Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America

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INTRODUCTION

> [T]he Constitution is the rock upon which our nation rests. We must follow it not only when it is convenient, but when fear and danger beckon in a different direction. To do less would diminish us and undermine the foundation upon which we stand.[1]

The United States government's preventive counterterrorism strategy is no secret.[2] Weeks after the 9/11 terrorist attacks, former Attorney General John Ashcroft declared,

> Let the terrorists among us be warned: If you overstay your visa—even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage . . . . Our single objective is to prevent terrorist attacks by taking suspected terrorists off the street.[3]

As the U.S. government adopted a no-tolerance policy to apprehending the terrorists, a fear-stricken public watched images of nefarious, dark-skinned, and bearded Muslims flash across millions of television screens. The message was, if there had ever been any doubt, that the 9/11 attacks confirmed Muslims and Arabs are inherently violent and intent on destroying the American way of life.

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1. United States v. Ghailani, No. S10 98 Crim. 1023(LAK), 2010 WL 4006381, at *1 (S.D.N.Y. Oct. 6, 2010).

2. *See* DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE 26-33 (2007) (explaining the government's "preventative" approach of detaining people based on "group identity or political affiliations"); President George W. Bush, Address Before the United States Military Academy Graduating Class (June 1, 2002) ("If we wait for threats to fully materialize, we will have waited too long . . . . [T]he war on terror will not be won on the defensive.") (transcript, video recording, and audio recording available at THE WHITE HOUSE, http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020601-3.html (last visited Jan. 5, 2012)). Attorney General John Ashcroft prepared the following statement:

> In order to fight and to defeat terrorism, the Department of Justice has added a new paradigm to that of prosecution—a paradigm of *prevention* . . . . Our new, international goal of terrorism prevention . . . involves anticipation and imagination about emerging scenarios, the puzzle pieces of which have yet to come into alignment.

John Ashcroft, U.S. Att'y Gen., Remarks Before the Council on Foreign Relations (Feb. 10, 2003) (prepared remarks available at U.S. DEP'T OF JUSTICE, http://www.justice.gov/archive/ag/speeches/2003/021003agcouncilonforeignrelation.htm (last visited Jan. 5, 2012)).

3. John Ashcroft, U.S. Att'y Gen., Remarks Before the United States Conference of Mayors (Oct. 25, 2001) (prepared remarks available at U.S. DEP'T OF JUSTICE, http://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm (last visited Jan. 5, 2012)).

Heightened government scrutiny of these communities was not only warranted, but a rational[4] response to a perceived existential threat to the country.

Ten years later, the 9/11 terrorist attacks have transformed the American way of life for the worse.[5] In the hasty passage of the expansive USA PATRIOT Act ("PATRIOT Act"),[6] our fears gave way to the government's demand for unfettered discretion to preserve national security at the expense of civil liberties for all Americans. As a consequence, America has come to resemble a police state where government surveillance extends into almost every aspect of life.[7]

Body scans at airports strip us of our privacy.[8] Fusion centers have sprung up across the country, gathering intelligence on average Americans and depositing it into massive databases monitored by the government.[9] Warrantless National Security Letters gather in-depth information about our

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4. *See* Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 767-74 (arguing that the mainstream, institutionalized discourse defines racism as irrational because it is the "distortion of reason through the prism of myth and ignorance," and because it clouds perception "with beliefs rooted in superstition"; hence, selective targeting based on reason or rational characteristics cannot be racist).

5. *See, e.g.*, Evan Perez, *Rights Are Curtailed for Terror Suspects*, WALL ST. J. (Mar. 24, 2011), http://online.wsj.com/article/SB10001424052748704050204576218970652119898.html?mod=WSJ_hp_LEFTTopStories (highlighting the Obama administration's new policy curtailing *Miranda* rights for terror suspects and suggesting that it may erode *Miranda* rights for ordinary criminal defendants as the FBI expands discretion regarding when to invoke the new policy).

6. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S. Code).

7. *See, e.g.*, Glenn Greenwald, *A Prime Aim of the Growing Surveillance State*, SALON.COM (Aug. 19, 2011, 4:20 AM), http://www.salon.com/2011/08/19/surveillance_13/ (examining various governmental "efforts over the past several years to heighten surveillance powers" and "control . . . the flow of information").

8. *See, e.g.*, Richard Knox, *Protests Mount over Safety and Privacy of Airport Scanners*, NPR (Nov. 12, 2010, 3:22 PM), http://www.npr.org/blogs/health/2010/11/12/131275949/protests-mount-over-safety-and-privacy-of-airport-scanners.

9. MICHAEL GERMAN & JAY STANLEY, AM. CIVIL LIBERTIES UNION, WHAT'S WRONG WITH FUSION CENTERS? 3 (2007), *available at* http://www.aclu.org/files/pdfs/privacy/fusioncenter_20071212.pdf. Fusion centers are "state, local and regional institutions . . . originally created to improve the sharing of anti-terrorism intelligence among different . . . law enforcement agencies." *Id.* Each individual center emerged and developed independently, and for many, the scope of their mission has expanded dramatically, as has the scope of the information they collect and analyze. *Id.* Participation in the centers has "grown to include not just law enforcement, but other government entities, the military, and even select members of the private sector," leading to serious privacy concerns. *Id.*; *see* Thomas Cincotta, *Intelligence Fusion Centers: A De-Centralized National Intelligence Agency*, PUB. EYE (Winter 2009/Spring 2010), http://www.publiceye.org/magazine/v24n4/intelligence-fusion-centers.html.

financial and political lives absent any evidence of criminal activity.[10] Police departments have shifted resources from crime fighting to mapping communities based on their religious faith and ethnic origins, ostensibly to protect national security.[11] Overreaching enforcement of broad "material support to terrorism" laws has chilled religiously mandated charitable giving and humanitarian aid operations, thereby eroding the independence of the American nonprofit sector and unduly politicizing humanitarian assistance.[12] Fears of pervasive "homegrown terrorism," fueled by irresponsible congressional rhetoric,[13] have legitimized bigoted discourse about Muslims in America to the extent that some Americans challenge the status of Islam as a bona fide religion deserving of constitutional protection.[14]

At first blush, the preventive paradigm[15] appears legitimate. Few would contest the collective public safety interests in stopping terrorism before it

10. *See* 18 U.S.C. § 2709(b) (2006) (requiring third-party disclosure if the information sought is merely "*relevant to an authorized investigation* to protect against international terrorism or clandestine intelligence activities" (emphasis added)).

11. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE § 4, at 21-38 (2008), *available at* http://graphics8.nytimes.com/packages/images/nytint/docs/the-new-operations-manual-from-the-f-b-i/original.pdf (permitting mapping of communities based on race or ethnicity so long as it does not serve as the sole basis for monitoring specific communities). Despite the persistent economic slowdown, the Department of Justice requested over $300 million in program increases for the 2011 fiscal year to "strengthen national security and counter the threat of terrorism." *Strengthen National Security and Counter the Threat of Terrorism*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/jmd/2011factsheets/pdf/national-security-counter-terrorism.pdf (last visited Jan. 5, 2012).

12. For extensive information about the adverse impacts that material support to terrorism laws have had on the nonprofit sector, see *Negative Impacts of Post 9/11 Counterterrorism Measures on Charities, Donors and the People They Serve*, CHARITY & SEC. NETWORK NEWSL. (Aug. 16, 2010), http://www.charityandsecurity.org/system/files/Impact%20of%20Counterterrorism%20Measures%20on%20Charities%20Donors%20and%20the%20People%20the%20Serve.pdf.

13. *See, e.g.*, Laurie Goodstein, *Police in Los Angeles Step up Efforts to Gain Muslims' Trust*, N.Y TIMES, Mar. 10, 2011, at A17, *available at* http://www.nytimes.com/2011/03/10/us/10muslims.html (reporting that Representative Peter King said "American Muslims do not cooperate" with law enforcement); Scott Shane, *For Lawmaker Examining Terror, a Pro-I.R.A. Past*, N.Y. TIMES, Mar. 9, 2011, at A1, *available at* http://www.nytimes.com/2011/03/09/us/politics/09king.html (reporting that Representative Peter King asserted eighty-five percent of American mosque leaders "hold extremist views").

14. *See* Brief for the United States of America as Amicus Curiae at 1, Estes v. Rutherford Cnty. Reg'l Planning Comm'n, No. 10CV-1443 (Tenn. Ch. Ct. Oct. 18, 2010), *available at* http://www.justice.gov/crt/about/hce/documents/murfreesboro_amicus_10-18-10.pdf ("Plaintiffs have put into controversy whether Islam is a religion and whether a mosque is entitled to treatment as a place of religious assembly for legal purposes.").

15. Derived from Attorney General John Ashcroft's remarks, *see* Ashcroft, *supra* note 2, the phrase "preventive paradigm" has been used to describe the ideology behind the

occurs. Even so, on what grounds should the government be permitted to investigate individuals? Does mere political dissent, even if virulently anti-American, or unpopular orthodox religious practices suffice to subject individuals to increased scrutiny, or worse, loss of liberty? At what point does legitimate counterterrorism become political and religious persecution? The answers determine the type of country we want to live in—a free and just society consistent with the Founding Fathers' vision, or a paranoid society dislodged from fundamental principles of fairness and the rule of law.

While post-9/11 preventive counterterrorism policies have adversely impacted various groups of Americans, no group has been more profoundly affected than the Muslim, Arab, and South Asian communities.[16] Mosque infiltration has become so rampant that some congregants assume they are under surveillance as they fulfill their religious obligations.[17] Government informants have ensnared numerous, seemingly hapless and unsophisticated young men such that Muslims no longer know whom they can trust among each other.[18] Aggressive prosecutions of Muslim charities and individuals

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U.S. government's "sweeping" response to 9/11—an ideology that has "justif[ied] the coercive use of state power to preventively detain suspected terrorists, to engage in extraordinary rendition of suspects to foreign states, to interrogate detainees, and to go to war against Iraq." Jules Lobel, *The Preventive Paradigm and the Perils of Ad Hoc Balancing*, 91 MINN. L. REV. 1407, 1407 (2007).

16. For a general description of the distinctions between the Arab, Muslim, Middle Eastern, Sikh, and South Asian communities, see Sahar F. Aziz, *Sticks and Stones, the Words that Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y. CITY L. REV. 33, 43-48 (2009).

17. *See, e.g.*, Jerry Markon, *Mosque Infiltration Feeds Muslims' Distrust of FBI*, WASH. POST, Dec. 5, 2010, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/04/AR2010120403720.html (reporting on how the FBI's use of a mosque infiltrator backfired); Thomas Watkins, *Suit Claims FBI Violates Muslims' Rights at Mosque*, ABC NEWS (Feb. 23, 2011), http://abcnews.go.com/US/wireStory?id=12977749 ("Plaintiffs in a lawsuit against the FBI said . . . that the agency's use of a paid informant to infiltrate California mosques has left them and other Muslims with an enduring fear that their phones and e-mails are being screened and their physical whereabouts monitored."); *see also* Salvador Hernandez, *Judge: FBI Lied, but Documents About Muslims Stay Secret*, ORANGE COUNTY REG. (Apr. 29, 2011), http://www.ocregister.com/articles/documents-298500-fbi-government.html ("Documents connected to [FBI] surveillance of several Islamic organizations and Muslim leaders will not be released, but a federal judge strongly rebuked the government for lying about the existence of the documents to the federal court.").

18. *See, e.g.*, William Glaberson, *Newburgh Terrorism Case May Establish a Line for Entrapment*, N.Y. TIMES, June 16, 2010, at A25, *available at* http://www.nytimes.com/2010/06/16/nyregion/16terror.html (reporting that an FBI informant allegedly entrapped four young Muslim men with "promises of a $250,000 payment and a BMW," convincing them to plan synagogue bombings and military-plane shootings, despite the four men being "so ill-equipped to plan an attack that none had a driver's license or a car"); Amanda Ripley, *The Fort Dix Conspiracy*, TIME, Dec. 17, 2007, at 46, *available at* http://www.time.com/time/nation/article/0,8599,1691609,00.html (commenting on allegations that an FBI informant

across the country have embittered communities that now feel under siege by their government and distrusted by their non-Muslim compatriots.[19] Selective counterterrorism fuels public bias, as evidenced by the vitriolic discourse surrounding the Park 51 Community Center in lower Manhattan in 2010.[20] As a consequence, the vibrancy and development of civil society within these communities has been significantly stunted.[21] Current counter-terrorism efforts thus attack the social relationships, as well as the civil liberties, long understood as the glue holding this country together.

This article focuses on three powerful components of the government's counterterrorism preventive paradigm and the significant risks they pose to civil rights and civil liberties. Part I examines the adverse consequences of the government's use of religiosity as a proxy for terrorism. Specifically, the current preventative paradigm for countering terrorism risks the First Amendment infringement of protected activities and misdirects limited law enforcement resources away from criminal activity.[22] In addition to wasting limited resources, religious and racial profiling erodes trust between law enforcement and Muslim communities. To the extent constructive relations between communities and law enforcement bolster public safety, the

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"brainwashed" and tricked six young men accused of plotting an attack on Fort Dix: "if the rumors of entrapment become so corrosive that no one in the Muslim-American community feels safe talking to the FBI, then the government has lost its best potential ally"); *see also* CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, N.Y. UNIV. SCH. OF LAW, TARGETED AND ENTRAPPED: MANUFACTURING THE "HOMEGROWN THREAT" IN THE UNITED STATES 19-38 (2011), *available at* http://www.chrgj.org/projects/docs/targetedandentrapped.pdf (documenting multiple cases where government informants played a leading role in planning and implementing attempted terrorist acts, thereby raising concerns of de facto entrapment of Muslim targets).

19. *See, e.g.*, AM. CIVIL LIBERTIES UNION, BLOCKING FAITH, FREEZING CHARITY: CHILLING MUSLIM CHARITABLE GIVING IN THE "WAR ON TERRORISM FINANCING" 118-20 (2009), *available at* http://www.aclu.org/pdfs/humanrights/blockingfaith.pdf (discussing the alienation of Muslim Americans as a result of government actions toward Muslim charities and donors).

20. *See, e.g.*, *Imam's Wife Tells of Death Threats*, N.Y. TIMES, Oct. 4, 2010, at A20, *available at* http://www.nytimes.com/2010/10/04/nyregion/04daisy.html?ref=park51 (reporting the death threats made against a Park 51 imam and his wife).

21. *See generally* Aziz Z. Huq, *The Signaling Function of Religious Speech in Domestic Counterterrorism*, 89 TEX. L. REV. 833, 851-67 (2011) (arguing that current counterterrorism policies result in two First Amendment-related harms: (1) "individuals may experience a chilling effect on speech and association," and (2) "religious communities may be burdened by constraints on the autonomy to debate and cultivate unique distinctive religious views").

22. For a comprehensive analysis of the preventive paradigm and its injurious impact on Muslims, Arabs, and South Asians in America, see COLE & LOBEL, *supra* note 2, at 26-58.

government has an interest in curtailing arbitrary and overreaching counterterrorism enforcement.[23]

Part II demonstrates the government's aggressive use of "material support" laws found in 18 U.S.C. §§ 2339A and B as a prosecutorial fallback against individuals that otherwise cannot be shown to have participated in terrorism.[24] For example, in 2009 the Center on Law and Security at New York University School of Law found that defendants had been charged with § 2339B "[i]n 11 indictments, comprising four cases . . . either alone or in association with lesser statutes."[25] The far-reaching and devastating effects of these broadly interpreted laws—felt by American Muslim charities, Muslim donors, and the broader American nonprofit sector—are the effective criminalization of otherwise legitimate charitable giving, peacebuilding, and human rights advocacy.[26] As a result, the fear of inviting unwanted government scrutiny chills religious freedom rights and deters Muslims from fully practicing their faith.[27] In addition to calling for more judicious enforcement of material support laws, this paper argues for a specific intent requirement in §§ 2339A and 2339B as a means of ensuring innocent but unpopular individuals are not targeted for prosecution.

Part III focuses on the most recent and troubling developments in the preventive paradigm—the racial subtext of homegrown terrorism as a "Muslims only" club. The current debate over homegrown terrorism facilitates selective and arbitrary enforcement of counterterrorism laws against Muslims,

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23. *But see* discussion *infra* Part I.E (addressing the flaws in community outreach programs).

24. 18 U.S.C. §§ 2339A-2339B (Supp. IV 2010); U.S. DEP'T OF JUSTICE, INTRODUCTION TO NATIONAL SECURITY DIVISION STATISTICS ON UNSEALED INTERNATIONAL TERRORISM AND TERRORISM-RELATED CONVICTIONS 1 (2010), *available at* http://www.hsdl.org/?view&did=25289 ("Category II cases include offenses such as those involving fraud, immigration, firearms, drugs, false statements, perjury, and obstruction of justice, as well as general conspiracy charges under 18 U.S.C. § 371.").

25. CTR. FOR LAW & SEC., N.Y. UNIV. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2011-SEPTEMBER 11, 2009, at 50 (2010) (noting that such indictments "illuminate the concerns that are raised by the broad phrasing of the material support statute"); U.S. DEP'T OF JUSTICE, *supra* note 24.

26. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

27. Take, for example, a report involving a barber-shop police raid:

> Strangers loitered across the street from the [Muslim-owned] cafe in this Brooklyn neighborhood. Quiet men would hang around for hours, listening to other [predominantly Muslim] customers. Once police raided the barber shop next door, searched through the shampoos and left. Customers started staying away for fear of ending up on a blacklist, and eventually Ahmad had to close the place.

Chris Hawley, *Law May Not Be on Muslims' Side in NYPD Intel Case*, SALON.COM (Nov. 8, 2011, 11:31 PM), http://www.salon.com/2011/11/08/law_may_not_be_on_muslims_side_in_nypd_intel_case.

while many non-Muslims commit or attempt to commit deadly acts of terror undetected.[28] Notwithstanding the rise in terrorism by militias and right wing extremists, law enforcement has developed counterterrorism strategies based on essentialist stereotypes of terrorists as religious Muslims.[29] Some congressional leaders have followed suit by calling for more aggressive scrutiny of mosques, Muslim community organizations, and Muslim student groups.[30] This rhetoric seeks to deputize Muslim religious leaders to spy on their congregations with little regard for the broad, adverse implications on religious freedom for all Americans.[31]

The article concludes by calling for smarter, more efficient policies that focus on criminal activity rather than stereotypes that stigmatize entire communities as suspicious and disloyal. To the extent that Muslims, Arabs, and South Asians are the "miner's canary"[32] in forecasting the post-9/11 loss of

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28. By the Southern Poverty Law Center's count, 149 "patriot militia groups" were operating in the United States in 2008, but that number increased to 824 by 2010—a 500% increase. John Avlon, *Georgia Terror Plot's Militia Roots*, DAILY BEAST (Nov. 3, 2011, 9:33 AM), http://www.thedailybeast.com/articles/2011/11/03/georgia-terror-plot-s-scary-roots-in-far-right-fringe.html.

29. *See* Liaquat Ali Khan, *The Essentialist Terrorist*, 45 WASHBURN L.J. 47, 47 (2005) (describing the invention of the "essentialist terrorist" as a "Muslim militant . . . trained in religious schools . . . and recruited to unleash violence against the unbelievers").

30. *See, e.g.*, Press Release, Comm. on Homeland Security, U.S. House of Representatives, King, Lieberman Announce Joint House-Senate Hearing on Homegrown Terror Threat to Military Communities—Hearing Scheduled for December 7 (Nov. 28, 2011), *available at* http://homeland.house.gov/press-release/king-lieberman-announce-joint-house-senate-hearing-homegrown-terror-threat-military; Victor Manuel Ramos, *LI Muslims Uneasy About King Hearings*, NEWSDAY (Feb. 21, 2011, 10:07 PM), http://www.newsday.com/long-island/li-muslims-uneasy-about-king-hearings-1.2704094 (reporting how Representative Peter King has repeatedly asserted that "80 percent of U.S. mosques are controlled by radicals and could be harboring terrorists").

31. In his congressional hearings about homegrown terrorism committed by Muslims, Representative Peter King stated:

> There has not been enough cooperation from the Muslim community . . . . That is what I have learned over the past eight or nine years in dealing with law-enforcement officials at all levels. It has been disappointing. There is no doubt that the overwhelming majority of Muslims are good people, but the leadership in their communities has not cooperated enough, nor have they set a tone for cooperation. I want to see that change.

Robert Costa, *King's Speech*, NAT'L REV. ONLINE (Feb. 15, 2011, 4:00 AM), http://www.nationalreview.com/articles/259733/king-s-speech-robert-costa?pg=1.

32. Race has been compared to a miner's canary:

> Race, for us, is like the miner's canary. Miners often carried a canary into the mine alongside them. The canary's more fragile respiratory system would cause it to collapse from noxious gases long before humans were affected, thus alerting the miners to danger . . . . Those who are racially marginalized are like the miner's canary: their distress is the first sign of a danger that threatens us all.

civil rights and liberties for all Americans, their experiences demonstrate America's downward progression from the Founding Fathers' vision of a society where individuals can speak, assemble, and practice their faith free of government intervention or persecution.

I. MISTAKING RELIGIOSITY FOR TERRORISM

> First they came for the Socialists, and I did not speak out—
> Because I was not a Socialist.
> Then they came for the Trade Unionists, and I did not speak out—
> Because I was not a Trade Unionist.
> Then they came for the Jews, and I did not speak out—
> Because I was not a Jew.
> Then they came for me—and there was no one left to speak for me.
> —Martin Niemöller, 1892-1984[33]

The current preventive paradigm for countering terrorism misguidedly uses political beliefs and religious practices as proxies for criminal activity.[34] Orthodox Muslims or those who openly critique U.S. government policies find themselves targeted by aggressive counterterrorism tactics. Not only does this practice undermine civil liberties, it wastes limited law enforcement resources by monitoring legal activity while ignoring unlawful activity committed by those not fitting the religious profiles. Looking for evidence of radicalization through an individual's clothing, facial hair, or religious observances diverts resources from investigations of true threats.[35]

LANI GUINIER & GERALD TORRES, THE MINER'S CANARY 11 (2002) (footnote omitted).

33. *Martin Niemöller: "First They Came for the Socialists . . . ,"* U.S. HOLOCAUST MEMORIAL MUSEUM, http://www.ushmm.org/wlc/en/article.php?ModuleId=10007392 (last updated Jan. 6, 2011).

34. *See, e.g.*, COLE & LOBEL, *supra* note 2, at 30-33 ("[I]nstead of incarcerating people on the basis of proof beyond a reasonable doubt that they committed a past infraction, the preventive paradigm turns to detention as a preventive matter and employs it against individuals deemed suspect by virtue of their group identity or political affiliations."); MITCHELL D. SILBER & ARVIN BHATT, N.Y.C. POLICE DEP'T, RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT 31 (2007), *available at* http://www.nypdshield.org/public/SiteFiles/documents/NYPD_Report-Radicalization_in_the_West.pdf (asserting that "[w]earing traditional Islamic clothing, growing a beard," and "[b]ecoming involved in social activism and community issues" are signs of "radicalization"); Michael Powell, *In Police Training, a Dark Film on U.S. Muslims*, N.Y. TIMES, Jan. 24, 2012, at A1, *available at* http://www.nytimes.com/2012/01/24/nyregion/in-police-training-a-dark-film-on-us-muslims.html?pagewanted=all (reporting that the NYPD showed over 1400 of its officers a film titled *The Third Jihad*, which accuses American Muslims of "deception" and waging jihad "covertly throughout the West today").

