Law Enforcement and Intelligence Gathering in Muslim and Immigrant Communities After 9/11

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ABSTRACT

Since the attacks of September 11, 2001, law enforcement agencies have actively sought partnerships with Muslim communities in the U.S. Consistent with community-based policing, these partnerships are designed to persuade members of these communities to share information about possible extremist activity. These cooperative efforts have borne fruit, resulting in important anti-terrorism prosecutions. But during the past several years, law enforcement has begun to use another tactic simultaneously: the FBI and some police departments have placed informants in mosques and other religious institutions to gather intelligence. The government justifies this by asserting that it must take a pro-active stance in order to prevent attacks by terrorists from outside the U.S., and by so-called homegrown cells from within. The problem is that when the use of informants in a mosque becomes known in a Muslim community, people within that community – the same people that law enforcement has so assiduously courted as partners against extremism – feel betrayed. This directly and deeply undermines efforts to build partnerships, and the ability to gather intelligence that might flow from those relationships is compromised or lost entirely.

As it stands, the law – whether in the form of Fourth Amendment doctrine, defenses in substantive criminal law, or cases and statutes supporting lawsuits against government surveillance – offers little help in resolving this dilemma. Further, change in either statutes or Supreme Court doctrine that might help address the problem seems vanishingly unlikely. Locally negotiated agreements on the use of informants represent the best alternative route toward both security against terrorists and keeping Muslim communities inclined to assist in anti-terrorism efforts. In these agreements, law enforcement might agree to limit some of its considerable power to use informants, in exchange for the continued cooperation of the community. The article discusses how such agreements might be reached, what they might strive to do substantively, and also addresses the problems they would encounter.

I. INTRODUCTION

In the wake of the terrorist attacks of September 11, law enforcement at all levels of government realized the importance of obtaining intelligence to prevent further
attacks, and that the most important source of such critical information was – in fact, could only be – American Muslim communities themselves. One can see an example of the awakening to this reality in a speech in 2006 by Robert Mueller, Director of the FBI.\(^1\) Mueller’s address came just after the arrest in Miami of seven men whom Mueller characterized, collectively, as an example of “domestic terrorism cells” that “pose a threat potentially bigger than al Qaeda.”\(^2\) Mueller told his audience, many of whom were Muslims, that the deadliest terrorist attacks around the world, both carried out and thwarted, after September 11, 2001 had originated with people raised in the countries attacked or targeted. The seven individuals arrested in Miami had all the characteristics, Mueller said, of a “homegrown terrorist cell.”\(^3\) As examples of “homegrown” cells overseas, Mueller cited terrorist attacks launched (or aborted by police) in Madrid, London, and Toronto. In the United States, he cited Toledo, Ohio, where the FBI had arrested three men in February of 2006 on charges of providing material support for terrorists and planning to carry out jihadist attacks.\(^4\) If the U.S. wished to prevent attacks, Mueller said, close cooperation between law enforcement and Muslim communities in

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\(^1\) Mike Tobin, *FBI Chief Warns of Domestic Terrorists in City Club Speech*, CLEV. PLAIN DEALER, June 24, 2006, at A4.

