact that actual radicalization is a necessary aspect of involvement in terrorist activity. While individuals may sell drugs, launder money, or provide false identification for terrorists simply because a profitable opportunity has arisen, those individuals who have become involved in violent terrorist plots have done so only after acquiring a terrorist ideology; experts only disagree on the routes to this ideology.⁸⁷ Government studies seeking to identify a profile or path to terrorism take actual belief in terrorist methods and goals as a necessary ingredient, studying instead how that belief is engendered. Religious belief, for instance, may be only distantly connected to radicalization, and it may even counter-indicate radicalization.⁸⁸ Yet radicalization, i.e. the acquisition of a radical belief in the use of violence to attain political goals, is universal to the literature on

⁸⁵ See McAdams, *supra* note 79, at 129–30; see also Louis Michael Seidman, *Entrapment and the “Free Market” for Crime* 7 (Georgetown Law Faculty, Working Paper No 62, 2008), available at http://scholarship.law.georgetown.edu/fwps_papers/62.

⁸⁶ See Faiza Patel, *Rethinking Radicalization*, BRENNAN CTR. FOR JUSTICE 5–10 (2011), <http://www.brennancenter.org/page/-/RethinkingRadicalization.pdf>.

⁸⁷ See, e.g., THOMAS HEGGHAMMER, *JIHAD IN SAUDI ARABIA: VIOLENCE AND PAN-ISLAMISM SINCE 1979*, at 239–42 (2010); MARC SAGEMAN, *UNDERSTANDING TERROR NETWORKS* 135 (2004); Jeff Goodwin, *A Theory of Categorical Terrorism*, 84 *SOC. FORCES* 2027, 2032–36 (2006); Ami Pedahzur et al., *Altruism and Fatalism: The Characteristics of Palestinian Suicide Terrorists*, 24 *DEVIANT BEHAVIOR* 405 (2003); Post et al., *supra* note 84, at 171; see also Albert J. Bergesen & Yi Han, *New Directions for Terrorism Research*, 46 *INT’L J. COMP. SOC.* 133 (2005) (suggesting and implementing a new comparative strategy for research into modern terrorism).

⁸⁸ See BRIAN MICHAEL JENKINS, *WOULD-BE WARRIORS: INCIDENTS OF JIHADIST TERRORIST RADICALIZATION IN THE UNITED STATES SINCE SEPTEMBER 11, 2001*, at 3 (Rand Corp., Occasional Paper, 2010), available at http://www.rand.org/pubs/occasional_papers/OP292.html; MARC SAGEMAN, *LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY* 51 (2008); Tufyal Choudhury, *Dep’t for Communities & Local Gov’t, The Role of Muslim Identity Politics in Radicalisation*, COUNTEREXTREMISM.ORG, 6 (Mar. 2007), <https://www.counterextremism.org/resources/details/id/34>.

the threat of terrorism, radicalization, and recruitment.⁸⁹ Simply put, the study of the path to terrorism is the study of radicalization.

The statement above naturally leads to the conclusion, supported by the history of terrorism prosecutions in the United States, that those suspected or convicted terrorists who have engaged in actual violent plots on behalf of terrorist organizations have done so based on their own belief in the cause. Those defendants who have claimed not to believe in the cause have generally argued entrapment and, if convicted, it has been based on a decision by the jury not to believe that claim.⁹⁰ The other side of this coin is the fact that no suspected or convicted terrorist who has engaged in a violent plot in the United States on behalf of a global Islamist terrorist organization has done so for financial gain. Although finances have been a repeated aspect of questionable terrorism prosecutions, they do not appear in the biographies or analyses of those individuals who have managed to actually become threatening.⁹¹

B. *What Else Makes a Terrorism Case Seem Substantial—Operational Capacity*

At what point does a plot become threatening enough that interference, even in such a way that may entrap innocent persons, becomes worthwhile? As with so many questions surrounding counterterrorism tactics, and reflecting the primary question of trapping the unwary criminal as opposed to the unwary innocent, the question would seem to be

⁸⁹ See, e.g., DAVEED GARTENSTEIN-ROSS & LAURA GROSSMAN, *Homegrown Terrorists in the U.S. and U.K.: An Empirical Examination of the Radicalization Process* (2009), available at http://www.defenddemocracy.org/stuff/uploads/documents/HomegrownTerrorists_USandUK.pdf; JOHN HORGAN, *The Psychology of Terrorism* 105–06 (2005); JENKINS, *supra* note 88; Clark McCauley & Sophia Moskalkenko, *Individual and Group Mechanisms of Radicalization*, in *Protecting the Homeland from International and Domestic Terrorism Threats: Current Multi-Disciplinary Perspectives on Root Causes, the Role of Ideology, and Programs for Counter-Radicalization and Disengagement* 82, 82–91 (Laurie Fenstermacher et al. eds., 2010), available at http://www.start.umd.edu/start/publications/U_Counter_Terrorism_White_Paper_Final_January_2010.pdf; TOMAS PRECHT, *Danish Ministry of Justice, Home Grown Terrorism and Islamist Radicalisation in Europe: From Conversion to Terrorism* (2007), available at http://www.justitsministeriet.dk/sites/default/files/media/Arbejdsomraader/Forskning/Forskningspuljen/2011/2007/Home_grown_terrorism_and_Islamist_radicalisation_in_Europe_-_an_assessment_of_influencing_factors__2_.pdf; LORENZO VIDINO, *Radicalization, Linkage, and Diversity: Current Trends in Terrorism in Europe* (Rand Corp., Occasional Paper, 2011), available at http://www.rand.org/pubs/occasional_papers/OP333.html; Clark McCauley & Sophia Moskalkenko, *Mechanisms of Political Radicalization: Pathways Toward Terrorism*, 20 *TERRORISM & POL. VIOLENCE* 415 (2008); Alison Pargeter, *North African Immigrants in Europe and Political Violence*, 29 *STUD. CONFLICT & TERRORISM* 731 (2006); Andrew Silke, *Holy Warriors: Exploring the Psychological Processes of Jihadi Radicalization*, 5 *EUR. J. CRIMINOLOGY* 99, (2008); Choudhury, *supra* note 88.

⁹⁰ See *supra* notes 82–85 and accompanying text.

⁹¹ See Press Release, Dep't of Justice, Fact Sheet: Prosecuting and Detaining Terror Suspects in the U.S. Criminal Justice System (June 9, 2009), available at <http://www.justice.gov/opa/pr/2009/June/09-ag-564.html>.

one of threat level. If a suspect is no threat to the country, and no terrorist attack would occur without the interference of government actors, then there is little reason or justification for interfering with his life, egging on such an attack, and then arresting him. However, signs that a defendant poses a serious threat to the country may justify this type of interference. Over the past ten years, several such factors have emerged.

The first question to be asked is whether the defendant's interests reach to actual personal involvement in violent terrorist activity. The actions of persons accused of involvement in terrorism in our courts may be broken down into the following three categories: 1) Persons offering financial aid or humanitarian provisions such as food or blankets to terrorist organizations generally; 2) Persons offering weapons or military gear to terrorist organizations; and 3) Persons willing to engage in violent activity themselves.

It should be readily apparent that those in the third group pose the most immediate and serious threat in the eyes of law enforcement officials, as they pose the most immediate threat overall. It may be a useful prosecution and counterterror strategy to associate, publicly and criminally, terrorist financiers with active terrorists, aiding the ability of law enforcement to cut off the roots that support terrorism. However, in the path to violence and death, surely the acquisition of actual weapons presents a more immediate risk than the provision of finances. Similarly, the willingness to go out and place a bomb or use a weapon is, controlling for all other factors, closer to the actual perpetration of violence than is the acquisition of dangerous materials.

This fact is supported by the sentences received in terrorism prosecutions. 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. Out of those 66, 50 were involved in some type of plot either to reach terrorists overseas in order to join their violent efforts or to engage in some form of violent activity on behalf of terrorism here in the United States. Another nine were engaged in category 2 activity at the highest levels—namely attempting to provide missiles or bombs to a known terrorist organization.⁹²

But once allegations of entrapment are raised, the usefulness of judging terrorists by their plot level must be questioned. Plots may have been suggested or overly influenced by the activities of law enforcement agents. At this point, the question of operational capability may be even more useful as a way to determine the relative threat level of any given terrorism suspect.

⁹² These numbers come from my own research into terrorism prosecutions. I am extraordinarily grateful to Karen Greenberg and the Center on Law and Security at NYU Law for allowing me to begin my research with the names of defendants indicted in association with terrorism that I had compiled there as part of my duties as Director of Research from January 2008 through September 2010. I then added to this dataset, as well as updating it, after I left the Center in October 2010.