35. *See, e.g.*, SILBER & BHATT, *supra* note 34, at 18.

Furthermore, it is unlawful for the government to investigate and prosecute individuals *solely* based on First Amendment protected speech, association, assembly, and religious practices[36]—and for good reason. Our Founding Fathers were cognizant that when the government exercises its authority to quash political opponents or dissenting views, our democracy is threatened.[37] The Founding Fathers experienced first-hand the devastating effects of state entanglement in religious affairs. When one religion is disfavored among others, it results in a stigmatization and shunning of the religion's congregants in the court of public opinion or, worse, in a court of law.[38] Once the government is permitted to persecute a particular group based on its protected constitutional rights, it is only a matter of time before other groups are unfairly targeted.[39]

A. *Selective Targeting Based on Religious and Political Activity*

Prohibitions against racial profiling in law enforcement do not apply to religious or ethnic origin profiling.[40] Therefore, the government profiles on account of religion and ethnic origin in counterterrorism enforcement with no legal recourse for those targeted.[41] Further, the Federal Bureau of Investigation

36. 5 U.S.C. § 552a (Supp. IV 2010); OFFICE OF THE ATT'Y GEN., U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS 13 (2008), *available at* http://www.justice.gov/ag/readingroom/guidelines.pdf (prohibiting the FBI from "investigating or collecting or maintaining information on United States persons solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of other rights secured by the Constitution or laws of the United States"); *see also* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS 7 (2010), *available at* http://www.justice.gov/oig/special/s1009r.pdf (reiterating the standard set forth in the U.S. Attorney General's 1989 and 2002 FBI guidelines).

37. *See, e.g.*, LARRY D. ELDRIDGE, A DISTANT HERITAGE: THE GROWTH OF FREE SPEECH IN EARLY AMERICA 142 (1994).

38. *Id.* at 9, 13, 139-40.

39. *See, e.g.*, ELLEN SCHRECKER, THE AGE OF MCCARTHYISM 92-94 (1994) (explaining how the damages of McCarthyism spread from Communist groups to left-led unions, other liberal reform movements, and the nation's cultural and intellectual life).

40. *See* U.S. DEP'T OF JUSTICE, RACIAL PROFILING (2003), *available at* http://www.justice.gov/opa/pr/2003/June/racial_profiling_fact_sheet.pdf (outlining Justice Department guidelines making clear that racial profiling is illegal). *But see* Whren v. United States, 517 U.S. 806 (1996) (permitting law enforcement to make pretextual stops so long as there is probable cause of some violation of law, such as a traffic infraction, that would otherwise justify the stop).

41. *See, e.g.*, ASIAN LAW CAUCUS, RETURNING HOME: HOW U.S. GOVERNMENT PRACTICES UNDERMINE CIVIL RIGHTS AT OUR NATION'S DOORSTEP 4, 7, 10-12, 14, 23 (2009) *available at* http://www.asianlawcaucus.org/wp-content/uploads/2009/04/Returning%20Home.pdf; CTR. FOR IMMIGRANTS' RIGHTS, PA. STATE UNIV. DICKINSON SCH. OF LAW, FOR AM.-

("FBI") diverts resources to "map" U.S. communities based on religious, ethnic, and national-origin characteristics, identifying particular "Arab-American and Muslim communities" as "potential terrorist recruitment ground[s]."[42] The following cases demonstrate the problematic relationship between counterterrorism enforcement and religious and political activity.

In 2003 the government accused Sami Al-Arian of being the leader of a Palestinian jihadist group.[43] To support its case, the government relied mainly on evidence from the early 1990s when Al-Arian expressed strong political views in support of Palestinian rights.[44] The jury in the case, however, acquitted Al-Arian on eight of the seventeen charges and refused to convict him of the others.[45] Foregoing a retrial, the prosecution agreed to a plea bargain with Al-Arian in which he pleaded guilty to a lesser charge and "agreed to be deported."[46] Although Al-Arian was scheduled for release in April of 2007, immigration authorities imprisoned him for an additional year and a half for "refusing to testify before a grand jury about a cluster of Muslim organizations in northern Virginia."[47] The 9/11 attacks made prosecution of Muslim activists like Al-Arian more politically palatable. Indeed, the detention of Al-Arian raises questions as to whether his political beliefs were determinative in his selection for prosecution.

ARAB ANTI-DISCRIMINATION COMM., NSEERS: THE CONSEQUENCES OF AMERICA'S EFFORTS TO SECURE ITS BORDERS 34, 38 (2009), *available at* http://www.adc.org/PDF/nseers paper.pdf; Press Release, Muslim Advocates & Am. Civil Liberties Union, Groups Seek End to Religious Questioning at the Border by Federal Agents (Dec. 16, 2010), http://www.muslimadvocates.org/FINAL_DHS%20CBP%20letter%20release.pdf; Press Release, Am.-Arab Anti-Discrimination Comm. & Yale Law Sch., ICE Targets Immigrants from Muslim Majority Countries Prior to 2004 Presidential Election (Oct. 20, 2008), http://www.adc.org/PDF/frontline.pdf.

42. Charlie Savage, *F.B.I. Scrutinized for Amassing Data on American Communities*, N.Y. TIMES, Oct. 21, 2011, at A20, *available at* http://www.nytimes.com/2011/10/21/us/aclu-releases-fbi-documents-on-american-communities.html?_r=1&hpw.

43. *See* Jennifer Steinhauer, *Palestinian to Be Imprisoned Before Deportation*, N.Y. TIMES (May 1, 2006), http://www.nytimes.com/2006/05/01/us/01cnd-islamic.html?_r=1&oref=slogin.

44. *Id.* (reporting that Al-Arian "had been under surveillance by American intelligence officials since 1991"); *Trial of Sami Al-Arian Concludes with Acquittals, Deadlocks*, ANTI-DEFAMATION LEAGUE (Dec. 13, 2005), http://www.adl.org/main_Terrorism/arian_deadlock_121305.htm.

45. *See* Steinhauer, *supra* note 43.

46. *Sami Al-Arian Released After 5.5 Years in Prison*, DEMOCRACYNOW.ORG (Sept. 3, 2008), http://www.democracynow.org/2008/9/3/sami_al_arian_released_after_five.

47. *Id.* Following a successful habeas corpus petition, Al-Arian was eventually released in September of 2008. *Id.*

In another case, the FBI threatened Imam Foad Farahi with deportation for refusing to serve as a government informant over his congregation.[48] Farahi, an Iranian national, had applied for political asylum out of fear from persecution by the Shi-a dominated Iranian government on account of his adherence to Sunni Islam.[49] When Farahi informed the FBI that he could not "in good conscience" cooperate with them by "spy[ing] on members of his mosque," but would otherwise help so long as his relationship with the government was public, the government placed him in deportation proceedings.[50] Imam Farahi is only one of several imams who have faced deportation post-9/11 under questionable circumstances.[51]

In another high-profile case, the federal government held Syed Fahad Hashmi, a U.S. citizen raised in Queens, New York, in isolation for three years on allegations of providing material support to al Qaeda.[52] The government's case relied primarily on testimony of cooperating witness Junaid Babar, an acquaintance who stayed with Hashmi in London for two weeks in 2004.[53] Allegedly, Hashmi allowed Babar to store "military gear," such as raincoats, ponchos, and waterproof socks, in his London apartment—equipment Babar later delivered to an al Qaeda member in Pakistan.[54] The government placed Hasmi in pretrial solitary confinement based on these charges, political statements he made at Brooklyn College in 2002 (reportedly calling America "the biggest terrorist in the world"), and his membership in a New York-based

48. *See* Trevor Aaronson, *FBI Tries to Deport Muslim Man for Refusing to Be an Informant*, MIAMI NEW TIMES (Oct. 8, 2009), http://www.miaminewtimes.com/2009-10-08/news/unholy-war-fbi-tries-to-deport-north-miami-beach-imam-foad-farahi-for-refusing-to-be-an-informant/.

49. *Id.*

50. Trevor Aaronson, *The Informants*, MOTHER JONES, Sept./Oct. 2011, at 51, *available at* http://motherjones.com/politics/2011/08/fbi-terrorist-informants.

51. *See, e.g.*, *Imam Deported for Lying in Terror Probe*, TULSA WORLD (July 6, 2010, 2:36 AM), http://www.tulsaworld.com/news/article.aspx?subjectid=338&articleid=20100706_13_A3_Iahaas95349&rss_lnk=1 (reporting that an imam entangled in a New York City subway bombing plot was deported to Saudi Arabia, despite his history of cooperation with law enforcement, after pleading guilty to lying to the FBI); *Imam Without a Country*, MSNBC.COM (Jan. 15, 2007, 5:56 PM), http://www.msnbc.msn.com/id/16638494/ns/us_news-security/ (reporting that the imam of Ohio's largest mosque was deported to the West Bank amidst complaints of "double-cross[ing] by U.S. immigration officials"); *cf.* Holy Trinity Church v. United States, 143 U.S. 457, 471-72 (1892) (allowing an Anglican priest to remain in the country by disregarding the letter of immigration law and characterizing the United States as a "Christian nation" that prized religion).

52. *See* Jeanne Theoharis, *The Legal Black Hole in Lower Manhattan: The Unfairness of the Trial of Muslim Activist Syed Fahad Hashmi*, SLATE MAG. (Apr. 27, 2010, 11:05 AM), http://www.slate.com/id/2252117/.

53. *Id.*

54. *Id.*

political group, Al Muhajiroun.[55] Al Muhajiroun is not a designated terrorist organization,[56] but nevertheless Hashmi's First Amendment protected speech and associations with the group were used against him.[57] Despite his proclamations of innocence, Hashmi accepted a plea bargain on the eve of trial due in part to his concerns he could not get a jury untainted by the pervasive stereotypes of Muslims as terrorists.[58]

In the fall of 2010, the FBI "searched six addresses in Minneapolis and two in Chicago seeking . . . 'investigation into activities concerning the material support of terrorism.'"[59] The targets were 23 "anti-war activists" including Hatem Abudayyeh, a respected Arab American with a demonstrated commitment to civil and human rights.[60] The FBI raided Abudayyeh's home after he helped organize educational trips to the Palestinian territories in support of a Palestinian state.[61] Although formal charges have yet to be filed, the government searched for evidence that Abudayyeh had unlawfully provided money and other resources to designated terrorist organizations.[62] Allegedly, the travelers gave money to a Palestinian women's group "linked" to a small organization "on the U.S. list of terrorist groups."[63] Abudayyeh, meanwhile, claimed that the money was paid for "accommodation, food and transportation" at "no more than . . . [fifty dollars] per person a day during the two week tours."[64] One of the targeted activists stated that small sums she contributed to Abudayyeh's efforts were raised, in part, through her daughter's lemonade

55. *Id.*

56. Designated organizations may be Foreign Terrorist Organizations listed by the Secretary of State, 8 U.S.C. § 1189(a)(1) (2006), or Specially Designated Global Terrorists listed by the Department of the Treasury, 50 U.S.C. § 1702 (2006) (granting the President the authority to designate Specially Designated Global Terrorists); Exec. Order No. 13,224, 3 C.F.R. 786 (2001) (extending presidential power under § 1702 to the Department of the Treasury); *see also* Sahar F. Aziz, Note, *The Laws on Providing Material Support to Terrorist Organizations: The Erosion of Constitutional Rights or a Legitimate Tool for Preventing Terrorism?*, 9 TEX. J. C.L. & C.R. 45, 46 (2003).

57. *See* Theoharis, *supra* note 52.

58. *See* Larry Neumeister, *Syed Hashmi, American Student, Pleads Guilty to Helping Al Qaida*, HUFFINGTON POST (April 27, 2010, 8:32 PM), http://www.huffingtonpost.com/2010/04/27/syed-hashmi-american-stud_n_554211.html.

59. *See, e.g.*, *Searches, Grand Jury Investigation Target Anti-War Activists in Chicago, Minneapolis*, CHARITY & SEC. NETWORK (Sept. 27, 2010), http://www.charityandsecurity.org/news/Searches_FBI_Anti_War_Activists.

60. *See* Michael Tarm, *Activist: Palestinian Trips Had No Link to Terror*, SEATTLE TIMES (Feb. 7, 2011, 3:28 PM), http://seattletimes.nwsource.com/html/nationworld/2014157654_apusfbiraidsterrorism.html?syndication=rss.

61. *See id.*

62. *See id.*

63. *See id.*

64. *Id.*

stand.[65] This case corroborated concerns among Arabs and Muslims that political viewpoints on Palestine are more determinative than criminal activity in triggering a terrorism investigation.[66]

Additionally, thousands of individuals have been subjected to the FBI's abuse of "voluntary" interviews over the past ten years.[67] Many well-intentioned Muslims accept the FBI's requests to speak with them (often without a lawyer) only to find themselves prosecuted for making false statements on issues unrelated to terrorism.[68] Others are coerced into serving as informants under threat of prosecution for false statements.[69] Indeed, the problem has become so endemic that advocacy groups are proactively educating these communities on their right to refuse to submit to voluntary interviews and the importance of retaining counsel to protect them from this common preventive tactic.[70]

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65. *See id.*

66. *Preemptive Prosecution—Cheney's 1% Approach to Justice*, PROJECT SALAM, http://www.projectsalam.org/downloads/Preemptive_Prosecution_Case_Summaries.pdf (last visited Jan. 8, 2012) (highlighting the cases of Al-Arian, the Holy Land Foundation, and others where the defendants had controversial views in support of Palestinian human rights).

67. *See, e.g.*, Petra Bartosiewicz, *To Catch a Terrorist: The FBI Hunts for the Enemy Within*, HARPER'S MAG., Aug. 2011, at 37, *available at* http://harpers.org/archive/2011/08/0083545 ("In November 2001, the Department of Justice began conducting 'voluntary interviews' with 5,000 Middle Eastern noncitizens. Hundreds of FBI agents were dispatched across the country to conduct the interviews, with standard questions like 'Are you aware of anybody who reacted in a surprising way about the terrorist attacks?'"); Mary Beth Sheridan, *Interviews of Muslims to Broaden: FBI Hopes to Avert a Terrorist Attack*, WASH. POST, July 17, 2004, at A01, *available at* http://www.washingtonpost.com/wp-dyn/articles/A56080-2004Jul16.html.

68. *See, e.g.*, Nick Meyer, *Prominent Attorney Who Refused to Betray Arab and Muslim Clients Speaks on Civil Liberties, Life on Terror Watch List*, ARAB-AM. NEWS (Aug. 21, 2011, 2:25 AM), http://www.arabamericannews.com/news/index.php?mod=article&cat=Community&article=4627 ("[A]bout 1,200 non-citizens were rounded up immediately after the 9/11 attacks and . . . the only charges brought against them were actually for routine immigration violations or in some cases ordinary crimes . . . ."); Wajahat Ali, *Time for FBI to Stop Spying on American Muslims*, GUARDIAN (Dec. 7, 2010, 10:30 AM), http://www.guardian.co.uk/commentisfree/cifamerica/2010/dec/07/islam-terrorism.

69. *See, e.g.*, Aaronson, *supra* note 50, at 30, 32-33.

70. *See, e.g.*, AM. CIVIL LIBERTIES UNION, KNOW YOUR RIGHTS WHEN ENCOUNTERING LAW ENFORCEMENT 4-5 (2004), *available at* http://www.aclu.org/files/kyr/kyr_english.pdf; *Got Rights?*, MUSLIM ADVOCATES, http://www.muslimadvocates.org/get_involved/got_rights.html (last visited Jan. 8, 2012); *Know Your Rights*, COUNCIL ON AM.-ISLAMIC RELATIONS (2011), http://www.cair.com/CivilRights/KnowYourRights.aspx#9; *Urgent Community Alert: Seek Legal Advice Before Talking to FBI*, MUSLIM ADVOCATES 1-2, http://www.muslimadvocates.org/FBI_IVU_COMMUNITY%20ALERT.pdf (last visited Jan. 8, 2012).

When examined in context, these cases demonstrate a troubling trend in the preventive counterterrorism model: selective enforcement against Muslims based on orthodox religious practices or unpopular political viewpoints.

B. *The Use of Informants to Chill Religious Freedom and Political Activity*

The selective enforcement model relies heavily on dubious informants hired as "mosque crawlers" in search of vulnerable young men fitting a religious profile. For decades, informants have been an integral part of law enforcement. However, their pervasive presence in post-9/11 counterterrorism appears to be unprecedented. Compared to 1500 informants in 1975 and 2800 in 1980, reports indicate that there are now 15,000 FBI informants, whose tasks are driven to a large extent by racial and religious profiling.[71] According to various news outlets, many of the informants are explicitly tasked to spy on and infiltrate American Arab and Muslim communities.[72] When coupling these reports with recent discoveries that informants have induced Muslim men toward violence, it should come as no surprise that Muslim communities are distrustful of federal law enforcement agencies.[73]

The abuse of informants is spreading to state and local law enforcement agencies. The New York Police Department ("NYPD") was recently ordered to release documents revealing that agents and informants had repeatedly targeted New York City mosques, restaurants, and other Muslim-owned businesses viewed as "security risks" for "endorsing conservative religious views or having devout customers."[74] In addition, the NYPD explicitly used "ethnic orientation, leadership and group affiliations" to mark fifty-three

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71. *The Informants: How the FBI's Massive Informant Network Actually Created Most Plots "Foiled" in U.S. Since 9/11*, OLDSPEAK J. (Oct. 11, 2011, 4:57 PM), http://theoldspeakjournal.wordpress.com/2011/10/11/the-informants-how-the-fbis-massive-informant-network-actually-created-most-terrorist-plots-foiled-in-u-s-since-911/.

72. Aaronson, *supra* note 50, at 32; *Bloomberg Backs Law Enforcement Ahead of Muslim Leaders' Breakfast Boycott*, CNN (Dec. 29, 2011), http://articles.cnn.com/2011-12-29/us/us_new-york-bloomberg_1_muslim-leaders-spy-agency-cia?_s=PM:US; *FBI Used Outreach Programmes 'to Spy on Muslims,'* TELEGRAPH (Dec. 2, 2011, 12:59 AM), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/8929931/FBI-used-outreach-programmes-to-spy-on-Muslims.html.

73. Aaronson, *supra* note 50, at 32, 35.

74. *Documents Show NY Police Watched Devout Muslims*, WALL ST. J. (Sept. 6, 2011, 6:32 PM), http://online.wsj.com/article/APfd1a04fa820c44bd820aae6bc75d33e3.html; *see also* Joe Coscarelli, *NYPD Even Spied on the Muslim Leaders Who Were Helping Them*, N.Y. MAG. (Oct. 6, 2011, 10:36 AM), http://nymag.com/daily/intel/2011/10/nypd_even_spied_on_the_muslim.html (reporting that an imam was the target of New York City Police Department surveillance at the same time that he was welcoming officers into his mosque and attending hearings with Mayor Bloomberg and Commissioner Kelly).

"mosques of *concern*."[75] According to the Associated Press, the documents "paint the clearest picture yet of how the past decade's hunt for terrorists also put huge numbers of innocent people under scrutiny as they went about their daily lives in mosques, restaurants and social groups."[76]

Some of the informants, however, boast suspect or downright criminal pasts.[77] A telling case study involves an informant paid by the FBI to fake his conversion to Islam in order to infiltrate mosques and instigate terror plots among the Los Angeles Muslim communities.[78] Ironically, the informant's tactics were so aggressive that targeted Muslims actually reported *him* to the FBI as a potential terrorist.[79] Unbeknownst to the community leaders, the suspected terrorist was in fact an informant tasked with creating a fake terrorist plot.[80] Discovery of his real identity, along with other informants across the country, put into serious question the intentions of law enforcement in counterterrorism operations. The Muslim, Arab, and South Asian communities reasonably suspected the government was more concerned with scoring political points by bolstering terrorism statistics than protecting public safety.[81] Indeed, many Muslim community groups accused the government of systemic entrapment of vulnerable young men, citing to investigative reports by mainstream media outlets.[82]

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75. *Id.* (emphasis added).

76. *Id.*

77. For example, in 2005, a British businessman was convicted of providing material support to terrorists after law enforcement officials—acting as both the buyer and seller—reportedly caught him "brokering the sale of a surface-to-air missile." *See* Bartosiewicz, *supra* note 67. The informant involved in this sting operation had previously incriminated an innocent man during a DEA drug sting. *Id.* In an alleged 2007 plot involving destruction of fuel tanks at John F. Kennedy International Airport, the informant was a former drug dealer busted for possessing $2 million in cocaine and conspiring to murder a rival dealer. *Id.*

78. *See, e.g.*, Shan Li, *FBI Violated 1st Amendment Rights of Muslims, Suit Alleges*, L.A. TIMES (Feb. 24, 2011), http://www.latimes.com/news/local/la-me-fbi-muslims-20110224,0,2886967.story; Markon, *supra* note 17.

79. Markon, *supra* note 17 ("Muslims were so alarmed by [an informant's] talk of violent jihad that they obtained a restraining order against him.").

80. *Id.*

81. *See, e.g.*, David Bario, *By Any Means Necessary*, AM. LAW. (Oct. 1, 2008), http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1196279828736 (stating that the federal government's 2003 guidelines for prosecuting terrorism "encouraged strategic over-inclusiveness in charging terrorism suspects," causing prosecutors to "throw the kitchen sink at suspects to get them off the streets before they could act").

82. *See, e.g.*, Aaronson, *supra* note 50; Malia Wollan & Charlie Savage, *Holder Calls Terrorism Sting Operations 'Essential,'* N.Y. TIMES, Dec. 12, 2010, at A34, *available at* http://www.nytimes.com/2010/12/12/us/politics/12holder-1.html?scp=1&sq=Holder%20Calls%20Terrorism%20Sting%20Operations%20'Essential'&st=cse (reporting that Muslim

Likewise, in a case sensationally coined "the Albany missile plot," the FBI targeted two Muslims at a local mosque using a paid informant.[83] The targets, Yassin Aref and Mohammed Hossain, were "well-known members of the [local] community . . . with no prior criminal record and no history of violence."[84] The FBI's investigation began shortly after 9/11, when one of the mosque's founders was seen "celebrating the 9/11 attacks in the streets."[85] That individual was never charged with a crime and was eventually deported.[86] However, surveillance of the mosque continued, culminating in an eight-month sting operation.[87] In that operation, government informant Shahed Hussain led a fictitious money-laundering plot involving the sale of a shoulder-fired missile provided by the FBI.[88] Shahed Hussain was the same informant used in the Newburgh Four case—another sting operation where the government's informant played a problematic leading role in a fake terrorist plot.[89]

After befriending Mohammed Hossain, apparently to induce him into the plot, the informant offered him a loan for his struggling pizzeria.[90] The informant disclosed to Hossain that the loan had come from the sale of a missile to a terrorist group.[91] As soon as Hossain accepted the loan and asked Aref to witness it, they were both arrested on charges of conspiring to aid a terrorist group, providing support for a weapon of mass destruction, money-laundering, and supporting a foreign terrorist organization.[92]

A federal court in Albany sentenced the two defendants to fifteen years in federal prison after they pleaded guilty, and the case "became one of the

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leaders criticized the FBI's practices as "sting operations amount[ing] to improper entrapment").

