

SIXTY SHADES OF TERROR PLOTS: LOCATING THE ACTUS REUS AND THE HYPOTHETICAL LINE FOR ENTRAPMENT

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ABSTRACT

Due to the impact on privacy rights, the whistleblower accounts of Edward Snowden, demands for legislation to curb intrusive surveillance, and the impact of potential privacy violations on the evidentiary record in criminal convictions, Congress recently initiated investigations into the use of intelligence agency surveillance in FBI terror suspect investigations. Officials from the national security apparatus testified and advocates maintain that dozens of "terror plots" have been foiled since 9/11, but other experts report that the record does not sub-

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stantiate these numbers. For example, in July 2014, Human Rights Watch brought merited attention to this issue when it produced a report and accused the FBI of entrapping informants in nearly all high-profile terrorism cases, "creat[ing] terrorists out of law-abiding individuals," and targeting American Muslims in the agency's counterterrorism investigations.¹ This Article's scope is concerned with navigating the opposing positions and evaluating the evidentiary precedent substantiating criminally-punishable acts that have been classified as "terror plots" in order to assess whether actual danger from terrorism reasonably comports with emotive societal perceptions regarding terrorism.

I. THE TERROR THREAT MILIEU

The perception of peril from terrorism has enculturated American society and has created standard protocol responses that can beget tragedy. On October 3, 2013, a driver did not halt after officer demand at the Capitol Police security booth on Constitution Avenue in Washington D.C., but instead made a U-turn and Capitol Police and Secret Service officers shot at the driver with semiautomatic pistols.² The driver fled. Officers pursued the reckless driver down Pennsylvania Avenue, fired shots at multiple locations, and eventually killed the driver in her car.³

Police departments generally cannot open fire on vehicles, but as the *New York Times* reported, "[w]ith responsibility for safeguarding two of the country's most significant landmarks, however, the Capitol Police and the Secret Service are particularly attuned to potential terrorist threats."⁴ John Miller, former FBI assistant director and regular CBS commentator for terrorism news, remarked that after the car rammed the barricade at the Capitol Police security booth, the officers might have believed that there was an automobile bomb and thought,

1. ILLUSION OF JUSTICE, COLUMBIA LAW SCHOOL HUMAN RIGHTS INSTITUTE 22, 164 (July 2014), available at http://www.hrw.org/sites/default/files/reports/usterrorism0714_ForUpload_0_0_0.pdf.

2. N.R. Kleinfeld & William Rashbaum, *Possible Clues in Fatal Chase, but No Motive*, N.Y. TIMES (Oct. 4, 2013), http://www.nytimes.com/2013/10/05/nyregion/investigators-search-for-causes-behind-washington-car-chase.html?_r=0.

3. Jake Sherman, John Bresnahan & Mackenzie Weinger, *Car Chase, Gunfire Cause Chaos for Capitol*, POLITICO (Oct. 3, 2013), <http://www.politico.com/story/2013/10/shots-fired-capitol-hill-97808.html>.

4. Kleinfeld & Rashbaum, *supra* note 2 (also noting that Chuck Wexler, executive director of the Police Executive Research Forum, stated that "[t]he people who protect the White House and the people who protect the Capitol are not thinking about your everyday criminal. They are thinking about a terrorist."). Capitol Police Chief Kim Dine stated that "this appears to be an isolated, singular matter with, at this point, no nexus to terrorism." Sherman, Bresnahan & Weinger, *supra* note 3.

"is this a terrorist attack, is there a button under the dashboard . . . [?]"⁵

The driver was Miriam Carey, a 34-year-old dental hygienist from Connecticut, who suffered from postpartum depression.⁶ Carey's infant daughter was present in the automobile when she sped away and led the officers on a car chase.⁷ This heartbreaking event might have been due to an impulse reaction and protocol response that may ultimately be attributable to the common perception about terror threats.⁸ How scrupulously does the actual threat level from terrorism correspond to societal beliefs about the danger from terrorism?

Consider two opposing perceptions. In a 2007 *Los Angeles Times* article, Professors David Cole and Jules Lobel assessed the data provided by the Bush Justice Department and underscored that the Justice Department claimed that there were 261 "terrorism or terrorism-related" convictions between 9/11 and June 2006, but the truth is that there were only two cases of attempted terrorist activity.⁹ Two years later, Professor Cole still criticized the approach of prosecuting individuals without the commission of crimes.¹⁰

Alternatively, the Heritage Foundation announced that in 2007 it became the only organization that began tracking thwarted terrorist

5. *Miriam Carey, identified Capitol Hill car chase driver, was taken for mental-health evaluation*, CBS News (Oct. 5, 2013), http://www.cbsnews.com/8301-201_162-57606111/miriam-carey-identified-capitol-hill-car-chase-driver-was-taken-for-mental-health-evaluation/.

6. Matt Zapotosky, Sari Horwitz & Carol Morello, *Miriam Carey, driver shot near U.S. Capitol, lived with toddler daughter in Stamford, Conn.*, WASH. POST (Oct. 4, 2013), http://www.washingtonpost.com/local/miriam-carey-believed-to-be-driver-shot-near-us-capitol-lived-with-daughter-in-conn/2013/10/04/2794cc24-2ce7-11e3-8ade-a1f23cda135e_story.html.

7. Police officers might have known that the infant was present in the vehicle because the surveillance video displayed officers drawing their weapons on Carey while the car was stopped in front of the White House barricade, but Carey was still shot and killed after she sped away and led the officers on a car chase. David Montgomery, "We want to know: Why? What happened?" *So many questions, so much we still don't know about the case of the woman shot to death by the Secret Service and the U.S. Capitol Police on Oct. 3, 2013, after a car chase from the White House to Capitol Hill. Her 13-month-old daughter survived in a car seat*, WASH. POST (Nov. 26, 2014), <http://www.washingtonpost.com/sf/style/2014/11/26/how-miriam-careys-u-turn-at-a-white-house-checkpoint-led-to-her-death/> (stating that the daughter was in the car seat and the video displayed "the two-door black Infiniti surrounded by Secret Service officers with guns drawn").

8. The Secret Service had no knowledge of Carey before this action and she made no threats against U.S. government officials that would have placed authorities on notice. CBS NEWS, *supra* note 5 (noting that there is no evidence that Carey "made any kind of threat against the president," had not been "arrested or charged with a crime," and "[h]er name was not in the Secret Service's system").

9. David Cole & Jules Lobel, *Are We Safer?*, L.A. TIMES (Nov. 18, 2007), <http://www.latimes.com/la-op-cole18nov18-story.html>.

10. David Cole, *Out of the Shadows: Preventive Detention. Suspected Terrorists and War*, 97 CAL. L. REV. 693, 722-23 (2009).

attacks against the United States.¹¹ Writing articles with titles such as “60 Terrorist Plots Since 9/11,”¹² Heritage Foundation researchers counted 39 post-9/11 plots foiled on May 20, 2011,¹³ 40 plots foiled on September 7, 2011,¹⁴ 50 plots foiled on April 25, 2012,¹⁵ and 60 plots foiled on July 22, 2013.¹⁶ The titles should not be interpreted to impart that there has been a steeply appreciating number of events in more recent years because some events were later reclassified and inserted into previous years¹⁷ and many of the “plots” were intricate FBI sting operations that began in later years.¹⁸

Debate over the threat perceptions led to political confrontation in Congress because potential law enforcement practices can infringe privacy rights.¹⁹ Federal and state legislation was proposed to more adequately control surveillance operations²⁰ and criminal cases and

11. James Jay Carafano & Jessica Zuckerman, *40 Terror Plots Foiled Since 9/11: Combating Complacency in the Long War on Terror*, HERITAGE FOUNDATION (Sept. 7, 2011), <http://www.heritage.org/research/reports/2011/09/40-terror-plots-foiled-since-9-11-combating-complacency-in-the-long-war-on-terror>.

12. Jessica Zuckerman, Steven P. Bucci & James Jay Carafano, *60 Terrorist Plots Since 9/11: Continued Lessons in Domestic Counterterrorism*, HERITAGE FOUNDATION (July 22, 2013), <http://www.heritage.org/research/reports/2013/07/60-terrorist-plots-since-911-continued-lessons-in-domestic-counterterrorism>.

13. Jena Baker McNeill, James Jay Carafano & Jessica Zuckerman, *39 Terror Plots Foiled Since 9/11: Examining Counterterrorism's Success Stories*, HERITAGE FOUNDATION (May 20, 2011), <http://www.heritage.org/research/reports/2011/05/39-terror-plots-foiled-since-911-examining-counterterrorisms-success-stories>.

14. Carafano & Zuckerman, *supra* note 11.

15. James Jay Carafano, Steven P. Bucci & Jessica Zuckerman, *Fifty Terror Plots Foiled Since 9/11: The Homegrown Threat and the Long War on Terrorism*, HERITAGE FOUNDATION (Apr. 25, 2012), <http://www.heritage.org/research/reports/2012/04/fifty-terror-plots-foiled-since-9-11-the-homegrown-threat-and-the-long-war-on-terrorism>.

16. Zuckerman, Bucci & Carafano, *supra* note 12.

17. Compare *id.* (listing the Cases 4, 6, 16, 27, 29, 30, 35, 46, and 48), with McNeill, Carafano & Zuckerman, *supra* note 13 (detailing some of the same cases as occurring during different years after reclassification) and Carafano, Bucci & Zuckerman, *supra* note 15 (detailing some of the cases as occurring during different years after reclassification). The aforementioned cases do not all appear in the reports published in previous years despite that the chronological dates of the events precede the publication dates of the reports. Perhaps internet searches of cases will retrieve past Heritage Society reports and impart a deeper perception of peril if only dates and titles of the studies are considered.

18. See *infra* notes 215-349. However, the authors do tabulate an increase in the number of terror plots in recent years (based on the classification of cases). According to the chart, the number of terror plots per year has increased from 1 (2001), 2 (2002), 5 (2003), 3 (2004), 3 (2005), 7 (2006), 3 (2007), 3 (2008), 9 (2009), 7 (2010), 9 (2011), 6 (2012), 2 (partial year 2013). Zuckerman, Bucci & Carafano, *supra* note 12.

19. See Amos N. Guiora, *Self-Defense—From the Wild West to 9/11: Who, What, When*, 41 CORNELL INT'L L.J. 631, 644 (2008) (emphasizing the balance between the state's right to protect itself and the restrictions on the collection of intelligence).

20. *Giving NSA the boot—California bids to end spying on its citizens*, REUTERS (May 20, 2014), <http://rt.com/usa/160104-nsa-spying-california-snowden/> (noting that other states in the nation have sought to go further and require the NSA to end all domestic spying without a warrant in order to adhere to the U.S. Constitution's Fourth

sentencing proceedings were delayed due to questions over the legality of law enforcement techniques.²¹ As a response to the high-profile whistleblower accounts of former National Security Agency (hereinafter “NSA”) contractor Edward Snowden, in June 2013, U.S. Senators challenged the allegations of national security officials who maintained that dozens of terror plots had been foiled since 9/11.²² Senators contended: “We have not yet seen any evidence showing that the NSA’s dragnet collection of Americans’ phone records has produced any uniquely valuable intelligence”²³ Federal courts are currently divided over the constitutionality of the NSA’s mass data collection program.²⁴ In April 2014, the Supreme Court denied certiorari to resolve the division, but liberal Justice Ruth Bader Ginsberg remarked about a future case, “[w]e can’t run away” from the issue by claiming lack of knowledge on the subject; while conservative Justice Antonin Scalia expressed that the Court may not be the most appro-

Amendment assurance that the “government shall not engage in unreasonable search and seizure”).

21. Carrie Johnson, *Judge Suspends Sentencing Of Would-Be Bomber After NSA Revelations*, NPR (Nov. 26, 2013), <http://www.npr.org/blogs/thetwo-way/2013/11/26/247412767/judge-suspends-sentencing-would-be-bomber-after-nsa-revelations>. Questions on legality could potentially also call into question methods employed in previous convictions.

22. Spencer Ackerman, *Senators challenge NSA’s claim to have foiled ‘dozens’ of terror attacks*, THE GUARDIAN (June 13, 2013), <http://www.guardian.co.uk/world/2013/jun/13/senators-challenge-nsa-surveillance-terrorism>. The Heritage Foundation researchers represent a position quite similar to authorized spokespersons from the national security apparatus, except that the Heritage Foundation documents solely utilize publicly available information. The statement that “dozens of terrorist plots” have been foiled has become a routine statement by top officials of the national security community. Carlo Muñoz & Justin Sink, *NSA chief: Spying foiled terror plots*, THE HILL (June 13, 2013), <http://thehill.com/video/in-the-news/305107-nsa-chief-dozens-of-terrorist-plots-foiled-by-nsa-programs>. Advocates emphasize the critical need to focus more political attention on terrorism.

23. Ackerman, *supra* note 22; see also *CIA concedes it spied on senate investigations*, DAILY HERALD (July 31, 2014), http://www.thedailyherald.com/index.php?option=com_content&view=article&id=49285:cia-concedes-it-spied-on-senate-investigators&catid=3:news&Itemid=7 (reporting that a CIA investigation in 2014 acknowledged that the use of harsh interrogation methods, secret prisons, and extraordinary renditions to abusive foreign security services, “did not produce any significant counter-terrorism breakthrough in the years after the 2001 attacks and the CIA officials misstated or exaggerated the results to other agencies and to Congress.”).

24. Evan Perez, *Judge rules NSA collection of phone records is legal*, CNN (Dec. 27, 2013), <http://www.cnn.com/2013/12/27/justice/nsa-ruling/> (stating the division in the federal courts and reporting that the American Civil Liberties Union’s position was that upholding the constitutionality “misinterprets the relevant statutes, understates the privacy implications of the government’s surveillance and misapplies a narrow and outdated precedent to read away core constitutional protections”); see also Dustin Voltz, *Edward Snowden: Supreme Court Will Strike Down NSA Spying Programs*, NATIONAL JOURNAL (Oct. 11, 2014), <http://www.nationaljournal.com/tech/edward-snowden-supreme-court-will-strike-down-nsa-spying-programs-20141011> (reporting that “[f]ugitive leaker Edward Snowden” maintains that the Supreme Court will “agree these [NSA surveillance] programs went too far”).

appropriate institution to address national security issues, but stated that the essence of the issue does involve “balancing the emergency against the intrusion”²⁵

With the debates over privacy violations and accuracy of public discourse, three months later, the 9/11 Commission issued a ten-year update to its report on the 9/11 attacks and stated that al-Qaeda has expanded operations into more countries since 9/11, that the U.S. government must stay vigilant to thwart possible future terrorist attacks, and that political “leaders must do a better job of communicating with the public—including specifically explaining what is being done to prevent attacks.”²⁶ The 9/11 Commission raises a noteworthy goal because government representations and media presentations of government statements contour public perceptions and formulate criminal justice system policy²⁷ and if there are no suspects arrested in conjunction with a government threat dissemination or substantial evidence of a terrorist attack that would have occurred “but for” surveillance methods, there may be no reason to believe that surveillance information was verified or actually foiled a terrorist attack or that intrusions outweigh generally-applicable privacy violations.

Punishable criminal acts have traditionally required a mens rea, or the malicious mental state to commit a crime, and the actus reus, which consists of the physical steps taken toward the commission of a punishable offense. Today, it seems that the word “plot,” which in its general sense refers to “plan to or contrive especially secretly”²⁸ to en-

25. Rebecca Shabad, *Justices expect to hear case on NSA spying*, THE HILL (Apr. 18, 2014), <http://thehill.com/blogs/blog-briefing-room/news/203845-2-supreme-court-justices-say-court-will-likely-rule-on-nsa>.

26. Bill Chappell, *9/11 Commission Issues An Update On Anniversary of Report*, NPR (July 22, 2014), <http://www.npr.org/blogs/thetwo-way/2014/07/22/334080649/9-11-commission-issues-an-update-on-anniversary-of-report>; see also Lindsey Boerma, *CIA director: ISIS engaged in “active external plotting”*, CBS EVENING NEWS (Sept. 10, 2014), <http://www.cbsnews.com/news/cia-director-isis-engaged-in-active-external-plotting/> (the current CIA Director John Brennan stated that intelligence maintains that there is “credible evidence” that ISIS and al-Qaeda in Iraq are planning to attack the United States and that the “system was blinking red”). Americans have endured these false alarms of terror threats that manipulate politics and lead to aggressions around the world on a regular basis for thirteen years. The past performance of faulty predictions of credible and imminent threats, disseminated to the American public, is despicable.

27. Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 400-03 (2006); see also Michelle Ward Ghetty, *The Terrorist Is A Star!: Regulating Media Coverage of Publicity-Seeking Crimes*, 60 FED. COMM. L.J. 481, 508 (2008) (in an article devoted to questioning the media’s penchant to fixate on terrorism which can breed emotive societal sentiment and incite radicals seeking publicity, noting that “[t]he media industry argues that they are a profession . . . like any other recognized profession . . . journalists are not now and have never been truly considered ‘professionals’ . . . they, in fact, abhor responsibility for their judgments and actions; they tend to place greater emphasis on economic gain rather than personal service; . . . they have no true Code of Ethics . . .”).

28. MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003).

gage in nefarious activity, serves as a heuristic device that cognitively conveys that both the mens rea and actus reus were met for a terrorist act or even relays a perception that lives were saved because a terrorist attack would have unquestionably occurred had there been no law enforcement intervention or indispensable surveillance provided by intelligence agencies. However, the connotation of "terror plot" conveys a much deeper perception of culpability and jeopardy than lower threshold events that are also punishable crimes.

For example, in July 2014, Human Rights Watch brought merited attention to this issue when it produced a report and accused the FBI of entrapping informants in nearly all high-profile terrorism cases, "creating terrorists out of law-abiding individuals and targeting American Muslims in the agency's counterterrorism investigations."²⁹ Discovering, frequently with surveillance and intelligence data, and scrutinizing the acts of individuals and intervening may have assisted law enforcement agencies in thwarting future terrorist attacks from manifesting, but one could also construe that the proactive law enforcement intervention thoroughly assisted a "plots" development. This latter assumption of replete confidence of an impending attack, which merits pre-crime government intervention, evokes conceptions of the "precog" mutant psychics who floated in a tub of viscous liquid and predicted criminal activity before it happened in the film *Minority Report*³⁰ and of the language in Britain's Treason Act of 1351,³¹ which remains valid law and can punish those who "compass," "imagine," or "rehearse" the death of the King.³² "Imagining" the death of a government leader or fantasizing about acts of terrorism are not crimes, but the evidentiary basis for the post-9/11 terrorism cases should be dissected to query at what point along the continuum of imagining, communicating, rehearsing, or attempting to perpetrate an act of violence is necessary to be regarded a crime or labeled a "terror plot."

29. *FBI entrapped suspects in almost all high-profile terrorism cases in the US*, REUTERS (July 21, 2014), <http://rt.com/usa/174484-hrw-fbi-sting-entrapment/>.

30. Mark C. Niles, *Preempting Justice: "Precrime" in Fiction and in Fact*, 9 SEATTLE J. SOC. JUST. 275, 280 (2010).

31. Treason Act, 1351, 25 Edw. 3, c. 2 (Eng.).

32. Kristen E. Eichensehr, *Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States*, 42 VAND. J. TRANSNAT'L L. 1443, 1447-48, 1451 (2009) (citing *R v. Casement*, [1917] 1 K.B. 98 at 98-99 (Eng.)) (translating a relevant part of the Treason Act and noting that it remains valid law and punishes treason in the instance "[w]hen a man doth compass or imagine the death of our . . . King . . . that in the cases above rehearsed . . . that ought to be adjudged treason" (translating Declaration what Offences shall be adjudged Treason Act, 1351, 25 Edw. 3, c. 2 (Eng.))); see also D. ALAN ORR, *TREASON AND THE STATE: LAW, POLITICS, AND IDEOLOGY IN THE ENGLISH CIVIL WAR 18-19* (2002). One critic called this "a candidate for the most unpopular act ever passed by a parliament in England." *Id.* at 19.

This Article's scope is concerned with evaluating the evidentiary precedent of criminally punishable acts that have been classified as terror-related and with linking this precedent to the apparent societal perception underlying the emotive term "terror plot." From this analysis, which distinguishes societal perceptions from verified danger, one can query to what extent the NSA's mass data collection efforts are warranted to identify potential terror suspects and "terror plots." The Article develops as follows. Within each category of Part II, the cases, which are derived from the Heritage Foundation listing of "thwarted terror plots," are organized generally by initially examining events with a stronger evidentiary basis and descending to those cases with a seemingly weaker evidentiary basis. In the "actual perpetration" and failed attacks itemized in Sections (A) and (C) respectively, almost all of the cases did not involve preventative law enforcement efforts. In the case of suspect groups (two or more individuals), which are examined in Sections (D) and (E), and law-enforcement infiltration into the lives of individuals, which are considered in Sections (F) and (G), there has been an ostensible assumption that a "plot" would have manifested into an attack if not for the existence of law-enforcement's preemptive measures. However, this is specifically where commentators will disagree: Does law enforcement arrest suspects prematurely and before it is known that an attack would have occurred, or, in the case of sting operations, does law enforcement facilitate a fake plot with a suspect who would not have actually perpetrated a real plot or does law enforcement intervention thwart a real plot that would have manifested had there been no fake plot? This inquiry inherently also ponders whether the suspect should be able to withdraw from criminal activity and whether the entrapment defense should be recognized in terrorism sting operations.

II. CASES

A. ACTUAL PERPETRATION

After 9/11, several acts were perpetrated that can be classified as terrorism. Two cases that are not listed by the Heritage Foundation are the anthrax attacks and the Beltway Snipers' shooting spree. The details of the anthrax attacks, which followed on the heels of the 9/11 attacks, remain obscure because the anthrax was manufactured at Fort Detrick, Maryland, the FBI destroyed the evidence, one American was blamed and eventually exonerated, and years later another individual, who was already dead, was accused of being the culprit.³³

33. Eric Lichtblau & Nicholas Wade, *FBI adds details to case against anthrax scientist*, N.Y. TIMES (Aug. 19, 2008), <http://www.nytimes.com/2008/08/19/world/americas/>

The Beltway Snipers case refers to John Allen Muhammad and Lee Boyd Malvo who shot and killed ten and critically injured three victims when shooting at drivers with a .223 caliber rifle along the Washington, D.C. beltway over a three-week period in October 2002.³⁴

While being subject to torturous interrogation methods by U.S. authorities (including waterboarding),³⁵ Khalid Sheikh Mohammed ("KSM") admitted to involvement in the 1993 World Trade Center bombing, the 9/11 attacks, bombings of a nightclub in Bali and a Kenyan hotel in 2002, and other terrorist attacks.³⁶ KSM was captured in Afghanistan in 2003 and the Central Intelligence Agency's ("CIA") statements of KSM's admissions during interrogations served as the foremost witness accounts for the 9/11 Commission Report, but U.S. authorities are still pursuing trial processes against KSM and his apparent associates at Guantánamo Bay.³⁷ Ten years ago, the 9/11

19iht-anthrax.1.15414907.html?_r=0 (stating that the suspect, Bruce Ivins, a military scientist researching anthrax at Fort Detrick, killed himself as the Justice Department was preparing an indictment); see also David Folkenflik & Alex Chadwick, *Earlier Anthrax Suspect Was Exonerated*, NPR (Aug. 1, 2008), <http://www.npr.org/templates/transcript/transcript.php?storyId=93175420> (emphasizing that Dr. Steven J. Hatfill, a former U.S. Army Virologist, was exonerated of the government's allegations and the government paid Hatfill over \$5.8 million in compensation for lost future income due to the false allegations).

34. Federal Bureau of Investigation, *A Byte Out of History: The Beltway Snipers, Part 1*, (Oct. 22, 2007), http://www.fbi.gov/news/stories/2007/october/snipers_102207 (noting that Malvo and Muhammad were convicted of multiple charges in Maryland and Virginia and were sentenced to life without parole and that Muhammad was sentenced to death in Virginia).

35. See Scott Shane, *Waterboarding Used 266 Times on 2 Suspects*, N.Y. TIMES (Apr. 20, 2009), <http://www.nytimes.com/2009/04/20/world/20detain.html> (stating that the "self-described planner of the Sept. 11, 2001, terrorist attacks" was waterboarded 183 times).

36. Transcript of Combatant Status Review Tribunal Hearing for ISN10024 at 5, 18-20 (Mar. 10, 2007), http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/15_03_07_mohammed_transcript.pdf [hereinafter CSRT for ISN10024].