Operational capability may be defined as the ability of terrorists to successfully carry out acts of violence.⁹³ The presence of not just sympathetic individuals but individuals with training, such that they attain the capability to successfully launch an attack, has been a constant concern of the intelligence community. This is supported by common sense: an individual who wishes to build a bomb and kill civilians may be a threat in the long-term sense, should he learn to build or acquire a bomb he would certainly become dangerous. While some have theorized that aspiring terrorists might attain this capability through pamphlets posted on the Internet,⁹⁴ incidents of terrorism thus far have not been accomplished by individuals who have learned to build bombs through Internet postings or *The Anarchist Cookbook*.⁹⁵ Instead, training is required in order to turn an aspiring terrorist into an actual threat. As Peter Bergen has stated, “It’s ridiculous to think that the U.S. or any other military would do its training over the Internet . . . Radicalization is one thing, having operational cells with the capacity to launch attacks is something else entirely.”⁹⁶ As an example, some experts have speculated that Faisal Shahzad’s “abbreviated” training accounted for the fact that the bomb he placed in Times Square was poorly made and failed to properly explode.⁹⁷ The intelligence community has generally acknowledged this, which is part of the reason that training is repeatedly referred to as one aspect of what makes for a serious threat.⁹⁸

⁹³ See, e.g., JEROME P. BJELOPERA, CONG. RESEARCH SERV., AMERICAN JIHADIST TERRORISM: COMBATING A COMPLEX THREAT 34–36 (2011), available at <http://www.fas.org/sgp/crs/terror/R41416.pdf>; BRIAN A. JACKSON & DAVID R. FRELINGER, UNDERSTANDING WHY TERRORIST OPERATIONS SUCCEED OR FAIL 4–5 (Rand Corp., Occasional Paper, 2009), available at http://www.rand.org/pubs/occasional_papers/OP257.html.

⁹⁴ See GABRIEL WEIMANN, TERROR ON THE INTERNET: THE NEW ARENA, THE NEW CHALLENGE 111–40 (2006).

⁹⁵ WILLIAM POWELL, THE ANARCHIST COOKBOOK (1971).

⁹⁶ Peter Bergen, *Peter Bergen on Homegrown Terror in UPI*, NEW AM. FOUND. (January 21, 2007), <http://counterterrorism.newamerica.net/node/20671>.

⁹⁷ See, e.g., PETER BERGEN & BRUCE HOFFMAN, ASSESSING THE TERROR THREAT: A REPORT OF THE BIPARTISAN POLICY CENTER’S NATIONAL SECURITY PREPAREDNESS GROUP 13 (2010), available at <http://bipartisanpolicy.org/sites/default/files/NSPG%20Final%20Threat%20Assessment.pdf>.

⁹⁸ See, e.g., *Annual Threat Assessment of the U.S. Intelligence Community: Hearing Before the H. Permanent Select Comm. on Intelligence*, 111th Cong. 35 (2010) (statement of Dennis C. Blair, Director of National Intelligence) (“It is clear . . . that a sophisticated, organized threat from radicalized individuals and groups in the United States comparable to traditional homegrown threats in other countries has not emerged. Indeed, the elements most conducive to the development of an entrenched terrorist presence—leadership, a secure operating environment, trained operatives, and a well-developed support base—have been lacking to date in the United States or, where they have been nascent, have been interrupted by law enforcement authorities.”); *Eight Years After 9/11: Confronting the Terrorist Threat to the Homeland: Hearing Before the Sen. Comm. on Homeland Sec. & Governmental Affairs*, 111th Cong. 167 (2009) (statement of Mike Leiter, Director, National Counter Terrorism Center) (“The handful of homegrown extremists who have sought to strike within the

Connected to the need for training is the question of whether a suspect might be willing or able to reach a training camp in order to acquire this capability. Here too, experts have long noted the need for travel to a training camp or the interest in that travel as one aspect of an evaluation of the threat posed by individuals. As part of an evaluation of the threat posed by U.S. radicals, Peter Bergen noted in testimony to Congress the number of Americans who had travelled to terrorist training camps.⁹⁹ Dennis Blair has noted that a “linkage to overseas terrorist groups is probably necessary to transform [the threat posed by U.S. Islamist radicals] into a level associated with traditional terrorist groups.”¹⁰⁰

Moreover, even the dedicated and aspiring jihadist who finds radical ideology and adherents on the Internet and endeavors to travel overseas and reach a training camp may fail in his efforts. Tareq Mehanna is one example of a U.S. terror defendant who tried many times to join training camps overseas and was turned away; he never found a camp that would take him on.¹⁰¹ Betim Kaziu was similarly turned away in Iraq, Afghanistan, and the Balkans.¹⁰² This does not mean the role of law enforcement is to wait for a suspect to become a trained and dangerous terrorist; however, it supports the notion that opportunities to become a successful terrorist are not lurking around every corner.

It is for these reasons that of the most highly sentenced 66 defendants, 43 either had already acquired weapons, had training in the use of weapons, or had attempted to reach terrorist training camps. Other defendants who were harshly sentenced had sent money to finance training camps or had recruited individuals to go to training camps and learn to fight.¹⁰³ Similarly, the presence of some overseas connection or actual terrorism training has been noted as a decisive factor in whether or not a

Homeland since 9/11 have lacked the necessary tradecraft and capability to conduct or facilitate sophisticated attacks.”).

⁹⁹ *Reassessing the Evolving Al Qaeda Threat to the Homeland: Hearing Before the Subcom. on Intelligence, Info., Sharing, & Terrorism Risk Assessment of the H. Comm. on Homeland Sec.*, 111th Cong. 6 (2009) (statement of Peter Bergen, Senior Research Fellow, New America Foundation) (noting that 25 Americans had been convicted or charged with traveling to an overseas training camps and that the actual number of Americans who had travelled to training camps was likely much larger).

¹⁰⁰ *Annual Threat Assessment of the U.S. Intelligence Community*, *supra* note 98, at 35.

¹⁰¹ See Superseding Indictment at 1–13, *United States v. Mehanna*, 669 F. Supp. 2d 160 (D. Mass. 2009) (No. 09-CR-10017-GAO); Andrew March, *A Dangerous Mind?*, N.Y. TIMES, Apr. 22, 2012, at SR1.

¹⁰² Tom Hays, *Betim Kaziu Gets 27 Years in Homegrown Terror Case*, HUFFINGTON POST (Mar. 12, 2012, 7:33 PM), http://www.huffingtonpost.com/2012/03/03/betim-kaziu-gets-27-years_n_1318288.html.

¹⁰³ Such as Ali al-Timimi. Debra Erdley & Betsy Hiel, *Islamic Cleric Gets Life in Prison*, PITTSBURGH TRIBUNE-REVIEW (July 14, 2005), http://triblive.com/x/pittsburghtrib/news/regional/s_353218.html?printerfriendly=true#axzz29n2ONip1.

defendant is charged under terrorism statutes, rather than other national-security statutes.¹⁰⁴

These varying factors, then, may well point us in the direction of defendants who are worth pursuing, rather than those who are simply a waste of time. However, as was stated above, the interest in finding these possible future offenders before they have the opportunity to become threats may make it difficult to identify the truly dangerous suspects. The entire purpose of early intervention is to prevent the defendants from reaching a point where an intervention based on threat level would be justified.¹⁰⁵ Moreover, an investigation may be ongoing for months before information comes out that shows that a defendant is or is not willing to become trained or connect with well-trained overseas co-conspirators.

III. THE NEWBURGH FOUR: ENTRAPMENT AND TERRORISTS IN CONTEXT

A. *The Case Itself*¹⁰⁶

In September of 2007, Shahed Hussein began visiting a mosque in Newburgh, New York. At that point Hussein was already established as an FBI informant; he had begun his career as an informant (code-named “Malik”) when he participated in a sting operation having to do with a phony driver’s license scheme for which he himself had been indicted (his participation in the sting was in exchange for leniency in his own sentencing), and he had followed up that case by informing in a heroin trafficking case.¹⁰⁷ However, it was in 2003 when Hussein began his career as a terrorist informant by working on the case of *United States v. Aref*, wherein the defendants allegedly agreed to launder money that was to be used in an effort to assassinate the prime minister of Pakistan using a Stinger missile.¹⁰⁸ Having completed that case, Hussein was handed from Agent Tim Coll of the FBI (his handler in the *Aref* case) to Agent Robert Fuller, also of the FBI, who engaged him on the Newburgh case.¹⁰⁹

¹⁰⁴ See CTR. ON LAW AND SEC., N.Y.U. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2009, at 49–51 (2010), available at http://lawandsecurity.org/portals/0/documents/02_TTRCFinalJan142.pdf.

¹⁰⁵ See *id.* at 9.

¹⁰⁶ The following description of the Newburgh Four case is all taken from the public trial, which I observed while working for the Center on Law and Security. Citations to relevant transcripts and news articles are provided where relevant. This Part is based substantially on my dissertation, Francesca Laguardia, Not So Exceptional: Counterterrorism Policies as an Outgrowth of Late 20th Century Crime Control (Sep. 2012) (unpublished Ph.D. dissertation, New York University) (on file with author).

¹⁰⁷ Rayman, *supra* note 6; see also Transcript, *supra* note 5, at 131–32.

¹⁰⁸ *Aref* was subject to many criticisms and allegations of entrapment as well. See Rayman, *supra* note 6; see also *United States v. Aref*, No. 04-CR-402, 2007 WL 603508 (N.D.N.Y. Feb. 22, 2007), *aff’d*, 285 F. App’x 784 (2d Cir. 2008). It is notable that both cases featured Stinger missiles and questionable recording practices.

¹⁰⁹ See Transcript, *supra* note 5, at 654–57; Rayman, *supra* note 6.