83. *See* Bartosiewicz, *supra* note 67.

84. *Id.*

85. *Id.* (internal quotation marks omitted).

86. *Id.*

87. *Id.*

88. Paul Grondahl, *Suspicion, Acceptance in Wake of Terror Trial*, TIMES UNION (Albany), Oct. 12, 2006, at B1, *available at* http://albarchive.merlinone.net/mweb/wmsql.wm.request?oneimage&imageid=6362940.

89. CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, *supra* note 18, at 22 & 64 n.143.

90. Ted Conover, *The Pathetic Newburgh Four*, SLATE MAG. (Nov. 23, 2010, 12:21 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/11/the_pathetic_newburgh_four.html (reporting allegations that Hussain offered $250,000, a BMW, and other encouragement to induce the Newburgh Four—one of which suffered from paranoid schizophrenia and two of which had histories of drug offenses and minimum-wage jobs, but not anti-American sentiment—to pursue terrorist acts); Anjali Kamat & Jacquie Soohen, *Entrapment or Foiling Terror? FBI's Reliance on Paid Informants Raises Questions About Validity of Terrorism Cases*, DEMOCRACYNOW.ORG (Oct. 6, 2010), http://www.democracynow.org/2010/10/6/entrapment_or_foiling_terror_fbis_reliance.

91. Kamat & Soohen, *supra* note 90.

92. *Id.*

government's most lauded victories in the fight against domestic terrorism—even though, by the government's own acknowledgment, it involved no terrorists, no terrorism plot, and a missile provided by the FBI."[93] Yassin Aref is now held at one of two Communications Management Units—"experimental" prison facilities notorious for harsh and restrictive treatment that hold disproportionate numbers of Muslim inmates.[94]

In the case of Rezwan Ferdaus, a U.S. citizen accused of plotting to fly explosive-filled miniature airplanes into the U.S. Capitol and the Pentagon, there is reason to doubt whether the suspect was capable of devising such a complicated plot without the help of the government informant.[95] According to the affidavit filed with Ferdaus's indictment, significant questions remain regarding how Ferdaus actually came to the attention of the FBI and whether Ferdaus had the means to travel to Washington, D.C. on a "scouting trip" and purchase a miniature airplane without the thousands of dollars in cash the informants provided.[96] Further, the fact that "undercover agents met with Ferdaus and questioned the 'feasibility' of his plan" suggests that "the FBI agents were . . . goading Ferdaus into *more* action." [97]

And in Iowa, members of the small Muslim community in Des Moines were surprised to learn that Arvinder Singh, an Indian-born Sikh, was sent into their mosques to spy for the FBI.[98] Singh stated that he felt "obliged" to obey the FBI after he was charged with selling more than the legal limit of Sudafed, an offense that Singh claims he committed unwittingly.[99] Bit the FBI promised to expunge the offense from Singh's record and help him acquire American citizenship—an offer that Singh "desperately wanted."[100] The FBI reportedly told Singh, "You look Middle Eastern, and we need your help for the war against terror."[101] After assuming a Muslim identity, Singh frequented mosques throughout Iowa but attended four mosques regularly for seven years,

93. Bartosiewicz, *supra* at 67.

94. *See* Alia Malek, *Gitmo in the Heartland*, NATION, Mar. 28, 2011, at 17, 17-18, *available at* http://www.thenation.com/article/159161/gitmo-heartland. See *infra* Part I.C for a detailed discussion of Communications Management Units and their disproportionate use against Muslim inmates.

95. Paul Harris, *FBI Faces Entrapment Questions over Rezwan Ferdaus Bomb Plot Arrest*, GUARDIAN (Sept. 29, 2011, 3:34 PM), http://www.guardian.co.uk/world/2011/sep/29/fbi-entrapment-rezwan-ferdaus?newsfeed=true.

96. *Id.*

97. *Id.* (emphasis added).

98. Kiran Khalid, *Iowa Muslim Leader: Law Enforcement Betrayed Us*, CNN (Feb. 3, 2012, 8:48 PM), http://inamerica.blogs.cnn.com/2012/02/03/iowa-muslim-leader-law-enforcement-betrayed-us/.

99. *Id.*

100. *Id.*

101. *Id.*

occasionally taping conversations with congregants.[102] Yet despite the FBI's promise and his cooperation, Singh was arrested and placed into deportation proceedings when he tried to apply for citizenship.[103]

In November 2011, the FBI effectively admitted to the misuse of informants by the NYPD.[104] The NYPD had paid an informant to train and lead Muslim convert Joseph Pimentel, a drug user with possible mental illness, to attempt a terrorist plot.[105] Absent the informant's infusion of funds and expertise, Pimentel had no money, no knowledge of how to create a bomb, and arguably little inclination to follow through on violent acts.[106] By declining to get involved in the investigation because agents "were concern[ed] that the informer might have played too active a role in helping Mr. Pimentel,"[107] the FBI confirmed one of American Muslim communities' worst fears.[108] Law enforcement agencies are so desperate to show they are effectively countering terrorism that they poach on vulnerable Muslim targets.[109]

Skeptics of these entrapment allegations may interpret the FBI's decision not to participate in the Pimentel case as evidence that the FBI does not, in fact, engage in entrapment. However, when coupled with the aforementioned cases and others,[110] the Pimentel case offers compelling evidence that the misuse of

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102. *Id.*

103. *Id.*

104. *See, e.g.*, William K. Rashbaum & Joseph Goldstein, *Informer's Role in Terror Case Is Said to Have Deterred F.B.I.*, N.Y. TIMES, Nov. 22, 2011, at A1, *available at* http://www.nytimes.com/2011/11/22/nyregion/for-jose-pimentel-bomb-plot-suspect-an-online-trail.html?pagewanted=1&_r=1 ("But it was the informer's role, and that of his police handlers, that have now been cited as among the reasons the F.B.I., which had its own parallel investigation of Mr. Pimentel, did not pursue the case . . . .").

105. *Id.*

106. *Id.* ("The suspect had little money to speak of, was unable to pay his cellphone bill and scrounged for money to buy the drill bits that court papers said he required to make his pipe bombs. Initially, he had trouble drilling the small holes that needed to be made in the metal tubes.").

107. *Id.*

108. MUSLIM ADVOCATES, LOSING LIBERTY: THE STATE OF FREEDOM 10 YEARS AFTER THE PATRIOT ACT 1, 4, 12 (2011), *available at* http://www.muslimadvocates.org/Losing_Liberty_The_State_of_Freedom_10_Years_After_the_PATRIOT_Act.pdf; *MPAC Sends Letter to FBI over Use of Informants*, MUSLIM PUB. AFFAIRS COUNCIL (May 26, 2009), http://disqus.com/forums/mpac/mpac_sends_letter_to_fbi_director_over_use_of_informants_muslim_public_affairs_council_34/trackback/.

109. *See also* Kristin Wright, *Family of Plot Suspect Says He Is Innocent*, MYFOXTAMPABAY.COM (Jan. 9, 2012, 8:37 PM), http://www.myfoxtampabay.com/dpp/news/local/hillsborough/family-of-plot-suspect-says-he-is-innocent-01092012 (reporting on statements by the family of terror suspect Sami Osmakac that he could not have had the amount of cash he was suspected of providing to an FBI informant in order to purchase the supposed weapons).

110. *See* CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, *supra* note 18.

informants is a real problem in counterterrorism—notwithstanding denials by the FBI and other law enforcement agencies.[111]

Acknowledging that law enforcement may be overreaching in counterterrorism operations is important for many reasons. First, it is a prerequisite for a constructive discussion on how best to use limited resources to effectively prevent terrorism. Wasting money and time by hiring dubious individuals to create and execute terror plots makes the country less safe as real terrorists proceed undetected. Second, overzealous informants corroborate the suspicion that counterterrorism is more about creating scapegoats than making the country safer. This has devastating effects on relations between the government and Muslim communities, as well as individual rights. Third, such tactics perpetuate unfounded conspiracy theories percolating in the public discourse that all Muslims are disloyal, thereby justifying collective suspicion and punishment of Muslims by private actors as well as the government.

Finally, there is a serious rule of law issue at stake. Law enforcement holds almost unfettered discretion to choose whom to target and how to execute the investigation and prosecution. Abuse of such discretion leads to a general distrust in government and a corruption of the American legal system. When citizens suspect law enforcement of scapegoating particular racial or religious groups to satisfy public anxieties, they lose faith in the American promise of equal protection before the law. Once the system is corrupted, all Americans suffer, as it is only a matter of time before abuse of discretion becomes a new norm used against other vulnerable communities.[112]

C. *The Pitfalls of Religious Profiling*

Focusing on religiosity and ethnic origin wastes government resources when only a small portion of investigations result in criminal charges.[113] It also diverts resources away from persons who do not fit the post-9/11 profile of a Muslim terrorist.[114] As shown by recent attempted plots, bona fide terrorists

111. *FBI Director Questioned About Muslim Relations*, INFOCUS NEWS (Mar. 31, 2009), http://www.infocusnews.net/content/view/33149/135/ (reporting on FBI Director Robert Mueller's denials of allegations that his agency systemically spies on mosques).

112. *See Attorney General's Guidelines: Detecting and Preventing Terrorist Attacks*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/archive/ag/speeches/2002/53002factsheet.htm (last visited Jan. 8, 2012) (using neutrality principles to justify more targeted FBI investigations of "radical" religious and political organizations).

113. *See* Charlie Savage, *F.B.I. Focusing on Security over Ordinary Crime*, N.Y. TIMES, Aug. 24, 2011, at A16, *available at* http://www.nytimes.com/2011/08/24/us/24fbi.html?_r=3; *Searches, Grand Jury Investigation Target Anti-War Activists in Chicago, Minneapolis*, *supra* note 59.

114. *See, e.g.*, CHARLES KURZMAN, DEP'T OF SOCIOLOGY, UNIV. OF N.C., CHAPEL

often operate covertly with no connections to established institutions, such as mosques or other religious institutions.[115] There is little evidence to suggest that such individuals operate overtly through protests, public campaigns, or other lawful means for seeking social change. Hence, when law enforcement directs its resources toward groups and individuals openly expressing their political dissent, true terrorists—whether Muslim or not—proceed with their plans undetected.[116]

Evidence of the failure of counterterrorism strategies is ample. Notably, the government has failed to prevent some of the most serious terrorist plots attempted over the past few years. For instance, but for a fortuitous technical failure and the rapid response of a bystander, thousands of people could have been killed in Times Square in 2010.[117] Similarly, the 2009 Nigerian Christmas day bomber would have successfully killed hundreds on an airplane headed for Detroit but for the failure of his bomb to ignite.[118] Despite the massive

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HILL, MUSLIM-AMERICAN TERRORISM SINCE 9/11: AN ACCOUNTING 3 (2011), *available at* http://sanford.duke.edu/centers/tcths/about/documents/Kurzman_Muslim-American_Terrorism_Since_911_An_Accounting.pdf ("There were . . . more than 20 terrorist plots by non-Muslims in the United States in 2010, including attacks by Joseph Stack, who flew a plane into an IRS building in Austin, Texas; Larry Eugene North, who is suspected of placing bombs in mailboxes across eastern Texas; and George Jakubec, who was accused of manufacturing explosives in his home in Escondido, California."); *see also* David Crary, *Post-9/11 Tradeoff: Security vs. Civil Liberties*, HOUS. CHRON. (Nov. 22, 2011, 12:29 PM), http://www.chron.com/news/article/Post-9-11-tradeoff-Security-vs-civil-liberties-2277843.php#page-4 (comparing today's racial mapping programs with COINTELPRO and McCarthyism, and citing former FBI agent Michael German as saying that "[t]argeting entire communities for investigation based on erroneous stereotypes produces flawed intelligence").

115. See *infra* note 140 and accompanying text for a discussion of recent terrorist plots.

116. Throughout this country's history, dissidents have generally fallen into two non-overlapping groups: open political critics, who rarely engaged in terrorism, and violent opponents, who operated in the shadows and avoided even peaceful dissidents of the same stripe. *See infra* text accompanying notes 120-127 (discussing recent attacks by terrorists who do not fit the "Muslim terrorist" profile). Therefore, the FBI is following a strategy of well-proven uselessness. At most, it will find (and likely entrap) some hotheads. Yet those who intend serious harm to the United States, and likely would have avoided peaceful religious and political organizations even prior to the surveillance, certainly will do so now.

117. *See* Steve Benen, *Meet Aliou Niasse*, WASH. MONTHLY (May 5, 2010, 11:30 AM), http://www.washingtonmonthly.com/archives/individual/2010_05/023656.php.

118. *See, e.g.*, Andrew Johnson & Emily Dugan, *Wealthy, Quiet, Unassuming: The Christmas Day Bomb Suspect*, INDEPENDENT (Dec. 27, 2009), http://www.independent.co.uk/news/world/americas/wealthy-quiet-unassuming-the-christmas-day-bomb-suspect-1851090.html (reporting that when a suspect's father informed the U.S. embassy in Nigeria of his son's activities, the official briefing the case confirmed that the United States had known of the suspect's terrorist ties for at least two years prior to the attempted attack).

intelligence infrastructure created post-9/11, the intelligence community failed to act on his father's warnings to the U.S. embassy in Nigeria, as well as other relevant intelligence.[119]

Meanwhile, terrorists who do not fit the "Muslim terrorist" profile are fortuitously stopped or in some cases tragically missed. White supremacist James Cummings, for example, was actively constructing a lethal dirty bomb undetected by the FBI.[120] Only after his wife shot him in self-defense did the government discover his terrorist plot.[121] Similarly, Joseph Stack flew an airplane into an IRS building in Austin, Texas in protest of the IRS's demands that he pay his taxes.[122] Stack's terrorist attack killed an IRS employee who was a military veteran.[123] Had the attack occurred at a different time of day, however, hundreds of IRS employees could have been killed. Donny Eugene Mower threw a Molotov cocktail into a Planned Parenthood clinic in California, causing $26,000 of damage.[124] That he did not injure or kill anyone was only because he acted "in the early morning hours."[125] Another white supremacist was charged with murdering a security guard at the Holocaust Memorial Museum in Washington, D.C., and an anti-abortion extremist was convicted of murdering abortion-provider George Tiller in his church in Wichita, Kansas.[126] Finally, in Tucson, Arizona, Jared Loughner shot and killed six people while wounding fourteen others, including Congresswoman Gabrielle Giffords.[127]

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119. *Id.*

120. *See* Walter Griffin, *Report: 'Dirty Bomb' Parts Found in Slain Man's Home*, BANGOR DAILY NEWS (Feb. 10, 2009, 10:22 PM), http://new.bangordailynews.com/2009/02/10/politics/report-dirty-bomb-parts-found-in-slain-mans-home/.

121. *Id.*

122. *See, e.g.*, Michael Brick, *Man Crashes Plane into Texas I.R.S. Office*, N.Y. TIMES, Feb. 19, 2010, at A14, *available at* http://www.nytimes.com/2010/02/19/us/19crash.html.

123. *See* Joan Walsh, *Why so Little Attention to Vernon Hunter?*, SALON.COM (Feb. 22, 2010, 7:23 PM), http://www.salon.com/2010/02/23/vernon_hunter/ (reporting that Joseph Stack's victim was a Vietnam veteran and IRS employee).

124. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Man Pleads Guilty to Civil Rights Violations in Connection with Arson at Planned Parenthood and Vandalism of Mosque in Madera, California (Oct. 7, 2011), http://www.justice.gov/opa/pr/2011/October/11-crt-1336.html.

125. *Id.*

126. Andrea Stone, *Counterterrorism Czar Resists Muslim Labels, as Critics Say Right-Wing Threat Looms Larger*, HUFFINGTON POST (Nov. 17, 2011, 3:39 PM), http://www.huffingtonpost.com/2011/11/17/dhs-counterterrorism-muslims_n_1099631.html?page=2.

127. *See* David A. Fahrenthold & Clarence Williams, *Tucson Shooting Suspect Jared Loughner Appears to Have Posted Bizarre Messages*, WASH. POST (Jan. 9, 2011, 12:24 AM), http://www.washingtonpost.com/wp-dyn/content/article/2011/01/08/AR2011010803961.html (reporting that Loughner "left a trail of bizarre and anti-government messages on the

Despite these incidents, the United States Department of Homeland Security ("DHS") shortsightedly focuses almost exclusively on domestic Muslim groups.[128] Yet in 2009 DHS issued an internal intelligence report entitled "Rightwing Extremism," warning of rising terrorism by right-wing domestic groups.[129] The backlash to the report was remarkable: more than a dozen organizations representing the political right called for the immediate removal of DHS Secretary Janet Napolitano, prompting her to apologize for the report, dismember the analytical unit that produced the report, and block the distribution of definitions for terms such as "white supremacist" and "Christian Identity" from its analytical digest.[130] This occurred despite the well-

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Internet"); Jessica Hopper et al., *Accused Tucson Shooter Jared Loughner Smirks in Court, Smiles for Mug Shot*, ABC NEWS (Jan. 10, 2011), http://abcnews.go.com/US/jared-loughner-alleged-tucson-shooting-gunman-appears-court/story?id=12580344#.T1UmgcyRn2c.

128. The *Washington Post* reported as follows:

> The threat of Islamic-related terrorism in the United States has by all accounts captured the most attention and resources at DHS since it was formed in 2002. But a study conducted for the department last October concluded that a majority of the 86 major foiled and executed terrorist plots in the United States from 1999 to 2009 were unrelated to al-Qaeda and allied movements.

R. Jeffrey Smith, *Homeland Security Department Curtails Home-Grown Terror Analysis*, WASH. POST (June 7, 2011), http://www.washingtonpost.com/politics/homeland-security-department-curtails-home-grown-terror-analysis/2011/06/02/AGQEaDLH_story.html.

129. OFFICE OF INTELLIGENCE & ANALYSIS, U.S. DEP'T OF HOMELAND SEC., PUB. NO. IA-0257-09, (U//FOUO) RIGHTWING EXTREMISM: CURRENT ECONOMIC AND POLITICAL CLIMATE FUELING RESURGENCE IN RADICALIZATION AND RECRUITMENT (2009), *available at* http://www.fas.org/irp/eprint/rightwing.pdf; *see also* Audrey Hudson & Eli Lake, *Napolitano Stands by Controversial Report*, WASH. TIMES (Apr. 16, 2009), http://www.washingtontimes.com/news/2009/apr/16/napolitano-stands-rightwing-extremism/?page=all.

130. *See, e.g.*, Don Feder, *Ad Demands DHS Secretary Napolitano's Removal and Apology from Obama*, CHRISTIAN NEWSWIRE (Apr. 27, 2009), http://www.christiannewswire.com/news/7232710188.html (reporting that a coalition of organizations, including the American Family Association, the Religious Freedom Coalition, Let Freedom Ring, the United States Justice Foundation, and Vision America, commissioned a full-page advertisement in the *Washington Times* demanding the removal of Secretary Napolitano); Jackie Kucinich, *Napolitano Atones for DHS Report*, ROLL CALL (May 7, 2009, 12:00 AM), http://www.rollcall.com/issues/54_127/-34696-1.html; Caitlin Taylor, *Conservatives Decry Homeland Security Report on "Rightwing" Extremism*, ABC NEWS (Apr. 15, 2009, 9:45 AM), http://abcnews.go.com/blogs/politics/2009/04/conservatives-d/; Smith, *supra* note 128; *SPLC Urges DHS to Reassess Resources After Key Analyst Reveals Unit on Domestic Terror Was Scaled Back in Wake of Right-Wing Criticism*, S. POVERTY LAW CTR. (June 6, 2011), http://www.splcenter.org/get-informed/news/splc-urges-dhs-to-reassess-resources-after-key-analyst-reveals-unit-on-domestic-terror-was-scaled-back; Bob Unruh, *Campaign Demands Boot for Napolitano: Nearly 2 Dozen Groups Appalled at "Extremism" Report*, WND.COM (Apr. 28, 2009, 9:15 PM), http://www.wnd.com/?pageId=96406. *But see* Anthony Kimery, *DHS Disputes Claims It Stopped Producing Intel Reports on Rightwing Extremists*, HOMELAND SECURITY TODAY (June 6, 2011, 8:44 AM), http://www.hstoday.us/briefings/

documented evidence[131] of right-wing groups using or attempting to use weapons of mass destruction.[132] For example, the *Washington Post* reported several cases of similar right-wing extremism in 2010:

> Authorities . . . have arrested neo-Nazis who allegedly planted a bomb along the route of a Martin Luther King parade in Spokane, Wash.; arrested six members of an Alaska militia who allegedly plotted to kill state troopers; arrested a Wisconsin man for planning to kill Planned Parenthood workers; and on May 29 arrested a Florida man who claimed to be part of the burgeoning "sovereign citizen movement" after he sprayed a market with AK-47 fire.[133]

In light of these incidents, one DHS official explained the following frustration: "Other reports written by DHS about Muslim extremists . . . [get] through without any major problems. . . . Ours went through endless reviews and edits, and nothing came out."[134] This inconsistency is partly due to the common perception that only violence committed by Muslims is terrorism and thus deserving of harsher treatment, while violence committed by (typically white) right-wing extremists is negligible crime.[135]

The preventive paradigm thus permits the government to expand its investigative purview to focus almost exclusively on potential threats, more often colored by religious and cultural associations than actual evidence.[136] As a result, many non-Muslim domestic terrorists commit violence undetected.[137]

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daily-news-briefings/single-article/dhs-disputes-claims-it-stopped-producing-intel-reports-on-rightwing-extremists/32e45cd0bd2dc9c6f222afe8ce1c7a43.html.

131. *See* INTELLIGENCE PROJECT, S. POVERTY LAW CTR., TERROR FROM THE RIGHT (2009), *available at* http://www.splcenter.org/sites/default/files/downloads/publication/terror_from_the_right_0.pdf; *Extremism in America*, ANTI-DEFAMATION LEAGUE, http://www.adl.org/learn/ext_us/default.asp?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America (last visited Jan. 8, 2012).

132. The criminal code defines a "weapon of mass destruction" as "any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors"; "any weapon involving a biological agent, toxin, or vector"; or "any weapon that is designed to release radiation or radioactivity at a level dangerous to human life." 18 U.S.C. § 2332A(c)(2)(B)-(D) (2006).

133. Smith, *supra* note 128.

134. *Id.* (first omission in original).

135. *See* Charles Ellison, *Giffords' Shooting: Why Aren't We Calling It Terrorism?*, POLITIC365.COM (Jan. 10, 2011), http://politic365.com/2011/01/10/giffords-shooting-why-arent-we-calling-it-terrorism/.

136. *See* Smith, *supra* note 128.

137. *See* ALEJANDRO J. BEUTEL, MUSLIM PUB. AFFAIRS COUNCIL, DATA ON POST-9/11 TERRORISM IN THE UNITED STATES (2011), *available at* http://www.civilfreedoms.com/wp-content/uploads/2011/05/Post-911-Terrorism-Data.pdf.

