THE ANATOMY OF A FEDERAL TERRORISM PROSECUTION: A BLUEPRINT FOR REPRESSION AND ENTRAPMENT

Collin Poirot*

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* Collin Poirot is a practicing attorney in Brooklyn, New York, and holds a B.A. and B.S. from the University of Texas and a J.D. from Harvard Law School. This article is dedicated to all those struggling against political repression and fighting for justice; hopefully the lessons presented within can help keep our movements safe and effective. The ideas in this article draw in large part from conversations with Aziz Rana, Azadeh Shahshahani, Michael Deutsch, Mark Kleiman, and frontline activists who have themselves been targeted for repression and intimidation by the Federal Bureau of Investigation. In particular, the author is heavily indebted to the dedicated community organizers from the Arab American Action Network, the U.S. Palestinian Community Network, the Committee to Stop FBI Repression, Stop LAPD Spying Coalition, and Freedom Road Socialist Organization, who have shared their experiences of being targeting for repression and of fighting back. Finally, thank you to my family for always supporting me, and to the Columbia Human Rights Law Review Executive Online Editor, Isabelle Canaan, whose thoughtful input helped shape this article into its final form.

I. FEDERAL ANTI-TERRORISM OPERATIONS IN THE WAKE OF SEPTEMBER 11, 2001

The events of September 11th sparked a massive transformation in both the shape and scope of United States Federal Bureau of Investigation (FBI) surveillance and counter-terrorism operations. In the wake of September 11th, the FBI shifted from being an agency that investigated past or ongoing crimes to one focused on proactively gathering information to prevent future crimes.[1] The FBI not only developed a new framework for identifying likely future terrorists—the so-called 'radicalization' spectrum—but also created new investigative tools, expanding the strategies of surveillance and entrapment that it had honed during the Counter Intelligence Program (COINTELPRO) era.[2, 3]

While many have highlighted the diagnostic flaws and political implications of the FBI's use of the radicalization spectrum as an analytical tool,[4] few have attempted to draw a concise blueprint

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1. TREVOR AARONSON, THE TERROR FACTORY: INSIDE THE FBI'S MANUFACTURED WAR ON TERRORISM 35–39 (Ig Publishing, 2013).

2. The FBI's infamous Counter Intelligence Program was created in the 1950s with the objective of repressing subversive political organizations in the United States—famously used against groups like the Black Panthers.

3. The modern surveillance apparatus has roots going back to at least the Cold War period. For a discussion of pre-2001 FBI surveillance of dissident movements and communities, see, for example, AARON J. LEONARD & CONOR A. GALLAGHER, A THREAT OF THE FIRST MAGNITUDE (Repeater, 2017) (providing an overview of the FBI's infiltration of leftist and progressive organizations such as the Black Panther Party and the Revolutionary Union). For a discussion of the connections between surveillance under COINTELPRO and contemporary surveillance of the Black Lives Matter movement, see, for example, Zahra N. Mian, *'Black Identity Extremist' or Black Dissident?: How United States v. Daniels Illustrates FBI Criminalization of Black Dissent of Law Enforcement, from COINTELPRO to Black Lives Matter*, 21 RUTGERS RACE & L. REV. 53 (2020) (drawing connections between the FBI's repression of Black political organizations in the 1960s under COINTELPRO and the more recent prosecutions of Black community members such as Rakem Balogun); *see also* Aleena Aspervil, *If the Feds Watching: The FBI's Use of a 'Black Identity Extremist' Domestic Terrorism Designation to Target Black Activists & Violate Equal Protection,* 62 HOW. L.J. 907 (2019) (arguing that current FBI targeting of Black political organizing as domestic terrorism violates the Equal Protection Act and placing it in the context of the COINTELPRO era).

4. *See generally* Amna Akbar, *National Security's Broken Windows*, 62 UCLA L. REV. 834 (2015) (critiquing the FBI's radicalization theory in the context of so-called "countering violent extremism" programs; Faiza Patel et al., *Rethinking Radicalization*, BRENNAN CTR. FOR JUST. (2011), https://www.brennancenter.org/sites/default/files/legacy/RethinkingRadicalization

of the actual practices of entrapment and surveillance used in a typical terrorism sting following 2001 so that community members can learn to identify and combat them.[5] This article is an attempt to remedy this lacuna, and offers a step-by-step breakdown of the tactics regularly deployed by law enforcement during federal terrorism sting operations, surveillance, and informant recruitment. The piece also provides an overview of the statutes governing these operations, and the legal hurdles defendants face when presenting an entrapment defense.

In today's world, learning to recognize the patterns of entrapment, surveillance, and infiltration is all the more pressing. Although the contemporary intelligence infrastructure was originally designed to surveil the Arab- and Muslim-American communities, it has recently been adapted to a new, broader set of targets.[6] President Donald Trump's May 2020 announcement that the United States would declare "Antifa" (short for Anti-Fascist) a domestic terrorist organization is only the most recent example of the FBI's widening aperture for domestic terrorism, and follows on the heels of prior revelations regarding the targeting of other communities and activist movements, including the Black Lives Matter and immigrants' rights movements.[7] On August 3, 2017, the FBI circulated an "Intelligence Assessment" warning its agents of "Black Identity Extremists," whose "perceptions of police brutality against African Americans spurred an increase in premeditated, retaliatory lethal violence against law enforcement."[8] In May 2019, additional FBI documents were leaked

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.pdf [https://perma.cc/3JRD-FN49] (discussing how this theory draws a false connection between Muslim devotion and an inclination towards violent action).

5. Two excellent book-length treatments—to which this overview is heavily indebted—are WADIE E. SAID, CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF FEDERAL TERRORISM PROSECUTIONS (2015); AARONSON, *supra* note 1.

6. Alice Speri, *Fear of a Black Homeland: The Strange Tale of the FBI's Fictional 'Black Identity Extremist' Movement*, THE INTERCEPT (Mar. 23, 2019), https://theintercept.com/2019/03/23/black-identity-extremist-fbi-domestic-terrorism/ [https://perma.cc/22GA-T9ZX].

7. Claire Hansen, *White House Addresses Trump Pledge to Designate Antifa a Terrorist Group*, U.S. NEWS & WORLD REP. (June 1, 2020), https://www.usnews.com/news/national-news/articles/2020-06-01/white-house-addresses-trump-pledge-to-designate-antifa-a-terrorist-group (on file with the *Columbia Human Rights Law Review*).

8. Counter-Terrorism Division, *Black Identity Extremists Likely Motivated to Target Law Enforcement Officers*, U.S. FED. BUREAU OF INVESTIGATION 1, 2 (Aug. 3, 2017), https://www.documentcloud.org/documents/4067711-BIE-Redacted.html [https://perma.cc/89QK-YZAB].

revealing that the agency had also targeted immigrants' rights groups in Arizona for surveillance, including by monitoring social media.[9]

As the FBI shifts from a period of primarily targeting Arab- and Muslim-Americans to a wider focus on leftists and activists of color more broadly, the pre-existing machinery of surveillance, entrapment, and prosecution is likely to not only remain in use, but to be expanded upon. The abundance of FBI investigations (including "assessments," discussed at length in Part II)[10] against so-called "Black Identity Extremists" (BIE) since 2015 proves that the infrastructure built to repress Muslim Americans—particularly Black Muslim Americans—and Arab Americans is now being directly weaponized against other dissident communities and movements.[11] Already in 2020, the FBI and Joint Terrorism Task Forces (JTTFs) have approached multiple activists organizing for justice for George Floyd—who was killed by Minneapolis police officers—and have alternatively attempted to entrap them or pushed them to work as informants.[12] A straightforward explanation of how the FBI sets up and carries out these operations can inform community members and advocates, so that they are better prepared to recognize, avoid, and challenge these abusive practices.

II. COUNTER-TERRORISM SURVEILLANCE AND THE INFORMATION-SHARING ENVIRONMENT

Adopted after 2001, the FBI's new pre-emptive approach enabled the Bureau to implement looser regulations for surveillance

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9. Jana Winter & Hunter Walker, *Document Reveals the FBI Is Tracking Border Protest Groups as Extremist Organizations*, HUFFINGTON POST (Sept. 4, 2019), https://www.huffpost.com/entry/fbi-tracking-border-protest-groups_n_5d6ff5c2e4b09bbc9ef8ed2b [https://perma.cc/FD4Z-G6F4].

10. *See infra* Part II.

11. Alice Speri, *The FBI Spends a Lot of Time Spying on Black Americans*, THE INTERCEPT (Oct. 29, 2019), https://theintercept.com/2019/10/29/fbi-surveillance-black-activists/ [https://perma.cc/9DQM-3UBY].

12. Including, for instance, Chandler Wirostek, Eli Anderson, Mackenzie Randall, and a Presbyterian minister named Andrew Smith. Ryan Devereaux, *He Tweeted That He Was the Leader of ANTIFA. Then the FBI Asked Him to Be an Informant*, THE INTERCEPT (June 9, 2020), https://theintercept.com/2020/06/09/antifa-fbi-tweet/ [https://perma.cc/8BUB-DBFG]; Chris Brooks, *After Barr Ordered FBI to 'Identify Criminal Organizers,' Activists Were Intimidated at Home and at Work*, THE INTERCEPT (June 12, 2020), https://theintercept.com/2020/06/12/fbi-jttf-protests-activists-cookeville-tennessee/ [https://perma.cc/Y7MC-QJ4C] (interviewing intimidated activists).

of subjects or communities with potential nexuses to terrorism. While these specific shifts in policy and practice evolved over time, they were first compiled in the Attorney General's Guidelines for Domestic FBI Operations.[13] Published in 2008, the Guidelines call upon the FBI to proactively seek out targets for surveillance "with an eye towards early intervention and prevention of acts of terrorism before they occur."[14] The FBI published its own 'Domestic Investigations and Operation Guide' (DIOG) later that year, clarifying the means through which this new pre-emptive approach would be implemented.[15] The organizing analytic for intelligence gathering under the DIOG is the FBI's "domain management" (or "battlefield management")[16] approach to counter-terrorism surveillance. The 2008 DIOG explains that under this domain-based approach:

> The FBI is encouraged to "identify locations of concentrated ethnic communities in the Field Office's domain, if these locations will reasonably aid the analysis of potential threats… 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 . . . 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).[17, 18]

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13. *See generally The Attorney General's Guidelines for Domestic FBI Operations*, U.S. DEPT. OF JUST. (2008), http://www.justice.gov/ag/readingroom/guidelines.pdf [https://perma.cc/8444-XL85] (establishing the operating procedures for the FBI's domestic operations).

14. U.S. Dept. of Just., *supra* note 13, at 17.

15. U.S. Fed. Bureau of Investigation, *Domestic Investigations and Operations Guide*, U.S. DEPT. OF JUST. 1 (Dec. 16. 2008), https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29/fbi-domestic-investigations-and-operations-guide-diog-2008-version/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29%20Part%201%20of%205/view [https://perma.cc/2V4Q-FKVM].