Hussein visited the mosque for nine months without acquiring a target for a terrorist investigation.¹¹⁰ On the stand, Agent Fuller stated that Hussein had been sent to the mosque in order to acquire information on people other than the men who eventually became defendants in *United States v. Cromitie*.¹¹¹ In June of 2008, however, Hussein met James Cromitie, who introduced himself as Abdul Rahman.¹¹² This first conversation between Cromitie and Hussein was not taped, however, and when debriefed Hussein told his handler that Cromitie had stated he was eager to be involved in jihad. The FBI then decided to open a formal investigation into Cromitie; Hussein was told to nurture the relationship and soon began to tape the conversations the two had.¹¹³

Over the course of these conversations Cromitie put himself forward as a dangerous, violent, aspiring jihadist, bent on attacking the United States and American Jews in particular. "I am an American soldier. . . . But I'm not a soldier for America. . . . Do you understand what I'm saying?" he stated at one point.¹¹⁴ At other points he pointed gleefully to television footage of Jewish civilians observing the wreckage left by the Mumbai terrorist attacks in 2008, he spoke of his desire to kill Jews ("with no hesitation I will kill ten [Jews]"), and he discussed various targets in New York.¹¹⁵ He stated that the Twin Towers had been "the best target," but they "had already been hit," and that he would like to take down a plane.¹¹⁶ Eventually, discussion turned to the possibility of attacking a synagogue, and Cromitie gave every appearance of being eager to be involved in such an attack.¹¹⁷ After some time, Cromitie recruited the other three defendants in the case, and audio and video tapes recorded their efforts to plan a terrorist attack against an Air Force base as well as the Riverdale (Bronx, NY) synagogue that eventually led to their arrests.¹¹⁸ Together the defendants conducted surveillance on their targets and discussed their chances of success, always in the presence of Hussein, the FBI informant who assiduously taped their conversations.

Yet outside the presence of the informant, no action appears to have been taken by any of the defendants. In fact, in spite of thousands of hours of eavesdropping on Cromitie's personal phone, no indication of active involvement in the plot was found.¹¹⁹ The four defendants each had criminal records, but every aspect of criminality exhibited by the de-

¹¹⁰ According to his handler, this consisted of 12 visits.

¹¹¹ See Transcript, *supra* note 5, at 139; see also *United States v. Cromitie*, 781 F. Supp. 2d 211 (S.D.N.Y. 2011).

¹¹² Transcript, *supra* note 5, at 141–42.

¹¹³ *Id.* at 149, 151, 304–05.

¹¹⁴ *Id.* at 19, 686.

¹¹⁵ *Id.* at 20; Government Exhibit 102-E1-T, at 8, *Cromitie*, 781 F. Supp. 2d 211 (No. 09 Cr. 558 (CM)).

¹¹⁶ Transcript, *supra* note 5, at 20.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 53–54.

¹¹⁹ *Id.* at 604–08.

fendants over the course of the investigation appeared to be under the complete control of the informant, a fact admitted by Agent Fuller on the witness stand.¹²⁰ While Hussein repeatedly attempted to get one of the defendants to take the lead in the plan, most often Cromitie, the attempt was never successful. At points, Cromitie actively resisted obtaining lead of the group, with Hussein stating, “He’s, I’m not running the show, he’s running the show . . .” and Cromitie responding, “Ain’t nobody running the show. Why you keep saying that?”¹²¹

The defendants constantly exhibited their incompetence. Code words agreed upon in order to hide the ongoing plot were rapidly forgotten.¹²² At one point, a loud noise can be heard on a video recording which is clearly one of the defendants accidentally knocking the Stinger missile (provided by Hussein) against the wall of the storage unit in which the defendants were keeping it (paid for by Hussein). Hussein obtained the improvised explosive devices (duffle bags filled with C4) and the FBI chose how much C4 would go into them, apparently based on the size of duffle bag that the FBI had lying around the lab. The FBI further made the decision to put ball bearings into the bombs in order to cause maximum damage.¹²³ When attempting to make the final attachments in order to make the bombs “operational,” the defendants were at a complete loss, frustrating Hussein to the point where he exclaimed, “It’s easy, just plug it in,” and finally had to get out of the car, walk around to the bombs and do it himself. When finally placing the bombs, Cromitie forgot to set the timer on one.¹²⁴

More shocking than the apparent incompetence exhibited by the defendants was the blatant deception of Hussein. Hussein lied to his FBI handler in describing the sentence he had received in the case for which he was first indicted.¹²⁵ He lied to the judge on the original case against him when describing his financial status, so that he successfully avoided paying a fine in that case based on his dire financial straits;¹²⁶ lies of which the U.S. Attorney’s Office in the Southern District of New York only appeared to become aware during the Cromitie trial when defense attorneys raised them on cross examination. The prior terrorism case in which he had been involved had become an early rallying point for claims of informant impropriety, leading one news article to publish a list of the inconsistencies between what Hussein had told his FBI handler of taped conversations during the investigation and what had actually been said in

¹²⁰ *Id.* at 131–34, 269, 274–75.

¹²¹ Transcript, *supra* note 5, at 2061.

¹²² See Government Exhibit 119-E2-T, *United States v. Cromitie*, 781 F. Supp. 2d 211 (S.D.N.Y. 2011) (No. 09 Cr. 558 (CM)).

¹²³ See Transcript, *supra* note 5, at 258–60.

¹²⁴ Government Exhibit 128-E4-T, *Cromitie*, 781 F. Supp. 2d 211 (No. 09 Cr. 558 (CM)).

¹²⁵ Transcript, *supra* note 5, at 279.

¹²⁶ See *id.* at 1345–52.

those conversations (revealed later because, of course, they were taped).¹²⁷ Similar examples arose repeatedly in the Cromitie case, where Agent Fuller's written notes taken during debriefing sessions suggested that Cromitie had made incriminating statements, only to have the taped conversation show that in fact Hussein had been the person to make those statements, if they had been said at all.¹²⁸ Hussein's history revealed inconsistencies regarding the year in which he had entered the country, the year in which he had been held in a Pakistani prison, the state he lived in some years, and how many cars he had owned other years.¹²⁹ After days of cross examination (punctuated by slightly changed stories every time he had the opportunity to leave the stand and come back another day, presumably in order to change his story to something more believable), it appeared the man was incapable of telling the truth. Outside the presence of the jury, heated arguments arose between defense counsel and prosecutors as to the extent of the prosecution's responsibility for the improper conduct of the witness and the extent to which it could be written off as a poor memory and trouble with English as a second language. When the jury was present, jurors rolled their eyes when Hussein spoke, while journalists sitting in the courtroom laughed to themselves.

The defense's entrapment claim made the question of predisposition fundamental to the case. Since numerous conversations were not recorded—including the earliest discussion between Cromitie and Hussein wherein Cromitie allegedly referenced his desire to “make America pay”—Hussein's credibility regarding those first conversations was vital.¹³⁰ Moreover, what could be found in the recorded conversations was put in doubt by Hussein's active guidance of the conversation and Cromitie's own repeated dishonesty. Hussein responded to any hesitance towards violence with reassertions that violent jihad was morally laudable. In an early conversation, Cromitie related his hatred for Jews (who, he claimed, stare at him and make unkind statements to him regularly), stating he wanted to kill them but that he would not, because Allah would take care of it.¹³¹ Hussein responded that killing one person out of rage is unacceptable, but killing hundreds for jihad is praiseworthy.¹³² In another conversation, Cromitie stated that “Allah didn't bring me here to fight a war,” to which Hussein responded “Oh, Allah didn't bring you here to work for Walmart, too.”¹³³ Cromitie appeared incredibly eager to please Hussein, responding to these statements with assertions of his own violent capabilities—all of which turned out to be entirely false. Over the

¹²⁷ Rayman, *supra* note 6.

¹²⁸ See Transcript, *supra* note 5, at 355–56, 360–64.

¹²⁹ See *id.* at 285–86.

¹³⁰ *Id.* at 18, 305, 682.

¹³¹ *Id.* at 545–46.

¹³² *Id.* at 723.

¹³³ Government Exhibit 107-E1-T, at 2, United States v. Cromitie, 781 F. Supp. 2d 211 (S.D.N.Y. 2011) (No. 09 Cr. 558 (CM)).

course of his interaction with Hussein, Cromitie claimed to have Afghan heritage (false), to have bought guns at Walmart (false), to have quit his Walmart job in a blaze of violence involving a bat and rampant destruction (false), and to have threatened to blow up an Army recruiting station (false). He claimed to be able to obtain anything he might need “to defend Muslims,” yet eventually it was co-defendant David Williams who had to buy the gun for Hussein, and it took three months and numerous failed attempts for Cromitie to finally acquire the coconspirators he continually promised Hussein that he would rally.¹³⁴

Clearly the largest hurdle for the prosecution to jump in the case was the blatant reluctance of James Cromitie to become actively involved in the plot. Pushed by Hussein to make a concrete move towards some type of attack, Cromitie repeatedly put Hussein off: “I’ll do something when I decide to do something,” he would state; “Allah will tell me when it’s time.” Finally, Cromitie moved away, getting his Walmart job in another state and ceasing to communicate with Hussein. Repeated calls from Hussein went unanswered, Cromitie lied to Hussein about whether or not he was in town, and he hid in his house rather than answer his door when Hussein came to see him; in fact, for six weeks Cromitie’s involvement with Hussein was so nonexistent that the FBI determined the case had “gone cold” and was, essentially, over.¹³⁵

Then James Cromitie lost his job.¹³⁶ Hussein had, in the past, both taken Cromitie out for meals and given him money for rent and food; he had also bought a camera for Cromitie to use for surveillance, which Cromitie had sold.¹³⁷ Cromitie called Hussein, asking, “What am I gonna do?” and Hussein responded “I told you how you can get \$250,000, but you don’t want to do it.”¹³⁸ Cromitie stated he would call Hussein back, got off the phone, and called his former employer, trying (according to his defense attorneys) to get his job back at Walmart. His attempt to regain his former job failed (and the jury never heard the contents of that call; it was successfully precluded as hearsay). After all this, Cromitie called Hussein and told him they should meet.

