

Policing “Radicalization”

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INTRODUCTION

Together with our partner law enforcement agencies, and with the assistance of the community, the FBI will continue to pursue those who support violent extremism and promote the radicalization of others, whether online or in person.

—Department of Justice Press Release¹

My concern is that [the FBI is] not looking at criminal behavior. We're not looking at violent behavior. But we're focusing on religious practices and that this is evident, and I could cite other evidence . . . of training materials and written materials of the FBI that describe people who, you know, wear Muslim clothing, et cetera, as being signals that they may be violent.

—Representative Jan Schakowsky (D-IL), before the United States House Permanent Select Committee on Intelligence, Hearing on Domestic Threat Intelligence²

In the last ten years, the federal government's commitment to counterterrorism has spurred innumerable changes to our legal system, with the emergence of new laws, norms, and mechanisms,³ and with the repurposing of preexisting tools.⁴ The preventative framework—where the government aims to prevent future terrorism—now defines counterterrorism programs at home and abroad.⁵ A preventative approach propels questions about how to understand,

1. U.S. Attorney's Office E. Dist. of Va., *Leader of "Revolution Muslim" Sentenced to 138 Months for Using Internet to Solicit Murder, Encourage Violent Extremism*, U.S. DEP'T JUSTICE (June 22, 2012), <http://www.justice.gov/usao/vae/news/2012/06/20120622mortonnr.html>.

2. *Rep. Mike Rogers Holds a Hearing on Intelligence*, CQ-ROLLCALL POL. TRANSCRIPTIONS, Oct. 6, 2011 [hereinafter *Hearing on Intelligence*], available at 10/5/11 EMEDIAPT 17:31:00 (Westlaw).

3. These changes were rooted in preexisting legal structures. James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331, 332–41 (2009).

4. The material support statutes, 18 U.S.C. §§ 2339A, 2339B (2006 & Supp. III 2009), and even the naval base at Guantánamo Bay, are examples of tools that existed before 9/11 but were put to new uses after.

5. See, e.g., COUNTERTERRORISM SECTION, DEP'T OF JUSTICE, COUNTERTERRORISM WHITE PAPER 11, 29 (2006), available at <http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf> (“[O]ur full engagement in the preventive mode has moved our focus to the preparatory stages of terrorist planning and to those who would support and actively encourage such activity. Thus, we rely strongly on the material support statutes to prosecute those who provide funds, services, equipment and all types of assistance to terrorists, terrorist organizations, and designated state sponsors of terrorism”); Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429, 431–37 (2011); Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 429–36 (2007) [hereinafter Chesney, *Beyond Conspiracy?*]; Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 26–36 (2005) [hereinafter Chesney, *Sleeper Scenario*]; Matthew C. Waxman, *Police and National Security: American Local Law Enforcement and Counterterrorism After 9/11*, 3 J. NAT'L SECURITY L. & POL'Y 377, 379–85 (2009); Petra Bartosiewicz, Op-Ed., *How Not to Catch a Terrorist*, L.A. TIMES, Sept. 18, 2011, at A22; Petra Bartosiewicz, *To Catch a*

model, and manage risk to the foreground.⁶ The government has embraced “radicalization” as the parlance for that risk, spawning a growing number of “counter-radicalization” and “countering violent extremism” programs focused on monitoring and influencing the political and religious cultures of Muslim communities in the United States.

Radicalization suggests that the path from Muslim to terrorist is a predictable one produced by or correlated with religious and political cultures of Muslim communities. Government radicalization discourses and programs are almost entirely fixated on Islam and Muslims, despite data that the terrorist threat emanating from Muslims is minimal to nonexistent, including in comparison to violence from white-supremacist and right-wing groups.⁷ The Federal Bureau of Investigation (FBI) and the New York City Police Department (NYPD) have led the way in theorizing radicalization and shifting national security policing towards a focus on gathering intelligence on Muslim communities.⁸ Radicalization has

Terrorist: The FBI Hunts for the Enemy Within, HARPER’S MAG., Aug. 2011, at 37 [hereinafter Bartosiewicz, *To Catch a Terrorist*]. See generally DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* (2007) (describing and critiquing government anti-terrorism efforts).

6. In the realm of terrorism, the chances are small but the potential consequences huge, the argument goes; so it makes sense for the government to act aggressively and preventatively, even if the risk of the act itself is relatively minor. See, e.g., Samuel J. Rascoff, *Domesticating Intelligence*, 83 S. CAL. L. REV. 575, 604–16 (2010) (“[T]he post-9/11 domestic intelligence process is properly regarded as a form of risk assessment.”); see also Clive Walker, *Neighbor Terrorism and the All-Risks Policing of Terrorism*, 3 J. NAT’L SECURITY L. & POL’Y 121, 130 (2009) (“[T]he operation of all-risks policing powers involves the police treating anyone and everyone as a risk and taking action on the basis of leads even more vague and haphazard than intelligence or suspicion.”).

7. A recent report found:

For the second year in a row, there were no fatalities or injuries from Muslim-American terrorism. Meanwhile, the United States suffered approximately 14,000 murders in 2012. Since 9/11, Muslim-American terrorism has claimed 33 lives in the United States, out of more than 180,000 murders committed in the United States during this period. Over the same period, more than 200 Americans have been killed in political violence by white supremacists and other groups on the far right, according to a recent study published by the Combating Terrorism Center at the U.S. Military Academy. Sixty-six Americans were killed in mass shootings by non-Muslims in 2012 alone, twice as many fatalities as from Muslim-American terrorism in all 11 years since 9/11.

Charles Kurzman, *Muslim-American Terrorism: Declining Further*, TRIANGLE CTR. ON TERRORISM & HOMELAND SEC. 1 (Feb. 1, 2013), http://kurzman.unc.edu/files/2011/06/Kurzman_Muslim-American_Terrorism_February_1_2013.pdf (footnotes omitted) (citations omitted); see also Spencer Ackerman, *Report: U.S. Muslim Terrorism Was Practically Nil in 2012*, WIRED: DANGER ROOM (Feb. 1, 2013, 12:57 PM), <http://www.wired.com/dangerroom/2013/02/american-muslim-terrorism>. See generally COUNTERTERRORISM DIV., FED. BUREAU OF INVESTIGATION, *TERRORISM 2002–2005*, at 1–2 (2006), available at http://www.fbi.gov/stats-services/publications/terrorism-2002-2005/terror02_05.pdf (differentiating domestic extremists from “violent global jihadist movement”); Mark Follman et al., *A Guide to Mass Shootings in America*, MOTHER JONES (Feb. 27, 2013, 7:45 AM), <http://www.motherjones.com/politics/2012/07/mass-shootings-map> (detailing mass shootings from 1982 to 2012).

8. See, e.g., JEROME P. BJELOPERA, CONG. RESEARCH SERV., R42553, *COUNTERING VIOLENT EXTREMISM IN THE UNITED STATES* 3, 7–9 (2012) (discussing “countering violent extremism” efforts by the Department of Justice, Department of Homeland Security, and FBI);

come to frame all aspects of Muslim life as central to the counterterrorism intelligence-gathering project: from those who attend mosque and sport a beard compliant with religious tradition, to those who express outrage at the United States's increasing reliance on drone strikes in Muslim-majority countries; and from mosques to hookah bars and points in between. Law enforcement's contribution to our understanding of radicalization, and the resultant police practices, are the subject of this Article.

After 9/11, the FBI, the Department of Justice (DOJ), and the NYPD adopted a preventative approach to countering terrorism, emphasizing the need for proactive intelligence gathering and "forward-leaning"⁹ preventative prosecutions.¹⁰ That intelligence gathering is now defined through a concern with

Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125, 146 n.93 (2012) [hereinafter Rascoff, *Establishing Official Islam?*] (noting the Obama administration's preference for the "violent extremism" language). Other federal agencies are similarly concerned with radicalization. See, e.g., U.S. DEPT OF DEF., PROTECTING THE FORCE: LESSONS FROM FORT HOOD 4, 12, 15–18, 20 (2010), available at http://www.defense.gov/pubs/pdfs/dod-protectingtheforce-web_security_hr_13jan10.pdf (referring to the need for the Department of Defense to respond to the problem of "self-radicalization"). Radicalization policing might be understood as a modern-day application of the old Al Capone approach to policing: where law enforcement charges a big-time criminal with lesser pretextual charges as a way to get him off the streets. See Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 618–24 (2005). But when law enforcement is policing radicalization, the concern is not for some past crime. The concern in policing radicalization is the prevention of a future crime, predicted by the religious and political commitments of a community or an individual.

9. Bartosiewicz, *To Catch a Terrorist*, *supra* note 5, at 39 (describing a memo by FBI Director Robert Mueller issued days after 9/11 announcing a new policy of "forward-leaning—preventative—prosecutions").

10. See, e.g., COUNTERTERRORISM SECTION, *supra* note 5; *Counterterrorism Units*, NYPD, http://www.nyc.gov/html/nypd/html/administration/counterterrorism_units.shtml (last visited Apr. 15, 2013); *Directorate of Intelligence: Intelligence Philosophy*, FBI, <http://www.fbi.gov/about-us/intelligence/philosophy> (last visited Sept. 27, 2012) ("The FBI has a mandate from Congress, the President, the Attorney General, and the Director of National Intelligence (DNI) to protect national security by producing intelligence in support of its own investigative mission, national intelligence priorities, and needs of other customers."); *Directorate of Intelligence: Mission*, FBI, <http://www.fbi.gov/about-us/intelligence/mission> (last visited Apr. 15, 2013) ("The FBI's national security mission is to lead and coordinate intelligence efforts that drive actions to protect the United States."). For an argument about the comparative advantages of engaging local law enforcement in intelligence gathering in counterterrorism work and looking to the NYPD as an example, see Samuel J. Rascoff, *The Law of Homegrown (Counter) Terrorism*, 88 TEX. L. REV. 1715, 1728–36 (2010) [hereinafter Rascoff, *The Law of Homegrown (Counter) Terrorism*] (arguing in part that local counterterrorism intelligence is "situated to play a vital role in gathering the intelligence necessary for understanding the radicalization process"). See also David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1, 1–2 (2006) (discussing how state and local law enforcement's refusal to become involved in immigration enforcement "both illuminates a turning point in American policing, and teaches us important lessons in how we must go forward in the war on terror if we are to succeed"); Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289 (2012) (discussing the role of state and local government in post-9/11 national security law and policy, and arguing for a federalism frame that

radicalization, substantially expanding what is considered the legitimate scope of police work. Legal scholarship has grappled with the preventative paradigm¹¹ but largely ignored the government's new theory for predicting future terrorism.¹² While some have forcefully argued that the threat of radicalization is overstated,¹³ scholars have provided inadequate critical attention to either the construction of radicalization as a process or the growing number of government programs based thereon.¹⁴ This Article is aimed at that gap; the Article examines how government concern with radicalization and increased allowances for law enforcement intelligence gathering have allowed law enforcement to marshal significant resources towards monitoring American Muslim communities.¹⁵

emphasizes vertical intergovernmental arrangements to promote and mediate policy values over the long term).

11. See, e.g., COLE & LOBEL, *supra* note 5, at 109; Aziz, *supra* note 5; Chesney, *Beyond Conspiracy?*, *supra* note 5; Chesney, *Sleeper Scenario*, *supra* note 5; Waxman, *supra* note 5.

12. See Aziz Z. Huq, *Modeling Terrorist Radicalization*, 2 DUKE F. FOR L. & SOC. CHANGE 39 (2010) [hereinafter Huq, *Modeling Terrorist Radicalization*]; Aziz Z. Huq, *The Signaling Function of Religious Speech in Domestic Counterterrorism*, 89 TEX. L. REV. 833 (2011) [hereinafter Huq, *The Signaling Function*]; Rascoff, *Establishing Official Islam?*, *supra* note 8, at 155–62; Rascoff, *The Law of Homegrown (Counter) Terrorism*, *supra* note 10. There is more scholarly engagement with radicalization once you step outside the legal academic literature. See Arun Kundnani, *Radicalisation: The Journey of a Concept*, 54 RACE & CLASS 3 (2012); Faiza Patel, *Rethinking Radicalization*, BRENNAN CTR. FOR JUST. *passim* (Mar. 8, 2011), http://brennan.3cdn.net/f737600b433d98d25e_6pm6beukt.pdf. On the British experience in particular, see ARUN KUNDNANI, INST. OF RACE RELATIONS, SPOOKED! HOW NOT TO PREVENT VIOLENT EXTREMISM 6–7, 10–22 (2009), available at <http://www.irr.org.uk/pdf2/spooked.pdf>, and Paul Thomas, *Failed and Friendless: The UK's 'Preventing Violent Extremism' Programme*, 12 BRIT. J. POL. & INT'L REL. 442, 444–47, 450 (2010).

13. E.g., *Compilation of Hearings on Islamist Radicalization—Volume I: Hearings Before the H. Comm. on Homeland Sec.*, 112th Cong. 71–77 (2011) [hereinafter *King Hearing I*] (statement of Leroy Baca, Sheriff, Los Angeles County Sheriff's Department); *id.* at 228–31 (statement of Bert Useem, Department Head and Professor, Sociology Department, Purdue University); see also John Mueller & Mark G. Stewart, *The Terrorism Delusion: America's Overwrought Response to September 11*, 37 INT'L SECURITY 81, 87–89 (2012); Charles Kurzman, *Muslim-American Terrorism in the Decade Since 9/11*, TRIANGLE CTR. ON TERRORISM & HOMELAND SEC. 2–9 (Feb. 8, 2012), http://kurzman.unc.edu/files/2011/06/Kurzman_Muslim-American_Terrorism_in_the_Decade_Since_9_11.pdf (analyzing data regarding terrorism from the past decade).

14. Academics and advocacy groups have started to write critically of the concept. Huq, *Modeling Terrorist Radicalization*, *supra* note 12, at 56–69; Kundnani, *supra* note 12, at 8–22; Rascoff, *Establishing Official Islam?*, *supra* note 8, at 162–79; Letter from Alliance for Justice et al. to Senator Diane Feinstein, Chairman, U.S. Senate Select Comm. on Intelligence (Sept. 26, 2011), available at <http://www.defendingdissent.org/pdf/letters/feinsteinIntelAuth.pdf> (opposing the Wolf Amendment to the Intelligence Authorization Act, which would set up a radicalization commission); Michael German, *Radically Wrong: A Counterproductive Approach to Counterterrorism*, ACLU BLOG RTS. (Feb. 14, 2013, 10:52 AM), <http://www.aclu.org/blog/national-security-free-speech/radically-wrong-counterproductive-approach-counterterrorism>; Patel, *supra* note 12, at 8–12.

15. Examining the government's concept is important because the state has a particular "[i]nvestment in 'radicalization' modeling," as it "yields dividends in the form of legitimacy for policies of investigation and prosecution bottomed on the state's claim of expertise." Huq, *Modeling Terrorist Radicalization*, *supra* note 12, at 40. These claims are particularly "forceful in the terrorism domain because, unlike other areas of risk regulation . . . it is a field where the state claims to have privileged access to information and where it has comparatively few academic competitors." *Id.*

There is no singular, official, government-wide understanding of radicalization.¹⁶ Indeed, more often than not, government officials and documents refer to “radicalization,” “radical” and “radicalized” Muslims, “radical Islam,” “violent extremists,” and so on, without explanation of what precisely these terms mean.¹⁷ Importantly, however, these references assume causal connections between radicalism, extremism, Islam, and terrorism.

Despite diversity and indeterminacy in these narratives, government accounts of radicalization converge upon three important themes. First, radicalization is an observable and, to some extent, predictable process by which Muslims become terrorists, willing and able to commit violence against the United States (or American interests) in the name of Islam or the global Muslim community.¹⁸ Second, in its effort to combat terrorism, the government has a role to play in monitoring and countering radicalization.¹⁹ Third, radicalization is an outcome of certain religious and political cultures within Muslim communities. Stated another way, religious and political cultures within Muslim communities foment radicalization in individuals. This should be a fairly uncontroversial summation of the federal government’s approach. Putting the pieces together, the

16. There is a growing academic and think tank literature trying to understand radicalization as a process in the real world. See, e.g., JIHADI TERRORISM AND THE RADICALISATION CHALLENGE IN EUROPE *passim* (Rik Coolsaet ed., 2008); CLARK MCCAULEY & SOPHIA MOSKALENKO, FRICTION: HOW RADICALIZATION HAPPENS TO THEM AND US *passim* (2011); Peter Neumann, Nat’l Sec. Preparedness Grp., *Preventing Violent Radicalization in America*, BIPARTISAN POL’Y CTR. 15–19 (June 2011), <http://bipartisanpolicy.org/sites/default/files/NSPG.pdf>.

17. Similarly, the term “terrorism” is socially constructed and contested, including by courts. See, e.g., Wadie E. Said, *Humanitarian Law Project and the Supreme Court’s Construction of Terrorism*, 2011 BYU L. REV. 1455, 1456–57, 1460 (2011) (explaining the Supreme Court’s use of the word “terrorism” throughout history).

18. See MITCHELL D. SILBER & ARVIN BHATT, NYPD INTELLIGENCE DIV., RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT 21 (2007), available at http://www.nypdshield.org/public/sitefiles/documents/nypd_report-radicalization_in_the_west.pdf; Patel, *supra* note 12, at 1–2.

19. Samuel J. Rascoff notes that counter-radicalization is “open-ended and undertheorized” as a concept, but “the core intuition behind counter-radicalization is that the prevention of future violence requires official involvement in shaping the ideational currents that are thought to underpin that violence.” Rascoff, *Establishing Official Islam?*, *supra* note 8, at 126–27, 145 (discussing, in addition to various forms of counter-radicalization, “de-radicalization,” and explaining that government “efforts to bring about change in ideation may also take the form of attempts to roll back an individual’s or group’s existing radical commitments”). He describes the change that counter-radicalization has wrought in this way:

[C]ounter-radicalization has changed the structure of government. It involves three interrelated phenomena: the creation of a domestic intelligence network for the purpose of informing counter-radicalization efforts; the creation and repurposing of government posts for a counter-radicalization infrastructure; and the imposition of counter-radicalization goals into the traditional welfare state.

Id. at 155–56. He credits the rise of the domestic counter-radicalization agenda to three things: (1) the rise conforms to “the preemptive logic of counterterrorism, which focuses on strategies that minimize the risk and intensity of future terrorist attacks”; (2) the rise is viewed as an exercise of “soft power” preferable to the mixed record that the United States has on the exercise of “hard power” in the national security context; and (3) the increased sense that there is a “homegrown” dimension to the terrorist threat. *Id.* at 127–29.

federal government’s embrace of radicalization discourse results directly in the proliferation of government counter-radicalization programs,²⁰ as well as related initiatives to counter violent extremism,²¹ targeted at monitoring and shaping the forms that religion and politics take in Muslim communities,²² and emphasizing the need for “cooperation” from Muslim communities.²³

Radicalization has transformed the landscape of preventative counterterrorism policing, placing political and religious cultures of Muslim communities at the center of the counterterrorism project, with unexamined costs.

20. *Id.* at 145, 148.

21. *See, e.g.*, EXEC. OFFICE OF THE PRESIDENT, EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES (2011) [hereinafter EXEC. OFFICE OF THE PRESIDENT, EMPOWERING LOCAL PARTNERS], available at http://www.whitehouse.gov/sites/default/files/empowering_local_partners.pdf; Countering Violent Extremism (CVE) Working Grp., *Homeland Security Advisory Council*, HOMELAND SEC. 15–26 (last visited Dec. 21, 2013), http://www.dhs.gov/xlibrary/assets/hsac_cve_working_group_recommendations.pdf. The administration uses both phrases—violent extremism and radicalization—and the terms seem to stand for the same conceptual framework.

22. There is a growing racial and religious profiling literature on how post-9/11 policies discriminatorily target American Muslim communities, from airport screening and questioning at the border to charitable giving and surveillance. *See, e.g.*, SHIRIN SINNAR ET AL., ASIAN LAW CAUCUS & STANFORD LAW SCH. IMMIGRANTS’ RIGHTS CLINIC, RETURNING HOME: HOW U.S. GOVERNMENT PRACTICES UNDERMINE CIVIL RIGHTS AT OUR NATION’S DOORSTEP 4–5 (2009), available at <http://www.asianlawcaucus.org/sites/asian-law-caucus/files/Returning%20Home.pdf> [hereinafter SINNAR ET AL., RETURNING HOME]; Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1267–77 (2004); Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621, 622–623, 625 (2004); Kevin Lapp, *Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative*, 29 N.Y.U. REV. L. & SOC. CHANGE 573, 573–76 (2005); Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201, 1244–48 (2004); Shirin Sinnar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, 77 BROOK. L. REV. 41, 47–49, 54–56 (2011) [hereinafter Sinnar, *Questioning Law Enforcement*]; *Under the Radar: Muslims Deported, Detained, and Denied on Unsubstantiated Terrorism Allegations*, CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE 1–4 (May 4, 2011), [http://www.privacyos.org/sites/all/files/undertheradar\(2\).pdf](http://www.privacyos.org/sites/all/files/undertheradar(2).pdf); Thomas Cincotta, *Manufacturing the Muslim Menace: Private Firms, Public Servants, and the Threat to Rights and Security*, POL. RES. ASSOCIATES 32 (2011), http://www.publiceye.org/liberty/training/Muslim_Menace_Complete.pdf; *Unreasonable Intrusions: Investigating the Politics, Faith & Finances of Americans Returning Home*, MUSLIM ADVOCATES (Apr. 2009), https://d3n8a8pro7vnm.cloudfront.net/muslimadvocates/pages/178/attachments/original/1360963837/Unreasonable_Intrusions_2009.pdf?1360963837; Jennifer Turner, *Blocking Faith, Freezing Charity: Cbilling Muslim Charitable Giving in the “War on Terrorism Financing,”* ACLU 59–75 (June 16, 2009), <http://www.aclu.org/files/pdfs/humanrights/block-ingfaith.pdf>. Murad Hussain has called much of this “cultural profiling.” Murad Hussain, Note, *Defending the Faithful: Speaking the Language of Group Harm in Free Exercise Challenges to Counterterrorism Profiling*, 117 YALE L.J. 920, 926 (2008) (discussing post-9/11 “cultural profiling” as “law enforcement policies that specifically target expressions of cultural identity as proxy criteria thought to be correlated with criminality, terrorist connections, or other subversive propensities”). Debating the utility of racial profiling in the national security context is beyond the scope of this Article. Sharon Davies has done an elegant job unpacking the debate. *See* Sharon Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45 (2003).

23. *See* Aziz Huq, *The Social Production of National Security*, 98 CORNELL L. REV. 637, 685 (2013); Sahar F. Aziz, *Policing Terrorists in the Community*, 5 HARV. NAT’L SEC. J. (forthcoming 2014) (manuscript at 38) (on file with author).

The Article proceeds in four parts. Part I provides a brief history of law enforcement's production and embrace of radicalization. Part II analyzes the seminal NYPD report *Radicalization in the West: The Homegrown Threat*.²⁴ Part III provides a schematic for understanding radicalization policing. Part III.A lays out the standards governing the FBI's and NYPD's policing, with a focus on the relaxed standards on intelligence gathering in the post-9/11 era. Part III.B identifies and explores the core preventative policing techniques of policing radicalization: mapping, aggressive recruitment and deployment of informants, voluntary or pretextual interviews, community engagement, and Internet monitoring. Part IV identifies harms related to policing radicalization. Part IV.A introduces how radicalization attaches stigma to Muslim religious and political cultures and geographies. Part IV.B examines the fundamental tensions that radicalization produces between law enforcement and Muslim communities, and Muslim and American identities. Part IV.C examines the pressure radicalization creates on American Muslim identity performances.

A few notes on vocabulary are in order.

In referring to "radicalization," I refer to the discursive construct rather than any actual process, with a particular focus on government constructions. Government concern with radicalization and violent extremism is fairly coterminous²⁵—greater religiosity and politicization in Muslims is associated with the threat of terrorism. Similarly, government counter-radicalization and countering violent extremism programs both reflect the proposition that government must monitor and influence the religious and political cultures of Muslim communities as a way to ward off future terrorism. While I am concerned with both radicalization and violent extremism frameworks for understanding terrorist threats, I default towards the terminology of radicalization, since the concept is more theorized. Any marginal differences are beyond the scope of this Article.

I refer repeatedly to the religious and political cultures of Muslim communities. I use this phraseology to capture government concern with monitoring and influencing the religious ideas and practices and the political ideas and activities in Muslim communities. Government concern is both general (viz., the political and religious ideas that have currency in the imagined national American Muslim community) and site specific—attuned to the political and religious ideas with currency in a particular place where Muslims gather (e.g., a mosque or a Muslim

24. SILBER & BHATT, *supra* note 18.

25. See, e.g., STAFF OF S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, 112TH CONG., A TICKING TIME BOMB: COUNTERTERRORISM LESSONS FROM THE U.S. GOVERNMENT'S FAILURE TO PREVENT THE FORT HOOD ATTACK 17 (2011) [hereinafter S. COMM. ON HOMELAND SEC., A TICKING TIME BOMB], available at http://www.hsgac.senate.gov//imo/media/doc/Fort_Hood/FortHoodReport.pdf ("The process by which an individual transitions to a violent Islamist extremist is known as radicalization.").

student group). It is also individual and community based. Drawing on the discipline of political geography and its conversation with law,²⁶ I occasionally use the term "geography" to capture law enforcement's efforts to surveil and generate profiles on specific sites where Muslims gather and Muslim religious and political cultures emerge. Radicalization lends itself to this project by constituting Muslim gathering spaces as suspicious spaces.

Herein lies the larger problem with radicalization. While in some ways it offers only a thin veneer over suspicion of Muslims and Islam (or confluences between Muslims, Islam, and terrorism), the veneer is thick enough to change the terms of the debate. Law enforcement's concern with mosques, antiwar sentiments, hijabs, and niqabs is now cloaked in expertise about the process by which Muslims become terrorists. In a colorblind world where intent defines our understanding of discrimination, the language of justification for government action can make all the difference.²⁷

26. See, e.g., NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER, at xi–xiv (1994) (“[C]onceived within legal thought and legal practice are a number of representations—or ‘geographies’—of the spaces of political, social, and economic life. . . . While struggling to make sense of the complexity and ambiguity of social life, legal agents—whether judges, legal theorists, administrative officers, or ordinary people—represent and evaluate space in various ways. . . . These juridical representations touch all aspects of legal life. . . . The legal representation of space must be seen as constituted by—and, in turn, constitutive of—complex, normatively charged and often competing visions of social and political life under law.”); DAVID DELANEY, RACE, PLACE, AND THE LAW 1836–1948, at 6–10 (1998) (“It is hard to understate the central significance of geographical themes—space, place, and mobility—to the social and political history of race relations and antiblack racism in the United States.”); Franz von Benda-Beckmann et al., *Space and Legal Pluralism: An Introduction*, in SPATIALIZING LAW: AN ANTHROPOLOGICAL GEOGRAPHY OF LAW IN SOCIETY 1, 3–9 (Franz von Benda-Beckmann et al. eds., 2009) (“All social and legal institutions, relations and practices are located and distributed in space. . . . Law is also used for creating spaces for more specific purposes with special legal regimes that are superimposed on this general geographical political and administrative grid, such as economic zones, zones for urban planning, ‘problem’ or ‘safety’ zones. . . . Within legal spaces, we also find constructions of ‘dangerous’ spaces as opposed to ‘good’ or sanctioned spaces. . . . Legal constructions of space are used as an instrument to control people and resources.”); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1844–45 (1994) (“[P]olitical geography—the position and function of jurisdictional and quasi-jurisdictional boundaries—helps to promote a racially separate and unequal distribution of political influence and economic resources. . . . Thus, racial segregation persists in the absence of explicit, legally enforceable racial restrictions.” (footnote omitted)); Steve Herbert, *The Geopolitics of the Police: Foucault, Disciplinary Power and the Tactics of the Los Angeles Police Department*, 15 POL. GEOGRAPHY 47, 50 (1996) (“Because of its high level of technological and organizational sophistication, the LAPD is an unusually appropriate object of attention for an examination of the geopolitics of contemporary discipline.”).

27. Through her “preservation-through-transformation” theory, Reva Siegel has explained how social hierarchies sustain themselves in part by evolving their justificatory rhetoric. Reva B. Siegel, *“The Rule of Love”: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

I. RADICALIZATION BRIEFLY HISTORICIZED

The process by which an individual transitions to a violent Islamist extremist is known as radicalization.

—Special Report by the Senate Committee on Homeland Security and Governmental Affairs²⁸

Why is it that a whole range of political, cultural, social, and even economic events has often seemed reducible in so Pavlovian a way to 'Islam'? What is it about 'Islam' that provokes so quick and unrestrained a response?

—Edward Said²⁹

The following account charts the course of radicalization as a concept articulated, accepted, and implemented by agencies of the U.S. government and the NYPD. The account is not intended to be exhaustive, nor does it explore with any detail the broad array of policies spawned by radicalization. It is simply meant to convey the rapid ascent of radicalization as a concept and government policy priority. Throughout this Article, I focus on the DOJ, FBI, and NYPD. The DOJ—of which the FBI is a part—is the primary law enforcement entity responsible for policing and prosecuting terrorism and terrorism-related activity.³⁰ The NYPD's counterterrorism efforts are the next most prominent. The NYPD is engaged with counterterrorism policing through its Intelligence and Counterterrorism Divisions (as well as its Community Affairs Bureau), and in collaboration with the FBI through the New York Joint Terrorism Task Force (JTTF).³¹

28. S. COMM. ON HOMELAND SEC., A TICKING TIME BOMB, *supra* note 25.

29. EDWARD W. SAID, COVERING ISLAM: HOW THE MEDIA AND THE EXPERTS DETERMINE HOW WE SEE THE REST OF THE WORLD 9 (1981).

30. When NYPD counterterrorism work culminates in a terrorism-related indictment, it is typically a federal indictment. But New York recently made use of the terrorism provisions in its state criminal code for the first time in prosecutions against Ahmed Ferhani and Mohamed Mamdouh. *See* William K. Rashbaum & Colin Moynihan, *Most Serious Charges Are Rejected in Terror Case*, N.Y. TIMES, June 15, 2011, at A28 (describing the charges on which the state grand jury elected to indict the defendants); *see also* Joseph Goldstein & William K. Rashbaum, *City Bomb Plot Suspect Called Fan of Qaeda Cleric*, N.Y. TIMES, Nov. 20, 2011, at A1 (discussing the New York state-level prosecution against Jose Pimentel). In decisions much-speculated about, the FBI declined to be involved in these cases. Goldstein & Rashbaum, *supra*; Michael Greenberg, *The Problem of the New York Police*, N.Y. REV. BOOKS (Oct. 25, 2012), <http://www.nybooks.com/articles/archives/2012/oct/25/problem-new-york-police> [hereinafter Greenberg, *The Problem of the New York Police*].

31. *See, e.g.*, CHRISTOPHER DICKEY, SECURING THE CITY: INSIDE AMERICA'S BEST COUNTERTERROR FORCE—THE NYPD 163 (2009) (stating that as of early 2006, at least the upper echelons of the FBI and the NYPD were working together to combat terrorism); LEONARD LEVITT, NYPD CONFIDENTIAL: POWER AND CORRUPTION IN THE COUNTRY'S GREATEST POLICE FORCE 236–37 (2009) (discussing the New York City police commissioner's appointment of the NYPD's first deputy commissioner of counterterrorism, whose responsibilities include fashioning a police response to terrorism in New York City and supervising the detectives in the FBI-led JTTF); Richard Falkenrath, Deputy Comm'r for Counterterrorism, N.Y. Police Dep't, Address at the Wash. Inst. for

On both sides of the Atlantic, radicalization and counter-radicalization are new concepts for understanding the threat of terrorism at home and the role of government in responding. Radicalization theories are relatively new in Europe and even newer in the United States.³² Radicalization and counter-radicalization

Near E. Policy (June 23, 2009), available at <http://www.washingtoninstitute.org/html/pdf/falkenrath20090623.pdf> (discussing information-sharing and other counterterrorism cooperation between the NYPD and FBI); *Counterterrorism Units*, *supra* note 10 (describing the NYPD Counterterrorism Bureau and its various divisions); *Protecting America from Terrorist Attacks: Our Joint Terrorism Task Forces*, FBI, http://www.fbi.gov/about-us/investigate/terrorism/terrorism_jtfts (last visited Apr. 15, 2013) (describing the FBI JTTFs); see also Michael Greenberg, *New York: The Police and the Protesters*, N.Y. REV. BOOKS (Oct. 11, 2012), <http://www.nybooks.com/articles/archives/2012/oct/11/new-york-police-and-protesters> [hereinafter Greenberg, *New York: The Police and the Protesters*] (discussing the counterterrorism activities of the NYPD Intelligence Division and its interactions with the FBI and JTTF); Greenberg, *The Problem of the New York Police*, *supra* note 30 (discussing terrorist plots revealed as failed or foiled by the FBI or NYPD).