\(^2\) *Id.*

\(^3\) *Id.*

\(^4\) *Id.* It is worth noting that one year later after the arrests in Miami, i.e., by the summer of 2007, the government seemed less concerned with homegrown cells as it acknowledged that the greatest threat to the U.S. was al Qaeda, since it had managed to reconstitute and strengthen itself in ungovernable border areas of Pakistan. National Intelligence Council, *National Intelligence Estimate: The Threat to the U.S. Homeland*, July 2007, accessed July 25, 2007, at http://www.dni.gov/press_releases/20070717_release.pdf (al Qaeda “is and will remain the most serious threat to the Homeland, as its central leadership continues to plan high-impact plots…. We assess the group has protected or regenerated key elements of its Homeland attack capability…. [W]e judge that [al Qaeda] will intensify its efforts to put operatives here.”); Karen DeYoung & Walter Pincus, *Al-Qaeda’s Gains Keep U.S. at Risk, Report Says*, WASH. POST, July 18, 2007 (new national intelligence estimate concluded that the U.S. would face a threat from Al-Queda, which will still be the greatest threat to the U.S. over the next three years); Scott Shane, *Same People, Same Threat*, N.Y. TIMES, July 18, 2007 (biggest threat to U.S. is al Qaeda, as was true in 2001).
the U.S would become absolutely vital, because of the intelligence it would generate. Law enforcement could only defend the country against such attacks if it had the assistance of Muslims – an assessment with which law enforcement, intelligence and anti-terrorism officials the world over agree. And Mueller appealed directly to American Muslims for that assistance. “There are those [within American Muslim communities] who view the FBI with suspicion and we must build bridges to bridge that gap,” Mueller told his audience. “[W]e must reach the point where you are willing to come forward [to law enforcement] and say, ‘we have seen something that you need to know.’ Radicalization can only be broken if we stand together.”

Director Mueller’s comments in 2006 remain quite correct today. He saw the situation properly when he said that law enforcement cannot ignore even a remote possibility of homegrown terrorist cells in the U.S. This remains true even though

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5 See notes 46-58, infra, and accompanying text.
6 Tobin, supra note 2.
7 Cases like the arrest of the seven men in Miami do leave one with the feeling that this may be little more than just a possibility. Even though Attorney General Alberto Gonzales described the group as inspired by al Qaeda’s “violent jihadist message,” Rebecca Carr & Bob Deans, FBI Sting Nets Seven in Alleged Terrorist Plot, COX NEWS SERVICE, June 23, 2006, details of the Miami case leave some doubt whether the suspects actually subscribed to Islam at all. E.g., FBI: Accused Plotters Had Different Motives, WASH. POST, July 7, 2007, at A9 (statements by six of the seven men charged indicated that they did not even believe the idea of joining with al Qaeda; some of the men were motivated by money and not by Islamic extremism; some were just bewildered; and one asked the agent interrogating him if he could have some of the marijuana seized from him when arrested); Paul Thompson & Sarah Baxter, Bizarre Cult of Sears Tower ‘Plotter,’ SUNDAY TIMES (London), June 25, 2006 (discussing beliefs of Miami group which called itself “Seas of David” as rooted in Judaism, Christianity, and a far-from-standard version of Islam called “the Moorish Science Temple of America, an early 20th century religion founded by the Noble Drew Ali, a wandering African-American circus magician who claimed to have been raised by Cherokee Indians and to have learnt [sic] ‘high magic’ in Egypt” and who “style[d] himself an ‘angel’ and prophet of Allah”); Toby Harnden, Sect Inspired ‘Leader of Sears Tower Plot,’ SUNDAY TELEGRAPH (London), June 27, 2006 (discussing ringleader’s connection to Moorish Science Temple of America, and described him as “‘Moses-like’ figure who roamed his neighbourhood wearing a robe and carrying a crooked wooden cane” who had his followers wear uniforms bearing a Star of David and meet for Bible study and martial arts training); Jay Weaver & David Ovalle, Ex-Ally of Chief Suspect Doubts Plot, MIAMI HERALD, July 19, 2006 (leader of group had begun as a follower of the “Universal Divine Saviors” but later joined the ranks of the “Moorish Science Temple, a sect that blends Christianity, Judaism, and Islam...”); G. Jeffrey MacDonald, Muslim Group: Miami Terror Suspects Are Not Muslims, beliefnet.com, June 26, 2006,
experts believe that the possibility of such homegrown terrorism in the U.S. does not approach the risk faced by our allies in Europe. And Mueller correctly stated that success in heading off terrorism in America largely depends upon cooperative relationships between Muslim communities and law enforcement. These partnerships have extraordinary importance because they form information pipelines – conduits through which our law enforcement agencies can learn about real, concrete terrorist plots.