Cromitie continued to drag his heels for another two months. It was only after Hussein complained to Cromitie that he was getting in trouble with very important, very violent people (his claimed terrorist associates) that Cromitie brought David Williams into the conspiracy and began taking tangible steps toward forming a group and a terrorist plot.

Of the four, only Cromitie exhibited the virulent anti-Semitism that some might consider a predisposition to acts of terror; yet only Cromitie exhibited any reluctance to be involved in the plot or any desire to back out of it. This reluctance continued in the form of a seeming hesitance to

¹³⁴ Transcript, *supra* note 5, at 23, 48–49, 75.

¹³⁵ *Id.* at 195, 445–46.

¹³⁶ *Id.* at 57.

¹³⁷ *Id.* at 190–91, 264–65.

¹³⁸ Transcript, *supra* note 5, at 418.

injure bystanders. Cromitie stated outright at one point that he did not want to use the rocket launchers (because he did not know how to) and at another point that he wanted to shoot at planes when they were in the air, headed to Afghanistan, so that fewer bystanders would get hurt. According to defense attorneys, the four chose the time of their attack on the Synagogue purposefully (late and on a holiday) so that fewer people would be on the streets; however, it is unclear if this fact or the opposite was the reason for choosing 9:00 p.m. on a holiday.¹³⁹

Of course, discussion of the \$250,000 took up a good portion of the trial. Defense attorneys first insisted that the prosecution was withholding audiotapes, since no other mention of the money occurred in the taped conversations. Eventually, this strategy was abandoned and instead defense counsel argued to the jury that Hussein had purposefully kept the recording devices off (he had control over when he was and was not recorded) so that he could make the offer without anyone knowing about it, including his FBI handlers.¹⁴⁰ The conversation where the reference was recorded was one taped on a wiretap of Hussein's phone of which Hussein had not been aware. In fact, Agent Fuller maintained that he knew nothing about the \$250,000 and that he had not authorized such an offer (although inducements that large are supposed to be discussed between an informant and handler before they are made, as well as after).¹⁴¹ The fact that the offer had been made was found only by defense attorneys once the tapes had been handed over in discovery, and it was not included in the required *Giglio*¹⁴² memo outlining inducements that had been offered to the defendant. On the stand, Agent Fuller claimed that the \$250,000 was in reference to the cost of the plot, which included \$25,000 per bomb, and some other large amount for the purchase of the Stinger missile, rather than a direct offer of payment to Cromitie.¹⁴³ Hussein, however, stated that the money was a code word.¹⁴⁴ For the other three defendants, no reference to payment larger than \$5,000 could be found,

¹³⁹ It is Hussein who first suggests a holiday, seemingly in order to maximize casualties within the synagogue, yet it is unclear whether the defendants believed choosing a holiday would maximize or minimize the number of individuals harmed.

Hussein: There's one more thing that, uh, we should keep in mind. We have to do it on a Jewish holiday.

D. Williams: But that's when the police are going to be out there?

Cromitie: No, they won't be there. The Jewish holiday, the police aren't there. All roads are quiet. There is not a lot of people there. They are in their homes and synagogue, inside, not outside. So it's better we do it on a Jewish holiday, like, uh, like, our Sunday. Everybody be outside, it's not, they not in the synagogue, they outside the synagogue.

¹⁴⁰ See Transcript, *supra* note 5, at 156, 158, 165–67, 416.

¹⁴¹ *Id.* at 418, 424–26, 856.

¹⁴² *Giglio v. United States*, 405 U.S. 150 (1972). *Giglio* and a series of subsequent cases require that prosecutors disclose evidence that is relevant to the credibility of their witnesses.

¹⁴³ See also Transcript, *supra* note 5, at 424–26.

¹⁴⁴ See *id.* at 850.

although that payment and how the money would be used was discussed often (typically followed by assertions that participation in the plot was “not for the money” but “for Allah”).¹⁴⁵

Nevertheless, Judge McMahon clearly believed that the primary motivating factor for the defendants was financial rather than ideological. She stated as much at oral arguments for a directed verdict after the judgment had been made, in addition to her statements early on in the trial that the case was “not a terrorism case,” and her statement that she might well have believed the entrapment defense, had she been on the jury. Yet individual statements by each of the defendants that they were willing to be involved in the plot make it nearly impossible to rule that no reasonable juror could believe they were predisposed, particularly in the case of Cromitie who stated himself that he was thinking of jihad years before he ever met Hussein, if not his whole life.¹⁴⁶

B. Resource Allocation and the Question of Who Is a Proper Target

The rampant incompetence of the entire group, the complete lack of connection not only to any international terrorist cells but also to domestic terror cells, and the apparent disinterest in travelling overseas for training, or for that matter training domestically, would suggest that this is a group few experts would take seriously as a terror threat. Cromitie’s perpetual reluctance offers a common sense argument that actual terror recruiters would be uninterested in pursuing him. Admitting that even idiots can be trained to place bombs and that, in theory, capable fighters might be paid off by terror leaders, Cromitie and his compatriots had neither the skill nor the drive to become successful terrorists. Accepting the jury’s implicit finding that they were willing and ready to be used by terrorists, the group was simply incapable, and the likelihood of their being approached (and actively pursued, as Hussein did) by real terrorists is miniscule.

Yet the allotment of resources for this case was amazing. Along with the payment to Hussein of about \$100,000, and the cost of the time for the FBI handler, the lab, the C4, the warehouse, wiring the warehouse for video surveillance, wiring Hussein’s car for video surveillance, and of course prosecuting the case, there was the use of a helicopter and a veritable army of FBI agents and NYPD officers in the arrests of the four.¹⁴⁷ In spite of the fact that (as Judge McMahon stated at sentencing) “Only the government could have made a ‘terrorist’ out of Mr. Cromitie, whose

¹⁴⁵ See, e.g., *id.* at 503.

¹⁴⁶ Transcript, *supra* note 5, at 503; Transcript of Argument at 8, *United States v. Cromitie*, 781 F. Supp. 2d 211 (S.D.N.Y. 2011), ECF No. 169.

¹⁴⁷ See Transcript, *supra* note 5, at 134, 154–55, 161–62, 225, 244, 381, 402, 565; Associated Press, *Informant Key To NY Synagogues Bomb Plot Case*, CBS (Aug. 22, 2010, 1:00 AM), <http://newyork.cbslocal.com/2010/08/22/informant-key-to-ny-synagogues-bomb-plot-case>.

buffoonery is positively Shakespearean in its scope,”¹⁴⁸ the government pulled out every stop in pursuit.

In this way the case stands well for the proposition that questions regarding the proper targets of police investigation are more pressing, rather than less, in the case of terrorism prosecutions. In the wake of the terrorist attacks of 2001, terrorism investigations and prosecutions were thrust to the forefront of governmental interests and financial support. On October 25, 2001, then Attorney General John Ashcroft told the world that “the fight against terrorism is the first and overriding priority of the Department of Justice.”¹⁴⁹ Department of Justice resources in this area similarly increased. In 2007, the Department of Justice Inspector General noted that counterterrorism funding in the Department had increased to nearly five times its 2001 amount.¹⁵⁰

As part of its increased efforts to “deter, prevent and detect future terrorist acts,” the Department of Justice heavily increased its rate of terrorism prosecutions.¹⁵¹ This increase was apparent within only a few years, as terrorism investigations more than doubled between 2001 and 2003, while terrorism convictions more than quadrupled.¹⁵² Yet questions soon arose regarding the use of the label “terrorism investigation.” Media outlets noted a large number of so-called “terrorism prosecutions” that appeared to resolve with no actual connection to terrorism, other than the possible over-enthusiasm of individual law enforcement agents.¹⁵³ While these concerns might have been explained away with references to the need to protect sensitive information or the need for the DOJ to act preventively,¹⁵⁴ similar concerns were raised by the Office of the Inspector

¹⁴⁸ Benjamin Weiser, *3 Men Draw 25-Year Terms in Synagogue Bomb Plot*, N.Y. TIMES, June 30, 2011, at A22.

¹⁴⁹ John Ashcroft, Att’y Gen, Prepared Remarks for the US Mayors Conference (Oct. 25, 2001), available at http://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm; see also U.S. DEP’T. OF JUSTICE, OFFICE OF THE INSPECTOR GEN.: AUDIT DIV., THE DEPARTMENT OF JUSTICE’S INTERNAL CONTROLS OVER TERRORISM REPORTING i (2007), available at <http://www.justice.gov/oig/reports/plus/a0720/final.pdf> (“Since the September 11, 2001, terrorist attacks, the Department of Justice’s . . . highest priority has been to deter, prevent, and detect future terrorist acts.”).