37. The associates are Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi. *Khalid Sheikh Mohammed, 4 others charged in 9/11 attack*, CNN (Apr. 4, 2012), <http://www.cnn.com/2012/04/04/us/khalid-9-11-charges>. Criminal proceedings initiated in Military Commissions at Guantánamo Bay in 2007. CSRT for ISN10024, *supra* note 36, at 1 (stating that the first proceedings were the combatant status review proceedings). These five were charged in the military commissions in 2008. Charges Filed, *United States v. Mohammed*, No. AE 175 (Military Comm. Trial Judiciary Guantanamo Bay, Cuba, May 9, 2008), <http://f11.findlaw.com/news.findlaw.com/wp/docs/terrorism/usksmetal20808chrgs.pdf>. However, the Attorney General sought to have the suspects transferred to U.S. federal court jurisdiction. Press Release, U.S. Dept. of Justice, Departments of Justice and Defense Announce Forum Decisions for Ten Guantanamo Bay Detainees (Nov. 13, 2009), available at <http://www.justice.gov/opa/pr/2009/November/09-ag-1224.html>. KSM and associates eventually returned to the Military Commissions, which brought charges in April 2012. Press Release, U.S. Dept. of Defense, DOD Announces Charges Referred Against 9-11 Co-Conspirators (Apr. 4, 2012), available at <http://www.defense.gov/releases/release.aspx?releaseid=15158>. These five defendants were transferred back to the military commission in April 2011, and the Department of Defense an-

Commission Report wrote that KSM was “the principal architect of the 9/11 attacks,”³⁸ which denotes that KSM’s guilt was already assumed even though a court has not yet convicted him after being held for the past decade.

The Heritage Foundation study classifies the case of Mohammed Reza Taheri-azar as a terror plot.³⁹ In March 2006, Taheri-azar, a 22-year-old who spent most of his life in the United States and graduated from the University of North Carolina (“UNC”), drove his SUV into a UNC crowd and hit, but did not seriously injure, nine people.⁴⁰ The defendant admitted that he acted with the intention of avenging deaths of Muslims overseas due to the decisions and actions of the American government.⁴¹ Taheri-azar pled guilty to nine counts of attempted murder⁴² and was sentenced to between twenty-six and thirty-three years in prison.⁴³

Carlos Bledsoe pled guilty to murder to avoid the death penalty and was sentenced to life in prison without parole.⁴⁴ Bledsoe, an American with a history of drug and alcohol problems, traveled to Yemen to teach English after college.⁴⁵ During his stay in Yemen, Bledsoe became a Muslim, changed his name to Abdulhakim Mujahid Muhammad, returned to Arkansas, and shot two individuals (one of whom died) at the U.S. Army Recruiting Center in 2009 because of his hatred for the U.S. military and for abuses committed by the military during recent wars.⁴⁶

nounced charges for a Military Commissions trial in May 2011. Press Release, U.S. Dept. of Defense, DOD Announces Charges Sworn Against Five Detainees Allegedly Responsible for 9/11 Attacks (May 31, 2011), *available at* <http://www.defense.gov/Releases/Release.aspx?ReleaseID=14532>. Those proceedings continue. *See* Government Motion For a Trial Scheduling Order and Notice of Status of Discovery, *United States v. Mohammed*, No. AE 175 (Military Comm. Trial Judiciary Guantanamo Bay, Cuba, June 14, 2013), *available at* <http://media.miamiherald.com/smedia/2013/07/02/15/32/1bGOIG.S0.56.pdf>.

38. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, 9/11 COMMISSION REPORT 145 (2004), *available at* <http://www.9-11commission.gov/report/911Report.pdf>.

39. *See* Zuckerman, Bucci & Carafano, *supra* note 12.

40. Brenda Goodman, *Defendant Offers Details of Jeep Attack at University*, N.Y. TIMES (Mar. 8, 2006), <http://www.nytimes.com/2006/03/08/national/08carolina.html>.

41. *Id.*

42. *Man Is Charged After Driving Into Group of Students*, ASSOCIATED PRESS (Mar. 5, 2006), <http://www.nytimes.com/2006/03/05/national/05carolina.html?fta=y>.

43. *UNC ‘Pit’ attacker gets up to 33 years; victims share their stories*, WRAL (Aug. 26, 2008), <http://www.wral.com/news/local/story/3432689/>.

44. Richard Fausset, *Accused gunman sentenced in 2009 Arkansas shooting*, L.A. TIMES (July 26, 2011), <http://articles.latimes.com/2011/jul/26/nation/la-na-arkansas-shooting-20110726>.

45. *See* Memorandum from Division of Behavioral Health Services, Arkansas State Hospital, to Honorable Herb Wright, *Re: Muhammad, Abdul*, at 3-4 (July 20, 2010), http://www.investigativeproject.org/documents/case_docs/1423.pdf.

46. *See id.* at 5-6, 9.

In November 2009, U.S. Major Nidal Malik Hasan, a psychiatrist at Walter Reed Army Medical Center, called out "Allahu Akbar!" which means "God is Great!" in Arabic and opened fire with two pistols at the Fort Hood deployment center and killed twelve soldiers, one Defense Department employee, and injured forty-two others.⁴⁷ Jurors convicted Hasan and he was sentenced to death, which could make him the first U.S. soldier to be executed in over fifty years.⁴⁸ Hasan stated that he wanted to attack troops undergoing medical physicals prior to deployment to Iraq and Afghanistan because he would be defending Islamic militants from U.S. military aggression in foreign countries.⁴⁹

Yonathan Melaku, a former Marine Corps reservist, pled guilty to destruction of property, carrying and discharging a firearm in violation of 18 U.S.C. § 924(c)(1)(A) and attempting to injure veterans' memorials⁵⁰ and was sentenced to twenty-five years in prison.⁵¹ Melaku caused over \$100,000 in property damage when he fired handguns at five military-related edifices in Virginia at nighttime over the two weeks spanning from October 17 to November 2, 2010.⁵² Melaku stated that he committed the acts because he was angry over the U.S. wars in Afghanistan and Iraq.⁵³ With respect to the sentencing proceedings for the destruction of property offenses, the U.S. government requested that the defendant be sentenced to twenty-five years at a

47. FINAL REPORT OF THE WILLIAM H. WEBSTER COMMISSION ON THE FEDERAL BUREAU OF INVESTIGATION, COUNTERTERRORISM INTELLIGENCE AND THE EVENTS AT FORT HOOD TEXAS, ON NOVEMBER 5, 2009, WILLIAM H. WEBSTER COMMISSION 1 (2012), *available at* http://www.investigativeproject.org/documents/case_docs/2024.pdf [hereinafter Webster Commission].

48. *Fort Hood shooter Nidal Hasan sentenced to death for killing 13 soldiers*, ASSOCIATED PRESS (Aug. 28, 2013), *available at* <http://www.theguardian.com/world/2013/aug/28/fort-hood-shooter-sentenced-death>.

49. *Id.*

50. Plea Agreement at 1-2, *United States v. Melaku*, No. 1:12cr27 (E.D. Va. Jan. 26, 2012), *available at* http://www.investigativeproject.org/documents/case_docs/1890.pdf.

51. Position of the United States With Respect to Sentencing at 12, *United States v. Melaku*, No. 1:12cr27 (E.D. Va. Jan. 11, 2013), *available at* http://www.investigativeproject.org/documents/case_docs/2100.pdf.

52. *See id.* (noting that the buildings were the National Museum of the Marine Corps in Triangle, Virginia; the Marine Corp Museum; the Pentagon; the Marine Corps recruiting sub-station in Chantilly, Virginia; and the U.S. Coast Guard recruiting office in Woodbridge, Virginia); Plea Agreement at 6, *United States v. Melaku*, No. 1:12cr27 (E.D. Va. Jan. 26, 2012), *available at* http://www.investigativeproject.org/documents/case_docs/1890.pdf.

53. Justin Jouvenal, *Yonathan Melaku, who fired at pentagon and other military facilities, gets 25 years in prison*, WASH. POST (Jan. 11, 2013), http://www.washingtonpost.com/local/crime/pentagon-shooter-sentenced-to-25-years-in-prison/2013/01/11/a9fbd47a-5c2a-11e2-9fa9-5fbd9530eb9_story.html.

location with psychiatric care because the court found that Melaku suffered from schizophrenia.⁵⁴

On April 15, 2013, Tamerlan Tsarnaev, 26, and Dzhokhar Tsarnaev, 19, left backpacks at the Boston Marathon and remotely detonated bombs in the backpacks that killed three and injured over 260.⁵⁵ Four days later, the two brothers engaged in a shootout with police. Tamerlan was killed and Dzhokhar was found with gunshot wounds.⁵⁶ Apparently intending to commit suicide or believing he would die, Dzhokhar scrawled a message with a marker on the interior of the boat in which he was hiding that explained the Boston Marathon victims were “collateral damage” in U.S.-led wars against Muslim victims, and further wrote: “When you attack one Muslim, you attack all Muslims.”⁵⁷ Dzhokhar pled not guilty to terrorism charges and, at the time this Article was sent for publication, the trial is proceeding.⁵⁸

B. GENERALIZING ACTUAL ATTACKS AND FAILED “PLOTS”

Other than the mysterious anthrax attacks, the Beltway Snipers, and KSM and associates’ involvement in terrorism that did not take place in the United States (other than 9/11), four of the five remaining cases of actual perpetration involved defendants maintaining that they attacked military personnel and property specifically because of injustices perpetrated during wars overseas. If the definition of terrorism is read narrowly to only include attacks on civilians and civilian government facilities and personnel,⁵⁹ these events would not be

54. Position of the United States With Respect to Sentencing at 5-6, *United States v. Melaku*, No. 1:12cr27 (E.D. Va. Jan. 11, 2013).

55. Greg Botelho, *Timeline: The Boston Marathon bombing, manhunt and investigation*, CNN (May 2, 2013), <http://www.cnn.com/2013/05/01/justice/boston-marathon-timeline/>.

56. *Id.*

57. *Boston bombings suspect Dzhokhar Tsarnaev left note in boat he hid in, sources say*, CBS News (May 16, 2013), <http://www.cbsnews.com/news/boston-bombings-suspect-dzhokhar-tsarnaev-left-note-in-boat-he-hid-in-sources-say/>.

58. Richard A. Oppel Jr. & Jess Bidgood, *Marathon Bombing Suspect, in First Court Appearance, Pleads Not Guilty*, N.Y. TIMES (July 11, 2013), http://www.nytimes.com/2013/07/11/us/in-court-for-first-time-boston-bombing-suspect-will-face-victims.html?_r=0. Revelations have addressed the mental states of both brothers. Tamerlan told friends that he believed he had been the victim of mind control and some doctors speculated that he was schizophrenic. *Was Tamerlan Tsarnaev schizophrenic? Boston bomber told friends and family he ‘had two people living in his head’ was the victim of mind control*, DAILY MAIL (Dec. 16, 2013), <http://www.dailymail.co.uk/news/article-2524891/Was-Boston-bomber-Tamerlan-Tsarnaev-schizophrenic.html>. Dzhokhar was a university student at the University of Massachusetts and reportedly became obsessed with drugs and made about \$1,000 per week selling marijuana. *Id.*

59. 18 U.S.C. § 2331(5) (2012) (defining “domestic terrorism” as “acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; [and] . . . appear to be intended . . . to influence the policy of a government by intima-

acts of terrorism. If the definition of terrorism is read broadly and emphasis is placed on the fact that the facilities and personnel were located on U.S. soil and outside a zone of military combat, these cases could be viewed as cases of terrorism. For example, the Heritage Foundation study classifies the Major Nidal Malik Hasan attack at Fort Hood as a terrorist attack, but the Department of Defense labeled the case "workplace violence" and other commentators suggested that the event should be classified as deaths and injuries in combat.⁶⁰ Likewise, authorities filed no terrorism charges against Melaku for shooting handguns at military edifices⁶¹ and Taheri-azar was charged with attempted murder for his SUV collision.

The cases in which attacks did not manifest were classified by the Heritage Foundation studies⁶² as successfully foiled terrorist plots. Section (C) discusses the cases of "failures in the act," which predominately did not involve foiled attacks due to law enforcement intervention, but instead fortuitous non-success due to the suspect's blunders after having assembled explosive devices.⁶³ Section (D) considers cases with two or more individuals conspiring in terrorism-related offenses, with interactions frequently commencing prior to law enforcement involvement.⁶⁴ Section (E) examines cases of individuals convicted for attending apparent terrorist camps in foreign countries, the participation in which evidently implies that there is an ongoing conspiracy to engage in terrorism, perhaps even if there is no specifically planned act of terrorism.⁶⁵ Section (F) discusses cases of individuals who all apparently possessed some degree of a radical ideology, but in their quest to encounter subversive associates, communications

tion or coercion"); Stephen P. Marks, *Is There a "New Paradigm" of International Law?*, 14 MICH. ST. J. INT'L L. 71, 85 (2006) ("[T]he traditional paradigm is to treat acts of terrorism as international criminal behavior rather than acts of war."); Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149, 152 (2005) ("terrorism, even on the scale of the 9-11 attacks, can either be treated as a criminal matter . . . or an armed attack warranting response under the law of armed conflict.").

60. Editorial, *Nidal Hasan's victims fell in combat, not mere workplace violence*, DALLAS MORNING NEWS (Aug. 13, 2013), <http://www.dallasnews.com/opinion/editorials/20130813-editorial-even-nidal-hasan-would-say-his-victims-fell-in-combat.ece>.

61. However, when he was arrested on June 17, 2011, Melaku possessed a backpack containing twenty pounds of ammonium nitrate, black spray paint, cans of Rust-Oleum, and a notebook with Arabic statements that referenced the Taliban and al-Qaeda and the need to "defeat coalition and allies and America." Position of the United States With Respect to Sentencing at 4, *United States v. Melaku*, No. 1:12cr27 (E.D. Va. Jan. 11, 2013).

62. See *supra* notes 11-18.

63. See *infra* notes 68-84 and accompanying text.

64. See *infra* notes 85-190 and accompanying text.

65. See *infra* notes 191-214 and accompanying text.

led the FBI to open sting operations.⁶⁶ Section (G) also addresses loner suspect terrorists, but contends that the cases migrate toward more excessive law enforcement overreaching.⁶⁷ In some cases, the FBI literally *created* a terrorist group for identified radicals. Within each of these categories, the intention is to identify generalizations and trends and to assess case facts with a progressively descending evidentiary basis that substantiates the *actus reus*.

C. FAILURES IN THE ACT

On December 22, 2001, Richard Reid, a reported member of al-Qaeda, was a passenger on a commercial flight from Paris to Miami and was subdued by flight attendants with seatbelts after he attempted to light matches and ignite a plastic explosive device hidden in his shoe.⁶⁸ Reid was sentenced to life in prison.⁶⁹ British courts sentenced Saajid Badat to thirteen years in prison for plotting with Reid; a nearly identical shoe was found in Badat's family home in the United Kingdom, but he did not act to perpetrate an attack, and the judge mentioned that Badat had withdrawn from the plot.⁷⁰

In October 2010, two printer cartridges with explosive material were shipped by UPS and FedEx from Yemen to Chicago and the packages were identified in Britain and Dubai as containing explosive material.⁷¹ Nothing detonated and no one was arrested, but it was reported that the cartridges did have a timer attached to 300 grams of the explosive pentaerythritol tetranitrate ("PETN")⁷² and the event was deemed a "foiled] . . . package plot" and a "significant [intelligence] success."⁷³

66. See *infra* notes 215-66 and accompanying text.

67. See *infra* notes 267-349 and accompanying text.

68. Government's Sentencing Memorandum at 6-10, *United States v. Richard Colvin Reid*, No. 02-10013-WGY (D. Mass. Jan. 17, 2003), available at http://www.investigativeproject.org/documents/case_docs/864.pdf.

69. *Id.* (stating that the government preferred life in prison for Reid). Judge William Young sentenced Reid to life in prison. *Exchange between Reid, judge follows life sentence*, CNN (Dec. 6, 2003), http://www.cnn.com/2003/LAW/01/30/shoe_bomber.sentencing/.

70. *Regina v. Saajid Badat* [2005] A.C. 1 (Cent. Crim. Ct.), at 16, 18 (Case No. T20038119), available at http://www.cps.gov.uk/publications/docs/badat_opening_speech.pdf; *Shoebomb plotter given 13 years*, BBC (Apr. 22, 2005), http://news.bbc.co.uk/2/hi/uk_news/4474307.stm.

71. Mark Mazzetti, Robert F. Worth & Eric Lipton, *Bomb Plot Shows Key Role Played by Intelligence*, N.Y. TIMES (Oct. 31, 2010), <http://www.nytimes.com/2010/11/01/world/01terror.html>.

72. Gordon Rayner & Duncan Gardham, *Cargo plane bomb plot: ink cartridge bomb 'timed to blow up over US'*, THE TELEGRAPH (Nov. 10, 2010), <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8124226/Cargo-plane-bomb-plot-ink-cartridge-bomb-timed-to-blow-up-over-US.html>.

73. Mazzetti, Worth & Lipton, *supra* note 71.

In August 2009, Umar Farouk Abdulmutallab traveled to Yemen and befriended individuals associated with al-Qaeda.⁷⁴ Four months later and on a flight from Amsterdam to Detroit, Abdulmutallab pulled a blanket over his body during the descent over Detroit and attempted to detonate an explosive device hidden in his underwear, which ignited his pants, his seat, the walls, and the carpeting.⁷⁵ Abdulmutallab continued pro se, pled guilty to eight terrorism-related charges, and was sentenced to life in prison.⁷⁶

In May 2012, another alleged underwear plot was revealed. However, the plotter was reportedly a double agent working for Saudi Arabia and who had infiltrated a terrorist group (called al-Qaeda in the Arabian Peninsula) with an intention of blowing up a U.S. airliner with an underwear bomb.⁷⁷ The double agent reportedly volunteered to execute the suicide attack, but instead delivered the underwear to the FBI.⁷⁸ The underwear bomb was purportedly a more sophisticated device than that worn by Abdulmutallab because the underwear was "custom fit" and incorporated higher-grade explosives.⁷⁹ No one was arrested in association with the plot and the witness/undercover agent (who apparently had knowledge of the chain of custody of the underwear and the group) remains publicly unknown.

Faisal Shahzad, a naturalized U.S. citizen originally from Pakistan, pled guilty to ten terrorism related offenses and was sentenced to life in prison for attempting to detonate a bomb in Times Square.⁸⁰ The evidence against Shahzad included receiving explosives training in Pakistan, receiving \$5,000 sent by a co-conspirator in Pakistan to Massachusetts, and receiving another \$7,000 in New York, which was also wired at the direction of the co-conspirator.⁸¹ Shahzad purchased a Pathfinder for \$1,300⁸² and on May 1, 2010 drove the Pathfinder to Times Square and vacated the vehicle with two alarm clocks connected to wires and several bags of fertilizer, two five-gallon canisters

74. *United States v. Abdulmutallab*, 739 F.3d 891, 895 (6th Cir. 2014).

75. *Abdulmutallab*, 739 F.3d at 895; Monica Davey, *Would-Be Plane Bomber Pleads Guilty, Ending Trial*, N.Y. TIMES (Oct. 12, 2011), <http://www.nytimes.com/2011/10/13/us/umar-farouk-abdulmutallab-pleads-guilty-in-plane-bomb-attempt.html>.

76. Davey, *supra* note 75; *Abdulmutallab*, 739 F.3d at 895-96, 902-03, 906-08.

77. CNN Wire Staff, *News report: Would-be bomber was a double-agent*, CNN (May 8, 2012), <http://www.cnn.com/2012/05/08/world/meast/yemen-qaeda-plot/>.

78. *Id.*

79. *Al-Qaeda underwear bomber 'was undercover agent'*, BBC (May 10, 2012), <http://www.bbc.com/news/world-middle-east-18000351>.

80. Press Release, U.S. Attorney Southern District of N.Y., Dept. of Justice, *Faisal Shahzad Sentenced in Manhattan Federal Court to Life in Prison for Attempted Car Bombing in Times Square*, at 1-2 (Oct. 5, 2010), available at <http://www.justice.gov/usao/nys/pressreleases/October10/shahzadfaisalsentencingpr.pdf>.

81. *Id.* at 2.

82. *Id.* at 3.

of gasoline, 152 M-88 fireworks, and three propane canisters.⁸³ A witness spotted the unoccupied Pathfinder with its engine running in Times Square with smoke emanating from the vehicle and alerted police and fire department authorities, but there was no detonation.⁸⁴

D. GROUPS AND INDIVIDUALS CONSPIRING PRIOR TO LAW ENFORCEMENT INTERVENTION

In cases involving two or more individuals conspiring prior to law enforcement involvement, the foundation for a more cogent *mens rea* among the associates may exist as complicity and confidence level are nurtured with an interaction of like-thinking individuals. Communications among conspirators may generate more evidence and pose the possibility that one or more individuals will turn on associates during the development of a potential criminal act and warn law enforcement or implicate associates after arrest and during court processes, leading to a classic prisoner's dilemma in which one or more individuals admit to and substantiate a plot and cooperate with authorities to receive a reduced sentence, while leaving associates with deeper sentences.

In what was called the New York subway plot, which was likely the most complex web of associates since 9/11, the FBI arrested Afghani Ahmed Wais Afzali, but Afzali also previously served as a police informant⁸⁵ and was later deported.⁸⁶ Conspirators Zarein Ahmedzy and Najibullah Zazi were arrested and pled guilty to conspiring to use weapons of mass destruction in 2010 on evidence that they had possessed materials to make a bomb for an attack on the New York subway (but destroyed the materials prior to arrest).⁸⁷ The

83. Complaint at 5, *United States v. Faisal Shahzad*, No. 1:10-mj-00928-UA (S.D.N.Y. May 4, 2010), available at http://www.investigativeproject.org/documents/case_docs/1242.pdf.

84. *Id.* at 4-5.

85. Press Release, U.S. Dept. of Justice, Three Arrested in Ongoing Terror Investigation (Sept. 20, 2009), available at <http://www.justice.gov/opa/pr/2009/September/09-nsd-1002.html> [hereinafter Ongoing Terror Investigation] (noting that Afzali was criminally charged with making a false statement about terrorism). Afzali was "an infrequent police informant." A. G. Sulzberger, *Imam and Informant Tells Why He Lied*, N.Y. TIMES (Apr. 15, 2010), http://www.nytimes.com/2010/04/16/nyregion/16imam.html?pagewanted=all&_r=0. There was initially no plot announced at the time of the arrest. Ongoing Terror Investigation, *supra*. David Kris, Assistant Attorney General for National Security noted that "[t]he arrests carried out tonight are part of an ongoing and fast-paced investigation. It is important to note that we have no specific information regarding the timing, location or target of any planned attack." *Id.*

86. Colleen Long, *Imam booted out of U.S.: 'God bless America'*, MSNBC (July 6, 2010), http://www.msnbc.msn.com/id/38101445/ns/us_news-security/.

87. Press Release, U.S. Dep't of Justice, Zarein Ahmedzy Pleads Guilty to Terror Violations in Connection with Al-Qaeda New York Subway Plot (Apr. 23, 2010), available at <http://www.justice.gov/opa/pr/2010/April/10-ag-473.html>; John Marzulli, *Terrorist*

FBI's arrest of Najibullah Zazi was based on conversations with Afzali, tapped phone conversations, the retrieval of a JPEG image of instructions for manufacturing explosives located on Zazi's computer, and an admission that Zazi attained weapons training at an al-Qaeda facility in Pakistan.⁸⁸ Conspirator Adis Medunjanin was found guilty at trial and was punished with a life sentence plus ninety-five years.⁸⁹ Ahmedzy and Zazi testified against Medunjanin.⁹⁰

Najibullah Zazi was regarded as the leader of the group,⁹¹ but after testifying he was transferred to a secret location and was never sentenced.⁹² Similarly, after testifying against Medunjanin, Ahmedzy was not immediately sentenced.⁹³ Amanullah Zazi, Najibullah Zazi's cousin, could have faced thirty years in prison for his apparent involvement with the group, but because he pled guilty and testified against Medunjanin, he was sentenced to forty months in prison.⁹⁴ Meanwhile, Medunjanin, the only individual who was sentenced for a substantial period for what was called "the most serious al-Qaeda plot inside the United States since the 9/11 terror attacks," continues to maintain that he had "nothing to do with any subway plot or bombing plot whatsoever."⁹⁵

Bryant Neal Vinas, an American who traveled to Pakistan, testified at Medunjanin's trial, but Vinas asserted that he did not know anyone involved in the Manhattan subway plot and that he was not involved.⁹⁶ Vinas was also a cooperative witness (informant) in

lackey gets only 40 months in prison because he helped feds bust four other wannabe bombers, N.Y. DAILY NEWS (Dec. 14, 2012), <http://www.nydailynews.com/new-york/terrorist-lackey-40-months-prison-article-1.1220247> (noting that one of the plotters helped "destroy bomb-making materials"). The ingredients for the bomb included "seemingly innocuous items like flour, butter, batteries, a two-liter soda bottle, and Christmas lights" and ball bearings. Mosi Secret, *Witness Describes Bomb-Making Process for Thwarted Subway Plot*, N.Y. TIMES (Apr. 18, 2012), <http://www.nytimes.com/2012/04/19/nyregion/in-terrorism-trial-witness-testifies-about-bomb-making-process.html>.