Looking at the cases the government has brought against terrorist suspects since September of 2001, one cannot help but notice that Muslim communities have done exactly what Mueller wants: they have actively brought the FBI and other police agencies crucial information in terrorism cases. For example, the FBI still claims its six cases in Lackawanna, New York, as among its biggest anti-terrorism victories. The cases involved a group of six young men of Yemeni descent accused of engaging in terrorist activities. 

accessed May 22, 2007, at http://www.beliefnet.com/story/194/story_19420.html (Muslim civil rights group’s spokesman states that, based on news reports and suspects’ statements, suspects should not be described as Muslims). In the trial of the case, the jury acquitted one of the seven, but could not reach a verdict on the others; the jury foreman disclosed after the trial that the jurors were split “roughly evenly between guilt and innocence” on six defendants, and the judge declared a mistrial. Curt Anderson, Judge Declares Mistrial in Fla. Terrorism Case, BOSTON GLOBE, Dec. 14, 2007. A retrial resulted in a second hung jury; nevertheless, the federal government persisted, and as of the time of this writing prepared for a third trial. Jay Weaver, Opening of Third ‘Liberty City Six’ Terror Trial Delayed, MIAMI HERALD, Jan. 12, 2009 (third trial of remaining six defendants delayed because trial judge involved in another ongoing trial).

8 See, e.g., Eben Kaplan, American Muslims and the Threat of Homegrown Terrorism, Council of Foreign Relations, updated May 7, 2007, accessed May 21, 2007 at http://www.cfr.org/publication/11509/american_muslims_and_the_threat_of_homegrown-terrorism.html?breadcrumb=%2Fissue%2F24%2Fdefensehomeland_security#2; see also Spencer Ackerman, “Religious Protection,” The New Republic, Dec. 12, 2005, at 18, 20 (considerably lesser risk of homegrown Islamic extremism in the U.S. as compared Europe is because, in part, the U.S. “offers better social and economic opportunities to its Muslims citizens,” but mostly because of “America’s ability to accommodate Islam itself”). While there is evidence in polling data that there is what one might consider a surprising amount of denial among younger American Muslims on the questions of suicide terrorism, those holding these views still constitute a smaller percentage of the Arab and Muslim community than is true in Europe. Pew Research Center, Muslim Americans: Middle Class and Mostly Mainstream, May 22, 2007 (polling data reveal that while younger U.S. Muslims are more likely than older Muslim Americans to support suicide bombing in the defense of Islam, absolute levels of support for such extremism among Muslim Americans remains low, especially as compared to Muslims around the world.).
activity by, among other things, attending Al Qaeda training camps.9 The cases, announced with great fanfare by then Attorney General John Ashcroft,10 resulted in guilty pleas from, and long prison terms for, all of the accused.11 Few people seem to remember that the arrests occurred only because the Yemeni community in Lackawanna itself brought the men to the FBI’s attention.12 Without that information, the Lackawanna cell would have remained undiscovered, perhaps with potentially disastrous results. The Lackawanna case (and others like it) explains the strong consensus among law enforcement and security experts, both nationally and internationally, that cooperation and partnership between law enforcement and Muslim communities represent the key to success against terrorists.13

But the creation and cultivation of partnerships between law enforcement and Muslim communities does not represent the only effort by the FBI and local police to gather intelligence to prevent terrorism. Over the past several years, the FBI and the New York Police Department have made increasing use of informants – untrained, often compromised civilians, who receive money or other significant benefits14 – placing them