¹⁵⁰ U.S. DEP’T OF JUSTICE, *supra* note 149, at i n.1.

¹⁵¹ *Id.* at xi.

¹⁵² U.S. GEN. ACCOUNTING OFFICE, U.S. ATTORNEYS: PERFORMANCE-BASED INITIATIVES ARE EVOLVING 35, 40 (2004) available at <http://www.gao.gov/assets/250/242667.pdf>.

¹⁵³ E.g., Dan Eggen & Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges*, WASH. POST, June 12, 2005, at A1.

¹⁵⁴ See, e.g., U.S. DEP’T OF JUSTICE, *supra* note 149, at 8 (“In certain cases, evidence of a defendant’s knowledge of, or connection to, terrorist activity may not be sufficient to prove a terrorism crime beyond a reasonable doubt, or proving a criminal offense may require the disclosure of sensitive sources or classified information. In situations like these, the best alternative from a national security and law enforcement perspective is to charge the defendant under other applicable criminal statutes, or—if the defendant is an alien eligible for removal—to remove

General in the DOJ. One audit found that almost no statistics compiled by DOJ's offices in regards to terrorism investigations had been compiled accurately.¹⁵⁵ 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 2004.¹⁵⁶ Similar mistakes were found in the reporting of convictions and prosecutions in 2003 and 2004.¹⁵⁷

While it is certainly possible that the reason for these inaccuracies was primarily clumsiness, the sudden press attention, a reallocation of priorities, and the huge reallocation of resources must have played some part as well. Such practices place considerable pressure on already interested law enforcement agents.

These agents have many reasons to hope to find terrorists—from increased resources to prestige to the honest desire to aid in the prevention of some of the most serious crimes our country faces. However, the existence of these inaccuracies suggests the waste of considerable resources on cases that do not necessarily deserve this level of attention or spending. Especially in the current economic climate, the added time, money, and technology that is made available for terrorism investigations should not be thrown towards the investigation of individuals who pose no actual risk.

Moreover, the risk of wasted resources is larger in a terrorism case because the costs of terrorism investigations are greater. Where wasted resources in a normal criminal investigation may involve video and audio tapes, paying an informant or undercover agent, payment of agents to listen to wiretaps and consent recordings, and possibly the creation or purchase of drugs or firearms, terrorism cases may implicate all of this spending plus payment to numerous analysts (FBI and CIA) in order to determine possible terrorism connections, the creation of false explosives or missiles, and numerous other big-ticket items. The arrests of James Cromitie and his co-defendants serve as an excellent example of this cost.

C. Moral Indignation, Judicial Integrity, and Encouraging the Violation of Law in Terrorism Cases

Of all the possible justifications for the entrapment defense, it is the instinctive moral repugnance of the use of entrapment that comes closest to disappearing in the cases of persons arguably entrapped to commit

him from the United States and do our best to ensure that he does not return. While these alternatives do not yield sentences as lengthy as those imposed upon defendants convicted of terrorism offenses, they help the Department achieve its top priority: the detection, prevention, and disruption of terrorist activity." (quoting the Assistant Attorney General for the Office of Legislative Affairs)).

¹⁵⁵ *Id.* at iii–iv.

¹⁵⁶ *Id.* at vii–x.

¹⁵⁷ *Id.* at x. In contrast, the criminal division underreported almost all of its statistics, yet only by marginal amounts. *Id.* at xi.

terrorism offences. The reason for this is the common belief that true entrapment is not possible in terrorism cases. There is a vast chasm to leap between accepting that an otherwise innocent individual might be badgered into selling marijuana and accepting that a completely law abiding citizen might be convinced to place a bomb in a building where hundreds of people could be killed.

Yet this instinctive reaction should falter when the circumstances of some recent terrorism prosecutions are considered. Terrorism suspects may be young (teenaged) or of questionable mental competence (and in some cases, both).¹⁵⁸ These defendants are legitimate targets of police investigation, as teenagers and persons of questionable mental competence are well represented in the ranks of terrorists and therefore should not be immune to investigation or prosecution. Yet the dangers that are inherent in police aggressively instigating criminal activity are more, rather than less, extreme when such populations are involved. Such cases recollect the dangers and distaste expressed by justices in seeing the government “play[ing] on the weaknesses of an innocent party.”¹⁵⁹ The centrality of this concern in the development of the entrapment doctrine suggests an implicit understanding that mental weakness is not equivalent to predisposition.

Moreover, recall the original moral indignation that accompanied the possibility of police officers encouraging rather than preventing criminal activity. A teenage defendant who is already well enmeshed in dangerous criminal activity might not only deserve arrest but also lead to those highly-sought-after intelligence breaks that can be accomplished by following the connections of a criminal organization; but to encourage and incite a weak-minded or youthful individual towards criminal activity that he might never otherwise broach is precisely the type of morally-questionable behavior to which the entrapment doctrine originally responded. The moral outrage this type of conduct should engender is compounded when defendants are seized who appear to have no terrorist connections other than the police informer himself. What risk is posed by such an individual? And if no risk is posed, what moral quagmire have we entered by nurturing any violent tendencies the suspect might have had?

Perhaps most important to this question is the issue of the type of criminal belief that is encouraged by officers and informants in these situations. In the Bronx bomb-plot case, this was evident in the enthusiastic

¹⁵⁸ See, e.g., *Feds Arrest Somali Teen in Oregon Bomb Plot*, CBSNEWS.COM (Nov. 29, 2010, 9:14 AM), http://www.cbsnews.com/2100-201_162-7093701.html (Mohamed Mohamud, a teenager, is arrested for attempting to set off a bomb at a Portland Christmas-tree-lighting ceremony); William K. Rashbaum, *S.I. Man Describes Shattered Life, Then a Plot to Bomb a Subway Station*, N.Y. TIMES, May 10, 2006, at B5 (James Elshafay, a 19 year old who was being treated for schizophrenia became involved in a plot to bomb Herald Square in New York City).

¹⁵⁹ *Sherman v. United States*, 356 U.S. 369, 376 (1958).

and exceedingly successful encouragement of the lead defendant's anti-Semitism. Over the course of months, James Cromitie's hatred of Jews developed from a seeming reactive and focused resentment ("[S]ometimes I want to grab and kill them, but I know Allah will take care of it . . ." ¹⁶⁰) to an apparent outright and active desire to place bombs in synagogues ("I don't give a damn who [attacks military planes]. I want to do the synagogue." ¹⁶¹). If we are to assume this was a genuine increase in violent sentiment, rather placating a wealthy individual who was continually providing Cromitie with food, money, and promises of more to come, that development was caused by the informant's careful and persistent encouragement of these beliefs. "The Jews . . . are responsible for all of the evils in the world," Hussein insisted. ¹⁶² In fact, Hussein repeatedly emphasized the importance of anti-Semitism and culling the Jewish population. "[T]o eat under the shadow of a Jew is like eating your mother's meat." ¹⁶³ "[I]f evil goes too high, then Allah makes ways to drop them. I think that evil is reaching too high at a point, where you, me, all these brothers, have to come up with a solution to take the evil down." ¹⁶⁴

If, as defense attorneys argued, James Cromitie was not predisposed to be involved in a terrorist plot, but was merely a run-of-the-mill anti-Semite, it was a government informant who caused him to develop from a simple anti-Semite to an all-out terrorist brimming with anti-Semitic rage. An informant was paid nearly \$100,000 in order to engage in this encouragement, resulting in Cromitie becoming ultimately "an enthusiastic jihadist" who "showed no compunction" about setting bombs in an urban area and specifically a synagogue. ¹⁶⁵

D. Police Deterrence

The *Cromitie* case is perhaps most significant in the area of what its resolution will say to future FBI handlers dealing with questionable informants. The case was rife with questions about the propriety of the treatment of Hussein. Having already shown that he was embarrassingly deceitful with regards to his FBI handlers in the *Aref* case, ¹⁶⁶ the FBI apparently turned Hussein loose to perform the same way again. And he

¹⁶⁰ Transcript, *supra* note 5, at 545.

¹⁶¹ Government Exhibit 113-E5-T at 1, *United States v. Cromitie*, 781 F. Supp. 2d 211 (S.D.N.Y. 2011) (No. 09 Cr. 558 (CM)).

¹⁶² Government Exhibit 113-E1-T at 3, *Cromitie*, 781 F. Supp. 2d 211 (No. 09 Cr. 558 (CM)).

¹⁶³ Defendants' Renewed Motion to Dismiss for Outrageous Government Conduct at 8, *United States v. Cromitie*, 781 F. Supp. 2d 211 (S.D.N.Y.) (No. 7:09CR00558CM), 2011 WL 1086633.

¹⁶⁴ *Id.* Cromitie's attorneys claimed Cromitie originally balked from these statements, but their transcript of this conversation contradicts the prosecution's transcript of the same conversation. *Id.* at 8 & n.4.

¹⁶⁵ Weiser, *supra* note 148.