88. Ongoing Terror Investigation, *supra* note 85.

89. Mosi Secret, *Man Convicted of a Terrorist Plot to Bomb Subways Is Sent to Prison for Life*, N.Y. TIMES (Nov. 16, 2012), <http://www.nytimes.com/2012/11/17/nyregion/adis-medunjanin-convicted-of-subway-bomb-plot-gets-life-sentence.html>.

90. Secret, *supra* note 87.

91. *Id.*

92. Richard A. Serrano, *New FBI scrutiny as Al-Qaida recruitment grows*, STAR TRIBUNE (Jan. 20, 2014), <http://www.startribune.com/local/241110491.html>.

93. *Federal Appeals Court Upholds Conviction Of Would-Be Subway Bomber*, CBS NEW YORK (May 20, 2014), <http://newyork.cbslocal.com/2014/05/20/federal-appeals-court-upholds-conviction-of-would-be-subway-bomber/>.

94. Marzulli, *supra* note 87.

95. CBS NEW YORK, *supra* note 93.

96. *Testimonies From Subway Plot Trial Indicates Osama Bin Laden Wanted 9/11 Follow-Up*, CBS NEW YORK (Apr. 23, 2012), <http://newyork.cbslocal.com/2012/04/23/testimony-from-subway-plot-trial-indicates-osama-bin-laden-wanted-911-follow-up/>.

Medunjanin's trial,⁹⁷ but he was indicted and pled guilty to his own charges that included conspiracy to murder U.S. nationals by firing rockets at a U.S. military base in Afghanistan, providing assistance to a foreign terrorist organization by imparting information about the New York transit system to a foreign terrorist organization, and attending a terrorist training camp.⁹⁸

Six foreign-born radicals were charged in the "Fort Dix Plot" and were convicted and sentenced to between twenty months and life in prison for conspiring to kill U.S. soldiers and for violating firearm laws.⁹⁹ The evidence against the defendants, much of which was provided by the FBI's paid informants, included making comments exhibiting hatred for the United States and a desire to kill soldiers at Fort Dix, possessing a map of Fort Dix, and attempting to purchase M-16 rifles and semi-automatic AK-47 rifles from a paid informant, which was the point at which they were arrested.¹⁰⁰

In 2010 and 2011, Laguerre Payen, James Cromitie, David Williams, and Onta Williams were found guilty by jury trial and sentenced to twenty-five years in prison for conspiring to use weapons of mass destruction inside the United States, attempting to attain and use anti-aircraft missiles, and conspiring to kill U.S. officers and employees.¹⁰¹ The chronology began in June 2008 when Cromitie approached an FBI informant and expressed that he was upset about the U.S. war in Afghanistan, discussed a terrorist organization, and told the informant that he wanted to "do *jihad*."¹⁰² The four men and the informant conversed about possible attack targets in New York and the informant stated that he could acquire and provide "surface-to-air

97. Margot Williams, *Who Are the Terrorism Informants In Witness Protection?*, NPR (May 16, 2013), <http://www.npr.org/blogs/thetwo-way/2013/05/16/184574264/who-are-the-terrorism-informants-in-witness-protection>.

98. Sealed Pages of Transcript of Proceedings at 2, 4, *United States v. Bryant Neal Vinas*, No. 1:08-cr-00823-NGG (E.D.N.Y. Jan. 28, 2009), *available at* http://www.investigativeproject.org/documents/case_docs/1028.pdf; Superseding Information, *United States v. Bryant Neal Vinas*, No. 08-823 NGG (E.D.N.Y. Jul. 22, 2009), *available at* http://www.investigativeproject.org/documents/case_docs/1027.pdf.

99. The individuals were Mohamed Ibrahim Shnewer, Dritan Duka, Shain Duka, Eljivir Duka, Serdar Tatar, and Agron Abdullahu. Press Release, U.S. Dep't of Justice, *Three Brothers Sentenced to Life Prison Terms for Conspiring to Kill U.S. Soldiers* (Apr. 28, 2009), *available at* <http://www.justice.gov/opa/pr/2009/April/09-nsd-401.html>.

100. *Id.*; Dale Russakoff & Dan Eggen, *Six Charged in Plot To Attack Fort Dix*, WASH. POST (May 9, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/08/AR2007050800465.html>.

101. Press Release, U.S. Attorney Southern District of New York, *Laguerre Payen Sentenced in Manhattan Federal Court to 25 Years in Prison for Plotting to Bomb Bronx Synagogues and Shoot Down U.S. Military Planes* (Sept. 7, 2011), *available at* <http://www.justice.gov/usao/nys/pressreleases/September11/payenlaguerresentencingpr.pdf>.

102. *Id.*

guided missiles” and “C-4 plastic explosives” for the men.¹⁰³ The informant provided non-functional items and law enforcement officers arrested the four men after they planted the fake explosive devices at a target.¹⁰⁴

In May 2007, Russell Defreitas, a former cargo handler at JFK Airport, provided video of fuel tanks at JFK Airport to Kareem Ibrahim. Abdul Kadir and Abdel Nur tried to enlist other radicals in Trinidad and Iran for a terrorist attack. Ibrahim, Nur, and Kadir were all arrested in Trinidad in June 2007.¹⁰⁵ Evidence against Defreitas was provided by Steven Francis, a convicted drug dealer and FBI informant, who had recorded Defreitas making comments about hatred for the United States¹⁰⁶ and who accompanied Defreitas to videotape fuel tanks at JFK Airport four times in January 2007.¹⁰⁷ One of Defreitas’ lawyers called him “a man with a small mind [and] a big mouth,” but this was not operational because “[u]ntil the government got involved, this was talk.”¹⁰⁸ No equipment was procured and several conspirators were not present in the country. Defreitas, Kadir, and Ibrahim were convicted by jury trial and sentenced to life in prison for supporting and conspiring to commit terrorism, and Nur pled guilty and was sentenced to fifteen years in prison.¹⁰⁹

Abu Khalid Abdul-Latif and Walli Majahidh were sentenced to eighteen and seventeen years in prison respectively after they both pled guilty to possessing firearms, which they were criminally prohibited from possessing due to their previous criminal records,¹¹⁰ and to planning an attack on a military entrance processing center in Seattle with a weapon of mass destruction.¹¹¹ The evidence began to develop on May 30, 2011, when Abdul-Latif informed a “confidential source,”

103. *Id.*

104. *Id.*

105. Press Release, Dep’t of Justice, Imam From Trinidad Convicted Of Conspiracy To Launch Terrorist Attack At JFK Airport (May 26, 2011), *available at* <http://www.justice.gov/usao/nye/pr/2011/2011may26b.html> [hereinafter Imam Convicted].

106. Colin Moynihan, *Life Sentence for Leader of Terror Plot at Kennedy*, N.Y. TIMES (Feb. 17, 2011), http://www.nytimes.com/2011/02/18/nyregion/18plot.html?ref=russellmdefreitas&_r=0.

107. United States v. Kadir, 718 F.3d 115, 119 (2d Cir. 2013).

108. Moynihan, *supra* note 106.

109. Kadir, 718 F.3d at 120, 126; Imam Convicted, *supra* note 105.

110. Complaint at 5-7, United States v. Abdul-Latif, No. MJ11-292 2011 WL 2484947 (W.D. Wash. June 23, 2011), *available at* http://www.investigativeproject.org/documents/case_docs/1581.pdf.

111. Press Release, U.S. Attorney’s Office, Former Los Angeles Man Sentenced to 17 Years in Prison for Role in Plot to Attack Seattle Military Processing Center (Apr. 8, 2013), *available at* http://www.investigativeproject.org/documents/case_docs/2149.pdf; Press Release, U.S. Attorney’s Office, Seattle Man Sentenced to 18 Years for Plot to Attack Military Processing Center (Mar. 25, 2013), *available at* http://www.investigativeproject.org/documents/case_docs/2133.pdf.

who was a paid informant for the Seattle Police Department and the FBI, that he and Majahidh were planning a terrorist attack on a U.S. military facility and stated that he believed the attack was justified because he was angry over U.S. military activities in Afghanistan, Iraq, and Yemen, and the attack would deter U.S. military enlistment.¹¹² Abdul-Latif paid \$800 and instructed the confidential source to place an order for three machine guns, loaded magazines, and grenades.¹¹³ Some discussions among the conspirators might raise questions about whether they were fully devoted to the plan. But in other interactions, the associates were more willing to proceed with a mutual-reinforcement mechanism and indicated that they understood the likelihood of dying or committing suicide and exposed that they were inspired by the possible newsworthiness of the attack.¹¹⁴ Abdul-Latif and Majahidh conversed about the details of the planned attack with the confidential source on June 22, 2011 and sought to purchase three machineguns and magazines, but the suspects were arrested by FBI agents when they took possession of the weapons.¹¹⁵ Both Abdul-Latif and Mujahidh had criminal records, and Abdul-Latif had spent time in prison and had a history of mental illness and pressing personal problems.¹¹⁶

In November 2005, Uzair Paracha was found guilty by jury trial for providing material support to terrorism and was sentenced to

112. Complaint at 3-4, 9-10, 12, 14, 16, *United States v. Abdul-Latif*, No. MJ11-292 (W.D. Wash. June 23, 2011), 2011 WL 2484947, *available at* http://www.investigativeproject.org/documents/case_docs/1581.pdf (noting also that there were recorded conversations and video).

113. *Id.* at 4, 19.

114. *Id.* at 20-21, 29-30, 32, 34-36.

115. *Id.* at 11, 36.

116. *See id.* at 12 (noting that Abdul-Latif was the son of an imprisoned father, tried to kill himself multiple times starting when he was twelve, and had felony criminal convictions); Kim Murphy, *Pair accused of plotting Seattle attack*, L.A. TIMES (June 24, 2011), <http://articles.latimes.com/2011/jun/24/nation/la-na-seattle-terror-20110624> (reporting that "Majahidh had no felony convictions, the FBI said, but records reviewed by The Times show a string of misdemeanor charges, mainly in Riverside County, for such offenses as burglary, theft, child neglect and marijuana possession. Many were dismissed."); Susan Kelleher & Steve Miletich, *Suspect's troubled past: rap sheet, hallucinations*, SEATTLE TIMES (June 23, 2011), http://seattletimes.com/html/localnews/2015410529_davis24m.html (stating that Abdul-Latif had spent time in prison for robbery, had suffered from hallucinations and other psychological problems, had thousands of dollars in unpaid medical bills, and had recently filed for Chapter 7 bankruptcy, and noting that court records indicated that Mujahidh perpetrated domestic violence against his estranged wife). Walli Mujahidh also had a felony criminal record. Press Release, U.S. Dep't of Justice, *Former Los Angeles Resident Pleads Guilty in Plot to Attack Seattle Military Processing Center* (Dec. 8, 2011), *available at* <http://www.justice.gov/opa/pr/2011/December/11-nsd-1600.html> (stating that "Mujadidh is prohibited from possessing firearms due to a felony conviction in California for theft").

thirty years in prison.¹¹⁷ The evidence included Paracha receiving identification documents of a known al-Qaeda associate, posing as that person in the United States in an attempt to attain the issuance of immigration documents for that individual to enter the United States and receiving up to \$200,000 as an investment in Paracha's business on behalf of the al-Qaeda associate.¹¹⁸ Saifullah Paracha, Uzair's father, was also arrested in Thailand but has since been held without charge at Guantánamo Bay since 2004.¹¹⁹ The charges involved assistance to terrorism, but there was no specific plot.

Iyman Faris pled guilty to providing material support to al-Qaeda and was sentenced to twenty years in prison.¹²⁰ Evidence against Faris included that he attended an al-Qaeda training camp in late 2000, met with a senior operational leader of al-Qaeda in early 2002, and returned to the United States and "researched 'gas cutters,'" reportedly as a means of "severing bridge suspension cables" on a New York bridge.¹²¹

Nuradin Abdi, a Somali immigrant, was sentenced to ten years in prison in July 2007 after he pled guilty to plotting to blow up a shopping mall in Ohio.¹²² Evidence against Abdi included that he told Iyman Faris and American Christopher Paul at a coffee shop that we "could attack the mall with a bomb."¹²³ There was no acquisition of equipment or act in furtherance of that statement, and Abdi's attorney, Mahir Sherif, remarked that he is guilty at most of "ranting."¹²⁴

117. Press Release, U.S. Dep't of Justice, Pakistani Man Convicted of Providing Material Support to Al Qaeda Sentenced to 30 Years in Federal Prison (July 20, 2006), available at http://www.investigativeproject.org/documents/case_docs/244.pdf.

118. Indictment at 2-3, United States v. Paracha, No. 03 CR. 1197 (S.D.N.Y. Aug. 8, 2003), available at <http://www.cbsnews.com/htdocs/pdf/parachacomplaint.pdf> (also noting that the individual was planning to enter the United States between February and March of 2003).

119. Memorandum from D.M. Thomas, Jr., Rear Admiral of the U.S. Navy for Commander, Dep't of Defense, RE: Recommendation for Continued Detention Under DoD (Dec. 1, 2008), available at <http://projects.nytimes.com/guantanamo/detainees/1094-saifullah-paracha> (also noting that Saifullah Paracha suffers from a number of health issues).

120. Press Release, Dep't of Justice, Iyman Faris Sentenced for Providing Material Support to Al Qaeda (Oct. 28, 2003), available at http://www.justice.gov/opa/pr/2003/October/03_crm_589.htm.

121. *Id.*

122. Press Release, Dep't of Justice, Ohio Man Sentenced to Ten Years Imprisonment for Conspiracy to Provide Material Support to Terrorists (Nov. 27, 2007), available at http://www.justice.gov/opa/pr/2007/November/07_nsd_944.html [hereinafter Conspiracy to Provide Material Support].

123. *10-Year Sentence For Ohio Mall Bomb Plot*, CBS NEWS (Nov. 27, 2007), http://www.cbsnews.com/2100-201_162-3546747.html; Conspiracy to Provide Material Support, *supra* note 122.

124. CBS NEWS, *supra* note 123; Conspiracy to Provide Material Support, *supra* note 122.

Rather than serving the remainder of his sentence, Abdi was released from prison in 2012 and deported to Somalia.¹²⁵

In November 2012, Raees Alam Qazi and Sheheryar Alam Qazi, two brothers who are naturalized U.S. citizens from Pakistan, pled not guilty to charges of conspiring to provide material support to terrorism and conspiring to use a weapon of mass destruction.¹²⁶ The evidence is sparse because the trial was scheduled to commence in November 2014, but the allegations are that Raees Alam Qazi pedaled around New York on a bicycle to scout out locations for a bomb. The two siblings had purchased a remote-controlled car, Christmas lights, peroxide, and batteries and the suspects reportedly used the acquired items in an unsuccessful attempt to build a bomb.¹²⁷ The men possessed a copy of a magazine *Al Qaeda Inspire*, containing an article with instructions on assembling a homemade bomb.¹²⁸ The prosecutor stated that law enforcement officers arrested the men because they believed there was “an imminent threat,” but a federal agent acknowledged that there was no specific attack planned.¹²⁹ Prosecutors brought new charges while the two brothers were in custody because they allegedly had a physical altercation with two Deputy United States Marshals on April 8, 2014.¹³⁰

In 2009, Americans Ehsanul Islam Sadequee and Syed Haris Ahmed were sentenced to seventeen and thirteen years in prison respectively for furthering terrorist activities.¹³¹ Evidence against the defendants included that they traveled from the United States to Toronto to meet with supporters of terrorism, discussed potential terrorist attacks in the United States, filmed short video clips of possible terrorism targets in Washington, D.C., stored and shared the video clips with a third-party, possessed jihad videos and instructions on

125. Andrew Welsh-Huggins, *Nuradin Abdi, Ohio Mall Terrorism Defendant, Deported To Somalia*, HUFFINGTON POST (Nov. 19, 2012), http://www.huffingtonpost.com/2012/11/19/nuradin-abdi-ohio-mall-terrorism_n_2161887.html.

126. Indictment, *United States v. Qazi*, No. 12-60298-CR-SCOLA/SNOW (S.D. Fla. Nov. 30, 2012), available at http://www.investigativeproject.org/documents/case_docs/2071.pdf.

127. Lisa J. Huriash & Barbara Hijek, *New charges possible for Oakland Park brothers accused of terrorism*, SUN SENTINEL (May 1, 2014), http://articles.sun-sentinel.com/2014-05-01/news/fl-oakland-park-brothers-assault-20140501_1-raees-alam-qazi-sheheryar-alam-qazi-oakland-park-brothers.

128. Lizette Alvarez, *Details Are Revealed in Brothers' Terror Case*, N.Y. TIMES (Dec. 18, 2012), http://www.nytimes.com/2012/12/19/us/details-are-revealed-in-brothers-terror-case.html?_r=0.

129. *Id.*

130. Huriash & Hijek, *supra* note 127.

131. Press Release, U.S. Dep't of Justice, *Terrorism Defendants Sentenced in Atlanta* (Dec. 14, 2009), <http://www.justice.gov/opa/pr/2009/December/09-nsd-1338.html>.

bomb making, and Ahmed traveled to Pakistan to study paramilitary training at a jihadist school.¹³²

A group of seven indigent American citizens in Miami were frequently labeled the "Liberty City Seven" terrorists in the media. The suspects pled innocent, but six were convicted and sentenced to between six and thirteen and a half years for conspiring to commit acts of terrorism after two mistrials¹³³ and one defendant was acquitted of all charges.¹³⁴ One or more of the individuals met with an undercover FBI agent who pretended to be an al-Qaeda representative. They requested machine guns, vehicles, radios, and uniforms to wage jihad, as well as \$50,000 in cash from the agent. Narseal Batiste stated that he would wage war against the United States and destroy the Sears Tower. Each of the seven individuals swore loyalty to al-Qaeda.¹³⁵ Batiste, the purported leader of the "Liberty City Seven," said that he only postured and made assertions of acquiescence to the supposed al-Qaeda operative (FBI agent) because he wanted the \$50,000.¹³⁶ The FBI publicly acknowledged that this group had no contact with an international terrorist organization, did not possess explosives or other materials to conduct the attack, and was located in Miami.¹³⁷ The involved undercover FBI agent doubted the plot was possible.¹³⁸

132. Criminal Indictment at 5-8, *United States v. Ahmed*, No. 1:06-CR-147-CC (N.D. Ga. July 19, 2006), http://www.investigativeproject.org/documents/case_docs/140.pdf.

133. *Sears Tower bomb plot leader Narseal Batiste jailed*, BBC (Nov. 20, 2009), <http://news.bbc.co.uk/2/hi/8371671.stm> (reporting that the six defendants, who pled innocent but were found guilty after two mistrials and were sentenced to between six and thirteen and a half years in prison, were Narseal Batiste, Patrick Abraham, Stanley Grant Phanor, Naudimar Herrera, Burson Augustin, and Rotschild Augustine); *Feds to Pursue Third Trial in Alleged Chicago Sears Tower Bomb Plot*, Fox News (Apr. 23, 2008), <http://www.foxnews.com/story/2008/04/23/feds-to-pursue-third-trial-in-alleged-chicago-sears-tower-bomb-plot/>.

134. Peter Whoriskey, *Man Acquitted in Terror Cases Faces Deportation*, WASH. POST (Mar. 2, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/01/AR2008030101566.html> (noting that Lyglenson Lemorin was acquitted of all charges).

135. Indictment at 4-6, *United States v. Batiste*, No. 06-20373 (S.D. Fla. June 22, 2006), available at http://www.justice.gov/opa/documents/cts_batiste_indictment.pdf.

136. BBC, *supra* note 133.

137. Niles, *supra* note 30, at 276. The indictment also refers to an "individual known to the Grand Jury who was purporting to be a member of . . . al Qaeda," and the rest of the indictment refers to this individual as the "al Qaeda representative." Indictment at 4, *United States v. Batiste*, No. 06-20373 (S.D. Fla. June 22, 2006). Outside of this one line that provides this caveat, the record seems suggestive in implying that this was a real al-Qaeda member when it was just an FBI informant. Perhaps this terminology continues to impart more reality to the perception of an al-Qaeda or terrorism link in this case.

138. Dan Fletcher, *Top 10 Inept Terrorist Plots*, TIME (Sept. 8, 2009), http://content.time.com/time/specials/packages/article/0,28804,1920898_1920896_1920581,00.html.

In March 2013, Admed Ferhani and Mohamed Mamdough pled guilty and were sentenced to ten years and five years in state prison respectively for plotting to attack synagogues in New York.¹³⁹ On several occasions during April and May 2011 in the presence of an “accomplice” (who was an undercover detective), Ferhani and Mamdough stated that they wanted to disguise themselves as Jewish worshippers and blow up a synagogue and requested that the undercover detective refer them to someone who could make a bomb.¹⁴⁰ Ferhani sold crack cocaine, marijuana, and Percocet pills, reportedly to support the attack, and expressed that he wanted to buy guns and grenades.¹⁴¹ Ferhani and Mamdough did purchase two guns and a (fake) grenade from a second undercover detective and inquired about buying a silencer, bulletproof vest, a police radio interceptor, and a box of grenades.¹⁴² Weapon possession and drug trafficking charges were not brought against the individuals, even though these charges would have demanded a stiffer sentence than the sentence imposed on the defendants for pleading guilty to terrorism charges. Ferhani, the drug dealer, received the stiffer ten-year sentence, while Mamdough pled his innocence and contended that he was in the wrong place at the wrong time when Ferhani was running his mouth about “blowing things up” and that he “had nothing to do with this.”¹⁴³

Shahawar Matin Siraj was convicted and sentenced to thirty years in prison for plotting to bomb the New York City public transportation system, but he did not possess any equipment and U.S. attorney Roslynn R. Mauskopf explained that “the plot never developed beyond the planning stage, and the public was never at risk.”¹⁴⁴ Siraj claimed he was entrapped by Osama Eldawoody, who was paid \$100,000 by the FBI as an informant.¹⁴⁵ Eldawoody, who Siraj’s family claimed was Siraj’s closest friend and goaded him into conversing

139. Russ Buettner, *Man Sentenced in Plan to Bomb Manhattan Synagogue*, N.Y. TIMES (Apr. 26, 2013), <http://www.nytimes.com/2013/04/27/nyregion/man-sentenced-in-plan-to-bomb-new-york-synagogue.html>; Press Release, Cyrus R. Vance, Jr., District Attorney, N.Y. County, First Terrorist Convicted on State Terror Charges Sentenced to Decade in Prison for 2011 Plot to Attack Manhattan Synagogues (Mar. 15, 2013), available at http://www.investigativeproject.org/documents/case_docs/2122.pdf.

140. Indictment at 3-4, *New York v. Ferhani* (N.Y. Sup. Ct. June 15, 2011), available at http://www.investigativeproject.org/documents/case_docs/1592.pdf.

141. *Id.* at 4-5.

142. *Id.* at 6-9.

143. *NYC Terror Plot Suspect Mohammed Mamdough Says He Is Innocent*, CBS NEW YORK (May 14, 2011), <http://newyork.cbslocal.com/2011/05/14/nyc-terror-plot-suspect-mohammed-mamdough-says-he-is-innocent/>.

144. William K. Rashbaum, *Guilty Verdict in Plot to Bomb Subway Station*, N.Y. TIMES (May 25, 2006), <http://www.nytimes.com/2006/05/25/nyregion/25herald.html?ex=1306209600&en=d2ad540d25f2b2af&ei=5088&partner=rssnyt&emc=rss&r=0>.

145. *Id.*; Jennifer Lee, *Entrapment Evidence Lacking, Jurors Say*, N.Y. TIMES (May 25, 2006), <http://www.nytimes.com/2006/05/25/nyregion/25jurors.html> (some jurors not-

about a plot with explosives, recorded Siraj making violent, radical statements.¹⁴⁶ James Elshafay, Siraj's conspirator, pled guilty to conspiracy to blow up the subway station and testified against Siraj and received a much milder five-year sentence.¹⁴⁷

In an FBI sting operation, Yassin Muhiddin Aref and Mohammed Moshareff Hossain were convicted and sentenced to fifteen years in prison for laundering money and attempting to engage in the purchase of a surface to air missile.¹⁴⁸ Evidence included Aref and Hossain receiving cash from a confidential FBI informant; making return monthly installment payments, which were allegedly used by the informant to purchase a missile; engaging in money laundering by attempting to profit from weapon sales; being recorded while making statements of hatred for the present Pakistani government; and expressing that the Ambassador of Pakistan could be attacked.¹⁴⁹ Another interpretation of the evidence is that "there never was a plot"¹⁵⁰ because it was the FBI informant who insisted on needing missiles to kill the Pakistani diplomat and Aref and Hossain went along with the informant's "fictitious plot" by laundering money on behalf of the in-

ing that the entrapment defense may have been compelling but the defense did not succeed in presenting evidence).