10 Id.
11 Lowell Bergman, Queda Trainee Is Reported Seized in Yemen, N.Y. TIMES, Jan. 29, 2004. For anyone who wishes to get an the best possible in-depth look at the Lackawanna case from every point of view, see DINA TEMPLE-RASTON, THE JIHAD NEXT DOOR: THE LACKAWANNA SIX AND ROUGH JUSTICE IN AN AGE OF TERROR (Public Affairs, 2007).
12 Shenon, supra note 9 (“Officials said it was information from inside that [Yemeni community in which the suspects lived] that lead them to conduct an inquiry there.”); Frontline: Chasing the Sleeper Cell (PBS Broadcast, Oct. 16, 2003) (featuring agent in charge of investigation in Lackawanna declare that the investigation began with information from community given to law enforcement in a letter).
13 See notes 51-61, infra, and accompanying text.
14 I define informants in this way to distinguish them from trained police officers working undercover and, more importantly for purposes of this article, people who might come forward from inside these communities to pass information on to law enforcement. The latter type of individual might also be
as spies in Muslim religious and cultural institutions.\(^{15}\) In at least some cases – for example, in New York City\(^{16}\) and in Lodi, California\(^{17}\) – investigations based on the use of informants have resulted in convictions, though some doubt remains about the scope of these victories and the need for these kinds of efforts inside the U.S.\(^{18}\) And the trend toward using informants in this way has begun to accelerate. The most recent sign came in the last months of the Bush Administration, when Attorney General Michael Mukasey announced significant changes in the rules governing FBI investigations.\(^ {19}\) Since the 1970s, when evidence of decades of abuses by the Bureau came to light,\(^ {20}\) successive

called an informant, but he or she presents entirely different questions than those discussed here. When law enforcement places its informants into situations or institutions, it deliberately targets these institutions or the individuals within them for investigation, raising issues regarding law enforcement’s use of power and discretion, the supervision of these efforts by the judicial branch, the compliance with rules for the use of this discretion, and especially whether the facts should meet some threshold test before police exercise this discretion. When individuals come forward from within these institutions to inform law enforcement, they act not as law enforcement’s agents, but rather as concerned citizens who wish, in good faith, to report something suspicious.

\(^ {15}\) See, e.g., Andrea Elliott, As Police Watch for Terrorists, Brooklyn Muslims Feel the Eyes, N.Y. TIMES, May 27, 2006 (“It is no secret to the Muslim immigrants of Bay Ridge, Brooklyn, that spies live among them…. It is another thing for them to be officially revealed. Over the last several weeks … Muslims in Bay Ridge learned that two agents of he police had been planted in the neighborhood and were instrumental to the [prosecution of a fellow Muslim]").

\(^ {16}\) See notes 67-68, 88-96, infra, and accompanying text.

\(^ {17}\) See notes 97-101, infra, and accompanying text.

\(^ {18}\) E.g., Scott Shane & Lowell Bergman, Adding Up the Ounces of Prevention, N.Y. TIMES, Sept. 10, 2006 (quoting a former Central Intelligence Agency officer as stating that “[t]he Miami case is nonsense…. Those are absolute jokers,” and explaining that analysis of the evidence indicates that threat of terrorism inside the U.S. has been greatly exaggerated by the government); John Mueller, Is There Still a Terrorist Threat?: The Myth of the Omnipresent Enemy, FOREIGN AFFAIRS, Sept./Oct. 2006 (asserting that the reason for the lack of any attacks in the U.S. since September of 2001 is that there are no terrorists in the U.S., and that those outside the U.S. do not have the means or the desire to strike from abroad); Dan Eggen & Julie Tate, U.S. Campaign Produces Few Convictions on Terrorism Charges, WASH. POST, June 12, 2005 (“… [T]he data indicate that the government’s effort to identify terrorists in the United States has been less successful than authorities have often suggested…. In the end, most cases on the Justice Department list [of terrorism prosecutions] turned out to have no connection to terrorism at all.”).