¹⁶⁶ See *supra* note 108 and accompanying text.

did. As was discussed above, Hussein's repeated deceitfulness to his handler and prosecutors on the case was the subject of a great deal of cross examination and press attention.¹⁶⁷ He not only failed to tape significant conversations (such as the conversation where he originally offered \$250,000), but he failed to mention those conversations to his handler.¹⁶⁸ He repeatedly mischaracterized conversations with the targets.¹⁶⁹ His rampant lies made a joke of the case in the courtroom.

Yet the most significant aspect of the case is not Hussein's incredible dishonesty, but rather the FBI's failure to know about that dishonesty and make efforts to keep it in check. Almost no conversation was had between FBI handlers when Hussein was passed from the *Aref* case, where he had been an embarrassment, to the Southern District.¹⁷⁰ Hussein was given free rein over his tape recorder, to tape or not as he saw fit.¹⁷¹ Most importantly, the agent handling his case did not check the tape recordings Hussein made for discrepancies, apparently discovering several of those discrepancies only at trial, nor did he check into the accuracy of the statements Hussein was reporting until months after those statements were made.¹⁷² For this reason, he had no idea that he was investigating a poor target.

Many of the lies Hussein passed along from Cromitie to Agent Fuller could have been discovered with simple fact-checking, such as Cromitie's supposed violent actions at Walmart and his Afghan heritage, but no fact-checking was performed. But most importantly, Hussein misled his handler as to who had brought up certain topics regarding terrorism, and because the handler didn't listen to the tapes himself *he had no idea he was being lied to*. These lies may well have led directly to the FBI's continued pursuit of James Cromitie, who otherwise would not have been seen as a legitimate target.¹⁷³

Because stings are a vital part of U.S. efforts to prevent terror attacks, and because informants will normally be less than respectable individuals, the FBI must be encouraged in every possible way to keep a careful eye on its informants. Cases such as the Newburgh case and the *Aref* case, which bring these lapses to light, should be seized on in efforts to deter law-enforcement agencies from dropping the ball with respect to the oversight of their informants.

¹⁶⁷ See discussion *supra* Part III.A.

¹⁶⁸ Transcript, *supra* note 5, at 1814, 2009–11.

¹⁶⁹ See, e.g., *id.* at 1802–06.

¹⁷⁰ See *id.* at 132–33.

¹⁷¹ *Id.* at 165–66.

¹⁷² *Id.* at 367, 403–10, 451–55.

¹⁷³ Fahim, *supra* note 8.

IV. RESOLVING THE ISSUE: CONSIDERING ENTRAPMENT IN SENTENCING

While the above description gives strong reasons to consider cases such as the Newburgh Four as entrapment cases, it is hard to argue with the jury's (and Judge McMahon's) logic that the four should be found guilty. Each defendant showed himself ready, eventually, to engage in some of the most heinous crimes in our criminal code, potentially involving the deaths of dozens of people. If Hussein's and Cromitie's first conversations were in considerable doubt due to Hussein's lack of credibility and general manipulation, one cannot fault the jury for trusting Cromitie when he stated he had desired to be involved in jihad for years. Moreover, the entrapment defense has always been accepted to be a rarely successful defense, and even more rarely successful in cases involving violent crimes, rather than drug crimes or prostitution.¹⁷⁴ Terrorism crimes are perhaps the most violent crimes that a jury will ever see, and if even legal scholars believe entrapment simply cannot apply to terrorism,¹⁷⁵ what will a jury think?

The answer, then, as many scholars have suggested,¹⁷⁶ may lie in avoiding reliance on the jury. Even if it is questionable that a defendant should be entirely acquitted for participation in a terrorist plot where evidence suggests he was entrapped, and even if that evidence is not strong enough for an acquittal, evidence of overwhelming government involvement surely lessens the culpability of the defendant. In the case of James Cromitie, rather than a terrorist mastermind bent on destruction of the United States, we have a (less than competent) stooge who is willing to be poked and prodded into acts of violence.¹⁷⁷ While he may be morally culpable, his culpability is not the same as a motivated radical who would have made an independent effort to find a way to cause harm. For this reason, I suggest that the punishment, i.e. sentence, of such a defendant should be affected by the amount of government encouragement that was required to assure his involvement.

Moreover, the severe punishment of defendants such as Cromitie does not fulfill the legitimate functions of punishment as recognized by

¹⁷⁴ One reason given for both of these facts is that the defendant must admit to having actually committed a crime; convincing a jury to look past that fact and acquit is a large and frequently impassable hurdle. Smith, *supra* note 23, at 763–74. Yet while scholars have generally accepted that the successful application of an entrapment defense is an uncommon occurrence, empirical support for this opinion is hard to come by. Because a successful entrapment defense results in acquittal, it leaves no history or documentation (no appellate record) for scholars to look to in order to determine its frequency of use or success. *See id.* at 762. My own news search for entrapment cases ending in acquittals turned up 95 successful acquittals based on an entrapment defense, over 80 cases, in 20 years, only 20 of which involved any level of violence.

¹⁷⁵ *See* Stevenson, *supra* note 10, at 134.

¹⁷⁶ *See supra* note 37 and accompanying text.

¹⁷⁷ Weiser, *supra* note 148.

the Supreme Court.¹⁷⁸ Such an incompetent defendant, who had no resources to contact true terrorists and likely would not be seen as a promising recruit if he did happen to run into one, evidences less need for incapacitation. He need not be incarcerated for decades in order to keep the public safe, as there appears to be general agreement that there was little threat posed by him to begin with. Similarly, having only descended into violent rhetoric and willingness to commit acts of violence after months of active encouragement, it is unlikely rehabilitative efforts would be any less successful in regards to him than in regards to any other defendant. Unlike the ideal type of a radicalized jihadist who is completely subscribed to the extremist ideology, Cromitie is more likely to see himself as a dupe and be hesitant to ever become involved in any such plot again.

The two purposes of punishment that might give pause are retribution and deterrence, yet even here there seems to be little reason to classify a clearly manipulated defendant as deserving of the same retribution or useful for the same level of deterrence as was most likely envisioned by legislatures passing these statutes. It is true that there is a value to deterring even idiotic observers from becoming involved in terrorist plots. Idiots can position bombs. Perhaps more importantly, the idea that any supposed terrorist who endeavors to enlist a friend in acts of terror could really be an undercover informant is a useful deterrent. Those individuals who might have independent motivation to become involved in terrorist plots but who still need a trained extremist to show them how to be successful might be slowed or even stopped in their progression by doubts about the credentials of their terror instructor.

The question, however, is how much punishment is necessary for such deterrence. A conviction for violation of a terrorism statute may result in a sentence of only 12 years or less for simple support or life in prison for more active terror plots.¹⁷⁹ For those defendants who will sit and consider their chances of being apprehended, individuals who are not truly radical but believe that it may be worth killing dozens of people for the sake of a large payout, surely even 10 years is sufficient if they believe apprehension to be likely. For the other set of defendants, truly motivated and radical individuals who are willing to risk their lives in order to further their ideology, the only true deterrence is that they might get

¹⁷⁸ “A sentence can have a wide variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation.” *Ewing v. California*, 538 U.S. 11, 25 (2003).

¹⁷⁹ See, e.g., Press Release, U.S. Attorney’s Office, Local Man Sentenced for Providing Material Support to Terrorist Organization (June 19, 2012), available at <http://www.fbi.gov/stlouis/press-releases/2012/local-man-sentenced-for-providing-material-support-to-terrorist-organization> (“Mohamud Abdi Yusuf, 31, was sentenced to 140 months in prison on charges of providing material support to a foreign terrorist organization.”); Reuters, *3 Brothers Sentenced to Life for Holy War Plot at Ft. Dix*, N.Y. TIMES (Apr. 28, 2009), <http://www.nytimes.com/2009/04/29/nyregion/29fortdix.html>.

caught rather than being successful. For these individuals, the difference between a 10 or 20 year sentence and a term of life is unlikely to be a significant deterrent.

Finally the question comes to retribution. Certainly, a good amount of retribution may be called for in the case of a defendant who was willing to use bombs against innocent civilians, whether based on extremist ideology or based on financial incentives. Yet surely the amount of retribution called for is lessened when that defendant required immense amounts of encouragement from government agents before he would engage in the behavior. While severe retribution is called for, it is not called for at the level of a defendant who came to this conclusion on his own, without such encouragement, and without government interference.

A. Departing Below the Statutory Minimum: Sentencing Entrapment and Sentencing Manipulation

Departing below a statutory minimum sentence is an extreme measure, generally only taken when a defendant has provided significant aid to an investigation, and upon the request of the prosecution.¹⁸⁰ However, in the mid-1990s a few courts suggested that, in circumstances reaching a standard of either “sentencing entrapment”¹⁸¹ or “sentencing manipulation,”¹⁸² a departure below the statutory minimum might become appropriate.

Sentencing entrapment was first recognized as a possible sentencing defense by the Eighth Circuit in 1991.¹⁸³ The sentencing defense, where recognized, operates based on the subjective test for entrapment: the sentencing judge will determine if the defendant was predisposed towards a particular count charged, or only a lesser crime. If the defendant was predisposed only to commit the lesser crime, but was entrapped into committing a more serious crime carrying a higher sentence, the judge may depart downward from the guidelines range based on this entrapment.¹⁸⁴

¹⁸⁰ 18 U.S.C. § 3553(e) (2006).