16. AARONSON, *supra* note 1, at 49.

17. U.S. Fed. Bureau of Investigation, *supra* note 15, pt. I, § 4.3.C.2.

While the FBI's history of surveillance of dissident communities has included this type of mapping before, the specific domain management approach and the production of ethnic and religious maps as a tool to predict domestic terrorism is a hallmark of the War on Terror period.[19]

A. Surveillance Without a Factual Predicate

The DIOG's most materially significant provision is the framework for conducting *assessments*, a new form of preliminary surveillance that can be carried out without "a particular factual predication" or probable cause.[20] These assessments are usually the first step the FBI takes in mapping out and surveilling target communities, and can be initiated in pursuit of any of six "authorized purposes,"[21] including "obtaining information on individuals, groups, or organizations of possible investigative interest . . . and identifying and assessing individuals who may have value as confidential human sources."[22, 23] The "confidential human sources" ground allows the FBI

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18. This approach of geographically and demographically mapping specific ethnic communities under surveillance bears resemblance to the notorious Demographics Unit (renamed the Zone Assessment Unit) of the New York Police Department, which produced detailed maps of popular businesses, restaurants, and parks among 28 designated "ancestries of interest" (as well as "American Black Muslims") in New York. *See* Diala Shamas & Nermeen Arastu, *Mapping Muslims: NYPD Spying and Its Impact on American Muslims*, MUSLIM AM. CIV. LIBERTIES COAL., CITY U. OF N. Y. CREATING L. ENFORCEMENT ACCOUNTABILITY & RESPONSIBILITY, & ASIAN AM. LEGAL DEF. & EDUC. FUND 1, 7 (June 28, 2012), http://www.law.cuny.edu/academics/clinics/immigration/clear/Mapping-Muslims.pdf [https://perma.cc/M832-3EH3].

19. Amna Akbar, *Policing 'Radicalization'*, 3 U. C. IRVINE L. REV. 809, 855 (2013) (discussing the evolution of mapping as a tactic of political repression in the United States from 1919, when the NYPD was tasked with preparing maps of immigrant communities suspected of leftist political tendencies, through to its massive expansion by the FBI during the war on terror).

20. U.S. Fed. Bureau of Investigation, *supra* note 15, pt. II, § 5.1.

21. *Id.* pt. II, § 5.4.A.

22. *Id.* pt. II, § 5.2.

23. The other authorized purposes are to:

> [S]eek information . . . relating to activities constituting violations of federal criminal law or threats to the national security . . . [to] seek information . . . relating to the involvement or role of individuals, groups, or organizations relating to activities constituting violations of federal criminal law or threats to the national security . . . [to] identify and obtain information about potential targets of or vulnerabilities to criminal activities in violation of federal law or threats to the

to investigate a given target or community for no reason other than identifying, recruiting, or maintaining "the cover or credibility of" potential informants.[24] Where the assessment ostensibly relates to "threats to the national security," it can be initiated by an individual agent "without supervisory approval" and can continue for an indefinite duration.[25]

The investigative methods authorized during an assessment include "visiting any place or attending an event that is open to the public," "physical, photographic and video surveillance where such surveillance does not infringe on a reasonable expectation of privacy," questioning individual members of the public, "obtaining information from, tasking, or otherwise operating" confidential informants, and "requesting information without revealing FBI affiliation or the true purpose of a request."[26] The DIOG was further revised in 2013, and now lists "trash covers" (physically picking through peoples' garbage) as an authorized tool for use during an assessment.[27] In other words, a hypothetical FBI agent could initially insert themself into a group or community using a fake name or back-story, and then attend meetings, recruit informants, collect and look through the group's trash, and take photographic and video surveillance of the group members, all without any "factual predicate" (i.e. any factual basis for suspecting criminal activity).

The FBI has used these assessment tactics extensively since their authorization, massively expanding its network of informants and surveillance. The most recent statistics from FBI documents released under the Freedom of Information Act reveal that, between

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> national security . . . [to] obtain information to inform or facilitate intelligence analysis and planning . . . [and to] seek information . . . relating to matters of foreign intelligence interest responsive to foreign intelligence requirements.

Id. pt. II, § 5.4.A.

24. *Id.* pt. II, § 5.4.A.5.

25. *Id.* pt. II, § 5.6.A.1 ("Duration: There is no time requirement for this type of assessment, but it is anticipated that such assessments will be relatively short. These assessments require recurring 30-day justification reviews by the [Supervisory Special Agent] or [Supervisory Intelligence Analyst].").

26. U.S. Fed. Bureau of Investigation, *supra* note 15, at pt. II, § 5.9.

27. U.S. Fed. Bureau of Investigation, *Domestic Investigations and Operations Guide*, U.S. DEPT, OF JUST. § 5.6.3.4.8.K, (Oct. 16, 2013), https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29/fbi-domestic-investigations-and-operations-guide-diog-2013-version/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29%202013%20Version%20Part%2001%20of%2001/view [https://perma.cc/DV83-SF97].

2009 and 2011, the Bureau opened 82,325 assessments of different individuals and communities, only 1,986 of which resulted in factual predicates necessary for a preliminary or full investigation (the two categories of more enhanced investigations).[28] Regardless of whether a full investigation is launched, information gathered in these assessments is then stored in the FBI databases, Guardian and eGuardian, and can also be shared with other federal, state, and local agencies.[29]

B. Suspicious Activity Reporting

Another post-9/11 FBI surveillance method that communities should be aware of is Suspicious Activity Reporting (SAR), which the FBI has used to collect more than one hundred thousand pieces of unverified "intelligence" information on individuals and communities.[30] The suspicious activity reports (SARs) program officially began in 2007[31], when the United States Department of Homeland Security (DHS), the FBI, and state and local law enforcement developed the collaborative Nationwide Suspicious Activity Reporting Initiative (NSI).[32] The following year, the FBI launched a national database called eGuardian, which allows the Bureau to receive SARs with a potential nexus to terrorism from the NSI, and to analyze and share them with other law enforcement and intelligence agencies at the state, local, and federal level, as well as fusion centers.[33] SARs that are submitted to the NSI but are not

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28. Charlie Savage, *F.B.I. Focusing on Security Over Ordinary Crime*, N.Y. TIMES (Aug. 23, 2011), http://www.nytimes.com/2011/08/24/us/24fbi.html?_r-0 (on file with the *Columbia Human Rights Law Review*).

29. U.S. Fed. Bureau of Investigation, *supra* note 15, pt. II, § 5.6.A.1.

30. U.S. GOV'T PUBL'G OFF., Sixteen Years After 9/11: Assessing Suspicious Activity Reporting Efforts, House Committee on Homeland Security, Hearing Before the Subcomm. on Counterterrorism and Intel., 115 Cong. 6 (Sept. 13, 2017).

31. The basic purpose of the SARs initiative was to encourage, streamline, and make shareable the sorts of "tips and leads" that law enforcement and intelligence agencies collect. *See* THOMAS CINCOTTA, PLATFORM FOR PREJUDICE: HOW THE NATIONWIDE SUSPICIOUS ACTIVITY REPORTING INITIATIVE INVITES RACIAL PROFILING, ERODES CIVIL LIBERTIES, AND UNDERMINES SECURITY 32–33 (Political Research Associates, 2010).

32. U.S. GOV'T ACCOUNTABILITY OFF., ADDITIONAL ACTIONS COULD HELP ENSURE THAT EFFORTS TO SHARE TERRORISM-RELATED SUSPICIOUS ACTIVITY REPORTS ARE EFFECTIVE (2013), https://www.gao.gov/assets/660/652995.pdf [https://perma.cc/JPC5-4C5H].

33. Jacqueline F. Brown, *Privacy Impact Assessment for the eGuardian System*, U.S. FED. BUREAU OF INVESTIGATION (Jan. 4, 2013),

deemed to have a potential nexus to terrorism are distributed for follow-up investigation by other agencies.[34]

Different government entities have integrated the NSI with existing fusion centers and law enforcement agencies, and have developed particular protocols for processing and forwarding the SARs they receive.[35] The FBI's SARs program, for example, calls upon law enforcement officers and general members of the public to report any "observed behavior that may be indicative of intelligence gathering of pre-operational planning related to terrorism, criminal or other illicit intention."[36] The 2015 "functional standard" for SARs includes as examples of "suspicious" behavior such common activities as "taking pictures or video of persons, facilities, buildings, or infrastructure in an unusual or surreptitious manner that would arouse suspicion . . . in a reasonable person," "demonstrating unusual or prolonged interest in facilities, buildings, or infrastructure," and "observation through binoculars, taking notes, attempting to mark off or measure distances, etc."[37] As journalist and activist Dia Kayyali points out, these standards "are clearly ripe for abuse" insofar as the racial and religious biases of the general public will shape how such activities are interpreted.[38]

Once SARs are submitted to the NSI, they are reviewed by the receiving law enforcement agency or fusion center, then analyzed and distributed for follow-up investigations based on the subject matter.[39] According to 2017 remarks by the Acting Deputy Secretary

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https://www.fbi.gov/services/information-management/foipa/privacy-impact-assessments/eguardian-threat# [https://perma.cc/CCH6-U5VJ].

34. U.S. GOV'T PUBLISHING OFF., *supra* note 30 (explaining how different state and local law enforcement agencies follow-up on non-terrorism SARs).

35. *Id.*

36. U.S. Fed. Bureau of Investigation, *Privacy Impact Assessment for the eGuardian Threat Tracking System*, U.S. DEPT. OF JUST. 1, 6 (Nov. 25, 2008), https://docplayer.net/69076242-Privacy-impact-assessment-for-the-eguardian-threat-tracking-system.html (on file with the *Columbia Human Rights Law Review*).

37. *Functional Standard (FS) Suspicious Activity Reporting (SAR) ISE-FS-200*, INFO. SHARING ENV'T 48–49 (Feb. 23, 2015).

38. If a white man in a suit takes photographs of a busy courthouse entrance, for instance, he is unlikely to be reported by other bystanders in the same way as a Muslim woman wearing a hijab. *See generally* Dia Kayyali, *Why Fusion Centers Matter: FAQ*, ELECTRONIC FRONTIER FOUND. (Apr. 7, 2014), https://www.eff.org/deeplinks/2014/04/why-fusion-centers-matter-faq [https://perma.cc/Y2GP-4EWG] (explaining how fusion centers and the use of SARs can lead to discriminatory profiling based on societal biases).

39. U.S. GOV'T PUBLISHING OFF., *supra* note 30, at 5–6.

of Intelligence Operations for DHS, since 2010 there had been more than one hundred thousand SARs submitted to the NSI, of which around 1,200 led to a new FBI investigation or related to an existing one and 1,100 were used to "enhance" the terrorism watchlist.[40] This suggests that the vast majority of SARs submitted to the NSI did not contain evidence of any terrorist threat. Despite the low number of SARs that contain valid counter-terrorism information, even SARs rejected by the FBI are still investigated by other law enforcement and intelligence agencies.[41] This storage and sharing of information helps explain how the SARs program has led to a disproportionate focus on specific communities while also providing law enforcement with the necessary pretext for over-policing, surveilling, and repressing those same communities.

C. The Information-Sharing Environment and Fusion Centers

Not only has the FBI made it easier for its own agents to surveil community members without factual justification, but, in recent years, it has also enjoyed increased access to information held by other agencies, such as Immigration and Customs Enforcement (ICE), the National Security Administration (NSA), and local police departments. Today, the primary channels through which agencies share intelligence information are the national network of "fusion centers"—electronic information hubs jointly-operated by federal, state, and local law enforcement.[42] Fusion centers are designed to facilitate information sharing between agencies on "homeland security-related issues," and to establish "an analytical (fusion) process for evaluating threats."[43] While initially launched as a

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40. *Id.* at 6.