32. Huq, *Modeling Terrorist Radicalization*, *supra* note 12, at 41 n.10 (noting the author's inability to find any references to radicalization prior to 2001); Kundnani, *supra* note 12, at 4–10 (tracing the emergence of the radicalization theories in European accounts to 2004). On the American borrowing of the British/European experience, see Rascoff, *Establishing Official Islam?*, *supra* note 8, at 148, which notes that "American domestic counter-radicalization is emerging mainly as a (modified) import from Europe, chiefly from the United Kingdom," and Kundnani, *supra* note 12, at 3–7. On the British experience itself, see KUNDNANI, *supra* note 12, and Thomas, *supra* note 12. See also Huq, *Modeling Terrorist Radicalization*, *supra* note 12, at 51–56. The concept gained traction during a period when the Bush administration's approach to prosecuting terrorism through the federal courts was under considerable attack, from entities inside and outside of the government. Starting as early as 2003 and through 2007, a number of prominent investigations into the Bush administration's Article III terrorism-related prosecutions determined that the administration was bloating its record. COLE & LOBEL, *supra* note 5, at 110–11 ("The key to understanding the administration's claim that it has obtained more than four hundred criminal indictments and two hundred convictions in 'terrorism-related' cases is the word 'related.' . . . [T]he majority of [those] indictments and convictions . . . are for minor, nonviolent offenses such as making false statements on a federal form, immigration infractions, or credit card fraud."); Dan Eggen & Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges*, WASH. POST, June 12, 2005, at A1; Scott Shane & Lowell Bergmann, *Adding Up the Ounces of Prevention*, N.Y. TIMES, Sept. 10, 2006, at C1; Karen J. Greenberg & Daniel Freifeld, *Terrorist Trials, 2001–2007: Lessons Learned*, CTR. ON L. & SEC. 1 (Oct. 2007), http://www.lawandsecurity.org/portals/0/documents/08_ttrc2007update1.pdf; *Terrorist Trial Report Card: U.S. Edition*, CTR. ON L. & SEC. 3 (2006), http://www.lawandsecurity.org/portals/0/documents/09_ttrccomplete.pdf; *Terrorist Trials: A Report Card*, CTR. ON L. & SEC. 1–2 (Feb. 2005), http://www.lawandsecurity.org/portals/0/documents/12_terroristtrialreportcard.pdf ("The legal war on terror has yielded few visible results. There have been relatively few indictments, fewer trials, and almost no convictions on charges reflecting dangerous crimes."); TRAC, *Criminal Terrorism Enforcement Since the 9/11/01 Attacks: A TRAC Special Report*, SYRACUSE UNIV. (Dec. 8, 2003), <http://trac.syr.edu/tracreports/terrorism/report031208.html>. In February 2007, the DOJ's Office of the Inspector General (OIG) issued a damning report examining the DOJ's terrorism-related statistics. OFFICE OF THE INSPECTOR GEN., U.S. DEPT OF JUSTICE, *THE DEPARTMENT OF JUSTICE'S INTERNAL CONTROLS OVER TERRORISM REPORTING* (2007), available at <http://www.justice.gov/oig/reports/plus/a0720/final.pdf>. The OIG "found that the Department components and the Department as a whole did not accurately report terrorism-related statistics. The Department components lacked adequate internal controls for gathering, verifying, and reporting terrorism-related statistics." *Id.* at xvii. For example, the FBI overstated the number of terrorism-related convictions "because the FBI initially coded the investigative cases as terrorism-related when the cases were opened, but did not recode cases when no link to terrorism was established." *Id.* at viii, 17–19 (describing various cases where the

programs are primarily if not almost exclusively concerned with Muslim communities.

The chronology of the U.S. government's rapid embrace of radicalization starts in earnest in 2006.³³ At that time, the FBI issued an Intelligence Assessment, *The Radicalization Process: From Conversion to Jihad*, asserting the existence of an identifiable and predictable process by which a Muslim becomes a terrorist.³⁴ The FBI identified the four stages of radicalization as "preradicalization," "identification," "indoctrination," and "action."³⁵ In addition to proposing what on its face seems a reductionist view of how someone might decide to commit any crime—let alone a crime of great magnitude—the twelve-page document includes almost no citations, sourcing, or indication of methodology. Four out of the five sources listed in the document's seven footnotes are from the 1990s, one from the

FBI failed to properly recode cases). The greatest inaccuracies were a result of coding "statistical data as terrorism or anti-terrorism related [without] support that a case showed any reasonable link to terrorist activity." *Id.* at xi–xii; *see also id.* at 42–56. Similar to the FBI, the Executive Office for United States Attorneys (EOUSA), and the Offices of the United States Attorneys (USAO) inaccurately reported because "the USAOs categorized the cases against the defendants under the anti-terrorism program activity when the case was filed but did not change the categorization based upon further investigation or based on the actual evidence found or offenses for which the defendants were convicted." *Id.* at xiii. The DOJ OIG's report echoed an earlier report by the Government Accountability Office that found similar lack of oversight in DOJ's reporting of terrorism statistics, as well as inconsistencies between the FBI's and EOUSA's classification schemes. U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-03-266, JUSTICE DEPARTMENT: BETTER MANAGEMENT OVERSIGHT AND INTERNAL CONTROLS NEEDED TO ENSURE ACCURACY OF TERRORISM-RELATED STATISTICS 6 (2003), available at <http://www.gao.gov/assets/240/236927.pdf> (finding at least 132 of 288 cases misclassified as terrorism-related). For a view in line with the government's defense, see Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data in Light of the "Soft-Sentence" and "Data-Reliability" Critiques*, 11 LEWIS & CLARK L. REV. 851, 889 (2007) (concluding that the overall pattern of dispositions and sentences indicates the DOJ's program has been successful). *But see* Richman & Stuntz, *supra* note 8 (discussing the success of U.S. preemptive counterterrorism tactics, but emphasizing their possible costs to credibility).

33. The earliest reference to a U.S. government concern with Muslim "radicalization" seems to be from 2003, regarding prisons. *Terrorism: Radical Islamic Influence of Chaplaincy of the U.S. Military and Prisons: Hearing Before the Subcomm. on Terrorism, Tech. & Homeland Sec. of the S. Comm. on the Judiciary*, 108th Cong. 8–9 (2003) (statement of John S. Pistole, Assistant Director, Counterterrorism Division, Federal Bureau of Investigation) ("U.S. correctional institutions are a viable venue for . . . radicalization and recruitment. . . . To assist in ferreting out potential radicalization issues within the Federal Bureau of Prisons system, the Bureau of Prisons maintains a presence on the FBI's National Joint Terrorism Task Force."); *see also The Homeland Security Implications of Radicalization: Hearing Before the Subcomm. on Intelligence, Info. Sharing, & Terrorism Risk Assessment of the H. Comm. on Homeland Sec.*, 109th Cong. 14 (2006) (statement of Donald Van Duyn, Assistant Director, Counterterrorism Division, Federal Bureau of Investigations) ("[T]he FBI and the Bureau of Prisons (BOP) have been actively engaged in efforts to detect, deter, and interdict efforts by terrorist and extremist groups to radicalize or recruit in US prisons since February 2003.').

34. FBI COUNTERTERRORISM DIV., *THE RADICALIZATION PROCESS: FROM CONVERSION TO JIHAD 2* (2006). Although not made public, this document was leaked.

35. *Id.* at 3. In 2003, a professor of psychology guest wrote an article for the FBI Law Enforcement Bulletin theorizing four stages of "radicalization." *See* Randy Borum, *Understanding the Terrorist Mind-Set*, FBI L. ENFORCEMENT BULL., July 2003, at 7 (arguing that "four observable stages appear to frame a process of ideological development" of a terrorist).

1960s.³⁶ The next pivotal development came in 2007, when the NYPD Intelligence Division published a pivotal almost 100-page public report, *Radicalization in the West: The Homegrown Threat*.³⁷ That report mirrors the 2006 FBI Intelligence Assessment, theorizing the process from Muslim to terrorist, with similar stages and markers, but in much greater detail.³⁸

The FBI Intelligence Assessment and the NYPD report sowed the idea of radicalization and counter-radicalization into government discourse.³⁹ Since 2007, U.S. federal and local government literature has taken for granted a problem with Muslim radicalization in the United States; government programming based on that assumption has developed at a clip. In Congress, for example, both the House and Senate Homeland Security Committees have devoted considerable resources to the development of the radicalization discourse, emphasizing the need for the government to monitor and respond to radicalization.⁴⁰ More recently, the White

36. FBI COUNTERTERRORISM DIV., *supra* note 34, at 12 nn.1–7.

37. SILBER & BHATT, *supra* note 18.

38. The four stages take on a slightly modified parlance from the FBI: “[p]re-radicalization,” “[s]elf-identification,” “[i]ndoctrination,” and “[j]ihadization.” *Id.* at 21. Each stage has “specific signatures associated with it.” *Id.*; see *infra* Part II.

39. For another accounting of the federal and state government literature, see Huq, *Modeling Terrorist Radicalization*, *supra* note 12, at 43–51 (discussing both state-level and federal-level responses to “radicalization” in the U.S.). Huq suggests that the NYPD’s publication of the “radicalization” theory was related to the NYPD’s drive to establish itself as the preeminent national security law enforcement entity, even over the FBI. *Id.* at 64–65. On the larger questions of federal and state law enforcement competition and cooperation, see Waxman, *supra* note 10; Matthew Waxman, *Policing Terrorism*, DEFINING IDEAS (May 4, 2012), <http://www.hoover.org/publications/defining-ideas/article/116471> (arguing federalism is key to forming a more efficient counterterrorism system).

40. Under Peter King’s leadership, in 2011 and 2012, the House Homeland Security Committee held a series of hearings premised on the assertion that American Muslims are radicalizing at an increasing rate and pose a significant threat to the United States. See *Compilation of Hearings on Islamist Radicalization—Volume III: Hearings Before the H. Comm. on Homeland Sec.*, 112th Cong. 75 (2012) (statement of Rep. Peter T. King, Chairman H. Comm. on Homeland Sec.) (reiterating the necessity of the hearings based on “a crisis of radicalization to violence . . . within the Muslim-American community”); *Compilation of Hearings on Islamist Radicalization—Volume II: Joint Hearing Before the H. Comm. on Homeland Sec. and the S. Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. 2 (2011) [hereinafter *King Hearing II*] (statement of Rep. Peter T. King, Chairman, H. Comm. on Homeland Sec.) (“[Responding] to . . . a growing security threat from radicalization both within the military as well as against military personnel and their families residing in the United States.”); *King Hearing I*, *supra* note 13, at 278 (statement of Rep. Peter T. King, Chairman, H. Comm. on Homeland Sec.) (“[A]l-shabaab . . . is engaged in an on-going [sic] successful effort to recruit and radicalize dozens of Muslim American jihadis who pose a direct threat to the United States.”); *id.* at 204 (addressing the “issue of Islamic radicalization in U.S. prisons . . . because the danger remains real and present”); *id.* at 2 (arguing that the need for the hearings is based on al-Qaeda’s attempts to “recruit and radicalize” people in the United States). Witnesses at these hearings have balked at King’s premises. See *King Hearing I*, *supra* note 13, at 73–74 (statement of Leroy Baca, Sheriff, Los Angeles County Sheriff’s Department) (arguing that no particular religion is more susceptible to radicalization and that cooperation and relationship building are more effective than arrests and enforcement); *id.* at 231 (statement of Bert Useem, Department Head and Professor, Sociology Department, Purdue University) (“U.S. prisons are not systematically generating a terrorist threat to the U.S. homeland.”); *id.* at 200 (statement of Rep. Keith Ellison) (noting the threat of prison radicalization “seems to be

House has embraced the need to “counter violent extremism” and “radicalization,” playing a leadership role in encouraging such programs in its 2010 and 2011 national security strategy papers.⁴¹ The Obama administration’s 2011 Strategic Implementation Plan, *Empowering Local Partners to Prevent Violent Extremism in the United States*, announces prioritization of government programs supporting

false, or, at least, overstated” (quoting Bert Useem & Obie Clayton, *Radicalization of U.S. Prisoners*, 8 AM. SOC’Y CRIMINOLOGY 561, 586 (2009)). Under Joe Lieberman’s imprimatur, the Senate Homeland Security and Governmental Affairs Committee, too, has held a series of hearings and issued a number of reports embracing and expounding on the NYPD’s radicalization theory. *See, e.g., King Hearing II, supra*, at 45 (noting that the Senate Committee’s report heavily relied on the NYPD’s RADICALIZATION IN THE WEST report); *A Ticking Time Bomb: Counterterrorism Lessons from the U.S. Government’s Failure to Prevent the Fort Hood Attack: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. 14 (2011) (statement of Samuel J. Rascoff, Assistant Professor of Law, New York University School of Law) (recommending cooperation with Muslim communities as an effective means of counter-radicalization); *Prison Radicalization: Are Terrorist Cells Forming in U.S. Cell Blocks?: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 109th Cong. 1 (2006) (statement of Sen. Susan M. Collins, Chairwoman, S. Comm. on Homeland Sec. & Governmental Affairs) (citing a need to learn more about radicalization in prisons); STAFF OF S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, 112TH CONG., ZACHARY CHESSER: A CASE STUDY IN ONLINE ISLAMIST RADICALIZATION AND ITS MEANING FOR THE THREAT OF HOMEGROWN TERRORISM 3–4 (2012) [hereinafter S. COMM. ON HOMELAND SEC., ONLINE ISLAMIST RADICALIZATION], available at [http://www.hsgac.senate.gov/imo/media/doc/CHESSER%20FINAL%20REPORT\(1\).pdf](http://www.hsgac.senate.gov/imo/media/doc/CHESSER%20FINAL%20REPORT(1).pdf) (examining the phenomenon of online radicalization through Zachary Chesser); STAFF OF S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, 110TH CONG., VIOLENT ISLAMIST EXTREMISM, THE INTERNET, AND THE HOMEGROWN TERRORIST THREAT 4–5 (2008) [hereinafter S. COMM. ON HOMELAND SEC., VIOLENT ISLAMIST EXTREMISM] (adopting the NYPD’s four-stage radicalization model). Mitch Silber testified about the report before the Senate Homeland Security committee. *Violent Islamist Extremism—2007: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 110th Cong., 140–54 (2007) (testimony of Mitchell D. Silber, Senior Intelligence Analyst, Intelligence Division, New York City Police Department). Tellingly, the Congressional Research Service’s recent reports on “American jihadist terrorism” and countering violent extremism take for granted the existence of a legible, predictable radicalization process, while at the same time counseling some degree of caution. Both cite to the NYPD report to define radicalization. *See* BJELOPERA, *supra* note 8, at 3–4; JEROME P. BJELOPERA & MARK A. RANDOL, CONG. RESEARCH SERV., R41416, AMERICAN JIHADIST TERRORISM: COMBATING A COMPLEX THREAT 1–2, 11–14 (2010); *see also* JEROME P. BJELOPERA, CONG. RESEARCH SERV., R41416, AMERICAN JIHADIST TERRORISM: COMBATING A COMPLEX THREAT 12 (2013) (referring to the NYPD report as “widely circulated within the law enforcement community”).

41. *See* EXEC. OFFICE OF THE PRESIDENT, EMPOWERING LOCAL PARTNERS, *supra* note 21, at 2–3, 5–6 (discussing the need to prevent and counter radicalization and extremism); EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY 19, 26, 37 (2010) [hereinafter EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY], available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (discussing generally how to fight radicalism and extremism); EXEC. OFFICE OF THE PRESIDENT, NATIONAL STRATEGY FOR COUNTERTERRORISM 6, 9–12 (2011) [hereinafter EXEC. OFFICE OF THE PRESIDENT, STRATEGY FOR COUNTERTERRORISM], available at http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf (stating that cooperation is necessary to fight radicalization and discussing strategies to defeat al-Qaeda and its ideologies); Lorenzo Vidino, *Countering Radicalization in America: Lessons From Europe*, U.S. INST. PEACE 2 (Nov. 2010), http://www.usip.org/files/resources/SR262%20%20Countering_Radicalization_in_America.pdf (noting the Obama administration has recently “ask[ed] several governmental agencies to craft policies to ‘counter violent extremism’ and devise appropriate counterradicalization plans”).

community-based approaches to “countering violent extremism.”⁴² While the Obama plan is short on details,⁴³ its issuance suggests more government community-engagement programs across the board. The U.S. Department of Homeland Security (DHS) and the National Counterterrorism Center (NCTC)⁴⁴

42. EXEC. OFFICE OF THE PRESIDENT, EMPOWERING LOCAL PARTNERS, *supra* note 21, at 2–7; *see also* EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY, *supra* note 41, at 19–22, 26–27 (discussing plans to advance security interests by working with the international community to disrupt al-Qaeda forces); EXEC. OFFICE OF THE PRESIDENT, STRATEGY FOR COUNTERTERRORISM, *supra* note 41, at 6–7, 9–12 (discussing strategy of building international security partnerships to counter al-Qaeda).

43. For an analysis of the White House’s proposal, see Huq, *supra* note 23. *See also* German, *supra* note 14 (“Rather than challenge the radicalization theory with the many studies that refute it, the Obama administration issued a plan for preventing violent extremism. While the White House deserves some credit for using more careful language and for emphasizing the need for community engagement, it perpetuates the notion that ‘radicalization to violence’ is a discernible process that government can identify, predict and interdict, and establishes policies that again threaten civil liberties.”).

44. Some have argued that DHS and NCTC have rejected religiosity as a proxy for violence, or the idea of one “radicalization” pathway to terrorism. Huq, *Modeling Terrorist Radicalization*, *supra* note 12, at 49–50; Patel, *supra* note 12, at 13. But former DHS Secretary Napolitano regularly referred to the need for the government to counter violent extremism. *Understanding the Homeland Threat Landscape—Considerations for the 112th Congress: Hearing Before the H. Comm. on Homeland Sec.*, 112th Cong. 12 (2011) (statement of Janet Napolitano, Secretary, Department of Homeland Security) (referring to the need to counter violent extremism, and to DHS’s efforts to “compile . . . case studies that examine recent incidents involving terrorism . . . [that] focus on common behaviors and indicators regarding violent extremism”); Janet Napolitano, *Partnering with Communities to Counter Violent Extremism*, HOMELAND SEC. (Mar. 6, 2011), <http://www.dhs.gov/node/7913> (“We therefore see countering violent extremism as both a ‘whole of government’ and ‘whole of nation’ effort.”); Office of the Press Sec’y, *Secretary Napolitano Meets with State, Local, and Tribal Law Enforcement on Countering Violent Extremism*, U.S. DEP’T HOMELAND SEC. (Jan. 18, 2012), <http://www.dhs.gov/news/2012/01/18/secretary-napolitano-meets-state-local-and-tribal-law-enforcement-countering-violent> (chronicling Secretary Napolitano’s meetings with law enforcement officials to “engage them on the critical task of preventing violent extremism”); *see also* HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR HOMELAND SECURITY 22 (2007) (proposing that law enforcement agencies should “identify and address sources of violent extremist radicalization in the Homeland”). Napolitano has spoken about the threat of “right-wing extremism,” but in June 2009, DHS retracted a report entitled *Rightwing Extremism: Current Economic and Political Climate Fueling Resurgence in Radicalization and Recruitment*, after the report sparked controversy. OFFICE OF INTELLIGENCE AND ANALYSIS, U.S. DEP’T OF HOMELAND SEC., RIGHTWING EXTREMISM: CURRENT ECONOMIC AND POLITICAL CLIMATE FUELING RESURGENCE IN RADICALIZATION AND RECRUITMENT (2009), *available at* <http://www.fas.org/irp/eprint/rightwing.pdf>; *see also* R. Jeffrey Smith, *Homeland Security Department Curtails Home-Grown Terror Analysis*, WASH. POST (June 7, 2011), http://www.washingtonpost.com/politics/homeland-security-department-curtails-home-grown-terror-analysis/2011/06/02/AGQEaDLH_story.html. Daryl Johnson, the author of the report on rightwing extremism, stated, “Other reports written by DHS about Muslim extremists . . . got through without any major problems,” while “[o]urs [on right wing extremism] went through endless reviews and edits, and nothing came out.” Smith, *supra*; *see also* Amy Goodman, *Former DHS Analyst Daryl Johnson on How He Was Silenced for Warning of Far-Right Militants in U.S.*, DEMOCRACY NOW! (Aug. 9, 2012), http://www.democracynow.org/2012/8/9/former_dhs_analyst_daryl_johnson_on (speaking about the backlash he experienced after the right-wing extremism report was disclosed to the public). The *Washington Post* reported that DHS “cut the number of personnel studying domestic terrorism unrelated to Islam, canceled numerous state and local law enforcement briefings, and held up dissemination of nearly a dozen

have also worked to model, assess, and encourage government programs to respond to “radicalization” and “violent extremism.”⁴⁵

The FBI and DOJ policies reflect a clear prioritization of countering radicalization and violent extremism.⁴⁶ The DOJ and FBI regularly refer to radicalization, and to Muslim individuals adhering to “extremist” or “radical” ideologies, as the targets of their investigations and prosecutions.⁴⁷ FBI training

reports on extremist groups.” Smith, *supra*; see also Spencer Ackerman, *DHS Crushed This Analyst for Warning About Far-Right Terror*, WIRED (Aug. 7, 2012), <http://www.wired.com/dangerroom/2012/08/dhs/all> (relating how “they dissolved [Johnson’s] team” after the DHS repudiated the report on rightwing extremism).

45. See RICHARD A. BEST, JR., CONG. RESEARCH SERV., R41022, THE NATIONAL COUNTERTERRORISM CENTER (NCTC)—RESPONSIBILITIES AND POTENTIAL CONGRESSIONAL CONCERNS 6 (2011) (referring to a 2006 NCTC implementation plan which included as an objective “containing violent extremism”); THE NAT’L COUNTERTERRORISM CTR., COUNTERTERRORISM 2012 CALENDAR 140 (2012) (“Radicalization is a dynamic and multi-layered process involving several factors that interact with one another to influence an individual. There is no single factor that explains radicalization and mobilization.”); *Hearing on Intelligence*, *supra* note 2 (recording statements by Matthew Olsen, Director of the National Counterterrorism Center, that the NCTC includes within its mandate “the problem of countering violent extremism” and that the NCTC, with FBI and DHS, is “train[ing] local state law enforcement to better spot the signs of radicalization”); *About Us*, NAT’L COUNTERTERRORISM CTR., http://www.nctc.gov/about_us/about_nctc.html (last visited Apr. 15, 2013) (“NCTC’s Radicalization and Extremist Messaging Group leads the [Intelligence Community’s] efforts on radicalization issues.”); see also 50 U.S.C. § 404o(d)(2) (2006 & Supp. IV 2010) (establishing the NCTC with a mission to “conduct strategic operational planning for counterterrorism activities”).

46. In some forums, the FBI has suggested it does not sanction the idea of a fixed radicalization process. See *Homeland Threats and Agency Responses: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. 12 (2012) (statement of Kevin L. Perkins, Associate Deputy Director, FBI) (“These individuals have no typical profile; their experiences and motives are often distinct.”); Huq, *Modeling Terrorist Radicalization*, *supra* note 12, at 48 (quoting a few FBI statements on radicalization). This doublespeak is a common trend. In a report on “32 Terrorism Cases Against the Homeland” prepared by the New York State Intelligence Center, for example, the authors write: “There is no definitive terrorist profile. However, we were able to identify trends in basic pedigree information to suggest that these individuals are largely young males, between the ages of 18–33, who explicitly support or follow radical Islamic ideology.” N.Y. STATE INTELLIGENCE CTR., THE VIGILANCE PROJECT: AN ANALYSIS OF 32 TERRORISM CASES AGAINST THE HOMELAND 4 (2010); see also Falkenrath, *supra* note 31 (“The analysts who follow radicalization have a number of different theories about what is driving this, and as a former academic—a former professor—I must say I’m not yet persuaded as to which theory is right. The NYPD intelligence division put out a very important report about two years ago on radicalization laying out its analysis of ten major cases of homegrown radicalization and the steps that the individuals went through. *And we think that’s a pretty good framework for evaluating these different plots.*” (emphasis added)).

47. *Commerce, Justice, Science, and Related Agencies Appropriations for Fiscal Year of 2013: Hearings Before a Subcomm. of the S. Comm. on Appropriations*, 112th Cong. 11 (2012) (statement of Robert S. Mueller, III, Director, FBI) (framing as particularly important “al Qaeda’s use of on-line chat rooms and Web sites to recruit and radicalize followers to commit acts of terrorism”); *id.* at 7 (statement of Robert S. Mueller, III, Director, FBI) (referring to a case of “homegrown violent extremists” as “exemplify[ing] the need to continue to enhance our intelligence capabilities and to get the right information to the right people before any harm is done.”); *Ten Years After 9/11—2011: Hearings Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 112th Cong. 215 (2011) (statement of Robert S. Mueller, III, Director, FBI) (“Individuals may be radicalized over the Internet even if they do not receive direct guidance or training from a terrorist group.”); FBI COUNTERTERRORISM DIV., *supra*

note 34 (presenting a “model of the radicalization process for a legal US person who is a convert to Islam”); Dennis A. Ballas, *Prisoner Radicalization*, FBI (Oct. 2010), <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/October-2010/confronting-science-and-market-positioning> (discussing “the threat of inmate radicalization”); Dep’t of Justice Office of Pub. Affairs, *Al Qaeda Operative Convicted by Jury in One of the Most Serious Terrorist Plots Against America Since 9/11*, U.S. DEP’T JUST. (May 1, 2012), <http://www.justice.gov/opa/pr/2012/May/12-nsd-565.html> (quoting Loretta E. Lynch, U.S. Attorney for the Eastern District of New York (referring to the defendant’s “journey of radicalization”)); Dep’t of Justice Office of Pub. Affairs, *Maryland Man Pleads Guilty to Conspiracy to Provide Material Support to Terrorists*, U.S. DEP’T JUST. (May 4, 2012), <http://www.justice.gov/opa/pr/2012/May/12-nsd-579.html> (quoting FBI Special Agent Charge Venizelos) (referring to the defendant as a “radicalized teen,” and commenting that “[t]his investigation and the guilty plea announced today underscores [sic] the continuing threat we face from violent extremism and radicalism, both from within our country and from across the world”); Dep’t of Justice Office of Pub. Affairs, *North Carolina Resident Found Guilty of Terrorism Violations*, U.S. DEP’T JUST. (June 14, 2012), <http://www.justice.gov/opa/pr/2012/June/12-nsd-755.html> (“[S]ome defendants also allegedly radicalized others to believe that violent *jihad* was [sic] a personal religious obligation.”); Dep’t of Justice Office of Pub. Affairs, *Two Indicted for Conspiracy to Provide Material Support to Terrorists*, U.S. DEP’T JUST. (Oct. 20, 2011), <http://www.justice.gov/opa/pr/2011/October/11-nsd-1385.html> (quoting Mark Giuliano, Executive Assistant Director of the FBI’s National Security Branch) (warning that individuals have “used the Internet to further their radicalization and contribute to the radicalization of others”); Dep’t of Justice Office of Pub. Affairs, *Virginia Man Accused of Attempting to Bomb U.S. Capitol in Suicide Attack*, U.S. DEP’T JUST. (Feb. 17, 2012), <http://www.justice.gov/opa/pr/2012/February/12-nsd-234.html> (quoting Lisa Monaco, Assistant Attorney General for National Security and James W. McJunkin, Assistant Director in Charge of the FBI Washington Field Office, respectively), (announcing the arrest of a “homegrown violent extremist[]” who adhered to a “radical” version of Islam); *Saudi National Charged with Conspiracy to Provide Material Support to HAMAS and Other Violent Jihadists*, U.S. DEP’T JUST. (Mar. 4, 2004), http://www.justice.gov/opa/pr/2004/March/04_crm_137.htm (announcing the indictment of a graduate student from Saudi Arabia for operating websites on behalf of various Islamic organizations and “radical” Saudi sheikhs); *Two Plead Guilty to Domestic Terrorism Charges of Conspiring to Attack Military Facilities, Jewish Targets*, U.S. DEP’T JUST. (Dec. 14, 2007), http://www.justice.gov/opa/pr/2007/December/07_nsd_1006.html (announcing the guilty pleas of two members of a domestic “radical Islamic organization”); U.S. Attorney’s Office Dist. of Mass., *Massachusetts Man Charged with Conspiracy to Provide Material Support to Terrorists*, FBI (Oct. 21, 2009), <http://www.fbi.gov/boston/press-releases/2009/bs102109a.htm> (“[C]oconspirators attempted to radicalize others and inspire each other by, among other things, watching and distributing jihadi videos.”); U.S. Attorney’s Office E. Dist. of Va., *Leader of Revolution Muslim Pleads Guilty to Using Internet to Solicit Murder and Encourage Violent Extremism*, FBI (Feb. 9, 2012), <http://www.fbi.gov/washingtondc/press-releases/2012/leader-of-revolution-muslim-pleads-guilty-to-using-internet-to-solicit-murder-and-encourage-violent-extremism> (quoting Raymond W. Kelly, NYPD Commissioner) (“Morton used the Internet to conspire to solicit murder, and . . . encouraged others to solicit the murder of an artist whose material he deemed offensive.”); U.S. Attorney’s Office E. Dist. of Va., *supra* note 1 (quoting James W. McJunkin, Assistant Director in Charge of the FBI’s Washington Field Office) (“[T]he FBI will continue to pursue those who support violent extremism and promote the radicalization of others”); U.S. Attorney’s Office N. Dist. Ala., *Uzbek National Pleads Guilty to Charges of Threatening to Kill the President and Providing Material Support to Terrorist Activity*, U.S. DEP’T JUST. (Feb. 10, 2012), <http://www.justice.gov/usao/aln/News/February%202012/February%2010,%202012%20Uzbek.html> (quoting FBI Special Agent in Charge Patrick J. Maley) (“This case serves as a reminder of the dangers of the Internet on radicalizing our youth right in our own back yards”); *see also* U.S. DEP’T OF JUSTICE, FY 2012 PERFORMANCE BUDGET: OFFICE OF JUSTICE PROGRAMS 31 (2012), *available at* <http://www.justice.gov/jmd/2013justification/pdf/fy13-ojp-justification.pdf> (documenting \$4,000,000 for research to develop “a better understanding of the domestic radicalization phenomenon”).

materials describe indices of radicalization considered worthy of police scrutiny.⁴⁸ Other materials further correlate devoutness in Muslims with violence.⁴⁹ While the FBI stated that “[s]trong religious beliefs should never be confused with violent extremism,” the 2006 FBI Intelligence Assessment is “still in official use.”⁵⁰ It is

48. See *Hearing on Intelligence*, *supra* note 2 (“My concern is that [the FBI is] not looking at criminal behavior. We’re not looking at violent behavior. But we’re focusing on religious practices and that this is evident, and I could cite other evidence . . . of training materials and written materials of the FBI that describe people who, you know, wear Muslim clothing, et cetera, as being signals that they may be violent.”); FED. BUREAU OF INVESTIGATION, FBI-CTC COLLABORATIVE AFTER-ACTION REPORTS NAC 09-15, at 2 (2009), available at <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM009767.pdf> (“It would have been nice to have . . . more time and focus on the significance of different types of clothing and other significant indicators in a person’s appearance and items of their possible radicalization level.”); see also JOINT TERRORISM TASK FORCE, ORIENTATION AND OPERATIONS TRAINING (2010), available at <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM005626.pdf> (listing orientation sessions such as “Arab Culture, Basic Islam, and Radicalization”); OFFICE OF THE INSPECTOR GEN., U.S. DEPT OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF PRISONS’ SELECTION OF MUSLIM RELIGIOUS SERVICES PROVIDERS 6 n.6 (2004), available at <http://www.aclu.org/files/fbimappingfoia/20111110/ACLURM001509.pdf> (defining radicalization as “the process by which inmates who do not invite or plan overt terrorist acts adopt extreme views, including beliefs that violent measures need to be taken for political or religious purposes”).

49. See Spencer Ackerman, *FBI Teaches Agents: ‘Mainstream’ Muslims are ‘Violent, Radical’*, WIRED (Sept. 14, 2011), <http://www.wired.com/dangerroom/2011/09/fbi-muslims-radical/all> (“At the Bureau’s training ground in Quantico, Virginia, agents are shown a chart contending that the more ‘devout’ a Muslim, the more likely he is to be ‘violent.’”); Spencer Ackerman, *New Evidence of Anti-Islam Bias Underscores Deep Challenges for FBI’s Reform Pledge*, WIRED (Sept. 23, 2011), <http://www.wired.com/dangerroom/2011/09/fbi-islam-domination/all> [hereinafter Ackerman, *New Evidence*] (“[T]he [FBI] library also contains books by anti-Islam authors that portray the religion as devoted to murder and world domination.”).

50. Ackerman, *New Evidence*, *supra* note 49 (quoting FBI Nat’l Press Office, *Response to Media Reporting Regarding Counterterrorism Training*, FBI (Sept. 15, 2011), <http://www.fbi.gov/news/pressrel/press-releases/response-to-media-reporting-regarding-counterterrorism-training>). Ackerman asked the FBI to reconcile its statement with the fact that the FBI Intelligence Assessment is still in use. FBI spokesman Christopher Allen replied, “The assessment you cite includes a series of indicators of radicalization. These indicators do not conflict with our statement that strong religious beliefs should never be confused with violent extremism.” Ackerman, *New Evidence*, *supra* note 49; see also BJELOPERA, *supra* note 8, at 3 n.6 (citing Carol Dyer et al., *Countering Violent Islamic Extremism: A Community Responsibility*, FBI L. ENFORCEMENT BULL., Dec. 2007, at 6, for the proposition that the FBI’s own four-stage model of radicalization closely follows that of the NYPD); Carol Dyer et al., *supra*, at 3, 4 (“The FBI assesses the radicalization process as four stages: preradicalization, identification, indoctrination, and action.”); Letter from Am. Civil Liberties Union et al. to Robert S. Mueller, III, Dir., Fed. Bureau of Investigation 2 (Oct. 4, 2011) [hereinafter Letter to Mueller], available at http://www.aclu.org/files/assets/sign_on_letter_to_dir_mueller_re_radicalization_report_10_4_11.pdf (“Contrary to your statement that strong religious beliefs should not be confused with violent extremism, the 2006 FBI report states that these religious practices indicate a person is on a path to becoming a violent extremist. The report encourages law enforcement officials unfairly and inappropriately to view Muslim converts as potential threats.”). In response to the revelations about biased training, Deputy Attorney General James Cole issued a memo calling for review of materials, particularly those on counterterrorism and countering violent extremism. Memorandum from James Cole, Deputy Attorney Gen. to Heads of Components and U.S. Attorneys 1 (Mar. 20, 2012), available at <http://www.justice.gov/dag/training-guiding-principles.pdf> (citing Memorandum from James Cole, Deputy Attorney Gen., to Heads of Components and U.S. Attorneys (Sept. 28, 2011)). In his

nearly impossible to reconcile these two statements given that the Intelligence Assessment clearly equates "radical" Muslim religious and political activity to terrorism. For example, the Intelligence Assessment identifies "indicators the FBI has developed in order to identify an individual going through the radicalization process"—those indicators include "[w]earing traditional Muslim attire," "[g]rowing facial hair," "[f]requent attendance at a mosque or prayer group," "[t]ravel to a Muslim country," "[i]ncreased activity in a pro-Muslim social group or political cause," and "[p]roselytizing."⁵¹

The embrace of radicalization discourse results directly in the proliferation of government counter-radicalization programs,⁵² as well as related initiatives to counter violent extremism,⁵³ targeted at shaping the forms that religion and politics take in Muslim communities.⁵⁴ Since 2010, federal agencies, including the FBI, DOJ, DHS, and NCTC, have taken on new "counter-radicalization" initiatives, ranging in form from engagement in and outreach to Muslim communities, to creating imam councils of "moderate" imams, to forming greater intelligence collection networks.⁵⁵ The pace of these programs is hard to keep up with. Most recently, in 2012, the FBI established a Countering Violent Extremism office in its National Security Branch;⁵⁶ in February 2013, the White House

2012 memorandum, he announced his ratification of principles for FBI training, drafted by a working group on training issues within the Attorney General's Arab-Muslim Engagement Advisory Group. *Id.*

51. FBI COUNTERTERRORISM DIV., *supra* note 34, at 10; *see also* Letter to Mueller, *supra* note 50 (relisting "indicators" of a convert's extremism).