¹⁸¹ *E.g.*, United States v. Lenfesty, 923 F.2d 1293 (8th Cir. 1991).

¹⁸² *E.g.*, United States v. Garcia, 79 F.3d 74 (7th Cir. 1996).

¹⁸³ *Lenfesty*, 923 F.2d 1293; United States v. Stuart, 923 F.2d 607 (8th Cir. 1991). Both cases involved drug crimes, *Lenfesty* involving a claim that law enforcement had allowed the defendant to engage in multiple sales purely in order to enlarge the eventual sentence, and *Stuart* involving a claim that law enforcement had created the larger crime by providing financing for a greater purchase of drugs than the defendant would otherwise have engaged in. Neither claim was successful.

¹⁸⁴ United States v. Stauffer, 38 F.3d 1103, 1107–08 (9th Cir. 1994); United States v. Barth, 990 F.2d 422, 424–25 (8th Cir. 1993); United States v. Connell, 960 F.2d 191, 196 (1st Cir. 1992); *Lenfesty*, 923 F.2d at 1300; *see also* U.S. SENTENCING COMM’N, *supra* note 19, § 2D1.1 commentary n.26, at 162 (allowing downward departure if defendant was induced to buy more drugs than he otherwise would because a government agent quoted a price substantially below market price).

Sentencing manipulation, in contrast, returns to the objective test for entrapment, relying more heavily on outrageous or improper government conduct than the defendant's predisposition.¹⁸⁵ References to sentencing manipulation came quickly on the heels of the appearance of the sentencing entrapment defense,¹⁸⁶ and the two are often confused or used in overlapping manners.¹⁸⁷ Some circuits have rejected either or both defenses altogether.¹⁸⁸

The intricacies of the developing sentencing-entrapment and sentencing-manipulation doctrines are beyond the scope of this Article; however, one development in particular bears note. Several circuits have suggested that adjusting for sentencing entrapment might allow a judge to depart below statutory minimum sentences. The earliest such suggestion came from the Eighth Circuit in 1994, in a narcotics case involving methamphetamine.¹⁸⁹ The defendant, Mark Merial, had eventually cooperated with law enforcement, and so had been granted a downward departure based on his substantial cooperation.¹⁹⁰ He was seeking an ad-

¹⁸⁵ *United States v. Sanchez*, 138 F.3d 1410, 1414 (11th Cir. 1998) ("While sentencing entrapment focuses on the defendant's predisposition, sentencing factor manipulation focuses on the government's conduct."); *Garcia*, 79 F.3d at 75 ("Sentencing manipulation occurs when the government engages in improper conduct that has the effect of increasing a defendant's sentence."); see also *United States v. Newsome*, No. 94-5551, 1995 U.S. App. LEXIS 6626, at *3-5 (6th Cir. Mar. 29, 1995); *United States v. Jones*, 18 F.3d 1145, 1153-54 (4th Cir. 1994).

¹⁸⁶ See *Connell*, 960 F.2d at 196-197.

¹⁸⁷ Abelson, *supra* note 27, at 781; Stevenson, *supra* note 50, at 3-4; Joan Malmud, Comment, *Defending a Sentence: The Judicial Establishment of Sentencing Entrapment and Sentencing Manipulation Defenses*, 145 U. PA. L. REV. 1359, 1372 (1997); Todd E. Witten, Comment, *Sentencing Entrapment and Manipulation: Government Manipulation of the Federal Sentencing Guidelines*, 29 AKRON L. REV. 697, 726-27 (1996).

¹⁸⁸ See, e.g., *Garcia*, 79 F.3d at 76 (7th Cir. 1996) ("We now hold that there is no defense of sentencing manipulation in this circuit."). There seems to be some confusion as to how decisively the defenses must be rejected in order to qualify as rejected in a circuit. Stevenson suggests that the defense has been rejected by the Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits, yet Abelson accurately suggests that the Fifth Circuit refuses to rule on the matter, considering sentencing review outside of its jurisdiction. Abelson, *supra* note 27, at 785; Stevenson, *supra* note 10, at 201 & n.388. Moreover, Stevenson's own list of cases includes a number of cases where circuits have simply rejected the defense on the given facts. See, e.g., *Sanchez*, 138 F.3d at 1414 (acknowledging sentencing entrapment defense but rejecting it on the instant facts); *United States v. Jones*, 102 F.3d 804, 809 (6th Cir. 1996) ("While this circuit has never granted a downward departure premised on sentencing entrapment, we need not address whether this circuit should adopt the defense."); *United States v. Lacey*, 86 F.3d 956, 966 (10th Cir. 1996) (stating that the conduct alleged was better suited to an evaluation under outrageous government conduct standard). One recent Eleventh Circuit case expressly recognizes the defense of sentencing manipulation. *United States v. Ciszowski*, 492 F.3d 1264, 1270 (11th Cir. 2007) ("While our Circuit does not recognize sentencing entrapment as a viable defense, we do recognize the outrageous government conduct defense, and we have considered sentencing manipulation as a viable defense.").

¹⁸⁹ *United States v. Merial*, 1994 WL 396036, at *1 (8th Cir. Aug. 2, 1994).

¹⁹⁰ *Id.*

ditional downward departure based on sentencing entrapment. Although the court found no reason to believe that the government engaged in sentencing entrapment, it stated that had such entrapment occurred, then modification of his sentence in addition to the departure granted based on cooperation would have entitled Merial to a sentence below the statutory minimum.¹⁹¹

In 1995, the First Circuit followed suit with dicta that could be even broader in application. In *United States v. Montoya*, the First Circuit stated that its belief that precedents allowing for departure from the guidelines range “applies to statutory minimums as well as to the guidelines.”¹⁹² Mimicking the Eighth Circuit, Judge Boudin found no factual support for such departure in the case then at hand; however, he made a point of clarifying that such a challenge could be brought by sentenced criminals, and that the claim could in some circumstances be sustained.¹⁹³ Judge Boudin noted that his statement was pure dicta, asserting that statements regarding sentencing manipulation would most often be dicta due to the incredibly high standard applied to sentencing challenges.¹⁹⁴ However, in cases where sentencing manipulation reached the point of extraordinary misconduct, Judge Boudin and two other First Circuit judges offered dicta to support the notion that a departure below the statutory minimum would be appropriate.¹⁹⁵

In 1996, the Ninth Circuit took up the argument. Facing another narcotics case, Judge Beezer remanded the case for resentencing, based on the fact that the district court had failed to consider its option of sentencing the defendant below the statutory minimum based on a sentencing entrapment argument.¹⁹⁶ Judge Beezer stated, “If a defendant proves that sentencing entrapment has occurred, there is no sound reason that the government’s wrongful conduct should be protected by a statutory minimum based upon an amount of drugs higher than a defendant was predisposed to buy or sell.”¹⁹⁷ This argument was still good law in 1999, when the Ninth Circuit remanded *United States v. Riewe* to the district court for resentencing based on specific factual findings on a sentencing entrapment claim based on multiple drug purchases.¹⁹⁸

Nor has the argument disappeared since its introduction in the mid to late 1990s. In 2007 the Eleventh Circuit added its own dicta to the growing chorus. *United States v. Ciszkowski* involved not only narcotics, but murder for hire and firearms charges.¹⁹⁹ The appropriate sentence for

¹⁹¹ *Id.* at *2.

¹⁹² *United States v. Montoya*, 62 F.3d 1, 3 (1st Cir. 1995).

¹⁹³ *Id.* at 4.

¹⁹⁴ *Id.* at 3–4.

¹⁹⁵ *Id.* at 4.

¹⁹⁶ *United States v. Castaneda*, 94 F.3d 592, 594–95 (9th Cir. 1996).

¹⁹⁷ *Id.* at 595.

¹⁹⁸ *United States v. Riewe*, 165 F.3d 727, 729 (9th Cir. 1999).

¹⁹⁹ *United States v. Ciszkowski*, 492 F.3d 1264, 1266 (11th Cir. 2007).

the defendant was based in part on the fact that the firearm used (provided by law enforcement agents) had been equipped with a silencer.²⁰⁰ The defendant argued he had been entirely unaware that the silencer existed.²⁰¹ Clearly following the Ninth Circuit precedent, the Eleventh Circuit found that a sentence below the statutory minimum could be appropriate because “an adjustment for sentencing factor manipulation is not a departure. When a court filters the manipulation out of the sentencing calculus before applying a sentencing provision, no mandatory minimum would arise in the first place.”²⁰² However, once again the facts of the case were insufficient to show such manipulation.²⁰³

While it is true that the burden of proving sentencing entrapment or sentencing manipulation is high, it is also apparent that a growing minority of circuits believe not only that the defenses should exist, but that at times they should allow for departure below statutory minimum sentences. A return to the purposes of sentencing and of the entrapment doctrine suggests that perhaps the burden should not be quite as high as it is. With the idea in mind that departure below a statutory minimum might in some cases be called for, it is worthwhile to return to the question of terrorism prosecutions and contextualizing the criminality of certain defendants.