41. In New Jersey, for instance, Superintendent of the State Police Rick Fuentes has explained that:

> The SARs are received at a desk that is staffed 24/7 by personnel from the Office of Homeland Security and Preparedness. The FBI has a right of first refusal on all SARs. The SARs that are not accepted by the FBI are investigated either by OHS&P or a local police department. None of them go unanswered.

Id. at 10.

42. *National Network of Fusion Centers Fact Sheet*, DEP'T OF HOMELAND SEC. (Aug. 16, 2019), https://www.dhs.gov/national-network-fusion-centers-fact-sheet [https://perma.cc/L7GA-67DJ].

43. Mikaela Cooney et al., *An Assessment of the Utility of a State Fusion Center by Law Enforcement Executives and Personnel*, 20 INT'L ASS'N OF L. ENF'T INTEL. ANALYSTS 1, 4 (2011).

counter-terrorism innovation, the vast majority of fusion centers have since broadened their scope to an "all crimes" orientation, where civilians and local officers are encouraged to report any information that *may* lead to the prevention of a crime.[44] As of June 2020, there are eighty of these fusion centers in operation nationwide.[45]

The crowd-sourced information stored in these fusion centers is then accessible to any agency with access to that particular center, which usually includes DHS, the FBI, local law enforcement, and members of local JTTFs, among others.[46] By late 2017, 90% of all fusion centers had channels for receiving SARs directly from members of the general public, and 31% had already developed applications for the public to submit SARs using their smartphones.[47] In this way, the fusion centers collect, organize, and weaponize "intelligence" information gathered through myriad unreliable and discriminatory methods, for use by law enforcement at all levels.[48]

The degree to which federal immigration agencies, such as Customs and Boarder Protection (CBP) and ICE have embedded themselves in fusion centers is just one example of how these centers have been adapted to suit myriad law enforcement and intelligence purposes.[49] The information shared with CBP and ICE through these fusion centers includes, for example, the National Gang Intelligence Center—an FBI database of possible gang affiliates which is, in turn, used to justify denying lawful status to immigrants or even deport them.[50]

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44. *Id.* at 7.

45. *Fusion Center Locations and Contact Information*, DEPT. OF HOMELAND SEC. (Apr. 16, 2020), https://www.dhs.gov/fusion-center-locations-and-contact-information [https://perma.cc/JJ67-8G39].

46. Priscilla M. Regan et al., *Constructing the Suspicious: Data Production, Circulation, and Interpretation by DHS Fusion Centers*, 47 ADMIN. & SOC'Y 740, 742 (2015).

47. HOUSE HOMELAND SEC. COMM., ADVANCING THE HOMELAND SEC, INFO. SHARING ENV'T: A REV. OF THE NAT'L NETWORK OF FUSION CTRS 21 (Nov. 2017).

48. CINCOTTA, *supra* note 31, at 43.

49. According to the House of Representatives' Homeland Security Committee, many fusion centers now have ICE or CBP agents among their staff, and nearly 40% of fusion centers actively process information from ICE and CBP. HOUSE HOMELAND SEC. COMM., *supra* note 47, at 14–15.

50. *Understanding Allegations of Gang Membership/Affiliation in Immigration Cases*, IMMIGR. LEGAL RES. CTR. 1, 7–8 (Apr. 2017), https://www.ilrc.org/sites/default/files/resources/ilrc_gang_advisory-20170509.pdf [https://perma.cc/5F23-LPAU].

In this way, the profiling and mass surveillance of Arab- and Muslim-American communities on the pretext of combatting terrorism generated a robust surveillance infrastructure that has now been adapted to support ICE and CBP operations. The expansion of information-sharing infrastructure and practices since September 11th also undergirds the FBI's current, extensive cooperation with local law enforcement in surveilling Black Lives Matter activists.[51]

III. WEAVING THE WEB OF INFORMANTS AND PROVOCATEURS

Mass surveillance and profiling through SARs and assessments, combined with enhanced inter-agency information-sharing through the fusion centers, has provided the FBI with an engine to dramatically expand its web of confidential informants and agent provocateurs.[52] According to investigative journalist Trevor Aaronson, there are roughly ten-times as many confidential informants in the FBI's network now as there were at the peak of COINTELPRO.[53] And for each of the fifteen thousand registered informants, "there are as many as three unofficial ones, known in FBI parlance as 'hip pockets.'"[54] These hip pockets are used "in contravention of FBI and Guidelines mandates so [the agents] will not have to complete the paperwork, obtain required approvals, or risk disclosing their informants' identities to prosecutors or others," according to the Office of the Inspector General.[55]

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51. Leaked FBI documents obtained by MediaJustice and the ACLU in 2019 included reports of:

> '[L]iaisons' with organizations outside of the FBI and . . . active FBI collaboration with other law enforcement agencies . . . [and] a number of 'strategy meetings' involving local law enforcement, including in the days before the first anniversary of Brown's killing in Ferguson . . . law enforcement partners were asked to contribute to 'collecting better intelligence on possible Black Separatist Extremists.'

Speri, *supra* note 11.

52. In this context, "agent provocateur" is used to mean an individual who is paid to solicit a target's agreement to an illegal act, and plays an active role in pushing the target to break the law, as opposed to merely surveilling them.

53. AARONSON, *supra* note 1, at 26.

54. *Id.* at 44.

55. Off. of the Inspector Gen., *The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines*, U.S. DEPT OF JUST. 1, 113 (Sept. 1, 2005), https://oig.justice.gov/sites/default/files/legacy/special/0509/final.pdf [https://perma.cc/NZT4-TQVT].

This vast ecosystem of informants and hip pockets includes people who continued to commit crimes even while on the FBI payroll, as well as some with proven histories of lying to their handlers.[56] As Aaronson describes:

> Elie Assad, the informant in the Florida stings . . . lied during a polygraph examination in Chicago yet continued to work as an FBI informant. In the Michael Finton case, the FBI had credible information that its informant was dealing drugs yet continued to use him until the final day of the sting operation. The informant in the Rezwan Ferdaus case was caught on an FBI video purchasing heroin and still the Bureau continued to pay him for his work."[57]

In court, crucial factual disputes regarding what was said during conversations between the informant and the defendants can come down to questions of credibility, which is why documented dishonesty and criminal behavior is relevant. This also means that someone may break the law or engage in criminal acts while still working for the FBI as an informant.[58, 59]

Whereas in the past, many informants were recruited after being caught committing a crime, the FBI has increasingly come to rely on threats of retaliatory deportation or the revocation of lawful status to compel immigrants to spy on their neighbors.[60] The FBI can even threaten to create legal obstacles when non-citizen family

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56. AARONSON, *supra* note 1, at 60.

57. *Id.* at 180.

58. In this way, the common assumption that if someone breaks the law then they must not be working with the FBI no longer holds true. *Id.*

59. *Id.* at 103–05.

60. As Sara Kamali explains:

> [A] typical scenario will play out as follows: an FBI agent trying to get someone to cooperate will look for evidence that the person has immigration troubles. If they do, he can ask ICE to begin or expedite deportation proceedings. If the immigrant then chooses to cooperate, the FBI will tell the court he is a valuable asset, averting deportation.

Sara Kamali, *Informants, Provocateurs, and Entrapment: Examining the Histories of the FBI's PATCON and the NYPD's Muslim Surveillance Program*, 15 SURVEILLANCE & SOC'Y 68, 73 (2017); *see also Abdelfattah v. U.S. Dept. of Homeland Sec.,* 787 F.3d 524, 530 (D.C. Cir. 2015) (noting that an FBI agent had directly contacted the plaintiff by phone and "threatened him with deportation if he did not agree to work as an FBI informant").

members attempt to visit or immigrate.[61] Even where the target is a citizen—in the context of an assessment, for instance—the undercover agent can push them to make false statements, and then construe those statements as violations of Title 18 § 1001, which establishes the criminal offense of lying to a federal agent.[62] This charge can then be leveraged to pressure an individual to become an informant in exchange for not being arrested.[63]

The FBI has also been accused in court of adding people to the No-Fly List and refusing to remove them as a way of punishing those who refuse to become informants.[64] In *Tanvir v. Tanzin*, four American Muslim men argued that the FBI violated their constitutional rights when it added them to the No-Fly List and then kept them on it in retaliation for their refusal to become FBI informants.[65] By 2012, the No-Fly List—which was created in 2001,

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61. Heather Maher, *How the FBI Helps Terrorists Succeed*, THE ATLANTIC (Feb. 26, 2013), https://www.theatlantic.com/international/archive/2013/02/how-the-fbi-helps-terrorists-succeed/273537/ [https://perma.cc/59MU-34HN].

62. 18 U.S.C. § 1001(a)(1–3) (2006).

63. Trevor Aaronson, *The Informants*, MOTHER JONES 37 (Sept.–Oct. 2011), https://www.motherjones.com/politics/2011/07/fbi-terrorist-informants/ [https://perma.cc/K537-MXGC].

64. *See* Fikre v. Fed. Bureau of Investigation, 142 F.Supp.3d 1152, 1166 (D. Or. 2015) (granting in part and denying in part the defendants' motion to dismiss where plaintiff alleged that the FBI "retaliated against him for declining to be an informant by placing him on the No-Fly List"); Latif v. Holder, 28 F.Supp.3d 1134, 1143–46 (D. Or. 2014) (granting a motion for partial summary judgement where plaintiffs alleged they were kept on the No Fly List in retaliation for refusing to speak with the FBI); Tarhuni v. Session, No. 3:13-cv-00001-BR, 2018 WL 3614192, at *4 (D. Or. 2018) (denying the defendant's motion to dismiss where "although Plaintiff was never asked to become an informant for the FBI, Plaintiff allege[d] he believes he was put on the No-Fly List as part of an effort . . . to coerce Plaintiff into becoming an informant related to activities at the Masjid As-Saber Mosque"); Kovac v. Wray, 363 F.Supp.3d 721, 735 (N.D. Tex. 2019) (denying defendants' motion to dismiss the plaintiffs' due process challenge to the Constitutional adequacy of DHS procedures for challenging their inclusion in the TSDB"); El Ali v. Barr, No. 8:18-cv-02415-PX, 2020 WL 4051866, at *6 (D. Md. 2020) (granting in part and denying in part defendant's motion to dismiss where plaintiffs alleged that they "have been approached to act as informants in exchange for being pulled off Watchlists").

65. The four plaintiffs in *Tanvir*:

> [A]ssert[ed] that they were each approached by federal agents and asked to serve as informants for the FBI . . . to gather information on members of Muslim communities and report that information to the FBI. In some instances, the FBI's request was accompanied with severe pressure, including threats of deportation or arrest; in others, the request was

shortly after September 11th—already contained 21,000 names.[66] Individuals added to the list are prohibited from boarding any plane that "starts in, ends in, or flies over the United States."[67] Despite recent policy changes in response to the *Tanvir* lawsuit and others, challenging one's inclusion on the no fly list remains a lengthy and usually fruitless pursuit.[68] The implications of not being able to travel

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> accompanied by promises of financial and other assistance. Regardless, plaintiffs rebuffed those repeated requests . . . . In response to these refusals, the federal agents maintained Plaintiffs on the national "No Fly List."

Tanvir v. Tanzin, 894 F.3d 449, 453 (2d Cir. 2018).

66. *See Tanvir v. Tanzin (formerly Tanvir v. Holder and Tanvir v. Lynch)*, CTR. FOR CONST. RTS. (Apr. 6, 2020), https://ccrjustice.org/home/what-we-do/our-cases/tanvir-v-holder [https://perma.cc/U96S-VQ4Z].