Counterterrorism has become so politicized that actively pursuing Muslims appears to be the most politically palatable strategy to justify the costly preventive paradigm. Accordingly, the FBI has been more focused on searching for terrorist threats at the expense of investigating ordinary crime.[138] Devoting such considerable resources to investigations driven by racial and religious profiles is entirely inefficient, as is the FBI's overbroad authority to open threat assessments based solely on a "vague tip or some other ambiguous lead."[139]

Certainly, illegal activity can and does occur under the guise of legitimate institutions and advocacy. But in the case of terrorism committed by Muslims since 9/11, individuals often acted in secret, on their own, and without involvement from a mosque or established American Muslim organization.[140] Unfortunately, instead of reassessing the counterterrorism strategy that failed to detect the Christmas day bomber, the Times Square bomber, and Major Nidal Hasan's killing spree in Fort Hood, Texas,[141] the government has targeted mosques, community businesses, and Muslim charitable institutions.

D. *Post-Conviction Profiling—Communications Management Units*

The disparate treatment produced by the preventive paradigm does not cease following conviction. In cases where Muslims are convicted of terrorism charges, the punishments are often extraordinarily severe compared to those imposed on others convicted of similar acts. The only apparent distinction among these cases is the religious and racial backgrounds of the defendants.[142]

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138. *See* Savage, *supra* note 113 (reporting that, in recent years, FBI agents "have been more likely to be hunting for potential threats to national security than for ordinary criminals").

139. *See* Emily Berman, *FBI: Fact or Fiction*, BRENNAN CTR. FOR JUST. 2-5 (July 27, 2011), http://brennan.3cdn.net/59810135f03ecb3ac3_zhm6bxtbf.pdf (analyzing the expanded authorities granted to the FBI through the use of threat assessments); Savage, *supra* note 113.

140. *See, e.g.*, *Investigators Say Fort Hood Suspect Acted Alone*, MSNBC.COM (Nov. 9, 2009, 9:33 PM), http://www.msnbc.msn.com/id/33777070/ns/us_news-tragedy_at_fort_hood/; *see also supra* notes 116-119 and accompanying text.

141. In November 2009, United States Army psychiatrist Major Nidal Hasan wounded twenty-nine and killed thirteen during a shooting spree in Fort Hood, Texas. Shortly after the shooting, the "FBI launched an internal review of how it handled information gathered about [Hassan] nearly a year [earlier]." *See Investigators Say Fort Hood Suspect Acted Alone*, *supra* note 140.

142. *Compare* James C. McKinley Jr., *Texas: Capital Trial Is Suggested in Rampage at Fort Hood*, N.Y. TIMES, Mar. 5, 2011, at A16, *available at* http://www.nytimes.com/2011/03/05/us/05brfs-CAPITALTRIAL_BRF.html?src=twrhp (reporting that Major Nidal Malik Hasan was to be recommended for court-martial and possible death penalty), *with* William Yardley, *Suspect Charged in Attempted MLK Day Bombing*, N.Y. TIMES, Mar. 10, 2011, at

The Bureau of Prisons currently houses Muslim terrorist suspects in Communications Management Units ("CMUs")—facilities designed to restrict inmate communications.[143] These units impose serious psychological and emotional isolation for prisoners.[144] Prisoners of CMUs have virtually no contact with the outside world and are severely restricted in their communications with friends or family. For example, inmate visitations in CMUs are limited to eight hours per month with no physical contact; maximum-security prisons, however, allow inmates up to thirty-five hours per month.[145] Further, while even maximum-security prisons allow for "limited physical contact, such as handshaking, embracing, and kissing, between an inmate and a visitor," CMUs ban all physical contact.[146] All visitor conversations in CMUs must be in English unless special permission is granted in advance.[147] Further, CMU prisoners are permitted only two fifteen-minute phone calls per week in contrast to the general prison population's right to 300

A20, *available at* http://www.nytimes.com/2011/03/10/us/10bomb.html (reporting that a suspect of an attempted bombing at a Martin Luther King, Jr. Day parade was "charged with attempted use of a weapon of mass destruction and possession of an unregistered explosive device," but no terrorism charges).

143. *See, e.g.*, Malek, *supra* note 94, at 17 (reporting that eighteen of the thirty-three prisoners at the Terre Haute, Indiana CMU and twenty-three of thirty-six prisoners at the Marion, Illinois CMU are Muslim, while Muslims make up just six percent of the overall federal prison population). Unfortunately, such disparity in treatment across racial and religious lines is not new to the American criminal justice system. It is similar to what we witnessed in the draconian "War on Drugs," where as of the fall of 2010, African American defendants received sentences nearly 100 times longer than their white counter-parts. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 109-12 (2010) (discussing disparate sentencing requirements, namely, the 100:1 ratio of crack cocaine versus powder cocaine, and the fact that ninety-three percent of those charged with crimes involving crack cocaine are African American). In August 2010, President Barak Obama signed the Fair Sentencing Act, which changed the crack-cocaine sentencing disparity changed from 100:1 to 18:1, thereby decreasing but not eliminating the consequent racial disparities. Danielle Kurtzleben, *Data Show Racial Disparity in Crack Sentencing*, U.S. NEWS & WORLD REP. (Aug. 3, 2010), http://www.usnews.com/news/articles/2010/08/03/data-show-racial-disparity-in-crack-sentencing. *But see Obama Signs Bill Reducing Cocaine Sentence Gap*, CBS NEWS (Aug. 3, 2010, 12:51 PM), http://www.cbsnews.com/stories/2010/08/03/politics/main6739503.shtml (noting that the Fair Sentencing Act does not affect state mandatory sentencing laws, where most drug offenses are tried).

144. Complaint at Exhibit B, Aref v. Holder, 774 F. Supp. 2d 147 (D.D.C. 2011) (No. 10-0539 (RMU)).

145. *Id.* at 14-15, 18-19.

146. 28 C.F.R. § 540.51(h)(2) (2011); Complaint, *supra* note 144, at 14-15.

147. Complaint, *supra* note 144.

minutes of phone time per month.[148] Worse, these exceptional conditions continue with little public transparency and opportunity for challenging the government's basis for such severe post-conviction punishments.[149]

Two CMUs currently exist: one in Terre Haute, Indiana and the other in Marion, Illinois.[150] The facilities were opened in 2006 and 2008, respectively, with limited adherence to legal procedures that would otherwise allow for transparency and public scrutiny.[151] In 2006, in accordance with the Administrative Procedures Act, the Bureau of Prisons published a proposed rule to restrict communications by inmates with "an identifiable link to terrorist-related activity."[152] During the comment period, the rule was criticized by civil rights groups not only as unnecessary, but also as "flawed and potentially unconstitutional."[153] Rather than consider the public comments and promulgate a final rule as legally required, the Bureau bypassed the rule-making process altogether, opening a prison unit operating under the proposed rule in December 2006.[154] Sixteen men, including thirteen Arab Muslims and one non-Arab Muslim, were placed in the unit and told they were part of "an experiment."[155]

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148. *Id.* at 20-21; Carrie Johnson & Margot Williams, *'Guantanamo North': Inside Secretive U.S. Prisons*, NPR (Mar. 3, 2011), http://www.npr.org/2011/03/03/134168714/guantanamo-north-inside-u-s-secretive-prisons.

149. *See* Karin Friedemann, *Imam Yassin Aref Transferred from CMU*, MUSLIM OBSERVER (Apr. 21, 2011), http://muslimmedianetwork.com/mmn/?p=8312 (reporting the opinion of one inmate who likened the inside of a CMU to a concealed condition of slavery); Malek, *supra* 94 (describing how one prisoner was simply "told he was moving, given thirty minutes to pack and thrown into 'the hole' until he was" transferred to the CMU); Carrie Johnson & Margot Williams, *Judge Allows Suit over Restrictions on Inmates to Go Forward*, NPR (Mar. 30, 2011, 2:05 PM), http://www.npr.org/blogs/thetwo-way/2011/03/30/134984393/judge-allows-suit-over-restrictions-on-inmates-to-go-forward (reporting the lack of due process and oversight in CMUs).

150. *Communications Management Units: The Federal Prison System's Experiment in Social Isolation*, CTR. FOR CONSTITUTIONAL RIGHTS 1, http://www.ccrjustice.org/files/CCR_CMU_Factsheet.pdf (last visited Jan. 9, 2012).

151. Malek, *supra* note 94, at 17.

152. Limited Communication for Terrorist Inmates, 71 Fed. Reg. 16,520, 16,523 (proposed Apr. 3, 2006) (to be codified at 28 C.F.R. § 540.200(b)(2)); *see also* Malek, *supra* note 94, at 17. The proposed rule defined a "terrorist-related activity" in part as a violent or dangerous criminal act apparently intended to intimidate, coerce, or cause mass destruction. Limited Communication for Terrorist Inmates, 71 Fed. Reg. at 16,523 (to be codified at 28 C.F.R. § 540.201(a)).

153. Malek, *supra* note 94, at 17.

154. *Id.*

155. *Id.* at 18.

Conditions are so egregious at CMUs that the Center for Constitutional Rights has challenged their legality on constitutional grounds.[156] The suit alleges that the Federal Bureau of Prisons violated the plaintiffs' First, Fifth, and Eighth Amendment rights by "creating, participating in, and endorsing [p]laintiffs' systematic mistreatment."[157] Specifically, the plaintiffs allege that they were confined to the CMUs on account of their religious or political beliefs, "or in retaliation for other protected First Amendment activity."[158] Three of the seven plaintiffs are practicing Muslims.[159] The complaint also alleges that nearly "two-thirds of the prisoners confined . . . [in the CMUs] are Muslim—a figure that over-represents the proportion of Muslim prisoners in BOP [Bureau of Prisons] facilities by at least 1000%."[160] This calls into question the propriety of the criteria for selecting which prisoners are placed into CMUs. On April 6, 2010, the Bureau of Prisons reintroduced its proposed rule, seeking to make the CMUs permanent fixtures of the American prison system[161]—a procedure that should have been completed before the CMUs were ever opened.[162]

E. *Flawed Community Outreach Models Aimed at Diffusing Legitimate Grievances and Collecting Intelligence About Muslims*

Muslim leaders have communicated many of the concerns highlighted in this paper to government officials on multiple occasions and in various forums. Indeed, specific offices within the Department of Justice, the FBI, and the Department of Homeland Security are tasked with conducting outreach to Muslim communities.[163] In theory, these programs are aimed at building

156. *See* Complaint, *supra* note 144, at 4-5.

157. *Id.* at 3, 5.

158. *Id.* at 4.

159. *Id.* at 6-9.

160. *Id.* at 3-4.

161. Communication Management Units, 75 Fed. Reg. 17,324 (proposed Apr. 6, 2010) (to be codified at 28 C.F.R. pt. 540).

162. Will Potter, *Government Acknowledges Secretive Prisons for "Domestic Terrorists," Proposes Making Them Permanent*, GREENISTHENEWRED.COM (Apr. 14, 2010), http://www.greenisthenewred.com/blog/cmu-proposal-domestic-guantanamo/2660/.

163. *See, e.g.*, *About the Community Engagement Section*, U.S. DEP'T OF HOMELAND SEC., http://www.dhs.gov/xabout/structure/gc_1282160309298.shtm (last modified July 21, 2011); *Enhanced Engagement with Arab and Muslim American Communities*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/minneapolis/news-and-outreach/outreach/enhanced-engagement-with-arab-and-muslim-american-communities (last visited Jan. 9, 2012) ("This initiative brings together leaders from the Somali-American community to discuss with the FBI issues important to their community. The group helps build relationships based on mutual respect and understanding."); *Initiative to Combat Post-9/11 Discriminatory*

constructive relationships between Muslim communities and law enforcement.[164] In practice, however, the community outreach programs are superficial attempts to diffuse grievances arising from religious profiling, abusive use of informants, and the chilling of religious and political activity.

To no avail, members of targeted communities repeatedly express concern that outreach meetings are a politically divisive tactic, at best, and a calculated means of entrapment, at worst.[165] The grievances are routinely dismissed with boilerplate responses that the American government does not counter terrorism in violation of constitutional rights.[166] Rather than reform government

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Backlash: Enforcement and Outreach, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/legalinfo/discrimupdate.php (last visited Jan. 9, 2012) ("Since September 11, 2001, the Civil Rights Division has engaged in an extensive program of outreach to Muslim, Sikh, Arab, and South-Asian American organizations. This outreach has included meetings of senior Civil Rights Division officials with community leaders to address backlash-related civil rights issues . . . .").

164. *See, e.g.*, NAT'L SEC. STAFF, EXEC. OFFICE OF THE PRESIDENT OF THE U.S., STRATEGIC IMPLEMENTATION PLAN FOR EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES 1-2 (2011), *available at* http://www.whitehouse.gov/sites/default/files/sip-final.pdf; EXEC. OFFICE OF THE PRESIDENT OF THE U.S., EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES, (2011), *available at* http://www.whitehouse.gov/sites/default/files/empowering_local_partners.pdf.

165. *See, e.g.*, Letter from Salam Al-Marayati, President, Muslim Pub. Affairs Council, to Senator Joseph Lieberman (June 16, 2010), *available at* http://files.e2ma.net/2785/assets/docs/letter_to_senator_lieberman_on_islamist_terminology__mpac_6-16-10_.pdf (expressing concern over the use of religious terminology in counterterrorism efforts); Letter from Twenty-Seven Orgs. to Janet Napolitano, U.S. Sec'y of Homeland Sec. (Jan. 8, 2010), *available at* http://saalt.org/attachments/1/TSA%20Profiling%20Letter.pdf (objecting to TSA's screening standards); Press Release, Am. Civil Liberties Union, ACLU and Broad Coalition Tell Rep. King of Concerns About Muslim "Radicalization" Hearing (Mar. 8, 2011), http://www.aclu.org/free-speech-national-security/aclu-and-broad-coalition-tell-rep-king-concerns-about-muslim-radicaliz (expressing concern about congressional hearings on the alleged "radicalization" of American Muslims and "the unsubstantiated allegation that Muslim-American leaders are uncooperative with U.S. counterterrorism efforts"); *see also* FAIZA PATEL, BRENNAN CTR. FOR JUSTICE, N.Y. UNIV. SCH. OF LAW, RETHINKING RADICALIZATION 26-27 (2011), *available at* http://brennan.3cdn.net/3ff468de1211ff853e_hwm6beu15.pdf (explaining that outreach meetings are generally perceived "as insincere" and "as a one-way means for the government to gather information about community members' religious practices").

166. *See, e.g.*, *Attorney General Eric Holder on Department of Justice's Outreach and Enforcement Efforts to Protect American Muslims*, U.S DEP'T OF JUSTICE (June 4, 2009), http://www.justice.gov/ag/speeches/2009/ag-speech-090604.html ("We have a solemn responsibility to protect our people while we also protect our principles."); Press Release, Office of the Press Sec'y, U.S. Dep't of Homeland Sec., Statement by U.S. Department of Homeland Security Secretary Janet Napolitano on the Threat of Right-Wing Extremism (Apr. 15, 2009), http://www.dhs.gov/ynews/releases/pr_1239817562001.shtm ("We are on the lookout for criminal and terrorist activity but we do not—nor will we ever—monitor ideology or political beliefs. We take seriously our responsibility to protect the civil rights

practices, for example, government officials have used the meetings defensively, to "prove" they "did the right thing."[167] At a December 2010 outreach meeting, Attorney General Eric Holder told a group of Muslim leaders that he had "no apologies for how the FBI agents handled their work" and that preemptive operations are an "essential law-enforcement tool."[168]

Even if government spokespersons genuinely believe their proclamations of good faith, government actions indicate otherwise. The prosecution of Yassin Aref exemplifies the concern that individuals are targeted for investigation based on their unpopular political beliefs or religious practices.[169] Further, the prosecution of trusted Muslim community leaders undermines the legitimacy of community outreach meetings. For instance, the raid and arrest of Hatem Abudayyeh, a longtime activist of the Arab American Action Network, resulted in hundreds of individuals protesting outside FBI headquarters in Chicago.[170]

Counterterrorism tactics have led community leaders to resign themselves to the ineffectiveness of government outreach to Muslim, Arab, and South Asian communities.[171] Such programs are perceived as nothing more than pro forma, political cover for the government in the face of allegations of systemic unlawful profiling.[172] To the extent that the government's outreach to Muslim communities is genuine, the legitimacy of such outreach has been significantly

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and liberties of the American people, including subjecting our activities to rigorous oversight from numerous internal and external sources.").

167. *See, e.g.*, Bartosiewicz, *supra* note 67 (discussing how, following a sting operation at a local mosque, the FBI organized a series of meetings with local leaders to address the community's outrage, but then refused permission to record the meetings and asserted that the point was only to "prove" the FBI "did the right thing").

168. *Id.*

169. *See, e.g.*, *id.* ("When asked at a press conference following the sentencing [of Aref and Hossain] whether there was anything connecting the defendants, particularly Aref, to terrorism, the prosecuting attorney answered, 'Well, we didn't have the evidence of that, but he had the ideology.'").

170. *See, e.g.*, Serena Maria Daniels & Andy Grimm, *Activists Protest FBI Raids*, CHI. TRIB. (Sept. 27, 2010), http://articles.chicagotribune.com/2010-09-27/news/ct-met-fbi-protest-0928-20100927_1_jim-fennerty-activists-search-warrant (quoting Ahmed Rehab, director of the Council on American-Islamic Relations Chicago's chapter, as saying: "Hatem is a longtime, respected leader in the community. It is unthinkable that he would have connections to terrorism . . . . This is an example of FBI overreach when it comes to activism or commentary on the (Middle East) conflict."); *see also* Andy Grimm & Cynthia Dizikes, *FBI Raids Anti-War Activists' Homes*, CHI. TRIB. (Sept. 24, 2010), http://articles.chicagotribune.com/2010-09-24/news/ct-met-fbi-terrorism-investigation-20100924_1_fbi-agents-anti-war-activists-federal-agents.

171. *See* PATEL, *supra* note 165.

172. *Id.*

impaired—so much so that some community leaders have ceased participation in order to avoid condoning discriminatory practices.[173]

A recent freedom of information inquiry by the American Civil Liberties Union ("ACLU") further exacerbated these relations by revealing that many of the community outreach meetings have been used for collecting intelligence on Muslim Americans.[174] According to the ACLU, the FBI secretly recorded names and conversations at community meetings, religious dinners, and job fairs.[175] One 2008 document shows that an FBI agent "collected and documented individuals' contact information and First Amendment-protected opinions and associations, and conducted internet searches to obtain further information about the individuals in attendance, including, in one instance, the photo of a dinner participant."[176] This helps explain why the government has expressed insufficient concern for meaningfully addressing the communities' grievances. Apparently, officials are more concerned with gathering intelligence than redressing alleged civil rights violations.

II. MATERIAL SUPPORT STATUTES—THE LYNCHPIN OF THE PREVENTIVE PARADIGM

The linchpin of the preventive counterterrorism paradigm is 18 U.S.C. §§ 2339A and 2339B—laws prohibiting material support to terrorism.[177] Too often, the laws are the fallback criminal provisions employed when the government cannot prove terrorism charges. Material support laws are so broad and vaguely worded that they effectively criminalize a myriad of

173. *Id.*; Abukar Arman, Op-Ed., *Bridges of Rhetoric and Suspicion*, WORLDPRESS.ORG (Aug. 16, 2009), http://www.worldpress.org/Americas/3398.cfm. ("[T]he reality on the ground tells a different story—one in which rhetoric is abundant and substance is scarce."); *NYPD Spying on Muslims Leads to Spiral of Mistrust*, HOMELAND SEC. NEWSWIRE (Nov. 23, 2011, 1:51 PM), http://www.homelandsecuritynewswire.com/dr20111123-nypd-spying-on-muslims-leads-to-spiral-of-mistrust ("Following the revelation that the New York City police department was spying on the daily lives of ordinary Muslims, community activists have launched a campaign encouraging people to avoid directly reporting suspicious activity to the police.").

174. Ryan J. Reilly, *Muslim Officials Want Answers from FBI over Data Collection During Outreach Efforts*, TPMMUCKRAKER (Dec. 1, 2011, 5:45 PM), http://tpmmuckraker.talkingpointsmemo.com/2011/12/muslim_officials_want_answers_from_fbi_over_data_collection_during_outreach_efforts.php.

175. Eileen Sullivan, *ACLU: FBI Used Outreach to Collect Info on Muslims*, SALON.COM (Dec. 1, 2011, 9:41 AM), http://www.salon.com/2011/12/01/aclu_fbi_used_outreach_to_collect_info_on_muslims/.

176. *See* Reilly, *supra* note 174.

177. 18 U.S.C. §§ 2339A-2339B (Supp. IV 2010).

activities that would otherwise be constitutionally protected.[178] Moreover, the statutes do not require the government to prove the defendant had specific intent to support terrorism, thereby granting the government carte blanche to prosecute a broad range of legitimate activities, such as charitable giving, peacebuilding, and human rights advocacy.[179] The Department of Justice, with the Supreme Court's blessing, has criminalized training and advocacy in support of nonviolence where the executive branch determines such activities present a security threat to a United States national or to the United States itself.[180] The government's standards for furthering terrorist means are so broad that they arguably prohibit legal defense of designated terrorists in constitutional litigation.[181]

Similarly, humanitarian aid delivered to noncombatant civilians is now illicit based on the theory that it frees up resources to redirect toward violence. This untenable theory of liability, also known as the "fungibility" theory,[182]

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178. David Cole, *The Roberts Court vs. Free Speech*, N.Y. REV. BOOKS (Aug. 19, 2010), http://www.nybooks.com/articles/archives/2010/aug/19/roberts-court-vs-free-speech/?pagination=false. Professor David Cole of Georgetown University Law Center writes:

> Under this [material support] law, when former President Jimmy Carter monitored the June 2009 elections in Lebanon, and met with each of the parties to advise them on fair election practices, he could have been prosecuted for providing "material support," in the form of "expert advice," to a designated group, because he advised Hezbollah. When *The New York Times*, *Los Angeles Times*, and *The Washington Post* published Op-Eds by Hamas leaders in recent years, they, too, were committing the crime of providing "material support" to a designated terrorist group, because doing so provided Hamas a "service."

Id.

179. *See* 19 U.S.C. §§ 2339A-2339B.

180. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2713 (2010).

181. *See* Cole, *supra* note 178. The logic behind these standards is that the "taint" of terrorism is so severe that any support for terrorist actors "legitimizes and furthers their terrorist means." *Humanitarian Law Project*, 130 S. Ct. at 2710, 2725. But this reasoning creates a slippery slope. As Justice Breyer aptly stated, "this 'legitimacy' justification cannot by itself warrant suppression of political speech, advocacy, and association" because if it did, "the First Amendment battle would be lost in untold instances where it should be won." *Id.* at 2736 (Breyer, J., dissenting).

182. The Supreme Court has explained this theory as follows:

> Money is fungible, and "[w]hen foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put." But "there is reason to believe that foreign terrorist organizations do not maintain legitimate financial firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations." Thus, "[f]unds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups to fund the purchase of arms and explosives."