\(^ {20}\) See notes 115, 138 through 142, infra, and accompanying text.
U.S. Attorneys General have created official rules, known as the Attorney General’s Guidelines, to prohibit FBI misconduct.\(^2^1\) By the time that Attorney General Mukasey took office, an array of Guidelines existed, all calibrated in individual ways to cover different types of investigations. Mukasey announced a repeal of five sets of specialized Guidelines – those covering general criminal matters, racketeering and terrorism enterprises, national security, foreign intelligence, and civil disorders and demonstrations –and replaced them with one: the Attorney General’s Guidelines for Domestic FBI Operations.\(^2^2\) The Administration argued that these changes just made common sense; agents in all of these types of investigations would now apply the same standards. Opponents objected to the new Guidelines, arguing that they would lead to racial profiling in terrorism investigations.\(^2^3\) And to be sure, the placement of FBI spies into

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\(^2^1\) See notes 143 through 150, infra, and accompanying text.


\(^2^3\) For example, the American Civil Liberties Union expressed “deep concern” because the FBI would now have the power to begin investigations based on the race or ethnicity of suspects. The ACLU’s executive director accused the Attorney General of “[i]ssuing guidelines that permit racial profiling…The new guidelines offer no specifics on how the FBI will ensure that race and religion are not used improperly as proxies for suspicion…” American Civil Liberties Union, *New Guidelines Open Door to Further Abuse*, Sept. 12, 2008, accessed Sept. 16, 2008, at http://www.aclu.org/safefree/general/36732prs20080912.html. Muslim and Arab communities in the U.S. also expressed fear of racial and religious profiling. “There is anxiety the Middle Eastern community will be targeted,” said an attorney in Dearborn, Michigan, who has frequently defended Arab Americans in national security cases. “There is always a danger in the implementation when you give such discretion in the hands of agents.” Niraj Warikoo, *FBI Power in Terror Cases Grows*, DETROIT FREE PRESS, November 30, 2008. The Department of Justice attempted to re-assure opponents, saying that the new Guidelines would “work in tandem with the Attorney General’s Guidance Regarding the Use of Race by Federal Law Enforcement Agencies,” which, according to the Department, “prohibit opening an investigation based solely on an individual’s race, ethnicity, or religion.” U.S. Department of Justice, *Fact Sheet: Attorney General Consolidated Guidelines for FBI Domestic Operations*, October 3, 2008, accessed October 6, 2008, at http://www.usdoj.gov/opa/pr/2008/October/08-ag-889.html. While this statement is literally true, it omits enough to deceive. It fails to mention that the Guidance Regarding the Use of Race contains an exception for any investigation involving national security or immigration matters – precisely the subjects for which the government has used profiling to investigate Muslims and Arab Americans. U.S. Department of Justice, *Attorney General’s Guidance Regarding the Use of Race by Federal Law Enforcement Agencies*, June 2003, access at http://www.usdoj.gov/crt/split/documents/guidance_on_race.pdf, December 21, 2008.
sensitive settings like mosques does pose a threat to civil liberties of Muslims and Arab Americans. But the new Guidelines also create another, more significant danger: they give the FBI complete discretion to place informants into the most sensitive settings in Muslim and Arab American communities – mosques, social service agencies, bookstores, and other organizations without any evidence that these institutions and the individuals who use them pose any genuine danger. While this standard (or non-


25 Of course, the new Guidelines are not limited to just Muslim and Arab American settings; they would apply to any religious or cultural institutions, as well as other settings such as political organizations, academic meetings or conferences, or the like. I emphasize Muslim and Arab contexts because those are the places where the Bureau is most likely to place informants now, given our current struggle with terrorism.