67. *Tanvir*, 894 F.3d at 454.

68. *What Do If You Think You're on the No Fly List*, ACLU (2020), https://www.aclu.org/know-your-rights/what-do-if-you-think-youre-no-fly-list/ [https://perma.cc/42MV-MG6Y]. The ACLU advises that:

> If you are denied boarding on a flight, you can submit a standard form to the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) . . . if you are a U.S. citizen or lawful permanent resident, and the [Terrorist Screening Center] determines that you are on the No Fly List, DHS TRIP will send you a letter informing you of your status on the No Fly List and providing the option to submit and receive additional information. If you choose that option, DHS TRIP will provide a second letter identifying the general criterion under which you have been placed on the No Fly List . . . the government's summary likely will not include all of its reasons for your placement on the list, and in some cases the government will choose not to provide any summary at all. The government also will not provide you any of the evidence it relied upon in deciding to place you on the list, and it may also withhold information in its possession that undercuts its basis or putting you on the list. Finally, the government does not provide a live hearing at which you could testify or give you an opportunity to cross-examine witnesses against you. You may submit a written response . . . with any exhibits or other materials you think are relevant. The government will review your response submission and inform you of its final determination. If you are not a U.S. citizen or lawful permanent resident . . . the letter does not confirm or deny whether you have been included on the No Fly List . . . currently, the only way for a non-citizen to discover if they have been removed from the No Fly List or not after following this procedure is by purchasing an airplane ticket and attempting to board.

Id.

through U.S. airspace can be severe, as they were for the plaintiffs in *Tanvir*.[69]

Individuals who are targeted for assessments or recruitment may also be added to the FBI's Terrorist Screening Database (TSDB)—a larger database from which the FBI develops particularized watchlists and intelligence information for clients including the State Department, local law enforcement, foreign governments, and even *private sector* entities.[70] In *Elhady v. Kable*, District Court Judge Anthony Trenga held that the TSDB—which contained information on more than 1.2 million people, including "4,600 United States citizens or lawful permanent residents" in 2017—imposed a substantial burden on the liberty interests of those listed, and that the existing process for challenging one's inclusion on

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69. As a result of their inclusion on the No-Fly List, "some of the men were not able to see family members overseas for years. One was not able to visit his gravely ill 93-year-old grandmother; another was separated from his wife and three young daughters for five years," while a third plaintiff "was unable to see his wife for nearly two years." CTR. FOR CONST. RTS., *supra* note 66.

70. The specific partners include:

> CBP, which screens all individual travelers against the TSDB when they seek to enter the United States; the Coast Guard, which, along with CBP, uses the TSDB to screen passenger and crew manifests for ships traveling through U.S. waters and seaports; TSA, which screens air travelers against the TSDB and designates anyone on the list as 'high-risk status,' subjecting them to additional pre-boarding security screening; the State Department, which uses the TSDB to screen individuals for visa waiver, visa, and passport eligibility; United States Citizenship and Immigration Services ('USCIS'), which checks the TSDB status of individuals who apply for or may benefit from immigration, asylum, and naturalization benefits; DHS, which, in conjunction with other agencies, uses the TSDB to screen TSC, TSA, and CBP employees and contractors, private sector employees with transportation and infrastructure functions, individuals with any form of airport identification, and those applying for or maintaining Transportation Worker Identification Credentials, Federal Aviation Administration airman certificates, and hazardous material transportation licenses; and the Department of Defense ('DOD'), which uses the TSDB to screen individuals accessing military bases . . . [and] more than 18,000 state, local, county, city, university and college, tribal, and federal law enforcement agencies and approximately 533 private entities.

Elhady v. Kable, 391 F.Supp.3d 562, 569–70 (E.D. Va. 2019).

the TSDB was constitutionally deficient.[71] That case, however, is on appeal to the Fourth Circuit Court of Appeals at the time of writing.[72]

Finally, the FBI pays informants substantial sums of money, enabling them to live on an FBI paycheck while they focus on setting up a sting or eavesdropping on the community. Informants can earn nearly $100,000 per job, not including additional 'performance incentives' which may be disbursed if the sting operation is successful and results in a conviction.[73] In the Liberty City Seven case, for example, one informant received $85,000 for his work as an agent provocateur, while another received $21,000, according to documents released in discovery.[74] For many potential informants, this financial incentive to spy on and even entrap their own neighbors is difficult to pass up. In the case of Derrick Shareef,[75] for instance, the FBI paid the informant $16,000—the exact amount that he owed in child support.[76] In the next phase of a typical counter-terrorism sting, these informants play an additional role as agent provocateurs.[77]

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71. The 23 plaintiffs were U.S. citizens who had, for no apparent reason, experienced long delays and invasive interrogations by DHS when attempting to cross United States borders. They sought to challenge their possible inclusion on the TSDB. *Id.* at 571.

72. *See* Briefing Order, Elhady v. Kable, 0:20-cv.us-01311 (4th Cir. Mar. 17, 2020).

73. A confidential informant could receive additional financial reward, for instance, by acting as an agent provocateur. AARONSON, *supra* note 1, at 45.

74. In this case, FBI informant and provocateur Elie Assaad led the seven defendants to pledge allegiance to Al Qaeda and offered to fund Narseal Batiste's struggling dry-wall business if he went along with the plot that another informant, Abbas Al Saidi, had initiated. AARONSON, *supra* note 63 (contextualizing the sting operation and providing background on the case); Narseal Batiste's Supplement to Demand for Specific Kyles and Brady Information and Giglio/Napue Materials and Request for Expedited Ruling at 2, United States v. Narseal Batiste, No. 1:06-CR-20373-JAL (S.D. Fla. Aug. 27, 2007), http://theterrorfactory.com/documents/batiste398main.pdf [https://perma.cc/FF9F-U8RQ] (establishing the amounts of money paid to the informants).

75. Pierre Thomas & Jason Ryan, *'Lone Wolf' Charged with Plotting Attack During Christmas Rush*, ABC NEWS (Dec. 8, 2006), http://abcnews.go.com/TheLaw/story?id=2710776 [https://perma.cc/F43J-DHDH].

76. According to the sentencing memorandum submitted by Sheriff's attorney:

> Derrick did not know that his 'father figure' [the informant] was actually in arrears in excess of $16,000.00 for child support for two of his children. Derrick was unaware that during the course of the friendship the informant was being paid by the government and had received in excess of $16,000.00 for services rendered in connection with Derrick.

IV. AGENT PROVOCATEURS AND MANIPULATION

While the particular facts of each terrorism sting operation differ, certain trends hold true, including the FBI's usage of agent provocateurs. The most systematic review of post-9/11 terrorism prosecutions to date is found in Trevor Aaronson's book *The Terror Factory: Inside the FBI's Manufactured War on Terrorism*. After analyzing the record in every terrorism prosecution from 2001 to 2013, Aaronson calculated that at least fifty defendants were on trial for conduct spurred by an agent provocateur employed by the FBI—"someone who provided not only the plan but also the means and opportunity for the terrorist plot."[78] As Aaronson notes, "what data is available suggests would-be Islamic terrorists caught in FBI terrorism stings never could have obtained the capability to carry out their planned violent acts were it not for the FBI's assistance."[79] In today's anti-terrorism stings, the FBI routinely embarks on a canned hunt, where the hunter is never in real danger and the chase itself is choreographed ahead of time.[80]

Sentencing Memorandum at 2, U.S. v. Shareef, (N.D. Ill. Sept. 26, 2008), http://theterrorfactory.com/documents/shareef_sentencing.pdf [https://perma.cc/F3S7-EQ5W].

77. This term is explained above, *supra* note 52.

78. AARONSON, *supra* note 1, at 197.

79. *Id.* at 29–30.

80. Indeed:

> The FBI currently spends $3 billion annually to hunt an enemy that is largely of its own creation. Evidence in dozens of terrorism cases . . . suggests that today's terrorists in the United States are nothing more than FBI creations, impressionable men living on the edges of society who become bomb-triggering would-be killers only because of the actions of FBI informants. The FBI and the Justice Department then cite these sting cases as proof that the government is stopping terrorists before they strike. But the evidence available for review in these cases shows that these 'terrorists' never had the capability to launch an attack themselves.

Id. at 234. In the Newburgh Five case, U.S. v. Cromitie, No. 09 Cr. 558(CM), 2011 WL 1842219, sentencing judge Colleen McMahon similarly declared that "[o]nly the government could have made a 'terrorist' out of Mr. Cromitie, whose buffoonery is positively Shakespearean in its scope" and called the FBI's actions a "fantasy terror operation" before sentencing Cromitie to 25 years. David K. Shipler, *Terrorist Plots, Hatched by the F.B.I.*, N.Y. TIMES (Ap. 28, 2012), https://www.nytimes.com/2012/04/29/opinion/sunday/terrorist-plots-helped-along-by-the-fbi.html (on file with the *Columbia Human Rights Law Review*).

The agent provocateurs behind these terrorism stings have many means at their disposal for persuading the targeted community member to participate in a conspiracy to violate the law. The FBI often uses informants who either have a prior relationship with the target or ingratiate themselves through financial inducements, drugs, and emotional manipulation, among other tools.[81] Where the target of a particular sting has financial troubles, the FBI will have the provocateur offer them money in exchange for participating in the conspiracy.[82]

In the case of the Liberty City Seven, the lead defendant, Narseal Batiste, ran a failing drywall business[83] in one of the poorest neighborhoods of Northern Miami and lived in a single bedroom apartment with his family.[84] According to Batiste's attorneys, the informant who approached him, Abbas al-Saidi, initiated the sting by offering to help with Batiste's economic troubles, telling him that "you're always looking for money, and I have some people in Yemen I can introduce you to . . . but you gotta spin it the right way, and I'll help you do that."[85] The second informant used in the Liberty City Seven case, Elie Assad, also offered to help Batiste pay for his drywall warehouse to the tune of $50,000 as long as he continued to go along with the conspiracy Assad had suggested.[86] Similarly, the agent provocateur in the entrapment of Yassin Aref, the imam at Albany's Masjid As-Salam, and Mohammed Hossain, a Bangladeshi immigrant, offered the latter a $45,000 loan to repair his dilapidated restaurant, the Little Italy Pizzeria.[87] This loan later formed the basis

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81. For example, the FBI used all of these methods when targeting Olajuwon Davis for a domestic terrorism sting. *See* Speri, *supra* note 6; Danny Wicentowski, *How a Black Panther in Ferguson Became the Star of an FBI Sting*, RIVERFRONT TIMES (Aug. 7, 2019), https://www.riverfronttimes.com/stlouis/a-black-panther-and-talented-actor-found-himself-starring-in-an-fbi-sting/Content?oid=32055025&showFullText=true (on file with the *Columbia Human Rights Law Review*) (detailing the various means of coercion the FBI used against Davis).

82. AARONSON, *supra* note 1, at 75.

83. Transcript at 77, U.S. v. Batiste, 1:06-cr-20373-JAL (S.D. Fla. Feb.18, 2009).

84. *Id.* at 69.

85. AARONSON, *supra* note 1, at 75.

86. Assad explained that Batiste would be given the $50,000 only if he agreed to take an oath of loyalty to Al-Qaeda. Transcript, *supra* note 83, at 194.