52. "Counter-radicalization programs have proliferated across a wide variety of countries over the last five years. American domestic counter-radicalization is emerging mainly as a (modified) import from Europe, chiefly from the United Kingdom." Rascoff, *Establishing Official Islam?*, *supra* note 8, at 148 (footnote omitted).

53. *See, e.g.*, EXEC. OFFICE OF THE PRESIDENT, EMPOWERING LOCAL PARTNERS, *supra* note 21 (outlining how the federal government will support community-based efforts to prevent violent extremism); Countering Violent Extremism (CVE) Working Grp., *supra* note 21 (presenting findings and recommendations related to community-based prevention of violent extremism).

54. Rascoff, *Establishing Official Islam?*, *supra* note 8, at 126–27 ("[T]he core intuition behind counter-radicalization is that the prevention of future violence requires official involvement in shaping the ideational currents that are thought to underpin that violence.").

55. *Id.* at 145–46, 153–59; *see also Working with Communities to Disrupt Terror Plots: Hearing Before the Subcomm. on Intelligence, Info. Sharing & Terrorism Risk Assessment of the H. Comm. on Homeland Sec.*, 111th Cong. 53 (2010) (statement of Deborah A. Ramirez, Executive Director, Partnering for Prevention and Community Safety Initiative, Northeastern University School of Law) (discussing the need for a "systematic strategy to obtain and use community information to thwart terrorism and to fight extremism").

56. *Homeland Threats and Agency Responses: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. 8 (2012) (statement of Janet Napolitano, Secretary, Department of Homeland Security).

announced its plan to launch an interagency working group to counter “online radicalization to violence.”⁵⁷

In addition to influencing policing, a concern with radicalization has also started to shape the exercise of prosecutorial discretion. While prosecutions are beyond the scope of this Article, it is worth noting that a growing number of national security prosecutions target political and religious speech.⁵⁸ This targeting

57. Quintan Wiktorowicz, *Working to Counter Online Radicalization to Violence in the United States*, WHITE HOUSE BLOG (Feb. 5, 2013, 10:02 AM), <http://www.whitehouse.gov/blog/2013/02/05/working-counter-online-radicalization-violence-united-states>.

58. One version of the critique is that Muslim defendants are prosecuted *with* their speech. See Huq, *The Signaling Function*, *supra* note 12 (analyzing the legal and policy significance of state reliance upon religious speech as a predictor of terrorism risk); Steven R. Morrison, *Terrorism Online: Is Speech the Same as it Ever Was?*, 44 CREIGHTON L. REV. 963, 970 (2011) (“Speech has become a target of terrorism investigations.”); see also *Targeted and Entrapped: Manufacturing the “Homegrown Threat” in the United States*, CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE 16 (2011), <http://www.nlg-npap.org/system/files/targetedandentrapped.pdf>. Granted, proving political motivation can be part of the prosecution’s burden to meet. But prosecutors regularly introduce inflammatory evidence with unclear relevance to the facts on trial. Introducing YouTube videos watched and religious literature consumed by defendants, for example, has become commonplace in terrorism-related trials. CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, *supra*, at 16; Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687, 712 (2010) [hereinafter Said, *The Terrorist Informant*] (discussing prosecutions where there is a concern that entrapment tactics were deployed); *id.* at 717 (“The [Siraj Matin] trial saw the admission of evidence of Siraj’s support for al-Qaeda, Hamas, Hamas leaders, violence against Jews, and books and videos endorsing and praising so-called violent jihad, which bolstered the government’s predisposition argument.”); *id.* at 722–23 (“The prosecution [against the Fort Dix Five] also introduced evidence showing that the defendants had repeatedly watched al-Qaeda videos and downloaded lectures that spoke in favor of Islamist violence, in addition to their firing weapons in the woods on several occasions.”). In Fahad Hashmi’s case, the government intended to introduce a surveillance tape of Hashmi’s political activities at trial. Laura Rovner & Jeanne Theoharis, *Preferring Order to Justice*, 61 AM. U. L. REV. 1331, 1391–97 (2012). While prosecutors regularly introduce evidence of political speech into the proceedings, they oppose efforts by defense counsel to include the larger political context to which the defendant may have been speaking. See, e.g., Government’s Motion in Limine to Preclude Argument and Evidence Related to the United States Government’s Political Policies and Activities Abroad and in Domestic (Criminal) Terrorism Investigations and Related Matters, United States v. Mehanna, No. 09-cr-10017-GAO (D. Mass. Oct. 3, 2011), ECF No. 280; Government’s Motion in Limine to Limit Defense Comment and Inquiry Regarding Inadmissible Subject Matter, United States v. Mehanna, No. 09-cr-10017-GAO (D. Mass. Oct. 3, 2011), ECF No. 279; see also Rovner & Theoharis, *supra*. For a distinct yet related concern about the perils of a distinct sort of “terrorism enforcement as a kind of foreign policy tool, that is, geared at prosecuting individuals connected to organizations targeting foreign individuals and entities” rather than “as a matter of direct national security,” see Wadie E. Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543, 545 (2011). Said observes:

Historically, the terrorism trial concerned itself with acts of violence with a United States nexus. In such a case, an inquiry as to underlying foreign policy was not legitimate, since what was being criminalized was actual violence. As the terrorism prosecution post-9/11 has focused on conduct further removed from violent activity, the question of what standards allow a group to be classified as terrorist becomes more relevant. When all nonstate violence can be deemed terrorist, it is legitimate to require the government to articulate standards for groups to follow if they are to overcome their designated FTO status.

is facilitated by the material support ban, now the predominant charge in terrorism-related prosecutions, with an already broad scope that is further magnified when used, as it regularly is, in combination with a conspiracy charge.⁵⁹ Most prominent is the government's prosecution against Tarek Mehanna.⁶⁰ The government brought material support, conspiracy, and attempt charges against Mehanna, as well as charges of providing false information to the FBI.⁶¹ The

Id. at 593–94; *see also* Laila Al-Arian, *Who Stands with the Accused?*, NATION, June 2–9, 2012 at 31–34; Noor Elashi, *Echoes of Korematsu: The Holy Land Five Case*, COUNTERPUNCH (Aug. 31, 2011), <http://www.counterpunch.org/2011/08/31/the-holy-land-five-case>.

59. *Terrorist Trial Report Card: September 11, 2001–September 11, 2011*, CTR. ON L. & SEC. 19–21 (2011), <http://www.lawandsecurity.org/portals/0/documents/ttrc%20ten%20year%20Issue.pdf> [hereinafter *Terrorist Trial Report Card 2011*]; *see also* RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN FEDERAL COURTS 11–12 (2009), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/090723-LS-in-pursuit-justice-09-update.pdf> (showing that the material support statutes were the most commonly charged substantive offenses in the authors' data); Steven R. Morrison, *Conspiracy Law's Threat to Free Speech*, 15 U. PA. J. CONST. L. 866, 874, 876 (2013) (discussing two material support cases in conspiracy law context); Chesney, *supra* note 32, at 857 (discussing charges under the material support statute as one of several terrorism prevention strategies adopted by the DOJ); Steven R. Morrison, *The System of Modern Criminal Conspiracy* (Nov. 11, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1955158 (arguing that modern U.S. conspiracy law is systemically different from its prior iterations). The most recent Terrorist Trial Report Card found that the most commonly charged crimes are material support for terrorists and foreign terrorist organizations, 18 U.S.C. §§ 2339A, 2339B (2012), and general criminal conspiracy, 18 U.S.C. § 371 (2012). *Terrorist Trial Report Card 2011*, *supra*, at 13–14. From 2009–2011, the most common charges are the same, but also include conspiracy to kill, kidnap, maim, or injure persons or property in a foreign country. *Id.* at 14; *see also* 18 U.S.C. § 956A (2012). *Human Rights First's* 2009 report reached similar conclusions, although it also noted the aiding-and-abetting (18 U.S.C. § 2 (2012)) statute was among the most commonly charged. ZABEL & BENJAMIN, *supra*, at 26. Both reports find the money laundering, 18 U.S.C. § 1956 (2012), false statements, 18 U.S.C. § 1001 (2012), and weapons charges, 18 U.S.C. § 924 (2012), provisions to be charged next most frequently. ZABEL & BENJAMIN, *supra*, at 28 fig.12; *Terrorist Trial Report Card 2011*, *supra*, at 13 tbl.12.

60. The government's prosecution against Tarek Mehanna has been most loudly criticized as an attack on the First Amendment—indeed for demonstrating the “Muslim exemption” to the First Amendment. *See, e.g.*, Andrew F. March, Op-Ed., *A Dangerous Mind*, N.Y. TIMES SUNDAY REV., Apr. 12, 2012, at 1; David Cole, *39 Ways to Limit Free Speech*, N.Y. REV. BOOKS BLOG (Apr. 19, 2012, 3:15 PM), <http://www.nybooks.com/blogs/nyrblog/2012/apr/19/39-ways-limit-free-speech>; Nancy Murray, *It's Official. There Is a Muslim Exemption to the First Amendment*, BOSTON.COM (Apr. 12, 2012, 5:00 PM), http://boston.com/community/blogs/on_liberty/2012/04/its_official_there_is_a_muslim.html; *see also* Ross Caputi, *If Tarek Mehanna Is Guilty So Am I*, COMMON DREAMS (Apr. 16, 2012), <https://www.commondreams.org/view/2012/04/16-13>; Francis Reynolds, *Laila Al-Arian: Free Speech Under Attack for Muslim-Americans*, NATION (June 25, 2012), <http://www.thenation.com/video/168534/laila-al-arian-free-speech-under-attack-muslim-americans>. On behalf of and co-counseled with the Center for Constitutional Rights, I submitted an amicus brief in the appeal of the judgment against Mehanna. *See* Brief of Amicus Curiae Center for Constitutional Rights in Support of Defendant-Appellant Tarek Mehanna and Reversal of the Judgment Below, Dec. 26, 2012.

61. Second Superseding Indictment at 1, 11, 19–20, 23, 26, 28, 30, 32, 34–35, United States v. Mehanna, Cr. No. 09-cr-10017-GAO (D. Mass. June, 17, 2010), ECF No. 83; U.S. Attorney's Office Dist. of Mass., *supra* note 47; U.S. Attorney's Office Dist. of Mass., *Two Men Charged with Material Support to Terrorists, Conspiracy to Kill in a Foreign Country, and Other Offenses*, FBI (Nov. 5, 2009), <http://www.fbi.gov/boston/press-releases/2009/bs110509.htm>.

underlying facts centered on his translation and posting of documents online, including an old Arabic text, *39 Ways to Serve and Participate in Jihad*, downloading videos, engaging in online chats critical of U.S. foreign policy, and traveling to Yemen in 2004.⁶² The prosecution's theory centralized Mehanna's translation of *39 Ways* as a response to Osama bin Laden's call for global Muslim jihad and Mehanna's vocal opposition to U.S. foreign policy in Muslim-majority countries.⁶³ The prosecution framed Mehanna as a "media wing" for al-Qaeda,⁶⁴ aiming to inspire jihad through propagation of ideology.⁶⁵ The defense suggested he was simply a fierce critic of U.S. policies, engaging in protected speech activity.⁶⁶ Similarly, while the prosecution framed Mehanna's trip to Yemen as a failed

62. Second Superseding Indictment, *supra* note 61, at 6–9, 14; *see also* Government's Sentencing Memorandum at 2–3, United States v. Mehanna, No. 09-cr-10017-GAO (D. Mass. Apr. 10, 2012), ECF No. 430; Defendant's Memorandum on Appropriate Sentence Under the Sentencing Guidelines at 3–5, United States v. Mehanna, No. 1:09-cr-10017-GAO (D. Mass. Apr. 9, 2012), ECF No. 429; U.S. Attorney's Office Dist. of Mass., *Tarek Mehanna Sentenced to 17.5 Years on Terrorism-Related Charges*, U.S. DEP'T JUST. (Apr. 12, 2012), www.justice.gov/usao/ma/news/2012/April/MehannaTarekSentencingPR.html (describing conviction and sentencing).

63. *See* Transcript of Record at 3-32 to 3-53, United States v. Mehanna, No. 09-cr-10017-GAO (D. Mass. Oct. 27, 2011), ECF No. 386. This raises a related but distinct concern that the government introduces evidence of terrorist violence, or videos of Osama bin Laden, even where that evidence is entirely disconnected to the facts charged against the defendant, presumably to suggest a connection between the defendant and the portrayed terrorist violence. *See, e.g.*, Walt Nett, *Judge Rejects Videos in Aldawsari Case*, AMARILLO GLOBE-NEWS, June 16, 2012, at A6 (showing that the judge excluded the Arabic version but allowed into evidence the English version of the videos that the defense argued were unrelated to the facts at hand); Milton J. Valencia, *Jury Will See Bin Laden Video in Trial*, BOS. GLOBE, Oct. 27, 2011, at B2; Milton J. Valencia, *Terror Trial Jury Shown Attack Videos*, BOS. GLOBE, Nov. 8, 2011, at B1, B4 (the judge permitted prosecutors to show jurors "a series of violent videos . . . depicting suicide bombings and glorifying the Sept. 11, 2001, terrorist attacks . . . to depict Mehanna as an Al Qaeda supporter who translated and distributed the videos to non-Arabic speakers, to willfully promote Al Qaeda's ideology"); *see also* Al-Arian, *supra* note 58, at 31–32 (stating that author's father faced charges including "conspiracy to kill and maim persons abroad," even though "prosecutors freely admitted that [her] father had no connection to any violence"); Elashi, *supra* note 58 (describing Mehanna's defense's strategy for appeal, including on the grounds that the district court "[a]bused its discretion by allowing 'inflammatory evidence of little or no probative value,' which included multiple scenes of suicide bombings"); Murray, *supra* note 60 (explaining Mehanna was convicted of various material support to terrorism charges despite the fact that "[n]o evidence was presented in court directly linking him to a terrorist group").

64. Transcript of Record, *supra* note 63, at 3-49.

65. *See, e.g., id.* at 3-47. The government's oft-discredited expert, Evan Kohlmann, contributed to the government's situating of Mehanna as part of the larger threat of violent extremism and radical Islam. *See generally* Transcript of Record at 26-141, United States v. Mehanna, No. 09-cr-10017-GAO (D. Mass. Dec. 2, 2011). Indeed, Marc Sageman, another expert on terrorism issues who works regularly for the U.S. government, was called as a defense expert at trial to discredit Kohlmann. *See generally* Transcript of Record at 34-13, United States v. Mehanna, No. 09-cr-10017-GAO (D. Mass. Dec. 14, 2011). For the broader criticisms of Kohlmann, *see* Petra Bartosiewicz, *Experts in Terror*, NATION, Feb. 4, 2008, at 18, 18–21; Wesley Yang, *The Terrorist Search Engine*, N.Y. MAG., Dec. 13, 2010, at 40; Jonathon M. Seidl, *Defense Trying to Stop 'Terrorism' Expert from Testifying at Ft. Hood Shooter Trial*, BLAZE (Aug. 9, 2012), <http://www.theblaze.com/stories/defense-trying-to-stop-terrorism-expert-from-testifying-at-ft-hood-shooters-trial>.

66. *See* Transcript of Record, *supra* note 63, at 3-68 to 3-74.

attempt to visit a training camp,⁶⁷ Mehanna says he was going abroad for religious schooling.⁶⁸ Mehanna was found guilty at trial and faces a seventeen-year sentence. The prosecution has been criticized vehemently for its attack on the First Amendment—indeed for demonstrating the “Muslim exemption [sic]” to the First Amendment.⁶⁹ The First Circuit Court of Appeals recently affirmed. The government’s prosecution of Mehanna does not stand alone. Instead, it exemplifies a new trend in focusing criminal prosecutions on religious and political speech in order to serve a larger counter-radicalization agenda.⁷⁰

67. See *id.* at 3-29.

68. See *id.* at 3-70 to 3-71 (“Yemen is known for . . . the study of Islamic law. The government of Yemen funds these schools. People can attend by just showing up. They’re not political at all; they are simply religious schools. And Tarek had talked to people that at some point in his life he would like to go to Yemen and study at these schools: study Arabic and study Islamic law.”).

69. See, e.g., March, *supra* note 60; Cole, *supra* note 60; Murray, *supra* note 60; see also Reynolds, *supra* note 60.

70. Consider these prosecutions:

- The prosecution against Zachary Chesser and Jesse Morton, on material support, conspiracy, and Internet-use-related charges, primarily regarding communication of threats and solicitation of “violent jihadists,” based on posts to RevolutionMuslim.com and other websites where defendants posted YouTube videos and articles, including lectures by Anwar al-Aulaqi. At the heart of allegations was a post by both defendants regarding *South Park*’s then-upcoming episode depicting Muhammad, which the prosecution characterized as constitutive of threats, and the defendants later characterized as invitations for discussion of the issues to avoid misunderstanding. Both men pled guilty.
- For Jesse Curtis Morton, see Statement of Facts at 16–19, *United States v. Morton*, No. 1:12-cr-35-LO (E.D. Va. Feb. 9, 2012), ECF No. 24 (detailing some of Morton’s conduct in relation to the case); Plea Agreement at 1, *United States v. Morton*, No. 1:12-cr-35-LO (E.D. Va. Feb. 9, 2012), ECF No. 23 (stating that Morton pled guilty to a three-count criminal information); Position of the United States with Respect to Sentencing Factors at 9, *United States v. Morton*, No. 1:12-cr-35-LO (E.D. Va. June 14, 2012), ECF No. 37 (arguing for prison sentence of 151 months); Criminal Information at 1, *United States v. Morton*, No. 1:12-cr-35-LO (E.D. Va. Feb. 9, 2012), ECF No. 20 (listing the criminal charges against Morton); Affidavit of Special Agent Paula R. Menges at 16, *United States v. Morton*, No. 1:12-cr-35-LO (E.D. Va. May, 13 2011), ECF No. 3 (concluding that Morton knowingly and unlawfully communicated threats); Defendant’s Sentencing Memorandum and Position with Respect to Sentencing Factors at 12, *United States v. Morton*, No. 1:12-cr-35-LO (E.D. Va. June 18, 2012), ECF No. 38 (requesting a prison sentence of forty-six to fifty-seven months followed by a period of supervised release); U.S. Attorney’s Office E. Dist. of Va., *supra* note 47; U.S. Attorney’s Office E. Dist. of Va., *supra* note 1. For Zachary Adam Chesser, for whom many documents were sealed, see Statement of Facts at 12–14, *United States v. Chesser*, No. 1:10-cr-395-LO (E.D. Va. Oct. 20, 2010), ECF No. 32 (detailing some of Chesser’s conduct); Plea Agreement at 1, *United States v. Chesser*, No. 1:10-cr-395-LO (E.D. Va. Oct. 20, 2010), ECF No. 31 (stating that Chesser pled guilty to a three-count criminal information); Position of the United States with Respect to Sentencing Factors at 12, *United States v. Chesser*, No. 1:10-cr-395-LO (E.D. Va. Feb. 18, 2011), ECF No. 46 (arguing for a prison sentence of 360 months); Defendant’s Position with Regard to Sentencing Factors at 31, *United States v. Chesser*, No. 1:10-cr-395-LO (E.D. Va. Feb. 18, 2011), ECF No. 44 (requesting a prison sentence of 240 months); S. COMM. ON HOMELAND SEC., ONLINE ISLAMIST RADICALIZATION, *supra* note 40, at 21 (concluding that Chesser was a harbinger of violent extremism online); Dep’t of Justice Office of Pub. Affairs, *Virginia Man Pleads Guilty to Providing Material Support to a Foreign Terrorist Organization and Encouraging Violent Jihadists to Kill U.S. Citizens*, U.S. DEP’T JUST. (Oct. 20, 2010), <http://www.justice.gov/opa/pr/2010/October/10-nsd-1174.html>; Dep’t of Justice Office of Pub. Affairs, *Virginia Man Sentenced to 25 Years in Prison for Providing Material Support and Encouraging*

Violent Jihadists to Kill U.S. Citizens, U.S. DEP'T JUST. (Feb. 24, 2011), <http://www.justice.gov/opa/pr/2011/February/11-nsd-238.html>; U.S. Attorney's Office E. Dist. of Va., *Fairfax County Man Accused of Providing Material Support to Terrorists*, U.S. DEP'T JUST. (July 21, 2010), <http://www.justice.gov/usao/vac/news/2010/07/20100721chessernr.html>.

- The prosecution against Javed Iqbal and Saleh Elahwal, on material support, conspiracy, and other charges, for providing access to Al-Manar, Hezbollah's TV station, through their satellite television businesses. Hezbollah is a designated foreign terrorist organization (FTO), and both Hezbollah and Al-Manar are designated as Specially Designated Global Terrorists (SDGT). Both men ultimately pled guilty to providing satellite transmission services to Al-Manar in exchange for money.

See Government's Letter in Support of Sentencing at 1, *United States v. Iqbal*, No. 1:06-cr-1054-RMB (S.D.N.Y. Apr. 16, 2009), ECF No. 107 (arguing for a sixty-three-month sentence); Government's Memorandum of Law in Opposition to Defendants' Pre-Trial Motions at 1, *United States v. Iqbal*, No. 1:06-cr-1054-RMB (S.D.N.Y. May 29, 2007), ECF No. 37 (arguing for denial of the defendants' pre-trial motions); Indictment at 3–18, *United States v. Iqbal*, No. 1:06-cr-1054-RMB (S.D.N.Y. Nov. 15, 2006), ECF No. 9 (listing eleven counts against the defendants); Joint Memorandum of Law in Support of Defendants' Pre-Trial Motions at 50, *United States v. Iqbal*, No. 1:06-cr-1054-RMB (S.D.N.Y. Apr. 14, 2007), ECF No. 35 (arguing for dismissal of the indictment or alternative relief); Press Release, U.S. Attorney's Office S. Dist. N.Y., *New Jersey Man Sentenced to 17 Months in Prison for Providing Material Support and Resources to Hizballah* (June 23, 2009), available at <http://www.justice.gov/usao/nys/pressreleases/June09/elahwalsalehsentencingpr.pdf>; Press Release, U.S. Attorney's Office S. Dist. N.Y., *Staten Island Man Sentenced to 69 Months in Prison for Providing Material Support and Resources to Hizballah* (Apr. 23, 2009), available at <http://www.justice.gov/usao/nys/pressreleases/April09/iqbaljavedsentencingpr.pdf>; Press Release, U.S. Attorney's Office S. Dist. N.Y., *Staten Island Satellite TV Operator Pleads Guilty to Providing Material Support to Hizballah TV Station* (Dec. 23, 2008), available at <http://www.justice.gov/usao/nys/pressreleases/December08/iqbaljavedpleapr.pdf>; *Man Pleads Guilty to Providing Material Support to Hizballah TV Station*, U.S. DEP'T JUST. (Dec. 30, 2008), <http://www.justice.gov/opa/pr/2008/December/08-nsd-1156.html>.

- The prosecution against Jubair Ahmad, on a material support charge, for preparing a video containing a prayer in support of jihad and mujahideen on behalf of Lashkar-i-Taiba, an FTO. Ahmad pled guilty.

See Statement of Facts at 3–4, *United States v. Ahmad*, No. 1:11-cr-554-TSE (E.D. Va. Dec. 2, 2011), ECF No. 43 (describing Ahmad's conduct with regard to the case); Plea Agreement at 1, *United States v. Ahmad* No. 1:11-cr-554-TSE (E.D. Va. Dec. 2, 2011), ECF No. 42 (pleading guilty to the charge); Position of the United States with Regard to Sentencing at 2, *United States v. Ahmad*, No. 1:11-cr-554-TSE (E.D. Va. Apr. 3, 2012), ECF No. 45 (requesting that the court apply the statutory maximum of 180 months); Criminal Information, *United States v. Ahmad*, No. 1:11-cr-554-TSE (E.D. Va. Dec. 2, 2011), ECF No. 39 (charging Ahmad with unlawfully, knowingly, and willfully providing material support to Lashkar-i-Taiba); Defendant's Position with Regard to Sentencing Factors at 1, *United States v. Ahmad*, No. 1:11-cr-554-TSE (E.D. Va. Apr. 7, 2012), ECF No. 49 (requesting that the court impose a sentence of twenty-four months).

Because the defendants pled guilty in each of these cases, the underlying facts are difficult to discern. Chesser and Morton have published open letters contesting the version of facts to which they pled. See, e.g., Zachary Chesser, *Victims of the American Inquisition*, ASEERUN (Feb. 17, 2012), <http://aseerun.org/2012/02/20/victims-of-the-american-inquisition> (stating Chesser's account of the events leading up to his incarceration); Younus Abdullah Muhammad (Jesse Morton), *Seeking Clarification: A Reaction to My Arrest for South Park Opposition*, ISLAMPOLICY (Jan. 10, 2012), http://www.islampolicy.com/2012_01_08_archive.html (presenting Morton's version of his statements regarding the creators of *South Park*). Even on the government's version of the facts, each of these cases, and the potential pattern they represent of targeting speech, are worthy of close examination and further scrutiny.

II. RADICALIZATION DEFINED AND DECONSTRUCTED

Now, let me talk a little bit about the threat and issues related to radicalization. We take the threat very seriously, obviously.

—Richard Falkenrath, Deputy Commissioner for Counterterrorism, New York City Police Department⁷¹

Despite the impetus to find a terrorist profile or hallmarks of radicalization to hone in on incipient terrorists, empirical research has emphatically and repeatedly concluded that there is no such profile and no such easily identifiable hallmarks.

—Brennan Center for Justice Report⁷²

The NYPD Intelligence Division's 2007 report *Radicalization in the West: The Homegrown Threat* is the most exhaustive account produced by a law enforcement entity in the United States.⁷³ Government agencies regularly cite the report, bolstering its authority.⁷⁴ Understanding radicalization discourse, its ambitions and limitations, requires a critical examination of the report. This Part charts the Intelligence Division's argument and engages with the limitations of its study. Prepared by NYPD Senior Intelligence Analysts Mitchell D. Silber and Arvin Bhatt, the NYPD report theorizes the process of going from Muslim to terrorist. While Silber and Bhatt suggest there is no fixed trajectory for radicalization, they extrapolate just that, suggesting a predictability that allows for sound direction for terrorism policing.⁷⁵

71. Falkenrath, *supra* note 31.

72. Patel, *supra* note 12, at 8.

73. SILBER & BHATT, *supra* note 18. See Huq, *Modeling Terrorist Radicalization*, *supra* note 12, at 43–56, for more on the state and federal government literature, as well as information on the British counterpart; see also Rascoff, *Establishing Official Islam?*, *supra* note 8, at 145–61 (discussing the background of U.S. domestic counter-radicalization and its various manifestations). There is also a larger academic literature on “radicalization,” much of which collapses Muslim identity manifestations (individual and collective) with potential for terrorism. See Kundnani, *supra* note 12 (examining critically the academic literature).

74. See, e.g., S. COMM. ON HOMELAND SEC., A TICKING TIME BOMB, *supra* note 25, at 17 n.6 (noting the Senate report's “framework is adapted from a publicly available description of the radicalization process by the [NYPD] Intelligence Division,” and then citing to the NYPD radicalization report); S. COMM. ON HOMELAND SEC., VIOLENT ISLAMIST EXTREMISM, *supra* note 40, at 4–5 (referring to and summarizing the NYPD model of “radicalization” in framing the role of the Internet in generating “violent Islamist extremism”). In the wake of the Associated Press (AP) reports on the NYPD Intelligence Division's program of blanket surveillance of Muslim communities, the federal government, and the FBI in particular, distanced itself from the NYPD. Jason Grant, *FBI Leader: Muslims' Trust Is Broken He Breaks Silence on Spying Backlash*, STAR-LEDGER, Mar. 7, 2012, available at http://www.nj.com/news/index.ssf/2012/03/recent_nypd_spying_uproar_shak.html; Samantha Henry, *NJ FBI: NYPD Monitoring Damaged Public Trust*, ASSOCIATED PRESS, Mar. 7, 2012, <http://www.ap.org/content/ap-in-the-news/2012/nj-fbi-nypd-monitoring-damaged-public-trust>; Pete Yost, *Holder Disturbed by Reports on NYPD Muslim Spying*, ASSOCIATED PRESS, Mar. 8, 2012, <http://www.ap.org/content/ap-in-the-news/2012/holder-disturbed-by-reports-on-nypd-muslim-spying>.

75. SILBER & BHATT, *supra* note 18, at 8, 84 (stating that while “[t]here is no useful profile to

Silber and Bhatt begin concerned with Muslims and Islam.⁷⁶ They interpose as the target of terrorism prevention a process they call “radicalization.” Silber and Bhatt express a need to intervene at an “earlier point” where “the potential terrorist or group of terrorists begin and progress through a process of radicalization,” culminating in “a terrorist attack.”⁷⁷ To that end, they delineate a four-stage radicalization process: “pre-radicalization,” “self-identification,” “indoctrination,” and “jihadization,” each associated with “specific signatures.”⁷⁸

The first stage, “pre-radicalization,” is concerned with “[f]ifteen to thirty-five year-old male Muslims who live in male-dominated societies”⁷⁹ and “enclaves of ethnic, Muslim communities—communities that are dominated by Middle Eastern, North African, and South Asian cultures.”⁸⁰ Rather than articulate anything nearing a description of a discrete stage in a multi-step process, the report defines preradicalization’s circumference as spatial and cultural, gendered, classed, and aged. The immigrant Muslim neighborhood becomes a site of suspicion. Silber and Bhatt hypothesize that “[m]iddle class families and students” are of greatest concern, including “the bored and/or frustrated, successful college students, the unemployed, the second and third generation, new immigrants, petty criminals, and prison parolees.”⁸¹

assist law enforcement or intelligence,” there is “remarkable consistency in the behaviors and trajectory of each of the plots across all the stages”).

76. Huq, *Modeling Terrorist Radicalization*, *supra* note 12, at 59 (noting that the NYPD by its “decision to couple Islam and terror . . . and by the sampling methodology” treats “the ‘Muslim’ *a priori* as a source of risk and harm”).

77. SILBER & BHATT, *supra* note 18, at 5.

78. *Id.* at 21.

79. *Id.* at 24. The report reasons: “These individuals are at an age where they often are seeking to identify who they really are while trying to find the ‘meaning of life’. [sic] This age group is usually very action-oriented.” *Id.* The emphasis on male-dominated societies is worth noting, especially given the popular narrative that situates Muslim cultures as threatening due, in part, to their dogged commitment to backward values. See Amna Akbar & Rupal Oza, “*Muslim Fundamentalism*” and *Human Rights in an Age of Terror and Empire*, in GENDER, NATIONAL SECURITY, AND COUNTER-TERRORISM: HUMAN RIGHTS PERSPECTIVES (Margaret Satterthwaite & Jayne C. Huckerby eds., 2013) (discussing the prevalence of these narratives among conservatives and liberals, including certain feminist human rights activists).

80. SILBER & BHATT, *supra* note 18, at 24. Silber and Bhatt argue that these communities “often serve as ‘ideological sanctuaries’ for the seeds of radical thought.” *Id.* at 24. “Pre-radicalization is the point of origin for individuals before they begin this progression. . . . The majority of the individuals involved in these plots began as ‘unremarkable’ - they had ‘ordinary’ jobs, had lived ‘ordinary’ lives and had little, if any criminal history.” *Id.* at 6. The focus on immigrant communities is puzzling when one considers the significant proportion of African Americans within American Muslim communities. See, e.g., Allison Keyes, *A History of Black Muslims in America*, NPR (Aug. 23, 2005), <http://www.npr.org/templates/story.php?storyId=4811402>; U.S. *Religious Landscape Survey*, PEW FORUM ON RELIGION & PUB. LIFE 40 (Feb. 2008), <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>; *Muslim Americans: No Signs of Growth in Alienation or Support for Extremism*, PEW RESEARCH CTR. 8–9 (Aug. 30, 2011), <http://www.people-press.org/files/legacy-pdf/Muslim%20American%20Report%2010-02-12%20fix.pdf>.

81. SILBER & BHATT, *supra* note 18, at 24. At the same time, they note that “[l]ittle, if any, criminal history” binds the men in the cases they examined for the report. *Id.* at 25.

The second stage, "self-identification," involves gravitation toward "Salafi Islam" and a "Salafi mosque."⁸² (In the United States, Salafism tends to be understood as a homogeneous "fundamentalist" strain of Islam—indeed *the* primary strain of concern. To the contrary, Salafism is a mode of interpretation with various geographical and historical iterations.)⁸³ The associated factors are widespread expressions of Muslim identity or religiosity: "pilgrimage to Mecca," "[g]rowing a beard," and "pa[y]ing off the mortgage on [one's] house because Islam forbids paying interest on loans."⁸⁴ Here, Muslim religious practice—core First Amendment activity, unconnected to any suspicion of criminal activity—becomes a predictor for criminality.