26 First, the new Guidelines lower the standard for initiating investigations. They group investigations into three types, in ascending order of seriousness: assessments, preliminary investigations, and full investigations. For an assessment, an investigation designed to check out possible leads, the FBI need not have any factual basis to conduct investigations of persons, groups or organizations; agents may simply decide to investigate because they want to, because they feel some gut-level suspicion, or anything, or nothing. For preliminary investigations – the next step up the investigative ladder – the Bureau must have a factual predicate, but this means only that agents know about “[a]n activity constituting...a threat to the national security” and feel that “the investigation may obtain information relating to the activity or
standard) might at first be seen as a benefit to the FBI because it allows the Bureau to use informants more easily, it actually poses a significant danger that has gone largely unnoticed. Using informants in these Muslim religious and cultural contexts too frequently or casually damages the Bureau’s critical and generally successful efforts to build partnerships with Muslim and Arab American communities. It will cause lasting damage to the efforts to bring Muslim communities and law enforcement together to build common cause against extremism, and will harm efforts to obtain intelligence from these communities through carefully-built cooperative relationships established in the last five years. The reaction of Muslim communities to news of the involvement of informers in terrorism cases has, in fact, seemed especially sharp precisely because this comes against the background of police and community efforts to engage in purposeful cooperation. When Muslims learn that the government has done this, members of these communities feel used and betrayed – not partners of law enforcement, but suspects, each and every one. We can ill afford to damage the possibility that these partnerships can serve as sources of information; they remain our best – perhaps our only -- hope for obtaining the intelligence we need to head off the damage of actual terrorist attacks in the future. Constructing these law enforcement/community partnerships, all acknowledge, requires great efforts to build trust; when the use of informants has come to light, the community perceives this as a betrayal of that trust.

involvement or role” of the suspect. These changes in the rules for initiating assessments and preliminary investigations essentially leave it up to the Bureau to begin national security or terrorism investigations based on very little evidence, or none at all – an institutionalization of the “just trust us” standard that seems at the very least out of place considering the Bureau’s history of abuses of its power. See notes 138 through 142, infra, and accompanying text.
As it now stands, the law provides virtually no legal protection for people against the use of informants by the government. The Fourth Amendment imposes no standards for, and does not require any judicial oversight of, police use of informants.\textsuperscript{27} Neither substantive criminal law defenses\textsuperscript{28} nor civil actions hold any promise of restraining this type of government activity.\textsuperscript{29} Therefore, we find ourselves at a sensitive crossroads. On the one hand, we cannot wholly discount the possibility that very small groups of terrorists in our country may attempt to do catastrophic damage. And it remains at least possible that infiltration of these groups by informants could prevent a disaster.\textsuperscript{30} On the other hand, the unregulated use of informants in mosques and other religious and cultural settings can also do great damage, because it poses the risk of cutting off our best possible source of intelligence: the voluntary, cooperative relationships that have developed between law enforcement and Muslim communities.

Both the courts and legislative bodies seem extremely unlikely to move toward greater regulation of police use of informants in this setting,\textsuperscript{31} so any initiative must come from somewhere else. Fortunately, the unusual circumstances of the situation may provide an answer. While the idea may seem counterintuitive at first, close study reveals that the interested parties – law enforcement, on the one hand, and Muslim communities,

\begin{itemize}
\item \textsuperscript{27} See notes 70-84, infra, and accompanying text.
\item \textsuperscript{28} See notes 85-110, infra, and accompanying text.
\item \textsuperscript{29} See notes 111-137, infra, and accompanying text.
\item \textsuperscript{30} This type of infiltration seems to have prevented real terrorist violence by a cell in Canada. See Eric Lipton, \textit{Lessons From Canada: Snooping Works}, N.Y. TIMES, June 11, 2006 (terrorist cell in Canada that planned attacks on Canadian targets, including beheading the prime minister, broken through surveillance work that featured penetration by an informant).
\item \textsuperscript{31} For example, as to courts, Professor Bill Stuntz has said, the shadow of 9/11 hangs over every legal change that might affect the power of law enforcement to apprehend terrorists. William J. Stuntz, \textit{Local Policing After the Terror}, 111 YALE L.J. 2137, 2158-59 (after September 11, 2001, the “specter” of suicide terrorist attacks hangs over the any decision involving law enforcement power).
\end{itemize}
on the other – stand in a unique relationship of reinforcing mutual need. This situation thus presents an exceptional opportunity for the negotiation of cooperative agreements in which both sides might gain. Law enforcement might agree to at least mildly restrict its own ability to use informants in the most sensitive situations; in turn, the Muslim community would pledge to continue, and when possible to increase, its voluntary cooperation. All of this could be accomplished by negotiating local agreements governing the use of informants that both police and the community could accept. While negotiated limits on law enforcement power represent a novel approach to police regulation, few other possibilities for change seem promising. While parties traveling this path would surely encounter formidable obstacles, the status quo offers little hope of averting harm to the different but overlapping goals that law enforcement and Muslim communities have. To state the matter simply, a negotiated set of limitations on the use of informants represents the last best chance to both salvage the relationships that law enforcement and Muslim communities must have in order to fight terrorism, and to use informants judiciously and carefully to infiltrate possible terrorist cells when real danger exists.