Humanitarian Law Project, 130 S. Ct. at 2725-26 (alternations in original) (citations

"jeopardizes the provision of aid and disaster relief in conflict zones" by preventing the receipt of food, water, and shelter to innocent beneficiaries abroad.[183] In other words, but for the misfortune of being trapped in a conflict zone where one party is designated as terrorist, civilians can be denied much-needed aid from American civil society. This consequence is especially disastrous in areas, such as Somalia, Sri Lanka, Gaza, and Northwest Pakistan,[184] where a designated organization exercises governmental or quasi-governmental control, thus making it impossible to provide humanitarian aid without dealing with the designated group. Furthermore, American charities that provide the humanitarian aid are often punished through public smear campaigns and prosecutions.[185]

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omitted) (quoting Joint Appendix at 134-35, *Humanitarian Law Project*, 130 S. Ct. 2705 (No. 08-1498), 2009 WL 3877534, at *134-35).

183. *See, e.g.*, Press Release, Am. Civil Liberties Union, Supreme Court Rules "Material Support" Law Can Stand (June 21, 2010), http://www.aclu.org/national-security/supreme-court-rules-material-support-law-can-stand (arguing that the Court's decision in *Humanitarian Law Project* "jeopardizes the provision of aid and disaster relief in conflict zones controlled by designated groups").

184. The State Department's list of designated terrorist organizations includes Al-Shabaab (Somalia), Liberation Tigers of Tamil Eelam (Sri Lanka), Hamas (Gaza), and Tehrik-e Taliban (Pakistan). *See Foreign Terrorist Organizations*, U.S. DEP'T OF STATE (Jan. 27, 2012), http://www.state.gov/j/ct/rls/other/des/123085.htm. Each of these groups exerts either official or de facto control over the areas in which they operate.

185. *See* AM. CIVIL LIBERTIES UNION, *supra* note 19, at 42 (noting that the government put KindHearts out of operation by freezing the charity's assets without instituting criminal proceedings or designating KindHearts as a terrorist organization); *see also* Patrick Poole, *Terrorist Fundraisers for Obama*, FRONTPAGE MAG. (Apr. 23, 2008), http://archive.frontpagemag.com/readArticle.aspx?ARTID=30693 (listing KindHearts officials and their supposed "tie[s] to terrorist fundraising and support"); Press Release No. JS-4058, U.S. Dep't of the Treasury, Treasury Freezes Assets of Organization Tied to Hamas (Feb. 19, 2006), http://www.treasury.gov/press-center/press-releases/Pages/js4058.aspx (announcing that KindHearts' assets were to be blocked *pending investigation* of whether the charity provided support to terrorist organizations). This government action amounts to a smear campaign. *See* Press Release No. JS-4058, U.S. Dep't of the Treasury, *supra* (quoting Stuart Levey, Treasury Under Secretary for Terrorism and Financial Intelligence, as saying, "KindHearts is the progeny of Holy Land Foundation and Global Relief Foundation, which attempted to mask their support for terrorism behind the façade of charitable giving."). As one article explained:

> One of the problems with the war on terror is that, when organization connected to terrorist groups overseas are shut down by the United States, far too many of those active in the groups are awarded freedom without punishment, enabled to continue their activities with impunity, while exploiting legal loopholes and public sentiment in which charity and cheerful-sounding names evoke. KindHearts is one of those organizations.

Joe Kaufman, *The Black Hearts of KindHearts*, FRONTPAGE MAG. (Mar. 14, 2006), http://archive.frontpagemag.com/readArticle.aspx?ARTID=5236.

The adverse effect of this discriminatory targeting of American Muslim charities does more than simply chill religious freedom;[186] it undermines the country's credibility in its publicized outreach initiative to Muslims and impedes its foreign policy in the Middle East. Muslims abroad view treatment of Muslims in America as a litmus test of American sincerity vis-à-vis its various initiatives, such as democratization projects, the defense of human rights, and the strengthening of civil society. When Muslims see discrimination by the American government against American Muslims, they reasonably question the legitimacy of the United States' proclaimed leadership in supporting liberal democratic ideals abroad. Such double-talk, therefore, renders the United States irrelevant (or obstructive) in international forums addressing anti-discrimination, human rights, and the rule of law.

A. *Disproportionate Enforcement Against Muslim Charities*

With few exceptions, the executive branch has exercised its broad discretion to selectively target Muslim charities providing seemingly legitimate humanitarian aid.[187] The result is a serious chilling effect on Muslim communities' willingness to openly partake in political dissent and the inhibition of Muslim charities from effectively providing aid with religiously mandated charitable donations.[188]

Since 9/11, Muslim donors have been scared to make charitable contributions because they fear prosecution for providing material support to terrorism.[189] They also fear that their donations will invite government scrutiny and harassment in the form of immigration checks, requests for voluntary FBI interviews, inclusion on watch lists, and surveillance.[190] Indeed, donations to

186. *See* David Cole, *Guilt by Association Squared: Extending the Bounds of the 'Material Support' Statute*, AM. CONST. SOC'Y BLOG (Nov. 8, 2010), http://www.acslaw.org/acsblog/guilt-by-association-squared-extending-the-bounds-of-the-'material-support'-statute (arguing that two material support cases pending in federal court "threaten to . . . chill the legitimate humanitarian aid activities of countless charities and foundations across the United States").

187. Seven out of the nine U.S. charities shut down pending terrorism-related investigation or designation are Muslim charities. *See* AM. CIVIL LIBERTIES UNION, *supra* note 19, at 8.

188. *See* Eric Gorski, *U.S. Muslims Experiencing Anxiety over Roles*, DENVER POST (Aug. 19, 2011, 1:00 AM), http://www.denverpost.com/frontpage/ci_18692208 (quoting a local imam as stating that his mosque shut down because "IRS scrutiny of giving to Islamic charitable organizations had a chilling effect on donations").

189. *See* AM. CIVIL LIBERTIES UNION, *supra* note 19, at 92-93 (reporting that donation levels in many charities and mosques are down by at least fifty percent).

190. *See, e.g.*, OMB WATCH, MUSLIM CHARITIES AND THE WAR ON TERROR 5, 89 (rev. 2006), *available at* http://www.ombwatch.org/files//npadv/PDF/MuslimCharitiesTopTenUpdated.pdf ("Many in the Muslim community fear that their donations might land them on a

Muslim charities fell precipitously in the years immediately following 9/11.[191] Ten years after 9/11, many Muslim charities still struggle to obtain pre-9/11 donation levels.[192]

The government's closure and terrorist designation of three of the largest Muslim American charities immediately following the 9/11 attacks sent shockwaves through Muslim communities nationwide.[193] During the 2001 Ramadan season—when Muslim charitable giving is at its yearly peak—the federal government froze the assets of the Holy Land Foundation for Relief and Development, the Global Relief Foundation, and the Benevolence International Foundation.[194] The subsequent criminal prosecution of the Holy Land Foundation's leaders[195] alarmed Muslim donors, who reasonably feared that even the most tenuous association with a Muslim charity could lead to ruinous consequences.[196] As of June 2009, seven of the nine charities with assets seized by the Department of the Treasury as a result of terrorism-related investigation or designation were Muslim charities.[197]

Unbeknownst to many, a formal terrorist designation is not necessary to figuratively "tar and feather" a charity. A mere investigation by the executive

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list of suspected terrorist sympathizers and supporters, even if they are completely unaware of any wrongdoing or if the charity comes under suspicion years later.").

191. One charitable organization observed:

> In this climate of fear and suspicion, donations to Muslim charities have declined significantly since last Ramadan. Some Muslim donors are turning to nondenominational groups and local causes, while others are choosing to give anonymous cash donations—a practice that ends up hindering the government's ability to prevent terrorist financing and demonstrates the extent to which the right to give openly has been compromised.

Id. at 5.

192. *See* AM. CIVIL LIBERTIES UNION, *supra* note 19, at 92-93.

193. *Id.* at 7; *see also* Aziz, *supra* note 56, at 45, 46.

194. AM. CIVIL LIBERTIES UNION, *supra* note 19, at 7.

195. *See id.* at 61-63.

196. *See* Kathryn A. Ruff, Note, *Scared to Donate: An Examination of the Effects of Designating Muslim Charities as Terrorist Organizations on the First Amendment Rights of Muslim Donors*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 447, 447-73 (2005) ("While some of those fears are grounded in the possibility of actually funding terrorism, a greater reason for the drop in religious donations is that many Muslims are afraid of becoming targets of law enforcement and branded as terrorists due to their connections with a charity that comes under investigation.").

197. The seven Muslim charities are the Al Haramain Islamic Foundation-USA in Oregon, the Benevolence International Foundation in Illinois, the Global Relief Foundation in Illinois, the Holy Land Foundation for Relief and Development in Texas, the Islamic American Relief Agency-USA in Missouri, the Goodwill Charitable Organization in Michigan, and KindHearts for Charitable Humanitarian Development in Ohio. AM. CIVIL LIBERTIES UNION, *supra* note 19, at 11.

branch is enough to trigger the asset-freezing provision of sanctions laws,[198] thus paralyzing the organization. The law does not require probable cause of a violation of the regulations, nor must the government seek approval from a judge before or after the freeze is imposed.[199] Further, the investigation and resulting freeze have no limits.[200] The ensuing public media coverage of the freeze puts the final nail in the organization's coffin, as subsequent association with the organization is an invitation for government scrutiny. Before December 2010, organizations were denied access to their funds to hire a defense lawyer unless the Department of the Treasury, the adverse party in any such litigation, authorized such expenditures.[201] In one instance where the Department did make funds available, the amount was a small fraction of the cost of hiring competent counsel.[202]

Further, lawyers were prohibited from representing accused defendants without obtaining a license from the Office of Foreign Asset Control ("OFAC") until the ACLU and the Center for Constitutional Rights ("CCR") challenged the procedures in 2010.[203] Prior to the action, such representation was only permitted under a very limited set of circumstances.[204] Compensated services were also severely restricted, permitting charities to fund their legal services

198. 50 U.S.C. § 1702(a)(1)(C) (2006); OMB WATCH, *supra* note 190, at 2 (stating that the executive branch has "largely unchecked power" to seize groups' materials, assets and property *pending investigation* into terrorism ties); Aziz, *supra* note 56, at 54 ("The [International Emergency Economic Powers Act's] asset freezing provision applies to 'any foreign person, foreign organization, or foreign country that [the President] determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States . . . ,' as well as to suspect domestic organization, regardless of their affiliation with a specific attack." (second alteration in original) (quoting 50 U.S.C. § 1702(a)(1)(C) (Supp. II 2000))).

199. 50 U.S.C. § 1702(a)(1)(C).

200. *Id.*

201. *New Treasury Rule Improves Access to Lawyers for Listed Charities*, CHARITY & SEC. NETWORK (Dec. 15, 2010), http://www.charityandsecurity.org/news/Treasury_Improves_Access_Lawyers_Charities.

202. *See, e.g.*, Plaintiff's Reply Memorandum in Support of Its Motion for Partial Summary Judgment and Its Memorandum in Opposition to Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment on All Counts at 53-59, KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner, 676 F. Supp. 2d 649 (N.D. Ohio 2009) (No. 3:08CV2400) (arguing that KindHearts had a constitutional right to use its funds to pay for its legal defense).

203. *See* Complaint for Declaratory & Injunctive Relief, Am. Civil Liberties Union v. Geithner, No 1:10-cv-01303-JDB (D.D.C. Aug. 3, 2010).

204. *See id.* at 7 (citing prior versions of 31 C.F.R. §§ 594.101-.901, specifically § 594.506(a)).

only through funds raised outside the United States or, after obtaining a license, through money raised by legal defense funds.[205]

The new regulations issued in December 2010 now permit American lawyers to provide pro bono representation in any proceeding before a court without obtaining a license.[206] The regulations also permit charities or persons to pay for legal services without obtaining a license if the services involve, among other things, "counseling on the requirements of and compliance with U.S. law," "[r]epresentation of persons named as defendants or parties to domestic U.S legal proceedings," and "[a]ny other legal services where U.S. law requires access to legal counsel at public expense."[207] If the needed legal services are neither pro bono nor falling within one of the aforementioned exceptions, the charity or person must still obtain a license and can use one of only two approved payment methods: (1) payment from the charity or person's non-American sources, or (2) payment from a legal defense fund at an American financial institution.[208] Prior to the new regulations, the negative publicity of an asset freeze coupled with the inability to access funds for legal counsel sounded the charity's death knell.

In addition to the seven shut down Muslim American charities,[209] six other Muslim American charities have found themselves at the center of publicly announced terrorism investigations, raids, and surveillance.[210] Unable to overcome the resulting stigma and blacklisting, three have permanently closed without ever being designated as a terrorist organization.[211]

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205. *See, e.g.*, *KindHearts*, 647 F. Supp. 2d at 916 (finding OFAC's policy restricting the use of blocked assets for compensation of legal services to be reasonable and facially valid, but arbitrarily and capriciously applied in KindHearts' case).

206. Global Terrorism Sanctions Regulations, 75 Fed. Reg. 75,904, 75,906 (Dec. 7, 2010) (codified at 31 C.F.R. §§ 594.506, .517 (2011)); *New Treasury Rule Improves Access to Lawyers for Listed Charities*, *supra* note 201; *see also* Press Release, Am. Civil Liberties Union, Government Changes Attorney Licensing Regulations in Response to Lawsuit Filed by CCR and ACLU (Dec. 17, 2010), http://www.aclu.org/national-security/government-changes-attorney-licensing-regulations-response-lawsuit-filed-ccr-and-a.

207. *See New Treasury Rule Improves Access to Lawyers for Listed Charities*, *supra* note 201.

208. *Id.*

209. *See* AM. CIVIL LIBERTIES UNION, *supra* note 19, at 11.

210. The six charities are KinderUSA in Texas, Life for Relief and Development in Michigan, Al-Mabarrat in Michigan, Child Foundation in Oregon, Help the Needy in New York, and Care International in Massachusetts. *See id.* at 12.

211. Help the Needy and Care International have closed. *Id.* KindHearts also announced its closing in January 2012. Jim Sielicki, *Charity Targeted by Treasury Dissolves*, TOLEDO BLADE (Jan. 9, 2012), http://www.toledoblade.com/Courts/2012/01/09/Charity-targeted-by-Treasury-dissolves.html.

B. *Guilt Without Proof of Wrongdoing*

At least one court has interpreted material support laws in a way that relieves prosecutors from having to prove that a charity provided donations directly to a designated foreign terrorist organization. In *United States v. El-Mezain* ("Holy Land Foundation"), a Texas federal district court instructed the jury that providing humanitarian aid to nongovernmental groups abroad that are not designated as terrorist organizations makes American charities and their officers guilty of § 2339B if those groups are later shown to be fronts for, or controlled by, a designated terrorist organization.[212] The Holy Land Foundation defendants were convicted based on their donations to local *zakat*[213] committees that provided direct humanitarian aid to impoverished Palestinians in the West Bank and Gaza.[214] The *zakat* committees, which have never been designated as terrorist organizations, were indigenous nonprofit organizations with necessary networks for distributing aid.[215] Indeed, the United States Agency for International Development ("USAID") and the

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212. The district court instructed the jury as follows:

> To find a defendant guilty of the crimes charged in Counts 2 through 10, you must find that the government has proven each of the following elements beyond a reasonable doubt: First: that the defendant under consideration knowingly provided, or attempted to provide, the material support alleged in the count under consideration to the entity listed in that count; Second: that the entity listed in the count under consideration was controlled by Hamas or that the defendant under consideration was attempting to provide support to Hamas by providing or attempting to provide the support to the entity listed in the count under consideration; Third: that the defendant under consideration either knew that Hamas was designated as a foreign terrorist organization, or he knew that Hamas has engaged in, or engages in, terrorist activity; and Fourth: that the court has jurisdiction over the crime charged in the count under consideration.

Amicus Brief of Charities, Foundations, Conflict-Resolution Groups, & Constitutional Rights Organizations in Support of Defendants & Urging Reversal of Convictions of Counts 2-10 at 9-10, United States v. El-Mezain, No. 09-10560 (5th Cir. Oct. 26, 2010); *see also* Ruff, *supra* note 196, at 476 (stating that despite KinderUSA's specific attempts to structure its practices to comply with material support laws, it nevertheless stopped soliciting donations due to FBI surveillance, wiretapping, attempts to subvert employees, and the government's spreading of malicious information).

213. *Zakat*, one of the five pillars of Islam, requires that Muslims donate a certain amount of their annual earnings to charity. *See* Liz Leslie, *Ramadan and Charity: What Is Zakat?*, MUSLIM VOICES (July 28, 2010), http://muslimvoices.org/ramadan-charity-zakat/.

214. *See Conviction of Holy Land Foundation Raises Questions, Concerns for Nonprofits*, CHARITY & SEC. NETWORK (Nov. 25, 2008), http://www.charityandsecurity.org/news/Conviction_Holy_Land_Raises_Questions_Concerns_Nonprofits.

215. *See id.*

International Red Cross ("IRC") often worked with the same *zakat* committees to deliver aid to Palestinians.[216]

Despite USAID's and IRC's similar work in the Palestinian territories, the Holy Land Foundation ("HLF") and its Muslim officers were convicted of providing material support to Hamas, a designated terrorist group, on account of donations to the undesignated *zakat* committees.[217] The trial court erroneously instructed the jury that if some individuals in the *zakat* committees were associated with Hamas, HLF's donations constituted material support to Hamas, even if the American charity lacked knowledge of such associations.[218] Thus, although the government could not prove that HLF's donations were transferred to Hamas or that HLF had any knowledge of these committees' alleged ties to Hamas, HLF was found guilty based on its contribution to the undesignated groups.[219] This tenuous and arguably unconstitutional theory of liability ultimately exposes all American humanitarian aid agencies operating in conflict zones where designated terrorist groups exist. That USAID can engage in the same activity without sanction further evinces the politicization of humanitarian aid.

The serious legal implications of the Holy Land Foundation case caused twenty of the United States' largest nonprofits and foundations to file an amicus brief asking the Fifth Circuit to interpret the material support statute to require proof of knowledge that a recipient of assistance is a designated group or is controlled by one.[220] Amici argued that the district court's jury instructions denied individuals fair notice of what is prohibited and failed to require proof of individual culpability.[221] Further, amici noted that the district court's interpretation "jeopardize[d] the legitimate charitable work of countless foundations and charities throughout the United States."[222] The interpretation thus expanded criminal culpability such that many organizations engaged in humanitarian assistance in troubled parts of the world are now exposed to

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216. *Id.* ("[T]he same *zakat* committees have received aid from the International Red Cross and the U.S. Agency for International Development.").

217. *Id.*

218. *Id.*

219. *Id.*

220. Amicus Brief of Charities, Foundations, Conflict-Resolution Groups, & Constitutional Rights Organizations in Support of Defendants & Urging Reversal of Convictions of Counts 2-10, *supra* note 212, at 1, 21, 23, 25; *see also Brief Argues Material Support Conviction Should Require Knowledge of Terror Connection*, CHARITY & SEC. NETWORK (Oct. 26, 2010), http://www.charityandsecurity.org/news/Brief_Argues_Material_Support_Conviction_Should_Require_Knowledge_of_Terror_Connection.

221. Amicus Brief of Charities, Foundations, Conflict-Resolution Groups, & Constitutional Rights Organizations in Support of Defendants & Urging Reversal of Convictions of Counts 2-10, *supra* note 212, at 15-21.

222. *Id.* at 1.

prosecution that they can do little to prevent.[223] Ultimately, "the [resulting] chilling effect" will devastate their important work and deny beneficiaries humanitarian aid.[224] Unfortunately in December 2011, the U.S. Court of Appeals for the Fifth Circuit balked on the issue presented by amici, noting that no defendants had raised the issue on appeal.[225]

The amici included large and reputable nonprofit organizations, such as the Carter Center, the Rockefeller Brothers Fund, the Constitution Project, the Council on Foundations, and the Samuel Rubin Foundation.[226] Their participation demonstrates these laws' broader adverse consequences, notwithstanding their selective enforcement against Muslim groups and individuals.

Although material support laws were initially enforced against Muslim communities, aggressive prosecution has since spread to other groups as the government seeks to convince the public that it is actively protecting national security. The 2010 Supreme Court ruling in *Holder v. Humanitarian Law Project*[227] brought to light the broad-reaching adverse implications of loosely drawn and broadly interpreted laws prohibiting material support to terrorism. The plaintiffs, a former federal administrative law judge and American-based advocacy groups, sought to persuade the Kurdistan Workers' Party in Turkey ("PKK"), a designated foreign terrorist organization, to move away from violence.[228] While the PKK engaged in violent activities, the plaintiffs expressly sought to train members to use humanitarian and international law to resolve disputes peacefully and to petition the United Nations and other representative bodies for humanitarian relief.[229]

To the dismay of many peacebuilding and humanitarian aid organizations, the Supreme Court found that the law criminalizing the plaintiffs' activities was constitutional.[230] The ruling thereby made it illegal for Americans to teach

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223. *Id.*

224. *Id.* at 1-2; *see also* David Cole, Op-Ed., *Chewing Gum for Terrorists*, N.Y. TIMES, Jan. 3, 2011, at A21, *available at* http://www.nytimes.com/2011/01/03/opinion/03cole.html.

225. United States v. El-Mezain, 664 F.3d 467, 539 n.32 (5th Cir. 2011) (noting that although "[a]n amicus brief filed by a diverse group of organizations challenge[d] the district court's jury charge on the substantive violations of § 2339B based on the Fifth Amendment's Due Process Clause," the issue was not properly before the court because no defendant had raised the issue).

226. Amicus Brief of Charities, Foundations, Conflict-Resolution Groups, & Constitutional Rights Organizations in Support of Defendants & Urging Reversal of Convictions of Counts 2-10, *supra* note 212, at i-ii.

227. Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

228. *Id.* at 2729.

229. *Id.*

230. *See id.* at 2731; *see also* Press Release, The Constitution Project, Constitution Project Dismayed by Supreme Court's Rejection of Constitutional Challenge to Provisions

designated terrorist groups to put down their guns, pick up their pens, invoke international human rights law, and seek redress through international tribunals. In a dissenting opinion, Justice Breyer thus criticized the majority's failure to differentiate between aiding terrorist groups that engage in violent terrorist acts and those that participate in legitimate democracy-building advocacy.[231]

The criminalization of aid and advocacy directly contradicts America's stated commitment to international human rights law and sends a message to the world that the United States is not serious about human rights and peaceful conflict resolution. Moreover, the ruling undermines American civil society as the independent nonprofit sector plays a pivotal role in international peacebuilding efforts and the provision of humanitarian aid to impoverished civilians trapped in conflict zones.[232] The Court's interpretation of the material support laws essentially limits international peacebuilding efforts to highly politicized, and often ineffective, government programs sponsored by the State Department or USAID.[233] In the end, this current formulation and interpretation of material support laws undermines our nation's reputation in the international community, our national security interests in minimizing violence and terrorism abroad, and our own civil society.[234]

C. *Collateral Prosecution and Surveillance of Muslim Donors*

While few individual donors have been prosecuted for material support arising out of charges brought against charities,[235] some have experienced

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of Material Support Laws (June 21, 2010), http://www.constitutionproject.org/news/2010/06212010n_constitution.php; *Supreme Court Upholds Ban on Peaceful Conflict Resolution Support to Terrorist Groups*, CHARITY & SEC. NETWORK (June 21, 2010), http://www.charityandsecurity.org/news/Supreme_Court_Ban_Peaceful_Conflict_Resolution_Support_Terrorist_Groups (reporting how one law professor commented that "the ruling will adversely impact peace groups hoping to turn terrorist groups away from violence").