146. Tom Hays, *Would-Be Subway Bomber Gets 30 Years*, ASSOCIATED PRESS (Jan. 8, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/08/AR2007010800158.html> (noting that Siraj apologized for his statements on the tapes and that he maintained that he never had any previous violent thought until Elawoody befriended him); see also Robin Shulman, *The Informer: Behind the Scenes, or Setting the Stage?*, WASH. POST (May 29, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/28/AR2007052801401.html> (further noting that Eldawoody "signed up as an NYPD confidential informer in July 2003," the police are helping him attain a job, Eldawoody will be buying a house, and "[t]here are no recordings of their early conversations."). Perhaps the time in which the goading by Eldawoody took place was in the earlier conversations that were not recorded. If this is true, or at least plausible, it seems rather unjust to negate or reduce the efficacy of an entrapment defense due to the one-sided nature of the best available or most compelling evidence of recordings to a suspect simply because Siraj did not have the foresight to record Eldawoody at an earlier time so that he could most effectively mount an entrapment defense later.

147. Press Release, U.S. Dept. of Justice, *Shahawar Matin Siraj Sentenced To Thirty Years of Imprisonment For Conspiring To Place Explosives at the 34th Street Subway Station* (Jan. 8, 2007), available at <http://www.justice.gov/usao/nye/pr/2007/2007Jan08.html>.

148. Michael Wilson, *Jury Convicts 2 Albany Men in Missile Sting*, N.Y. TIMES (Oct. 11, 2006), <http://www.nytimes.com/2006/10/11/nyregion/11plot.html>.

149. Criminal Complaint at 4-5, 7-8, 12, *United States v. Aref*, Case No. 04-m-330-DRH (N.D.N.Y. Aug. 5, 2004), available at <http://f11.findlaw.com/news.findlaw.com/cnn/docs/albany/usaref80504cmp.pdf>.

150. Wilson, *supra* note 148 (Kevin A. Luibrand, an attorney for the defendants, stated "[b]efore the government arrived on the scene, they were not committing any crimes and were not thinking about committing any crimes", while U.S Attorney Glenn T. Suddaby stated "[o]bviously we had a couple of individuals that were prone to supporting terrorism").

formant to make a profit.¹⁵¹ In fact, Hossain first met the informant because he wanted the informant to assist his brother with obtaining a driver's permit in New York by fraudulent means, which the informant did, and thereafter it was the informant who initiated discussions about missiles, including by displaying his own surface-to-air missile to Hossain at the informant's building, and offered to give a ten percent profit to Hossain by helping the informant "legalize" money made on "the black market" by washing it through Hossain's pizza business.¹⁵² It would seem that because the informant was working for the FBI, the informant was not actually making money on the black market, purchasing a missile, or washing dirty money through Hossain's business.

Kevin James was imprisoned for robbery convictions, and while in prison several inmates radicalized. Prosecutors contended that James was the leader of a prison gang known as "Jam'iyyat Ul-Islam Is-Saheeh."¹⁵³ In July 2005, Levar Haley Washington, who met James in prison, and Gregory Vernon Patterson were arrested for perpetrating gas station robberies in Los Angeles.¹⁵⁴ Washington, Patterson, James, and Hamad Samana (with Patterson and Samana not having a previous criminal record¹⁵⁵) pled guilty to conspiring to wage war against the United States and were sentenced to twenty-two years, twelve years, sixteen years, and seventy months in prison, respectively.¹⁵⁶ The terror plot angle apparently was premised on the distribution of materials inside prison that called the U.S. government and

151. Adam Liptak, *Spying Program May Be Tested by Terror Case*, N.Y. TIMES (Aug. 26, 2007), <http://www.nytimes.com/2007/08/26/us/26wiretap.html?pagewanted=all> (further noting that Terence L. Kindlon, Aref's lawyer, stated that "[t]he F.B.I. case was a hoax that grew out of the Bush administration's misuse of fear to turn our democracy into a dictatorship").

152. Criminal Complaint at 2-5, *United States v. Aref*, Case No. 04-m-330-DRH (N.D.N.Y. Aug. 5, 2004). In a specific example, the confidential source wanted to transport his own surface-to-air missile to Kingston, New York, and instead of paying someone else \$10,000 to transport the missile, the informant requested Hossain to do it and was willing to pay Hossain. *Id.* at 9.

153. Dennis A. Ballas, *Prisoner Radicalization*, FBI LAW ENFORCEMENT BULLETIN (Oct. 2010), available at <http://leb.fbi.gov/2010/october/leb-october-2010>; *Four charged with hatching prison terror plot*, NBC NEWS (Aug. 31, 2005), http://www.nbcnews.com/id/9148467/ns/us_news-security/t/four-charged-hatching-prison-terror-plot/#.U2gDxYFdWa9.

154. NBC NEWS, *supra* note 153.

155. Greg Krikorian & Solomon Moore, *4 Men Indicted in Alleged Plot to Spread Terror in Southland*, L.A. TIMES (Sept. 1, 2005), <http://articles.latimes.com/2005/sep/01/local/me-profile1>.

156. Ballas, *supra* note 153; Andrew Murr, *Guilty Plea in Terror Case*, NEWSWEEK (Mar. 13, 2010), <http://www.newsweek.com/guilty-plea-terror-case-95253> (stating that Samana had been declared unfit to stand trial and was undergoing psychiatric treatment).

supporters of Israel “infidels.”¹⁵⁷ Prosecutors contended that the defendants hatched a terror plot and they “financed it by robbing gas stations,” which was the reason Washington and Patterson were arrested.¹⁵⁸ The FBI stated in its press release that “Washington and Patterson conducted about a dozen armed robberies of gas stations.”¹⁵⁹ Under the applicable California law, each offense carries between two to nine years in prison, depending on whether it is first or second degree,¹⁶⁰ plus another ten years for the use of a weapon during the robbery.¹⁶¹ The defendants could have been charged with well over a hundred years in prison for the robberies alone, but instead the defendants were willing to plead guilty to terrorism related charges even though they did not commit any act in furtherance to commit terrorism or acquire explosives.¹⁶²

The FBI hired Darren Griffin to act undercover and infiltrate an alleged association of terrorists in Toledo.¹⁶³ The defendants—Mohammad Zaki Amawi, Marwan Othman El-Hindi, and Zand Wassim Mazloun, two of whom were Americans—were convicted by a jury for conspiracy to maim persons overseas and for supporting terrorism.¹⁶⁴ They were sentenced to between eight and twenty years in prison.¹⁶⁵ Evidence indicated that all three men were hostile over U.S. military operations overseas, read and promoted jihadist websites, possessed and distributed a bomb-making video, and offered radical views in the presence of Griffin. All of these acts took place inside the United States.¹⁶⁶ The court underscored that a radical ideology seemed pre-

157. Ballas, *supra* note 153.

158. NBC News, *supra* note 153.

159. Press Release, Federal Bureau of Investigation, Man Who Formed Terrorist Group that Plotted Attacks on Military and Jewish Facilities Sentenced to 16 Years in Federal Prison (Mar. 6, 2009), *available at* <http://www.fbi.gov/losangeles/press-releases/2009/la030609ausa.htm>.

160. Cal. Penal Code §§ 212.5, 213 (West 2014 & Supp. 2015).

161. Cal. Penal Code § 12022.53 (West Supp. 2015).

162. It also seems unrealistic to assume that the suspects would have been able to plan for and covertly act to carry out such a terrorist attack when they were wanted fugitives following a string of gas station robberies. Moreover, if one associates the ubiquity of prison gangs as a driving force for violence, it might be arduous to encounter any prisoner who is not associated with organized violence and predisposed to further criminal acts.

163. Government Sentencing Memorandum at 20, 24, *United States v. Amawi*, No. 3:06CR719 (N.D. Ohio Oct. 5, 2009), *available at* http://www.investigativeproject.org/documents/case_docs/1100.pdf.

164. *Id.* at 3, 11-12, 18, 20-22, 25, 37.

165. Press Release, U.S. Dep’t of Justice, Three Sentenced for Conspiring to Commit Terrorist Acts Against Americans Overseas (Oct. 22, 2009), *available at* <http://www.justice.gov/opa/pr/2009/October/09-nsd-1136.html>.

166. Government Sentencing Memorandum at 3, 11-12, 18, 20-22, 25, 37, *United States v. Amawi*, No. 3:06CR719 (N.D. Ohio Oct. 5, 2009), *available at* http://www.investigativeproject.org/documents/case_docs/1100.pdf.

sent because Amawi viewed jihadist videos.¹⁶⁷ One or more of the defendants might have possessed a mindset to attack a U.S. military serviceperson, but there was no plot and there was no step taken to travel abroad even though to “maim overseas” was a charge brought by prosecutors.

As part of a ring of associates that allegedly involved eight people,¹⁶⁸ Daniel Patrick Boyd pled guilty to providing material support to terrorists, to murder, kidnap, and maim persons abroad (for acts taken roughly from November 2006 to July 2009) and was sentenced to 216 months in prison.¹⁶⁹ Boyd, who was the ringleader, testified against co-conspirators who pled not guilty but four defendants were convicted and were sentenced to between fifteen and forty-five years in prison.¹⁷⁰ Daniel Boyd’s sons, Dylan and Zakariya Boyd, pled guilty to conspiring to assist terrorists and were sentenced to eight and nine years in prison.¹⁷¹ The evidence against the group included that several of the comrades had traveled to Israel in 2007 and allegedly wanted to engage in violent jihad (but did not do so while present in Israel), sought to hide their malicious intentions, conspired violent acts that would constitute murder and maiming overseas, and sought to recruit others to fight jihad overseas.¹⁷² The individuals reportedly conversed about violence for over two and a half years,¹⁷³ but did not attempt to commit any act of terrorism. However, several of the defendants did own rifles.¹⁷⁴

167. *Id.* at 32 (“the amount of time that Amawi spent watching, collecting, sharing and discussing these materials constitutes convincing evidence of his commitment to this ideology.”).

168. Carol Cratty, *Three men sentenced in North Carolina terrorist ring*, CNN (Jan. 13, 2012), <http://www.cnn.com/2012/01/13/justice/nc-terror-ring-sentencing/>.

169. Press Release, Federal Bureau of Investigation, North Carolina Resident Daniel Patrick Boyd Sentenced for Terrorism Violations (Aug. 24, 2012), *available at* <http://www.fbi.gov/charlotte/press-releases/2012/north-carolina-resident-daniel-patrick-boyd-sentenced-for-terrorism-violations>.

170. Press Release, Federal Bureau of Investigation, Fourth Circuit Affirms Convictions of Boyd Defendants (Feb. 4, 2014), *available at* <http://www.fbi.gov/charlotte/press-releases/2014/fourth-circuit-affirms-convictions-of-boyd-defendants> (referencing Hassan, Yaghi, Sherifi, and Subastic); Federal Bureau of Investigation, *supra* note 169 (stating that Boyd “cooperated with the government” and after “pleading guilty to two counts of the superseding indictment in 2011” and having other charges dismissed, “Boyd testified at trial against several of his co-conspirators who were convicted in October 2011”); Cratty, *supra* note 168; *Alleged NC Terrorism Ringleader Pleads Guilty*, CBS NEWS (Feb. 9, 2011), <http://www.cbsnews.com/news/alleged-nc-terrorism-ringleader-pleads-guilty/> (calling Boyd the alleged ringleader).

171. Cratty, *supra* note 168.

172. Indictment at 2-10, *United States v. Boyd*, No. 5:09-cr-216-1 FL (E.D.N.C. July 22, 2009), *available at* http://www.investigativeproject.org/documents/case_docs/1029.pdf; Cratty, *supra* note 168.

173. Indictment at 3, *United States v. Boyd*, No. 5:09-cr-216-1 FL (E.D.N.C. July 22, 2009), *available at* http://www.investigativeproject.org/documents/case_docs/1029.pdf.

174. *Id.* at 5, 8-9, 11, 12.

The Heritage Foundation study also lists criminal cases brought in foreign courts and one that involved assistance to a reported terrorist in a foreign country. For the latter case, in June 2012, Raja Lahrasib Khan, a Chicago cab driver, pled guilty to providing material support and resources to an alleged al-Qaeda affiliated group and was sentenced to seven-and-a-half years in prison by a U.S. court.¹⁷⁵ The evidence against Khan, who was originally from Pakistan but was naturalized in the United States, included that he provided between \$200 and \$250 to Ilyas Kashmiri, a leader of a Kashmir independence movement and who Khan believed was associated with al-Qaeda and was involved in terrorist attacks in the Kashmir, India region.¹⁷⁶ Khan also sent \$930 via Western Union to "Individual A" in Pakistan on November 23, 2009, instructed Individual A to give approximately \$300 to Kashmiri, and participated in meetings during February and March 2010 with an undercover law enforcement officer who gave \$1,000 to Khan on March 17, 2010 and instructed Khan to give the money to Kashmiri.¹⁷⁷

Several cases listed by the Heritage Foundation study developed in foreign courts. Courts in England sentenced Dhiren Barot to forty years (which was later reduced to thirty years) for having terrorist plans saved in computer files but as Justice Butterfield remarked, he had not "moved to the final stages of achieving them."¹⁷⁸ Six other associates admitted to conspiracy charges to cause explosions and were sentenced to between fifteen and twenty-six years in prison.¹⁷⁹

Assem Hammoud, a Lebanese man in Lebanon, and seven others allegedly planned to bomb the New York subway system based on FBI discoveries of conversations in online chat rooms. None of the chatterers had traveled to the United States, but FBI Assistant Director Mark Mershon explained that "[t]hey were about to go to a phase where they would attempt to surveil targets, establish a regimen of attack and acquire resources necessary to effectuate the at-

175. Chuck Goudie, *Fare for taxi-driving terrorist sympathizer: 90 months*, CHICAGO CHRONICAL (June 8, 2012), <http://www.chicagochronicle.com/index.php/sid/206436566>.

176. Plea Agreement at 3-5, United States v. Khan, No. 10 CR 240 (N.D. Ill. Feb. 6, 2012) (noting also that Khan was in Pakistan in 2008).

177. *Id.*

178. 'Dirty bomb' man's sentence cut, BBC (May 16, 2007), http://news.bbc.co.uk/2/hi/uk_news/6661371.stm; Al-Qaeda plotter jailed for life, BBC (Nov. 7, 2006), http://news.bbc.co.uk/2/hi/uk_news/6123236.stm.

179. Dhiren Barot's co-conspirators, BBC (June 15, 2007), http://news.bbc.co.uk/2/hi/uk_news/6756685.stm; see also David Carlisle, *Dhiren Barot: Was He an Al Qaeda Mastermind or Merely a Hapless Plotter?*, 30(12) STUD. IN CONFLICT & TERRORISM 1057 (2007), available at <https://www.ncjrs.gov/App/publications/Abstract.aspx?id=242745> (many argued that Barot had only vague plans without funding or al-Qaeda connections).

tacks”¹⁸⁰ Based on discussions in this internet chat room among individuals who had never met each other and that fact that authorities stating that they discovered maps and plans for a bombing operation on Hammoud’s computer, Lebanese courts convicted and sentenced Hammoud to two years in prison and he was released for time served and two other men, a Syrian and a Lebanese chatterer, who were never in custody, were sentenced, in absentia, to life in prison.¹⁸¹ These convictions did not take place in U.S. courts and none of the defendants were present in the United States.¹⁸²

Britain’s Heathrow Airport delayed flights in 2006 amid fears that terrorists would smuggle liquid-based explosive devices into as many as ten airline flights.¹⁸³ The British MI5 had bugged the suspects’ apartments and the associates discussed smuggling the components for the bombs on board and the recruitment of “martyrs.”¹⁸⁴ Craig Murray, the former British Ambassador to Uzbekistan, pointed out that “[n]one of the alleged terrorists had made a bomb. None had bought a plane ticket.”¹⁸⁵ However, the judge did believe that this was a plot that had “reached an advanced stage in its development” and one of the men did possess materials that could be used to produce an explosive device.¹⁸⁶ The three men were convicted in British courts and were sentenced to twenty years to life in prison, but the convictions were not for conspiring to bomb a plane, but for conspiracy to commit murder because they were “prepared to blow themselves up.”¹⁸⁷

In a case unfolding in Canadian courts and currently consisting of sparse public facts due to the sealed investigatory record, Chiheb Es-

180. Kelli Arena, *FBI: Three held in New York tunnel plot*, CNN (July 7, 2006), <http://www.cnn.com/2006/US/07/07/tunnel.plot/>.

181. *Lebanon: 2-Year Sentence in Plot to Blow Up Hudson River Tunnels*, N.Y. TIMES (Feb. 17, 2012), http://www.nytimes.com/2012/02/18/world/middleeast/lebanon-2-year-sentence-in-plot-to-blow-up-hudson-river-tunnels.html?_r=0; Eric Lipton, *Recent Arrests in Terror Plots Yield Debate on Preemptive Action by Government*, N.Y. TIMES (July 9, 2006), <http://www.nytimes.com/2006/07/09/us/09plot.html> (stating that Hammoud was monitored in internet “chat rooms used by Islamic extremists who had used coded language to discuss a possible attack” and that “[o]ne American official said the members of the group had never met one another.”).

182. N.Y. TIMES, *supra* note 181; Lipton, *supra* note 181.

183. *Airlines terror plot’ disrupted*, BBC (Aug. 10, 2006), http://news.bbc.co.uk/2/hi/uk_news/4778575.stm.

184. Duncan Gardham & Gordon Rayner, *Airliner bomb trial: How MI5 uncovered the terror plot*, THE TELEGRAPH (Sept. 9, 2008), <http://www.telegraph.co.uk/news/uknews/2709379/Airliner-bomb-trial-How-MI5-uncovered-the-terror-plot.html>.

185. Craig Murray, *The timing is political*, THE GUARDIAN (Aug. 17, 2006), <http://www.guardian.co.uk/commentisfree/2006/aug/18/comment.politics1>.

186. *Airline plot trio gets life terms*, BBC (Sept. 14, 2009), http://news.bbc.co.uk/2/hi/uk_news/8254156.stm.

187. *Would-be suicide bombers jailed for life*, BBC (July 12, 2010), <http://www.bbc.co.uk/news/10600084>.

seghaier, a thirty-six-year-old Palestinian living in Toronto, and Raed Jaser, a thirty-one-year-old native of Tunisia living in Montreal, were accused of conspiring to derail a New York to Toronto passenger train.¹⁸⁸ Authorities conducted covert searches of the suspects' homes and vehicles, monitored phone calls and bank records, and rented an apartment adjacent to a suspect.¹⁸⁹ Experts stated that the undercover operations involved interactions with the suspects that will "without any question" lead to entrapment claims in Canadian courts.¹⁹⁰

E. ATTENDING A SUSPECT TERRORIST CAMP

Attending an apparent terrorist camp can to some degree make the participant either guilty of attempted terrorist activity or presumed to be awaiting orders to perpetrate terrorism.¹⁹¹ Perhaps there are gradations of intent and questions over whether a suspect is always assumed to be guilty after attending a militant camp, can withdrawal from an ongoing conspiracy, or has varying intentions for attending a militant camp, including the case of a camp not necessarily organized for the intention of perpetrating terrorist activities or designed for combat in a region that does not even involve the United States.¹⁹²

188. Wendy Gillis, *Entrapment defence likely in train-terror case: experts*, THE STAR (Jan. 15, 2014), http://www.thestar.com/news/gta/2014/01/15/entrapment_defence_likely_in_trainterror_case_experts.html.

189. *Id.*

190. *Id.*

191. See *United States v. Hayat*, 710 F.3d 875 (9th Cir. 2013) (reporting that Hayat "attended a camp to train for jihad . . . and taught how to kill American troops," which also assumed that he would receive orders in the United States); *Appeals panel upholds terrorist conviction*, UPI (Mar. 14, 2013), http://www.upi.com/Top_News/US/2013/03/14/Appeals-panel-upholds-terrorist-conviction/UPI-95951363272485/ (discussing the case of Hamid Hayat and stating that the "U.S.-born Pakistani . . . was suspected of awaiting orders to carry out an attack on the United States."); Carafano & Zuckerman, *supra* note 11 (identifying individuals attending reported terrorist camps as a form of "plot").

192. For example, Hamid Hayat stated that he attended a camp and the focus was on "kill[ing] American troops." *Hayat*, 710 F.3d at 883; see also *United States v. Kahn*, 309 F. Supp. 2d 789, 821 (E.D. Va. 2004) (stating that there was preparation in camps to fight in Afghanistan against U.S. troops). This might not be defined as terrorism, but the act of unauthorized training or fighting in a foreign war can be a domestic crime or a war crime if a citizen is not a member of a recognized military force engaged in armed combat under the Geneva Convention. POW status can be denied if combatants are not (1) commanded by leaders, (2) wear recognizable combat insignia, (3) openly carry arms, and (4) obey laws of war. Convention Relating to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316; see Hague Conventions on Land Warfare of 1899, ch. I, art. 1 July 29, 1899, 32 Stat. 1803; Hague Conventions on Land Warfare of 1907, ch. I, art. 1 Oct. 18, 1907, 36 Stat. 2277. Likewise, armed combat could involve Afghanistan, the Balkans, Syria, or some other region. Training might implicate questions akin to mercenarism, for which many private multinational military firms have been under scrutiny. See ALLISON STANGER, *ONE NATION UNDER CONTRACT: THE OUTSOURCING OF*

A case that certainly did proceed beyond merely attending a terrorist training camp is found in the indictment of Christopher Paul, an American from Ohio, who pled guilty to conspiring to assist terrorists and was sentenced to twenty years in prison.¹⁹³ The evidence consisted of Paul travelling to Pakistan and Afghanistan in the early 1990s to join the mujahedeen, receiving weapons training at a militant camp, fighting in Afghanistan and in the Balkans with the mujahedeen and al-Qaeda members from 1993 to 1995, conducting militant training operations for several local group members in Burr Oak State Park in Ohio in 1997, making forty-four calls to a co-conspirator in Europe in 1999, and travelling to Germany to provide explosives training to a terror group in April 1999.¹⁹⁴

The higher profile case was that of Jose Padilla, who was arrested and called an “enemy combatant” in 2002.¹⁹⁵ Attorney General John Ashcroft maintained that Padilla was a link in an “unfolding terrorist plot to attack the United States” with a radioactive bomb, but after several years of investigation, evidence did not substantiate this allegation and Padilla was eventually convicted in January 2008 and sentenced to seventeen years in prison for attending an al-Qaeda camp in Afghanistan in 2000,¹⁹⁶ but he was re-sentenced to twenty-one years in 2014.¹⁹⁷

The Lackawanna Six, a group of six Americans, were touted in the media by the Bush administration as a terror cell waiting to strike. The associates were ultimately convicted of training at an al-Qaeda camp in Afghanistan and were sentenced to between seven and

AMERICAN POWER AND THE FUTURE OF AMERICAN FOREIGN POLICY 106 (2009) (remarking that “the legal status of contractors working abroad is still completely murky” because “they aren’t noncombatants under the Fourth Geneva Convention, because they carry weapons on behalf of the U.S. government” and they “aren’t lawful combatants either” because “they don’t wear uniforms or answer to the U.S. military”, and quoting Professor Phillip Carter who explains that private military contractors “actually have the same legally ambiguous status as the unlawful combatants detained at Guantanamo Bay”); see generally Robert Bejesky, *Mercenaries, Myrmidons, and Missionaries*, 37 U. ARK. LITTLE ROCK L. REV. 45 (2014).

193. Press Release, Federal Bureau of Investigation, Ohio Man Sentenced to 20 Years for Terrorism Conspiracy to Bomb Targets in Europe and the United States (Feb. 26, 2009), available at <http://www.fbi.gov/cincinnati/press-releases/2009/ci022609.htm/>.