87. Transcript of Summation at 2022, U.S. v. Aref and Hossain, 04-CR-402 (N.D.N.Y. Oct. 3, 2006) 1872, 2022; *see also* AARONSON, *supra* note 1, at 125 (explaining that "Hussain made [Hossain] an offer: he'd give him $50,000 in cash, and Hossain could keep $5,000 and pay back the remaining $45,000 in

for a charge of money laundering in a conspiracy to aid a terrorist group.[88] Similarly, in the case of James Cromitie, entrapped as one of the Newburgh Four, not only did informant Shahed Hussain pay the defendant's rent multiple times, but he even offered the impoverished Walmart worker "$250,000" if he would continue with the terror plot Hussain had suggested.[89] Other inducements offered to Cromitie in exchange for his cooperation with the proposed terrorism plot included money to buy a new car, payment for meals and personal expenses, money to purchase a barber shop, and an all-expenses paid vacation to Puerto Rico.[90]

V. PROSECUTION AND THE END OF THE ENTRAPMENT DEFENSE

Cases like those of the Newburgh Four[91] or the Liberty City Seven[92] raise questions as to the potential use of an entrapment

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installments over the following year" and "Hossain agreed . . . the government would later call this money laundering; Hossain would call it a loan, because his pizza shop was struggling").

88. Michael Wilson, *Jury Convicts 2 Albany Men in Missile Sting*, N.Y. TIMES (Oct. 11, 2006), http://www.nytimes.com/2006/10/11/nyregion/11plot.html (on file with the *Columbia Human Rights Law Review*).

89. Brief for Defendant-Appellant at 57–58, U.S. v. Cromitie, 727 F.3d 194 (2d Cir. 2013) (Docket No. 11-2763).

90. In exchange for going along with a terrorism plot suggested by the informant, Cromitie was offered—at various points over a period of eleven months:

> [R]epeated offers of 'a lot of cash'; an all-expense paid vacation to Puerto Rico; enough cash to do 'whatever you want to do' after the vacation; cash to buy a brand new car; a BMW automobile; a Mercedes-Benz for co-defendant Onta Williams; a barbershop for Cromitie, whose only skill was barbering, worth $60-70,000; cash to pay for the co-defendant lookouts so Cromitie would not have to pay for them himself; spending money and payment for meals and other personal expenses, such as rent, food, cell phone cards, and cab fare; and $250,000 in cash.

Cromitie, 727 F.3d at 57–58 (internal citations omitted),

91. *Cromitie*, 727 F.3d at 212 (upholding the Newburgh Four's convictions, and stating that the jury was "entitled to think that wanting to die like a martyr, coupled with wanting to do something to America, meant a willingness to be a suicide bomber," and thus the entrapment defense was not established as a matter of law).

92. U.S. v. Batiste, No. 06-20373-CR-LENARD, 2009 WL 1437251 (S.D. Fla. 2009). In Batiste, the jury, which ultimately convicted the defendant, was instructed that:

defense. Indeed, popular ethics, and common sense, would suggest that an individual should not be imprisoned for following the suggestions of a government employee, using funds and contacts provided by that employee, and carrying out an act largely planned by that employee. Similarly, the FBI's current counterterrorism and counterintelligence budget of more than $3.8 billion[93] raises concerns about the extent to which these taxpayer dollars are spent orchestrating the very plots they are intended to thwart. Despite these concerns and the potential usefulness of a robust entrapment defense as a necessary bulwark against government abuse, the utility and applicability of the entrapment defense have steadily eroded over time. Multiple factors have contributed to this erosion, and enabled a "near-perfect" record of convictions in domestic terrorism cases since 2001.[94]

The first factor is the predisposition test. The basic rule is that an entrapment defense must fail where the defendant would most likely have engaged in the criminal conduct even without government involvement—where the defendant was *predisposed* towards the conduct.[95] In *Jacobson v. U.S.*, the preeminent Supreme Court case on the use of the predisposition test in federal sing operations, the court reversed a conviction after the prosecutors failed

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> Defendant is 'entrapped' when law enforcement officers, or cooperating individuals under their direction, induce or persuade a Defendant to commit a crime that the Defendant had no previous intent to commit . . . . However, there is no entrapment where a Defendant is ready and willing to break the law and the Government merely provides what appears to be a favorable opportunity for the Defendant to commit the crime.

Id. at *30.

93. U.S. Fed. Bureau of Investigation, *FY 2021 Authorization and Budget Request to Congress*, U.S. DEP'T OF JUST. (Feb. 2020), 4–12, https://www.justice.gov/doj/page/file/1246311/download [https://perma.cc/DFR7-GS7D].

94. Only three people have been acquitted of domestic terrorism charges since 2001: Lyglenson Lemorin and Naudimer Herrera, charged as members of the Liberty City Seven and acquitted for having distanced themselves from the rest of the group early during the sting, and Omar Mateen's widow, Noor Zahi Salman. *Trial and Terror*, THE INTERCEPT (Sept. 27, 2020), https://trial-and-terror.theintercept.com/ [https://perma.cc/C9AK-JNWJ] [hereinafter *Trial and Terror*].

95. Mathews v. U.S., 485 U.S. 58, 63 (1988) (establishing that "a valid entrapment defense has two related elements: governmental inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct").

to show predisposition.[96] The court clarified that in order to defeat an entrapment defense, the prosecution must show "that [the defendant] was predisposed, independent of the government's acts and beyond a reasonable doubt, to violate the law."[97]

At the time of writing, the best example of the majority circuit court interpretation of *Jacobson*'s somewhat vague test for predisposition is the Second Circuit's decision in *U.S. v. Cromitie*, the Newburgh Four sting mentioned above.[98] In the case of the Newburgh Four, a group of impoverished men in New York were targeted for an eleven-month sting operation using an agent provocateur, Shahed Hussain—a Pakistani man who was himself coerced into acting as an informant after the FBI threatened him with deportation—and eventually charged with attempting to use weapons of mass destruction, attempting to acquire and use anti-aircraft missiles, and attempting to kill officers of the United States.[99] The *Cromitie* court began by clarifying three established means of showing predisposition in the circuit: "an existing course of similar criminal conduct; the accused's already formed *design* to commit the crime or similar crimes; [and] his willingness to do so, as evidenced by ready complaisance."[100]

The first method of showing predisposition is straightforward, and can be disregarded for defendants without a documented history of prior criminal conduct that is similar to the charged crime.[101] As

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96. Jacobson v. U.S., 503 U.S. 540, 542 (1992) (overturning the appellant's conviction where "the Government overstepped the line between setting a trap for the 'unwary innocent' and the 'unwary criminal,'" and therefore failed to show predisposition as a matter of law following a 26-month entrapment sting involving child pornography charges).

97. The court clarified that "in their zeal to enforce the law . . . Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the government may prosecute." *Id*. at 548–54.

98. Brief for Defendant-Appellant at 57–58, U.S. v. Cromitie, 727 F.3d 194 (2d Cir. 2013) (Docket No. 11-2763).

99. *Cromitie*, 727 F.3d at 199–200 ("[T]o avoid being deported, Hussain agreed to cooperate with the government's investigation of another individual . . . . Hussain became a paid informant of the FBI and started working in the lower Hudson Valley. As the District Court stated, Hussain's goal was to 'locate disaffected Muslims who might be harboring terrorist designs.'" (citing United States v. Cromitie, No. 09 Cr. 558(CM), 2011 WL 1842219, at *2 (S.D.N.Y. May 10, 2011))).

100. *Id.* at 205 (citing United States v. Becker, 62 F.2d 1007 (2d Cir. 1933)).

101. *Cromitie*, 727 F.3d at 212 ("Cromitie had not engaged in a course of similar conduct prior to the Government's inducement, nor did he readily agree to

long as the defendant required inducement and did not "readily agree to committing the charged offense" once presented with the opportunity, the third basis of showing predisposition is also inapplicable.[102] This leaves the second, more subjective way of showing predisposition: the defendant's prior 'design' to commit similar crimes, which depends on the defendant's state of mind and cannot be refuted as easily as the first and third.[103]

In *Cromitie*, the Second Circuit attempted to clarify this predisposition standard by providing that "having the requisite 'design,' does not mean 'prepared' in the sense of having taken specific preparatory steps to accomplish an offense . . . it means 'prepared' in the sense of being ready to commit the offense once the opportunity is presented,"[104] and that "with respect to a category as varied as terrorist activity, the requisite design . . . may be broader that the design for other narrower forms of criminal activity."[105] Thus, since terrorism is a very broad category of crime—"especially with respect to terrorist activities directed against the interests of the United States"—the government can overcome an entrapment defense simply by showing the defendant had "a rather generalized idea or intent to inflict harm on such interests."[106] Whereas in most cases the government is required to show the defendant had a narrow and concrete 'design' to commit a specific criminal act prior to being induced, this burden is therefore lessened in terrorism prosecutions, and can be met using vaguer evidence of anti-American sentiments and a desire to inflict harm on the country.[107]

[the conspiracy] . . . the issue becomes whether, prior to inducement, he had an 'already formed *design* to commit the crime or similar crimes." (citing *Becker*, 62 F.2d at 1008)).

102. *Id*.

103. *Id.* at 206.

104. *Id.* at 207.

105. *Id.*

106. *Id.*

107. In Cromitie's case, for instance, the Second Circuit held that a reasonable jury could find predisposition to commit a suicide bombing, as a matter of law, based on the defendant's statement that he wanted to die like a martyr, and to "do something" to America. *Id*. Compare the low level of precision and specificity required to show predisposition towards committing terrorism with the specificity required in non-terrorism cases. *See, e.g.*, Jacobson v. U.S., 503 U.S. 540, 550 (1992) (holding that, in the context of the non-terrorism offense of receiving child pornography in violation of 18 U.S.C. § 2252(a)(2), the defendant's prior purchase of child pornography before such materials were made illegal could not support a finding that he was predisposed to receive such materials in violation of the law; rather, "it may indicate a predisposition to view sexually

Maintaining this double-standard for winning an entrapment claim in court—where the evidentiary threshold for finding predisposition in terrorism cases is functionally lower than it would be in non-terrorism cases—has an especially severe impact on Muslim- and Arab-American communities in the United States. As Piotr Szpunar and others have noted, a jury made up of Americans who have spent the past two decades consuming violent, stereotypical depictions of Muslims and Arab people perpetuated in the media and by politicians is primed to interpret outward expressions of Muslim devotion as potential markers of the very sort of 'radicalism' required for a showing of predisposition.[108] Reflecting this, courts have held that an entrapment defense can be defeated in a terrorism trial based on such minimal evidence of predisposition as, for instance, a defendant watching YouTube videos published by Islamic militant groups, claiming to want to "die like a shahid, a martyr," and claiming to want to "do something to America."[109]

Not only is the entrapment defense weakened by the subjective standard for showing predisposition, but it is rendered even less protective of entrapped community members due to a second factor rooted in informant conduct rather than case-law. As legal scholar Wadie E. Said notes in his book *Crimes of Terror: The*

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oriented photographs that are responsive to his sexual tastes; but evidence that merely indicates a generic inclination to act in a broad range, not all of which is criminal, is of little probative value in establishing predisposition"); *see also* Dejan M. Gantar, *Criminalizing the Armchair Terrorist: Entrapment and the Domestic Terrorism Prosecution*, 42 HASTINGS CONST. L.Q. 135, 135 (2014) (arguing that the "federal courts apply a lower standard for prosecutors in proving predisposition by allowing nothing more than evidence of a defendant's religious or political beliefs, or general 'impulse to lash out,' to demonstrate predisposition . . . [and] that this evidentiary laxity establishes a double standard in terrorism cases").