231. *See Humanitarian Law Project*, 130 S. Ct. at 2731-43 (Breyer, J., dissenting).

232. *See* OMB WATCH, *supra* note 190, at 2.

233. *See, e.g.*, U.S. AGENCY FOR INT'L DEV., U.S. DEP'T OF STATE & U.S. DEP'T OF DEF., QUARTERLY PROGRESS AND OVERSIGHT REPORT ON THE CIVILIAN ASSISTANCE PROGRAM IN PAKISTAN AS OF DECEMBER 31, 2010 (2010), *available at* http://www.usaid.gov/oig/public/special_reports/pakistan_quarterly_report_as_of_dec_31_2010.pdf.

234. Specifically, the *Humanitarian Law Project* ruling undermines the independence of American civil society through human rights advocacy. Ironically, just weeks after the Court's ruling in *Humanitarian Law Project*, Secretary of State Hillary Clinton touted the necessity of a strong civil society as one of the "essential elements of a free nation." Hillary Rodham Clinton, U.S. Sec'y of State, Civil Society: Supporting Democracy in the 21st Century, Address Before the Community of Democracies (July 3, 2010) (transcript and video recording available at U.S. DEP'T OF STATE, http://www.state.gov/secretary/rm/2010/07/143952.htm (last visited Jan. 10, 2012)).

235. *But see* AM. CIVIL LIBERTIES UNION, *supra* note 19, at 74 (describing the well-known case of a Palestinian American and former imam of a Georgia mosque who pleaded

collateral prosecution[236] for tax, immigration, and other nonterrorism related charges.[237] Many Muslim community members believe that their donations to Muslim charities invite government scrutiny that may otherwise not have occurred.[238] Muslim donors worry that they will become targets of investigation and prosecution if the government becomes aware of their donations, especially to charities engaged in humanitarian relief efforts abroad. They fear that donor lists of Muslim charities, either designated or under investigation, are a starting point for investigating terrorism, even where there is no individualized evidence of wrongdoing.[239] Hence these lists are suspected of serving as the starting point for fishing expeditions in search of terrorists. Such fears are not far-fetched.

Major donors to Muslim charities report experiencing burdensome tax audits, denials of citizenship applications, unusually vigorous immigration enforcement, and surveillance.[240] Major donors have also been targeted for interviews regarding "their charitable donations and knowledge of Muslim charities' activities locally and nationally."[241] The ACLU, the Asian Law Caucus, Muslim Advocates, and the Arab American Anti-Discrimination Committee, among others, have all documented complaints about such targeting.[242] Some of these interviews are involuntary, as they occur at the border when individuals attempt to return from abroad.[243] Others are a result of

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guilty in August 2006 to charges of materially supporting terrorism through donations to the Holy Land Foundation).

236. Collateral prosecution of American Muslim donors involves arrests or indictments that, while "not officially related to the donors' charitable contributions," are assumed to have been "prompted by their donations." *Id.* at 73.

237. *See id.* at 73-75; *see also* Huq, *supra* note 21, at 839-40 (noting the Justice Department's use of inchoate offenses and immigration regulation as a tool in the preventive counterterrorism model).

238. *See* Gorski, *supra* note 188. *See generally* Aziz, *supra* note 56.

239. *See* AM. CIVIL LIBERTIES UNION, *supra* note 19, at 69-70 (citing a 2005 investigation by the U.S. Senate Committee on Finance that reviewed financial records given to the IRS, including the donor lists of two dozen Muslim charities).

240. *Id.* at 73-74 (highlighting the case of Jesse Maali, who was prosecuted for violations of immigration, employment, and tax law after his large donations to Muslim charities came to the attention of federal agents).

241. *Id.* at 69.

242. *Id.* at 69-73.

243. *See, e.g.*, COUNCIL ON AM.-ISLAMIC RELATIONS, THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES 2009: SEEKING FULL INCLUSION 19, 27 (2009), *available at* http://www.cair.com/Portals/0/pdf/CAIR-2009-Civil-Rights-Report.pdf (noting cases of Muslims who were stopped at border crossings and detained for hours without explanation); Oralandar Brand Williams, *CAIR Says Muslim Americans Harassed when Crossing Border*, DETROIT NEWS (Mar. 25, 2011), http://www.detnews.com/article/20110325/METRO/103250392/CAIR-says-Muslim-Americans-harassed-when-crossing-border (reporting a call for a

ubiquitous FBI requests for voluntary interviews, which many community members accept without legal representation as an earnest, but ill-advised, gesture to prove their innocence. The ACLU, for instance, "has documented reports of law enforcement targeting of Muslim donors in Texas, Michigan, New York, Virginia, Florida, Louisiana, California, Minnesota, Missouri, and Wisconsin for 'voluntary' interviews."[244] And other interviews occur abroad when individuals are prohibited from returning to the United States after trips to Muslim communities.[245] Adding to mistrust among Muslims is the fact that interviews sometimes result in criminal charges for material false statements unrelated to terrorist activities.[246]

D. *Feasible Solutions Rejected by the Government*

In response to this problematic process, a broad coalition of highly regarded nonprofit organizations has urged the Department of the Treasury to amend its Anti-Terrorism Financing Guidelines to reflect the industry's own body of "best practice" guidance for charities in the U.S. and abroad.[247] Moreover, the Charity and Security Network has developed model rules to protect the due process rights of U.S. charities during the designation and investigation process.[248] Such protections are necessary because current law prevents a designated[249] nonprofit organization from meaningfully defending itself from allegations of supporting terrorism. Once an organization is designated, its assets are frozen without notice or an opportunity to defend

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federal investigation into the routine harassment of Arab and Muslim Americans at U.S. border crossings).

244. AM. CIVIL LIBERTIES UNION, *supra* note 19, at 69.

245. *See, e.g.*, Nigel Duara, *Ore. Man Asks Why He Was Queried by FBI in Tunisia*, YAHOO! NEWS (Feb. 15, 2012), http://news.yahoo.com/ore-man-asks-why-queried-fbi-tunisia-001231680.html (reporting that the FBI placed a Libyan American on a no-fly list while he was attempting to return from delivering humanitarian supplies in Libya, then questioned him about his religious beliefs and his mosque).

246. *See, e.g.*, *Islamic Singer Sentenced in False Statements Case*, SEATTLE TIMES (Dec. 14, 2010, 7:30 PM), http://seattletimes.nwsource.com/html/entertainment/2013680098_apusmichiganhamassupport.html (reporting that a prominent Muslim singer, who was also a Holy Land Foundation representative in 1997 and 1998, pleaded guilty to making false statements during the immigration process and was deported).

247. *Nonprofit Groups End Talks with Treasury About Ineffectual Guidelines*, CHARITY & SEC. NETWORK (Dec. 1, 2010), http://www.charityandsecurity.org/news/Nonprofit_Groups_End_Talks_With_Treasury_about_Ineffectual_Guidelines.

248. *Model Policies for Fair Procedures for Listing and Delisting U.S. Charities*, CHARITY & SEC. NETWORK, http://www.charityandsecurity.org/solutions/model_due_process_procedures_charities (last visited Jan. 9, 2012).

249. *See* discussion *supra* note 56; *see also* Aziz, *supra* note 56, at 51-55.

itself.[250] Further, the absence of a mechanism comparable to the Classified Information Procedures Act—which generally allows defendants to confront classified evidence presented against them—prevents the nonprofit organization from reviewing the entire record of evidence used against it.[251] Nor is the nonprofit organization permitted to offer evidence in its own defense at the pre-designation or federal appeals process.[252] The absence of minimal due process rights undermines the legitimacy of the designation process, suggesting that it is as much about political showmanship as it is about law.[253]

This author, through coalition efforts, has proposed thoughtful solutions to these concerns that are blithely dismissed by Department of the Treasury and White House officials.[254] For example, rather than maintaining a process that assumes guilt without the benefit of the organization's defense, designated groups should be afforded a meaningful opportunity to defend themselves promptly in the wake of an asset freeze. Further, the government should have to disclose sufficient information regarding its classified case to allow the group a meaningful defense. Designated groups should also be provided notice of the charges against them and a statement of the reasons for designation, neither of which is currently required.[255]

Officials often cite the ease with which an organization may transfer money abroad to avoid having its assets frozen for illicit acts.[256] While such

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250. 8 U.S.C. § 1189(a)(4)(B)(iv)(II), (c)(1)-(3) (2006).

251. *Compare id.*, *and* 50 U.S.C. § 1702(c) (2006), *with* 18 U.S.C. app. §§ 1-16 (2006) (Classified Information Procedures Act).

252. *Model Policies for Fair Procedures for Listing and Delisting U.S. Charities*, *supra* note 248 ("Charities . . . cannot present evidence in an appeal to the federal courts."). *But see* 31 C.F.R. § 501.807 (2011) (providing administrative review and an opportunity to submit additional evidence only *after* an entity is designated or has its property seized). *See generally* Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury, 585 F. Supp. 2d 1233, 1250 (D. Or. 2008) (relying on a declaration that the government submitted outside the record to provide background information on its designation procedures), *aff'd in part and rev'd in part on other grounds*, 660 F.3d 1019 (9th Cir. 2011).

253. *E.g.*, RON SUSKIND, THE PRICE OF LOYALTY 191-99 (2004); Julie B. Shapiro, *The Politicization of the Designation of Foreign Terrorist Organizations: The Effect on the Separation of Powers*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 547, 583, 599 (2008).

254. *See, e.g.*, *Nonprofit Groups End Talks with Treasury About Ineffectual Guidelines*, *supra* note 247.

255. *See* 8 U.S.C. § 1189; 50 U.S.C. § 1702; *see also* Aziz, *supra* note 56, at 68-78 (providing a more detailed examination of the due process shortcomings of the terrorist designation process).

256. *See* Victoria B. Bjorklund et al., *Terrorism and Money Laundering: Illegal Purposes and Activities*, 25 PACE L. REV. 233, 242 (2005); Press Release No. HP-404, U.S. Dep't of the Treasury, Testimony of Chip Poncy Director, Office of Strategic Policy, for Terrorist Financing and Financial Crimes U.S. Department of the Treasury Before the U.S. Senate Homeland Security and Governmental Affairs Committee (May 10, 2007), http://www.treasury.gov/press-center/press-releases/Pages/hp404.aspx.

concerns are reasonable, they too can be addressed without compromising the nonprofit's due process rights. For example, an independent conservator can be appointed to oversee the charity's finances pending investigation.[257] This assures the government that funds will not be transferred out of its jurisdiction and prevents the collective punishment of the entire organization, as well as its donors and beneficiaries, on account of mere allegations. Likewise, government investigations should adopt the same policy toward charities that it applies to corporations suspected of fraud, where the focus is first on individual bad actors, rather than the elimination of the entire corporation.[258] So long as the organization can show that it acted in good faith and that any wrongdoing was a result of a limited number of individuals, it should be spared total liquidation. This more reasonable approach not only protects charitable organizations, but also its beneficiaries who are in desperate need of lawful humanitarian assistance.

Additionally, while new regulations permitting a charity to pay for particular legal services are welcome,[259] there is little justification for the government's continued refusal to allow an undesignated charity—that is, a charity merely under investigation—access to its funds for services that are *not* the focus of the investigation. This is especially appropriate with large charities that operate in various countries, whereas the government's concerns may be limited to operations in a particular country or a specific project. The government has yet to provide a reasonable explanation, other than its punitive preventive philosophy, for these broad measures. Moreover, once the government freezes the funds, it refuses all requests to release them to other charitable organizations performing the same work in accordance with the *cy pres* doctrine.[260] Under the *cy pres* doctrine, if a charitable purpose of an organization becomes unlawful, impracticable, or impossible, a court may order

257. *See* Sahar Aziz, *A Comparison of Due Process Rights in Terrorist Designation Processes to the Charity and Security Network's Model*, CHARITY & SEC. NETWORK 4 (Jan 3, 2011), http://www.charityandsecurity.org/system/files/comparison_chart.pdf.

258. *See* Memorandum from Larry D. Thompson, U.S. Deputy Att'y Gen., to Heads of Dep't Components, U.S. Att'ys (Jan. 20, 2003), *available at* http://www.justice.gov/dag/cftf/corporate_guidelines.htm ("Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Only rarely should provable individual culpability not be pursued, even in the face of offers of corporate guilty pleas.").

259. *See supra* notes 206-208 and accompanying text.

260. *See Principles and Procedures for Release of Frozen Funds for Charitable Purposes*, CHARITY & SEC. NETWORK, http://www.charityandsecurity.org/Solution/Procedures_Release_Funds_Charity (last visited Jan. 9, 2012) (proposing that the Treasury Department's regulations incorporate the *cy pres* doctrine and require charitable funds to be used for purposes consistent with the donors' intent).

the money be delivered to another institution to be spent in a manner consistent with the donors' charitable purposes.[261]

Representatives of the nonprofit sector have requested that the Department of the Treasury, as sole controller of the frozen assets, transfer the money to another charity operating consistent with the donors' intent.[262] Tellingly, the government has denied these requests with no regard for the needs of intended beneficiaries.[263] Such behavior evinces the politicization of counterterrorism that, thus far, has most adversely impacted Muslim charities and individuals.

At stake is far more than the due process rights of a particular organization and the sustainability of the nonprofit sector, both of which are important in their own right. Equally significant is the legitimacy of the U.S. government's counterterrorism strategy. If the government is truly committed to effective counterterrorism strategies, it should acknowledge the failings of the designation regime and implement the nonprofit sector's thoughtful recommendations.[264] Such efforts would significantly improve the Muslim community's perception of preventative measures and facilitate meaningful engagement among the government and the Muslim American community.

III. THE RACIAL SUBTEXT OF "HOMEGROWN TERRORISM" POST-9/11

The policies surrounding "homegrown terrorism" have become the most troubling aspect of the government's preventive counterterrorism model. This politically charged term used to conjure up images of Timothy McVeigh, the Unibomber, and extremist right-wing militia groups. Since 9/11, however, "homegrown terrorism" has become infused with the racial subtext of "Muslim domestic terrorists" as a result of racial and religious stereotyping in the media that is further legitimized by the government.[265] This new pejorative

261. Morris v. E.A. Morris Charitable Found., 589 S.E.2d 414, 416 (2003); 14 C.J.S. *Charities* § 45 (2006).

262. JOHN ROTH ET AL., NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., MONOGRAPH ON TERRORIST FINANCING 101 (2004), *available at* http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf; *Nonprofits Call for Release of Frozen Funds for Humanitarian Efforts*, OMB WATCH (Nov. 7, 2006), http://www.ombwatch.org/node/3094.

263. *See* ROTH ET AL., *supra* note 262.

264. For more information on proposed solutions to the processes surrounding the designation of terrorist organizations, see *Proposed Solutions*, CHARITY & SEC. NETWORK, http://www.charityandsecurity.org/solution/Proposed%20Solutions (last visited Jan. 10, 2012).

265. *The Extent of Radicalization in the American Muslim Community and that Community's Response: Hearing Before the H. Comm. on Homeland Sec.*, 112th Cong. (2011) (statement of Rep. Keith Ellison) ("Targeting the Muslim American community for the actions of a few is unjust.") (prepared testimony available at CONGRESSMAN KEITH ELLISON, http://ellison.house.gov/index.php?option=com_content&view=article&id=587:

connotation facilitates the selective enforcement of counterterrorism laws against Muslims and legitimizes widespread discrimination.

While preventing domestic terrorism is undoubtedly an important public safety concern, the current debate misguidedly focuses only on terrorism committed by Muslims.[266] Meanwhile non-Muslims may be engaging in terrorist activities undetected because they do not fit into the government's established racial or religious profiles.[267] In fact, a recent study reveals "Islamist terrorism has been no more deadly in the United States than other

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congressman-ellisons-testimony-to-the-house-committee-on-homeland-security-as-prepared-for-delivery&catid=36:keiths-blog&Itemid=44); LAURA W. MURPHY & MICHAEL W. MACLEOD-BALL, AM. CIVIL LIBERTIES UNION, WRITTEN STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION BEFORE THE HOUSE COMMITTEE ON HOMELAND SECURITY (2011), *available at* http://www.aclu.org/files/assets/Final_statement_for_Feb_2011_King_Hearing.pdf ("Broadly targeting the entire American Muslim community for counterterrorism enforcement will make it more likely that law enforcement officials will misunderstand the factual evidence surrounding risk factors for violence and focus their investigative efforts on innocent Americans because of their religious beliefs rather than on true threats to the community."); COREY P. SAYLOR, COUNCIL ON AM.-ISLAMIC RELATIONS, WRITTEN STATEMENT OF THE COUNCIL ON AMERICAN-ISLAMIC RELATIONS ON THE EXTENT OF RADICALIZATION IN THE AMERICAN MUSLIM COMMUNITY AND THAT COMMUNITY'S RESPONSE, SUBMITTED TO THE HOUSE COMMITTEE ON HOMELAND SECURITY (2011), *available at* http://www.cair.com/ActionCenter/PeterKingHearings.aspx (pleading Congress to "[r]efuse to offer a legitimizing platform to those who spout anti-Muslim bigotry").

266. *See, e.g.*, RICK "OZZIE" NELSON & BEN BODURIAN, CTR. FOR STRATEGIC & INT'L STUDIES, A GROWING TERRORIST THREAT? ASSESSING "HOMEGROWN" EXTREMISM IN THE UNITED STATES (2010), *available at* http://csis.org/files/publication/100304_Nelson_GrowingTerroristThreat_Web.pdf (highlighting five case studies of homegrown terrorism where all of the defendants are Muslim without mention of terrorism cases committed by non-Muslims); Letter from Representative Peter T. King to Representative Bennie G. Thompson (Feb. 8, 2011), *available at* http://www.house.gov/apps/list/hearing/ny03_king/kingfirmonradhearings.html ("[T]he homeland has become a major front in the war with Islamic terrorism and it is our responsibility to fully examine this significant change in al Qaeda tactics and strategy. To include other groups such as neo-Nazis and extreme environmentalists in this hearing would be extraneous and diffuse its efficacy. . . . [T]he Committee will continue to examine the threat of Islamic radicalization, and I will not allow political correctness to obscure a real and dangerous threat to the safety and security of the citizens of the United States.").

267. *See Statement of Muslim Advocates on the King Hearings*, MUSLIM ADVOCATES (Mar. 10, 2011), http://www.muslimadvocates.org/FINAL_Post-Hearing_MAStmt.pdf; Letter from Fifty-One Orgs. to Representative Peter T. King (Mar. 7, 2011), *available at* http://www.afj.org/press/letter-opposing-house-homeland-security-committee-hearing-on-march-10.pdf (opposing the House Homeland Security Committee's anticipated hearings regarding American Muslim radicalization); Letter from Wade Henderson et al., The Leadership Conference, to Representative Peter T. King (Feb. 4, 2011), *available at* http://www.civilrights.org/advocacy/letters/2011/king-hearing-letter-2-4-11.pdf (arguing that the radicalization hearings would "likely weaken counterterrorism efforts by ignoring the long history of Muslim cooperation with law enforcement").

forms of domestic terrorism since September 11."[268] Muslim extremists carried out just five of the eighty-three terrorism incidents between September 11, 2001 and the end of 2010—only six percent.[269] Perhaps the error in focusing on race and religion, rather than criminal activity, was most glaring in 1995 when law enforcement zeroed in on the Arab and Muslim community immediately following the Oklahoma City bombing.[270] After wasting time and resources, law enforcement realized the primary suspect was, in fact, a white male military veteran.[271]

The racial subtext of Muslim "terrorist other"[272] as comprising the only homegrown threat to national security is manifested and perpetuated in various contexts. Purported experts conduct counterterrorism trainings to law enforcement officers with minimal objective qualifications beyond a zealous belief that there is a clash of civilizations between the West and Islam. Even if such experts are the minority, their continued employment exposes a failure of leadership in terms of ensuring those tasked with protecting the nation are well informed with objective and fact-based trainings.

A similar narrative is perpetuated in the U.S. Congress through homegrown terrorism hearings focused exclusively on Muslims. Generalizing from a few

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268. Peter Bergen & Andrew Lebovich, Editorial, *Study Reveals the Many Faces of Terrorism*, CNN (Sept. 9, 2011), http://articles.cnn.com/2011-09-09/opinion/opinion_bergen-lebovich-us-terrorism-cases_1_islamist-qaeda-terrorism?_s=PM:OPINION ("[T]he record of the past decade suggests that if a chemical, biological or radiological attack were to take place in the United States, it is more likely that it would come not from a Islamist terrorist but from a right-wing extremist or anarchist.").

269. Stone, *supra* note 126 ("There were 60 cases [of terrorism] linked to animal rights or environmental radicals . . . and a dozen to anti-abortion activists.").

270. *See* Phyllis B. Gerstenfeld, *A Time to Hate: Situational Antecedents of Intergroup Bias*, 2 ANALYSES SOC. ISSUES & PUB. POL'Y 61, 64 (2002) (noting that, in the aftermath of the 1995 Oklahoma City bombing, "media and law enforcement attention immediately focused on people of supposed Middle Eastern descent"); Girardeau A. Spann, *Terror and Race*, 45 WASHBURN L.J. 89, 103-04 & n.57 (2005) (noting that the immediate U.S. reaction to the Oklahoma City bombing was to blame foreigners and pass anti-immigrant legislation, even though the bombing was carried out by white domestic terrorists).

271. The case of Timothy McVeigh illustrates that although "terrorist other" stereotypes predated 9/11, they were largely applied to Arabs. I proffer that these stereotypes have become further entrenched and applied to a much broader group of people including South Asians, Sikhs, and anyone perceived as Muslim. *See* Aziz, *supra* note 16, at 46-47.

272. *See, e.g.*, Susan Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 299 (2002) ("A complex matrix of 'otherness' based on race, national origin, religion, culture, and political ideology may contribute to the ferocity of the U.S. government's attacks on the civil rights of Arabs and Muslims.").

terrorism cases to the collective conduct of millions of Muslim Americans, these hearings contribute to suspicions of mosques as bastions of extremists, Muslim charities as supporters of terrorism, and imams as unpatriotic for refusing to spy on their congregations.