This article proceeds as follows. Section II discusses the recent history of efforts to build bridges and connections between law enforcement and American Muslim communities, and the counter-productive effect the use of informants in these same communities has had. Section III examines what the law allows law enforcement to do with informants. Section IV will discuss why we should expect the use of police informants in Muslim communities to persist or even grow, but will also explore as the real costs of the use of informants to both the community and to security efforts, leading
to an understanding of why some regulation of informant practice seems desirable.

Section V will propose locally-created, informal agreements on accepted practices for the use of informants, and will also discuss the proposal’s shortcomings.

II. BUILDING BRIDGES BETWEEN MUSLIM COMMUNITIES AND LAW ENFORCEMENT TO GATHER INTELLIGENCE, AND THE USE OF INFORMANTS IN THOSE COMMUNITIES

The first priority in our struggle against terrorists remains the gathering of intelligence. The reason for this is simple, but profoundly important. Only through the constant collection of pertinent information and its careful analysis can our public safety and security services not just respond to terrorist activity after it happens, but stop it before it happens. As with other aspects of anti-terrorism work, different strategies and tactics exist for gathering intelligence from which law enforcement and security officials can choose the best approaches. Notice, therefore, the wide agreement among officials about the effectiveness, importance, and centrality of one particular method of intelligence gathering: the creation and cultivation of strong relationships and partnerships between law enforcement and Muslim communities, in order that intelligence flows from these communities to law enforcement as easily as possible.

A. Bridge Building Between Law Enforcement and Muslim Communities

For at least one reason, the consensus on the importance of building trust-based relationships as a way to fight terror cannot surprise anyone in law enforcement: we know this method works. Few people view the world as pragmatically as law enforcement officers do. They want to use strategies and tactics that will protect the public as effectively as possible. And building good relations with Muslim communities has paid off against terrorists in the most direct way possible. The Lackawanna case,
discussed above, remains a showcase example. The men apprehended in Lackawanna, characterized by the U.S. Department of Justice as a sleeper cell waiting for the word to put their deadly agenda into action, might have attacked except for the fact that the Muslim community in Lackawanna passed crucial information to the FBI that prompted the investigation. But the Lackawanna case does not stand alone. For example, in the Toledo terrorism case mentioned by FBI Director Robert Mueller in his speech in 2006, the Muslim community played the same kind of critical role. When the FBI announced the indictments of the three individuals in Toledo, Ted Wasky, the FBI’s Special Agent in Charge of the Bureau’s Cleveland field office, which conducted the investigation, explicitly acknowledged the help of Toledo’s Muslims. Wasky praised the extensive and important cooperation of Muslims in the case, resulting in important information about the suspects flowing to law enforcement. “[The members of the Toledo Muslim community] are the ones who deserve the most credit,” Wasky said. “The ability to prevent another terrorist attack cannot be won without the support that the community gave.”