194. *Id.*

195. *Padilla v. Rumsfeld*, 352 F.3d 695, 699, 701 (2d Cir. 2003), *rev’d*, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

196. Kirk Semple, *Padilla Gets 17 Years in Conspiracy Case*, N.Y. TIMES, Jan. 23, 2008, at A14.

197. Press Release, U.S. Dep’t of Justice, Jose Padilla Re-Sentenced to 21 Years in Prison for Conspiracy to Murder Individuals Overseas, Providing Material Support to Terrorists (Sept. 9, 2014), available at <http://www.justice.gov/opa/pr/2014/September/14-nsd-956.html>.

ten years in prison.¹⁹⁸ A similar case involved Hamid Hayat, the son of a Pakistani immigrant in California, who was convicted and sentenced to a twenty-four-year prison sentence for supporting terrorism by attending a terrorist camp in Pakistan and for lying to government officials by stating that he did not attend a terrorist camp.¹⁹⁹

After an eight-week trial, Tarek Mehanna was convicted and sentenced to 210 months in prison for “conspiracy to provide material support to al Qaeda, providing material support to terrorists (and conspiracy to do so), conspiracy to commit murder in a foreign county, conspiracy to make false statements to the FBI, and two counts of making false statements.”²⁰⁰ The court’s factual findings were that American Daniel Maldonado, Mehanna, and Adhmed Abousamra discussed Islamic jurisprudence, watched a jihadi videotape that showed mujahideen victories, and expressed their interest in participating in jihad, gloriously dying on the battlefield, and fighting in Afghanistan, Chechnya, or Iraq.²⁰¹ Maldonado did travel abroad.²⁰² On December 16, 2006, FBI agents interviewed Mehanna about the whereabouts of Maldonado, who had trained for jihad in Somalia and was involved in fighting, but Mehanna falsely stated that he was unaware of his whereabouts when the FBI verified that Mehanna had received telephone calls from Maldonado.²⁰³ Maldonado was later arrested, indicted, and pled guilty to one count of receiving “military-type training from a foreign terrorist organization” and was sentenced to ten years in prison.²⁰⁴ The court found that in other conversations among

198. Press Release, U.S. Dep’t of Justice, Mukhtar Al-Bakri Pleads Guilty to Providing Material Support to Al Qaeda (May 19, 2003), *available at* http://www.justice.gov/opa/pr/2003/May/03_crm_307.htm (noting that all six individuals pled guilty, that the charges were “based on their attendance at an al Qaeda-affiliated training camp” and that they “provided material support to al Qaeda by obtaining a uniform, traveling to the al Farooq training camp near Kandahar, Afghanistan, and providing guard duty at the training camp”); Joint Memorandum of Law in Support of Defendants’ Motion to Revoke Magistrate Judge Schroeder’s Detention Order, *United States v. Goba*, 02-CR-214-S (W.D.N.Y. Nov. 25, 2002), *available at* <http://news.findlaw.com/hdocs/docs/terrorism/usgoba112502jmol.pdf>; Matthew Purdy & Lowell Bergman, *Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. TIMES (Oct. 12, 2003), <http://www.nytimes.com/2003/10/12/nyregion/12LACK.html>.

199. *United States v. Hayat*, 710 F.3d 875 (9th Cir. 2013); UPI, *supra* note 191.

200. Press Release, Federal Bureau of Investigation, Tarek Mehanna Sentenced in Boston to 17 Years in Prison on Terrorism-Related Charges (Apr. 12, 2012), *available at* <http://www.fbi.gov/boston/press-releases/2012/tarek-mehanna-sentenced-in-boston-to-17-years-in-prison-on-terrorism-related-charges>.

201. Criminal Complaint at 10-11, 15, *United States v. Mehanna*, No. 09-0119-LTS (D. Mass. Oct. 20, 2009), *available at* <http://graphics8.nytimes.com/packages/pdf/national/20091021-terror-complaint.pdf>.

202. *Id.* at 12.

203. Affidavit of Andrew Nambu at 3-4, 6, *United States v. Mehanna*, No. 08-148-255 (D. Mass. Nov. 7, 2008), *available at* http://www.investigativeproject.org/documents/case_docs/726.pdf.

204. *United States v. Mehanna*, 669 F. Supp. 2d 160, 162 (D. Mass. 2009).

Abousamra, Mehanna, and two cooperating witnesses (who recorded conversations), that the associates commented about shooting members of the U.S. government and going to a mall and randomly shooting people.²⁰⁵ Abousamra remains on the FBI's "Most Wanted" list.²⁰⁶

An association of eleven individuals, labeled in the media as the "Virginia Jihad Network,"²⁰⁷ was charged with varying levels of conspiracy to levy war against the United States; conspiracy to provide material support to al-Qaeda, the Taliban, and other terror groups; and conspiracy to possess and use firearms in connection with crimes of violence.²⁰⁸ Evidence brought against the men to support the charges included that they prepared for jihad and attained military training by playing paintball games in secret in Virginia;²⁰⁹ that several defendants attended a Lashkar-e-Taiba terror camp (a group founded on fighting Russians in Afghanistan);²¹⁰ and that some members assisted Muslims in Chechnya, viewed Osama bin Laden favorably, and favored jihad.²¹¹ More than one member received and possessed AK-47 firearms and ammunition in the United States.²¹² Of the eleven men, nine were convicted (three of whom had sentences reduced to thirty-seven and thirty-eight months for testifying against the others) and two were found innocent.²¹³ Prosecutors never alleged that the group had planned a domestic terror attack, but some of the defendants stated that they were preparing to fight against U.S. troops.²¹⁴

F. LONER SUSPECT TERRORISTS ON A QUEST TO LOCATE FRIENDS

Most of the cases in Sections (F) and (G) involve loner suspect terrorists who were flagged by law enforcement during their quest to locate friends. The FBI often associates with the suspect and builds a

205. *Mehanna*, 669 F. Supp. 2d at 160-62.

206. WANTED BY THE FBI: AHMAD ABOUSAMRA, FEDERAL BUREAU OF INVESTIGATION, available at <http://web.archive.org/web/20121106012954/http://www.fbi.gov/wanted/alert/ahmad-abousamra>.

207. Carafano & Zuckerman, *supra* note 11.

208. *United States v. Khan*, 309 F. Supp. 2d 789, 796 (E.D. Va. 2004).

209. *Khan*, 309 F. Supp. 2d at 802.

210. *Id.* at 806-07.

211. *Id.* at 803-05, 820.

212. *Id.* at 808.

213. Jerry Markon, *Teacher Sentenced for Aiding Terrorists*, WASH. POST (Aug. 26, 2006), <http://www.washingtonpost.com/wpdyn/content/article/2006/08/25/AR2006082500460.html>; Jerry Markon, *Judge Slashes Sentences of 2 in 'Va Jihad'*, WASH. POST (Feb. 25, 2006), <http://www.washingtonpost.com/wpdyn/content/article/2006/02/24/AR2006022401861.html>.

214. *Judge Slashes Sentences*, *supra* note 213. The conspirators never reached Afghanistan, but they reportedly took steps to pursue that goal. *Khan*, 309 F. Supp. 2d at 821.

fake terrorist organization as part of a sting operation. Cases seemingly demonstrate that suspects do possess a malicious mens rea, but one might query whether any “terror plot” would exist without the staged police involvement or whether a “terror plot” became more concrete and feasible with law enforcement assistance, whether there was a deepening of the suspect’s mens rea only because of the FBI’s proactive sting operation, and whether the foremost consequence of interventionist law enforcement operations is to amass more evidence and lengthen the defendants’ prison sentence, rather than save the public from the suspect’s wrath.

A loner terror suspect who did provide significant evidence of a terror plot without a facilitating FBI sting operation was Khalid Ali-M Aldawsari. Aldawsari, a Saudi Arabian citizen living in Lubbock, Texas, placed an order for ten 500 milliliter bottles of eighty percent concentrated phenol.²¹⁵ Concentrated phenol can be used to make explosives, but also has legitimate uses and Aldawsari never retrieved the order from the freight service.²¹⁶ FBI agents discovered that Aldawsari had, in previous years, researched (on the internet) how to make “Plastique Explosive From Aspirin” and how to booby-trap a vehicle, made statements about the plight of Arabs and Muslims around the world on an internet blog, purchased a chemical suit, possessed a multi-year journal that chronicled plans for a terrorist attack,²¹⁷ and emailed himself a list of twelve “nice targets.”²¹⁸ The FBI arrested Aldawsari on February 24, 2011 because he had acquired several materials to make an explosive device, including a Hazmat suit, clocks, concentrated sulfuric and nitric acids, wiring, and beakers.²¹⁹ Aldawsari pled innocent but was convicted of one count of attempted use of a weapon of mass destruction and was sentenced to life in prison, and the conviction was upheld by the appellate court.²²⁰

215. Complaint at 3-4, *United States v. Aldawsari*, No. 5:11-MJ-017 (N.D. Tex. Feb. 23, 2011), available at http://www.investigativeproject.org/documents/case_docs/1488.pdf.

216. *Id.* (noting that the shipment was returned to the supply company and that an FBI agent, posing as a company representative called and asked why Aldawsari wanted the phenol and he responded that it was for personal research to “get into a bigger university” but Aldawsari was a Business major at South Plains College).

217. *Id.* at 4, 6, 8-10.

218. Press Release, Dep’t of Justice, Texas Resident Arrested on Charge of Attempted Use of Weapon of Mass Destruction Suspect Allegedly Purchased Bomb Materials and Researched U.S. Targets, at 2 (Feb. 24, 2011), available at http://www.investigativeproject.org/documents/case_docs/1487.pdf.

219. *Id.*

220. Press Release, U.S. Attorney’s Office, U.S. Court of Appeals Affirms Conviction and Sentence of Khalid Aldawsari (Jan. 24, 2014), available at http://www.investigativeproject.org/documents/case_docs/2303.pdf.

Derrick Shareef was sentenced to a thirty-five year prison term after he pled “guilty to a charge of attempted use of a weapon of mass destruction in violation of 18 U.S.C. § 2332a(a)(2)(D).”²²¹ The evidence involved William Chrisman, an FBI informant, accompanying Shareef to the CherryVale Mall in Rockford, Illinois, in the fall of 2006 to assess the possibility of an attack with guns and grenades, Chrisman recording conversations about the planned attack, Shareef buying weapons through Chrisman’s contact (an undercover FBI agent), and Shareef receiving guns (but not grenades) from the undercover FBI agent and putting them into Chrisman’s car, which was the point of Shareef’s arrest.²²² Shareef was a U.S. citizen who apparently converted to Islam and was acting alone.²²³

FBI agents identified Hosan Maher Husein Smadi, a nineteen-year-old Jordanian man living in Texas, of making hateful statements about the United States in internet chat rooms.²²⁴ Undercover FBI agents posed as al-Qaeda “sleeper” cell members and associated with Smadi from June to September 2009.²²⁵ Smadi stated that he wanted to bomb the sixty-story Fountain Place office tower in Dallas and an undercover FBI agent provided Smadi with a fake “vehicle-borne improvised explosive device” with no explosive materials.²²⁶ Smadi drove the truck to Fountain Place, thought he activated the device, walked across the street, entered the getaway car driven by an undercover law enforcement officer, and was arrested after he dialed a code on his cell phone that he believed would remotely activate the device.²²⁷ Smadi pled guilty to attempting to use a weapon of mass destruction and was sentenced to twenty-four years in prison.²²⁸ There was no real terrorist cell and no association with a terrorist organiza-

221. *United States v. Shareef*, No. 10-C-7860, 2011 WL 1838876, at *1-2 (N.D. Ill. May 13, 2011).

222. *Id.*; Mike Robinson, *Feds: Man Planned to Blow Up Ill. Mall*, ASSOCIATED PRESS (Dec. 9, 2006), <http://www.washingtonpost.com/wpdyn/content/article/2006/12/08/AR2006120800857.html>.

223. Robinson, *supra* note 222.

224. James C. McKinley Jr., *Friends’ Portrait of Texas Bomb Suspect at Odds With F.B.I.*, N.Y. TIMES (Sept. 27, 2009), <http://www.nytimes.com/2009/09/28/us/28texas.html?pagewanted=all&r=0>.

225. Press Release, Federal Bureau of Investigation, FBI Arrests Jordanian Citizens for Attempting to Bomb Skyscraper in Downtown Dallas (Sept. 24, 2009), *available at* <http://www.fbi.gov/dallas/press-releases/2009/dl092409.htm>.

226. *Id.*

227. Press Release, U.S. Dep’t of Justice, Man Admits Attempting to Use a Weapon of Mass Destruction to Bomb a Skyscraper in Downtown Dallas (May 26, 2010), *available at* http://www.justice.gov/usao/txn/PressRel10/smadi_ple_pr.html.

228. Press Release, U.S. Dep’t of Justice, Man Sentenced to 24 Years in Prison for Attempting to Use a Weapon of Mass Destruction to Bomb Skyscraper in Downtown Dallas (Oct. 19, 2010), *available at* <http://www.justice.gov/opa/pr/2010/October/10-nsd-1170.html>.

tion, there would have been no bombing material (albeit fake) without covert FBI involvement, and perhaps there would have been no "plot" without the encouragement, friendship, and support provided through the FBI sting operation.

In October 2012, Manssor Arbabsiar, a naturalized citizen from Iran, pled guilty to conspiring in a murder-for-hire offense and conspiring to commit an act of terrorism across national boundaries²²⁹ and was sentenced to twenty-five years in prison.²³⁰ Evidence included Arbabsiar traveling to Mexico during May to July 2011 and meeting with a U.S. Drug Enforcement Agency confidential source ("DEA Source") who Arbabsiar believed was a member of a drug cartel. Arbabsiar relayed that he and his Iranian associates would pay \$1.5 million to have four members of the drug cartel murder the Saudi Ambassador to the United States.²³¹ Arbabsiar did facilitate two electronic banking transactions of \$49,960 each in August 2011, which were actually wired to an undercover FBI bank account in Manhattan, and Arbabsiar was arrested following a flight from Mexico to New York in September 2011.²³²

Farooque Ahmed, a naturalized American originally from Pakistan, was arrested by the FBI in October 2010, pled guilty to assisting individuals who he believed were al-Qaeda members and to collecting information related to a terror plot, and was sentenced to twenty-three years in prison.²³³ In January 2010, Ahmed and a companion sent an email to someone believed to be associated with a terrorist organization and Ahmed and his associate received a return email in April 2010 from the alleged terror group representative.²³⁴ A contact told Ahmed to meet him at a hotel near the Washington-Dulles International Airport.²³⁵ Ahmed and the contact met at the hotel on April

229. Memorandum from the U.S. Attorney for the S. Dist. of N.Y. to Sabrina Shroff, Fed. Defenders of N.Y., Re: U.S. v. Manssor Arbabsiar, at 1-2, 9 (Oct. 16, 2012), *available at* http://www.investigativeproject.org/documents/case_docs/2048.pdf.

230. Press Release, U.S. Dep't of Justice, Manssor Arbabsiar Sentenced in New York Federal Court to 25 Years in Prison for Conspiring with Iranian Military Officials to Assassinate the Saudi Arabian Ambassador to the United States (May 30, 2013), *available at* http://www.investigativeproject.org/documents/case_docs/2178.pdf.

231. Complaint at 7-9, United States v. Arbabsiar, No. 11 MAG 2617 (S.D.N.Y. Oct. 11, 2011), *available at* http://www.investigativeproject.org/documents/case_docs/1712.pdf.

232. *Id.* at 2-3, 15.

233. Plea Agreement at 1, United States v. Ahmed, No. 1:10cr413 (E.D. Va. Mar. 29, 2011), *available at* http://www.investigativeproject.org/documents/case_docs/1511.pdf; Press Release, Dep't of Justice, Virginia Man Sentenced to 23 Years in Prison for Plotting Attacks on D.C.-Area Metro Stations with People He Believed to Be Al-Qaeda Members (Apr. 11, 2011), *available at* http://www.investigativeproject.org/documents/case_docs/1513.pdf [hereinafter Virginia Man Sentenced].

234. Plea Agreement, *supra* note 233, at 12-13.

235. *Id.*

18th and at a hotel room in Sterling, Virginia, on May 15th, and the contact handed Ahmed a document with potential terrorist attack locations and instructions.²³⁶ Ahmed told the individual that he wanted to kill Americans fighting in Afghanistan.²³⁷ In July 2010, Ahmed recorded images of the Arlington Cemetery Metrorail station and provided the image to his supposed terrorist contact and took mobile phone video camera images of Arlington Cemetery, Courthouse, the Pentagon City Metrorail stations, and a hotel in Washington, D.C.²³⁸ Ahmed made statements relaying that he wanted to kill as many Americans as possible and was asked to choose which of three backpacks would be most conducive to an attack.²³⁹ In the end, there was never an attempted attack, there was no terror group, and there were no explosive materials acquired;²⁴⁰ the press releases often discount the fact that Ahmed's contacts were all FBI agents and that the FBI devised the plot and assigned Ahmed with the tasks.²⁴¹ Ahmed's original "associate" who was present when the original email was sent and who accompanied Ahmed on the surveillance tasks was not charged and remained anonymous.²⁴²

In June 2012, Rezwan Ferdaus pled guilty to "attempting to damage and destroy a federal building (the Pentagon and U.S. Capitol Building) by means of an explosive" and to "attempting to provide material support to terrorists"²⁴³ and was sentenced to seventeen years in prison.²⁴⁴ The evidence was that Ferdaus provided twelve mobile phones that were modified to function as improvised explosive devices ("IEDs") to undercover FBI employees, who Ferdaus mistakenly believed were terrorist comrades who would use the devices to kill Amer-

236. *Id.* at 13-14.

237. *Id.*

238. *Id.* at 14.

239. *Id.* at 15-16.

240. *Man charged in D.C.-area bomb plot had 'an associate'*, CNN (Oct. 28, 2010), <http://www.cnn.com/2010/US/10/28/virginia.plot.arrest/>.

241. Virginia Man Sentenced, *supra* note 233; Sabrina Tavernise & Eric Schmitt, *Virginia Man Is Charged in Plot on Capital Subway*, N.Y. TIMES (Oct. 27, 2010), http://www.nytimes.com/2010/10/28/us/28bomb.html?_r=0 ("a federal official who had been briefed on the case confirmed that Mr. Ahmed's contacts had been F.B.I. agents who were part of a sting operation.").

242. CNN, *supra* note 240. The accomplice's anonymity could mean he was a government informant.

243. Memorandum from Carmen M. Ortiz, U.S. Attorney, Dist. of Mass., U.S. Dep't of Justice to Miriam Conrad and Catherine Byrne, Office of the Fed. Defender, Re: Plea Agreement in U.S. v. Rezwan Ferdaus (June 28, 2012), available at http://www.investigativeproject.org/documents/case_docs/2018.pdf.

244. Press Release, U.S. Attorney's Office District of Massachusetts, Man Sentenced in Boston for Plotting on Pentagon and U.S. Capitol and Attempting to Provide Detonation Devices to Terrorists (Nov. 1, 2012), available at http://www.investigativeproject.org/documents/case_docs/2059.pdf.

ican soldiers.²⁴⁵ Ferdaus also filmed a video to train viewers on making IEDs,²⁴⁶ stated in recorded meetings with undercover FBI agents that he wanted to fly “small drone airplanes” with explosives into the Pentagon and U.S. Capitol Building, and provided plans on two thumb drives to the undercover FBI employees explaining how he would like to perpetrate the attack.²⁴⁷

In February 2014, Jose Pimentel pled guilty to attempted criminal possession of a weapon to commit terrorism²⁴⁸ and was sentenced to sixteen years in prison.²⁴⁹ Pimentel made internet postings in support of al-Qaeda and violent jihad; made statements to a NYPD confidential informant (who Pimentel wrongly believed was a terrorist comrade) of a desire to attack U.S. service members returning from Iraq and Afghanistan; informed the confidential informant that he bought the supplies (pipes, incendiary powder scraped from matches, Christmas lights, batteries, clocks, nails, and wire); and was making pipe bombs from instructions found in an *Inspire* magazine article.²⁵⁰ He was captured on video drilling the holes in pipes and was arrested.²⁵¹

Hassan Abujihaad, an enlistee in the U.S. Navy, pled guilty and was convicted and sentenced to ten years in prison for providing “classified information regarding the movements of a United States Navy battle group” to Azzam Publications in 2000, which purportedly provided support to terrorists through its internet sites.²⁵² Publicizing the information might provide a terror group with vessel movements to plan an attack, but Abujihaad was not implicated in a specific terror plot. Also, Babar Ahmad and Syed Talha Ahsan, British citizens, were extradited from Britain to the United States, indicted in the Fed-

245. *Id.*

246. *Id.*

247. Affidavit of Special Agent Gary S. Cacace, at 8, 30 (Sept. 28, 2011), http://www.investigativeproject.org/documents/case_docs/1690.pdf.

248. Press Release, District Attorney Cyrus R. Vance, Da Vance: Jose Pimentel Pleads Guilty to State Terrorism Charge (Feb. 19, 2014), *available at* http://www.investigativeproject.org/documents/case_docs/2311.pdf.

249. James C. McKinley Jr., *Judge Imposes 16-Year Term for Manhattan Man in Pipe Bomb Case*, N.Y. TIMES (Mar. 25, 2014), http://www.nytimes.com/2014/03/26/nyregion/judge-imposes-16-year-term-for-manhattan-man-in-pipe-bomb-case.html?_r=0.

250. Deposition of Robert Roloph at 3-5, *New York v. Pimentel*, No. [Redacted] (N.Y. Ct. Crim. Ct. Nov. 20, 2011), *available at* http://www.investigativeproject.org/documents/case_docs/1841.pdf.

251. *Id.* at 5.

252. Press Release, U.S. Dep’t of Justice, Jury Finds Former Member of U.S. Navy Guilty of Terrorism and Espionage Charges (Mar. 5, 2008), *available at* http://www.justice.gov/opa/pr/2008/March/08_nsd_174.html.

eral District Court for the District of Connecticut, and pled guilty to providing support to terrorism for running Azzam Publications.²⁵³

In 2007, Michael C. Reynolds was convicted and sentenced to thirty years in prison for providing material support to terrorism.²⁵⁴ Reynolds contacted Shannen Rossmiller, a judge who was working for the FBI and posing as a terrorist through the internet. The prosecution claimed that Reynolds believed he was associating with someone who would pay him \$40,000 to perpetrate a plot to bomb the Transcontinental Pipeline and that he had acted on that initiative by possessing a list of items to build a land mine.²⁵⁵ Prosecutors believed that Reynolds may have been motivated by greed, or that he believed he might be able to end the Iraq War by requiring troops to guard pipelines.²⁵⁶ Reynolds contended, unsuccessfully, that he was the citizen informant trying to snare a terrorist by breaking up Rossmiller's plot.²⁵⁷

In February 2012, Sami Osmakac, a naturalized American-born in Kosovo, pled not guilty to charges of attempted use of a weapon of mass destruction,²⁵⁸ but was found guilty at trial and was sentenced to forty years in prison.²⁵⁹ The government's affidavit explains that the FBI in Tampa received a call from a paid confidential human source ("CHS") to apprise the FBI that Osmakac wanted to perpetrate a violent attack.²⁶⁰ The FBI arranged for a surveillance operation. At Osmakac's next meeting with CHS, CHS stated that he/she could procure weapons from an associate, who happened to be an undercover FBI agent ("UCE").²⁶¹ Two days later, on December 21, 2011, the meeting between CHS and Osmakac was recorded and Osmakac stated that he wanted uzis with long magazines, ten grenades, and an

253. Press Release, Federal Bureau of Investigation, Two British Nationals Plead Guilty to Terrorism-Related Charges in New Haven Federal Court (Dec. 10, 2013), available at <http://www.fbi.gov/newhaven/press-releases/2013/two-british-nationals-plead-guilty-to-terrorism-related-charges-in-new-haven-federal-court>.

254. *Man Gets 30 Years in Pipeline Plot*, Fox News (Nov. 6, 2007), http://www.foxnews.com/printer_friendly_wires/2007Nov06/0,4675,TerrorSting,00.html.

255. *Id.*; *Man convicted in plot to blow up U.S. pipelines*, NBC News (July 14, 2007), http://www.nbcnews.com/id/19753811/ns/us_news-security/t/man-convicted-plot-blow-us-pipelines/#.Ue8_X6y9uSo.

256. NBC News, *supra* note 255.

257. *Id.*

258. CNN Wire Staff, *Florida Bomb Plot Suspect Pleads Not Guilty*, CNN (Feb. 9, 2012), <http://www.cnn.com/2012/02/09/us/florida-terror-plea/>.

259. Press Release, U.S. Dep't of Justice, Pinellas Man Sentenced To Forty Years' Imprisonment For Attempted Use Of Weapon Of Mass Destruction (Nov. 5, 2014), available at <http://www.justice.gov/usao-mdfl/pr/pinellas-man-sentenced-forty-years-imprisonment-attempted-use-weapon-mass-destruction>.

260. Criminal Complaint at 2-3, United States v. Osmakac, No. 8:12-cr-45-T-35AEP (M.D. Fla. Jan. 8, 2012), available at http://www.investigativeproject.org/documents/case_docs/1873.pdf.

261. *Id.*

explosive belt, as well as instruction from CHS on how to use the weapons.²⁶² On January 1, 2012, Osmakac told CHS that he desired to kill as many people as possible, discussed a location in the Ybor City location of Tampa to place a vehicle-borne explosive device, and recognized that he could die.²⁶³ On January 7, Osmakac met with the UCE at a hotel and the UCE delivered an AK-47, six grenades, a handgun, ammunition, and an explosive belt, all of which were non-functional.²⁶⁴ Osmakac also filmed an eight minute video to explain that his motives consisted of avenging wrongs done to Muslims.²⁶⁵ Osmakac drove the silver minivan to the target, returned to the hotel to retrieve his non-functional “weapons,” took actions that he believed “armed” the detonation device in the silver minivan, and was arrested.²⁶⁶

G. WEAKER CASES OF LONER SUSPECTED TERRORISTS SEARCHING FOR FRIENDS

What distinguishes most of the following cases in this Section from those contained in the preceding Section is that undercover FBI agents and informants often represented that they possessed the higher order terrorist contacts and led the suspect’s operation. Some suspects were already present in the United States illegally, which might mean that deportation could have been a viable alternative to designing an elaborate sting operation in order to goad suspects along to defuse a supposed threat with fake weapons. Other cases do not follow this pattern, but were placed in this Section because they ostensibly rest on a frailer evidentiary foundation.