Equally troubling, Silber and Bhatt situate dissent with mainstream American political discourse, and identification with other Muslims, as integral to radicalization. "[A]lienation, discrimination, racism[—]real or perceived"—and "exposure" to "international conflicts involving Muslims," trigger this stage.⁸⁵ "Becoming involved in social activism and community issues" is a signature factor.⁸⁶

In the third phase, "indoctrination," "an individual progressively intensifies his beliefs, wholly adopts jihadi-Salafi⁸⁷ ideology and concludes, without question, that the conditions and circumstances exist where [militant jihad] is required to support and further the cause."⁸⁸ This stage is marked by "[w]ithdrawal from the [m]osque," "[p]oliticization of [n]ew [b]eliefs," "[h]olding meetings and discussions with an increasing radical agenda in more private settings," and "watching jihadi videos . . . that highlight[] atrocities committed against

82. *Id.* at 6, 32–33.

83. *See, e.g.*, PRINCETON READINGS IN ISLAMIST THOUGHT: TEXTS AND CONTEXTS FROM AL-BANNA TO BIN LADEN 3–5, 19–23 (Roxanne L. Euben & Muhammed Qasim Zaman eds., 2009); Henri Lauzière, *The Construction of Salafyya: Reconsidering Salafism from the Perspective of Conceptual History*, 42 INT'L J. MIDDLE E. STUD. 369 (2010); *see also* Akbar & Oza, *supra* note 79, at 162 ("[T]erms such as . . . 'salafi' seem to stand in for an entire set of arguments and political positions as if they are obvious markers—without need of verification—of bad, threatening, Muslims."); Diala Shamas & Nermeen Arastu, MUSLIM AM. CIVIL LIBERTIES COAL. ET AL., *Mapping Muslims: NYPD Spying and Its Impact on American Muslims*, CUNY SCH. L. 16 (2013), <http://www.law.cuny.edu/academics/clinics/immigration/clear/Mapping-Muslims.pdf> (describing Salafism and the difference between Salafism and radicalization).

84. SILBER & BHATT, *supra* note 18, at 61.

85. *Id.* at 32.

86. *Id.* at 33.

87. This hyphenated term, in itself, it seems, a product of the "War on Terror," collapses two terms—jihad and Salafi—regularly misused in the United States. *See* Akbar & Oza, *supra* note 79, at 162.

88. SILBER & BHATT, *supra* note 18, at 7; *see also id.* at 38 ("The key aspect of this stage is the acceptance of a religious-political worldview that justifies, legitimizes, encourages, or supports violence against anything *kufr* or un-Islamic, including the West, its citizens, its allies, or other Muslims whose opinions are contrary to the extremist agenda.").

Muslims.”⁸⁹ Similar to the second stage, possessing particular religious and political ideologies is posited to hasten the radicalization process.

The first three stages of radicalization are focused on where Muslims live and congregate, manifestations of religious and political beliefs, and social or religious activities.⁹⁰ In the final stage, “jihadization,” the process finally culminates in an intent to commit a criminal act.⁹¹ Jihadization includes a number of substages, one of which is “[a]ttack [p]lanning.”⁹² “‘Outward Bound’-like [a]ctivities,” such as “camping, white-water rafting, paintball games, target shooting,” are construed as training activities.⁹³ “[T]ravel[] abroad” (in particular, to Pakistan, Iraq, Afghanistan, Kashmir, and Somalia)⁹⁴ is in itself troubling, the report asserts, as travel might involve attendance at a training camp or at a “religious retreat steeped with extremist thought.”⁹⁵ The report also discusses “[m]ental [r]einforcement [a]ctivities” as indicators, including visiting “[e]xtremist websites, chatrooms, and blogs” and watching “[j]ihadist videos and tapes.”⁹⁶

At the report’s core are troubling conclusions: that Muslim religiosity and politicization predictably correlate with terrorism; and that Muslim collective spaces—where Muslim political and religious cultures would emerge—are sites for radicalization. Silber and Bhatt frame a concern with “radicalization” as a reason to target the religious and political cultures of Muslim communities. The first stage focuses on young men situated in Muslim communities or institutions,

89. *Id.* at 38–39, 63.

90. Interestingly, Silber and Bhatt define the criminal act with a very particular intent: “[T]he ultimate objective for any attack is always the same—to punish the West, overthrow the democratic order, reestablish the Caliphate, and institute sharia.” *Id.* at 45.

91. *Id.* at 7, 45.

92. *Id.* at 47. This substage includes “[d]rawing maps, videotaping targets, and staking out target areas,” as well as “[a]cquiring [m]aterial/[d]eveloping the [d]evice” most “commercially available or reasonably obtainable” like “[f]ertilizer-based devices, commercial explosives, cell phones and explosive ignition devices.” *Id.* These activities are occasionally “associated with low-end criminal activity and almost always suspicious activity such as: cooking chemicals . . . [and] purchasing large amounts of any one chemical or material.” *Id.*

93. *Id.* at 46; see also Chris Hawley, *NYPD Monitored Muslim Students All over the Northeast*, ASSOCIATED PRESS (Feb. 18, 2012), <http://www.ap.org/content/ap-in-the-news/2012/nypd-monitored-muslim-students-all-over-northeast> (reporting that the NYPD sent an undercover officer on a whitewater rafting trip with eighteen Muslim students).

94. SILBER & BHATT, *supra* note 18, at 45. The FBI Intelligence Assessment also frames travel as an important part of “radicalization.” FBI COUNTERTERRORISM DIV., *supra* note 34, at 8 (“Overseas travel can be a significant experience that appears to accelerate the radicalization process. Although radicalization can occur without overseas travel, it appears to provide the networking and experience necessary to participate in operational activity. The experience may vary from religious or language instruction to basic paramilitary training.”). As Darryl Li and Ramzi Kassem have powerfully shown, the reasons for this travel could be multifold. Ramzi Kassem, *From Altruists to Outlaws: The Criminalization of Traveling Islamic Volunteers*, 10 UCLA J. ISLAMIC & NEAR E.L. 85, 85–87 (2011); Darryl Li, *A Universal Enemy?: “Foreign Fighters” and Legal Regimes of Exclusion and Exemption Under the “Global War on Terror”*, 41 COLUM. HUM. RTS. L. REV. 355, 369–73 (2010).

95. SILBER & BHATT, *supra* note 18, at 45–46.

96. *Id.* at 47.

encompassing a reason to scrutinize where these men socialize and with whom these men associate. The later stages focus on increasingly religious and politicized Muslims who identify with a global concept of Muslim community and who resist American cultural norms and foreign policy. According to Silber and Bhatt, while expressing Muslim identity or hanging out in Muslim spots does not guarantee radicalization, it will always point towards the dangerous possibility:

It is useful to think of the radicalization process in terms of a funnel. Entering the process does not mean one will progress through all four stages and become a terrorist. However, it also does not mean that if one doesn't become a terrorist, he or she is no longer a threat. Individuals who have been radicalized but are not jihadists may serve as mentors and agents of influence to those who might become the terrorists of tomorrow.⁹⁷

The report also identifies various Muslim gathering places as radicalization or extremism "incubators" that facilitate radicalization.⁹⁸ As such, they invite law enforcement surveillance of Muslim religious and political cultures and geographies.

The flaws in Silber and Bhatt's methodology make clear the inherent unreliability of the radicalization theory. A certain impulse towards racial and religious typecasting may seem obvious on the surface of their theory. After all, they start by singling out Muslims and Islam for posing the threat of radicalization, and by isolating Muslim religious and political cultures as fundamental to the problem. But even if one agrees with the parameters of their study, their case studies are woefully inadequate to justify an aggressive policing regime. The report relies on an incredibly small number of case studies—eleven cases total, with five American cases as the focus⁹⁹—for the ambitious conclusions it draws.

The case studies are mismatched to the report's ambitious conclusions. Silber and Bhatt draw out a whole assortment of details from the lives of men in their case studies, pointing to them as indicative of a process of radicalization. The report places causal value on whichever details it chooses to recognize in the case studies—details that may be altogether disconnected from the crime with which the men were ultimately charged. For example, because the U.S. examples it identifies all involved second-generation immigrants the report identifies

97. *Id.* at 10. Similarly, the FBI Intelligence Assessment finds: "The evidence suggests that the radicalization of an individual is a fluid process that does not have a time table and does not always lead to action. US converts, under the right circumstances, may enter, exit, or even re-enter the radicalization process at any stage." FBI COUNTERTERRORISM DIV., *supra* note 34, at 4.

98. SILBER & BHATT, *supra* note 18, at 18, 22, 68, 70–72 (listing "radicalization incubators," which include "cafes, cab driver hangouts, flophouses, prisons, student associations, non-governmental organizations, hookah (water pipe) bars, butcher shops and book stores").

99. *See id.* at 5, 87. In the language of the NYPD, the report reviewed "nearly one dozen terrorist-related case studies": five from within the United States and six from abroad. *Id.* at 7, 17.

immigrant communities as the relevant ground for “pre-radicalization.”¹⁰⁰ Or, the report discusses a man Mike, who asked his friends to start calling him Maher, suggesting that the name change is indicative of “radicalization.”¹⁰¹ Similarly, the report discusses men who spent time in an Islamic bookstore or with Muslim student associations on college campuses, and constructs those venues as radicalization “[i]ncubators.”¹⁰² The list goes on and on. The report suggests that convergence in particular details between the small number of case studies should be sufficient to invest the details with predictive authority. But apart from pointing to occasional convergence, Silber and Bhatt offer no reason to find a causal nexus between the details they identify as radicalization markers and the crimes with which these men were charged.

Moreover, the report purports to model behavior for *terrorism* based on a number of cases where the defendants were not even charged with committing a violent terrorist act.¹⁰³ The five American cases are particularly noteworthy. None involved the commission of any violent crime. Four out of five seemed to have never involved any intent to commit violent crime.¹⁰⁴ For example, the government charged Fahad Hashmi for allowing Junaid Babar to store socks, ponchos, and raincoats in his apartment; Babar then allegedly transferred those materials to al-Qaeda.¹⁰⁵ Three of the cases deal with trips abroad, allegedly to

100. *Id.* at 59–60.

101. *Id.* at 61. The AP’s reporting revealed the NYPD was in fact scrutinizing Muslims in New York who changed their names:

The New York Police Department monitors everyone in the city who changes his or her name, according to interviews and internal police documents obtained by The Associated Press. For those whose names sound Arabic or might be from Muslim countries, police run comprehensive background checks that include reviewing travel records, criminal histories, business licenses and immigration documents.

Matt Apuzzo & Adam Goldman, *NYPD Keeps Files on Muslims Who Change Their Names*, ASSOCIATED PRESS (Oct. 26, 2011), <http://ap.org/Content/AP-In-The-News/2011/NYPD-keeps-files-on-Muslims-who-change-their-names> (discussing an investigation that revealed how NYPD monitored name changes on the basis that “would-be terrorists could use their new names to lie low in New York”).

102. SILBER & BHATT, *supra* note 18, at 70, 72–73.

103. *See* Huq, *Modeling Terrorist Radicalization*, *supra* note 12, at 57 (“The NYPD report mixes studies of completed terrorism conspiracies with incidents in which an attack was apparently forestalled; it discusses both realized and potential threats.”).

104. Silber and Bhatt are somewhat self-conscious about their reliance on cases that did not culminate in an act of violence. In discussing the three travel cases, they offer: “The lack of rich details on these U.S. cases, coupled with the fact that they were disrupted at a relatively early stage, obscured the fact that radicalization had occurred. Nevertheless, the three U.S. cases still provided sufficient evidence to corroborate parts of each of the four stages” SILBER & BHATT, *supra* note 18, at 58.

105. *See* Rovner & Theoharis, *supra* note 58, at 1347–53; *see also* Indictment, United States v. Hashmi, No. 1:06-cr-442-LAP (S.D.N.Y. May 24, 2006), ECF No. 1 (listing four counts against Hashmi); Defendant’s Response to Government’s Motion to Admit Certain Evidence at Trial at 1–2, United States v. Hashmi, 1:06-cr-442-LAP (S.D.N.Y. Nov. 4, 2009), ECF No. 123 (referring to evidence that Hashmi permitted Babar to store goods in his apartment). A number of questions have been raised about the government’s prosecution against Hashmi, including the possibility that Babar

fight or train with terrorists: (1) the case against the "Lackawanna Seven" for a May 2001 trip to Afghanistan, where the men did not like the anti-American sentiment they encountered at the camp and quickly returned to the United States;¹⁰⁶ (2) the case against the "Portland Seven," where the men were turned away at the border of Afghanistan as they allegedly tried to enter to fight alongside the Taliban;¹⁰⁷ and (3) the "Virginia Paintball Case," where some of "the men are alleged to have attended a training camp run by Lashkar-i-Taiba, a militant group committed to driving India from Kashmir" and to have urged others "to fight with the Taliban in Afghanistan—before the United States attacked Afghanistan."¹⁰⁸

was working with the government as an informant all along. Rovner & Theoharis, *supra* note 58, at 1352–53, 1403 n.371 (citing the court's statement that Babar would be sentenced to time served for his "exceptional" service as he "began cooperating even before his arrest").

106. See Criminal Complaint at 6–11, United States v. Goba, No. 1:02-m-107 (W.D.N.Y. Sept. 13, 2002), ECF No. 1; COLE & LOBEL, *supra* note 5, at 117–18 (explaining that even though the FBI found no evidence that the men were involved in criminal activity, out of fear of being tried as enemy combatants, the men pled guilty to single counts of material support and received seven to ten year jail sentences); Matthew Purdy & Lowell Bergman, *Where the Trail Led: Between Evidence and Suspicion; Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. TIMES, Oct. 12, 2003, at N1; see also Roya Aziz & Monica Lam, *Profiles: The Lackawanna Cell*, FRONTLINE (Oct. 16, 2003), <http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/inside/profiles.html> (providing profiles of each of the "Lackawanna Seven"); *How Dangerous Was the Lackawanna Cell?*, FRONTLINE (Oct. 16, 2003), <http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/inside/howdangerous.html> (interviewing various experts regarding the dangerousness of the "Lackawanna Seven"); *Interview Sabim Alwan*, FRONTLINE (Oct. 16, 2003), <http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/interviews/alwan.html> (interviewing one of the "Lackawanna Seven").

107. Indictment at 8–11, United States v. Battle, No. 02-cr-399-JO (D. Or. Oct. 3, 2002), ECF No. 1. On October 3, 2002, the men were indicted for unsuccessfully trying to join a terrorist organization. Al Saoub never returned and was killed in Afghanistan in October 2003. *Id.* The rest of the men pled guilty and received sentences of various lengths, from three years in a work camp to eight years. COLE & LOBEL, *supra* note 5, at 119 ("The Portland reference presumably refers to six men who pleaded guilty to attempting to travel to Afghanistan to fight alongside the Taliban. They never made it there. While the citizens among them could certainly have been tried for attempted treason, there was no allegation that any were involved in terrorism."); Hal Bernton, *2 More Defendants in Portland's Terrorism Case Enter Guilty Pleas*, SEATTLE TIMES, Oct. 17, 2003, at B1; *Two Defendants in 'Portland Cell' Case Plead Guilty to Conspiracy to Contribute Services to the Taliban, Federal Weapons Charges*, U.S. DEPT JUST. (Sept. 18, 2003), http://www.justice.gov/opa/pr/2003/September/03_crm_513.htm.

108. COLE & LOBEL, *supra* note 5, at 118; see also Indictment at 7–10, United States v. Royer, No. 1:03-cr-296-LMB (E.D. Va. June 25, 2003), ECF No. 1 (describing the group's involvement with Lashkar-i-Taiba). The case,

which netted the government eleven 'terrorism' convictions, involved a group of men in Virginia accused of playing paintball games, owning hunting rifles, and planning to fight for Muslim causes in Kashmir. . . . As with the Lackawanna defendants, none of the men was ever charged with planning to undertake terrorist activity of any kind, here or abroad.

COLE & LOBEL, *supra* note 5, at 118; see also Huq, *The Signaling Function*, *supra* note 12, at 845–46 (looking at the prosecution against Ali al-Timimi, one of the defendants in the Virginia case, as an example of how "religious speech or dogma can be a basis for solicitation or aiding-and-abetting charges" in the terrorism context and "suggest[ing] that such prosecutions can rely on ambiguous religious statements that require interpretation"); Jerry Markon, *'Va. Jihad' Case Hailed as Key in War on Terror*, WASH. POST, June 8, 2006, at A3 (articulating the view of those who saw the case as

At least one case features a plot with a heavy-handed government informant.¹⁰⁹ The fifth of the five American cases, against Shahawar Siraj Matin, involved what one might consider a traditional terrorist plot: to blow up the Herald Square subway station in New York City. It emerged at trial, however, that an NYPD informant worked on Matin for months to encourage anger in Matin toward American foreign policy against Muslims. The informant repeatedly poked and prodded Matin that it was his duty to take violent action against the United States, and suggested the method and means to obtain the necessary materials to commit such violent action.¹¹⁰ The case has been widely criticized for the techniques employed by the government in obtaining the indictment and conviction, though when the defense raised the entrapment defense at trial, it failed, as it almost always does.¹¹¹

So, the NYPD actively participated in—molded even—what it purports to study. To say the least, creating a model for terrorist radicalization based on government-facilitated plots seems of limited value for its predictive power. It creates a dangerous “feedback loop: the police influence the content and direction of prosecutions and then rely on those prosecutions as evidence of the underlying crime problem.”¹¹² That evidence, in turn, further constitutes the need for the aggressive police powers.

Somewhat ironically, the NYPD does not discuss the few violent plots prosecuted after 9/11 that did not involve coercive government interference.¹¹³ Those plots are few in number—and do not in themselves justify the expansive

“target[ing] Muslim men who had done nothing more than innocuously play paintball in the woods and who never intended attacks inside the United States”).

109. See Huq, *Modeling Terrorist Radicalization*, *supra* note 12, at 58.

110. See, e.g., *United States v. Siraj*, 468 F. Supp. 2d 408, 414–16 (E.D.N.Y. 2007), *aff'd*, 533 F.3d 99 (2d Cir. 2008); AMITAVA KUMAR, A FOREIGNER CARRYING IN THE CROOK OF HIS ARM A TINY BOMB 124 (2010); Said, *The Terrorist Informant*, *supra* note 58, at 715–32 (discussing Matin and other cases); Robin Shulman, *The Informer: Behind the Scenes, or Setting the Stage?*, WASH. POST, May 29, 2007, at C1; *Targeted and Entrapped*, *supra* note 58, at 33–37; *Terrorist Trial Report Card 2011*, *supra* note 59, at 26; see also Bartosiewicz, *To Catch a Terrorist*, *supra* note 5, at 41 (discussing the “more active role” informants are given); *Entrapment or Foiling Terror? FBI’s Reliance on Paid Informants Raises Questions About Validity of Terrorism Cases*, DEMOCRACY NOW! (Oct. 6, 2010), http://www.democracynow.org/2010/10/6/entrapment_or_foiling_terror_fbis_reliance [hereinafter *Entrapment or Foiling Terror?*] (investigating three cases).

111. *Siraj*, 468 F. Supp. 2d at 414–17, 420–23; see also Huq, *Modeling Terrorist Radicalization*, *supra* note 12, at 58 (listing coercion, entrapment, and other incentives in cases involving the use of informants).

112. Huq, *Modeling Terrorist Radicalization*, *supra* note 12, at 58 (“In relying on cases involving informants—including one in New York City—the NYPD report thus relies on facts created by the police themselves.”).

113. Trevor Aaronson, *The Informants*, MOTHER JONES, Sept.–Oct. 2011, at 32, 32–33 (“With three exceptions, all of the high-profile domestic terror plots of the last decade were actually FBI stings. (The exceptions are Najibullah Zazi, who came close to bombing the New York City subway system in September 2009; Hesham Mohamed Hadayet, an Egyptian who opened fire on the EL-Al ticket counter at the Los Angeles airport; and failed Times Square bomber Faisal Shahzad.)”).

radicalization paradigm. In fact, it is unclear whether there exists an American set of data on which such a theory for modeling *radicalization to actual violence* could even be extrapolated.¹¹⁴ The vast majority of the 500 to 600 terrorism-related prosecutions are precisely that, terrorism-related, often with an unclear nexus to any violence or intention to commit violent acts.¹¹⁵ Far from typically including violence, the criminal prohibition on material support,¹¹⁶ now charged in the vast

114. Writing in 2007, Cole and Lobel critically analyzed the Bush administration's record of terrorism prosecutions in the federal courts. COLE & LOBEL, *supra* note 5, at 115 ("Virtually all of the convictions on terrorism charges the Justice Department has obtained since 9/11 involve no acts of terrorism per se, nor conspiracy to engage in terrorist acts, nor even the aiding and abetting of terrorist crimes, but only material support to a group the government has labeled terrorist. . . . Because [material support laws] are so sweeping, a conviction under these laws does not mean that a terrorist has been convicted, or that any terrorism has been prevented."); *see also* Eric Umansky, *Department of Pre-Crime*, MOTHER JONES (Feb. 29, 2008), <http://www.motherjones.com/politics/2008/02/departement-pre-crime> (dubbing the material support laws "a prosecutor's dream," as they "don't require evidence of a plot or even of a desire to help terrorists," providing "the government a shot at convictions traditional criminal laws could never provide"). Cole and Lobel further deconstructed the Bush administration's claims about the five "terror cells" it claimed to have disrupted. COLE & LOBEL, *supra* note 5, at 116–17 ("[The men] were charged under the material-support laws, which make it possible to convict individuals without showing that they have actually undertaken, planned, supported, or even thought about furthering terrorist activity. None of the putative cell members was charged with, much less convicted of, attempting or conspiring to engage in any actual terrorist conduct. Indeed, there was little or no reason to believe that any of them were actual terrorists waiting to strike."); *see also id.* at 111–14, 121–22 (discussing inadequacies in the government's cases against Sami Al-Arian, Sami al-Hussayen, James Yee, Brandon Mayfield, Muhammad Salah, and Abedelhaleem Ashqar; José Padilla and Yaser Hamdi; and counting as potential successes for the preventative paradigm the prosecutions against Iyman Faris and Ahmed Abu Ali). For a different view of Abu Ali, drawing from his interrogation under torture, *see* Wadie E. Said, *The Message and Means of the Modern Terrorism Prosecution*, 21 *TRANSNAT'L L. & CONTEMP. PROBS.* 175, 183–87 (2012). Cole and Lobel further note Richard Reid as the only person actually attempting to carry out a terrorist act and Zacarias Moussaoui as one of only four convicted for conspiracy to engage in terrorist conduct, but say neither can be attributed as a success to the preventative paradigm. COLE & LOBEL, *supra* note 5, at 120 (describing that a flight attendant noticed Reid in the act, and Moussaoui was arrested prior to the institutionalization of the preventative paradigm).

115. Whereas the *Mother Jones* fall 2011 study identified 508 post-9/11 terrorism defendants, Aaronson, *supra* note 113, at 36–37, the Center for Law and Security's fall 2011 study identified 578. *Terrorist Trial Report Card 2011*, *supra* note 59, at 7.

116. Two provisions in the criminal code penalize material support to foreign terrorist organizations (FTOs), so designated by the Secretary of State in consultation with the Secretary of Treasury and Attorney General: section 2339A and section 2339B. 18 U.S.C. §§ 2339A, 2339B (2012). The designation must be based on a finding that the entity engages in "terrorist activity" or "terrorism," and thereby "threatens the security of United States nationals or the national security of the United States." 8 U.S.C. § 1189(a)(1)(C) (2012); 8 U.S.C. § 1189(d)(4) (2012). So-designated FTOs may seek review of the designation in the United States Court of Appeals for the District of Columbia Circuit within thirty days of designation. 8 U.S.C. § 1189(c)(1) (2012). Whereas section 2339A criminalizes providing material support knowing that such support would be used in support of terrorism, section 2339B dispenses with the specific intent requirement. Section 2339B makes it a federal crime to "knowingly provide[] material support or resources to a foreign terrorist organization . . ." 18 U.S.C. § 2339B(a)(1). For definitions of "terrorist activity" and "terrorism," *see* 8 U.S.C. § 1182(a)(3)(B)(iii) (2012) and 22 U.S.C. § 2656f(d)(2) (2012), respectively. The mental state required to violate section 2339B is knowledge of either the group's designation as a terrorist organization or the group's commission of terrorist acts, not specific intent to further terrorism. 18

majority of terrorism-related cases,¹¹⁷ has been subject to serious critique precisely for its breadth,¹¹⁸ the pressure it puts on the First Amendment,¹¹⁹ and the discretion it gives prosecutors.¹²⁰ Typically, material support charges do not

U.S.C. § 2339B(a)(1); CHARLES DOYLE, CONG. RESEARCH SERV., RL33035, MATERIAL SUPPORT OF TERRORISTS AND FOREIGN TERRORIST ORGANIZATIONS: SUNSET AMENDMENTS 6 (2005).

Congress created the crime of material support in 1996 as part of the Antiterrorism and Effective Death Penalty Act (AEDPA)'s Title III—International Terrorism Prohibitions. H.R. REP. NO. 104-518, at 35 (1996) (Conf. Rep.). Post-9/11, Congress expanded the definition of “material support or resources” to cover “expert advice or assistance,” Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 805, 115 Stat. 272, 377 (codified at 18 U.S.C. § 2339A); and “service,” Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603, 118 Stat. 3638, 3762–64 (codified as amended in scattered sections of 18 U.S.C.); H.R. REP. NO. 108-796, at 128 (2004) (Conf. Rep.). Congress also clarified that the mental state required to violate section 2339B was knowledge of either the group’s designation as a terrorist organization or the group’s commission of terrorist acts, not specific intent to further terrorism, 18 U.S.C. § 2339B(a)(1); defined “training” as “instruction or teaching designed to impart a specific skill, as opposed to general knowledge,” 18 U.S.C. § 2339A(b)(2); defined “expert advice or assistance” as “advice or assistance derived from scientific, technical or other specialized knowledge,” 18 U.S.C. § 2339B(b)(3). *A Review of the Tools to Fight Terrorism Act: Hearing Before the Subcomm. on Terrorism, Tech. & Homeland Sec. of the S. Comm. on the Judiciary*, 108th Cong. 6 (2004) (joint statement of Daniel J. Bryant, Assistant Att’y Gen., Department of Justice and Barry Sabin, Chief, Counterterrorism Section, Criminal Division, Department of Justice); H.R. REP. NO. 108-796, at 128; DOYLE, *supra*, at 4, 6. Congress further clarified that “personnel” meant a person who had

knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control.

Intelligence Reform and Terrorism Prevention Act of 2004 § 6603; H.R. REP. NO. 108-796, at 129; DOYLE, *supra*, at 5.

117. *Terrorist Trial Report Card 2011*, *supra* note 59, at 19 (“Since 2007, material support has gone from being charged in 11.6% of cases to 69.4% in 2010. In 2011 so far, 87.5% of cases involve a material support charge.”). The majority of charges involve material support to terrorism, general criminal conspiracy, false statements, money laundering, and immigration and identity fraud. *Id.* at 13–14, 19–21; ZABEL & BENJAMIN, *supra* note 59; Chesney, *supra* note 32, at 856, 860.

118. *Aiding Terrorists: An Examination of the Material Support Statute: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 25 (2004) [hereinafter *Aiding Terrorists*] (statement of David Cole, Professor of Law, Georgetown University Law Center) (testifying that “the statute is vague and over-broad”). The statutory scheme defines material support or resources to include provision of

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

18 U.S.C. § 2339A(b)(1); *see also* 18 U.S.C. § 2339B(g)(4) (providing the same definition).

119. *Aiding Terrorists*, *supra* note 118, at 24–26; David Cole, *The First Amendment’s Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine*, 6 HARVARD L. & POLY REV. 147 (2012); Morrison, *Conspiracy Law’s Threat to Free Speech*, *supra* note 59; Rovner & Theoharis, *supra* note 58, at 1348–57; Wadie E. Said, *Humanitarian Law Project and the Supreme Court’s Construction of Terrorism*, 2011 BYU L. REV. 1455, 1498–1508.

120. COLE & LOBEL, *supra* note 5, at 115 (“Because [material support laws] are so sweeping, a

actually include any act of violence. Moreover, a growing number of high-profile prosecutions that feature a violent terrorist plot—the majority it seems—rely on government informants that encourage, design, or facilitate the plots.¹²¹ That the government-facilitated violent plots far outnumber any nongovernment-facilitated violent plots should give rise to skepticism about the nature of the underlying threat.

The problem, of course, is that despite a claim to the contrary, Silber and Bhatt's NYPD report is not a neutral study confined to the Ivory Tower.¹²² A series of Pulitzer Prize-winning investigative reports by the Associated Press (AP)

conviction under these laws does not mean that a terrorist has been convicted, or that any terrorism has been prevented."); Umansky, *supra* note 114. The Supreme Court rejected First and Fifth Amendment challenges to the scheme in a pre-enforcement challenge on facts fairly dissimilar from the typical context in which the statute is used. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2722, 2730 (2010). On the grounds of particular importance here, the Court rejected plaintiffs' First Amendment concerns primarily on the grounds that the statute did not criminalize "independent advocacy," as opposed to work done under the direction of a foreign terrorist organization. *Id.* at 2709–11. The Court found the independent advocacy distinction relevant for its Fifth Amendment analysis as well. The Court went to pains to explain that "personnel" and "service" did not include "independent advocacy." *Id.* at 2720–21. The Court further reasoned that the material statute did not prevent plaintiffs from speaking on any topic and advocacy, so long as they did not do so at the direction of, or in coordination with, a foreign terrorist organization. The dissent argued that the majority's distinction between directed and independent advocacy was unfounded in First Amendment jurisprudence. *Id.* at 2733–37 (Breyer, J., dissenting). The Court also rejected plaintiffs' Fifth Amendment void-for-vagueness challenge on the grounds that plaintiffs' activities fell clearly within the terms "training" and "expert advice or assistance." *Id.* at 2720.

121. *See, e.g.*, Aaronson, *supra* note 113, at 32 (describing how, in one year, FBI sting operations resulted in prosecutions against 158 defendants, of which forty-nine had participated in plots led by an FBI operative instigating terrorist action); *see also Terrorist Trial Report Card 2011, supra* note 59, at 26 ("Since 2009, the federal government has expanded its use of aggressive and often controversial investigations, whereby a confidential informant or undercover officer makes contact with a potential terror suspect and assists him in the planning of an attempted terror crime.").

122. The NYPD report stirred some controversy, drawing criticism that it would engender racial and religious profiling. Memorandum from Aziz Huq, Brennan Ctr. for Justice, Concerns with Mitchell D. Silber & Arvin Bhatt, N.Y. Police Dep't, *Radicalization in the West: The Homegrown Threat 1* (Aug. 30, 2007), available at http://brennan.3cdn.net/436ea44aac969ab3c5_sbm6vtxgi.pdf ("The Report applies a highly questionable methodology to draw conclusions unwarranted by its insufficient data set, conclusions that will likely result in racial and religious profiling deleterious both to civil liberties and to genuine efforts at attaining security."); Letter from Raymond W. Kelly, Police Comm'r, N.Y. Police Dep't, to Faiza Ali, Muslim Am. Civil Liberties Coal. (Oct. 6, 2008), available at http://brennan.3cdn.net/b881ffda53e1324896_43m6bp19j.pdf; Letter from Muslim Am. Civil Liberties Coal. to Raymond Kelly, Police Comm'r, N.Y. Police Dep't (Sept. 8, 2009) [hereinafter Muslim Am. Civil Liberties Coal. 2009 Letter], available at <http://www.brennancenter.org/page/-/Justice/20090908.MACLCL%27s.Response.to.Clarification.pdf>; Letter from Muslim Am. Civil Liberties Coal. to Raymond Kelly, Police Comm'r, N.Y. Police Dep't (Oct. 23, 2008), available at <http://www.brennancenter.org/page/-/Justice/10.23.MACLCL.pdf>; Letter from Muslim Am. Civil Liberties Coal. to Raymond Kelly, Police Comm'r, N.Y. Police Dep't (Nov. 23, 2007), available at <http://www.brennancenter.org/page/-/Justice/MACLCL%20Community%20Statement.pdf>. In response, the NYPD reissued the report with a two-page statement of clarification noting the report was not meant as a "policy prescriptive." SILBER & BHATT, *supra* note 18, at 11–12. *But see* Muslim Am. Civil Liberties Coal. 2009 Letter, *supra* (responding to the NYPD's statement of clarification as insufficient).

later revealed the NYPD Intelligence Division's operation of a "Demographics Unit."¹²³ Leaked documents from that unit borrowed heavily from the NYPD report's vocabulary and logic,¹²⁴ suggesting the report was effectively functioning as an operational guide.¹²⁵ The NYPD's program, as well the FBI's related approach, will be explored next.