108. Piotr Szpunar, *Premediating Predisposition: Informants, Entrapment, and Connectivity in Counterterrorism*, 34 CRITICAL STUD. IN MEDIA COMM. 371, 375–76 (2017); *see also* CTR FOR HUM. RTS. AND GLOBAL JUST., TARGETED AND ENTRAPPED: MANUFACTURING THE "HOMEGROWN THREAT" IN THE U.S. 16 (N.Y.U., 2011) ("[I]n investigating or trying Muslim defendants, law enforcement agents and the courts have equated the expression of religious ideas—or even the possession of particular print and video materials—as evidence of a desire to commit terrorism" using "the problematic assumption that religious and political views or speech constitute . . . intent or predisposition.").

109. *Cromitie*, 727 F.3d at 213–14 (holding that the defendant's subsequent, more precise statements of enmity towards America—made after the government's inducement—could be used as evidence to clarify the meaning of Cromitie's prior ambiguous statement that he wanted to "do something" to America).

Legal and Political Implications of Federal Terrorism Prosecutions, there is a significant pattern across federal terrorism stings in which crucial conversations between the target and the informant are, for one reason or another, unavailable.[110] While the overwhelming majority of conversations the FBI instructs its informants to have with the target are carefully recorded and documented, the recording devices routinely "malfunction" or fail to record potentially exculpatory conversations.[111]

Taken as a whole, "if you take a close look at all the terrorism stings the FBI has engaged in since 9/11, you'll find missing recordings in nearly every one."[112] These missing recordings rarely harm the prosecution's case, since the FBI can easily claim that a given encounter was not recorded due to security risks associated with wearing a wire, or based on a prior assessment that the conversation would be of little import to the case.[113, 114] For the

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110. Said, *supra* note 5, at 41. Said explains that:

> [T]he most powerful method for obtaining a conviction is for the informant to record conversations with the defendant in which he exhibits a willingness or intention to engage in an act of terrorism . . . . However, in many high-profile terrorism prosecutions, key conversations between an informant and target have gone unrecorded . . . at the most critical times, such as the initial meeting between the informant and target, or when the target expresses a desire not to go through with the plot.

Id.

111. For examples of cases in which the FBI has claimed that equipment malfunctioned and failed to record important conversations, see U.S. v. Mohamud, 941 F.Supp.2d 1303, 1317 (D. Or. Apr. 12, 2013); Affidavit of FBI Special Agent Keith E. Bender in Support of Criminal Complaint at 13, U.S. v. Martinez, 1:10-MJ-04761-JKB (D. Md. Dec. 8, 2010).

112. AARONSON, *supra* note 1, at 190.

113. Aaronson notes that "even after recordings began in the Newburgh sting, the FBI elected not to tape some meetings, including vital ones such as when Hussain took the four men to dinner at a T.G.I. Friday's the night before the planned bombing and offered them money to carry forward the plot." *Id.* at 190–96.

114. Retired FBI Agent James J. Wedick is skeptical of these excuses for not recording important conversations, and has stated in an interview with Trevor Aaronson that:

> With the technology the FBI now has access to—these small devices that no one would ever suspect are recorders or transmitters—there's no excuse not to tape interactions between the informant and the target . . . so why in many of these terrorism stings are meetings not recorded? Because it's convenient for the FBI not to record. They are paying

defendants, however, the absence of a recording means that their case can depend largely on an informant's testimony, which can be custom-tailored to fit the requirements of a terrorism conviction while minimizing the available grounds for a defense.[115]

These factors combine to create a legal architecture in which it is exceedingly difficult for defendants to win an entrapment claim in federal anti-terrorism prosecutions. The fact that terrorism defendants are often subject to sentencing enhancements means that the vast majority of defendants end up accepting a plea deal in order to avoid draconian prison sentences; deciding that the entrapment defense is too risky to justify going to trial.[116, 117] Even where a defendant chooses to challenge these abusive sting practices by going to trial and claiming entrapment, the dismal track record of the entrapment defense shows just how big of a risk these defendants are taking. At the time of writing, *none* of the domestic terrorism

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> informants huge sums of money and not monitoring them correctly . . . . I think it's apparent that the Bureau understands and is aware of the problem, but is decidedly more interested in not being caught flatfooted again about would-be and/or suspected terrorists… so we see rather aggressive informants suggesting or proposing things J. Edgar Hoover never would have permitted.

Id. at 195–96.

115. For individuals who believe they are the target of a sting operation, it may be useful to make one's recordings of exculpatory conversations, which can include attempts to withdraw from the conspiracy or egregious conduct by the informant (whether in the form of threats, gaslighting, humiliation, or other types of coercion).

116. *See* Sameer Ahmed, *Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror*, 126 YALE L.J. 1520, 1527–28 (2017) (examining the unique severity of the Terrorism Enhancement—both in terms of how many years it can add to one's sentence, as well as the scope of crimes it can be applied to, including—after September 2001—"crimes involving terrorism, but not falling within the statutory definition of 'federal crime of terrorism' . . . obstructing an investigation of a federal crime of terrorism . . . harboring or concealing a terrorist" and even "intending to influence the government's conduct by intimidation or coercion, retaliate against government conduct, or influence a civilian population by intimidation or coercion," as well as conspiring or attempting to commit any of the crimes covered by the enhancement).

117. As of July 15, 2020, there have been 926 terrorism prosecutions by the Department of Justice (not including prosecutions before September 11, 2001). In those cases, "603 defendants have pleaded guilty to charges, while the courts found 198 guilty at trial. Just three have been acquitted and four have seen their charges dropped or dismissed, giving the Justice Department a near-perfect record of conviction in terrorism cases." *Trial and Terror*, *supra* note 94.

defendants who have gone to trial and claimed entrapment in federal court have been successful.[118]

VI. SURVEILLANCE TECHNOLOGY, SOCIAL MOVEMENTS, AND "BLACK IDENTITY EXTREMISM"

Today, the FBI appears particularly focused on Black radical and civil rights struggles, and on organizations that are active within them. In August 2017, the FBI's Domestic Terrorism Analysis Unit circulated an intelligence assessment entitled "Black Identity Extremists Likely Motivated to Target Law Enforcement Officers," which identified "Black Identity Extremists" as: individuals who seek political change "wholly or in part, through unlawful acts of force or violence, in response to perceived racism and injustice in American society and some… in furtherance of establishing a separate black homeland or autonomous black social institutions, communities, or governing organization within the United States."[119]

The report warned that these individuals' "perceptions of police brutality against African Americans spurred an increase in premeditated, retaliatory lethal violence against law enforcement and will very likely serve as justification for such violence."[120] In other words, the FBI has identified Black people organizing against police violence as a likely source of domestic terrorist threats.[121] The FBI determined that this Black Identity Extremism (BIE) movement was "very likely" sparked by the 2014 police murder of Michael Brown in Ferguson, Missouri and the failure to indict any of the officers involved.[122]

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118. *See id.* (providing a database of all terrorism stings since 2001, including those in which the entrapment defense was raised and rejected).

119. U.S. Fed. Bureau of Investigation, *Black Identity Extremists Likely Motivated to Target Law Enforcement Officers*, U.S. DEP'T OF JUST. 2 n.b (Aug. 3, 2017), https://privacysos.org/wp-content/uploads/2017/10/FBI-BlackIdentity Extremists.pdf [https://perma.cc/VW79-26K5].

120. *Id.* at 2.

121. U.S. Fed. Bureau of Investigation, *FY 18 CSG— Threat Guidance— CTD*, U.S. DEP'T OF JUST. (first made public Aug. 8, 2019), 1 https://www.scribd.com/document/421166393/FBI-Strategy-Guide-FY2018-20-and-Threat-Guidance-for-Racial-Extremists [https://perma.cc/MX62-3BQV].

122. In the report, the FBI:

> assesses it is very likely Black Identity Extremist (BIE) perceptions of police brutality against African Americans spurred an increase in premeditated, retaliatory lethal violence against law enforcement and will very likely serve as

Although the specific BIE report was circulated in 2017, the FBI has a documented history of surveillance and infiltration of Black Lives Matter going back to the movement's beginnings in 2014—including the use of informants within activist circles, physical surveillance and stake outs, monitoring of social media accounts, and even tracking activists' travel.[123] The 2017 BIE report itself refers to six instances of violence that it attributes to BIE. The earliest example cited is the case of Olajuwon Davis and Brandon Orlando Baldwin—two men in Ferguson, Missouri who were targeted for a federal sting due to their activism following the murder of Michael Brown and their affiliation with the New Black Panther Party for Self-Defense (NBPP).[124] Davis and Baldwin were arrested on the eve of the grand jury decision not to indict Darren Wilson—the officer who killed Michael Brown—and their arrest coincided with a surge in FBI presence in Ferguson; reports indicate that around one hundred FBI agents were relocated there in response to the protests.[125]

Baldwin and Davis' cases closely adhere to the blueprint for terrorism entrapment laid out above. Reporter Alice Speri learned that two informants befriended Davis after he rose to leadership in the local chapter of the NBPP.[126] These informants ingratiated themselves by offering Davis money, hotel stays, and marijuana, before later moving into his apartment complex and spending "weeks hanging out with him, talking about 'the resistance.'"[127] The FBI also

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> justification for such violence. The FBI assess it is very likely this increase began following August 9, 2014 shooting of Michael Brown in Ferguson, Missouri, and the subsequent Grand Jury November 2014 declination to indict the police officers involved. The FBI assesses it is very likely incidents of alleged police abuse against African Americans since then have continued to feed the resurgence in ideologically motivated, violent criminal activity within the BIE movement.

U.S. Fed. Bureau of Investigation, *supra* note 119, at 2.

123. George Joseph & Murtaza Hussain, *FBI Tracked an Activist Involved with Black Lives Matter as they Traveled Across the US, Documents Show*, THE INTERCEPT (Mar. 19, 2018), https://theintercept.com/2018/03/19/black-lives-matter-fbi-surveillance/ [https://perma.cc/75E3-54LP].

124. U.S. Fed. Bureau of Investigation, *supra* note 119, at 6.

125. Associated Press, *Two Sentenced for Bomb Plot in Wake of Ferguson Police Shooting*, CBS NEWS (Sept. 3, 2015), https://www.cbsnews.com/news/2-sentenced-for-bomb-plot-in-wake-of-ferguson-police-shooting/ [https://perma.cc/EWZ3-GUSW].