On December 8, 2010, Antonio Benjamin Martinez (Muhammad Hussain), a twenty-one-year-old with a criminal record, was arrested by the FBI, pled guilty to “attempted use of a weapon of mass destruction in violation of 18 U.S.C. § 2332a(a)(3),”²⁶⁷ and was sentenced to twenty-five years in prison.²⁶⁸ FBI Special-Agent-in-Charge Richard

262. *Id.* at 4.

263. *Id.* at 6-7, 9-10.

264. Osmakac’s only payment for the weapons was a \$500 deposit. *Id.* at 5, 11-12.

265. *Id.* at 12.

266. *Id.* at 13-14.

267. Memorandum from United States Attorney District of Maryland for the Northern Division, U.S. Dep’t of Justice, to Joseph A. Balter, Federal Public Defender, Plea Agreement: United States v. Antonio Benjamin Martinez, a/k/a Muhammad Hussain Criminal No. JFM-10-0798 (Jan. 4, 2012), *available at* http://www.investigativeproject.org/documents/case_docs/1888.pdf; Press Release, U.S. Dept. of Justice, Maryland Man Charged in Plot to Attack Armed Forces Recruiting Center, *available at* http://www.investigativeproject.org/documents/case_docs/1438.pdf [hereinafter Maryland Man Charged].

268. Press Release, U.S. Dep’t of Justice, Maryland Man Sentenced to 25 Years in Prison for Attempted Use of a Weapon of Mass Destruction in Plot to Attack Armed

A. McFeely stated that “[t]he danger posed by the defendant in this case was very real” and was thwarted due to the “exceptional work of the Joint Terrorism Task Force,” but U.S. Attorney Rod J. Rosenstein stated that “there was no actual danger because the people Mr. Martinez asked to help carry out his attack actually were working with the FBI.”²⁶⁹ Evidence against Martinez included that Martinez posted a message on Facebook stating that he wanted to travel to Afghanistan and fight in the war for Allah.²⁷⁰ Martinez’s inclinations were rejected by at least three other individuals who he attempted to befriend, but he did begin to interact with one interested individual, who was an FBI confidential source.²⁷¹ Martinez met with the FBI informant on several occasions and the informant recorded Martinez making statements about an interest in fighting a war and carrying out a terrorist attack.²⁷² The undercover FBI informant eventually introduced Martinez to his “Afghani brother,” who was also an undercover FBI agent. The criminal complaint pointed out that the FBI agent relayed to Martinez that “it would not take much to make a powerful vehicle bomb,” and further emphasized that the undercover agent offered to train Martinez, and told Martinez he would support him.²⁷³ Martinez affirmed to his new associates on several occasions that he was prepared to commit a terrorist attack. Martinez surveyed the target with undercover FBI agents and was supplied a fake bomb and SUV by the FBI. Martinez was arrested after he dropped off the SUV in front of the Armed Services Recruiting Center in Baltimore and attempted to detonate the fake bomb.²⁷⁴ Given that Martinez was so callous and lacking in common sense that he posted his interest in terrorism on Facebook, apparently in an attempt to find terrorist friends, but kept being rejected by everyone except for the FBI, perhaps indicates that some perpetrators may only deepen their culpability after they encounter people who will actually listen.

Forces Recruiting Center (Apr. 6, 2012), *available at* http://www.investigativeproject.org/documents/case_docs/1950.pdf.

269. Maryland Man Charged, *supra* note 267.

Second, every person Mr. Martinez asked to join in his scheme either declined to participate, tried to talk him out of it or reported him to the FBI, and there is no evidence that Mr. Martinez received direction or support from any other person. Third, undercover investigations are pursued only when supervisory law enforcement agents and prosecutors conclude that there is a serious risk that cannot be ignored.

Id.

270. Complaint at 2-3, *United States v. Martinez*, No. 10-4761 JKB (D. Md. Dec. 8, 2010), *available at* http://www.investigativeproject.org/documents/case_docs/1437.pdf.

271. *Id.*

272. *Id.* at 2-10.

273. *Id.* at 10-11.

274. *Id.* at 13, 16-18.

Ulugbek Kodirov pled guilty to unlawfully possessing an illegal firearm in the United States and to making statements about wanting to kill the U.S. President²⁷⁵ and was sentenced to fifteen years and eight months in prison.²⁷⁶ Kodirov, a twenty-year-old Uzbek, was present in the United States illegally because his student visa was revoked for failure to enroll.²⁷⁷ The evidence involved Kodirov contacting "Individual #1," who Kodirov believed was located in Uzbekistan, via the internet in early July 2011. Kodirov spoke with Individual #1 on the phone about the Islamic Movement of Uzbekistan, which the U.S. State Department classified as a Foreign Terrorist Organization.²⁷⁸ In those discussions, Individual #1 represented that he was in contact with "the Emir," who wanted Kodirov to kill President Obama with a sniper rifle.²⁷⁹ Kodirov met "Individual #2," who spoke Uzbek, in Birmingham in spring 2011 and they attended Mosque together, watched jihadist videos, spoke of wanting to participate in jihad overseas, and discussed how Kodirov could shoot the President.²⁸⁰ Individual #1 met Kodirov in Birmingham, Alabama on July 12, 2011 and they discussed assassinating the President.²⁸¹ The next day, Individual #1 introduced Kodirov to Individual #3, "a sympathizer with his plan," at the Hampton Inn in Leeds, Alabama. Individual #3 gave Kodirov a fully automatic Sendra Corporation Model M15A1 rifle (without Kodirov providing any payment) and four disassembled hand grenades. Kodirov accepted and walked away with the items and was arrested before he left the hotel.²⁸² The entire sting operation transpired within a span of about one week, all of the individuals involved were working for the FBI as undercover informants,²⁸³ and the M15A1 rifle was fully automatic and illegal to possess in the United States.²⁸⁴ It was the FBI's non-existent "Emir,"

275. Plea Agreement at 1, *United States v. Kodirov*, No. 2:11-cr-00299-AKK-HGD (N.D. Ala. Feb. 10, 2012), *available at* http://www.investigativeproject.org/documents/case_docs/1915.pdf; Indictment at 1, 3, *United States v. Ulugbek Kodirov*, No. 2:11-cr-00299-AKK-HGD (N.D. Ala. July 27, 2011), *available at* http://www.investigativeproject.org/documents/case_docs/1916.pdf.

276. Press Release, U.S. Attorney's Office Northern District of Alabama, *Uzbek National Sentenced to Nearly 16 Years in Prison for Threatening to Kill the President and Providing Material Support to Terrorism* (July 12, 2012), *available at* http://www.investigativeproject.org/documents/case_docs/2020.pdf.

277. Plea Agreement, *supra* note 275, at 3.

278. *Id.* at 4.

279. *Id.* at 4-5.

280. *Id.* at 5-6.

281. *Id.* at 5-7.

282. *Id.* at 8-10.

283. See Criminal Complaint at 2, *United States v. Kodirov*, No. 2:11-cr-00299-AKK-HGD (N.D. Ala. July. 14, 2011), *available at* http://www.investigativeproject.org/documents/case_docs/1917.pdf.

284. Plea Agreement, *supra* note 275, at 9.

who provided directives, delivered through the FBI informant (Individual #1), for Kodirov to assassinate the President.

Moroccan Amine El Khalifi had been an illegal immigrant in the United States since his visa expired in 1999.²⁸⁵ El Khalifi pled guilty to attempted use of a weapon of mass destruction in June 2012²⁸⁶ and was sentenced to thirty years in prison.²⁸⁷ The evidence involved El Khalifi traveling from Alexandria, Virginia, to Baltimore, Maryland, with a man known as "Hussein" who identified himself as an al-Qaeda representative, but who was actually an FBI informant.²⁸⁸ Hussein introduced El Khalifi to "Yusuf," who El Khalifi believed was associated with an extremist group but was actually an undercover law enforcement officer.²⁸⁹ On December 15, 2011, El Khalifi explained to Yusuf that he wanted to bomb an office building in Alexandria that housed the U.S. military, a synagogue, and a restaurant frequented by U.S. military officials, and Yusuf handed El Khalifi his AK-47 and let him hold it as a symbolic gesture.²⁹⁰ One week later, El Khalifi traveled with Hussein and identified the restaurant that he wanted to target.²⁹¹ In January 2012, El Khalifi traveled with Hussein to buy cell phones, nails, and glue for an improvised bomb and explained to Hussein that he decided that he would bomb the military installation, but not the restaurant, and that he wanted to blow up the U.S. Capitol building.²⁹² As a prelude, Yusuf provided an explosive device and he and El Khalifi tested it in a quarry by dialing the telephone number, and after it exploded El Khalifi said that he wanted a larger explosion.²⁹³ On February 14, Yusuf gave El Khalifi an inoperative MAC-10 automatic weapon and a jacket equipped with an inert bomb, and

285. Criminal Complaint at 2, *United States v. El Khalifi*, No. 1:12-MJ-87 (E.D. Va. Feb. 17, 2012), available at http://www.investigativeproject.org/documents/case_docs/1920.pdf.

286. Plea Agreement at 1, *United States v. El-Khalifi*, No. 1:12-CR-37 (E.D. Va. June 22, 2012), available at http://www.investigativeproject.org/documents/case_docs/2001.pdf.

287. Press Release, U.S. Attorney's Office, Virginia Man Sentenced to 30 Years in Prison for Plot to Carry Out Suicide Bomb Attack on U.S. Capitol (Sept. 14, 2012), available at <http://www.fbi.gov/washingtondc/press-releases/2012/virginia-man-sentenced-to-30-years-in-prison-for-plot-to-carry-out-suicide-bomb-attack-on-u.s.-capitol>.

288. Criminal Complaint, *supra* note 285, at 4; John Miller, *Inside the plans of Capitol bomb suspect*, CBS News (Feb. 18, 2012), <http://www.cbsnews.com/news/inside-the-plans-of-capitol-bomb-suspect/>.

289. Criminal Complaint, *supra* note 285, at 2-3.

290. *Id.* at 3.

291. *See id.* at 3-4 (noting also that El Khalifi entered the restaurant and asked the waiter about the busiest time and he returned and decided that he would bomb at lunchtime because it was the busiest time).

292. *Id.* at 4-5.

293. *Id.* at 5.

El Khalifi took his weapon and vest and was arrested when he exited the parking garage and walked toward the U.S. Capitol.²⁹⁴

Michael C. Finton converted to Islam when he was serving time in an Illinois prison from 2001 to 2006 for aggravated robbery and aggravated battery.²⁹⁵ Finton was under FBI surveillance for two years²⁹⁶ and FBI agents developed a sting operation and posed as al-Qaeda operatives.²⁹⁷ Finton “met on several occasions with an undercover law enforcement officer whom Finton believed was acting on behalf of al-Qaeda.”²⁹⁸ The FBI provided Finton with a van, fake explosives, and a cell phone detonation device.²⁹⁹ Finton drove the van to the federal building, believed he armed the device, left the van, and entered a getaway vehicle driven by the undercover law enforcement agent who represented himself as a member of al-Qaeda.³⁰⁰ Finton was arrested, indicted, pled guilty to attempting to bomb a federal courthouse, and was sentenced to twenty-eight years in prison.³⁰¹

Starting in August 2009, nineteen-year-old Somali-American Mohamed Osman Mohamud sent emails to two individuals who he thought were associated with terrorist groups in Pakistan, but undercover FBI agents intercepted the emails and began to communicate with Mohamud.³⁰² Mohamud met with one of the suspected terrorists, who was an undercover FBI agent, on July 30, 2010³⁰³ and spoke of being devoted to violent jihad.³⁰⁴ Mohamud met with a second jihadist, who was also an undercover FBI employee, on August 19, 2010 and in subsequent meetings discussed buying bomb parts that would be delivered to the undercover agents.³⁰⁵ On November 26, the undercover agent picked up Mohamud and drove him to a van equipped with the FBI’s bomb, which was inert. The agent and Mohamud drove to the location, left the vehicle, remotely set the timer

294. *Id.* at 7.

295. Dirk Johnson, *Suspect in Illinois Bomb Plot ‘Didn’t Like America Very Much’*, N.Y. TIMES (Sept. 27, 2009), <http://www.nytimes.com/2009/09/28/us/28springfield.html?pagewanted=all>.

296. *Entrapment Defense Hasn’t Worked in Terror Cases*, NPR (Dec. 2, 2010), <http://www.npr.org/2010/12/02/131758291/entrapment-defense-hasn-t-worked-in-terror-cases>.

297. Johnson, *supra* note 295.

298. Press Release, U.S. Dep’t of Justice, *Illinois Man Admits Plotting to Bombing Federal Courthouse and Is Sentenced to 28 Years in Prison* (May 9, 2011), *available at* <http://www.justice.gov/opa/pr/2011/May/11-nsd-590.html> [hereinafter *Illinois Man Admits Plotting*].

299. NPR, *supra* note 296.

300. *Illinois Man Admits Plotting*, *supra* note 298.

301. *Id.*

302. Arrest Warrant at 2-3, *United States v. Mohamud* (D. Or. Nov. 26, 2010), *available at* http://media.oregonlive.com/portland_impact/other/USAFFIDAVIT.pdf.

303. *Id.*

304. *Id.* at 2-5.

305. *Id.* at 3-5.

on the fake explosive device, and Mohamud was arrested.³⁰⁶ Glenn Greenwald, a former constitutional and civil rights litigator and author of three best selling books, wrote an article describing the case with the title accentuating that Mohamud was another instance of “the FBI successfully thwart[ing] its own terrorist plot.”³⁰⁷ Mohamud pled not guilty and his attorneys provided an entrapment defense, but he was found guilty at trial of attempting to use a weapon of mass destruction.³⁰⁸ The court postponed sentencing because the case “‘derived from’ secret NSA electronic surveillance.”³⁰⁹

In September 2012, Adel Daoud, an eighteen-year-old, was arrested³¹⁰ and pled not guilty to charges of attempted use of a weapon of mass destruction and attempt to destroy a bar/restaurant and liquor store.³¹¹ The evidence cited in the FBI affidavit included Daoud distributing material by email in October 2011 relating to jihad and killing Americans, attempting to recruit supporters for attacks by email and internet postings, and viewing jihad websites.³¹² Two on-line undercover FBI employees (“OCE1” and “OCE2”) contacted Daoud in May 2012 about his internet postings and Daoud asked OCE2 about carrying out a terrorist attack. OCE2 said he could assist because his cousin in New York was an operational terrorist.³¹³ Daoud produced a list of twenty-nine potential bomb targets, including bars, malls, military recruiting centers, and tourist attractions around Chicago.³¹⁴ Starting in June 2012, Daoud began communicating with and met the “cousin,” who was an undercover FBI agent (“UCE”), and on September 13, 2012, UCE showed Daoud an explosive

306. *Id.* at 5-6.

307. Glenn Greenwald, *The FBI successfully thwarts its own Terrorist plot*, SALON (Nov. 28, 2010), http://www.salon.com/2010/11/28/fbi_8/; GLENN GREENWALD, SALON, http://www.salon.com/writer/glenn_greenwald/ (providing author's biography).

308. Bryan Denson, *Mohamed Mohamud found guilty in Portland terrorism trial*, THE OREGONIAN (Jan. 31, 2013), http://www.oregonlive.com/portland/index.ssf/2013/01/mohamed_mohamud_found_guilty_i.html; *Portland bomb case ends with 30-year sentence amid entrapment claims*, ASSOCIATED PRESS (Oct. 1, 2014), <http://www.theguardian.com/world/2014/oct/01/portland-bomb-mohamed-mohamud-sentence-fbi-entrapment>. “Mohamud’s lawyers contend he was the victim of entrapment, a defense rejected at a trial last year.” *Id.*

309. Johnson, *supra* note 21.

310. Press Release, U.S. Dep’t of Justice, Hillside Man Arrested After FBI Undercover Investigation on Federal Charges for Attempting to Bomb Downtown Chicago Bar (Sept. 15, 2012), available at http://www.investigativeproject.org/documents/case_docs/2046.pdf.

311. Indictment, United States v. Daoud, No. 12 CR 723 (N.D. Ill. Sept. 20, 2012), available at http://www.investigativeproject.org/documents/case_docs/2216.pdf.

312. Criminal Complaint at 3-5, 12-14, United States v. Daoud, No. 12 CR 723 (N.D. Ill. Sept. 15, 2012), available at http://www.investigativeproject.org/documents/case_docs/2045.pdf.

313. *Id.*

314. *Id.* at 19.

device (which was inert) inside a Jeep Cherokee.³¹⁵ The next day Daoud picked up the Cherokee, drove it to a bar in downtown Chicago, left the vehicle, attempted to remotely detonate the bomb, and was arrested by FBI agents.³¹⁶ Daoud's apparent motive, expressed in emails, included that the United States, United Kingdom, and Israel had committed numerous atrocities around the world, he wanted to engage in jihad, and Daoud felt hostility about the United States being at war with Muslims, which was a particular reason for wanting to attack a military recruiting center.³¹⁷ While Daoud was incarcerated, prosecutors brought a soliciting murder charge because Daoud allegedly called someone on the telephone in an attempt to solicit the individual to kill the undercover FBI informant.³¹⁸ Attorney Thomas Durkin remarked that the assassination charge was "an absurd plot on its face" because of the terms of the solicitation and because the suspect is indigent.³¹⁹

In June 2003, Ahmed Omar Abu Ali, an American of Jordanian descent, was arrested in Saudi Arabia for developing terror plots, extradited to the United States, and sentenced to life in U.S. federal prison.³²⁰ Abu Ali was arrested at the Islamic University in Medina, Saudi Arabia, and his dormitory room contained jihad literature, a GPS device, and a notebook with names of associates.³²¹ Abu Ali was interrogated in Saudi Arabia and admitted on videotape and in writing that he was preparing for a terrorist operation inside the United States, which might include killing President George W. Bush.³²² While Abu Ali was still present in Saudi Arabia, the FBI executed a search warrant at his home in Virginia and discovered hotmail addresses, a two-page article praising the 9/11 attacks, and a handgun

315. *Id.* at 5.

316. *Id.* at 5-6.

317. *Id.* at 7-8, 11, 15, 21.

318. Indictment, *United States v. Daoud*, No. 14-1284 (N.D. Ill. Sept. 15, 2012), available at http://www.investigativeproject.org/documents/case_docs/2218.pdf; Jason Meisner, *Terror suspect also charged with soliciting murder*, CHICAGO TRIB. (Aug. 29, 2013), http://articles.chicagotribune.com/2013-08-29/news/ct-met-daoud-terrorism-charges-20130830_1_attempted-murder-undercover-agent-federal-agent.

319. Ron Magers, *Adel Daoud, Teen Terror Suspect, In Court on FBI Murder Attempt*, ABC 7 EYEWITNESS NEWS (Sept. 6, 2013), <http://abc7chicago.com/archive/9238810/>.

320. Jerry Markon, *Va. Man's Sentence Increased to Life in Terror Plot*, WASH. POST (July 28, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/27/AR2009072701384.html>. Based on the evidentiary findings, a federal grand jury returned an indictment and Saudi Arabia surrendered Abu Ali to U.S. authorities and he returned to the United States to face the charges. *United States v. Abu Ali*, 528 F.3d 210, 225 (4th Cir. 2008).

321. *Abu Ali*, 528 F.3d at 224.

322. *Id.*

magazine.³²³ The defense objected to evidence that derived from several repeated days of interrogations in Saudi Arabia, but the evidence was admitted in U.S. court.³²⁴

Emerson Winfield Begolly was indicted for encouraging others to commit a crime of violence under 18 U.S.C. § 373(a) and for distributing information on weapons of mass destruction under 18 U.S.C. § 842(p)(2)(A).³²⁵ Begolly pled guilty and was sentenced to 102 months in prison and five years of supervised release.³²⁶ From July 25, 2010 to December 28, 2010, Begolly, an American born in Pennsylvania and an active moderator on the Ansar al-Majahideen English Forum, encouraged website viewers to engage in acts of terrorism on police stations, post offices, planes, financial institutions, military facilities, infrastructure, forests, water facilities, cell phone towers, synagogues, and schools. He provided instructions for making explosives and favorably discussed the 9/11 attacks, the Beslan crisis, and kidnappings.³²⁷ When the FBI sought to interview him, Begolly attacked the two FBI agents, drawing blood, and attempted to use a loaded Makarov nine-millimeter semi-automatic handgun against the agents.³²⁸ The FBI described this as another terrorism case in the press release,³²⁹ but the assault charges for attacking federal agents with the enhanced penalty (of using a firearm) carry up to a twenty-year prison sentence.³³⁰ Prosecutors did not bring assault charges, but instead Begolly pled guilty to offenses related to the distribution of terrorist information and was levied a prison sentence of less than nine years.

Paul Gene Rockwood, Jr. pled guilty to making false statements to the FBI and was sentenced to eight years in prison. His wife, Nadia Piroška Maria Rockwood, pled guilty to making false statements to

323. *Id.* at 225.

324. *United States v. Abu Ali*, 395 F. Supp. 2d 338, 342 (E.D. Va. 2005). The “fruit” of the failure to provide U.S.-equivalent constitutional guarantees was not inadmissible because U.S. constitutional restrictions only apply in the United States, the Saudi and U.S. authorities were not acting jointly, and any errors were not prejudicial. *Abu Ali*, 528 F.3d at 227; *but see id.* at 271 (Motz, J., dissenting).

325. Indictment at 7-8, *United States v. Begolly*, No. 1:11cr326 (E.D. Va. July 14, 2011), available at http://www.investigativeproject.org/documents/case_docs/1603.pdf.

326. Press Release, U.S. Dep’t of Justice, Pennsylvania Man Sentenced for Terrorism Solicitation and Firearms Offense (July 16, 2013), available at <http://www.fbi.gov/pittsburgh/press-releases/2013/pennsylvania-man-sentenced-for-terrorism-solicitation-and-firearms-offense> [hereinafter *Pennsylvania Man Sentenced*].

327. Indictment at 1, 2, 4-5, *United States v. Begolly*, No. 1:11cr326 (E.D. Va. July 14, 2011), available at http://www.investigativeproject.org/documents/case_docs/1603.pdf.

328. *Id.* at 6.

329. See *Pennsylvania Man Sentenced*, *supra* note 326 (describing Begolly’s charge as “soliciting others to engage in acts of terrorism . . .”).

330. 18 U.S.C. § 111 (2012).

the FBI and was sentenced to five years of probation.³³¹ There were no terrorism-related offenses. The FBI asserted that Paul Rockwood became a follower of Islam in late 2001 or 2002, researched explosives and remote triggering devices in 2006, began to share militant views with others and expressed the possibility of carrying out mail bomb attacks or shooting targets in 2009, and created a list of fifteen specific individuals to target (all of whom were outside the state of Alaska) in 2010.³³² A local who knew Paul Rockwood, the local weatherman, was shocked.³³³ The fact that this progression of acts were strung out over a decade without a tangible threat might raise questions of whether there was a danger.

Quazi Mohammad Rezwanul Ahsan Nafis, a twenty-one-year-old Bangladeshi who entered the United States in January 2012, pled guilty to attempting to bomb the New York Federal Reserve Bank in Lower Manhattan³³⁴ and was sentenced to thirty years in prison.³³⁵ Nafis contacted someone whom he thought was a terrorist sympathizer, but who was actually an FBI confidential human source ("CHS"), and explained to the CHS that he wanted to engage in jihad against the United States.³³⁶ Nafis told the CHS that Nafis had contacts with al-Qaeda members overseas.³³⁷ The CHS introduced Nafis to an undercover law enforcement officer ("UC"), who the CHS maintained was an al-Qaeda member, and in July 2012, Nafis told the UC that he desired to launch a terrorist attack on the United States.³³⁸ On August 23, Nafis queried the UC, "[t]he thing that I want to ask you about is that, the thing that I'm doing, is it under al-Qaeda?" and the UC responded affirmatively.³³⁹ The UC asked Nafis what he needed, and Nafis responded that he wanted a "big car . . . which can

331. Press Release, U.S. Attorney's Office, U.S. Dep't of Justice, Alaska Man Pleads Guilty to Making False Statements In Domestic Terrorism Investigation (July 21, 2010), *available at* <http://www.fbi.gov/anchorage/press-releases/2010/ak072110.htm>.

332. *Id.*

333. Kim Murphy, *Terrorism case baffles remote Alaska town*, L.A. TIMES (July 23, 2010), <http://articles.latimes.com/2010/jul/23/nation/la-na-adv-alaska-terrorists-20100723-1>.