123. Matt Apuzzo & Adam Goldman, *Documents Show NY Police Watched Devout Muslims*, ASSOCIATED PRESS (Sept. 6, 2011), <http://www.ap.org/Content/AP-In-The-News/2011/Documents-show-NY-police-watched-devout-Muslims> [hereinafter Apuzzo & Goldman, *Police Watched Devout Muslims*]; Matt Apuzzo & Adam Goldman, *Inside the Spy Unit That NYPD Says Doesn't Exist*, ASSOCIATED PRESS (Aug. 31, 2011), <http://www.ap.org/content/ap-in-the-news/2011/inside-the-spy-unit-that-nypd-says-doesnt-exist>; Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, ASSOCIATED PRESS (Aug. 23, 2011), <http://www.ap.org/content/ap-in-the-news/2011/with-cia-help-nypd-moves-covertly-in-muslim-areas> [hereinafter Apuzzo & Goldman, *NYPD Moves Covertly*]; Adam Goldman & Matt Apuzzo, *NYPD Built Secret Files on Mosques Outside NY*, ASSOCIATED PRESS (Feb. 22, 2012), <http://www.ap.org/content/ap-in-the-news/2012/nypd-built-secret-files-on-mosques-outside-ny>; *The Demographics Unit*, NYPD, <http://wid.ap.org/documents/nypd-demo.pdf> (last visited Apr. 9, 2013). In a deposition regarding the NYPD's Demographics Unit—now called the Zone Assessment Unit—the commanding officer of the NYPD stated clearly that none of the information collected by that unit resulted in *any* leads to any actual terrorism investigations. Deposition of Thomas Galati at 27, 36, 72–86, *Handschu v. Special Servs. Div.*, No. 71 Civ. 2203 (CSH) (S.D.N.Y. Sept. 12, 2002) [hereinafter Galati Deposition], available at http://www.nyclu.org/files/releases/Handschu_Galati_6.28.12.pdf; see also Justin Elliott, *Fact Check: How the NYPD Overstated Its Counterterrorism Record*, PROPUBLICA (July 10, 2012), <http://www.propublica.org/article/fact-check-how-the-nypd-overstated-its-counterterrorism-record>; Adam Goldman & Matt Apuzzo, *NYPD: Muslim Spying Led to No Leads, Terror Cases*, ASSOCIATED PRESS (Aug. 21, 2012), <http://www.ap.org/content/ap-in-the-news/2012/nypd-muslim-spying-led-to-no-leads-terror-cases> [hereinafter Goldman & Apuzzo, *NYPD: Muslim Spying*]; Adam Serwer, *NYPD: Muslims' Conversations About Anti-Muslim Bias Justify Spying on Muslims*, MOTHER JONES (Aug. 23, 2012), <http://www.motherjones.com/politics/2012/08/nypd-muslim-surveillance-transcript-redacted>; Seth Freed Wessler, *The Real Reason Why Big Brother's Still Spying on New York City's Muslims*, COLORLINES (Aug. 29, 2012), http://colorlines.com/archives/2012/08/nypd_muslim_spying_fail.html.

124. DEMOGRAPHICS UNIT, NYPD INTELLIGENCE DIV., EGYPTIAN LOCATIONS OF INTEREST REPORT 7–37 (2006) [hereinafter DEMOGRAPHICS UNIT, EGYPTIAN LOCATIONS OF INTEREST REPORT], available at <http://hosted.ap.org/specials/interactives/documents/nypd/nypd-egypt.pdf> (listing Egyptian "Locations of Interest," which include coffee shops, restaurants, grocery stores, cafes, Halal meat stores, and book stores); DEMOGRAPHICS UNIT, NYPD INTELLIGENCE DIV., SYRIAN LOCATIONS OF CONCERN REPORT [hereinafter DEMOGRAPHICS UNIT, SYRIAN LOCATIONS OF CONCERN REPORT], available at <http://hosted.ap.org/specials/interactives/documents/nypd/nypd-syria.pdf> (stating that Syrian "Locations of Interest" include bars, cafes, bakeries, restaurants, grocery stores, and newsstands); SILBER & BHATT, *supra* note 18, at 22 ("radicalization incubators" include "cafes, cab driver hangouts, flophouses, prisons, student associations, non-governmental organizations, hookah (water pipe) bars, butcher shops and book stores"); Adam Goldman et al., *NYPD Eyed US Citizens in Intel Effort*, ASSOCIATED PRESS (Sept. 22, 2011), <http://www.ap.org/content/ap-in-the-news/2011/nypd-eyed-us-citizens-in-intel-effort> ("Police documented where Moroccans bought groceries, which hotels they visited and where they prayed.")

125. See, e.g., Apuzzo & Goldman, *supra* note 101; Hawley, *supra* note 93; Eileen Sullivan, *NYPD Spied on City's Muslim Anti-Terror Partners*, ASSOCIATED PRESS (Oct. 6, 2011), <http://www.ap.org/content/ap-in-the-news/2011/nypd-spied-on-citys-muslim-anti-terror-partners>. For the whole series of the AP's reporting on the NYPD's Demographics Unit, see *Highlights of AP's Pulitzer Prize-Winning Probe into NYPD Intelligence Operations*, ASSOCIATED PRESS, <http://ap.org/nypd> (last visited Apr. 9, 2013); see also Ramzi Kassem, *Praying While Muslim: How the NYPD's Covert Intelligence Operation Has Criminalized an Entire Community*, NATION, July 2–9, 2012, at 25 (providing background on NYPD

III. POLICING THE NEW TERRORISM

Shamiur Rahman, a 19-year-old American of Bangladeshi descent who has now denounced his work as an informant, said police told him to embrace a strategy called “create and capture.” He said it involved creating a conversation about jihad or terrorism, then capturing the response to send to the NYPD.

—Associated Press¹²⁶

I have never made a lead from rhetoric that came from a Demographics report

—Thomas Galati, Commanding Officer of the NYPD Intelligence Division¹²⁷

For the FBI and NYPD, the preventative framework has facilitated a shift from being law enforcement agencies to being dual purpose intelligence gathering and law enforcement agencies.¹²⁸ Radicalization has transformed the project of counterterrorism intelligence gathering into one squarely focused on gathering as much information as possible about Muslim life in the United States, with a particular emphasis on political and religious cultures of Muslim communities. This Part describes how radicalization theory translates into contemporary police practice. The policing tactics described here are enabled by constitutional doctrine, including the Fourth Amendment, typically thought of as the bulwark against the state’s intrusions. The problem is not of constitutional exceptionalism then, but

Demographics Unit operations and anecdotal evidence of NYPD surveillance); Amna Akbar, *Blueprints: Mapping US Muslim Communities*, ALJAZEERA (Sept. 19, 2011), <http://www.aljazeera.com/indepth/opinion/2011/09/201191994512478104.html> (discussing the theories behind the NYPD’s and FBI’s rationale for mapping Muslim communities).

126. Adam Goldman & Matt Apuzzo, *Informant: NYPD Paid Me to ‘Bait’ Muslims*, ASSOCIATED PRESS (Oct. 23, 2012), <http://www.ap.org/content/ap-in-the-news/2012/informant-nypd-paid-me-to-bait-muslims> (“For his work, [Rahman] earned as much as \$1,000 a month and goodwill from the police after a string of minor marijuana arrests.”).

127. Galati Deposition, *supra* note 123, at 124.

128. Moreover, the related growth of cross-governmental collaboration through Joint Terrorism Task Forces, fusion centers, shared databases like eGuardian, and federal-state-local enforcement has created exponential growth in the information and enforcement power available to the government. See *Federal Government Intelligence Sharing with State, Local, and Tribal Law Enforcement: An Assessment Ten Years After 9/11: Hearing Before the Subcomm. on Counterterrorism and Intelligence of the H. Comm. on Homeland Sec.*, 112th Cong. 13–15 (2012) (statement of Eric Velez-Villar, Assistant Director, Federal Bureau of Investigation, Department of Justice); STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, S. COMM. ON HOMELAND SEC. & GOV’T AFFAIRS, 112TH CONG., FEDERAL SUPPORT FOR AND INVOLVEMENT IN STATE AND LOCAL FUSION CENTERS (Comm. Print 2012); JOHN ROLLINS, CONG. RESEARCH SERV., RL34070, FUSION CENTERS: ISSUES AND OPTIONS FOR CONGRESS 1–2 (2008); eGuardian Frequently Asked Questions (Mar. 8, 2010), available at <http://www.aclu.org/files/assets/aclueg000020.pdf>; Michael German & Jay Stanley, *What’s Wrong with Fusion Centers?*, ACLU 3–5 (2007), http://www.aclu.org/files/pdfs/privacy/fusioncenter_20071212.pdf; *Protecting America from Terrorist Attack*, *supra* note 31.

rather the extensive powers afforded to government by current constitutional doctrine.¹²⁹

Before laying out the core preventative policing techniques, I will provide a general overview of the relevant standards for each agency.¹³⁰ Part III.A lays out the standards governing the FBI's and NYPD's policing. Relaxed standards and minimal accountability mechanisms have created a legal landscape in which the FBI and NYPD exercise broad unchecked authority to collect intelligence. Part III.B identifies a number of policing techniques as core to "radicalization" policing: mapping, aggressive recruitment and deployment of informants, voluntary or pretextual interviews, community engagement, and Internet trolling. Subparts A and B paint a picture of how policing standards and practices have combined to focus on radicalization and therefore the religious and political cultures of Muslim communities.¹³¹

A. Standards

In the last decade, the FBI and NYPD have expanded their investigative powers and discretion. Each agency no longer requires the police to suspect criminal wrongdoing before it deploys a stunning array of investigative arsenal. In fact, both agencies rely on precisely those techniques for which the ex ante internal standards have become de minimis; those tactics are also nearly immune from ex post facto judicial challenge.¹³²

The FBI is governed primarily by the Attorney General's Investigative

129. For an argument that the Fourth Amendment adopts the perpetrator's perspective, resulting in disproportionate burdens on communities of color, see Devon W. Carbado, (*E*)*Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 965–74 (2002).

130. See, e.g., COLE & LOBEL, *supra* note 5, at 1–19; Sinnar, *Questioning Law Enforcement*, *supra* note 22, at 58–61; Kassem, *supra* note 125; Emily Berman, *Domestic Intelligence: New Powers, New Risks*, BRENNAN CTR. FOR JUST. 26–30 (2011), http://brennan.3cdn.net/b80aa0bab0b425857d_jdm6b8776.pdf. While I lay out reasons why challenging these techniques is difficult, the question of the legality of the policing techniques presented here is beyond the scope of this Article. There is a growing literature, and a number of lawsuits asking the question. See, e.g., Complaint at 2–4, *Hassan v. City of New York*, No. 2:12-cv-03401-SDW-MCA (D.N.J. June 6, 2012), ECF No. 1; Tracey Maclin, "Voluntary" Interviews and Airport Searches of Middle Eastern Men: *The Fourth Amendment in a Time of Terror*, 73 MISS. L.J. 471, 493–510 (2003); Sinnar, *Questioning Law Enforcement*, *supra* note 22, at 56–57.

131. See Rascoff, *Establishing Official Islam?*, *supra* note 8, at 156 ("[T]he government has invested heavily in intelligence collection and analysis as part of a comprehensive approach to domestic counter-radicalization. Counter-radicalization inevitably entails judgments about which individuals or communities have already or may become radicalized as well as the nature of the radicalization process itself. Thus, the government has employed the nascent domestic intelligence apparatus to locate the boundaries—both conceptually and empirically—between radical and non-radical Islam." (footnotes omitted)).

132. This is particularly significant because standards for both the FBI and NYPD, and for other local police departments around the country, were developed in response to public pressure demanding change from McCarthy era excesses of police power. See Paul G. Chevigny, *Politics and Law in the Control of Local Surveillance*, 69 CORNELL L. REV. 735, 736–38 (1984).

Guidelines (the Guidelines), issued at the discretion of the Attorney General.¹³³ The original Guidelines were promulgated by Attorney General Edward Levi in 1976 to ward off the possibility of a congressional statutory charter in the face of public outrage over J. Edgar Hoover's FBI and of the Church Committee's findings about the FBI's extensive disruptive surveillance of communists, black and women's liberationists, and the New Left more generally.¹³⁴ The Guidelines "proceed[ed] from the proposition that Government monitoring of individuals or groups because they hold unpopular or controversial political views is intolerable in our society."¹³⁵ The Levi Guidelines included three increasingly robust investigative phases: preliminary, limited, and full investigations. Commencement of each stage required a nexus to criminal activity. Each phase permitted more intrusive investigative techniques, but required higher suspicion thresholds and included greater procedural safeguards.

The Guidelines have been significantly relaxed since 9/11, allowing the FBI to exercise greater power with fewer procedural constraints or suspicion thresholds.¹³⁶ In 2002 and 2008, Attorneys General John Ashcroft and Michael Mukasey issued the Guidelines that have governed the FBI in the post-9/11 era.

133. See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE FEDERAL BUREAU OF INVESTIGATION'S COMPLIANCE WITH THE ATTORNEY GENERAL'S INVESTIGATIVE GUIDELINES 36–59 (2005) [hereinafter OFFICE OF THE INSPECTOR GEN., FBI COMPLIANCE], available at <http://www.justice.gov/oig/special/0509/index.htm>; Berman, *supra* note 130, at 7, 13 (outlining the role of the Attorney General and the Guidelines in constraining the FBI). Importantly, the DOJ's guidance bans profiling based on race and ethnicity in law enforcement practices, but it does not explicitly ban profiling based on religion or national origin, and does not apply to national and border security contexts. See CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES 1 (2003), available at http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.

134. Lininger, *supra* note 22, at 1213–14; Berman, *supra* note 130, at 9–10; see also OFFICE OF THE INSPECTOR GEN., FBI COMPLIANCE, *supra* note 133, at 29–36 (summarizing the FBI's pre-Guidelines activities).

135. OFFICE OF THE INSPECTOR GEN., FBI COMPLIANCE, *supra* note 133, at 36 (citing *FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 94th Cong. 257 (1976) (testimony of Edward H. Levi, Att'y General, Department of Justice)).

136. OFFICE OF THE ATTORNEY GEN., THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS (2008) [hereinafter OFFICE OF THE ATTORNEY GEN., GUIDELINES FOR DOMESTIC FBI OPERATIONS], available at <http://www.justice.gov/ag/readingroom/guidelines.pdf>; OFFICE OF THE ATTORNEY GEN., THE ATTORNEY GENERAL'S GUIDELINES ON FEDERAL BUREAU OF INVESTIGATION UNDERCOVER OPERATIONS (2002), available at <http://www.fas.org/irp/agency/doj/fbi/fbiundercover.pdf>; OFFICE OF THE ATTORNEY GEN., THE ATTORNEY GENERAL'S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS (2002), available at http://www.fas.org/irp/agency/doj/fbi/general_crimes2.pdf. For a discussion of the history of the FBI Guidelines, with a focus on post-9/11 changes, see Berman, *supra* note 130. See also COLE & LOBEL, *supra* note 5, 1–19; Sinnar, *Questioning Law Enforcement*, *supra* note 22, at 58–61. See generally JEROME P. BJELOPERA & MARK A. RANDOL, CONG. RESEARCH SERV., R41780, THE FEDERAL BUREAU OF INVESTIGATION AND TERRORISM INVESTIGATIONS 1 (2011) (noting the Guidelines and DIOGs provide "the FBI more leeway to engage in proactive investigative work that does not depend on criminal predication (i.e., a nexus to past or future criminal activity)").

Importantly, the 2008 Guidelines created the “assessment,” a new stage of FBI investigation, prior to what used to be the first stage of investigation, a “preliminary investigation.”¹³⁷ While an assessment requires no “particular factual predication” or suspicion of wrongdoing or criminal activity, it authorizes the use of intrusive investigative techniques.¹³⁸ For example, in conducting an assessment, the FBI may use unlimited physical surveillance, pretextual interviews, and deployment of confidential informants, absent any suspicion of wrongdoing, and with little to no procedural safeguards.¹³⁹

First issued in 2008, and then revised in 2011, the FBI’s Domestic Investigations and Operations Guide (DIOG) provides direction for the Guidelines’ implementation.¹⁴⁰ The DIOG allows for five types of assessments, which can be deployed mostly or partly based on First Amendment activity.¹⁴¹ The DIOG also authorizes mapping, accessing information in the possession of other government agencies, Internet monitoring, and interviewing of “complainants” even prior to the opening of an assessment.¹⁴² Importantly, the

137. OFFICE OF THE ATTORNEY GEN., GUIDELINES FOR DOMESTIC FBI OPERATIONS, *supra* note 136, at 17–18, 20–21.

138. Assessments do require an “authorized purpose.” *Id.* at 17; *see also* Memorandum from the Fed. Bureau of Investigation to All Field Offices (Sept. 24, 2009), *available at* <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM004887.pdf> (providing standards for the type of information agents in the Counterterrorism Division should solicit in the assessment stage and beyond).

139. FED. BUREAU OF INVESTIGATION, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE 4-13 to 4-14, 5-2, 6-7 (2011).

140. *Id.* The DIOG is in a way the regulation to the Guidelines’ law. Muslim Advocates, a California-based advocacy organization, filed a Freedom of Information Act request for the 2008 DIOGs. *See Muslim Advocates Seeks FBI Guidelines on Racial Profiling of Muslim Americans*, MUSLIM ADVOCATES (June 17, 2009), http://www.muslimadvocates.org/muslim_advocates_seeks_fbi_guidelines_on_racial_profiling_of_muslim_americans. The DOJ released redacted excerpts of the DIOGs, *available at* <http://documents.nytimes.com/the-new-operations-manual-from-the-f-b-i>. The current 2011 DIOG is *available on* the FBI’s website. Before the 2008 DIOG, there was the Manual of Investigative and Operational Guidelines. FED. BUREAU OF INVESTIGATION, MANUAL OF INVESTIGATIVE AND OPERATIONAL GUIDELINES, *available at* <http://vault.fbi.gov/miog/manual-of-investigative-operations-and-guidelines-miog-part-02-01-of-06/view>; OFFICE OF THE INSPECTOR GEN., FBI COMPLIANCE, *supra* note 133.

141. Investigative activity cannot be based *solely* on First Amendment activity. Large sections of the assessment-related rules are redacted. FED. BUREAU OF INVESTIGATION, *supra* note 139, at 5-4 to 5-37; *see also* Charlie Savage, *F.B.I. Agents Get Leeway to Push Privacy Bounds*, N.Y. TIMES, June 13, 2011, at A1, A13; Charlie Savage, *F.B.I. Focusing on Security over Ordinary Crime*, N.Y. TIMES, Aug. 24, 2011, at A16 (finding that between 2009 and 2011, the FBI opened 82,325 assessments, 42,888 of which were to see whether people were terrorists or spies; the vast majority of assessments were closed out “without finding information that justified a more intensive inquiry”). The 2008 DIOG was similarly lenient as to the permissible role of First Amendment activity in the opening of an assessment. FED. BUREAU OF INVESTIGATION, FBI DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE (2008), *available at* <http://documents.nytimes.com/the-new-operations-manual-from-the-f-b-i>; Berman, *supra* note 130, at 23–25. As with the 2008 DIOG, in the 2011 DIOG, the section on “undisclosed participation” by “confidential human sources”—informants—is largely redacted. FED. BUREAU OF INVESTIGATION, *supra* note 139, at 16-2 to 16-11.

142. FED. BUREAU OF INVESTIGATION, *supra* note 139.

Guidelines and the DIOG are not enforceable in court; nor are they the product of any meaningful public engagement.

The NYPD is governed by its patrol guide and the *Handschu* Guidelines.¹⁴³ A federal consent decree resulting from a 1970s class action lawsuit complaining of police infiltration and surveillance of that time's radicals, the *Handschu* Guidelines provide parameters and oversight for the NYPD's surveillance of political and religious activity.¹⁴⁴ Mirroring the cyclical history of the FBI,¹⁴⁵ meaningful restraints on the NYPD were removed after 9/11. In 2002, the NYPD argued in court that *Handschu* undermined the department's ability to keep New York City safe from terrorism and requested greater flexibility in its ability to gather and disseminate intelligence.¹⁴⁶ In 2003, the court approved modified guidelines submitted by the NYPD, eliminating the prior required criminal nexus for surveillance of political activity, insulating the NYPD from independent review by the *Handschu* Authority, and relaxing the rules for collection, retention, and dissemination of information.¹⁴⁷ The revised guidelines allow the NYPD to initiate

143. *Handschu v. Special Servs. Div.*, 605 F. Supp. 1384 (S.D.N.Y. 1985); BARRY KAMINS, *NEW YORK CITY POLICE DEPARTMENT PATROL GUIDE MANUAL* (2006).

144. *Handschu v. Special Servs. Div.*, 737 F. Supp. 1289, 1303–04 (S.D.N.Y. 1989); *Handschu*, 605 F. Supp. at 1388–92. For information on the underlying activities of the Bureau of Special Services, the NYPD's then-intelligence arm, see, for example, Emanuel Perlmutter, *Police Intelligence Unit Watches Racial Activity: Undercover Detectives Play Major Role in Curbing Subversive Forces*, N.Y. TIMES, July 27, 1964, at 19. See also *Targeted and Entrapped*, *supra* note 58, at 12–13 (describing the background of the litigation and the settlement terms). The original Guidelines required factual criminal predicates for investigations of political and religious activity. More specifically, the consent decree prohibited the NYPD from investigating political activity unless there was "specific information" that the group was linked to a crime that had been committed or was about to be committed. *Handschu* also required transparency in approval procedures for such investigations and provided for an oversight body to ensure compliance and provide for review of alleged violations. *Handschu*, 605 F. Supp. at 1390–91. *Handschu* further created an independent oversight body, the *Handschu* Authority, through which investigation of political activity had to be preapproved, and grievances by members of the public could be filed; this process limited the NYPD's ability to collect, retain, and disseminate intelligence, and provided grievance procedures for individuals. *Id.* For a survey of police surveillance oversight mechanisms resulting from local police abuse in the 1960s and 1970s, see Chevigny, *supra* note 132.

145. See generally Chevigny, *supra* note 132 (providing an overview of actions in several jurisdictions challenging political surveillance and a comparison of various regulatory approaches); Fisher, *supra* note 22 (providing an overview of political surveillance practices conducted by the FBI and local law enforcement).

146. Declaration of Deputy Comm'r David Cohen, *Handschu v. Special Servs. Div.*, No. 71 Civ. 2203 (CSH) (S.D.N.Y. Sept. 12, 2002). But see Jerrold L. Steigman, Note, *Reversing Reform: The Handschu Settlement in Post-September 11 New York City*, 11 J.L. & POL'Y 745, 782–83 (2003) (rejecting the NYPD's reasoning for demanding the post-9/11 changes in the consent decree).

147. *Handschu v. Special Servs. Div.*, 288 F. Supp. 2d 411, 420, 429–30 (S.D.N.Y. 2003) ("In order to carry out its mission of preventing the commission of terrorist acts in or affecting the City of New York and the United States and its people, the NYPD must proactively draw on available sources of information to identify terrorist threats and activities. It cannot be content to wait for leads to come in through the actions of others, but rather must be vigilant in detecting terrorist activities to the full extent permitted by law, with an eye towards early intervention and prevention of acts of terrorism before they occur."); see also Kassem, *supra* note 125, at 26; Leonard Levitt, *NYPD Seeks to Overturn Surveillance Rules*, NEWSDAY, Sept. 26, 2002, available at 2002 WLNR 536399 (Westlaw); *Police*

investigations based on speech or expression protected by the First Amendment.¹⁴⁸ They invest tremendous discretion to the Deputy Commissioner to approve investigations and investigatory techniques.¹⁴⁹ For example, there are no restrictions placed on the use of informants except that their deployment must be authorized by the Deputy Commissioner of the Intelligence Division.¹⁵⁰

As discussed in Part III.B, the FBI and NYPD have come to rely on five policing techniques key to preventative counterterrorism policing, with a focus on “radicalization” in Muslim communities: mapping, aggressive recruitment and deployment of informants in mosques and other Muslim community spaces,¹⁵¹ community engagement programs, voluntary interviews, and Internet monitoring.¹⁵² Each of these policing techniques is permissible within or prior to an FBI assessment, so they can be deployed even where the police do not suspect illegal activity.¹⁵³ Similarly, while attorneys continue to litigate the NYPD’s tactics for their compliance with the current *Handschu* Guidelines,¹⁵⁴ the thresholds for deploying these tactics are de minimis.

These tactics are also largely immune from post hoc review.¹⁵⁵ Since the surveillance tactics are used indiscriminately in Muslim communities, typically the surveillance does not lead to indictment.¹⁵⁶ In fact, a commanding officer of the

Surveillance of Political Activity—the History and Current State of the Handschu Decree, N.Y. CIV. LIBERTIES UNION, <http://www.nyclu.org/content/testimony-police-surveillance-of-political-activity-history-and-current-state-of-handschu-de> (last visited Apr. 13, 2013) (testimony of Arthur N. Eisenberg).

148. *Handschu*, 288 F. Supp. 2d at 421.

149. *Id.* at 422–38.

150. *Id.* at 428.

151. Undercover police officers are also aggressively deployed. See, e.g., Apuzzo & Goldman, *Police Watched Devout Muslims*, *supra* note 123, at 1 (“Every day, undercover officers and informants filed reports from their positions as ‘listening posts’ inside Muslim communities.”); Adam Goldman et al., *NYPD Eyed US Citizens in Intelligence Effort*, ASSOCIATED PRESS (Sept. 22, 2011), <http://www.ap.org/content/ap-in-the-news/2011/nypd-eyed-us-citizens-in-intel-effort> (“[As part of the ‘Moroccan Initiative,’] [u]ndercover officers snapped photographs of restaurants frequented by Moroccans, including one that was noted for serving ‘religious Muslims.’”).

152. These major tactics draw on and relate to a broader set of tactics, like growing information sharing and joint enforcement. See *supra* text accompanying note 128.

153. FED. BUREAU OF INVESTIGATION, *supra* note 139, at 4-13 to 6-3. Mapping may also be deployed as part of an assessment: the section on mapping states that “the relevance of the ethnic or racial information mapped to the authorized purpose of the Assessment or investigation must be clearly demonstrated and documented.” *Id.* at 4-14.

154. The Galati deposition was taken by *Handschu* attorneys in connection with current efforts to determine whether the Intelligence Division’s Demographics Unit overstepped *Handschu*’s bounds. Galati Deposition, *supra* note 123; NYPD *Testimony on Muslim Surveillance Operation Highlights Futility of Spying on Innocent People*, ACLU (Aug. 21, 2012), <http://www.aclu.org/national-security/nypd-testimony-muslim-surveillance-operation-highlights-futility-spying-innocent>.

155. For a helpful discussion of the limitations to challenges to many of these tactics, see Emily Berman, *Regulating Domestic Intelligence Collection*, 71 WASH. & LEE L. REV. (forthcoming 2014) (on file with author).

156. Galati Deposition, *supra* note 123 (stating that none of the information collected by the NYPD Demographics Unit resulted in leads for terrorism investigations); see also Goldman & Apuzzo, *NYPD: Muslim Spying*, *supra* note 123 (noting that in more than six years of conducting surveillance on

NYPD recently admitted that the Intelligence Division's program to gather such intelligence in Muslim communities resulted in not one indictment under his watch.¹⁵⁷ Nonetheless, there are other real harms associated with surveillance. But the secret nature of surveillance makes it hard for plaintiffs to prove in court that they are subject to surveillance. Plaintiffs are hard pressed to prove sufficient harm to confer standing, deal as they must with the Supreme Court's decision in *Laird v. Tatum*.¹⁵⁸ "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."¹⁵⁹ *Clapper v. Amnesty International USA* creates yet another hurdle to establishing standing to challenge national security surveillance.¹⁶⁰

Even when the FBI's and NYPD's tactics culminate in an indictment, there are significant barriers to challenges. The *Handschu* Guidelines, Attorney General's Guidelines, and DIOG provide few limitations on police power.¹⁶¹ Nor do they give rise to private causes of action. Voluntary interviews and community engagement rely on consent; however facile that consent may be, courts are unlikely to be any more sympathetic to Fourth Amendment challenges in the terrorism context than in the ordinary crime context.¹⁶² Neither is the Fourth

Muslim neighborhoods, NYPD's Demographics Unit "never generated a lead or triggered a terrorism investigation").

157. Galati Deposition, *supra* note 123, at 124.

158. *Laird v. Tatum*, 408 U.S. 1, 13 (1972); Lininger, *supra* note 22, at 1236–44 (discussing *Laird* and other hurdles to challenges to post-9/11 surveillance of Muslim communities as authorized under the 2002 Attorney General's Guidelines); see also Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 45–46 (2011) (discussing different interpretations of *Laird*); Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 143–45 (2007) (same).

159. *Laird*, 408 U.S. at 13–14.

160. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1149, 1155 (2013) (dismissing plaintiffs' constitutional challenge to section 702 under the Foreign Intelligence Surveillance Act of 1978 (FISA) on standing grounds—plaintiffs did not establish injury in fact fairly traceable to the law they wished to challenge).

161. For example, the limitations on entrapment are scant. The rules for dealing with informants are laid out in a specific set of guidelines. OFFICE OF THE ATTORNEY GEN., GUIDELINES FOR DOMESTIC FBI OPERATIONS, *supra* note 136, at 33 ("Otherwise illegal activity by a human source must be approved in conformity with the Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources."). The relevant guidelines explicitly contemplate that informants will be authorized to engage in illegal activity, with limitations only on acts of violence and acts that would be unlawful if performed by an actual FBI agent. OFFICE OF THE ATTORNEY GEN., THE ATTORNEY GENERAL'S GUIDELINES REGARDING THE USE OF FBI CONFIDENTIAL HUMAN SOURCES 30 (2006), available at <http://www.justice.gov/oip/docs/ag-guidelines-use-of-fbi-chs.pdf> ("The FBI is never permitted to authorize a Confidential Human Source to: a. participate in any act of violence except in self-defense or b. participate in an act designed to obtain information for the FBI that would be unlawful if conducted by a law enforcement agent (e.g., breaking and entering, illegal wiretapping, illegal opening or tampering with the mail, or trespass amounting to an illegal search).") (footnotes omitted).

162. The two scholarly pieces considering Fourth Amendment challenges to voluntary interviews in this context agree that courts are unlikely to find Fourth Amendment protections for the typical case, given most FBI interviews would not constitute seizures because of the myth of possible

Amendment likely to offer relief when it comes to physical or virtual dealings with informants (or undercover officers), since the third-party consent doctrine insulates undercover activity.¹⁶³ Indeed, informant creation and deployment are “methodically exempted . . . from the kinds of constitutional regulations that cover other investigative techniques, including Fourth Amendment rules on searches, seizures, and warrants, the Fifth Amendment requirement that suspects be given Miranda warnings and counsel, and Sixth Amendment right-to-counsel rules.”¹⁶⁴ The entrapment defense may be raised at trial. But in its focus on the defendant’s subjective state of mind, rather than the conduct of the government, the threshold for entrapment is near impossible to meet:¹⁶⁵ it has not once

refusal. Maclin, *supra* note 130, at 493–510; Sinnar, *Questioning Law Enforcement*, *supra* note 22, at 46–47; *see also* Kaupp v. Texas, 538 U.S. 626, 631–33 (2003); United States v. Drayton, 536 U.S. 194, 203–04 (2002); Florida v. Bostick, 501 U.S. 429, 434, 439–40 (1991); Florida v. Royer, 460 U.S. 491, 497 (1983) (plurality opinion).

163. United States v. Caceres, 440 U.S. 741, 744 (1979) (“Neither the Constitution nor any Act of Congress requires that official approval be secured before conversations are overheard or recorded by Government agents with the consent of one of the conversants.”); United States v. White, 401 U.S. 745, 750–54 (1971); On Lee v. United States, 343 U.S. 747, 748–51 (1952); *see also* Pearson v. Callahan, 555 U.S. 223, 244–45 (2009); Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 566–70 (2009); Lininger, *supra* note 22, at 1248–49 (“An invited informer is a person who has express or tacit permission to be on the premises, even though the informer would have been denied permission if the informer’s true identity had been known. . . . The invited informer may enter a religious institution, wear a body wire, and carry a pinhole camera without ever ‘searching’ the premises. Only when the informer exceeds the scope of his invitation does a ‘search’ occur.” (footnotes omitted)); Tim Sobczak, Note, *The Consent-Once-Removed Doctrine: The Constitutionality of Passing Consent from an Informant to Law Enforcement*, 62 FLA. L. REV. 493, 509–518 (2010). For a comprehensive summary of the limitations of various challenges to government use of informants, *see* David A. Harris, *Law Enforcement and Intelligence Gathering in Muslim and Immigrant Communities After 9/11*, 34 N.Y.U. REV. L. & SOC. CHANGE 123, 141–58 (2010), and ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 45–81 (2009). For general standards related to the government’s ability to surveil Internet-related spaces, *see* the Stored Communications Act, 18 U.S.C. §§ 2701–2712 (2006) (requiring a warrant only for the contents of electronic communications held on a third party’s server that are less than 180 days old), and the Electronic Communications Privacy Act, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.); United States v. Warshak, 631 F.3d 266, 288 (6th Cir. 2010) (determining that, under the Fourth Amendment, law enforcement needs a warrant to access contents of emails); United States v. Forrester, 512 F.3d 500, 510 (9th Cir. 2008) (determining that there is no reasonable expectation of privacy in IP addresses). *See also* Theodoric Meyer & Peter Maass, *No Warrant, No Problem: How the Government Can Still Get Your Digital Data*, PROPUBLICA, Dec. 4, 2012, <http://www.propublica.org/special/no-warrant-no-problem-how-the-government-can-still-get-your-digital-data>.

164. NATAPOFF, *supra* note 163, at 85–86.

165. Richard H. McAdams, *The Political Economy of Entrapment*, 96 J. CRIM. L. & CRIMINOLOGY 107, 115–19 (2005); *see also* Jacobson v. United States, 503 U.S. 540, 548–49 (1992) (“Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.” (footnote omitted)); Mathews v. United States, 485 U.S. 58, 63 (1988); United States v. Russell, 411 U.S. 423, 429 (1973) (explaining that the entrapment defense focuses “on the intent or predisposition of the defendant to commit the crime”); Sherman v. United States, 356 U.S. 369, 372 (1958)

succeeded in the terrorism context, even on facts of outrageous government overreach.¹⁶⁶

Indictment or not, the government insulates its practices by relying on an arsenal of secrecy tools, to which courts largely defer.¹⁶⁷ In one recent case, members of a Southern California Muslim community sued the FBI after an FBI informant spoke publicly about spying on the community as part of an FBI project dubbed Operation Flex.¹⁶⁸ Relying on a classified declaration provided to the court *ex parte* and *in camera*, a federal district court sustained the Obama administration's first invocation of the state secrets doctrine in relation to a domestic program.¹⁶⁹ In shielding a much-criticized FBI surveillance operation,

("However, the fact that government agents merely afford opportunities or facilities for the commission of the offense does not constitute entrapment." (internal quotation marks omitted)); *United States v. Harvey*, 991 F.2d 981, 993 (2d Cir. 1993) ("Based upon Harvey's *prompt* response to the government's single invitation to him to purchase child pornography, the jury could rationally find that he possessed the requisite predisposition beyond a reasonable doubt.").