126. Speri's information comes from interviews with Baldwin and Davis' friends and family. Speri, *supra* note 6.

127. *Id.*

made use of people close to Davis and Baldwin. One informant, who offered Davis and his pregnant wife a free place to stay, had known Davis since childhood and had previously worked with Davis' mother—Davis even described the man as a "cousin."[128] Both informants also joined the NBPP during the investigation.[129] Claiming that they could not purchase the guns themselves due to their criminal records, the FBI informants encouraged Davis and Baldwin to purchase firearms on behalf of the group and even provided the funding.[130] Davis and Baldwin were ultimately convicted after allegedly purchasing three non-functional pipe bombs from an undercover FBI agent.[131]

Around the same time the 2017 BIE report was in circulation, the FBI began harassing Black Lives Matter activists directly, calling them and visiting them at home to discourage them from protesting.[132] The FBI's use of direct intimidation tactics against activists continues to this day. In June 2020, following the police murder of George Floyd, four activists in Cookeville Tennessee—ages nineteen, twenty-one, twenty-two, and fifty-two—were visited at their family homes by FBI agents involved in a local JTTF.[133] All four reported the FBI's approach as intimidating, or as an attempt at intimidation, and felt they were being interrogated for organizing Black Lives Matter rallies.[134] The FBI questioned the activists about their social media posts, including "'private"' posts that are not visible to the general public, and their connections to or knowledge of "terrorist organizations" including antifa.[135] Former Tennessee State Trooper and City Council member Mark Miller confirmed the FBI

128. Wicentowski, *supra* note 81.
129. *Id.*
130. Speri, *supra* note 6.
131. Judgment at 1–3, U.S. v. Davis, et al., No. 4:14-CR-00366, 2015 WL 1500987 (E.D. Mo. 2015).
132. Feliks Garcia, *Black Lives Matter Activists Say FBI Told Them Not to Protest GOP Convention*, THE INDEPENDENT (July 14, 2016), https://www.independent.co.uk/news/world/americas/black-lives-matter-activists-fbi-republican-convention-cleveland-samuel-sinyangwe-johnetta-elzie-a7137806.html [https://perma.cc/M3LH-2J8B].
133. Chris Brooks, *After Barr Ordered FBI to 'Identify Criminal Organizers,' Activists Were Intimidated at Home and at Work*, THE INTERCEPT (June 12, 2020), https://theintercept.com/2020/06/12/fbi-jttf-protests-activists-cookeville-tennessee/ [https://perma.cc/66CC-SG7C].
134. *Id.*
135. *Id.*

had "a whole team of [Joint Terrorism Task Force] cyber security agents in Nashville who just monitor people's Facebooks."[136]

The FBI's first case against an alleged BIE after the leaked report came to light was that of Rakem Balogun, also known as "Christopher Daniels," in Texas.[137] Balogun was arrested in December of 2017, following a two-year FBI investigation, and charged with a single count of possession of a firearm by a prohibited person.[138] Balogun was a member of the Huey P. Newton Gun Club and described himself as a scientific, revolutionary socialist.[139] Special Agent Aaron Keighley of the FBI testified that Balogun had been under investigation by the FBI's domestic terrorism unit for at least two years after he was filmed attending a police brutality protest in Austin, Texas, in March 2015.[140] The FBI was able to identify Balogun from video footage posted to the far-right conspiracy blog InfoWars.[141] Ultimately, a federal judge dismissed the charges[142] against Balogun after keeping him in jail for five months, causing him to lose his job and his home, and to miss the first months of his newborn daughter's life.[143]

Balogun was targeted on the basis of his political activities and speech. Not only did the FBI first target Balogun for investigation as a result of his activism against police brutality[144], but the FBI also made repeated reference to his social media posts in support of Micah Xavier and Tremaine Wilburn—alleged killers of police officers—in asking the federal judge to keep Balogun detained pending his trial.[145] The FBI eventually admitted in court that it had

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136. *Id.*

137. Martin de Bourmont, *Is a Court Case in Texas the First Prosecution of a 'Black Identity Exttremist'?*, FOREIGN POLICY (Jan. 30, 2018), https://foreignpolicy.com/2018/01/30/is-a-court-case-in-texas-the-first-prosecution-of-a-black-identity-extremist/ [https://perma.cc/AG5Y-Z8Q7].

138. United States v. Daniels*,* 316 F. Supp. 3d 949, 952 (N.D. Tex. 2018).

139. Speri, *supra* note 6.

140. United States v. Daniels, No. 3:18-CR-005-D, 2018 U.S. Dist. LEXIS 14499, at *2 (N.D. Tex. Jan. 30, 2018).

141. Sam Levin, *Black Activist Jailed for His Facebook Posts Speaks Out About Secret FBI Surveillance*, THE GUARDIAN (May 11, 2018), https://www.theguardian.com/world/2018/may/11/rakem-balogun-interview-black-identity-extremists-fbi-surveillance [https://perma.cc/S6G9-7LSV].

142. *Daniels*, 316 F. Supp. 3d, at 952.

143. Levin, *supra* note 141.

144. *Daniels,* 2018 U.S. Dist. LEXIS 14499, at *2.

145. The government argued that "his prior arrests and online anti-law enforcement posting ma[d]e [Balogun] 'an unusually high threat to the community.'" *Id.* at *7.

no evidence of Balogun making any specific threats to harm law enforcement,[146] and had targeted him for FBI surveillance based purely on his activism and social media posts.[147] The FBI's 2018 Consolidated Strategy Guide echoes this strategy of bringing pretextual gun charges—such as the charge against Balogun—as a way to repress alleged BIE acolytes when it declares that "[m]any BIEs are . . . prohibited possessors[148], therefore the FBI will continue to use their prohibited purchaser status as a tactic to assist in mitigating the threat for potential violence" (presumably through criminal charges and sting operations).[149] Davis and Baldwin were also initially arrested on gun charges before the government added the pipe bomb allegations.[150]

Following massive popular backlash, [151] FBI Director Christopher Wray claimed in a Senate Judiciary Committee Hearing on FBI Oversight on July 23, 2019, that the Bureau had abandoned the term "Black Identity Extremism" in favor of a new category of

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146. U.S. District Judge Fitzwater noted that "Daniels is correct that there is no evidence that his statements ever rose to the level of specific threats." *Id*. at *12.

147. F.B.I. Special Agent Aaron Keighley testified that:

> Daniels first attracted the FBI's attention in March 2015, when he participated in an anti-law enforcement demonstration in Austin, Texas . . . videos posted on several websites show Daniels and other members of the crowd chanting various phrases that were derogatory toward law enforcement . . . the FBI then investigated Daniels' online activity . . . . Daniels had posted on his Facebook profile several statements praising violence against police officers . . . . Daniels neither specifically posted that he wanted to harm a law enforcement officer nor directed another person to do so.

Id. at *2–3.

148. In this context, a "prohibited possessor" is someone who is barred from possessing a firearm due to their prior criminal history. U.S. Fed. Bureau of Investigation, *supra* note 121, at 1. In the case of Rakem Balogun, the federal government argued that he was prohibited from owning a firearm under 18 U.S.C. § 922(g)(9), which bars possession of a firearm by anyone with a prior misdemeanor domestic violence conviction. *Daniels*, 316 F. Supp. 3d, at 952.

149. *Daniels*, 316 F. Supp. 3d, at 952.

150. Superseding Indictment at 7, U.S. v. Davis, et al., No. 4:14CR00366, 2015 WL 1500987 (E.D. Mo. 2015).

151. This included, for example, pressure from members of the Congressional Black Caucus. Chandelis R. Duster, *Black Lawmakers Meet with FBI Director Over 'Black Identity Extremists' Report*, NBC NEWS (Nov. 29, 2017), https://www.nbcnews.com/news/nbcblk/black-lawmakers-meet-fbi-director-over-black-identity-extremists-report-n824801 [https://perma.cc/29GG-6BN6].

"Racially Motivated Violent Extremism."[152] This claim was proven misleading the very next month, however, when leaked FBI documents [153] revealed that although the term "Black Identity Extremism" itself was no longer officially in use, the category of Black domestic terrorism based on perceived injustice by the police remained fully operative. The leaked "Threat Guidance" for FY 2020, prepared by the FBI's counter-terrorism division, shows that even the most recent renaming of the category—Racially Motivated Violent Extremists (RMVEs)—includes as domestic terrorists "actors who use retaliation and retribution for wrongdoings against African Americans by those they view as oppressors, including law enforcement of all races, whites, government personnel, and others they view as participants in an unjust institutionalized system."[154] In this way, the same individuals and organizations targeted for repression based on the original BIE report were still being targeted as domestic terrorists. The documents also show that in 2018 the FBI considered BIE a "priority domestic terrorism target," while white supremacist extremism was only expected to pose a "medium threat" that year.[155]

In response to the alleged threat posed by Black liberation activists, the FBI has also developed a new program called IRON FIST. According to the leaked documents:

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152. In response to questions by Senator Cory Booker from New Jersey, Director Wray stated "We don't use the term 'Black Identity Extremism' anymore . . . we don't use that terminology anymore. That was part of the reorganization of all of our domestic terrorism threat categorization, that terminology went away as part of this Racially Motivated Violent Extremism category." Christopher Wray, *Senate Judiciary Committee Hearing on FBI Oversight*, SENATE JUD. COMM. (July 23, 2019), https://www.c-span.org/video/?462772-1/senate-judiciary-committee-hearing-fbi-oversight (last visited Nov. 8, 2020).

153. Ken Klippenstein, *Leaked FBI Documents Reveal Bureau's Priorities Under Trump*, YOUNG TURKS (Aug. 8, 2019), https://tyt.com/stories/4vZLCHuQrYE4uKagy0oyMA/mnzAKMpdtiZ7AcYLd5cRR [https://perma.cc/M558-HFH].

154. The document goes on to state that "the FBI judges some RMVE perceptions of police brutality against African Americans served as justification for pre-meditated, retaliatory lethal violence against law enforcement . . . following the August 2014 shooting of Michael Brown in Ferguson, Missouri, and the subsequent acquittal of police officers involved in that incident." U.S. Fed. Bureau of Investigation, *FY20—Threat Guidance—CTD*, U.S. DEP'T OF JUST. (first made public Aug. 8, 2019), https://www.scribd.com/document/421166393/FBI-Strategy-Guide-FY2018-20-and-Threat-Guidance-for-Racial-Extremists [https://perma.cc/5KLE-YSWG].

155. U.S. Fed. Bureau of Investigation, *supra* note 120, at 1.

> IRON FIST was implemented to mitigate the potential threat posed by the BIE movement . . . by identifying actionable intelligence to directly support the initiation of FBI investigations and augment current efforts directed against BIEs. IRON FIRST is designed . . . to proactively address this priority domestic terrorism target by focusing FBI operations via enhanced intelligence collection efforts. In addition, FBIHQ works to develop potential [informants] and conduct assessments on the current BIE [informant] base.[156]

The FBI continues to focus heavily on Black activism to this day, and has devoted significant resources to "opening a series of 'assessments' into the activities of individuals and groups it mostly labeled 'black separatist extremists'" under the IRON FIST program.[157] In June 2020, the FBI confirmed that it possesses over one million pages of documents relating to alleged BIE, up to one third of which relate to "open investigations of Black people as 'domestic terrorist' threats for potential 'Black identity' activities."[158] These nationwide assessments of the exaggerated and imagined threat posed by BIE were given priority over investigating and preventing actual violent attacks by white supremacists and members of the far right, "including mass shootings at a Pittsburgh synagogue and an El Paso shopping mall."[159]

In addition to this wave of ongoing assessments, the FBI has also recently been documented using aerial surveillance to monitor Black Lives Matter protests.[160] In the first week of June 2020, the

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156. *Id.* at 4.

157. Speri, *supra* note 11.

158. *FBI Misled Congress: Black Activists Still Under Investigation by New and Old Extremist Designations*, MEDIAJUSTICE (June 17, 2020), https://mediajustice.org/news/fbi-misled-congress-black-activists-still-under-investigation-by-new-and-old-extremist-designations/ [https://perma.cc/4W3W-ED3V].

159. Michael German, *The FBI Targets a New Generation of Black Activists*, BRENNAN CTR. FOR JUST. (June 26, 2020), https://www.brennancenter.org/our-work/analysis-opinion/fbi-targets-new-generation-black-activists [https://perma.cc/2P74-JN2T].