334. Press Release, U.S. Dep't of Justice, New York Man Pleads Guilty to Attempting to Bomb New York Federal Reserve Bank in Lower Manhattan (Feb. 7, 2013), *available at* http://www.investigativeproject.org/documents/case_docs/2117.pdf.

335. Press Release, U.S. Attorney's Office, Al Qaeda-Inspired Operative Sentenced to 30 Years in Prison for Attempting to Bomb Federal Reserve Bank in New York (Aug. 9, 2013), *available at* http://www.investigativeproject.org/documents/case_docs/2207.pdf.

336. Complaint at 4-5, *United States v. Nafis*, No. 12 M 965, 2012 WL 4903275 (E.D.N.Y. Oct. 17, 2012), *available at* http://www.investigativeproject.org/documents/case_docs/2052.pdf.

337. *Id.* at 6.

338. *Id.* at 7-8.

339. *Id.* at 10.

blow up the whole New York Stock Exchange Building.”³⁴⁰ When Nafis asked why the UC would not carry out the attack, the UC responded that “it was his role to facilitate NAFIS’s [sic] attack.”³⁴¹ Nafis referred the UC to possible storage space locations for an explosive device so that the UC could examine them.³⁴² Nafis and the UC together purchased items for an alleged explosive device, including batteries, electrical components, large garbage bins, and 1,000 pounds of material that the UC alleged was explosive but was actually inert, and the UC and Nafis jointly prepared the “bomb.”³⁴³ Nafis filmed himself to explain why he was committing the terrorist attack and after he attempted to detonate the alleged bomb parked next to the New York Federal Reserve Bank with a cell phone call, he was arrested.³⁴⁴

Select facts, contained in principal and publicly-available court records, may not always convey the extent that FBI sources and undercover agents goad or reassure suspected terrorists, but precedent continues to aggregate with successful prosecutions. If undercover FBI agents and informants did not encourage, support, portray interest in, and assert devotion to the cause of terrorism (or even the glory of martyrdom), the target of a sting operation might become more reluctant to participate, become suspicious, exclude associates, or lose interest. However, when court records are drafted and quotes from suspects are inserted in the statement of facts in indictments, news articles, and affidavits of law enforcement officers, without relaying the entire record, the complete context of a guilty plea may remain obscure to the public.³⁴⁵ Yet, if the entire sting operation is viewed as a process, a probative concern is whether there were critical points at which a suspect might have withdrawn from the plans if informants and undercover FBI agents in a sting operation made alternative representations.

For example, in the Nafis case, unlike the court records of many of the other cases, encouragement from law enforcement is brazenly presented in the court records. Nafis clearly viewed the UC as his leader and was seeking approval.³⁴⁶ There was even an instance

340. *Id.*

341. *Id.* at 11.

342. *Id.* at 13.

343. *Id.* at 15-19.

344. *Id.* at 19-20.

345. See Greenwald, *supra* note 307 (remarking that “FBI claims are sometimes one-sided, unreliable and even untrue,” and evidence is often “uncorroborated and unexamined.”).

346. In addition to examples provided in the text, another example is where Nafis provided comments and “[t]he UC then told NAFIS that he would pass along NAFIS’s [sic] request to al-Qaeda leadership.” See Complaint at 14, *United States v. Nafis*, No. 12 M 965, 2012 WL 4903275 (E.D.N.Y. 17, Oct. 2012).

when Nafis sought to return to Bangladesh before the attack but he wanted to clear his travel plans with al-Qaeda leaders and the UC explained “that the al-Qaeda leaders with whom the UC had purportedly consulted at NAFIS’s request would not wait for NAFIS [sic] to return from Bangladesh before carrying out the attack.”³⁴⁷ Nafis may have been trying to convince the UC of his devotion, but had the UC not stated that Nafis could not wait, perhaps Nafis might have flown to Bangladesh and not returned to the United States. Also, apparently in an attempt to make this case appear like a larger conspiracy, the government and media emphasized that Nafis had an accomplice because he communicated with this conspirator on Facebook. But that so-called co-conspirator, Howard Willie Carter II, a resident of San Diego, California, was indicted for child pornography charges,³⁴⁸ and court records do not indicate that Nafis had ever met him.³⁴⁹

III. ANALYSIS

A. PRESUMPTIONS OF GUILT AND DANGER

Returning to the origin of the Article, the phrase “foiling a terror plot” invokes a highly emotive connotation and implies that law enforcement victoriously saved the public from certain, grievous harm. Tallies of “plots” intimate a perception of graver overall danger. The national security apparatus has defended potentially violative surveillance methods by claiming that “dozens of plots” have been prevented since 9/11, but if the surveillance was not imperative to averting an unequivocally existing plan for attack, is the societal perception of peril sensible? From the publicly available information of the cases discussed in this Article, evidence against the defendants spans from documentation of or admission to a malicious idea, to conducting internet research and initiating correspondence, to the purchase and assembly of equipment, and to the movement toward a real or unreal destructive act. What the sixty cases listed in Part II reveal is that acts can be criminally punishable quite early along this string of events, acts proceeding further along this progression are punished

347. *Id.*

348. Steve Price, *Accused co-conspirator in NY bomb plot appears in San Diego court*, CBS 8 (Oct. 18, 2012), <http://www.cbs8.com/story/19858943/accused-co-conspirator-in-ny-bomb-plot-appears-in-san-diego-court>; Complaint at 6, *United States v. Nafis*, No. 12 M 965, 2012 WL 4903275 (E.D.N.Y. Oct. 17, 2012).

349. *Howard Willie Carter II Arrested: Man Allegedly Worked As Accomplice To Quazi Nafis In Federal Reserve Terror Plot*, HUFFINGTON POST (Oct. 18, 2012), http://www.huffingtonpost.com/2012/10/18/howard-willie-carter-ii-a_n_1981620.html; Complaint, at 5, *United States v. Nafis*, 2012 WL 4903275 (E.D.N.Y. Oct. 2012) (stating that “[t]he CO-CONSPIRATOR is not a government agent and has subsequently been arrested by federal authorities for non-terrorism-related felony offenses”).

with longer sentences, participation in pretend terrorist operations are crimes so long as the defendants believe that they are perpetrating a terrorist act, and the phrase "terror plot" should not equate to a concrete level of danger.³⁵⁰

The successfully perpetrated acts and crimes in Part II, Section (A), the enigmatic anthrax attacks, the Beltway Snipers shooting spree, apparent post-9/11 acts by KSM and associates (although they have not yet been convicted and the charges do not involve acts in the United States), and the Tsarnaev brothers' Boston Marathon bombing case, all can be classified as terrorism.³⁵¹ However, Taheri-azar was charged with attempted murder for driving his SUV into a crowd of people, and Bledsoe, Hasan, and Melaku all attacked military locales and personnel and were not charged with terrorism offenses.³⁵² In Section C, several potential terrorist attacks did providentially fail, all ostensibly close to perpetration, without the intervention of law enforcement, including Reid and Abdulmuttab who wore combustible attire on commercial aircraft, Shahzad's explosive-laden Pathfinder that did not ignite in Times Square, and the two cases that did not result in an arrest—the anonymous double agent wielding an advanced underwear bomb and the two printer cartridges shipped from Yemen.³⁵³ All of the cases addressed in Part II, Sections (D), (E), (F), and (G) reside in shades of gray as to whether they should be classified as a "terror plot," irrespective of whether a punishable crime was committed.

With respect to groups possessing a nefarious motive, not one of the twenty-three cases in Part II, Section (D) actually involved an attack that neared completion with functional equipment.³⁵⁴ Five of the events transpired in foreign countries (or several wire transfers that originated in the United States in the case of Khan), Ferhani and Mamdough could have been charged with drug dealing and weapons charges, Aref and Hossain were convicted of money-laundering, and Washington and Patterson committed about a dozen armed robberies of gas stations.³⁵⁵ Four of the five events in Section (E) involved training and/or lying about not training at a suspect terrorist camp without the existence of a tangible plan for terrorism.³⁵⁶

350. See *supra* notes 33-349 and accompanying text. Many of the cases did not involve an identifiable act of violence. Likewise, if a suspect does have a mischievous mens rea and has ideas of a dozen different violent acts without actus reus on any one of them, one might argue that there was no tangible plot because the feasibility and reality of the intention might be diminished by the generalized musing.

351. See *supra* notes 33-58 and accompanying text.

352. See *supra* notes 33-58 and accompanying text.

353. See *supra* notes 59-67 and accompanying text.

354. See *supra* notes 85-190 and accompanying text.

355. See *supra* notes 85-190 and accompanying text.

356. See *supra* notes 191-214 and accompanying text.

United States law, given the sheer number of terrorism-related criminal offenses, has been interpreted to proscribe acts in which a juror could believe that a defendant has a penchant to engage in terrorism without there being an actual terror plot.³⁵⁷ Associations, speech, and acts that can incite violence are not protected by the First Amendment³⁵⁸ and the risk of severe harm can warrant preemptive law enforcement.³⁵⁹ Perhaps this combination inherently pares the need for the criminal justice system to possess a robust evidentiary record to substantiate an *actus reus* for a future crime due to the strong *mens rea*, particularly when the associates in a group conspiracy are apt to turn on each other and testify against each other as the

357. See e.g., 18 U.S.C. § 373(a) (2012) (prohibiting encouragement of others to commit a crime of violence); 18 U.S.C. § 842(p)(2)(A) (2012) (criminalizing distribution of information on weapons of mass destruction). As cases throughout this Article exhibit, the instrumentality to carry out an attack need not be real, such as in the case of the FBI-supplying inert weapons. However, defendants may be charged under statutes that prohibit the attempted use of a weapon of mass destruction. 18 U.S.C. § 2332a(a)(2)(D) (2012) (prohibiting the attempted use of a weapon of mass destruction). Likewise, the criminal offense of abetting terrorism references a litany of underlying offenses, many of which do not require a clear and identifiable act of violence. 18 U.S.C. § 2339A (2012). Despite the fact that cases cited throughout this Article have been prosecuted under a multitude of different statutory provisions, the cases are still often referred to in the media, publications, and even government authorities as “terror plots.” The predisposition to commit the crime, such as in the case of the defendant being “ready and willing to commit the crime,” is essential to determining whether the target of the sting operation will be successful with an entrapment defense. Andrew Carlon, Note, *Entrapment, Punishment, and the Sadistic State*, 93 VA. L. REV. 1081, 1088 (2007). If the offense is met there may be an attempt. The Federal guidelines for FBI undercover operations substantially focus on identifying an underlying *mens rea* to commit the crime in question, which may or may not consist of an existing identifiable act of terrorism prior to the commencement of a sting operation. ATTORNEY GENERAL JOHN ASHCROFT, ATTORNEY GENERAL’S GUIDELINE’S ON FEDERAL BUREAU OF INVESTIGATION UNDERCOVER OPERATIONS 16 (May 30, 2002), available at <http://www.justice.gov/sites/default/files/ag/legacy/2013/09/24/undercover-fbi-operations.pdf>.

358. *Schenck v. United States*, 249 U.S. 47, 50-52 (1919); *Debs v. United States*, 249 U.S. 211, 214-15 (1919). There are also similarities with the charge of treason if terrorism is viewed as supporting a foreign power against one’s nation, including when a citizen need not perpetrate a physical blow against the nation, but pursues acts toward that goal. *United States v. Greiner*, 26 F. Cas. 36, 39 (Pa. D. 1861); *In re Charge to Grand Jury*, 30 F. Cas. 1046, 1047 (C.C.D. R.I. 1842); *United States v. Greathouse*, 26 F. Cas. 18, 26 (N.D. Cal. 1863) (abetting and sustaining the crime of treason is also punishable). Terrorism is also similar to the crime of sedition. Seditious conspiracy occurs when individuals conspire to levy war against or attempt to overthrow the United States government or thwart the government from executing the law. 18 U.S.C. § 2384 (2012); *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (O’Connor J., plurality opinion) (remarking that Hamdi wielded weapons on behalf of the Taliban and against the United States).

359. Tamara Tabo, *Terroristic Threat Laws & A Texas Teen: There But For The Grace Go We*, ABOVE THE LAW (July 11, 2013), <http://abovethelaw.com/2013/07/terroristic-threat-laws-a-texas-teen-there-but-for-the-grace-go-we/> (stating that “[p]oliticians and prosecutors trumpet terroristic threat laws as tools for the swift intervention of authorities, allowing law enforcement to prevent horrendous crimes.”).

recipients of plea deals.³⁶⁰ Consequently, almost all the defendants in Sections (D) and (E) were not convicted for a verified, future terrorist act, but for communicating and acting in a manner that is not protected by the U.S. Constitution; these instances can be perceived as committing some tangible movement toward a terror-related offense.³⁶¹

Of the twenty loner terrorism cases described in Part II, Sections (F) and (G), Aldawsari and Pimentel did seek to acquire bomb-making materials while under law enforcement surveillance; Arbabsiar was a murderer-for-hire case; Ferdaus engaged in terrorism training; Abu Ali was arrested in Saudi Arabia and did not pose an imminent threat to the United States; Rockwood was not charged with terrorism offenses; Begolly's more serious and clearer offense was assaulting FBI agents with a loaded handgun; and the other thirteen cases consisted of such substantial FBI involvement, such as befriending the target of a sting operation, sharing sympathies, and providing inoperative weapons to the defendants, that these "terror plots," might more aptly be called FBI plots.³⁶²

360. UNITED NATIONS, HANDBOOK ON CRIMINAL JUSTICE RESPONSES TO TERRORISM 53 (2009) (stating that plea agreements provide evidence against accomplices and noting that "[b]ecause of the importance of 'accomplice testimony' in cases involving terrorism, plea bargaining and offers of immunity or leniency often play a crucial role in the gathering of evidence and the successful prosecution of these cases").

361. There are jurisprudential similarities between these convictions and sentences imposed on communist sympathizers during the Red Scare and McCarthyism. Referring to the era of McCarthyism, Dean Erwin Chemerinsky wrote of the leading Supreme Court case that upheld four twenty-year conspiracy convictions, *United States v. Dennis*, 341 U.S. 494 (1951), and noted that the four associates "teach[ing] the works of Marx, Lenin, and Engles" were not "plotting the overthrow of the government; they weren't even convicted of advocating the overthrow of the government." Erwin Chemerinsky, Mary Ellen O'Connell & Jeremy Rabkin, *Spring 2010 Symposium—A Collision of Authority: The U.S. Constitution and Universal Jurisdiction: A Symposium Transcript*, 9 RICH. J. GLOBAL L. & BUS. 307, 315 (2010) (statement by Chemerinsky). In fact, for the decade of McCarthyism, free speech and personal and professional association were chilled, failure to respond to accusatorial un-American committee hearings was criminalized, and group associations with communism assumed that communists intended to overthrow the U.S. government, that the interchange of ideas regarding communist thought could be suppressed, and that investigations into private lives were justified because communism was a highly-organized conspiracy with sleeper agents that could act and imperil society before it was too late, but the Supreme Court eventually rejected these premises and questioned the government's inquests as overreactions. Robert Bejesky, *From Marginalizing Economic Discourse with Security Threats to Approbating Corporate Lobbies and Campaign Contributions*, 12 CONN. PUB. INT. L.J. 1, 19-25 (2012). However, an important distinction is that suppressing communist thought and association may have been stymieing movements that only sought to achieve more equitable allocation of resources, while terrorism, by definition, utilizes violence for political and societal coercion as a terminal mission.

362. See *supra* notes 215-349 and accompanying text.

Rather than subjecting suspects to elaborate FBI sting operations for often clueless loners³⁶³ and chaperoning suspects to the push of a red button in order to aggregate evidence and thereby set precedent with convictions, suspects might have been placed on a high-priority watch list. The government could have determined if hospitalization or therapy was viable, or even deported those who were aliens, which might have been an alternative for defendants such as Kodyrov and El Khalifi.³⁶⁴ For example, the British government set criteria for deporting any non-citizen for precisely the same types of activities that made individuals in the United States targets of FBI sting operations.³⁶⁵ Instead, American taxpayers fund the investigation, trial, and imprisonment in a federal incarceration facility that costs approximately \$30,000 per year for each inmate³⁶⁶ and must endure successions of media releases, and often exaggerations, about foiled terror plots.

A common criticism is that many of these cases have involved the FBI targeting and entrapping vulnerable people with fake terror plots,³⁶⁷ but not one of the charged terrorists was successful in raising the entrapment defense.³⁶⁸ Instead, precedent accumulates on successful terrorism prosecutions without Americans being able to access a record of all FBI surveillance and sting operations to determine if

363. Fletcher, *supra* note 138 (listing the top ten inept terrorist attacks). Several plots devised by apparent terrorists did fail, but other cases involving FBI informants and agents urged the plots along for susceptible loners. Inept suspects might not know how to perpetrate a terror attack and therefore might not have executed an attack without the FBI's expert guidance. This ineptitude might also be recognized by the FBI, which must supply (inert) weapons and explosives that do not pose an actual danger, but the suspect does not even know how to identify explosive material. If the suspects are so easily fooled by everyone around them when the sting cases keep successively emerging with fools who are unable to execute an attack by themselves, perhaps suspects are also not sufficiently competent to stand trial.

364. Welsh-Huggins, *supra* note 125; see also Plea Agreement at 9, United States v. Shahzad, No. 10-CR-541 (S.D.N.Y. June 21, 2010), available at http://www.investigativeproject.org/documents/case_docs/1435.pdf (noting also the possibility of supervised release).

365. UK BORDER AGENCY, EXCLUSION OF INDIVIDUALS FROM THE UNITED KINGDOM FOR ENGAGING IN UNACCEPTABLE BEHAVIOR, available at <http://www.refworld.org/pdfid/4a6d6c272.pdf> (stating criteria for deportation includes behavior that would "express views which foment, justify or glorify terrorist violence in furtherance of particular beliefs; seek to provoke others to terrorist acts; foment other serious criminal activity or seek to provoke others to serious criminal acts; or foster hatred which might lead to inter-community violence in the U.K.").

366. *Guantanamo Camp Costs \$900,000 A Year Per Inmate*, REUTERS (May 3, 2013), http://www.huffingtonpost.com/2013/05/03/guantanamo-camp-cost_n_3211978.html (noting that it costs about \$900,000 per year to house Guantanamo Bay inmates).

367. Paul Harris, *Fake terror plots, paid informants: the tactics of FBI 'entrapment' questioned*, GUARDIAN (Nov. 16, 2011), <http://www.guardian.co.uk/world/2011/nov/16/fbi-entrapment-fake-terror-plots>.

368. NPR, *supra* note 296.

preemptive FBI operations ceased or failed due to the target-suspect actually consciously choosing not to perpetrate an act of terrorism.³⁶⁹ With respect to successful prosecutions, in contrast to the overwhelming time, energy, and expense that government authorities invest in arranging sting operations, investigating and prosecuting cases,³⁷⁰ and attempting to discover every morsel of incriminating evidence, terrorism defendants are frequently indigent, and may need to rely on appointed counsel. As a result, they may feel that pleading guilty is a preferable option to taking the risk of a stiffer sentence and confronting the public embarrassment of a trial that affirms how they were duped by law enforcement. Approximately half of the cases presented involved a guilty plea and half of the defendants went to trial.³⁷¹

Broad public perceptions presumably form from press releases of the criminal cases.³⁷² From the Heritage Foundation article, the researchers mention, “[t]he fact that the United States has not suffered a large-scale attack since 9/11 truly speaks to the country’s

369. Since there were no attacks in the years shortly after 9/11 and there were fewer convictions, one should wonder whether there were suspects with a similar predisposition before and after the FBI began to commonly use sting operations. Perhaps many individuals were predisposed, but later changed their minds. Maybe suspects also pulled out of an FBI-led sting operation either because they had a change of heart or became suspicious, or there was FBI overreaching and the FBI chose not to arrest the suspect. However, because these operations are covert and because itemizing details of failed sting operations would raise the possibility of defamation of the suspect, there cannot be a public record of all sting operations. Likewise, even if there was a vague tabulation of the total number of sting operations, one cannot assess the factual circumstances to place the operations in context. Thus, while there was no successful entrapment defense, perhaps there could have been a successful entrapment defense if there were other cases that did not result in an indictment. The fact that an FBI sting operation made it easy for the suspect to follow through does not mean that the suspect would have committed an act of terrorism without the FBI sting operation.

370. Murr, *supra* note 156 (stating that in the Washington and Patterson robbery cases, law enforcement “had at least 25 agencies and over 500 investigators, analysts and prosecutors at the local, state, and military levels . . .”).

371. Of the 60 cases, two cases did not involve defendants—printer cartridges sent from Yemen and an undercover agent who revealed explosive underwear—29 defendants admitted guilt; 24 pled innocent and sent to trial; and 5 involved multiple defendants with one or more defendants pleading guilty and testifying against the others pleading innocent.

372. The use of sting operations and the ubiquitous publication of the phrase “terror plot” may intensify the societal perception of danger, particularly when there may not have been such a high number of events that are called “plots” without FBI involvement. The media impact of press releases can be critical in engendering a perception of the threat through repetition and emotional impact. DAVID L. ALTHEIDE, *TERRORISM AND THE POLITICS OF FEAR* 47 (2006) (stating that “[t]he politics of fear relies on a compliant mass media that will carry news reports and other popular-culture messages that promote fear”); Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 *EUR. J. INT’L L.* 993, 993 (2001) (stating that 9/11 had “atrocious” effects on the “human, psychological” state).

counterterrorism successes.”³⁷³ No one should doubt that the FBI has remained vigilant, but does the evidence surrounding the convictions in this Article indubitably corroborate that there would have been a “large-scale attack”? Without FBI preemptive measures, some attacks, such as the Boston Marathon bombing, may very well have slipped through to perpetration, but this is not clear.

In virtually every Justice Department press release, like a mantra, the FBI congratulates its agents publicly and provides accolades for the FBI’s conscientiousness in thwarting terrorism, which imparts more perceived reality to the accumulation of alleged “terror plots” and peril. For example, in the press release in the Michael C. Finton case, acting Assistant Attorney General Hinnen stated: “Although a coordinated undercover law enforcement investigation thwarted Mr. Finton’s plot to destroy the federal courthouse in Springfield, this case underscores the need to remain vigilant against the threat posed by homegrown extremism.”³⁷⁴ Finton had been under FBI surveillance for two years and had not engaged in any terrorism initiative, but FBI agents instituted a sting operation, posed as al-Qaeda operatives, and provided a van, fake explosives, and a detonation device to someone who had already spent five years in prison for aggravated robbery and aggravated battery.³⁷⁵ Would Finton have been willing to engage in such an act without FBI encouragement, support, and bomb-making expertise? Whose “plot” was it?

The assumption that a suspect would have engaged in an act of terrorism once a determination is made about the suspect’s existing mens rea and possibly actus reus was crafted in post-9/11 law enforcement policies. After 9/11, U.S. law enforcement agencies interpreted their mission to include a movement from post-factum to “preventative” law enforcement,³⁷⁶ and prosecutors became willing to indict suspected terrorists at early stages; this pitted civil rights against new

373. Carafano & Zuckerman, *supra* note 11.

374. Illinois Man Admits Plotting, *supra* note 298.

375. *Id.*; NPR, *supra* note 296.

376. U.S. DEPT OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FBI’S INVOLVEMENT IN AND OBSERVATIONS OF DETAINEES INTERROGATIONS IN GUANTANAMO BAY, AFGHANISTAN AND IRAQ (UNCLASSIFIED) 11 (2008), available at <http://www.usdoj.gov/oig/special/s0805/final.pdf> (noting the need to detain suspected terrorists and prevent attacks); Robert M. Chesney, *Terrorism, Criminal Prosecution and the Preventive Detention Debate*, 50 S. TEX. L. REV. 669, 675-77 (2009); see also Press Conference, Michael Chertoff, U.S. Secretary of Homeland Security, CNN (July 7, 2006), <http://transcripts.cnn.com/TRANSCRIPTS/0607/07/ywt.01.html>.

We don’t wait until someone has lit the fuse to step in and prevent something from happening. That would be playing games with people’s lives . . . We swoop in as early as possible . . . And anybody who thinks they have time to wait and see how things play out, I think is really taking a foolish approach to the issue of security.

Id.

perceptions of evidentiary standards.³⁷⁷ The assumption that post-9/11 terror suspects were guilty of perpetrating a future terror attack³⁷⁸ is eerily similar to the premise of the fictional book *Minority Report*³⁷⁹ and movie by the same name. *Minority Report* describes the concept of preempting crimes:

[W]e get them first, before they can commit an act of violence. So the commission of the crime itself is absolute metaphysics. We claim they're culpable. They, on the other hand, eternally claim they're innocent. And, in a sense, they are innocent. In our society we have no major crimes, but we do have a detention camp full of would-be criminals.³⁸⁰

Referencing the preventative law enforcement approach of *Minority Report*, Dean Mark C. Niles remarks that when the "public becomes aware of just *one* mistake, the deafening outcry of injustice would require the system's immediate termination," but in the post-9/11 world "the majority of this nation has accepted the continued implementation of a preemptive detention system with dubious predictive reliability."³⁸¹ Niles is absolutely correct and the problem is that the point of outcry from wrongful conviction cannot possibly be reached in terrorism cases because if a suspect is found guilty, even though the suspect did not take volitional initiatives up to a point of certain perpetration, there is no way of knowing if the suspect was *not* devoted to perpetrating the violent act, which is dissimilar from the circumstance of the wrongfully convicted who is exonerated years later with forensic evidence. In the latter case, someone *did* commit a crime and the mystery is the identity of the perpetrator, but in the former case the question is whether the defendant would have committed an act of terrorism even though the violent act did not actually occur.³⁸² Consequently, the suspected terrorist is imprisoned for hold-

377. Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 426 (2007).