A. *Counterterrorism Trainings Perpetuate Essentialist Definitions of Muslims*

As law enforcement struggles to prevent the next terrorist attack on U.S. soil, it adopts essentialist definitions of Muslims as inherently prone to terrorism. Such a misguided strategy diverts resources, alienates communities, and may make us less safe.[273] This is demonstrated in law enforcement trainings where government-paid instructors teach those tasked with countering terrorism that "Islam is a highly violent radical religion that mandates that all of the earth must be Muslim."[274] *The Third Jihad*, a film shown to over 1400 NYPD officers in 2010, claims that "[f]ew Muslim leaders . . . can be trusted" and that Muslims are engaging in jihad "covertly throughout the West today."[275] The film posits images of Muslim terrorists shooting Christians and exploding car bombs, executed children covered in sheets, and "a doctored photograph show[ing] an Islamic flag flying over the White House," all while "[o]minous music" plays in the background.[276] The NYPD reportedly stopped showing the film only after a trainee voiced complaints.[277] While Mayor Michael Bloomberg asserted that the NYPD employed "'terrible judgment'" in showing the film, NYPD Commissioner Ray Kelly appeared in and was

273. *See, e.g.*, Stone, *supra* note 126 (citing the director of the National Consortium for the Study of Terrorism and Responses to Terrorism as saying: "If you overreact by targeting or perhaps trampling, as reported in New York, on the civil liberties of a group, that will make you less safe.").

274. Meg Stalcup & Joshua Craze, *How We Train Our Cops to Fear Islam*, WASH. MONTHLY, Mar./Apr. 2011, at 20, 21, *available at* http://www.washingtonmonthly.com/features/2011/1103.stalcup-craze.html; *see also* Press Release, Am.-Arab Anti-Discrimination Comm., Joint Statement on Meeting with FBI Director Robert Mueller (Feb. 15, 2012), http://www.adc.org/media/press-releases/2012/february-2012/joint-statement-on-meeting-with-fbi-director-robert-mueller/ (noting that FBI Director Mueller stated more than 700 FBI training documents and 300 presentations have been "deemed unusable by the Bureau and pulled from the training curriculum").

275. *See* Powell, *supra* note 34.

276. *Id.*

277. *Bloomberg Blasts Use of Movie During NYPD Training*, WALL ST. J. (Jan. 24, 2012, 7:15 PM), http://online.wsj.com/article/AP3734e6c13f2a4b9b85ef5692766d9088.html.

interviewed for the film, knowing that it "was for a documentary on radical Islam."[278]

A 2010 PowerPoint presentation compiled by an intelligence analyst working at a United States Attorney's office warned Department of Justice officials that the United States is at war with Islam.[279] As the federal government directs billions of dollars in terrorism-related training grants to state and local governments, more police officers are exposed to biased depictions of Muslims and Islam as inherently violent, savage, and anti-American.[280] It should come as no surprise, therefore, when law enforcement officers act on these stereotypes in their counterterrorism enforcement.

In addition to indoctrinating law enforcement officers to suspect Muslims, the alarmist tenor of the discourse surrounding "homegrown terrorism" communicates to the public that Muslims are collectively guilty for the illegal acts of a handful of individuals.[281] Targeted government prosecutions, deportations, and profiling validate the public's worst fears about Muslims, thereby feeding the frenzy of bias. This is despite 2007 and 2011 reports by the Pew Research Center concluding that "[m]ost Muslim Americans continue to reject violence and extremism. As in 2007, [in 2011] very few see suicide bombing and other forms of violence against civilians as ever justified in the defense of Islam, and al Qaeda is even less popular than it was then."[282]

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278. *E.g.*, Michael Powell, *In Shift, Police Say Leader Helped with Anti-Islam Film and Now Regrets It*, Jan. 25, 2012, at A22, *available at* http://www.nytimes.com/2012/01/25/nyregion/police-commissioner-kelly-helped-with-anti-islam-film-and-regrets-it.html.

279. *See* Spencer Ackerman, *Justice Department Official: Muslim 'Juries' Threaten 'Our Values,'* WIRED (Oct. 5, 2011, 6:30 AM), http://www.wired.com/dangerroom/2011/10/islamophobia-beyond-fbi/all/1 (reporting that Justice Department officials communicated that the "U.S. is at war with the Islamic religion").

280. *See, e.g.*, Stalcup & Craze, note 274; Spencer Ackerman, *FBI Teaches Agents: 'Mainstream' Muslims Are 'Violent, Radical,'* WIRED (Sept. 14, 2011, 8:45 PM), http://www.wired.com/dangerroom/2011/09/fbi-muslims-radical/; Editorial, *Sheriff Shows Poor Judgment in 'Training,'* DAILY NEWS J. (Feb. 19, 2012, 1:32 AM), http://www.dnj.com/article/20120219/OPINION01/302190025 (reporting that a Virginia sheriff "organized an officer training session . . . conducted by a Virginia-based group with dubious intentions and no government vetting . . . . whose leaders challenge the constitutional rights of Muslims").

281. *See, e.g.*, William Wan, *N.Y. Muslims Fear Congressman's Hearings Could Inflame Islamophobia*, WASH. POST (Jan. 24, 2011, 12:02 AM), http://www.washingtonpost.com/wp-dyn/content/article/2011/01/23/AR2011012304448.html (reporting that Representative King's hearings "singled out the mosque as a hotbed of 'radical Islam'").

282. PEW RESEARCH CTR., MUSLIM AMERICANS: NO SIGNS OF GROWTH IN ALIENATION OR SUPPORT FOR EXTREMISM 65 (2011), *available at* http://www.people-press.org/files/legacy-pdf/Muslim-American-Report.pdf.

Meanwhile, Muslims' proactive actions to prevent terrorism are either overlooked or dismissed as insufficient.[283] Worse yet, law enforcement officials and other experts who highlight Muslims' contributions to preventing terrorism may be accused of engaging in apologetic political correctness that makes the country less safe.[284]

To be sure, there are American Muslims who attempted to commit terrorist acts. Examples include Faisal Shahzad, who attempted to bomb Times Square in New York City in May 2010,[285] and Najibullah Zazi, who attempted to bomb the New York City subway.[286] Additionally, Mohamed Osman Mohamud is accused of attempting to ignite a bomb in a public square in Portland in November 2010.[287]

At the same time, however, other American Muslims played pivotal roles in preventing these very acts.[288] For example, a Senegalese Muslim immigrant

283. *Compare* KURZMAN, *supra* note 114, at 5 (reporting that of 120 disrupted plots, forty-eight involved tips from the Muslim American community), *with* George Zornick, *Peter King: It's Not Enough for Muslims to 'Denounce all Terrorism,' They Must Also Denounce Muslims*, THINKPROGRESS (Feb. 15, 2011, 3:18 PM), http://thinkprogress.org/2011/02/15/king-attacks-muslims/ (reporting Representative King's assertion: "It is not enough for [Muslim leaders] to say that they denounce all terrorism, that they denounce all violence . . . . *They have to be much more aggressive*." (alteration in original) (emphasis added)).

284. *See* Robert Faturechi, *Sheriff Baca, GOP Congressman Clash over Baca's Support of Muslim Group*, L.A. TIMES (Mar. 10, 2011, 12:49 PM), http://latimesblogs.latimes.com/lanow/2011/03/sheriff-baca-gop-congressman-clash-over-links-to-muslim-group.html (reporting that a congressman warned a Los Angeles sheriff during a congressional hearing that the Muslim group the sheriff supported was "affiliated with terrorists" and was "'using'" him).

285. Joseph Berger, *Times Square Terror*, N.Y. TIMES, May 30, 2010, at MB9, *available at* http://www.nytimes.com/2010/05/30/nyregion/30world.html?_r=1&ref=timessquarebombattemptmay12010.

286. A.G. Sulzberger & William K. Rashbaum, *Guilty Plea Made in Plot to Bomb New York Subway*, N.Y. TIMES, Feb. 23, 2010, at A1, *available at* http://www.nytimes.com/2010/02/23/nyregion/23terror.html.

287. Colin Miner et al., *F.B.I. Says Oregon Suspect Planned 'Grand' Attack*, N.Y. TIMES, Nov. 28, 2010, at A1, *available at* http://www.nytimes.com/2010/11/28/us/28portland.html?scp=2&sq=Mohamed%20Osman%20Mohamed&st=cse; Aaronson, *supra* note 50, at 41 ("The Portland case [of Mohamed Osman Mohamud] has been held up as an example of how FBI stings can make a terrorist where there might have been only an angry loser. 'This is a kid who, it can be reasonably inferred, barely had the capacity to put his shoes on in the morning,' [a former FBI agent] says.").

288. *See, e.g.*, Sheila Musaji, *American Muslims Cooperation with Law Enforcement*, AM. MUSLIM (Jan. 9, 2012), http://theamericanmuslim.org/tam.php/features/articles/american-muslims-cooperation-with-law-enforcement/0018970 ("Muslim communities helped U.S. security officials to prevent nearly 2 out of every 5 Al-Qaeda plots threatening the United States since 9/11.").

was the first to report to police the suspicious smoke coming out of the car in Times Square where Faisal Shahzad planted his bomb.[289] In the case of Mohamed Osman Mohamud, Mohamud's father personally contacted the local FBI office expressing concern over his son's deteriorating mental health and obsession with violent extremist activity.[290] Not only was Mohamud's father a Muslim proactively cooperating with law enforcement,[291] he risked his son's liberty to ensure the safety of his fellow Americans.[292] The actions of these Muslim men potentially saved the lives of thousands of people.[293] Such cases highlight that the American Muslim community is like any other: composed of criminals and law-abiding citizens. The latter should not be collectively punished for the bad deeds of the former based on false stereotypes of Muslims as the "terrorist other."

For over ten years, mosques and Muslim civic organizations across the country have issued numerous press releases and decrees denouncing terrorism and rejecting any claims that Islam condones terrorism or the killing of innocent civilians.[294] Despite their unequivocal rejection of terrorism in the

289. Alexandra Frean, *Car Bomb Found in the Heart of New York; Street Sellers Raise Alarm After Seeing Smoke Pouring from Vehicle*, TIMES (London), May 3, 2010; Zaid Jilani, *Media Ignore the Fact that Man Who Alerted Police to Failed Times Square Bombing Is a Muslim Immigrant*, THINKPROGRESS (May 5, 2010, 10:47 AM), http://thinkprogress.org/security/2010/05/05/95219/senagalese-muslim-vendor/.

290. Nina Shapiro, *Mohamed Osman Mohamud Was Turned in by His Parents, Neighbor Says*, SEATTLE WKLY. (Nov. 29, 2010, 3:35 PM), http://blogs.seattleweekly.com/dailyweekly/2010/11/mohamed_osman_mohamud_was_turn.php.

291. *E.g.*, Zaid Jilani, *Suspected Oregon Terror Act yet Another Plot Foiled Because of Intelligence Provided by a Muslim*, THINKPROGRESS (Nov. 29, 2010, 10:00 AM), http://thinkprogress.org/politics/2010/11/29/132303/oregon-mosque-teenage-terrorism/ ("[T]he FBI only began tracking Mohamud thanks to a tip from his Muslim father.").

292. *See id.*

293. *See generally Congressman Launching Probe into Local Muslim Radicalization*, L.A. TIMES (Jan. 16, 2011), http://articles.latimes.com/2011/jan/16/nation/la-na-american-muslims-20110116 (reporting that Representative Keith Ellison "offered to volunteer himself and other witnesses as proof that several terrorist plots—including those in Times Square and in Virginia—were initially brought to the attention of federal law enforcement by Muslims"). Similarly, Sami Osmakac was arrested in Florida following a tip from local Muslims. *MPAC Commends Tampa, FL, Muslims Who Helped to Prevent Planned Attack*, MUSLIM PUB. AFFAIRS COUNCIL (Jan. 9, 2012), http://www.mpac.org/programs/hate-crime-prevention/commends-fl-muslims.php.

294. *See, e.g.*, Khalid Hasan, *Major US Islamic Group Denounces Terrorism*, DAILY TIMES (May 1, 2006), http://www.dailytimes.com.pk/default.asp?page=2006\05\01\story_1-5-2006_pg7_42; *Muslim Group Denounces Terror Attacks, Harassment*, CNN (Sept. 17, 2001), http://articles.cnn.com/2001-09-17/us/gen.hate.crimes_1_american-muslims-arab-american-muslim-group?_s=PM:US; Romesh Ratnesar, *The Myth of Homegrown Islamic Terrorism*, TIME (Jan. 24, 2011), http://www.time.com/time/world/article/0,8599,2044047,00.html (reporting that violent extremism by U.S. Muslims has not increased and that

name of Islam, segments of the American public and the government continue to suspect Muslims en masse as part of the problem.[295] Ironically, individual accountability and responsibility are core American values that set us apart from other societies where guilt by association is the norm. Thus, the stereotyping arising from essentialist definitions of homegrown terrorism should be cause for concern for all Americans. Holding individuals accountable for the acts of others within their religious or other identity group is an affront to fundamental American principles that protect all of us from undue government interference and irrational bigotry.

B. *The Flawed New York Police Department Counter Radicalization Report*

Nowhere is the misguided homegrown terrorism policy more glaring than in the deeply flawed, but highly influential, NYPD report on counter radicalization. The report unabashedly equates Muslim religiosity with radicalization toward terrorism. The report states: "In the example of the homegrown threat, local residents or citizens gradually adopt an extremist religious/political ideology hostile to the West."[296] The report goes on to say, "Radicalization in the West often starts with individuals who are frustrated with their lives or with the politics of their home governments,"[297] and "Muslims in the U.S. are more resistant, but not immune to the radical message [of Salafi Islam]."[298]

The NYPD report draws broad and faulty conclusions based on a few case studies and encourages policing activity on the basis of religious conduct engaged by millions of Muslims.[299] For instance, "typical signatures" of homegrown terrorism include "giving up cigarettes, drinking, gambling and urban hip-hop gangster clothes," "wearing traditional Islamic clothing, growing a beard," and "becoming involved in social activism and community issues."[300] The report thus correlates religiosity with violence, further reinforcing the false stereotype of Muslims as terrorists. In fact, hundreds of millions of Muslims

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American Muslims "remain more moderate, diverse and integrated than the Muslim populations in any other Western society").

295. *See*, *e.g.*, Morgan Chesky, *Radio Ad Refuses Service to Obama Supporters, Muslims*, KVUE.COM (Oct. 27, 2011, 5:31 PM), http://www.kvue.com/news/Radio-ad-refuses-service-to-Obama-supporters-Muslims-132748178.html (reporting that a Texas man's radio advertisement expressly refused service to Muslims, stating "[t]he fact is if you are a devout Muslim then you cannot be a true American").

296. SILBER & BHATT, *supra* note 34, at 16.

297. *Id.*

298. *Id.* at 8.

299. *See id.* at 23-56.

300. *Id.* at 33.

worldwide are devout followers of their faith and reject terrorism and violence in general.[301]

While many Muslim terrorists are motivated by political objectives, the NYPD report effectively recasts the religion of Islam as a political movement, thereby legitimizing harsh investigative and prosecutorial techniques otherwise unconstrained by anti-profiling and anti-discrimination policies.[302] The focus on religious beliefs rather than indicia of terrorism causes law enforcement and the public to misinterpret mundane Islamic practices as leading indicators of terrorist inclinations.

The NYPD report's significance lies not only in its inaccurate content, but that it has become a template for other law enforcement "counter radicalization" campaigns.[303] As a consequence, the report serves as a baseline for many federal agencies struggling to develop a cohesive and comprehensive strategy to counter "homegrown terrorism," which has become acceptably restricted to terrorism committed only by Muslims.[304]

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301. *See* ABU DHABI GALLUP CTR., MUSLIM AMERICANS: FAITH, FREEDOM, AND THE FUTURE 30 (2011), *available at* http://www.abudhabigallupcenter.com/File/148772/MAR_Report_ADGC_en-US_071911_sa_LR_web.pdf (showing poll in which eighty-nine percent of Muslim Americans reject violent individual attacks on civilians, compared with seventy-one percent of Protestant, seventy-one percent of Catholic, seventy-five percent of Jewish, seventy-nine percent of Mormon, and seventy-six percent of atheist/agnostic Americans); FORUM ON RELIGION & PUB. LIFE, PEW RESEARCH CTR., THE FUTURE OF THE GLOBAL MUSLIM POPULATION 7 (2011), *available at* features.pewforum.org/FutureGlobalMuslimPopulation-WebPDF.pdf (noting that there are nearly 1.6 billion Muslims worldwide in 2010).

302. There is no federal law prohibiting racial profiling within the law enforcement context. *See* U.S. DEP'T OF HOMELAND SEC., THE DEPARTMENT OF HOMELAND SECURITY'S COMMITMENT TO RACE NEUTRALITY IN LAW ENFORCEMENT ACTIVITIES 1 (2004), *available at* http://www.dhs.gov/xlibrary/assets/CRCL_MemoCommitmentRaceNeutrality_June04.pdf (citing CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES 9 (2003), *available at* http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf); *see also* Sahar F. Aziz, *From the Oppressed to the Terrorist: Muslim American Women Caught in the Crosshairs of Intersectionality*, 8 HASTINGS RACE & POVERTY L.J. (forthcoming 2012) (manuscript at 10), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1981777.

303. *See* Timothy Connors, *Putting the "L" into Intelligence-Led Policing: How Police Leaders Can Leverage Intelligence Capability*, 22 J. INTELLIGENCE & COUNTERINTELLIGENCE 237, 237 (2009) ("The [NYPD Radicalization Report] provides tangible evidence that the police agencies of major cities and states are effectively building their ability to collect and analyze information.").

304. *See* Letter from Representative Peter T. King to Representative Bennie G. Thompson, *supra* note 266; *see also* David A. Fahrenthold & Michelle Boorstein, *Rep. Peter King's Muslim Hearing: Plenty of Drama, Less Substance*, WASH. POST (Mar. 10, 2011), http://www.washingtonpost.com/politics/peter-king-tempers-rhetoric-on-muslims-as-congressional-hearing-gets-under-way/2011/03/10/ABhV3BQ_story.html.

C. *The Post-9/11 Un-American Activities Hearings*

The NYPD report contributed to a controversial series of congressional hearings scrutinizing Muslim Americans as collectively suspect of terrorist inclinations. In the spring of 2011, Representative Peter King, Chairman of the House Committee on Homeland Security, initiated a series of hearings on homegrown terrorism.[305] He stated his point clearly and unequivocally: American Muslims have not done enough to cooperate with law enforcement in countering terrorism.[306] When criticized for limiting his focus on homegrown terrorism to Muslims, Representative King insisted that expanding the focus to all acts of terrorism in the United States would be unproductive; instead, the primary threat lays within the American Muslim communities.[307]

An integral part of King's strategy to vilify Muslims is to accuse Muslim imams of obstructing law enforcement counterterrorism efforts[308]—notwithstanding their participation in numerous community outreach meetings over the past ten years.[309] According to Representative King, the imams were not doing enough to identify and report terrorism within their congregations to law enforcement. Indeed, he even went so far as to accuse mosques across the country of harboring terrorists.[310]

305. *See King Opens Committee on Homeland Security Hearing on Radicalization*, CONGRESSMAN PETE KING (Mar. 10, 2011), http://www.house.gov/apps/list/hearing/ny03_king/openshomelandhearingonrad.html.

306. *See id.* ("Muslim community leaders (and) religious leaders must play a more visible role in discrediting and providing alternatives to violent Islamist ideology." (internal quotation marks omitted)).

307. *See* Letter from Representative Peter T. King to Representative Bennie G. Thompson, *supra* note 266 ("[T]he homeland has become a major front in the war with Islamic terrorism and it is our responsibility to fully examine this significant change in al Qaeda tactics and strategy. To include other groups such as neo-Nazis and extreme environmentalists in this hearing would be extraneous and diffuse its efficacy. . . . [T]he Committee will continue to examine the threat of Islamic radicalization, and I will not allow political correctness to obscure a real and dangerous threat to the safety and security of the citizens of the United States."); *King Opens Committee on Homeland Security Hearing on Radicalization*, *supra* note 305 ("There is no equivalency of threat between al Qaeda and neo-Nazis, environmental extremists or other isolated madmen.").

308. *See* PATEL, *supra* note 165, at 23 ("To date, despite concerns about the legitimacy of the government's counterterrorism efforts (and contrary to the unsubstantiated claims made by Rep. Peter King in justifying his controversial radicalization hearings), American Muslims have an exemplary record of cooperating with law enforcement agencies on counterterrorism efforts." (endnote omitted)).

309. *See* discussion *supra* Part I.C.

310. *See* Ramos, *supra* note 30 (reporting that Representative King has repeatedly asserted "80 percent of U.S. mosques are controlled by radicals and could be harboring terrorists").

Representative King's homegrown terrorism campaign, appropriately termed "McCarthyite" and a "witchhunt" by some,[311] has two fundamental flaws. First, allegations of a lack of cooperation by Muslim Americans are directly contradicted by the facts.[312] Second, the demand for religious leaders to serve as deputies of the FBI or state and local law enforcement sets a dangerous precedent that threatens America's core principle of the separation of church and state.

Since 9/11, there have been numerous meetings held between law enforcement and Muslim communities across the country.[313] Imams from the local communities routinely attend these meetings.[314] Notwithstanding the serious structural flaws with the outreach campaigns discussed *supra* Part I, many Muslim leaders attend in hopes of protecting their communities from collective punishment.[315] As a Senior Policy Advisor in the Office for Civil Rights and Civil Liberties at the Department of Homeland Security, the author of this article personally witnessed the genuine concern expressed by Muslims regarding the sabotage of their religion by violent extremists who misinterpret Islam to commit political violence.

311. *See, e.g.*, Eugene Robinson, *Peter King's Modern-Day Witch Hunt*, WASH. POST, (Mar. 11, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/03/10/AR2011031005934.html.

312. *See* KURZMAN, *supra* note 114, at 5 (reporting that of 120 disrupted plots, forty-eight involved tips from the Muslim American community); Dina Temple-Raston, *Imam Arrests Show Shift in Muslim Outreach Effort*, NPR (July 19, 2011), http://www.npr.org/2011/07/19/137767710/imam-arrests-show-shift-in-muslim-outreach-effort (quoting the U.S. Attorney for the Southern District of Florida, Wifredo Ferrer, as stating "[w]e have found that Muslim and Arab community members have been really helpful in informing us and disrupting plots against the United States").

313. *See, e.g.*, PATEL, *supra* note 165, at 26 ("[E]ven the best-coordinated outreach efforts are unlikely to succeed when paired with an approach to radicalization that emphasizes intelligence-gathering about religious behaviors and practices.").

314. *See, e.g.*, Temple-Raston, *supra* note 312 ("They already had a relationship with leaders in the Muslim community. They had already attended prayers in some of their mosques. They'd had dinners to meet mosque members and U.S. Attorney's Office employees.").

315. *See, e.g.*, Jon Jordan, *CAIR Says FBI Cutting Ties Hurts Efforts in Local Communities*, NEWSON6.COM (Mar. 26, 2011, 6:01 PM), http://www.newson6.com/Global/story.asp?S=14328429 (reporting that the director of the Council on American-Islamic Relations' Oklahoma chapter said the FBI's decision to cut ties with the organization is hurting the community); William Yardley & Jessie McKinley, *Terror Cases Strain Ties with Some Who Can Help*, N.Y. TIMES, Dec. 1, 2010, at A15, http://www.nytimes.com/2010/12/01/us/01trust.html.

Religious leaders continue to condemn terrorism and communicate their interest in keeping safe all Americans.[316] Indeed, the largest Muslim organizations in America have explicitly and consistently condemned terrorism committed in the name of Islam, and usually do so within hours of a reported attempted terrorist plot.[317] As evinced by the thousands of press releases, reports, public statements, and commentaries produced since 9/11,[318] there is no reasonable basis for concluding that Muslim leaders and organizations are not interested in counterterrorism and ensuring the safety of all Americans. Thus, Representative King's broad conclusion that Muslim imams do not cooperate with the government ought to be recognized for what it really is: inflammatory political posturing.