166. For a review of the entrapment defense as raised in terrorism prosecutions, see *Targeted and Entrapped*, *supra* note 58, at 15–18, 59–63 nn.101–26; *Terrorist Trial Report Card 2011*, *supra* note 59, at 28 ("Ten defendants who have been caught up in sting operations since 9-11 formally presented entrapment as a defense in court proceedings, but the defense has never been successful in a terrorism prosecution." (footnote omitted)). See also Said, *supra* note 58 (describing the legal standards for and ineffectiveness of the entrapment defense). Most recently, the entrapment defense failed in the closely watched prosecution of Mohamed Osman Mohamud, charged with attempting to place a bomb at a Portland Christmas tree-lighting ceremony. See, e.g., Bryan Denson, *Mohamed Mohamud Found Guilty in Portland Terrorism Trial*, OREGON LIVE (Jan. 31, 2013), http://www.oregonlive.com/portland/index.ssf/2013/01/mohamed_mohamud_found_guilty_i.html; Kari Huus, *Trial in Oregon's Alleged Christmas Bomb Plot to Turn on 'Entrapment'*, NBC NEWS (Jan. 10, 2013), http://usnews.nbcnews.com/_news/2013/01/10/16436454-trial-in-oregons-alleged-christmas-bomb-plot-to-turn-on-entrapment?lite; Joel Millman, *Stings to Get Close Look in Oregon Terror Case*, WALL ST. J. (Jan. 9, 2013, 8:30 PM), <http://online.wsj.com/article/SB10001424127887323706704578227740396234744.html>.

167. See, e.g., Joshua L. Dratel, *Section 4 of the Classified Information Procedures Act: The Growing Threat to the Adversary Process*, 53 WAYNE L. REV. 1041, 1041–42 (2007); Aziz Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887 (2012); Huq, *supra* note 23; Rovner & Theoharis, *supra* note 58, at 1386–91; Sam A. Schmidt & Joshua L. Dratel, *Turning the Tables: Using the Government's Secrecy and Security Arsenal for the Benefit of the Client in Terrorism Prosecutions*, 48 N.Y.L. SCH. L. REV. 69, 80–89 (2003); Steve Vladeck, *The New National Security Canon*, 61 AM. U. L. REV. 1295, 1329–30 (2012); Ellen C. Yaroshefsky, *The Slow Erosion of the Adversary System: Article III Courts, FISA, CIPA and Ethical Dilemmas*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 203, 203–04 (2006); see also Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013 (2008); cf. Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 227.

The most promising challenges may be to the NYPD's program, since there is no state secrets privilege available to the police department. See, e.g., Complaint, *Hassan v. City of New York*, No. 2:12-cv-03401-SDW-MCA (D.N.J. June 6, 2012), ECF No. 1.

168. *Fazaga v. Fed. Bureau of Investigation*, 885 F. Supp. 2d 978, 980–81 (C.D. Cal. 2012); *Fazaga v. Fed. Bureau of Investigation*, 884 F. Supp. 2d 1022, 1028 (C.D. Cal. 2012). Muslim communities have attempted through the courts, with limited success, to learn about the FBI's and NYPD's information-collection programs. *Fazaga* is just one example. See, e.g., *Islamic Shura Council of S. Cal. v. Fed. Bureau of Investigation*, 635 F.3d 1160, 1166 (9th Cir. 2011); Complaint, *Hassan v. City of New York*, No. 2:12-cv-03401-SDW-MCA (D.N.J. June 6, 2012).

169. Declaration of Att'y General Eric H. Holder, *Fazaga v. Fed. Bureau of Investigation*, No.

the court further immunized from review the intelligence-gathering practices discussed here.¹⁷⁰

Finally, there is a lack of political checks on these police practices, waged as they are against Muslims in the name of national security. While there have been some victories at the local level,¹⁷¹ neither Congress nor the administration seems interested in any meaningful fix.

B. Tactics

The FBI and NYPD deploy a number of policing techniques shaped around and responsive to a concern with radicalization and violent extremism: mapping, aggressive recruitment and deployment of informants, voluntary or pretextual interviews, community engagement, and Internet trolling. These tactics focus on gathering intelligence on the religious and political cultures of Muslim communities—and places where Muslims gather and such cultures may emerge. They also rely on participation from Muslim community members, stemming from and creating pressures that Part IV explores. The police tactics described here are reminiscent of earlier periods of our history, where our law enforcement agencies have spent tremendous resources monitoring and disrupting communities and ideologies identified as outside the mainstream.¹⁷² From World War II to the 1970s, the FBI conducted covert domestic operations aimed at groups considered to be antagonistic to the U.S. government, including Black nationalists, women's liberationists, and members of the Communist Party.¹⁷³ The Senate Church Committee found that the FBI relied on:

secret informants . . . wiretaps, microphone “bugs,” surreptitious mail

8:11-cv-00301-CJC, (C.D. Cal., Aug. 1, 2011), ECF No. 32-3; Hamed Aleaziz, *Want to Sue the FBI for Spying on Your Mosque? Sorry, That's Secret.*, MOTHER JONES (Aug. 8, 2011), <http://www.motherjones.com/politics/2011/08/state-secrets-fazaga-v-fbi>.

170. *Fazaga*, 885 F. Supp. 2d at 1042; see also Adam Serwer, *FBI Sting Lawsuit Blocked by “State Secrets” Doctrine*, MOTHER JONES (Aug. 15, 2012), <http://www.motherjones.com/mojo/2012/08/fbi-sting-lawsuit-blocked-state-secrets-doctrine>.

171. For example, for years Portland resisted participating in the local JTTF, since participation typically deputizes local law enforcement to function under the FBI Guidelines. Recently, Portland decided to join the JTTF, on the condition that local law enforcement would continue to be bound by local law. See, e.g., William Yardley, *Portland, Ore., Votes to Rejoin Task Force After Terrorism Scare*, N.Y. TIMES DAILY, May 1, 2011, at A31.

172. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50, 468, 498–500 (1985) (“[T]he overriding objective at all times should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically.”).

173. See OFFICE OF THE INSPECTOR GEN., FBI COMPLIANCE, *supra* note 133, at 33–34 (stating that the FBI investigated civil rights, antiwar, and women's rights movements); Lininger, *supra* note 22, at 1210–14 (discussing the FBI's aggressive investigations in the 1960s and 1970s, particularly of Dr. Martin Luther King, Jr. and the Southern Christian Leadership Conference); Berman, *supra* note 130, at 8–9 (listing both generic and specific abuses of power by the FBI).

opening, and break-ins, [sweeping] in vast amounts of information about the personal lives, views, and associations of American citizens [and] conducted a sophisticated vigilante operation aimed squarely at preventing the exercise of First Amendment rights of speech and association, on the theory that preventing the growth of dangerous groups and the propagation of dangerous ideas would protect the national security and deter violence.¹⁷⁴

That these tactics predate 9/11 underline the importance of studying their contemporary use against Muslim communities. Indeed, this policing paradigm portends expansive surveillance practices more broadly, in particular against groups the government identifies as nonconforming or threatening.¹⁷⁵

1. Mapping

Mapping has become a key tactic of preventative policing.¹⁷⁶ The FBI and NYPD have each engaged in different mapping activities of Muslim communities in the name of national security.¹⁷⁷ Places for religious and political discussion and gathering, and potential organizing, become important targets for intelligence gathering. The purpose of identifying these spaces seems to be twofold. First, by locating and then gathering intelligence on Muslim community spaces, law enforcement claims to be looking for spaces where individuals may radicalize.

174. SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES: INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS: BOOK II, S. REP. NO. 94-755, at 5 (1976); SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES: INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS: BOOK III, S. REP. NO. 94-755, at 3 (1976).

175. For coverage of policing of Occupy and antiwar activists from the last three years, see, for example, Greenberg, *New York: The Police and the Protesters*, *supra* note 31; Colin Moynihan, *F.B.I. Searches Antiwar Activists' Homes*, N.Y. TIMES, Sept. 25, 2010, at A10; Madeleine Baran, *Papers Shed Light on FBI's Anti-War Activist Probe*, MPR NEWS (May 18, 2011), <http://minnesota.publicradio.org/display/web/2011/05/18/fbi-documents-anti-war-activist-raids>.

176. The police practice of mapping jurisdictions predates 9/11: in 1919, a New York State legislative committee commissioned the NYPD and the New York State Police to prepare maps identifying neighborhoods where certain immigrants predominated, with a focus on organizations and individuals suspected as socialists, communists, and anarchists. *See, e.g.*, Fisher, *supra* note 22, at 622–25; Sam Roberts, *Police Demographics Unit Casts Shadows from Past*, N.Y. TIMES CITY ROOM (Jan. 30, 2012), <http://cityroom.blogs.nytimes.com/2012/01/03/police-demographics-unit-casts-shadows-from-past>.

177. Interestingly, the Los Angeles Police Department (LAPD) announced a plan for mapping L.A.'s Muslim communities in 2007. That plan was pulled back after the announcement drew public outcry. Richard Winton & Teresa Watanabe, *LAPD's Muslim Mapping Plan Killed*, L.A. TIMES, Nov. 15, 2007, at A1; Richard Winton et al., *LAPD to Build Data on Muslim Areas*, L.A. TIMES, Nov. 9, 2007, at A1; Richard Winton et al., *Outcry over Muslim Mapping*, L.A. TIMES, Nov. 10, 2007, at A1; *see also* Letter from Ranjana Natarajan et al. to Commander Michael P. Downing, Counter-Terrorism/Criminal Intelligence Bureau, L.A. Police Dep't (Nov. 8, 2007), *available at* http://makkah.files.wordpress.com/2007/11/muslim_leaders_to_lapd.pdf (expressing "grave concerns" about the LAPD's community-mapping plans).

Second, law enforcement claims to be looking for spaces where already radicalized individuals may seek cover to avoid detection from law enforcement.¹⁷⁸

By identifying and mapping spaces where Muslims gather, the FBI and NYPD are literally constituting vulnerable geographies. The act of mapping makes the communities subjects of surveillance and suspicion. The FBI's DIOG explicitly contemplates mapping as part of its ongoing "domain management" efforts.¹⁷⁹ The DIOG allows the FBI "to identify locations of concentrated ethnic communities in the field office's domain, if these locations will reasonably aid the analysis of potential threats and vulnerabilities, and, overall, assist domain awareness for the purpose of performing intelligence analysis."¹⁸⁰ The DIOG

178. Galati Deposition, *supra* note 123.

179. The concept of domain management is a bit obtuse, but seems to encapsulate an idea that, in order to be effective, the FBI needs to know the territory in which it operates. Memorandum from Detroit Fed. Bureau of Investigation Field Office 2 (July 6, 2009), available at <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM011609.pdf> ("Domain management is the systematic process by which the FBI develops cross-programmatic domain awareness and leverages its knowledge to enhance its ability to (i) proactively identify threats, vulnerabilities, and intelligence gaps; (ii) discover new opportunities for needed intelligence collection and prosecution; and (iii) [redacted] to provide advance warning of national security and criminal threats."); John S. Pistole, Deputy Dir., Fed. Bureau of Investigation, *Statement Before the Senate Select Committee on Intelligence, Washington, DC*, FBI (Jan. 25, 2007), <http://www.fbi.gov/news/testimony/implementing-the-intelligence-reform-and-terrorism-prevention-act> ("Domain management is simply about 'questions and choices': What do we need to know about our territory to protect the people in it? What do we know about the threats and vulnerabilities that worry us most? What don't we know about the threats and vulnerabilities that worry us most? What are we going to do to address our threats and vulnerabilities? . . . [Domain management is] designed to achieve a comprehensive understanding of a geographic or substantive area of responsibility."); see also Scott Shane & Lowell Bergman, *F.B.I. Struggling to Reinvent Itself to Fight Terror*, N.Y. TIMES, Oct. 6, 2006, <http://www.nytimes.com/2006/10/10/us/10fbi.html> (discussing the then-proposal for Domain Management by Philip Mudd—who had recently joined the FBI from the Central Intelligence Agency (CIA)—including internal challenges that the program was vague and implied "ethnic targeting").

180. The DIOG continues:

If, for example, intelligence reporting reveals that members of certain terrorist organizations live and operate primarily within a certain concentrated community of the same ethnicity, the location of that community is clearly valuable—and properly collectible—data. Similarly, the locations of ethnic-oriented businesses and other facilities may be collected if their locations will reasonably contribute to an awareness of threats and vulnerabilities, and intelligence collection opportunities. Also, members of some communities may be potential victims of civil rights crimes and, for this reason, community location may aid enforcement of civil rights laws. Information about such communities should not be collected, however, unless the communities are sufficiently concentrated and established so as to provide a reasonable potential for intelligence collection that would support FBI mission programs (e.g., where identified terrorist subjects from certain countries may relocate to blend in and avoid detection).

FED. BUREAU OF INVESTIGATION, *supra* note 139, at 4-13. It has been reported that after FBI Director Mueller's 2003 call for FBI field offices to map local mosques stirred outcry by civil libertarians, the FBI switched its rationale for the effort from monitoring terrorist activity to protecting Muslims from hate crimes. Lininger, *supra* note 22, at 1204 nn.7, 9. The prior DIOG allowed the FBI to collect information regarding ethnic and racial behaviors "reasonably believed to be associated with a particular criminal or terrorist element of an ethnic community" and to collect "the locations of ethnic-oriented businesses and other facilities" (likely including religious facilities

empowers FBI field offices to collect, map, and analyze racial and ethnic demographic information, including the location of businesses and other facilities servicing those demographic groups. Documents obtained by the American Civil Liberties Union (ACLU) through the Freedom of Information Act (FOIA) indicate local FBI offices have mapped the demographics of concentrated Muslim communities.¹⁸¹ The FBI data-mines commercially available information and government databases to generate these profiles.¹⁸² A 2009 Detroit field office memorandum opening a "domain assessment" provides as its basis that "[b]ecause Michigan has [a] large Middle-Eastern and Muslim population, it is prime territory for attempted radicalization and recruitment by these terrorist groups."¹⁸³

The NYPD has also mapped Muslim communities, through its Intelligence Division's Demographics Unit.¹⁸⁴ The NYPD created records on businesses

such as mosques) because "members of certain terrorist organizations live and operate primarily within a certain concentrated community of the same ethnicity." FED. BUREAU OF INVESTIGATION, *supra* note 141, at 32–33.

181. Importantly, the power is not limited to national security investigations, though the language of the 2008 DIOG shows particular concern with Muslims and national security, and the 2011 DIOG does too, though to a lesser extent. See *supra* text accompanying note 180. The documents also suggest the FBI maps other communities. *ACLU Eye on the FBI: The FBI is Engaged in Unconstitutional Racial Profiling and Racial "Mapping"*, ACLU (Oct. 20, 2011), http://www.aclu.org/files/assets/aclu_eye_on_the_fbi_alert_-_fbi_engaged_in_unconstitutional_racial_profiling_and_racial_mapping_0.pdf (summarizing documents obtained by FOIA requests, including FBI mapping of "Black Separatist" groups, Chinese, Russian, and Salvadorian communities).

182. Aaronson, *supra* note 113, at 33.

183. Memorandum from Detroit Fed. Bureau of Investigation Field Office, *supra* note 179. In 2003, prior to the rise of radicalization discourse, *Newsweek* reported that FBI Director Robert Mueller directed all FBI field offices to develop "demographic" profiles of their local areas, including a count of local mosques; this information would be used to "set specific numerical goals for counterterrorism investigations and secret national-security wiretaps in each region." Michael Isikoff, *Investigators: The FBI Says, Count the Mosques*, NEWSWEEK, Feb. 3, 2003, at 6; *Losing Liberty: The State of Freedom 10 Years After the Patriot Act*, MUSLIM ADVOCATES 10–12 (Oct. 2011) [hereinafter *Losing Liberty*], http://d3n8a8pro7vhmx.cloudfront.net/muslimadvocates/pages/47/attachments/original/Losing_Liberty_The_State_of_Freedom_10_Years_After_the_PATRIOT_Act.pdf?1330650785. "Each of the field offices received a six-page questionnaire asking for data about the number of mosques, as well as the number of flight schools, charity groups, dams, bridges, nuclear plants, and other facilities or organizations that the F.B.I. deemed relevant to its task of protecting national security." Lininger, *supra* note 22, at 1204–05 n.7. "After civil libertarians raised concerns about the burdens on religious freedom, the F.B.I. offered an entirely different rationale, claiming in public statements that mosque-counting was necessary to protect Muslims from hate crimes." *Id.* at 1205 n.9 (citing Marie Cocco, *Asbroft Makes Federal Cases Hither and Yon*, NEWSDAY, Feb. 27, 2003, at A31 ("Once word of the briefing leaked, the F.B.I. changed its rationale, saying it wanted to count mosques to safeguard them."); Larry Witham, *F.B.I. Defends Inclusion of Mosques in Crime Survey*, WASH. TIMES, Feb. 7, 2003, at A12 (quoting FBI official who said mosque-counting would help the FBI to protect Muslims from hate crimes).

184. The Demographics Unit was responsible for mapping "ethnic hot spots." See Apuzzo & Goldman, *NYPD Moves Covertly*, *supra* note 123; Goldman et al., *supra* note 124; *The Demographics Unit*, *supra* note 123, at 2. That Unit has since been renamed the Zone Assessment Unit, it seems, in 2010. Galati Deposition, *supra* note 123, at 16–17. A Commanding Officer of the Intelligence Division

owned and patronized by Muslims, Muslim student organizations, mosques, hookah bars, cafes, and schools all throughout New York City and into New Jersey.¹⁸⁵ The NYPD also created sets of “demographics” or “location” reports, organized by ethnicity and location, even outside New York City. For example, the AP published the NYPD’s *Demographics Report* on Newark, New Jersey, as well as its *Egyptian Locations of Interest Report*.¹⁸⁶ Similar sets of maps were released for Suffolk and Nassau Counties on Long Island, and for Moroccan, Albanian, and Syrian communities,¹⁸⁷ suggesting the department had reports for the broader New York City metropolitan area and for all its Muslim “ancestries of interest.”¹⁸⁸ Each of the reports included area maps marking Muslim religious schools, Muslim-owned and patronized businesses, Muslim houses of worship, and Muslim gathering places.¹⁸⁹ The reports also included more granular entries for particular institutions, noting the address, ownership, services provided, and some assessment of the constituency/clientele, often including their nationality, ethnicity, and religious orientation.¹⁹⁰ Where the NYPD created maps of Arab

admitted the program yielded no results in terms of terrorism prosecutions. *Id.* at 96–97; *see also* Elliott, *supra* note 123.

185. The NYPD “dispatched undercover officers, known as ‘rakers,’ into minority neighborhoods as part of a human mapping program, according to officials directly involved in the program. They’ve monitored daily life in bookstores, bars, cafes and nightclubs.” Apuzzo & Goldman, *NYPD Moves Covertly*, *supra* note 123; *see also* CYBER INTELLIGENCE UNIT, NYPD INTELLIGENCE DIV., WEEKLY MSA REPORT (2006), available at <http://hosted.ap.org/specials/interactives/documents/nypd-msa-report.pdf>; Apuzzo & Goldman, *Police Watched Devout Muslims*, *supra* note 123; Adam Goldman & Matt Apuzzo, *NYPD Docs: ‘Focus’ Scrutiny on Muslim Americans*, ASSOCIATED PRESS (Mar. 9, 2012), <http://www.ap.org/content/ap-in-the-news/2012/focus-scrutiny-on-muslim-americans>; Goldman et al., *supra* note 124; Chris Hawley & Matt Apuzzo, *NYPD Infiltration of Colleges Raises Privacy Fears*, ASSOCIATED PRESS (Oct. 11, 2011), <http://www.ap.org/content/ap-in-the-news/2011/nypd-infiltration-of-colleges-raises-privacy-fears>; Hawley, *supra* note 93.

186. DEMOGRAPHICS UNIT, EGYPTIAN LOCATIONS OF INTEREST REPORT, *supra* note 124; DEMOGRAPHICS UNIT, NYPD INTELLIGENCE DIV., NEWARK, NEW JERSEY DEMOGRAPHICS REPORT (2007), available at http://hosted.ap.org/specials/interactives/documents/nypd/nypd_newark.pdf.

187. DEMOGRAPHICS UNIT, NYPD INTELLIGENCE DIV., ALBANIAN LOCATIONS OF CONCERN REPORT, available at <http://hosted.ap.org/specials/interactives/documents/nypd/nypd-albania.pdf>; DEMOGRAPHICS UNIT, NYPD INTELLIGENCE DIV., MOROCCAN LOCATIONS, available at <http://wid.ap.org/documents/nypd-intel-morocco.pdf>; DEMOGRAPHICS UNIT, NYPD INTELLIGENCE DIV., NASSAU COUNTY DEMOGRAPHICS REPORT (2007), available at http://hosted.ap.org/specials/interactives/documents/nypd/nypd_nassau.pdf; NYPD INTELLIGENCE DIV., DEMOGRAPHICS UNIT, SUFFOLK COUNTY DEMOGRAPHIC REPORT (2006), available at http://hosted.ap.org/specials/interactives/documents/nypd/nypd_suffolk.pdf; DEMOGRAPHICS UNIT, SYRIAN LOCATIONS OF CONCERN REPORT, *supra* note 124; *see also Target of Surveillance*, http://hosted.ap.org/specials/interactives/documents/nypd/nypd_omar.pdf (last visited Apr. 15, 2013) (providing a map of a particular mosque in Paterson, New Jersey).

188. The nationality maps are consistent with a Demographics Unit PowerPoint enumerating twenty-eight “ancestries of interest”—focusing on countries with a majority or large Muslim population, and “American Black Muslim[s].” *The Demographics Unit*, *supra* note 123, at 5.

189. *See supra* text accompanying notes 184, 186.

190. *Id.*

neighborhoods that included Arab Jews and Christians, the maps explicitly excluded the non-Muslims from their purview.¹⁹¹

2. *Voluntary Interviews*¹⁹²

Government reports on radicalization mark the content of the imam’s Friday sermon and a neighbor’s trip to Mecca as relevant to determining the threat of radicalization in an individual or community. The need for such information has translated into the FBI’s and NYPD’s aggressive and regular use of “voluntary interviews” in Muslim communities.¹⁹³ Agents approach an individual at his home, work, or community institution to request an interview. Though the interview is technically voluntary,¹⁹⁴ like in other contexts where communities of color deal

191. See, e.g., DEMOGRAPHICS UNIT, SYRIAN LOCATIONS OF CONCERN REPORT, *supra* note 124 (“The Demographics Unit found that the Syrian community in NYC is divided into two parts, a Jewish Syrian and a Muslim Syrian community with the Jewish community being the larger of the two. This report will focus on the smaller Muslim community.”).

192. Lapp, *supra* note 22, at 578–80 (discussing two waves of “‘voluntary’ interviews” ordered shortly after 9/11 by Attorney General John Ashcroft); Maclin, *supra* note 130, at 478; Sinnar, *Questioning Law Enforcement*, *supra* note 22, at 46–56 (discussing the First Amendment implications of FBI “voluntary interviews” and Customs and Border Patrol interviews).

193. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-03-459, HOMELAND SECURITY: JUSTICE DEPARTMENT’S PROJECT TO INTERVIEW ALIENS AFTER SEPTEMBER 11, 2001, at 1 (2003), available at <http://www.investigativeproject.org/documents/testimony/115.pdf>; Thomas Ginsberg, *Officials Begin ‘Voluntary Interviews’ of Iraqi Nationals*, PHILA. INQUIRER, Mar. 21, 2003, at A15; Mary Beth Sheridan, *Interviews of Muslims to Broaden*, WASH. POST, July 17, 2004, at A1; Jodi Wilogren, *Michigan ‘Invites’ Men from Mideast to Be Interviewed*, N.Y. TIMES, Nov. 27, 2001, at A1; *ACLU Warns of Resurrecting ‘Voluntary’ Interview Program; Arab and Muslim Communities Should Not Be Targets of Racial Profiling*, ACLU (June 22, 2004), <http://www.aclu.org/national-security/aclu-warns-resurrecting-voluntary-interview-program-arab-and-muslim-communities-sh>; *Losing Liberty*, *supra* note 183, at 10–11; Shamas & Arastu, *supra* note 83, at 28–29. It is hard to know the volume or rate at which the FBI or NYPD conducts these interviews, but estimates of the FBI’s voluntary interviews are 200,000 to 500,000 interviews: “staggering numbers, if accurate, given estimates that adult Muslims in the United States number fewer than two million.” Sinnar, *Questioning Law Enforcement*, *supra* note 22, at 47. “[T]he FBI continues to interview U.S. Muslims, in waves and individually, in order to investigate specific terrorist threats, gather general intelligence about communities, follow up on tips of suspicious activity called in from the public, or solicit people to act as undercover informants.” *Id.* at 47–48 (footnotes omitted); see, e.g., *Racial Profiling and the Use of Suspect Classifications in Law Enforcement Policy: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 62–63 (2010) [hereinafter *Racial Profiling and the Use of Suspect Classifications*] (statement of Farhana Khera, President & Executive Director, Muslim Advocates); Petra Bartosiewicz, *The FBI Stings Muslims*, NATION, July 2–9, 2012, at 17 [hereinafter *Bartosiewicz, The FBI Stings Muslims*]; Phillip O’Connor, *St. Louis-Area Somalis Feel Intimidated by FBI*, ST. LOUIS POST-DISPATCH, Feb. 3, 2011, http://www.stltoday.com/news/local/metro/st-louis-area-somalis-feel-intimidated-by-fbi/article_45d06ac1-c3ea-5dcc-9ffc-5896a7e1598c.html; Turner, *supra* note 22, at 69 (documenting “reports of law enforcement targeting of Muslim donors in Texas, Michigan, New York, Virginia, Florida, Louisiana, California, Minnesota, Missouri, and Wisconsin for ‘voluntary’ interviews”).

194. With regard to coercion, the tactics sometimes “virtually compel[] compliance.” Sinnar, *Questioning Law Enforcement*, *supra* note 22, at 50. Shirin Sinnar documents reports of the FBI approaching people at work, where the ability to refuse without drawing more attention to the FBI visit at work is limited to nonexistent; FBI agents pressuring individuals to interview immediately, despite requests for counsel; late-night knocks on doors; and misrepresented purposes and threats in

with law enforcement, this technicality escapes most Muslims when they are confronted with law enforcement contact.¹⁹⁵ Agents often pressure and harass individuals into accepting the interviews, making repeated visits at home and at work, threatening immigration consequences or placement on the No Fly List.¹⁹⁶ These interviews seem to serve at least two overlapping purposes. First, the interviews allow the government to gather as much information as possible on Muslim communities without much transparency or oversight.¹⁹⁷ Second, the interviews serve as a way to seek out and cultivate potential informants—through whom more information can be gathered.¹⁹⁸

The FBI's approach to "voluntary interviews" is better documented than the NYPD's.¹⁹⁹ FBI agents regularly ask about religious and political opinions and activities—posing questions such as what is your "honest opinion of the United States"²⁰⁰ and inquiring about travel.²⁰¹ The selection criterion for interviews is

order to induce interviews. *Id.* at 50–51. In an indeterminate number of cases, the FBI engaged in even more overt intimidation to compel people to agree to ostensibly voluntary interviews. For instance, after the arrests of a Lodi, California, father and son on terrorism charges, the FBI aggressively sought information from other Pakistani Muslims: agents stationed their cars in front of homes, followed people for days, circled a mosque hosting a "know your rights" presentation where individuals they sought to interview had gathered, called individuals as many as ten times a day, and warned people that they would be "bad mouthed" at work if they did not cooperate. *Id.* (footnote omitted). "These measures conveyed a broader impression that the FBI would ratchet up pressure on those who declined an interview request." *Id.*

195. In fact, many Muslims approached feel they should go out of their way to comply with such requests, to demonstrate they have "nothing to hide." *See Aziz, supra* note 5, at 442 ("Many well-intentioned Muslims accept the FBI's requests to speak with them (often without a lawyer) only to find themselves prosecuted for making false statements on issues unrelated to terrorism."). African American Muslim communities tend to be more familiar with the idea that refusing the police is a possible and often sensible option.

196. Bartosiewicz, *The FBI Stings Muslims, supra* note 193; Aaronson, *supra* note 113, at 32, 36–37; *see supra* note 194.

197. *See Sinnar, Questioning Law Enforcement, supra* note 22, at 41–45.

198. Bartosiewicz, *The FBI Stings Muslims, supra* note 193.

199. *See Maclin, supra* note 130, at 493–510; Sinnar, *Questioning Law Enforcement, supra* note 22, at 46–47, 50–55; *Under the Radar, supra* note 22, at 4–5, 9, 14; *Losing Liberty, supra* note 183, at 10–11; South Asian Americans Leading Together et al., *In Our Own Words: Narratives of South Asian New Yorkers Affected by Racial and Religious Profiling*, SAALT 15 (Mar. 2012), <http://saalt.org/wp-content/uploads/2012/09/In-Our-Own-Words-Narratives-of-South-Asian-New-Yorkers-Affected-by-Racial-and-Religious-Profiling.pdf>.

200. Memorandum from L.A. Fed. Bureau of Investigation Field Office (May 28, 2003), available at <http://www.aclu.org/files/fbimappingfoia/20120217/ACLURM013019.pdf> (memorializing what seems to be a voluntary interview conducted in response to a lead where there is nothing on the face of the document to suggest any criminal predicate). Customs and Border Patrol asks similar questions of Muslims relating to First Amendment activity. SINNAR ET AL., RETURNING HOME, *supra* note 22, at 11–16; Muslim Advocates, *supra* note 22, at 6–9.

201. Sinnar, *Questioning Law Enforcement, supra* note 22, at 53–54; South Asian Americans Leading Together et al., *supra* note 199, at 20 (showing that twenty-five percent of respondents who provided details on interactions with law enforcement reported being subject to secondary screening by TSA agents more than half of the time they traveled). Sinnar argues the nature of the interview

based in part on ethnic, religious, or First Amendment profiling.²⁰² The NYPD seems to have similar practices, asking "about articles posted online and downloaded content"²⁰³ and about "opinions regarding the Arab Spring."²⁰⁴ These interviews are also used as a way to cultivate informants who will then be asked to spy on their communities and proactively share that information with law enforcement.²⁰⁵

3. Informants²⁰⁶

Radicalization's emphasis on monitoring Muslim communities and spaces has also affected the FBI's and NYPD's use of informants. Informants are standard fare in the criminal system. The problems of police coercion in recruiting and setting terms for the relationship, and secrecy and lack of accountability, apply across the board.²⁰⁷ In the counterterrorism context, however, informants are

sends the signal that activity such as traveling triggers government scrutiny or is somehow disfavored by the government:

Unlike covert investigative methods such as electronic surveillance, an interview is a highly personal encounter between an individual and a law enforcement officer who embodies the full force of the law—the power to arrest and imprison, to detain and deport, or to exclude altogether from the country. . . . Thus, the exchange that occurs in an interview signals the U.S. government's beliefs as to what, or whom, it considers threatening.

Sinnar, *Questioning Law Enforcement*, *supra* note 22, at 54. There are traces of the FBI's interest in travel, at least to Mecca for Hajj, in documents obtained by the American Civil Liberties Union through FOIA. Memorandum from S.F. Fed. Bureau of Investigation Field Office (Dec. 9, 2004), *available at* <http://www.aclu.org/files/fbimappingfoia/20120302/ACLURM017866.pdf> (memorializing mosque outreach conversation, including details about an upcoming trip to Mecca for Hajj); *see also* Eric Lichtblau, *Thousands from Muslim Nations Were Investigated Before '04 Election, Data Show*, N.Y. TIMES, Oct. 31, 2008, at A17 (reporting that immigration agents asked Muslim foreign nationals what they thought of America, whether violence was preached at their mosques, and whether they had access to biological or chemical weapons).

202. Sinnar, *Questioning Law Enforcement*, *supra* note 22, at 54.

203. Kassem, *supra* note 125.

204. *Id.*; *see also* South Asian Americans Leading Together et al., *supra* note 199, at 29–32.

205. Bartosiewicz, *The FBI Stings Muslims*, *supra* note 193.

206. Informants have been long critiqued for their role in the criminal justice system. NATAPOFF, *supra* note 163; Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 658, 665–67 (2004); Amanda J. Schreiber, Note, *Dealing with the Devil: An Examination of the FBI's Troubled Relationship with Its Confidential Informants*, 34 COLUM. J.L. & SOC. PROBS. 301, 302–03 (2001); *see also* Sarah Stillman, *The Throwaways*, NEW YORKER, Sept. 3, 2012, at 38, 40 (describing the sometimes deathly consequences of law enforcement's unregulated use of informants).

207. Law enforcement draws on economic, immigration, and criminal vulnerabilities to recruit informants. *See, e.g.*, Natapoff, *supra* note 206, at 645 ("The use of criminal informants in the U.S. justice system has become a flourishing socio-legal institution unto itself. Characterized by secrecy, unfettered law enforcement discretion, and informal negotiations with criminal suspects, the informant institution both embodies and exacerbates some of the most problematic features of the criminal justice process." (footnote omitted)); Aaronson, *supra* note 113, at 36. With regard to informants' vulnerability, Alexandra Natapoff explains:

When an officer first confronts a potential informant, prior to an arrest or formal criminal charge, there are very few legal constraints. For example, a suspect's right to receive Miranda warnings is triggered only if he is in custody, so if the suspect has not yet been

focused on assessing and fomenting radicalization in spaces where Muslims may gather.²⁰⁸ From FOIA requests to investigative journalism to accounts from current and former informants (including as government witnesses), the FBI's and NYPD's widespread use of informants in Muslim communities and community spaces is well established.²⁰⁹ There is reason to believe that there are informants at each and every mosque in the United States.²¹⁰ Informants are deployed broadly among Muslim student groups, and Muslim student social networks, as well.²¹¹

taken into custody or arrested, his unwarned statements to police can potentially be used against him. Similarly the Sixth Amendment right to counsel applies only once a suspect has been formally charged with a crime, so police can legally—and often do—negotiate directly with uncharged suspects without a lawyer. As a result, police have wide latitude to confront, threaten, and negotiate with potential informants without the presence of defense counsel or other witnesses.