B. Departing Below the Statutory Minimum: Culpability, Threat Level, and Seeing Defendants in Context

Because every purpose of punishment is undermined when the government becomes overly involved in a criminal plot, moral and practical considerations support the idea that the sentence of the defendant should be similarly modified. The question then becomes how much the defendant’s sentence should be modified—is merely sentencing at the statutory minimum sufficient? I suggest that a judge should be entitled, after careful factfinding in regards to government over-involvement, to decline to apply relevant enhancements and, in the case of defendants whose sentences might not be severely affected by enhancements, to reduce the defendant’s sentence below the statutory minimum.

Once more the Cromitie case provides an example. Because of the weapons used in the case (weapons which were suggested, encouraged and supplied by the informant), the Newburgh defendants were each in a position of being, at minimum, at the second highest level of the federal sentencing guidelines. The base suggested guidelines range at that point was 30 years to life in jail.²⁰⁴ The application of the terrorism sen-

²⁰⁰ *Id.* at 1267–68.

²⁰¹ *Id.* at 1268.

²⁰² *Id.* at 1270.

²⁰³ *Id.* at 1270–71.

²⁰⁴ See U.S. SENTENCING COMM’N, *supra* note 19, § 2M6.1.

tencing enhancement²⁰⁵ would have raised the offense level beyond what the guidelines calculate for, as well as increased the defendants' criminal history categories, thereby moving the defendants to a suggested sentence of life in jail.²⁰⁶ Yet given the nature of the case, the incredible influence of the government informant, the remarkable hesitance with which Cromitie became involved in the plot, and the reasoning suggested above concerning the purposes of punishment, how much punishment is called for? Fifteen or twenty years, which would place these bumbling defendants in the category of the highest-sentenced terrorist defendants in the U.S. since 2001, would seem to be sufficient to fulfill the goals of punishment in such an exceptional situation.

The statutory minimum for attempt and conspiracy to acquire anti-aircraft missiles is, however, 25 years.²⁰⁷ As Judge McMahon acknowledged, the introduction of anti-aircraft missiles to the plot was entirely based off of the informant's manipulation.²⁰⁸ Judge McMahon went so far as to issue an opinion stating that the counts were clear efforts at sentencing entrapment, but that "no circuit has actually upheld a district court's decision not to impose a mandatory minimum sentence because of manipulation."²⁰⁹ She therefore sentenced the defendants to 25 years each, still a significant departure from the guidelines range.²¹⁰

The question that follows from the above fact is why, if there was already significant departure from the guidelines range, does the sentence need to depart down from even the statutory minimum sentence? There are a few answers to this question. First, I submit that a sentence that is based on the statutory minimum will insufficiently shock law enforcement authorities. Many have doubted that any sentencing or even jury verdict can deter law enforcement from behaving incorrectly. These scholars argue that the time between arrest of a defendant and the verdict in that defendant's case is too great for law enforcement to feel either attached to the decision or discouraged from using whatever behavior it was that led to that response.²¹¹ A departure below the statutory minimum, however, would optimally be a cause for further press attention. Moreover, were press attention achieved in such a case, it would almost definitely focus on the fact that law enforcement activity was the

²⁰⁵ The enhancement increases the defendant's base offense level by 12 and raises criminal history to VI, if the offense "involved, or was intended to promote, a federal crime of terrorism." *Id.* § 3A1.4.

²⁰⁶ *See id.*

²⁰⁷ 18 U.S.C. § 2332g(c)(1) (2006).

²⁰⁸ Decision on Sentencing Entrapment/Manipulation at 3–4, *United States v. Cromitie*, 781 F. Supp. 2d 211 (S.D.N.Y. June 29, 2011) (No. 7:09-cr-00558-CM).

²⁰⁹ *Id.* at 5.

²¹⁰ *See id.* at 5.

²¹¹ Park, *supra* note 27, at 231–32; Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 369, 372; Stevenson, *supra* note 34, at 73; William J. Stuntz, *The Pathological Politics Of Criminal Law*, 100 MICH. L. REV. 505, 538–39 (2001).

cause of the extreme departure. As can be seen from press coverage of the Cromitie case, the complexities of the sentencing guidelines, enhancements, and base offense levels escape press notice.²¹² In contrast, a judge who stated that he or she was giving a sentence below the statutory minimum because law enforcement had behaved inappropriately would almost certainly gain attention. This attention would be linked directly to law enforcement and therefore might more successfully deter.

Additionally, as the analyses of the purposes of entrapment and the purposes of punishment show, these defendants are not the defendants the legislature envisioned when setting these statutory minimums. Because they pose no actual threat, to prosecute them wastes resources, tarnishes the courts, and (as can be seen by Judge McMahon's scathing remarks over the course of the trial) tends to engender moral outrage. The continued clumsiness on the part of the FBI in regards to this informant suggests that a strong showing is necessary in order to deter similar future conduct. The risks posed by an informant who actively attempts to radicalize otherwise stable, if hateful, bystanders provoke not just disgust but legitimate concern as to the level of control that can be maintained over such a suspect. These outlying purposes all relate back to the primary purpose of the entrapment doctrine: surely this is not what the legislature intended.

Finally, there is the issue of the sentencing of these defendants in light of the sentences given defendants in other, arguably more serious, terrorism cases. Sentencing these defendants to 25 years each puts them at the very top range of sentences in terrorism-related prosecutions. As of 2009, only 30 defendants had been sentenced to 25 years or longer.²¹³ While the actions of these defendants may well be considered high-level criminal behavior, neither their culpability, their threat level, nor their intent suggests that they should be sentenced so close to the top of terror-related defendants in the criminal courts.

This argument is further supported by the failure of even the probation office's presentence reports to suggest that the defendants should be sentenced within the guidelines range. When considering the sentence of defendant David Williams, the probation officer recommended a sentence of 35 years, rather than the life sentence the guidelines would have

²¹² See, e.g., Chad Bray, *Bomb Plotters Sentenced to 25 Years*, WALL ST. J., June 30, 2011, at A22; Chris Dolmetsch & Patricia Hurtado, *New York City Synagogue Bomb Plotters Are Sentenced to 25 Years in Prison*, BLOOMBERG (June 29, 2011), <http://www.bloomberg.com/news/2011-06-29/new-york-city-synagogue-bomb-plotters-are-sentenced-to-25-years-in-prison.html>; Juliet Papa, *3 Men Convicted in Riverdale Synagogues Plot Learn Their Fates*, CBS (June 29, 2011, 9:10 PM), <http://newyork.cbslocal.com/2011/06/29/sentencing-awaits-men-convicted-in-nyc-temple-plot>; Christina Romano & Julia Talanova, *Three Sentenced in Synagogue Bomb Plot*, CNN (June 29, 2011), http://articles.cnn.com/2011-06-29/justice/new.york.synagogue.sentencing.1_synagogue-bomb-plot-james-cromitie-onta-williams?_s=PM:CRIME; Weiser, *supra* note 148.

²¹³ CTR. ON LAW AND SEC., *supra* note 104, at 14.

suggested, based on the fact that there was no “loss of life, . . . the role of the CI, and . . . compared to sentences imposed in other terrorism offenses.”²¹⁴ As the report itself is not available, it is impossible to tell if this consideration was for all four defendants or just Williams, yet certainly these facts would apply to all four.

Four circuits thus far have given opinions suggesting that departure below the statutory minimum sentence might be appropriate in certain circumstances, specifically in cases of sentencing manipulation or sentencing entrapment.²¹⁵ The suggestion has not yet been employed, or adopted by more circuits, in spite of the fact that it first appeared 15 years ago.²¹⁶ For all the above reasons, I suggest that it is time for another look at situations where it might be appropriate to downwardly depart from mandatory-minimum sentences, in order to avoid punishing defendants who, I suggest, were never imagined by the legislature devising the statute.

CONCLUSION: ENTRAPMENT AS A BASIS FOR SEVERE DOWNWARD DEPARTURE

Surely when the sentencing guidelines were written to state that any offense involving weapons of mass destruction would carry the second highest possible base offense level, they were envisioning terrorists, whether well supported or lone wolves, whether insane chemistry professors or radical teenagers. They were not envisioning incompetent dupes who only thought of using such a weapon due to the insistence and manipulation of a government agent, and who never would have succeeded in finding that weapon if not for that same agent. The lessened culpability of such defendants suggests that the legislature similarly did not intend to punish these defendants in this manner. This may apply, depending on the case, to any given sentencing enhancement, but even to the minimum sentence itself.

The purposes behind the entrapment doctrine are just as relevant to terrorism prosecutions as they are to any other; perhaps even more so given the extreme pressures on government agents to produce terrorism prosecutions and the extreme powers those agents maintain in terrorism cases. Juries may never feel comfortable acquitting a defendant who has engaged in such behavior, and it may be that they should not. Such a black or white decision is inappropriate to what may turn out to be a very nuanced and difficult factual evaluation of relative guilt and relative threat. Responding to government overreaching via sentencing provides a more finely tuned approach to the concerns raised by the entrapment

²¹⁴ Letter from Theodore Green to Hon. Colleen McMahon at 8–9, *United States v. Cromitie*, 781 F. Supp. 2d 211 (S.D.N.Y. 2011) (No. 7:09CR00558).

²¹⁵ *See supra* Part IV.A.

²¹⁶ *Id.*

question, yet can still provide a deterrent to police overreaching and some relief for less culpable defendants.