The silver lining in the homegrown terrorism debate is the broad coalition of groups that have rejected King's presumptions of collective Muslim culpability. Christian, Jewish, and civil rights groups representing a diversity of demographics challenged the merits of limiting "homegrown terrorism" to terrorism committed only by Muslims.[319]

316. *See, e.g.*, Press Release, Religions for Peace, World Summit of Religious Leaders, Baku (Apr. 29, 2010), http://religionsforpeace.org/news/press/press-release-world-summit.html (reporting that senior religious leaders from Buddhist, Christian, Hindu, Jewish and Muslim faiths jointly "condemned terrorism and any attempts to use religion for destructive purposes").

317. *See, e.g.*, COUNCIL ON AM.-ISLAMIC RELATIONS, PERSISTENT AND CONSISTENT CONDEMNATION OF TERRORISM (2011), *available at* http://www.cair.com/Portals/0/CAIR%20on%20Terrorism.pdf (listing eighty-four press releases in which CAIR specifically condemned terrorism from 1994 to 2008); COUNCIL ON AM.-ISLAMIC RELATIONS, RESPONSE TO SEPTEMBER 11, 2001 ATTACKS (updated 2007), *available at* http://www.cair.com/Portals/0/pdf/September_11_statements.pdf (compiling in sixty-eight pages a sampling of all condemnations of 9/11 attacks by Muslims from around the world, including from CAIR and other American Muslim organizations); COUNCIL ON AMERICAN-ISLAMIC RELATIONS, ISLAMIC STATEMENTS AGAINST TERRORISM: RESPONSE TO JULY 7TH 2005 LONDON BOMBINGS (2005), *available at* http://www.cair.com/Portals/0/pdf/Condemnation_of_London_Bombings.pdf; *see also CAIR: Muslims Condemn Hate Vandalism of Md. Synagogue*, COUNCIL ON AM.-ISLAMIC RELATIONS (July 28, 2010, 11:44 AM), http://www.cair.com/ArticleDetails.aspx?mid1=777&&ArticleID=26533&&name=n&&currPage=4; *CAIR Condemns Plot to Kill Police, Attacks on Subway*, COUNCIL ON AM.-ISLAMIC RELATIONS (Mar. 29, 2010, 12:26 PM), http://www.cair.com/ArticleDetails.aspx?mid1=777&&ArticleID=26336&&name=n&&currPage=8; *MPAC Condemns 'Horrific Outburst of Violence' in Fort Hood, TX*, MUSLIM PUB. AFFAIRS COUNCIL (Nov. 5, 2009), http://www.mpac.org/press/press-releases/mpac-condemns-horrific-outburst-of-violence-in-forth-hood-tx.php; *U.S. Muslims Condemn Attack at Fort Hood*, COUNCIL ON AM.-ISLAMIC RELATIONS (Nov. 5, 2009, 6:15 PM), http://www.cair.com/ArticleDetails.aspx?mid1=777&&ArticleID=26126&&name=n&&currPage=13.

318. *See* sources cited *supra* note 317; *see also CAIR's Anti-Terrorism Campaigns*, COUNCIL ON AM.-ISLAMIC RELATIONS, http://www.cair.com/AmericanMuslims/AntiTerrorism.aspx (last visited Jan. 10, 2012).

319. *See* Press Release, Am. Civil Liberties Union, *supra* note 165; Press Release,

Unfortunately, insufficient attention was paid to the importance of allowing Muslims, and Americans, in general, to express political dissent openly despite the unpopularity of their views.[320] Instead, many Muslim groups and their allies sought to reassure the public of Muslim loyalty and their status as a "model minority."[321] Rather than focusing on the right of all Americans, including Muslims, to be radical within the limits of the law, some Muslim groups reacted with undue restraint by adopting Representative King's narrative to shape Muslim political beliefs and religious practices in accordance with a citizenry overly docile toward its government.[322] Indeed, the homegrown terrorism hearings were a missed opportunity to refocus the issue on the fundamental American right to hold unpopular or controversial views, rather than prove the innocence of a suspected religious minority.

D. *Deputizing Muslim Imams to Do the Government's Bidding*

Equally disconcerting, Representative King demanded that religious leaders perform the work of law enforcement—a misguided policy that sets a dangerous precedent of undermining the independence of religion from the state.[323] It is reasonable to ask citizens to report crimes when they see them, as this keeps all Americans collectively safer. The statistics indicate, moreover, that Muslims are doing precisely that.[324]

Kristen Ford, Faith in Public Life, 80+ Long Island Faith Leaders Call on Rep. Peter King to Cancel Muslim Hearings (Feb. 17, 2011), http://www.faithinpubliclife.org/newsroom/press/80_long_island_faith_leaders_c/.

320. *See, e.g.*, John Bentley, *Muslim Leader in King's District Issues Warning*, CBS NEWS (Mar. 10, 2011, 2:13 PM), http://www.cbsnews.com/8301-500803_162-20041716-500803.html (reporting that a Muslim leader warned Representative King that the radicalization hearings would endanger U.S. troops and citizens abroad, without mentioning Muslims' own civil and constitutional rights).

321. *Cf.* Miranda Oshige McGowan & James Lindgren, *Testing the "Model Minority Myth,"* 100 NW. U. L. REV. 331 (2006).

322. *See* Bentley, *supra* note 320; Temple-Raston, *supra* note 312 (reporting that a Florida Muslim community did not become outraged or hold demonstrations when the FBI arrested two of its imams, but instead handled the matter in a way that "is being lauded as a model for the way law enforcement and communities should work together").

323. *See* Zornick, *supra* note 283.

324. *See, e.g.*, KURZMAN, *supra* note 114, at 5; Zaid Jilani, *As King Targets Muslims, There Have Been Almost Twice as Many Plots Since 9/11 from Non-Muslim Terrorists*, THINKPROGRESS (Mar. 9, 2011, 6:05 PM), http://thinkprogress.org/security/2011/03/09/149537/king-muslims-plots-terrorists/ ("[N]early 4 in 10 Al-Qaida related plots in the United States have been broken up thanks to intelligence provided by the Muslim community themselves and 70 percent of recent terror plots in the United States have been foiled by help from Muslim Americans.").

However, King and his allies are calling for much more than merely reporting unlawful activity about which one has knowledge. Representative King seeks to, in effect, deputize religious leaders to perform the work of the FBI and police.[325] He appears to have no qualms requiring religious leaders to spy on their congregants and affirmatively search for illegal activity absent knowledge of specific illegal acts.[326] Putting religious leaders in such a predicament is not only arguably unconstitutional[327] and contrary to most clergy-parishioner privilege doctrines,[328] but it also breaches the sanctimonious trust between the spiritual leader and his or her congregants.

If this problematic practice becomes the norm, it will eventually become acceptable for religious leaders' loyalty to lie more with the state than the deity they worship. Thus, the erosion of the complete separation[329] between the state's governance role and religion's spiritual role has implications much broader than the constitutional rights of Muslims. It risks transforming the American way of life for the worse—the very thing we sought to stop the 9/11 terrorists from accomplishing.

E. *From Racial Subtexts to Palpable Discrimination*

Finally, the ongoing discourse on homegrown terrorism has facilitated palpable discrimination against Muslims in various contexts.[330] Words matter

325. *See* Zornick, *supra* note 283 (reporting Representative King's opinions on what Muslim leaders must do).

326. *Id.*

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

328. *See, e.g.*, N.Y. C.P.L.R. 4505 (McKinney 2007) ("Unless the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion . . . shall not be allowed [to] disclose a confession or confidence made to him in his professional character as spiritual advisor."); *see also Clergy Privilege*, ELEC. PRIVACY INFO. CTR., http://epic.org/privacy/privileges/#Clergy (last visited Jan. 20, 2012) ("Most states, if not all, have statutes protecting the conversations between a clergy member and the communicant.").

329. Few American principles are more renowned than Thomas Jefferson's vision of a "wall of separation between Church & State" created by the First Amendment's establishment clause. Letter from Thomas Jefferson to the Danbury Baptist Ass'n (Jan. 1, 1802), *available at* http://www.loc.gov/loc/lcib/9806/danpre.html.

330. *See, e.g.*, Alex Dobuzinskis, *Southwest Apologizes to Muslim Booted off Plane*, REUTERS (Mar. 16, 2011, 7:13 PM), http://www.reuters.com/article/2011/03/16/us-plane-apology-idUSTRE72F9NN20110316?feedType=RSS&feedName=domesticNews (reporting that a Muslim woman was kicked off an airplane because a crew member mistook her as saying "It's a go" to someone on her cell phone when she in fact said "I've got to go"); *Hate Map*, S. POVERTY LAW CTR., http://www.splcenter.org/get-informed/hate-map (last visited Jan. 10, 2012) (detailing the number of organizations in the United States that are dedicated to anti-Muslim activities); Jerry Markon, *Justice Department Sues on Behalf of Muslim*

because words influence behavior. The more American elected officials focus on Muslims in the context of suspected terrorists, the more the public knows Muslims only in the context of terrorism. As a result, "a significant minority of Americans doubt U.S. Muslims' loyalty to their country."[331] Muslims in America are thus no longer perceived as ordinary citizens with ordinary lives, but rather as terrorists in waiting, threatening the lives of their neighbors. The bigoted rhetoric exemplified by individuals like Representative King only solidifies stereotypes of the "terrorist other," whereby Muslims are inherently violent, disloyal, and forever foreign regardless of their American citizenship or American birthplace.[332] Even Muslims who have gone to great lengths to assimilate into American culture by changing their names to Americanized versions are monitored by law enforcement as potential terrorists.[333] Indeed, this long-practiced "rite of assimilation" is now seen "as a possible red flag in the hunt for terrorists."[334]

Numerous reports over the past ten years illustrate how such stereotypes directly contribute to tangible discrimination in various contexts. In 2010, for example, the American-Arab Anti-Discrimination Committee reported a significant rise in complaints of discrimination against Muslims.[335] The increasing anti-Muslim and anti-Arab rhetoric—presumably attributable to backlash from the Park 51 Community Center controversy—produced the highest number of discrimination complaints since 2003.[336] Nearly fifty percent of the complaints involved selective immigration enforcement or

Teacher, Triggering Debate, WASH. POST (Mar. 22, 2011), http://www.washingtonpost.com/politics/justice-department-sues-on-behalf-of-muslim-teacher-triggering-debate/2011/03/16/ABfSPtEB_story.html?hpid=z5 (reporting the case of an Illinois school district that refused to grant a Muslim woman time off to make pilgrimage to Mecca).

331. *See* ABU DHABI GALLUP CTR., *supra* note 301, at 35 (showing that roughly forty percent of Catholic, Protestant, and Mormon Americans polled believed Muslim Americans are not loyal to the United States); *see also* Ahmed Rehab, *Let's Face It: It's the Radical Right, Not Islam, That Is the Greatest Threat to the American Way*, HUFFINGTON POST (Dec. 16, 2011 1:05 PM), http://www.huffingtonpost.com/ahmed-rehab/lets-face-it-its-the-radi_b_1144842.html (commenting that Islamophobes share the following sentiment toward Muslim leaders and organizations: "'[W]e hate you because you are terror-linked, but when you're not, we need you to be terror-linked so we can hate you'").

332. *See* Aziz, *supra* note 16, at 33-35.

333. *NYPD Keeps Files on Muslims Who Change Their Names*, WALL ST. J. (Oct. 26, 2011, 7:00 PM), http://online.wsj.com/article/AP99772be873ea48c2a8c113e55c74dfcc.html ("Monitoring name changes illustrates how the threat of terrorism now casts suspicion over what historically has been part of America's story.").

334. *Id.*

335. *See* AM.-ARAB ANTI-DISCRIMINATION COMM., THE 2010 ADC LEGAL REPORT: LEGAL ADVOCACY & POLICY REVIEW 2 (2011), *available at* http://adc.org/fileadmin/ADC/Pdfs/2010_ADC_Legal_Report.pdf.

336. *Id.*

employment discrimination, ranging from individuals being called offensive ethnic slurs to unfair demotions or dismissals in the employment context.[337]

Further, the combination of negative images of Arabs and Muslims in the media[338] with the government's racial profiling and preventive practices has deeply entrenched invidious stereotypes of Muslims, Arabs, and South Asians in the workplace.[339] As recently as February 2011, the Equal Employment Opportunity Commission noted the significant increase of discrimination against Muslims, notwithstanding the passage of ten years since 9/11.[340] Instances of discrimination include allegations that employers refused to hire Muslim women because they wore headscarves, and in other cases, employees were subjected to offensive, ethnic slurs by coworkers or supervisors.[341]

This discrimination extends beyond the workplace, however. In December 2010 alone, at least three cases of physical attacks on Muslim women were reported.[342] In October 2011, a Christian group passed out anti-Muslim fliers at local high schools.[343] The fliers read, "Muslims become increasingly more aggressive," "[w]e must defend students from being recruited and radicalized into Islam," and "Ayatollah Khomeini had sex with a 4-year-old girl."[344] And in Texas, a radio advertisement for a concealed handgun class included a disclaimer from the instructor refusing to teach any "socialist liberal," "non-Christian Arab or Muslim," as well as anyone who voted for President Barack Obama.[345]

337. *Id.* at 2-3.

338. *But see All-American Muslim* (TLC television broadcast series, premiered Nov. 13, 2011), the first reality show depicting Muslims as ordinary people with diverse beliefs and lifestyles. Unfortunately, TLC has received threats demanding that it stop airing the show because it misinforms viewers about the serious threat regarding the terrorist inclinations of all Muslims. Sheila Musaji, *American Companies Accused of Joining the All-American Anti-Muslim Bandwagon*, AM. MUSLIM (Dec. 20, 2011), http://theamericanmuslim.org/tam.php/features/articles/all-american-muslim/0018896.

339. *See* notes 335-337 and accompanying text.

340. *See Questions and Answers About the Workplace Rights of Muslims, Arabs, South Asians, and Sikhs Under the Equal Employment Opportunity Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/publications/backlash-employee.cfm (last visited Jan. 10, 2012).

341. *Id.*

342. *See* Barry Leibowitz, *Anti-Muslim Hate Crime? Woman Says She Was Followed by Car, Pepper-Sprayed Near Ohio Mosque*, CBS NEWS (Dec. 21, 2010, 4:05 PM), http://www.cbsnews.com/8301-504083_162-20026330-504083.html (reporting that a Muslim woman was "attacked with pepper spray outside an Ohio mosque," while "the attacker told her to leave the country"); *see also* Aziz, *supra* note 302 (manuscript at 45-48).

343. *Anti-Muslim Fliers at Schools Spark Debate*, 10NEWS.COM (Oct. 6, 2011, 6:32 PM), http://www.10news.com/news/29413023/detail.html.

344. *Id.* (internal quotation marks omitted).

345. Chesky, *supra* note 295 (internal quotation marks omitted).

Anti-Muslim bias is no longer an arguably reflexive response to a traumatic terrorist attack against America. Nor is it merely short-term backlash. It has mutated into a more insidious and permanent fixture in American race politics where Muslims are arguably the most disfavored minority in America.[346] The bias can no longer be attributed to random acts by individuals, but must be viewed as part of the broader structural and institutional inequities facing racial and religious minorities. To be sure, much of this can be attributed to the government's preventive and selective counterterrorism model.

IV. CONCLUSION

Ten years after 9/11, the U.S. government's preventive counterterrorism strategy has cost billions of taxpayer dollars and diverted thousands of law enforcement personnel from preventing nonterrorism related crimes, while failing to prevent some of the most serious terrorist attacks committed by Muslims and non-Muslims alike.[347] Rather than partaking in responsible governance and reassessing its strategies, the government employs fear-based narratives to persuade the public to continue pouring billions into the national security system.

While countering terrorism is no easy feat, it is remarkable that the government was unable to prevent some major attempted attacks after having invested so many resources into counterterrorism, often at the expense of civil liberties of all Americans. Despite the creation of fusion spy centers nationwide, the relaxation of surveillance laws, the use of technology to peer into nearly every aspect of American life, and the reallocation of thousands of agents to countering terrorism, the government has yet to show results proportionate to the vested resources.[348] In the apt words of David Cole and Jules Lobel, we have become both less safe and less free.[349]

346. *See* Jaihyun Park et al., *Implicit Attitudes Toward Arab-Muslims and the Moderating Effects of Social Information*, 29 BASIC & APPLIED SOC. PSYCHOL. 35 (2007) (noting implicit bias among Americans in favor of white- and black-sounding names over Arab- and Muslim-sounding names).

347. The FBI reportedly spends nearly $3.3 billion annually on counterterrorism alone. Aaronson, *supra* note 50, at 32; *see also Smarter National Security Spending*, BILL OF RIGHTS DEF. COMM. 1, http://www.bordc.org/lobbyday/budget.pdf (last visited Jan. 10, 2012) (identifying at least $20 billion in potential federal agency spending cuts for national security during the fiscal year of 2010 to 2011).

348. *See* Dana Priest & William M. Arkin, *Top Secret America*, WASH. POST, http://projects.washingtonpost.com/top-secret-america/ (last updated Dec. 20, 2010).

349. *See* COLE & LOBEL, *supra* note 2.

What these strategies accomplish quite well, however, is the stigmatization of more than 2.5 million Muslim Americans[350] because of the illegal acts of a handful of Muslims—many of whom are foreign and have no ties whatsoever to the United States or its law-abiding Muslim communities. Many American Muslims feel they live a second-class existence because their houses of worship are under surveillance;[351] they believe their Internet activity is more likely to be under intensified scrutiny for any signs of radical dissent;[352] and their religious practices are under the microscope by purported terrorist experts who cannot tell the difference between orthodox Islamic practices and bona fide terrorist activity.[353] Muslim women's religious headwear is perceived as an illicit Shariahization of America.[354] That American Muslims are so distrusted to warrant a hearing focused solely on questioning their loyalty harkens back to darker days when the House Un-American Activities Committee questioned the loyalty of persons based on their political ideology.[355]

Predictably, what started out as a focus on vulnerable religious and racial minorities has now spread to a broader segment of Americans. Laws prohibiting material support to terrorism—initially applied only to Muslim individuals and institutions—are increasingly enforced against individuals and institutions engaged in humanitarian aid, peacebuilding, and human rights advocacy.[356] Non-Muslim activist groups who have been engaged in legitimate advocacy for decades are now targeted for investigation and potential prosecution pursuant to material support laws.[357] A combination of public

350. *See* Cathy Lynn Grossman, *Number of U.S. Muslims to Double*, USA TODAY (Jan. 27 2011, 2:29 PM), http://www.usatoday.com/news/religion/2011-01-27-1Amuslim27_ST_N.htm (reporting that the American Muslim population is currently 2.6 million).

351. *See* John Doyle et al., *Anti-Terror Program 'Kept New York Safe,' NYPD Says*, N.Y. DAILY NEWS (Aug. 24, 2011), http://articles.nydailynews.com/2011-08-24/local/29943085_1_terror-plots-cia-nypd-s-intelligence-unit. For example, after news media reports exposed the New York City Police Department's pervasive spying on mosques, one New York City mosque-goer responded by stating "[f]rom now on, I can't feel safe in my own mosque because someone might be sitting behind me spying." *Id.*

352. *See* Dawinder S. Sidhu, *The Chilling Effect of Government Surveillance Programs on the Use of the Internet by Muslim-Americans*, 7 U. MD. L.J. RACE RELIGION GENDER & CLASS 375, 376 (2007).

353. *See, e.g.*, Stalcup & Craze, *supra* note 274; Ackerman, *supra* note 280.

354. Aziz, *supra* note 302 (manuscript at 2-3).

355. *See, e.g.*, Alan I. Bigel, *The First Amendment and National Security: The Court Responds to Governmental Harassment of Alleged Communist Sympathizers*, 19 OHIO N.U. L. REV. 885, 889 (1993) ("The authorizing resolution to the House Un-American Activities Committee . . . conferred far-reaching discretion to investigate alleged un-American activities in the United States.").

356. Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

357. *See FBI Infiltrator of Anti-War Group Exposed as More Activists Face Subpoenas*, CHARITY & SEC. NETWORK (Jan. 18, 2011), http://www.charityandsecurity.org/

apathy regarding civil liberties, pervasive stereotypes of Muslims as terrorists, and government misinformation about the efficacy of counterterrorism policies has facilitated adoption of practices commonly found in police states.[358]

It is long overdue for Americans to reassess the successes and failures of counterterrorism policies over the past ten years. Are we safer or are we just lucky?[359] Has the PATRIOT Act made our government better able to prevent terrorism? Is it time for Americans, as many congressional leaders of both parties have proclaimed, to thoughtfully debate the efficacy of the PATRIOT Act and whether its infringements on the civil liberties of all Americans are warranted?[360] Are we seeking to rationalize our forfeiture of civil liberties by convincing ourselves that our national security policies work, irrespective of the facts on the ground? If we cannot answer these questions based on evidence, rather than fear-based speculation, then we have little to account for the last ten years of significant government expenditure, public anxiety, and civil liberties costs.

To be sure, individuals engaged in illegal acts should be prosecuted regardless of their demographic. However, the cases mentioned in this article raise serious concerns as to whether the religion and ethnicity of individuals, specifically their Muslim faith, is more determinative than suspected unlawful conduct when allocating limited counterterrorism resources.

In light of our nation's checkered civil rights record and ample opportunity to learn from the past, there is simply no excuse for repeating the same mistakes, but with a different vulnerable minority group. Preventing a terrorist attack need not come at the expense of the vilification of a religious minority. Nor should it require sacrificing Americans' most fundamental civil rights and liberties. History has repeatedly shown that it is only a matter of time before such invidious practices spread to other unpopular groups.

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news/FBI_Infiltrator_AntiWar_Group_Exposed_Activists_Subpoenas.

358. *See* Shahid Buttar, *Preventive Detention, at What Cost?*, HUFFINGTON POST (July 13, 2009, 6:32 PM), http://www.huffingtonpost.com/shahid-buttar/preventive-detention-at-w_b_230302.html.

359. *See, e.g.*, Bartosiewicz, *supra* note 67 ("[T]here's little evidence that [these new investigative techniques and powers] make us safer. *On the contrary, in every instance since 9/11 when an actual terrorist attack has been attempted, it failed not because of enhanced law-enforcement initiatives but as a result of the perpetrator's incompetence.* The 2002 'Shoe Bomber,' Richard Reid, was thwarted by an alert stewardess in his attempt to light homemade explosives hidden in his sneakers . . . ; the 2009 'Underwear Bomber,' Umar Farouk Abdulmutallab, failed to ignite the plastic explosives sewn into his underwear . . . ; and the 2010 'Times Square Bomber' Faisal Shahzad's homemade explosive device . . . simply didn't detonate." (emphasis added)).

360. *See, e.g.*, Letter from Senator Rand Paul to Members of the U.S. Senate (Feb. 15, 2011), *available at* http://www.randpaul2010.com/images/Patriot%20Act%20Dear%20Colleague.pdf (expressing opposition to the USA PATRIOT Act).