NATAPOFF, *supra* note 163, at 46–49 (footnotes omitted). With regard to their utility as investigative tools:

Because . . . constitutional constraints generally apply only to official actors, a private individual acting as an informant can obtain information that the government could not easily obtain on its own. Criminal informants are thus potent investigative tools, not only because they can be effective information gatherers but also because they are exempt from many of the rules that otherwise constrain official investigative techniques.

Id. at 55–57.

208. The changes to the governing standards for the FBI and NYPD to collect intelligence will likely mean changed approaches to informant deployment even outside of the counterterrorism context.

209. See, e.g., Aaronson, *supra* note 113; Bartosiewicz, *The FBI Stings Muslims*, *supra* note 193, at 18; Jerry Markon, *Mosque Infiltration Feeds Muslims' Distrust of FBI*, WASH. POST, Dec. 5, 2010, at A1; Council on American-Islamic Relations, Greater L.A. Area Chapter, *The FBI's Use of Informants, Recruitment, and Intimidation Within Muslim Communities* (Mar. 26, 2009) (on file with author); *Targeted and Entrapped*, *supra* note 58, at 9; Patel, *supra* note 12, at 21–23; see also *Terrorists for the FBI*, MOTHER JONES, <http://www.motherjones.com/special-reports/2011/08/fbi-terrorist-informants> (last visited Apr. 18, 2013) (detailing findings and conclusions of investigative report into over 500 domestic terrorist prosecutions). Reports by the Center for Law and Security suggest an increased reliance on informants in terrorism prosecutions, which further suggests an overall increased reliance on informants in the counterterrorism context. See *Terrorist Trial Report Card 2011*, *supra* note 59, at 43–46.

210. Indeed, the NYPD monitored all mosques within one hundred miles of New York City. Apuzzo & Goldman, *NYPD Moves Covertly*, *supra* note 123; see also Shelby Grad, *FBI Plans to Continue Mosque Monitoring Despite Concerns in Orange County*, L.A. TIMES L.A. NOW (June 9, 2009), <http://latimesblogs.latimes.com/lanow/2009/06/fbi-plans-to-continue-mosque-monitoring-despite-concerns-in-orange-county.html> (“The FBI plans to continue using informants to monitor mosques in America despite strong criticism over such programs leveled this year by Muslim American leaders in Orange County.”).

211. See, e.g., Hawley & Apuzzo, *supra* note 185; Hawley, *supra* note 93; Memorandum from Sacramento FBI Field Office (Nov. 10, 2009) [hereinafter Memorandum 1], available at <http://www.acu.org/files/fbimappingfoia/20111110/ACLURM007341.pdf> (documenting outreach to the Saudi Student Association at California State University Chico); Memorandum from S.F. Fed. Bureau of Investigation Field Office (Jan. 17, 2006) [hereinafter Memorandum 2], available at <http://www.acu.org/files/fbimappingfoia/20120217/ACLURM017916.pdf> (documenting “mosque outreach” attempts with Muslim Student Associations at local colleges); Memorandum from S.F. Fed. Bureau of Investigation Field Office (Sept. 27, 2005) [hereinafter Memorandum 3], available at <http://www.acu.org/files/fbimappingfoia/20120217/ACLURM017906.pdf> (same); Memorandum from S.F. Fed. Bureau of Investigation Field Office (Oct. 28, 2004) [hereinafter Memorandum 4], available at <http://www.acu.org/files/fbimappingfoia/20120217/ACLURM017906.pdf>

Informants may serve as listening posts, gathering information about religious and political cultures of Muslim communities.²¹² Under the Guidelines, it is permissible for the FBI to instruct informants to gather information in the broadest possible sense, without any nexus to suspected criminal activity.²¹³ Informants have been tasked with recording license plates, ascertaining religious and political opinions, attending mosque, and joining student groups in their activities.²¹⁴ The NYPD used informants dubbed "mosque crawlers," who were tasked with documenting contents of sermons and lists of those in attendance, absent any concern with any crime.²¹⁵ As with mapping and voluntary interviews, the gathering of all-encompassing information becomes imperative when a concern with radicalization defines your policing, and deploying as many informants as possible serves that end.

Informants also function as agent provocateurs, who test community and individual susceptibility to radicalization.²¹⁶ In a number of prominent investigations over the last few years, trial testimony and statements by informants have made clear that the FBI and NYPD send informants into Muslim communities to encourage and solicit political dissent to American foreign policy and to disseminate and observe the resonance of the view that Islam requires

www.aclu.org/files/fbimappingfoia/20120217/ACLURM017858.pdf (same); see also Shamas & Arastu, *supra* note 83, at 27.

212. See, e.g., Shan Li, *FBI Violated 1st Amendment Rights of Muslims, Suit Alleges*, L.A. TIMES, Feb. 24, 2011, at AA3; Kiran Khalid, *Iowa Muslim Leader: Law Enforcement Betrayed Us*, CNN (Feb. 3, 2012, 8:48 PM), <http://inamerica.blogs.cnn.com/2012/02/03/iowa-muslim-leader-law-enforcement-betrayed-us>. The distinction between listening post-styled informants and agent provocateurs is likely not always clear. Craig Monteilh, for example, was directed to monitor opinions, and to draw out reactions to suicide bombing. Li, *supra*. He was also encouraged to invite men from various mosques to work out with him at local gyms, where the FBI would then record conversations. Scott Glover, *Informant Describes Work for FBI*, L.A. TIMES, Apr. 28, 2009, at A3.

213. See, e.g., BJELOPERA & RANDOL, *supra* note 136 (noting the Guidelines and DIOGs provide "the FBI more leeway to engage in proactive investigative work that does not depend on criminal predication (i.e., a nexus to past or future criminal activity)"); Li, *supra* note 212; see also Complaint, *Fazaga v. Fed. Bureau of Investigation*, No. 8:11-cv-00301-CJC (C.D. Cal. Feb. 22, 2011), ECF No. 1.

214. See, e.g., Li, *supra* note 212; Paul Harris, *The Ex-FBI Informant with a Change of Heart: There Is No Real Hunt. It's Fixed.*, GUARDIAN (Mar. 20, 2012), <http://www.guardian.co.uk/world/2012/mar/20/fbi-informant>; Khalid, *supra* note 212. The FBI has even asked American Muslims to go abroad and collect intelligence as informants. Bartosiewicz, *The FBI Stings Muslims*, *supra* note 193 (referring to cases of American Muslim men asked by the FBI to go to Afghanistan to collect intelligence). Refusal can mean placement on the No Fly List and immigration consequences. *Id.*; Aaronson, *supra* note 113, at 32, 36–37.

215. Apuzzo & Goldman, *NYPD Moves Covertly*, *supra* note 123; Goldman & Apuzzo, *supra* note 126.

216. See generally Thomas Cincotta, *From Movements to Mosques, Informants Endanger Democracy*, PUB. EYE, Summer 2009, at 1, 11–17 ("By and large, evidence shows informants do not merely observe and collect data. They make things happen."). There is also a concern that the informant-induced plots justify in circular fashion the FBI's counterterrorism work. See Bartosiewicz, *To Catch a Terrorist*, *supra* note 5.

Muslims to take violent action against the United States.²¹⁷ In a number of cases, the FBI and NYPD have sent informants into mosques and other community institutions not only to gather information on the communities but also to see who responds, and how, when the informants speak of “jihad,” suicide bombing, American foreign policy, Osama bin Laden, and so on. Informants have openly espoused support for terrorism in mosques and other Muslim community institutions, and have taken to aggressively criticizing American foreign policy, while promoting the idea that Muslims have a duty to harm the United States. Informants have also emphasized the need to act on such a duty, to the point of pushing for, designing, and providing the means for a terrorist attack.²¹⁸

In espousing political dissent from American foreign policies and religious views that sanction violence against the United States, the informants seem most directly concerned with identifying individuals who agree with (or could be persuaded to agree with) those views. Indeed, while they provide something in the way of a caveat, Silber and Bhatt’s report for the NYPD suggests that radicalization works like a conveyer belt:²¹⁹ one stage leads to the next to the next and the next.²²⁰ If it is just a matter of eventuality between being open to or adopting particular political and religious views, and committing a violent terrorist

217. See, e.g., Aaronson, *supra* note 113, *passim*; Hamid Aleaziz, *Wondering if Your “Jihadist” Friend Is with the FBI*, MOTHER JONES (Mar. 20, 2012), <http://www.motherjones.com/mojo/2012/03/shahed-hussain-khalifah-al-akili/>; Wahajat Ali, *Time for FBI to Stop Spying on American Muslims*, GUARDIAN (Dec. 7, 2010), <http://www.guardian.co.uk/commentisfree/cifamerica/2010/dec/07/islam-terrorism>; Apuzzo & Goldman, *Police Watched Devout Muslims*, *supra* note 123 (describing how the NYPD used informants and plainclothes officers to investigate mosques and Muslim businesses “for reasons that included endorsing conservative religious views or having devout customers”); Goldman & Apuzzo, *supra* note 126; Greenberg, *New York: The Police and the Protesters*, *supra* note 31; Harris, *supra* note 214; Graham Rayman, *The Alarming Record of the F.B.I.’s Informant in the Bronx Bomb Plot*, VILLAGE VOICE (July 8, 2009), <http://www.villagevoice.com/2009-07-08/news/the-alarming-record-of-the-f-b-i-s-informant-in-the-bronx-bomb-plot>; see also KUMAR, *supra* note 110, at 124; Said, *The Terrorist Informant*, *supra* note 58, at 715–32; Bartosiewicz, *To Catch a Terrorist*, *supra* note 5, *passim*; Shulman, *supra* note 110; *Targeted and Entrapped*, *supra* note 58, at 41–45; Elliot, *supra* note 123; *Entrapment or Foiling Terror?*, *supra* note 110; *Terrorist Trial Report Card 2011*, *supra* note 59, at 26.

218. The informants seem to focus their facilitation efforts on individuals open to their viewpoints and vulnerable to their authority and/or resources. See, e.g., Harris, *supra* note 163, at 146 (detailing how an FBI informant built a case against Shahawar Siraj, described as “a suggestible young man” and a “dimwit,” by making “persistent efforts to arouse anti-American feelings in Siraj”); Rayman, *supra* note 2177 (“[The FBI’s informant] initiated the conversations, introduced the idea of a terror plot, and delivered the money, equipment, and resources to back it up. He quickly became known as the guy with ready cash who was interested in the lives of others and was quick to provide aid and comfort.”); Said, *The Terrorist Informant*, *supra* note 58, at 715–38; *Targeted and Entrapped*, *supra* note 58; see also Rick Perlstein, *How FBI Entrapment is Inventing Terrorists—and Letting Bad Guys Off the Hook*, ROLLING STONE (May 15, 2012), <http://www.rollingstone.com/politics/blogs/national-affairs/how-fbi-entrapment-is-inventing-terrorists-and-letting-bad-guys-off-the-hook-20120515>.

219. SILBER & BHATT, *supra* note 18, at 10 (referring to the radicalization process as a funnel and then suggesting “[e]ntering the process does not mean one will . . . become a terrorist”).

220. *Id.* at 77; see also Patel, *supra* note 12, at 3 (“[T]he FBI, along with many state and local law enforcement agencies, have followed the lead of the [NYPD] in affirmatively embracing the ‘religious conveyer belt’ model.”).

act, it would be within law enforcement's interests to hasten the process in a controlled setting, rather than to wait for the inevitable. That might explain the growing number of agent provocateur-driven sting operations,²²¹ "premised on the idea that individuals who would participate in schemes initiated by FBI informants might otherwise have been approached by an actual terrorist recruiter."²²²

4. Internet Monitoring

Consistent with governmental focus on the Internet as a hub for terrorist activity,²²³ the FBI and NYPD monitor Internet activity as part of their counterterrorism efforts.²²⁴ This includes monitoring what people consume and post on the Internet about their opinions and activities via email listservs, blogs, websites, and chatrooms.²²⁵ These efforts seem to focus on those who download content by particular Muslim scholars, like the late Anwar Al-Aulaqi; post on Muslim-identified websites or participate in Muslim-identified online chat and

221. The most recent *Terrorist Trial Report Card*, published by the Center for Law and Security, found:

The rise in indictments over the past two or three years is significantly affected by FBI informant operations. Since 2009, nearly 50% of terrorism cases have involved informants At least 15% of those informant cases can be considered sting operations. Since the early years of America's war on terror, the FBI has developed a strategy of preventive law enforcement in which agents seek to identify not only individuals engaged in terrorist activity, but those who, if approached with strong enough incentives, will agree to participate in terrorism. In 2009 and 2010, ten of these cases, which can take years to develop, came to fruition.

Terrorist Trial Report Card 2011, *supra* note 59, at 4. The report goes on to note that the "spike in 'homegrown' terrorism relies statistically on . . . those targeted by FBI stings." *Id.*

222. *Id.* at 5.

223. See, e.g., *King Hearing II*, *supra* note 40, at 15–16 (statement of Paul N. Stockton, Assistant Secretary of Defense for Homeland Defense and America's Security Affairs, Office of Under Secretary of Defense for Policy, Department of Defense); *Prison Radicalization*, *supra* note 40; S. COMM. ON HOMELAND SEC., ONLINE ISLAMIST RADICALIZATION, *supra* note 40, at 50 (testimony of Gregory B. Saathoff, Executive Director, Critical Incident Analysis Group, University of Virginia School of Medicine); S. COMM. ON HOMELAND SEC., VIOLENT ISLAMIST EXTREMISM, *supra* note 40.

224. See, e.g., *Racial Profiling and the Use of Suspect Classifications*, *supra* note 193, at 67 (statement of Farhana Khera, President & Executive Director, Muslim Advocates); Kassem, *supra* note 125. Though the Internet has been stigmatized as a terrorist haven, Steven Morrison persuasively argues that that online communication is "no more dangerous than its real-world counterpart and may actually be safer when it comes to terror recruitment." Steven R. Morrison, *Terrorism Online: Is Speech the Same as It Ever Was?*, 44 CREIGHTON L. REV. 963, 963 (2011); see also Dawinder S. Sidhu, *The Chilling Effect of Government Surveillance Programs on the Use of the Internet by Muslim-Americans*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 375, 389–93 (2007) (reporting the results of a survey about Internet usage showing that American Muslims "overwhelmingly believe" that post-9/11 the government monitors their "general and online activities," and that "a segment of the Muslim American population . . . has modified its Internet usage").

225. Kassem, *supra* note 125; Hawley & Apuzzo, *supra* note 185; Shamas & Arastu, *supra* note 83, at 40; see also *Racial Profiling and the Use of Suspect Classifications*, *supra* note 193 (statement of Farhana Khera, President & Executive Director, Muslim Advocates) (stating that FBI monitoring of Internet use chills First Amendment protected activities for Muslim Americans).

discussion forums focused on religious discourse and U.S. foreign policy; and watch “jihadi” videos.²²⁶ Muslim social networks are also monitored in this way.²²⁷ Like other methods of policing radicalization, Internet monitoring feeds into the other techniques; so, for example, Internet activity seems to trigger voluntary interviews and other scrutiny.²²⁸

5. Community Engagement

Community engagement has become a cornerstone of national security policing, and specifically to counter-radicalization efforts.²²⁹ These initiatives are premised on the idea that Muslim communities can serve as key partners in counterterrorism work.²³⁰ As with other community policing initiatives, community engagement programs acknowledge the historical lack of meaningful relationships between police and Muslim communities and emphasize the need for police to have strong, trusting relationships with Muslims.

Both the FBI’s and NYPD’s community engagement programs serve to gather intelligence on demographics, opinions, religious practices, and community activities. Far from signaling a desire for trust-building, then, these community

226. See FBI COUNTERTERRORISM DIV., *supra* note 34, at 7 (“Internet Chat Rooms . . . [are a] virtual arena [that allow] vulnerable individuals from around the world to discuss Islamic doctrine. Radicalization is encouraged both directly and indirectly on the Internet: indirectly through extremist propaganda (inflammatory speeches, videos, etc.) and directly through chat rooms and bulletin boards.”); SILBER & BHATT, *supra* note 18, at 22 (“The Internet, with its thousands of extremist websites and chat-rooms, is a virtual incubator of its own. In fact, many of the extremists began their radical conversion while researching or just surfing in the cyber world.”); see also Kassem, *supra* note 125 (discussing NYPD e-mail monitoring of a student group at a state university).

227. Shamas & Arastu, *supra* note 83, at 27 (documenting an instance where NYPD offered a college student “400 or 500 dollars a month” to “sit[] in front of [his] computer and look at what people are doing”).

228. Kassem, *supra* note 125.

229. See Amna Akbar, *National Security’s Broken Windows*, 62 UCLA L. REV. (forthcoming 2015); BJELOPERA, *supra* note 8, at 5 (“Following the 9/11 attacks, law enforcement agencies came to realize the prevention of terrorist attacks would require the cooperation and assistance of American Muslim, Arab, and Sikh communities.”); Rascoff, *Establishing Official Islam?*, *supra* note 8, at 153 (“Domestic counter-radicalization efforts have increasingly been predicated on the idea that engagement—outreach to certain Muslim communities in order to make Official Islam a social reality—can play a crucial role in promoting domestic security. . . . The precise nature of outreach programs of this sort varies within agencies and from one agency to the next.”); Aziz, *supra* note 23, at 456–59. U.S. Attorneys are part of these efforts. See BJELOPERA, *supra* note 8, at 6–7.

230. Aziz Huq, Stephen Schulhofer, and Tom Tyler have done an important series of studies looking at cooperation with law enforcement, including in the national security context, which identify procedural justice, or the perception of it, as the most reliable predictor of the public’s cooperation with law enforcement. Aziz Z. Huq et al., *Mechanisms for Eliciting Cooperation in Counterterrorism Policing: Evidence from the United Kingdom*, 8 J. EMPIRICAL LEGAL STUD. 728 (2011); Aziz Z. Huq et al., *Why Does the Public Cooperate with Law Enforcement?: The Influence of the Purposes and Targets of Policing*, 17 PSYCHOL. PUB. POLY & L. 419 (2011); Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335 (2011); Tom R. Tyler et al., *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC’Y REV. 365 (2010).

engagement programs feed into radicalization policing.²³¹ FBI documents reveal that: FBI agents who have attended “community events under the guise of community outreach are recording the content of presentations given at the events; the names, identifying information, and opinions of attendees; and information about the community groups, the names and positions of leaders, and the racial, ethnic and national origin of members.”²³² FBI agents would then share that information with other government agencies.²³³ For example, memorandums from the San Francisco Field Office—prepared by FBI agents who attended community *iftar*²³⁴ dinners as part of their mosque outreach program—document names of attendees, and conversations with and presentations by those in attendance; memorandums also suggest follow up surveillance through Internet searches.²³⁵ Documents generated by FBI community outreach efforts indicate

231. The NYPD seems to understand this, at least in theory. Falkenrath, *supra* note 31 (“[T]he counterterrorism deputy commissioner and the intelligence deputy commissioner are not responsible for community outreach. In part, we don’t want to stigmatize the interaction with these communities, and if the counterterrorism deputy commissioner or the intelligence go to a community meeting or a mosque, it sort of sends the message that the reason we’re here is we think there’s a threat.”).

232. *Ending Racial Profiling in America: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 22 (2012) (statement of Anthony D. Romero, Executive Director, American Civil Liberties Union).

233. *ACLU Eye on the FBI: The FBI Is Using the Guise of “Community Outreach” to Collect and Illegally Store Intelligence Information on Americans’ Political and Religious Beliefs*, ACLU 1 (Dec. 1, 2011), http://www.aclu.org/files/assets/aclu_eye_on_the_fbi_alert_-_community_outreach_as_intelligence_gathering_0.pdf [hereinafter *Eye on the FBI* (Dec. 1, 2011)] (referencing a number of FBI documents obtained through FOIA); *ACLU Eye on the FBI: The San Francisco FBI Conducted a Years-Long Mosque Outreach Program That Collected and Illegally Stored Intelligence About American Muslims’ First Amendment-Protected Religious Beliefs and Practices*, ACLU (Mar. 27, 2012), http://www.aclu.org/files/assets/aclu_eye_on_the_fbi_-_mosque_outreach_03272012_0_0.pdf [hereinafter *Eye on the FBI* (Mar. 27, 2012)]. “Under this program, intelligence agents either make their own community outreach presentations . . . or accompany FBI community outreach specialists to meetings to collect intelligence . . .” *Eye on the FBI* (Dec. 1, 2011), *supra*, at 2–3. “[T]he FBI categorized information about Muslims’ First Amendment-protected and other entirely innocuous activities, as well as mosque locations, as ‘positive intelligence’ [uploaded and retained in FBI intelligence files] and disseminated it to agencies outside the FBI.” *Eye on the FBI* (Mar. 27, 2012), *supra*, at 1; see also Memorandum from S.F. Fed. Bureau of Investigation Field Office (Mar. 2, 2011), available at <http://www.aclu.org/files/fbimappingfoia/20111110/ACLURM011275.pdf> (memorializing community outreach conversation with individual, including conversation regarding opinions on U.S. involvement in Iraq and Afghanistan).

234. *Iftar* is the meal that breaks the daily fast Muslims observe during the holy month of Ramadan.

235. Memorandum from S.F. Fed. Bureau of Investigation Field Office (Sept. 25, 2008), available at <http://www.aclu.org/files/fbimappingfoia/20111110/ACLURM013443.pdf>; Memorandum from S.F. Fed. Bureau of Investigation Field Office, (Oct. 10, 2007), available at <http://www.aclu.org/files/fbimappingfoia/20111110/ACLURM013438.pdf>; *Eye on the FBI* (Dec. 1, 2011), *supra* note 2333, at 2; see also, e.g., Memorandum from S.F. Fed. Bureau of Investigation Field Office (Mar. 3, 2008) [hereinafter Memorandum 5], available at <http://www.aclu.org/files/fbimappingfoia/20111110/ACLURM011160.pdf> (documenting community outreach to a Pakistani community organization, including organization activities, and identities of those involved); Memorandum from S.F. Fed. Bureau of Investigation Field Office (Feb. 21, 2008), available at <http://www.aclu.org/files/fbimappingfoia/20120302/ACLURM017992.pdf> (documenting a conversation conducted as part of mosque outreach; after the call, the agent seems to have run the individual’s name through various

they were “disseminated outside [the] FBI”²³⁶ and are marked “positive intelligence.”²³⁷

Similarly, the NYPD has monitored its closest community partners.²³⁸ The NYPD Demographics Unit listed as part of its activities, presumably to gather intelligence, “[p]articipat[ion] in social activities,” including “[c]ricket matches.”²³⁹ Importantly, cricket matches are one of the NYPD Community Affairs Bureau’s activities in New York’s Muslim communities; the overlap in programming suggests collaboration between intelligence gathering and community policing.²⁴⁰

IV. RADICAL HARMS

What are the broader implications of law enforcement’s radicalization and counter-radicalization narratives, programs, and priorities? At the heart of radicalization is an idea that the religious and political cultures of Muslim

databases, including Lexis-Nexis, the DMV, and a federal criminal database); Memorandum from S.F. Fed. Bureau of Investigation Field Office (May 11, 2007), *available at* http://www.aclu.org/files/fbi_mappingfoia/20111110/ACLURM012669.pdf (documenting mosque outreach meeting and analyzing “demographics” of those in attendance, who represented twenty-seven Muslim community and religious organizations); *Eye on the FBI* (Mar. 27, 2012), *supra* note 2333 (describing similar FBI community outreach efforts). For documents regarding FBI mosque and community outreach activities to Muslim student groups, see Memorandum 1, *supra* note 211; Memorandum 2, *supra* note 211; Memorandum 3, *supra* note 211; Memorandum 4, *supra* note 211.

236. Memorandum from S.F. Fed. Bureau of Investigation Field Office (Sept. 25, 2008), *supra* note 2355, at 4; Memorandum from S.F. Fed. Bureau of Investigation Field Office (Oct. 10, 2007), *supra* note 2355, at 3.

237. *See, e.g.*, Memorandum from S.F. Fed. Bureau of Investigation Field Office, at 3 (May 31, 2005), *available at* <http://www.aclu.org/files/fbimappingfoia/20120302/ACLURM017882.pdf> (showing “positive intelligence (disseminated outside FBI)” mark). Other documents are marked “800.” *See, e.g.*, Memorandum 5, *supra* note 2355. This is a coding internal to the FBI for “domain management,” an intelligence program. *Eye on the FBI* (Dec. 1, 2011), *supra* note 2333; *see also* Memorandum from Sacramento Fed. Bureau of Investigation Field Office 1 (Aug. 28, 2008), *available at* <http://www.aclu.org/files/fbimappingfoia/20111110/ACLURM007431.pdf> (“The 800 series has been established for the Intelligence Program.”). Other community outreach documents are marked “domain management,” for example, Memorandum from Sacramento Fed. Bureau of Investigation Field Office 1 (Apr. 20, 2007), *available at* <http://www.aclu.org/files/fbimappingfoia/20111110/ACLURM007538.pdf>, or “domain awareness,” for example, Memorandum from Sacramento Fed. Bureau of Investigation Field Office (Jan. 7, 2011), *available at* <http://www.aclu.org/files/fbimappingfoia/20111110/ACLURM013178.pdf> (noting the hire of a new, Pakistani, “very charismatic” imam).

238. Sullivan, *supra* note 125.

239. *The Demographics Unit*, *supra* note 123, at 6.

240. *See* Jacob Fischler, *Cricket in Queens: A Wicket Good Time*, QUEENS CHRON. (July 8, 2010), http://www.qchron.com/editions/north/cricket-in-queens-a-wicket-good-time/article_1ecfa70f-9405-5251-89aa-bbb42c5e4fe1.html; *see also Bridging the Gap Between the Police and the Community at N.Y.P.D., CTR. FOR HOMELAND DEF. & SEC.* (Jan. 11, 2011), <http://www.chds.us/?player&cid=2545> (interviewing Amin Kosseim, NYPD Officer, about the NYPD’s community policing initiatives); Amin G. Kosseim, *Counter-Radicalization: Best Practices in the United States and Lessons Learned from Abroad* (Sept. 2011) (unpublished thesis, Naval Postgraduate School), *available at* <http://www.hsdl.org/?view&did=691496> (discussing attempts at counter-radicalization through community policing initiatives including cricket games).

communities have the power to produce or inhibit terrorist violence.²⁴¹ In this narrative, Muslim religious and political cultures, real and virtual spaces for congregation, come within the appropriate jurisdiction of state surveillance and regulation. Muslims are reduced to either potential terrorists or informants (willing to share with law enforcement information on religious activities of community members) and counter-radicalizers (committed to fighting back Islam's violent tendencies). Legitimate differences of opinion—rooted in different conceptions of the world, political and economic realities—are reduced to irrational pathology.

Radicalization and counter-radicalization programs may seek to create precisely these pressures on Muslim communities. An accounting of these harms is imperative to evaluating the radicalization project, however, because the resultant impossible-to-navigate tensions have gone entirely unappreciated.²⁴² This Part lays out a schematic for the harms.

A. Religion, Politics, and Geography

Radicalization stigmatizes Muslim religious practices, political affiliations, and geographies in overlapping, messy ways. A broad range of activities (such as growing a beard or going to a mosque) and beliefs (such as opposition to American foreign policy in Iraq and Afghanistan) trigger law enforcement scrutiny. These activities draw scrutiny to the individual praying five times per day or attending the antiwar protest. They also draw scrutiny to the communities or spaces with which the individual may have contact of varying degrees: Is this the type of community where beard growth and antiwar activism is tolerated and growing? Is the beard growth and antiwar activism a result of local cultural tendencies?

Muslim communities keenly feel the stigma that radicalization attaches to their religious and political cultures. Reports suggest decreased mosque attendance, reluctance to engage in "[p]olitical organizing, civil engagement and activism" and "self-censorship on many religious and political topics . . . [including] even the surveillance itself."²⁴³ Similarly, imams have noted their

241. See, e.g., Tracy Russo, DEP'T OF JUSTICE, *Attorney General Holder Meets with Muslim Leaders in Portland*, JUST. BLOG (Sept. 30, 2011), <http://blogs.justice.gov/main/archives/1617?print=1> ("The Muslim leaders who met with the Attorney General pledged their support and are undertaking practical steps resist [sic] violent extremists targeting their young people and help federal law enforcement do its job better.")

242. See Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 809 (2012) (advocating that legal scholars pay attention to the harm efficiency of police practices, the law of the police beyond federal constitutional norms, and comparative institutional analysis).

243. Shamas & Arastu, *supra* note 83, at 14–15, 20 ("Business owners, mosque leaders and community members alike actively censor conversations, event programming, and internet usage in hopes that avoiding certain political content will keep them and their respective religious and social spaces off the NYPD's radar."). *Mapping Muslims* is based on experiences in New York City. See generally *id.* The experiences of Muslims in New York may be somewhat unique, as the overlapping

“inability to fulfill their role as spiritual advisors” because they cannot guarantee confidential space in their mosques or cannot be sure who is an informant, and Muslim student groups have banned political discussions from their campus offices.²⁴⁴ Muslims feel the stigma in their bodies, and in their ability to move and speak in the world.²⁴⁵

Radicalization policing reflects an almost obsessive desire to document and understand the minutiae of religious ideologies and practices in Muslim communities.²⁴⁶ At the same time that policing radicalization has become the norm, the government has promoted certain (“moderate”) Muslim religious views or leaders over others (“extreme,” “radical,” “fundamentalist”), with counter-radicalization as the guiding ethic.²⁴⁷ In so doing, the government has placed itself in the role of an arbiter of various practices of Islam. Sam Rascoff has elegantly articulated this as a concern that government counter-radicalization “may contribute to the ‘establishment’ of . . . ‘Official Islam’: a government-sponsored account of ‘mainstream Islam’ offered by the state in place of radical doctrinal alternatives.”²⁴⁸ As the government promotes certain faith leaders and religious interpretations, it marks others as “beyond the pale.”²⁴⁹

Likewise, in policing radicalization, law enforcement most carefully scrutinizes communities viewed as conservative, traditional, fundamentalist, or radical. The laser-beam focus on conservative or observant Muslims is embedded within the radicalization narrative. While the first stage, preradicalization, could describe

NYPD and FBI jurisdictions result in even more focused surveillance than may be typical in Muslim communities elsewhere in the country.

244. *Id.* at 14–18, 42.

245. *See, e.g.,* Ahmad, *supra* note 22, at 1262.

246. *See supra* Part III.B; *see also* Goldman & Apuzzo, *supra* note 126 (“Informants who trawl the mosques—known informally as ‘mosque crawlers’—tell police what the imam says at sermons and provide police lists of attendees, even when there’s no evidence they committed a crime.”).

247. *See, e.g.,* Matthew Lee, *The Mosque Flap, Part 2: State Department Sending Imam of Proposed Center on Mideast Trip*, WASH. POST, Aug. 12, 2010, at A13; Haroon Moghul, Remarks at the Conference of the Center on Law and Security at New York University School of Law (Nov. 5, 2010) (audio available at <http://clsline.files.wordpress.com/2010/12/protectingrightslibertiesofamericans.mp3>) (discussing efforts by the U.S. government to “build[] networks of acceptable Muslim intellectuals”); John Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at the Center for Strategic and International Studies: Securing the Homeland by Renewing American Strengths, Resilience, and Values (May 26, 2010) (transcript available at <http://csis.org/event/statesmens-forum-securing-homeland-renewing-americas-strengths-resilience-and-values>) (discussing the meaning of jihad).

248. Rascoff, *Establishing Official Islam?*, *supra* note 8, at 129–30 (footnote omitted).

249. *Id.* at 143–44. Importantly, radicalization makes much ado about Salafism, a term insufficiently concrete or specific to refer to any particular sect or sub-set of Muslims. Salafism is a mode of religious interpretation and practice that has been adopted in different historical and geographical contexts. As much as Islam and terrorism should not be conflated, both as a matter of ethics and based on facts, conservative religious belief and terrorism should not be considered interchangeable either. *See supra* note 83; *see also* KUNDNANI, *supra* note 12, at 7 (“‘Extremism’ is a vague concept that is easily exploited to demonise [sic] anyone whose opinions are radically different.”).

anyone living in a Muslim geography (Muslim neighborhood, mosque, etc.), the second stage is more concerned with basic religious practice (growing a beard, undertaking pilgrimage to Mecca), and the third with more intensive religious practice (attending religious study groups). In so doing, the reductive discourse muddles distinctions between espousing radical or nonconforming views, whether religious or political, and intending to engage in terrorism or violence.

Radicalization policing brings to bear scrutiny on individuals who identify or express sympathies with other Muslims in the United States or abroad—especially those Muslims who fall victim to U.S. policies. This is in part because opinions critical of the United States or U.S. policies are said to suggest radicalization.²⁵⁰ Of course many Americans are critical of the United States, Islamophobia, and anti-Muslim discrimination. But in the case of Muslims, these concerns, if expressed, are not understood as legitimate civic engagement but as markers for potential radicalization.

Radicalization policing is keenly focused on generating Muslim geographies—that is, in understanding and monitoring spaces where Muslims physically or virtually congregate, and in producing them as sites of difference and scrutiny. The FBI and NYPD have gone to great lengths to document mosques, Muslim student associations, Islamic bookstores, halal butchers, and Muslim websites and chatrooms.²⁵¹ There is a transnational component, too. Alongside Customs and Border Patrol, the FBI regularly interviews Muslims about their travels abroad, including travel to see family.²⁵² By virtue of associating with Muslim spaces, whether inside or outside the United States, Muslims are subject to intense state scrutiny.