378. See Michael P. Scharf & Gwen Gillespie, *Foreword: Security Detention*, 40 CASE W. RES. J. INT'L. L. 315, 316 (2009) (remarking on the similarities between those held without charge at Guantanamo Bay).

379. H.L. MENCKEN, *MINORITY REPORT* (Johns Hopkins University Press 1956).

380. Niles, *supra* note 30, at 280-81 (citing John Anderton, *Commission of Police*, in Dick, *The Minority Report*, in THE PHILIP K. DICK READER 324 (Citadel Press 1987) (1956)).

381. *Id.* at 278.

382. Similarly, in *Minority Report*, the fictional legal system portrayal was founded on determinations generated by three precog mutants who had premonitions of crime and those premonitions were interpreted by the precrime unit assigned to arresting individuals long before a suspect commits a crime. *Id.* at 280-81. The three precogs could disagree and there could be a majority report and a minority report, but the minority reports were destroyed because there was no desire to have a perception of fallibility or to acknowledge that someone accused of a crime could have an alternative future. *Id.* at 290. Stephen Spielberg stated that the film was produced with reflections

ing menacing desires that could (beyond a reasonable doubt) have resulted in an act of terrorism.

An individual may have a vicious mens rea and be predisposed to engaging in proscribed conduct, or could be disenfranchised and possess feelings of despair for the future, move his or her lips too much without thinking, or not really possess the resolution to commit a violent act of terrorism without external encouragement. If law enforcement surveils suspects, gathers information, and fully places the suspect on law enforcement's radar, is there a danger in permitting suspects to act on their own volition to confirm an actus reus in a real "plot" instead of law enforcement being so intricately involved that the actus reus is an invention?

Reconsider the case of the "Liberty City Seven," which may have been a critical turning point that led the FBI to produce more complete sting operations.³⁸³ After two mistrials, six of the seven defendants were convicted of conspiracy charges with intent to bomb the Sears Tower in Chicago. The seven poor and homeless individuals supposedly "pledged an oath of allegiance to al Qaeda," but in reality, the suspects did not swear allegiance to al-Qaeda.³⁸⁴ Instead they swore allegiance to an FBI actor apparently possessing \$50,000 and vehicles. The defendants did not have weapons or bomb-making material, and they were present in Miami.³⁸⁵ If the FBI is so confident that the individuals would bomb the Sears Tower, why not give them vehicles, permit them to attempt to acquire materials for a bomb on

on the Bush Administration's approach to terrorism cases and asked: "How many of our civil liberties are we willing to give up because the government tells us we have to in order to protect ourselves from better terrorism[?]" *Id.* at 286; see also RONALD DWOR-KIN, *TAKING RIGHTS SERIOUSLY* 13 (1977) (placing someone in jail based on the prediction of a crime, much like in insurance actuarial tables, is simply "unjust" and "denies his claim to equal respect as an individual").

383. It is possible that sting operations began to run up to the point of a fake bomb attack because of difficulties in prosecuting the Liberty Seven case. Because most of these enumerated plots occurred more recently and not closer to 9/11, maybe this suggests that the FBI ratcheted up the FBI sting operations in later years. Moreover, if such detailed sting operations are developed after the identification of a suspect, perhaps there are also instances in which the information and instructions on terrorism available to pique the interest may have also been generated by the FBI or CIA with surveiled media on the internet.

384. Press Release, U.S. Attorney's Office, Southern District of Florida, *Leader of Liberty City Six Convicted on All Counts, Four Others Convicted on Multiple Counts, and One Defendant Acquitted on Charges of Conspiring to Support al Qaeda, Attack Targets in the United States* (May 12, 2009), available at <http://www.fbi.gov/miami/press-releases/2009/mm051209.htm> (noting that "in March 2006, Batiste and other defendants pledged an oath of allegiance to al Qaeda"); *5 convicted in 'Liberty City' terror trial*, CNN (May 12, 2009), <http://www.cnn.com/2009/CRIME/05/12/liberty.seven/> (reporting that "[j]uries have twice deadlocked on verdicts for the group of homeless men initially known as the 'Liberty City 7'").

385. CNN, *supra* note 384.

their own, and see if they assemble it and begin driving 1,400 miles from Miami to Chicago? If the group acquires materials for a bomb and the FBI has a court order to eavesdrop on their location and their phones and can trace their whereabouts, it might be feasible to gather the necessary evidence for a viable and real case instead of hastening along the suspects and deepening the evidentiary basis premised on what law enforcement believes the group will do. Based on their financial position, no such plot was possible for these individuals and they did not reach a point at which one can guarantee that they would have committed the act. The common law permitted those likely to commit a crime to withdraw from a criminal act and not be guilty of attempt and contemporary penal codes require evidence of a “substantial step” that corroborates a guilty mens rea,³⁸⁶ but in this case we will never know if these indigent individuals would have taken the money and vehicles offered and informed the al-Qaeda/undercover officer to get lost. Another approach to inquiring into the nucleus of the guilty mens rea in terrorism cases is to distinguish other forms of large-scale violence and ask whether such glaring attention should be transfixed on militant Islam.

B. PLOTS OR LARGE-SCALE VIOLENCE WITHOUT RADICAL ISLAM

In the decade prior to 9/11, there were six major terrorist attacks on U.S. interests and only two attacks occurred inside the United States: the 1993 World Trade Center Bombing and Oklahoma City. The latter of which involved devastation wrought by Timothy McVeigh and Terry Nicholes in Oklahoma City and was worse than most Islamic terrorist attacks. The other four attacks did not occur on U.S. soil, and three were directed at the U.S. military—the military base bombing in Riyadh, Saudi Arabia on November 13, 1995, the attack on the U.S. military on the Al Khobar towers in Saudi Arabia on June 25, 1996, the bombings at the U.S. embassies in Kenya and Tanzania on August 7, 1998, and the bombing of the U.S.S. Cole in Yemen on October 12, 2000. These attacks on the U.S. military in foreign locations might have been incited principally by an opposition to the U.S. military serving as a world policeman, rather than by an underlying ideology that induces militants to oppose the U.S. military.³⁸⁷

386. Robert Batey, *Minority Report and the Law of Attempt*, 1 OHIO ST. J. CRIM. L. 689, 696-97 (2004).

387. See Scott Thompson, *Developments on Previous Symposia: Can Might Make Right? The Use of Force to Impose Democracy and the Arthurian Dilemma in the Modern Era*, 71 LAW & CONTEMP. PROB. 163, 174 (2008) (remarking that no country in history has ever become such a world policeman as the United States and emphasizing that there is an inherent danger in spreading forces so thinly that the domestic front is less protected); see also Michael Novak, *The Asymmetric Threat: National Self-Defense in*

With respect to investigations inside the United States, a radical Islamic ideology, often gathered through surveillance, is ostensibly the indicator to cause the FBI to focus on the mens rea of suspects even if those suspects are only a small fraction of Muslims in the United States.³⁸⁸ Without the presentation of peril from radicalized Islam in the news, courtesy predominantly of the national security apparatus, select politicians, and commentators from the private sector, perhaps it would be easier to recognize that terrorist acts by Islamic extremists account for a sliver of all violent attacks.³⁸⁹ The William H. Webster Commission Report remarked that one “can find causes [for violence] in political, social, environmental, and other contexts” and not just in Islamic radicalism.³⁹⁰ The Report continues by noting that “[r]adicalism is not a crime. Radicalization alone, without incitement to violence, may not constitute a threat.”³⁹¹ However, as the cases in this Article impart, the communication of radical ideals does proffer the prospect of intensifying danger with the association of individuals possessing the more generalized and more readily identifiable mens rea of militant Islam, while preempting violence deriving from less generalized and brazen motives would mandate extensive investigatory resources and could too easily transgress privacy rights with the use of preemptive law enforcement operations. In fact, a potential perpetrator of a violent attack would likely desire secrecy during planning even if the individual relishes the idea of publicizing the motis operandi after committing a violent act. Consider the underlying motives in a few other events.

Anders Behring Breivik, a thirty-two-year-old right-wing fundamentalist Christian, went on a rampage and murdered ninety-two

Uncharted Waters, 27 HARV. J.L. & PUB. POL’Y 817, 822 (2004) (referencing Harvard Professor Samuel Huntington’s remark of the significant number of recent violent confrontations involving Muslims and Huntington’s quote that the driving force is not inherent in religion but in “a great sense of grievance, resentment, envy and hostility towards the West”).

388. Drawing unreasonable generalizations was the core injustice with illegal stereotyping of black Americans and latinos in criminal law. See generally DAVID HARRIS, PROFILES IN INJUSTICE, WHY RACIAL PROFILING CANNOT WORK (2002); Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253 (2004); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296 (2001).

389. From FBI accounts of 318 events involving bombings, arson, malicious destruction, and shootings from 1980 to 2005, only seven percent of the attacks were attributed to Islamic extremists. Webster Commission, *supra* note 47, at 6.

390. *Id.* It would seem that this percentage should be even lower because there were likely more than 318 events over these 25 years.

391. *Id.*

people in Oslo in July 2011.³⁹² Breivik wrote a 1,500 page manifesto that contained warnings quite similar to the words of Osama bin Laden, except from the perspective of a Christian opposing Muslims.³⁹³ However, the grievous tragedy was more representative of an all-out massacre than the perpetration of actions consistent with the manifesto.³⁹⁴

Similarly, the 1999 Columbine school massacre in Colorado involved two teenage students killing thirteen on a shooting rampage at their school. Eric Harris and Dylan Klebold were originally assumed to be bullied loners, but the FBI later explained that the impetus was not a reverberation from bullying but a desire to successfully conduct a massive bombing operation, which was attempted but failed, that would have annihilated six hundred students, teachers, and administrators.³⁹⁵

Massacres were also driven by motives stemming from mental illness. In 2007, Seung-Hui Cho killed thirty-two people at Virginia Tech University because he believed he was being forced to lash out against the wealthy and other enemies.³⁹⁶ In July 2012, James Holmes opened fire at a movie theater in Aurora, Colorado killing twelve and injuring fifty-eight.³⁹⁷ In the months prior, Holmes had been a patient of university psychiatrists.³⁹⁸ In December 2012, Adam Lanza shot and killed twenty-six people, including twenty children, at Sandy Hook Elementary School.³⁹⁹ There was no clear motive other than the fact that he became a "recluse obsessed with school shootings."⁴⁰⁰ A few days later, sixty-two-year-old William Spengler,

392. Steven Erlanger & Scott Shane, *Oslo Suspect Wrote of Fear of Islam and Plan for War*, N.Y. TIMES (July 23, 2011), <http://www.nytimes.com/2011/07/24/world/europe/24oslo.html?pagewanted=all>.

393. See *id.* (stating that Breivik detailed the need for a Christian war to defend Europe from the danger of Muslim domination).

394. Erlanger & Shane, *supra* note 392 (noting that in attacks that killed eighty-five, Breivik hunted down young people attending a political summer camp on Utoya Island, and many of the young people were children of members of the Labor Party).

395. Dave Cullen, *The Depressive and the Psychopath*, SLATE (Apr. 20, 2004), http://www.slate.com/articles/news_and_politics/assessment/2004/04/the_depressive_and_the_psychopath.html.

396. *Killer's manifesto: 'You forced me into a corner'*, CNN (Apr. 18, 2007), <http://www.cnn.com/2007/US/04/18/vtech.shooting/>.

397. *Colorado Theater Shooting Fast Facts*, CNN (Mar. 2, 2014), <http://www.cnn.com/2013/07/19/us/colorado-theater-shooting-fast-facts/>.

398. Ted Rowlands & Jim Spellman, *James Holmes called university 9 minutes before shooting, attorney says*, CNN (Aug. 31, 2012), <http://www.cnn.com/2012/08/30/justice/colorado-shooting/>.

399. Jonathan Kienst & Shimon Prokupecz, *27 Dead, Including 20 Children, in Conn. School Shooting: Police*, NBC 4 NEW YORK (Dec. 15, 2012), <http://www.nbcnewyork.com/news/local/Shooting-Reported-at-Connecticut-School-183501531.html>.

400. Matt Smith, *Sandy Hook killer took motive to his grave*, CNN (Nov. 26, 2013), <http://www.cnn.com/2013/11/25/justice/sandy-hook-shooting-report/>.

who had served a seventeen-year sentence for murder, set an arson fire in Webster, New York, that destroyed seven houses and then shot at the responding firefighters, killing two.⁴⁰¹

On May 23, 2014, Elliot Rodger, who also had a mental illness,⁴⁰² stabbed three men to death at his home in Santa Barbara, drove to the Alpha Phi sorority house and sprayed bullets that killed two women and injured another. Rodger then drove to a delicatessen and shot and killed another individual and fired at and injured pedestrians before crashing his car and killing himself.⁴⁰³ Rodger's motive was relayed in posted YouTube videos and a 141-page document that he emailed to his family and a few dozen people shortly before the killing. The document promised a "Day of Retribution" in which he would launch a "War on Women," "kill good looking people," and punish females who had "starved [him] of sex."⁴⁰⁴ One of the fathers of the victims maintained that his son had died because of irresponsible politicians and the National Rifle Association.⁴⁰⁵

If the availability of weapons is the culprit, there is an interesting distinction in that some states have open carry laws that permit blatantly flashing weapons in plain sight as a Second Amendment right⁴⁰⁶ because there is no reason to believe the armed person possesses intent to wrongly use the weapon. But the majority of the cases listed in this Article involved individuals being convicted for possessing a malicious mens rea but no weapons, and others were arrested after the FBI gave them fake weapons.

401. Victoria Freile & Doug Stanglin, *4 firefighters shot, 2 killed at Webster, N.Y., fire*, USA TODAY (Dec. 24, 2012), <http://www.usatoday.com/story/news/nation/2012/12/24/webster-new-york-firefighter-shot/1788917/>.

402. There were warnings because Rodger had been seeing therapists, but refused to take his psychiatric medication. Joe Mozingo, Amanda Covarrubias & Richard Winton, *Isla Vista shooting suspect's videos reflect cold rage*, L.A. TIMES (May 25, 2014), <http://www.latimes.com/local/la-me-isla-vista-suspect-20140525-story.html#page=1>. In the month prior, Santa Barbara sheriff deputies visited Rodger's apartment to check on his welfare, but did not enter his apartment where his three semi-automatic handguns and plans could have been discovered. Holly Yan, Steve Almasy & Sara Sidner, *California mass killer thought plan was over during April visit by deputies*, CNN (May 25, 2014), <http://www.cnn.com/2014/05/25/justice/california-shooting-deaths/>.

403. Yan, Almasy & Sidner, *supra* note 402; Kashmir Hill, *The Disturbing Internet Footprint Of Santa Barbara Shooter Elliot Rodger*, FORBES (May 23, 2014), <http://www.forbes.com/sites/kashmirhill/2014/05/24/the-disturbing-internet-footprint-of-santa-barbara-shooter-elliott-rodger/>.

404. Nolan Feeney, *Last IDs Made in Calif. Killings*, TIME (May 25, 2014), <http://time.com/113948/elliott-rodger-ucsb-santa-barbara/>.

405. Yan, Almasy & Sidner, *supra* note 402.

406. See *State to state comparison: Open carry laws*, NBC WBIR (Apr. 9, 2014), <http://www.wbir.com/story/news/local/2014/04/09/state-to-state-comparison-open-carry-laws/7533637/> (stating that "[a]lthough the laws are not exactly the same, 29 states allow open carry without a permit").

Despite the difficulty of preventing violent attacks with obscure motives, law enforcement has been successful in thwarting attacks prior to completion. On May 1, 2014, a seventeen-year-old sought to plant bombs and use guns to kill students at Waseca Junior and Senior High School in Minnesota.⁴⁰⁷ The police learned of the plot, arrested the teen, and discovered pyrotechnic chemicals, ball bearings, gunpowder, and a pressure cooker in his school locker.⁴⁰⁸ He had stashed handguns and documented plans to kill his family and attack the school in a 180-page journal.⁴⁰⁹

A rapid response case occurred one month later when fifteen-year-old Jared Padgett rode the school bus to Reynolds High School in Troutdale, Oregon, while toting a duffle bag and guitar case containing an AR-15 rifle, a handgun, a large knife, and several hundred rounds of ammunition loaded in magazines.⁴¹⁰ At the school, Padgett shot and killed a student in a locker room, injured a teacher, exchanged gunfire with a police officer, and apparently shot and killed himself.⁴¹¹ Padgett was the seventy-fourth school shooting since the elementary school shooting in Newton, Connecticut, in late 2012, which is roughly one per week.⁴¹²

Terror attacks seem to consist most commonly of bombs as the chosen instrumentality to inflict damage and this has also been a pointed danger at schools. A Department of Justice report, covering January 1990 to February 2002, found that there were 1,055 explosive devices placed on school premises and fourteen percent provided a warning to school authorities.⁴¹³ The Secret Service discovered that seventy-five percent of the individuals who did place bombs in the schools planned the attack, the planning often consumed time and energy of the attacker nearly as an obsession, attackers acted out of perceived grievance, and there were often warning signs, but there was no definitive "profile" of attacker.⁴¹⁴

407. Dana Ford & Ben Brumfield, *Police: Minnesota teen planned school massacre*, CNN (May 2, 2014), <http://www.cnn.com/2014/05/01/justice/minnesota-attack-thwarted/>.

408. *Id.*

409. Michael Muskal, *Minnesota teen's alleged plot to bomb and open fire at school foiled*, L.A. TIMES (May 2, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-minnesota-police-foil-school-attack-20140502,0,3543272.story#axzz30bODq34c>.

410. Ed Payne & Dana Ford, *Oregon shooting: 'This is becoming the norm'—but will anything change?*, CNN (June 11, 2014), <http://www.cnn.com/2014/06/11/justice/oregon-high-school-shooting/>.

411. *Id.*

412. Niraj Chokshi, *Map: There have been at least 74 shootings at schools since Newtown*, WASH. POST (June 10, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/06/10/map-at-least-74-school-shootings-since-newtown/>.

413. Graeme R. Newman, *Bomb Threats in Schools*, U.S. DEP'T OF JUSTICE COMMUNITY ORIENTED POLICING SERVICES PROBLEM-SPECIFIC GUIDES SERIES No. 32, at 9-10 (Aug. 2011), available at <http://www.popcenter.org/problems/pdfs/BombThreats.pdf>.

414. *Id.* at 14.

Of the thousands of bomb threats to American schools each year, which drastically escalate in number following massacres that capture prolonged media attention,⁴¹⁵ experts estimate that somewhere between 90% and 99.99% are hoaxes.⁴¹⁶ If such an infinitesimal number of threats are genuine, one might also question how one defines or relays a punishable communication or threat.⁴¹⁷ A recent example that should not be called a “plot” but does contain the common elements of potential punishment for an act that may not pose a real danger of violence and of attempts to discover a broader terrorist conspiracy, occurred when an individual left a pamphlet that contained a bomb threat in Bronner’s Christmas Wonderland in Frankenmuth, Michigan on June 22, 2014.⁴¹⁸ The FBI investigated and Crime Stoppers publicly released a surveillance picture and offered a reward for information leading to the apprehension of the culprit who left the note.⁴¹⁹ Three weeks later, police identified the individual as a fifteen-year-old boy from a small mid-Michigan community.⁴²⁰ Prosecutors pondered potential criminal charges and Frankenmuth Police Chief Don Mawer stated that “kids do silly things sometimes” and commit pranks, but “[t]his can be viewed as an act of terrorism.”⁴²¹ Mawer further stated: “It was very important, to not only find this

415. Pennsylvania tallies the number of bomb threats to schools and found an average of sixty bomb threats to Pennsylvania schools per month in the three years prior to the Columbine tragedy, but the number increased to 309 bomb threats in the month after Columbine. Michele Norris, *Schools Try to Discourage Bomb Threats*, ABC News (Apr. 5, 2014), <http://abcnews.go.com/WNT/story?id=131133> (also noting that each one of the threats may cost taxpayers \$50,000). Some school districts are more prone to having bomb threats with one Maryland school district having 150 bomb threats and 55 associated threats during the 1997-1998 school year. Newman, *supra* note 413, at 9. Data from the 2012-2013 school year for New Jersey recorded 61 bomb threats, all of which were hoaxes. Memorandum from Edward Dickson, Director, NJ Office of Homeland Security & Preparedness, to Prosecutors, Police Chiefs, New Jersey State Police and School Superintendents (May 17, 2013), *available at* <http://www.state.nj.us/education/schools/security/ht/051713BombThreatAnalysis.pdf>.

416. Newman, *supra* note 413, at 9-10 (estimating that 90% of bomb threats to schools are pranks); Kayla Webley, *Put to the Test: Colleges Grapple with Bomb Threats*, TIME (Sept. 15, 2012), <http://nation.time.com/2012/09/15/put-to-the-test-colleges-grapple-with-bomb-threats/> (discussing bomb threats to universities, Jason Friedberg, the retired chief of public safety at Bucknell University in Pennsylvania, stated that up to 99.999% of bomb threats are hoaxes and that every college has several bomb threats every year).

417. There may not be much room for unreasonable jesting and loose-lipped and anomalistic departures from normal behavior.

418. Terry Camp, *Police Question Teen in Connection with Threat at Bronner’s Christmas Wonderland*, sNEWS1 (July 14, 2014), <http://snews1.com/id/1436243947/Police-question-teen-in-connection-with-threat-at-Bronners-Christmas-Wonderland>.

419. *Id.*

420. *Id.*

421. *Id.*

person, but find out who their affiliates are, and what was the motive.”⁴²²

The federal criminal penalty for making bomb threats, which technically may not involve any planning or acquisition of materials and could occur within a very short time frame, can carry up to a five-year prison sentence, up to twenty years if there is serious bodily injury, or up to life in prison if death results from the threat.⁴²³ Likewise, terroristic threat laws currently reside in a state of constitutional limbo and have been applied to a wide range of threats.⁴²⁴ There are many reasons for punishing threats that do not constitute an actual danger,⁴²⁵ but with such a wide assortment of crimes involving bombs and shootings of innocent people for varied motives and the existence of mentally ill or dejected Americans who commit violent crimes, the Heritage Foundation’s list of thwarted terror plots—the vast majority of which did not and could not cause harm to others—appears somewhat overwrought.

IV. CONCLUSION

Law enforcement efforts since 9/11 should receive accolades. The FBI may very well have prevented terrorist attacks. However, communications or acts that can incite violence are criminally punishable and are not protected by the First Amendment, but such conduct will not necessarily culminate in a terrorist attack. The ubiquitous media and intelligence community referral to the phrase “thwarted terror plots” is perhaps not the best descriptive phrase for the vast majority of convictions discussed in this Article because a verifiable peril is not a prerequisite for a criminal conviction. In the case of FBI sting operations, whether operations facilitate suspects to execute fake plots in lieu of a real attack or whether suspects were urged to participate in fake plots when they would not have perpetrated a real attack is a

422. *Id.*

423. 18 U.S.C. § 1038 (2012).

424. Tabo, *supra* note 359 (listing examples of 18-year-old Justin Carter being arrested and jailed for five months after he responded to someone calling him crazy on Facebook by posting, “yeah, he was messed up in the head and that he was going to ‘shoot up a kindergarten, watch the blood rain down and eat the beating heart out of one of them,’ . . . LOL”; Eighteen-year-old aspiring rapper Cameron D’Ambrosio being kept in jail for a month for stating on a Facebook page, “F--- a boston bomb wait till u see the s--- I do, I’m be famous rapping, and beat every murder charge that comes across me!”, but the grand jury did not indict D’Ambrosio; Olutosin Oduwole being convicted and sentenced to five years in prison for having a threatening note inside his car that “was threatening a ‘murderous rampage’” but he was released from prison after an appellate panel held that there was insufficient evidence to convict).

425. For example, harms to society include instilling fear, relaying a delusive sentiment that could confuse society with circumstances constituting a real danger, reducing productivity to society, and imposing unnecessary cost to taxpayers.

debatable question. What is clear is that false perceptions can potentially beget national security efforts that violate privacy rights, skew public understanding and political discourse, lead to overreaction in policymaking and foreign events, and even lay the foundation for unreasonably assuming that there is excessive domestic vulnerability to terrorism.