160. The FBI's surveillance fleet has reportedly been in existence since at least 1938, but the Bureau has only recently been caught using these aircraft to spy on peaceful protests. Sean Gallagher, *The FBI's Secret Air Force Watched the Streets of Baltimore*, ARS TECHNICA (May 6, 2015), https://arstechnica.com/tech-policy/2015/05/the-fbis-secret-air-force-watched-the-streets-of-baltimore/ [https://perma.cc/RS2S-B32J].

FBI used a Cessna Citation jet to conduct surveillance on protestors in Washington, DC.[161] The Cessna Citation is typically used to conduct surveillance in support of major gang and drug enforcement operations, but was also used to spy on protestors in Baltimore, Maryland following the police killing of Freddie Gray.[162] CBP, the agency responsible for enforcing immigration restrictions along the country's borders, was also documented flying a Predator surveillance drone over protests in Minneapolis, Minnesota following the police killing of George Floyd.[163]

A. Facial Recognition and Stingrays

The risks surrounding the FBI's aerial surveillance technology are compounded by its use in conjunction with two other types of FBI surveillance: facial recognition software and cellphone signal catchers, commonly referred to as "stingrays."[164] The FBI has access to powerful facial recognition software that it uses to check alleged intelligence photographs and videos against evidence held by other agencies, such as the drivers' license databases of local Departments of Motor Vehicles.[165] According to the U.S. Government Accountability Office, the FBI has access to "about 640 million" photos that they can search for matches.[166] The use of facial recognition also directly perpetuates racial bias in policing, since the majority of software available today—including all such software made in the U.S.—is more likely to give a false "match" for photos of

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161. Pete Muntean & Gregory Wallace, *US Government Spy Planes Monitored George Floyd Protests*, CNN (June 12, 2020), https://www.cnn.com/2020/06/11/politics/spy-planes-george-floyd-protests/index.html [https://perma.cc/T88U-AVC7].

162. German, *supra* note 158.

163. Jake Laperruque, *How to Respond to Risk of Surveillance While Protesting*, POGO (June 4, 2020), https://www.pogo.org/analysis/2020/06/how-to-respond-to-risk-of-surveillance-while-protesting/ [https://perma.cc/N4MF-LVSL].

164. Daniel Grinberg, *Tracking Movements: Black Activism, Aerial Surveillance, and Transparency Optics*, 41 MEDIA, CULTURE & SOC'Y 294, 306 (2019).

165. Facial Recognition Technology: Part II Ensuring Transparency in Government Use, House Committee on Oversight and Reform, 116 Cong. 10 (2019) (Statement of Kimberly J. Del Greco).

166. Facial Recognition Technology: Part II Ensuring Transparency in Government Use, House Committee on Oversight and Reform, 116 Cong. 34 (2019) (Statement of Gretta L. Goodwin).

Black, Asian, and Native American people as compared to white people.[167, 168]

One final piece of surveillance technology of immediate concern to those who attend protests or organize meetings is the Cell Site Simulator (commonly referred to as a "stingray"). Stingrays are suitcase-shaped devices that fit in the trunk of a police van, and can easily be concealed and transported.[169] When activated, stingrays create a fake cell service tower, tricking all devices within range to connect and send identifying information, along with real-time location data.[170] Modern stingrays can:

> [C]apture texts, numbers of outgoing calls, emails, serial numbers, identification, GPS location, actual content of conversation, and other raw and detailed information from unsuspecting phones and track the location of targets and non-targets in apartments, cars, buses, and on streets through mapping software. They can even make the tracked device send texts and make calls.[171]

The most advanced stingray technology may also be able to directly intercept incoming messages and phone calls.[172, 173] According

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167. Karen Hao, *A US Government Study Confirms Most Face Recognition Systems are Racist*, MIT TECH. REV. (Dec. 20, 2019), https://www.technologyreview.com/2019/12/20/79/ai-face-recognition-racist-us-government-nist-study/ [https://perma.cc/433X-JGFT].

168. Amazon's facial recognition technology, Rekognition, famously misidentified 28 members of Congress as positive matches for people who had been arrested. Almost 40% of those misidentified were Black, even though Black people made up only 20% of Congress at the time. Jacob Snow, *Amazon's Face Recognition Falsely Matched 28 Members of Congress With Mugshots*, ACLU (July 26, 2018), https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28 [https://perma.cc/6824-HYDU].

169. Harvey Gee, *Almost Gone: The Vanishing Fourth Amendment's Allowance of Stingray Surveillance in a Post-*Carpenter *Age*, 28 S. CAL. REV. L. & SOC. JUST. 409, 431 (2019).

170. *Stingray Tracking Devices: Who's Got Them?*, ACLU (2018), https://www.aclu.org/issues/privacy-technology/surveillance-technologies/stingray-tracking-devices-whos-got-them [https://perma.cc/7MGY-FJ8E].

171. Gee, *supra* note 169, at 431.

172. Zack Whittaker, *ACLU Sues Homeland Security Over 'Stingray' Cell Phone Surveillance*, TECHCRUNCH (Dec. 11, 2019), https://techcrunch.com/2019/12/11/aclu-cbp-ice-stingray-surveillance/?guccounter=1 [https://perma.cc/T297-FL7S].

173. If the FBI or local police were to use the cell site stimulator technology in conjunction with aerial surveillance technology to track protests, "they could

to leaked FBI documents from 2015, the FBI has also coordinated the sale of stingray technology to local law enforcement agencies.[174] Police departments have been using stingrays to conduct mass surveillance on Black Lives Matter protests since at least 2015, when the Baltimore Police Department and the FBI used them against people demanding justice for Freddie Gray.[175]

While the Supreme Court has yet to directly address the question of stingray use, it did hold in *Carpenter v. U.S.* that cell-site location information (CSLI) held by a third party carrier is protected under the Fourth Amendment.[176] In that case, the prosecution had requested and received 127 days' and 2 days' worth of continuous CSLI from MetroPCS and Sprint respectively without first acquiring a warrant supported by reasonable suspicion.[177] The Supreme Court held that, even though the defendant voluntary transmitted the CSLI to MetroPCS and Sprint, the Fourth Amendment still applied since carrying a cellphone "is indispensable to participation in modern society," and because "a cell phone logs a cell-site record . . . without any affirmative act on the part of the user beyond powering up . . . in no meaningful sense does the user voluntary 'assume the risk' of turning over a comprehensive dossier of his physical movements."[178] As such, the government was required to obtain a warrant supported by probable cause before searching the CSLI.[179]

It is yet to be seen whether the Supreme Court will apply this same logic to CSLI that is (1) gathered at a single point in time, (2)

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collect and analyze the data of thousands of nearby people," including those not attending the rallies. *See* Grinberg, *supra* note 164, at 306.

174. *Re: Acquisition of Wireless Collection Equipment/Technology and Non-Disclosure Obligations,* U.S. FED. BUREAU OF INVESTIGATION (June 29, 2012), https://assets.documentcloud.org/documents/1727748/non-disclosure-agreement.pdf [https://perma.cc/7FAW-WN7H].

175. Ian Duncan, *FBI Admits Providing Air Support to Baltimore Police During Freddie Gray Unrest*, BALTIMORE SUN (May 7, 2015), https://www.baltimoresun.com/news/crime/bal-fbi-admits-providing-air-support-to-baltimore-police-during-freddie-gray-unrest-20150506-story.html [https://perma.cc/97S2-HDKB].

176. The case involved an FBI investigation of a series of armed robberies in the Detroit-area, specifically targeting Radio Shack and T-Mobile stores. After one suspect supplied police and the FBI with phone numbers of alleged co-conspirators, the FBI used the numbers to request CSLI from cellular service providers as a way to probe the suspects' locations around the time of the robberies. Carpenter v. U.S., 138 S. Ct. 2206, 2217 (2018).

177. *Id.* at 2212.

178. *Id*. at 2220.

179. *Id.* at 2221.

from everyone in a given area, and (3) by the police themselves. The *Carpenter* court declined to extend its analysis to the collection of "real-time CSLI or 'tower dumps' (a download of information on all the devices that connected to a particular cell site during a particular interval)."[180] However, a number of state courts have imposed a warrant requirement on the use of stingrays by law enforcement.[181]

VII. GOING FORWARD

Today's organizers and protesters need to be aware of the technologies, practices, and legal theories that the federal government is using to repress, intimidate, and entrap them. These surveillance and sting operations serve multiple purposes, chief among them being the political repression of dissident movements that challenge imperialism, racism, and war. These sting operations also help the FBI justify its ever-expanding budget requests for counter-terrorism programs. As Michael German, a man who spent sixteen years as an FBI agent, explained, "if you are the terrorism agent in a benign Midwestern city, and there is no terrorism problem, you don't get to say, 'There's no terrorism problem here.' You still have to have informants and produce some evidence you're doing

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180. *Id.*

181. Cases imposing a warrant requirement on the police use of stingray technology include: State v. Andrews, 227 Md. App. 350, 355 (Md. Ct. Spec. App. 2016) (finding that "people have a reasonable expectation that their cellphones will not be used as real-time tracking devices by law enforcement, and . . . that people have an objectively reasonable expectation of privacy in real-time cell phone location information" and holding, therefore, that "the use of a cell site simulator requires a valid search warrant, or an order satisfying the constitutional requisites of a warrant"); Jones v. U.S., 168 A.3d 703, 714–15 (D. C. 2017) (concluding that "under normal circumstances, the use of a cell-site simulator to locate a person through his or her cellphone invades the person's actual, legitimate, and reasonable expectation of privacy in his or her location information and is a search"); People v. Gordon, 58 Misc.3d 544, 550 (N.Y. Sup. Ct. 2017)(holding that "by its very nature, then, the use of a cell site simulator intrudes upon an individual's reasonable expectation of privacy, acting as an instrument of eavesdropping and requires a separate warrant supported by probable cause"); State v. Sylvester, 254 So.3d 986, (Fla. Dist. Ct. App. 2018) (affirming the suppression of evidence discovered as a result of state law enforcement's use of a cell-site simulator, even where the state had a valid judicial order for historic CSLI held by a third party service provider, and clarifying that the use of a cell-site simulator is beyond the scope of a CSLI order for third party records). For a broader discussion of state court decisions on stingray technology, see Gee, *supra* note 168, at 438–41.

something."[182] The pressure to get results is built into the command structure and organizational culture of the Bureau.

Beyond suggesting that these stings and surveillance programs are unnecessary from a public safety perspective, this discussion also offers another important insight. The result of these counter-terrorism surveillance and entrapment programs has been the disruption of organizing and community-building efforts, the persecution of structurally oppressed communities, and the dramatic expansion of material infrastructure available for abuse by law enforcement at all levels.

For individuals or communities approached by the FBI, the best practice is to refuse to answer any questions without speaking to an attorney, and to ask the agents for a business card. Even if one has nothing to hide, it is ill-advised to speak with an intelligence officer—trained in interrogation and manipulation—without an attorney present. Furthermore, it may be helpful to record any conversations one has with FBI agents or suspected informants, as a way of ensuring that records are available in case of future criminal charges. Activists in contemporary social justice movements in particular must stay vigilant and informed: it is clear that specific communities and movements are being targeted for surveillance, undercover investigation, and infiltration, and the best defense against this kind of repression is to be legally- and historically-informed, and to continue organizing for political change.

182. AARONSON, *supra* note 1, at 207.