At the same time that radicalization policing is concerned with Muslim

250. See *supra* Part III.B; see also Galati Deposition, *supra* note 123, at 30–31, 36 (“Their job was, if they hear people talking about it, you know, they should inform us. If what they’re hearing is hostility towards the United States or to the general public at large, you know, as a result of these events, would something happen here as a result? Their job is to listen for that.”); *The NYPD Will Record Your Opposition to Drone Strikes*, EMPTYWHEEL (Aug. 21, 2012) [hereinafter *Opposition to Drone Strikes*], <http://www.emptywheel.net/2012/08/21/the-nypd-will-record-your-opposition-to-drone-strikes> (noting Thomas Galati’s reference to a drone strike as “an example of a US-related world event in response to which the NYPD might send people out to listen how people respond”).

251. These are, in the parlance of the NYPD *Radicalization Report*, “radicalization incubators.” SILBER & BHATT, *supra* note 18, at 22. The FBI Intelligence Assessment similarly marks these places as “[v]enues where interactions between converts and Islamic extremists can occur.” FBI COUNTER-TERRORISM DIV., *supra* note 34, at 6.

252. See SINNAR ET AL., RETURNING HOME, *supra* note 22 (describing the questioning, searching, and profiling of individuals entering the country and recommending procedures to avoid civil rights violations); Muslim Advocates, *supra* note 22 (describing the interrogations and searches of Muslims, Arabs, and South Asian Americans returning to the United States from trips abroad). See generally *supra* note 94 and accompanying text. The U.S. government has also relied on “proxy detention” arrangements to have foreign governments detain American Muslims in order to facilitate FBI questioning abroad. See Nick Baumann, *Locked Up Abroad*, MOTHER JONES, Sept.–Oct. 2011, at 47, 68.

communities as collectives and institutions, it simultaneously works to identify those individual Muslims the theory understands to portend terrorist violence most directly.²⁵³ American Muslims—young Muslim men in particular—are likely to find themselves within the ambit of law enforcement scrutiny if they are openly critical of American foreign policy, attend their local mosque or hookah bar, partake in their university Muslim student association, or travel to Muslim-majority countries.²⁵⁴ While they may draw scrutiny by affiliating with other Muslims, the scrutiny follows them as individuals.

B. A Fundamental Tension

Radicalization and counter-radicalization conceive of Muslim communities and the government in fundamentally incompatible ways: as suspects and partners. Radicalization constructs Muslim religious and political cultures as generative of terrorism and therefore worthy of state scrutiny. Counter-radicalization emphasizes the importance of partnerships in Muslim communities.²⁵⁵ Muslim communities are necessary to monitor radicalization precisely because of the threats lurking within—the problem is said (or suggested) to be in Islam. The government needs Muslim partners to cultivate environments that sanction acceptable, non-radical viewpoints and practices.²⁵⁶

253. See, e.g., OFFICE OF THE INSPECTOR GEN., *supra* note 48, at 6 n.6 (defining radicalization as “the process by which inmates who do not invite or plan overt terrorist acts adopt extreme views, including beliefs that violent measures need to be taken for political or religious purposes”).

254. Fisher, *supra* note 22, at 622–23, 625–26; Rovner & Theoharis, *supra* note 58, at 1348–57; see Hussain, *supra* note 22, at 930–34; Kassem, *supra* note 125, at 25–26; see also Goldman & Apuzzo, *supra* note 126 (reporting that the NYPD sent an informant to monitor a Muslim student group and told the informant “to take pictures of people at the events, determine who belonged to the student association and identify its leadership”). Commentators have wondered, for example, if the government concerned itself with Fahad Hashmi as a politically outspoken critic of American foreign policy. Rovner & Theoharis, *supra* note 58, at 1351–57; Jeanne Theoharis, *My Student, the ‘Terrorist,’* CHRON. REV., Apr. 8, 2011, at B3.

255. Rascoff, *Establishing Official Islam?*, *supra* note 8, at 153 (“Domestic counter-radicalization efforts have increasingly been predicated on the idea that engagement—outreach to certain Muslim communities in order to make Official Islam a social reality—can play a crucial role in promoting domestic security The precise nature of outreach programs of this sort varies within agencies and from one agency to the next.”); Russo, *supra* note 241 (“The Department’s engagement efforts have two central components. First we seek to build trust by working with Muslim leaders to find out how we can better serve the community on issues like civil rights enforcement to anti-bullying efforts. In addition, we work to equip and empower local Muslim leaders to help them guard against violent extremists who are targeting young people in their communities for recruitment to misguided, violent causes.”).

256. Rascoff, *Establishing Official Islam?*, *supra* note 8, at 138–40, 145–62 (footnote omitted) (discussing government-sponsored sports leagues in Muslim communities, and government-sponsored imam training); *id.* at 154 (“The phenomenon of engagement is also connected to the selection of specific interlocutors within various Muslim communities—a choice which necessarily implicates ‘theological criteria.’ These sorts of decisions are inevitable when the government dispatches American imams and other exponents of American Islam on overseas delegations.”); Huq, *supra* note 23 (manuscript at 21–73).

These constructions exist in fundamental tension. On the one hand, Muslim communities are expected to form trusting relationships with law enforcement: to play in police soccer leagues and to host agents at *iftar* dinners. In other words, they are expected to welcome law enforcement with open arms. On the other, radicalization and counter-radicalization construct Muslim religious and political cultures as central to the problem of terrorism.

Here, a deposition of Thomas Galati, Commanding Officer of the NYPD's Intelligence Division in the ongoing litigation surrounding the *Handschu* consent decree, is illuminating. He was asked about the purpose of the Demographics Unit's mapping of Muslim communities. His deposition reflects a concern with Muslim communities as geographies where individuals may radicalize. It also captures a distinct fear that by virtue of their shared belief in Islam, Muslim geographies might provide cover for coreligionists' radicalization.²⁵⁷ (The FBI's DIOG captures similar fears in its provisions devising the FBI's power to map.²⁵⁸) In discussing how such geographies or locations of concern were identified, Galati suggests any place where Pakistanis speak Urdu or talk politics would qualify.²⁵⁹ He asserts conversations by Lebanese immigrants in a Lebanese café regarding from where in Lebanon they hail as important to document—these conversations may indicate support for Hezbollah.²⁶⁰

What precisely marks these spaces as sites for radicalization? Is it an a priori assumption of Muslim communities and community spaces as cauldrons brewing

257. Galati Deposition, *supra* note 123, at 24–26. Galati also makes passing reference to the idea that the Intelligence Division of the NYPD pays attention to places from which terrorists might recruit. *Id.* at 27, 36, 72–86 (“In order to fight terrorism, we needed to know where people lived from countries of concern that could either recruit, hide or secrete themselves in these communities that were radicalized towards violence and we needed to know where they were, to identify those countries of concern, to find those people that were radicalized towards violence.”).

258. 2011 DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE, *supra* note 139, at 4-13 (authorizing the consideration of individual race or ethnicity, community race or ethnicity, and geo-mapping ethnic and racial demographics).

259. Galati Deposition, *supra* note 123, at 72–87. For example, when asked why the NYPD had recorded information about a particular location where Pakistanis were speaking Urdu, Galati stated:

I'm taking the conversation as a whole. I'm looking in that conversation. I'm seeing Urdu. I'm seeing them identify the individuals involved in [the conversation] are Pakistani. I'm using that information for me to determine that this would be a kind of place that a terrorist would be comfortable in and I'm retaining that for the fact that I can retain it, if it's going to help me detect or prevent a potential unlawful or terrorist attack. So, a potential terrorist could hide in here and that piece of information is important for me to know. That this is where I'm going to find somebody that speaks Urdu. And again, I'll go far beyond Pakistan. Most Urdu speakers from that region would be of concern, so that's why it's important to me.

Id. at 85–86.

260. *Id.* at 34–35 (“[A] conversation overheard by people in the Lebanese cafe may indicate to us that they are from South Lebanon or North Lebanon That may be an indicator of possibility that that is a sympathizer to Hezbollah because Southern Lebanon is dominated by Hezbollah.”).

radicalization?²⁶¹ Alternatively, radicalization may imagine that Muslims who choose to connect and commune with other Muslims are opening themselves up to a radicalization process.²⁶² In a slightly different gloss, the underlying logic could also suggest that Muslims gathering, talking politics or religion, or grieving the treatment of Muslims at home or abroad signals openness to radical ideas and radicalization.²⁶³

The logic of radicalization imposes on Muslims a rigid hierarchy of social relations, or, more plainly, a loyalty question. American and Muslim identities become an either-or proposition: they cannot exist simpatico. By choosing to commune with or feel sympathy for other Muslims, Muslims are seen to choose Islam over America, Muslim identity over American identity. Alongside this fundamental suspicion of Muslim cultures and geographies, how can Muslim communities be conceived of as partners?²⁶⁴ Partnership exacts its own tax. Because now if a Muslim does not want to cooperate in a community relationships program, it suggests she is making a choice, she is picking “them” over “us.”

C. *Surveilled Identities*

To understand the dynamic harms of radicalization, identity performance theories prove useful. In the legal academy, Devon Carbado, Mitu Gulati, and Kenji Yoshino have theorized the work of performing and negotiating identities—an ongoing task universal to the human condition—and the complex harms imposed on those marginalized on grounds of race, religion, gender, sexuality, and class.²⁶⁵ Carbado, Gulati, and Yoshino are just as concerned with documenting the

261. SHERENE H. RAZACK, CASTING OUT: THE EVICTION OF MUSLIMS FROM WESTERN LAW & POLITICS 47–50 (2008) (citing Amit Rai, *Of Monsters: Biopower, Terrorism and Excess in Genealogies of Monstrosity*, 18 CULTURAL STUD. 538 (2004)) (“In terrorism studies, the focus is on the motivations and belief systems of individual terrorists. The psyche is thus the privileged site of investigation and terrorism is explained as a compulsion or psycho-pathology.”).

262. In framing its concern with mosques and other institutions, the FBI Intelligence Assessment suggests a concern with recruitment: while “[n]ot all Muslim converts are extremists . . . they can be targeted for radicalization.” FBI COUNTERTERRORISM DIV., *supra* note 34, at 6; *see also* Letter to Mueller, *supra* note 50 (arguing that the FBI’s “indicators” of a religious convert’s extremism are actually “innocuous behaviors [that] may indicate strong religious beliefs”).

263. Serwer, *supra* note 123; *Opposition to Drone Strikes*, *supra* note 250.

264. *See, e.g.*, EXEC. OFFICE OF THE PRESIDENT, EMPOWERING LOCAL PARTNERS, *supra* note 21, at 2, 3, 5, 6. For an insightful analysis of this construct, see Huq, *supra* note 23 (manuscript at 21–26).

265. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002); *see also* Frank Rudy Cooper, *Surveillance and Identity Performance: Some Thoughts Inspired by Martin Luther King*, 32 N.Y.U. REV. L. & SOC. CHANGE 517, 525 (2008) (“[S]urveillance encourages particular identity performances and discourages others.”). As this Article went to press, Carbado and Gulati published an expansion of *Working Identity*. DEVON W. CARBADO & MITU GULATI, ACTING WHITE: RETHINKING RACE IN POST-RACIAL AMERICA (2013).

experiences of identity performance as with identifying antidiscrimination law's inability to imagine, let alone address, these harms.

Exploring their working identity theory in the workplace, Carbado and Gulati presented the identity negotiating options on a continuum from self-affirming to self-negating.²⁶⁶ Carbado and Gulati situated the options in a matrix reflecting the dialectical relationship between stereotypes (positive and negative), institutional criteria, and workplace standing.²⁶⁷ They highlighted how members of outsider groups privilege their identities as workers over their outsider identities.²⁶⁸ The negotiation occurs consciously and subconsciously as a matter of survival in the face of stereotypes:²⁶⁹

[B]ehavior and stereotypes are not independent. When the stereotype is strong, and the conditions are such that ordinary behavior is likely to dissipate it, an outsider subject to a strong negative stereotype has an incentive to take actions to negate it. On the other hand, someone subject to strong positive stereotypes need not work as hard to achieve the same final evaluation as someone who is subject to negative stereotypes. Further, the stronger the stereotype, the greater the effect to be on the employee's behavior.²⁷⁰

From the disproportionate costs placed on outsiders to work their identity, to the psychic harm of self-negating and self-denying behavior, all options come with heavy costs.²⁷¹

In theorizing the relationship between assimilation, discrimination, and antidiscrimination doctrine, Yoshino identified a range of assimilatory options for gays and lesbians: to convert (underlying gay identity is altered), pass (underlying gay identity is hidden), or cover (underlying gay identity is downplayed).²⁷² Yoshino observed the fluid nature of assimilation: the mode of assimilation one might adopt in any particular moment would depend on the context. He recognized "the relational aspects of presentations of the self"; "one must know not only the performance of the actor, but also the literacy of the audience."²⁷³

Both models offer insights into the harms of radicalization policing.²⁷⁴

266. Carbado & Gulati, *supra* note 265, at 1266–67.

267. *Id.* at 1271–72.

268. *Id.* at 1279–307.

269. *Id.* at 1267–70, 1278, 1307–08 (“[W]e do not mean to suggest that outsiders *invite* discrimination by performing their identities in certain ways; rather they are *disciplined* for not performing their identities in ways that are palatable to their insider employers. The result is that outsiders, to the extent they wish to survive in the workplace, often find themselves having to do extra work to make themselves palatable and their insider employers comfortable.” (footnote omitted)).

270. *Id.* at 1270–71.

271. *Id.* at 1279–93.

272. Yoshino, *supra* note 265, at 772–73.

273. *Id.* at 772–73, 837–49.

274. For purposes of my analysis, I focus on the American and Muslim identities in American Muslim identity negotiation. Of course, as with anyone else, an American Muslim possesses multiple

Radicalization discourse feeds into preexisting Islamophobia in the United States, lending legitimacy to anti-Muslim sentiment.²⁷⁵ Radicalization and counter-radicalization produce a tension between Muslim-ness and American-ness. That tension pressures Muslims to work their identity—to prove their American-ness, or their loyalty to the project of the United States over that of Islam. That pressure is intense given the weight of Muslim stereotypes and the scope of radicalization policing.

To understand how the relational aspect of identity performance—between viewer and viewed—defines Muslim identity performance, recall the all-consuming nature of radicalization policing. The radicalization policing techniques rely on participation from Muslim communities, informants, and undercover officers.²⁷⁶ By its system of policing radicalization, the government has brought Muslim communities into its surveillance apparatus, and thereby exponentially expanded the reach of surveillance. Radicalization policing effectuates a *panoptic* system of discipline for Muslim communities.²⁷⁷ In elaborating on Jeremy

other identities that will affect their identity negotiations and performances. Even on the most basic level, to add just one more vector: identity negotiation for American Muslim men will be different than for American Muslim women.

275. See, e.g., Ahmad, *supra* note 22, at 1262 (“The physical violence exercised upon the bodies of Arabs, Muslims, and South Asians has been accompanied by a legal and political violence toward these communities. In the first two years after September 11, the United States has developed a corpus of immigration law and law enforcement policy that by design or effect applies almost exclusively to Arabs, Muslims, and South Asians. These laws operate in tandem with the individual acts of physical violence that have been carried out against these same communities, thereby aiding and abetting hate violence. Taken together, the multiple assaults on the bodies and rights of Arabs, Muslims, and South Asians produce a psychological violence as well and reracialize the communities they target as ‘Muslim-looking’ foreigners unworthy of membership in the national polity.”).

276. Through voluntary interviews, law enforcement asks Muslims to share information on other Muslims. Through informants and undercover officers, law enforcement sends Muslims into physical and virtual Muslim collective spaces to gather information and test religious and political opinions. Through community engagement efforts, law enforcement creates incentives for Muslims to work with the state. Through Internet trolling, informants and undercover officers collect information on Muslim social networks, and religious and political opinions. See *supra* Part III.B.

277. In the late 1700s, Jeremy Bentham envisaged the panopticon: a circular building with an inspection tower at its center and inmates around the perimeter. JEREMY BENTHAM: THE PANOPTICON WRITINGS 35–37 (Miran Božović ed., 2d ed. 1995). The design would allow the watchman to see all the inmates without the inmates being able to tell whether or not they were actually under watch. The trick was ensuring constant apprehension of surveillance in the inmates:

[T]he more constantly the persons to be inspected are under the eyes of the persons who should inspect them, the more perfectly will the purpose of the establishment have been attained. Ideal perfection, if that were the object, would require that each person should actually be in that predicament, during every instant of time. This being impossible, the next thing to be wished for is, that, at every instant, seeing reason to believe as much, and not being able to satisfy himself to the contrary, he should *conceive* himself to be so.

Id. at 34. Whether or not they were actually under watch was beside the point. Then, in the 1970s, Michel Foucault invoked the panopticon to describe the modern disciplinary society and its way of deploying power to observe and shape people and institutions. MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 170–228 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977). Since Foucault and Bentham, theorists have analyzed how technology allows for panoptic

Bentham's panopticon, Michel Foucault noted how constant apprehension of the "[v]isible" and "[u]nverifiable" gaze of the state "automatizes and disindividualizes power":

The more numerous those anonymous and temporary observers are, the greater the risk for the inmate of being surprised and the greater his anxious awareness of being observed. . . .

. . . He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection.²⁷⁸

The question of how to perform your identity arises in contexts where your *outsider* identity is at play. That assumes there is an inside, where one can more comfortably inhabit a particular outsider identity, where it is no longer outside.²⁷⁹ Radicalization policing's reach into Muslim communities—at the same time, extensive, undeniable, and covert—flips the inside out. Mosques are not sanctuaries but the most intensive sites of surveillance. There is no inside where you are not an outsider; or the inside is incredibly small, porous, and precarious.²⁸⁰ Always weary of being watched, Muslims adopt self-regulating behavior.

Muslims work their identity to claim full(er) standing in the polity, to avoid being rendered an object of suspicion and surveillance. The pressure emerges in a larger, hostile climate in the United States. As with other outsider groups, the stereotypes Muslims deal with in relation to law enforcement and the public overlap considerably. The pressure for identity work comes from both private citizens—including other Muslims—and the government, though the consequences might be distinct, and as always context matters. Making matters more complicated, the pervasiveness of surveillance obscures the line between private citizens and the government.

Radicalization and counter-radicalization situate Muslim and American identity as antipodes. Imagine them as oppositional vectors: The choice to play up Muslim identity is a decision to signal less American-ness; emphasizing American identity destabilizes Muslim identity. The negative Muslim stereotype is so heavy, the pressures to perform American-ness are profound. The identity work, covering, or passing could take many forms. It could include removing a Muslim aesthetic—shaving a beard, removing a hijab—or downplaying Muslim aesthetics

surveillance structures deeper into our lives. *E.g.*, THOMAS ALLMER, TOWARDS A CRITICAL THEORY OF SURVEILLANCE IN INFORMATIONAL CAPITALISM (2012).

278. FOUCAULT, *supra* note 277, at 201–02.

279. I do not mean to suggest a static, true, underlying identity exists. Identity is complex and dynamic.

280. The precarity of the inside will be particularly pronounced in urban Muslim communities—where, for example, mosque communities will be larger and less static, and large police departments may prioritize counterterrorism alongside the local FBI office.

in another way—exchanging a niqab for a hijab.²⁸¹ It could include playing up one's American-ness—drinking beers or watching football. These decisions might influence the law enforcement scrutiny you might draw.

A recent community-and-interview-based report documented just such harms stemming from the NYPD Intelligence Division's surveillance program. Muslims reported feeling pressure to signal their Muslim identity less visibly or differently, to cover, or to pass, in order to avoid state scrutiny. This signaling takes shape in relation to religion, politics, and geography. Muslims do not want to seem too religious: Men shave their beards and women remove their hijabs or niqabs.²⁸² Or too political: Students stop talking politics in their Muslim student association office and switch out of political science majors.²⁸³ Muslims do not organize or organize differently. They “feel the need to repeatedly emphasize their peaceful position,”²⁸⁴ or to change how they inhabit Muslim geographies: Muslims go to the mosque less frequently, or only for prayer and not for other community and spiritual activities.²⁸⁵

Making the performance matrix more complicated, certain quintessentially American activities, when engaged in by Muslims, are signs of radicalization. Of course this is the case at higher levels of abstraction for mosque going (church) or protesting the Iraq war (dissent). There are also certain activities that will have heightened significance, especially for young Muslim men: for example, paintball, target practice, and white-water rafting.²⁸⁶

The suspicion of Muslim identity runs sufficiently deep that decisions to signal less Muslim-ness (covering or passing) can in themselves be read as suspicious or attempts to hide. For the same reason, it is not altogether clear that converting, at least not on its own, would wipe away the suspicion associated with Muslim identity. So while the NYPD radicalization report frames as suspicious a

281. While the hijab covers the hair, the niqab also covers the mouth and the nose.

282. Shamas & Arastu, *supra* note 83, at 15–17, 23–26 (“Almost all our interviewees noted that appearing Muslim, or appearing to be a certain type of Muslim, invites unwanted attention or surveillance from law enforcement. Outward displays of Muslim identity could include the choice to wear the hijab (headscarf), the niqab (full covering), grow a beard, or dress in certain kinds of traditional or Islamic clothing.”)

283. *Id.* at 25, 44–45.

284. *Id.* at 23.

285. *Id.* at 14–15, 17 (quoting twenty-six-year-old Brooklynite Ahsan Samad: “I used to go to the masjid [mosque] quite a lot. That stopped as soon as they [the NYPD] knocked on the door.”); *id.* at 42 (quoting a nineteen-year-old college student: “[The upperclassmen] told us we encourage you to have free speech and political conversations, just not inside the MSA room. Because we don’t want an informant to be here to catch one of your lines or crazy rants and you would get in trouble. I don’t want to go to the MSA room because I’m worried that someone will report what I’m saying. . . .”).

286. See *supra* Part II; see also Paul Harris, *Fort Dix Five: ‘If They Did Something Punish Them. But They’re Innocent Kids,’* GUARDIAN (Nov. 16, 2011), <http://www.guardian.co.uk/world/2011/nov/16/fbi-fort-dix-five>; Steve Huff, *The N.Y.P.D. Covertly Went Whitewater Rafting to Track Muslim Students*, N.Y. OBSERVER (Feb. 18, 2012), <http://observer.com/2012/02/the-n-y-p-d-covertly-went-whitewater-rafting-to-track-muslim-students>.

name change from Mike to Maher (intensifying Muslim identity), the NYPD also monitors name changes from Mohammad to Matt (passing, covering, or converting Muslim identity). The Associated Press aptly captured how this practice turns topsy turvy immigrant assimilation practices: "[f]or generations, immigrants have shed their ancestral identities and taken new, Americanized names as they found their place in the melting pot. For Muslims in New York, that rite of assimilation is now seen by police as a possible red flag in the hunt for terrorists."²⁸⁷

The question of identity work is relevant not simply to whether and how it marks you for state scrutiny. It is also relevant to how Muslims perform their direct relationship to the projects of radicalization policing and counter-radicalization. Does one facilitate law enforcement's efforts to collect intelligence on the day-to-day affairs of Muslim communities? That would signal assent in the American political project and affirmation of American identity. Refusal could signal dissent, prioritization of Muslim affinity, an Islamist or secret "jihadi" project. Indeed, recent efforts to conduct know-your-rights workshops and to educate Muslim communities on their rights to counsel in the face of law enforcement interviews—efforts replicating long-standing initiatives in communities of color negotiating difficult and abusive relationships with the police—have generated criticism along these axes: Muslim communities are not cooperating with law enforcement's efforts to protect against radicalization; lawyers are advising Muslim communities against sharing tips with law enforcement about terrorist activity.²⁸⁸ Whereas willingness to agree to share information with law enforcement is constructed as serving American interests and national security, refusals are suspect. Retaining a lawyer is another quintessentially American act. When that retention positions a Muslim in the way of the national security intelligence gathering, however broad or abusive, it becomes a Muslim act, one drawing scrutiny and suspicion.

Operating in the void of serious regulation, law enforcement quite literally incentivizes cooperation and penalizes refusals, creating dramatic performance pressures. Consider the case of Mohammad Tanvir, a twenty-something, working-class immigrant in New York City, working at bodegas to send money home to his parents in Pakistan.²⁸⁹ For a few years, the FBI attempted to recruit him to

287. In fall 2011, the Associated Press reported that the NYPD runs comprehensive background checks on New Yorkers with Arabic- or Muslim-sounding names, who change their names. Apuzzo & Goldman, *supra* note 101.

288. See, e.g., Sheryl Gay Stolberg & Laurie Goodstein, *Deep Partisan Rift Emerges in Hearing on U.S. Muslims*, N.Y. TIMES, Mar. 11, 2011, at A15; Amna Akbar & Ramzi Kassem, *Are Muslims Allowed Rights?*, ALJAZEERA (Nov. 28, 2011), <http://www.aljazeera.com/indepth/opinion/2011/11/2011112415501938290.html>.

289. I represented Tanvir during my time in the CLEAR project at CUNY's clinical program. See Bartosiewicz, *The FBI Stings Muslims*, *supra* note 193, at 20 (chronicling Tanvir's experience).

become an informant. The FBI asked him to collect information in local South Asian Muslim communities. The FBI also wanted to send him to Afghanistan to infiltrate terrorist training camps. The FBI offered to pay and to bring his wife from Pakistan to the United States.²⁹⁰ Their efforts were dogged and included threats of deportation. While Tanvir agreed he would call the FBI if he saw suspicious activity, he consistently refused to work as an informant: it did not feel right to him. In response, he was placed on the Department of Homeland Security's No Fly List, likely by the FBI. The stress of the FBI's harassment was so great, Tanvir decided to forego his green card and return to Pakistan permanently. But his placement on the No Fly List made that impossible, effectuating a limbo existence where he was stuck in a country that did not seem to want him, and yet could not return to his country of birth.

Perversely, working with law enforcement provides purchase to signal Muslim identity. It might even require religious Muslim identity performance—growing a beard, praying five times a day, going to the mosque—as that performance would give you the greatest access to religious Muslims. Rascoff observes:

Imagine that the FBI is contemplating employing an individual as a confidential informant in a mosque where authorities are concerned about the proliferation of radical ideology. The individual is attractive to law enforcement precisely because he possesses radical bona fides (having previously been an exponent of radical Islam himself) and will therefore have access to the institution. Further consider that the Bureau might want to take measures to protect against the prospective informant's reverting to a radical sensibility as he operates within a radical environment. It is conceivable under these circumstances the Bureau would, in effect, furnish tutorials for the informant in "moderate" Islam as a means of shoring up his participation in official work.²⁹¹

While Rascoff expresses a distinct concern about the state establishing Official Islam, his hypothetical also illustrates how cooperation might require Muslims to simultaneously play up and maintain distance from Muslim identity. The resulting identity performance calculus for Muslims wishing to partake in communal life—a central aspect of Islam—is incredible. The more religious are now constituted from the point of the view of the community as double suspect: as either radicals-cum-terrorists or informants.

In many ways, Muslim collective spaces are the most vulnerable, where performance matters most:

Tanvir's experience is in many ways representative of a broader set of experiences; the FBI regularly uses such pressure tactics. *See supra* Part III.B.

290. The FBI also offered to pay expenses for his parents to perform the religiously obligatory hajj to Mecca. Bartosiewicz, *The FBI Stings Muslims*, *supra* note 193, at 20.

291. Rascoff, *Establishing Official Islam?*, *supra* note 8, at 158–59.

[R]eligious spaces, intended to provide a haven for new and old congregants to forge bonds and support networks, [have become] the opposite – a space where interactions [are] marred by mutual suspicion. Many former regular mosque-goers have decreased mosque attendance, and those who attend do so to just pray and leave, looking over their shoulders for eavesdropping spies the entire time.²⁹²

The pressure to perform American-ness, then, extends to interactions with other Muslims and within Muslim institutions. While many have commented on constructions of the good Muslim / bad Muslim dichotomy by Western states and liberalism,²⁹³ that these dichotomies have carved up Muslim communities has gone lesser noticed. As a Muslim, you might be just as concerned with what the uniformed officer makes of you as he passes you in the street as what the woman at the mosque thinks when she engages you in conversation. That woman might be an undercover or an informant testing your opinions. Regardless of whether she is an undercover or informant, she might be keen on playing up her American-ness, and if she thinks you are radical, she might share your name with law enforcement. Or, she might suspect you as an informant, never engaging you in conversation.

The ever-present gaze of the state heavily weighs on, defines even, contemporary American Muslim identity performance.²⁹⁴ That its ever-presence is brokered by other Muslims—or by those who appear to be Muslim—causes profound individual and communal harm. There is distrust of “people who ‘talk really passionately about Islam,’ or even by non-Muslims who come to the mosque expressing interest in learning about Islam”; the “overly religious” and those who “frequent[] the mosque”; those who “regularly attend[] [Muslim Student Association] events . . . [and] those who only came once in awhile.”²⁹⁵ Indeed, as much as radicalization has stigmatized “radical Islam” or conservative Muslims for the American public at large, that stigma has been internalized in Muslim communities.

The gaze also gives rise to pressures for collective performances of American-ness. While the individual Muslim might go out of her way to signal her own American-ness, collectives also have moments of performative opportunity and pressure. Mosques can choose to invite law enforcement in for community

292. Shamas & Arastu, *supra* note 83, at 18.

293. See generally MAHMOOD MAMDANI, *GOOD MUSLIM, BAD MUSLIM: AMERICA, THE COLD WAR AND THE ROOTS OF TERROR* (2004); RAZACK, *supra* note 261; Sunaina Maira, “Good” and “Bad” Muslim Citizens: Feminists, Terrorists, and U.S. Orientalisms, 35 *FEMINIST STUD.* 631 (2009).

294. See Shamas & Arastu, *supra* note 83, at 26 (“Nearly all interviewees thought they knew someone who was an informant or an undercover officer. The reasons provided were diverse and contradictory, reflecting the widespread internal suspicion that surveillance has triggered within the American Muslim community.”); see also *id.* at 18 (“It’s very difficult, it’s very hard, you don’t know what to say, I have to think twice about the sentences I say just in case someone can come up with a different meaning to what I’m saying.” Amira*, 22, Sunday school teacher.”).

295. *Id.* at 18, 26.

engagement and counsel their congregations to talk to law enforcement, or mosques can make announcements that “informants are not welcome here” and refuse to give law enforcement access. Muslim civil rights organizations can go out of their way to condemn terrorist attacks with which they have no connection and to celebrate all new terrorism-related indictments, or they can choose to stay silent on the occasion of a terrorist attack and engage critically in debate about the utility of the aggressive policing and prosecuting tactics at work in Muslim communities. The choices are ever-present and the decisions will trigger various outcomes, predictable and unpredictable alike.²⁹⁶

CONCLUSION

Policing radicalization exacts impossible pressures and real harms on Muslim communities. The police practices and the resulting pressures on Muslim communities are largely unregulated by law and almost untouched by critical public debate. Naming these practices and their harms was the project of this Article.

Where the state marks ideology as tending towards criminality, the state generates a basis on which to discipline that ideology. Importantly, where the targeted are subaltern²⁹⁷—locked out of the channels of power and accountability—as Muslims are in the United States, the subaltern-ness is both what is targeted and what facilitates the targeting. Policing radicalization draws its legitimacy from proposed connections between certain Muslims and terrorism violence. But the government has not made its case. Government-produced radicalization theories reflect, and then reproduce, intense suspicion of Muslims and Islam, creating a dangerous self-perpetuating cycle.

Deploying the language of radicalization implicitly counters charges of biased policing. Now, in monitoring Muslim communities, it is said law enforcement is not monitoring Muslims for being Muslim, but instead for radicalization to terrorism. Radicalization theories move the idea that Muslim communities and cultures threaten national security from the world of bias to the realm of savvy expertise. In turn, radicalization and counter-radicalization impose heavy costs on

296. Carbado & Gulati, *supra* note 265, at 1277–79 (observing that strategic identity performing behavior is “risky and can backfire”).

297. Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271–308 (Cary Nelson & Lawrence Grossberg eds., 1988). Subaltern studies arose in response to orientalist studies of South Asia, as a movement to revise historiography, a movement that excluded the experience of the colonized. The term subaltern connotes those who are peripheral to or excluded from power and privilege structures on the grounds of race, gender, class, sexuality, and geography. See, e.g., Gayatri Chakravorty Spivak, *The New Subaltern: A Silent Interview*, in *MAPPING SUBALTERN STUDIES AND THE POSTCOLONIAL* 324 (Vinayak Chaturvedi ed. 2000).

Muslim communities and lay the groundwork for the state to police other subaltern communities.²⁹⁸

298. See, e.g., Josh Harkinson, *The Turncoat*, MOTHER JONES, Sept.–Oct. 2011, at 48–67 (discussing FBI informant Brandon Darby's involvement in left-wing protest groups in Austin, Texas); Greenberg, *New York: The Police and the Protesters*, *supra* note 31 (comparing the NYPD Counterterrorism Unit's investigations of Occupy protestors with its investigations of Muslims); Peter Krouse, *FBI Stings, Like One in Cleveland, Become More Common in Terrorism Investigations*, CLEVELAND.COM (May 6, 2012), http://www.cleveland.com/metro/index.ssf/2012/05/fbi_stings_become_more_common.html (discussing the FBI sting taking down Occupy Cleveland protestors who attempted to bomb a bridge with fake assistance from undercover FBI agents); James Sanna, *MN: Peace Activists Targeted by FBI Call Minneapolis Home Raids Harassment*, AM. INDEP. (Sept. 25, 2010, 10:30 AM), <http://americanindependent.com/143757/peace-activists-targeted-by-fbi-call-minneapolis-home-raids-harassment> (discussing the FBI's investigation of the Twin Cities-area Anti-War Committee for "material support for terrorism"); Thomas J. Sheeran, *3 Suspects Plead Guilty in Ohio Bridge Bomb Plot*, HUFFINGTON POST (Sept. 5, 2012, 6:50 PM), <http://www.huffingtonpost.com/huff-wires/20120905/us-bridge-bomb-plot> (discussing the progression of the case against the Occupy Cleveland bridge bombers).