The widespread agreement in law enforcement that the cooperation of the Muslim communities remains vital to the success of anti-terrorism efforts owes much to the strong consensus in law enforcement, building for at least twenty years, on the basic

32 See notes 9-12, supra, and accompanying text.
33 See note 1, supra.
34 Toledo’s Arab Community Crucial to Terrorism Investigation, WTOL-TV, Toledo, Ohio, accessed Feb. 21, 2006, at http://wtol.com/global/story.asp?s+4533250&ClientType=Printable; see also Richard B. Schmitt, Cloud of Suspicion Hangs Over Toledo, L.A. TIMES, Feb. 23, 2006 (”… Toledo’s Muslim community has a history of cooperating with law enforcement, which may have been the suspects’ undoing. An FBI official credited local Muslim groups Tuesday with providing crucial information that led to the arrests.”).
principles, goals, and benefits of community policing. Law enforcement almost everywhere acknowledges that police efforts alone cannot make cities and towns safe from crime and criminals; rather, public safety requires a partnership between police and the community that encourages communication about people and events on the ground. Community policing means far more than community relations, or shallow, one-off efforts by police agencies to exhibit sensitivity or hear the concerns of the communities they serve. Rather, the idea requires a deep commitment to the idea that success in public safety efforts of any kind can only occur when strong, positive connections exist between police and those they serve – that is, through partnerships based on trust. That type of partnership requires sustained effort by both the police and communities to build trust through establishing relationships and networks with each other, to develop a track record of joint efforts toward common goals, and to respect each other as real partners. The

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35 See, e.g., Kaplan, supra note 8, at 2 (“… [L]ocal police are the best tool the government has for preventing homegrown terrorists. Good community policing – establishing relationships and keeping abreast of trends in a neighborhood ‘based on common interest other than terrorism’ – underpins any effort to detect a homegrown plot.”). To be sure, there are critics of the community policing model who find it wanting in significant ways. E.g., Dan M. Kahan, Reciprocity, Collective Action, and Community Policing, 90 CAL. L. REV. 1513, 1515 (2002) (stating that proponents of community policing “have so far failed to identify a single theory of crime control that is comparable in parsimony and prescriptive richness to the rational actor model that animates traditional policing strategies…. [M]ost of the [community policing] strategies … have at least the potential to disrupt” successful reciprocal cooperation in crime fighting).


37 For a broader view of how community policing efforts fit within the history of American law enforcement in the late twentieth century and law enforcement’s future in the twenty-first century, particularly the importance of trust-based partnerships, see generally DAVID A. HARRIS, GOOD COPS: THE CASE FOR PREVENTIVE POLICING (The New Press 2005), Chapters Two (“The History Behind Preventive Policing”) and Three (“Building Bridges”).
lessons for our anti-terrorism efforts seem clear. If we believe that potential terrorists lurk in our Muslim communities, we must have good communications with them. This requires relationships built on trust – just like everything else in community policing does.

If building these relationships between law enforcement and communities would usually take considerable effort, it has been more difficult yet to build them between law enforcement and Muslim communities. First, in many jurisdictions prior to September 11, 2001, there existed no relationships at all between Muslim communities and the FBI and police departments. Michael Rolince, a thirty-one-year veteran of the FBI who now works as a counterterrorism consultant in the private sector, says that “[a]fter 9/11, I was of the opinion that we didn’t have the kind of inroads [into the Muslim community] that we needed to have,” Rolince says. “We didn’t know what was in our own backyard” as far as the Muslim population, so Rolince and his colleagues had to begin their efforts from scratch.38 And, as if starting from the very beginning would not be hard enough, any effort to create positive relationships between law enforcement and American Muslims would begin not on a blank slate, but against less-than-positive experiences. Efforts to build relationships came against the background of arrests of many hundreds of Muslims by the FBI after 9/11 on immigration and petty criminal charges, because the authorities suspected the arrestees – without evidence – of connection to the attacks or potential terrorist activity. The government detained these individuals, often for weeks or months and in severe conditions, and denied them access

to lawyers and family members. The government then kept them confined under a “hold until cleared” policy, effectively turning the presumption of innocence on its head, and then deported almost all of them; none had any connection to terrorism. The FBI followed this with a program of “voluntarily” interviews with thousands of young men from Muslim countries to ask whether they had any involvement in terrorism or had any information that might assist the authorities. As unlikely as it seems that such an effort would uncover valuable information, a report by Justice Department officials to then-Attorney General John Ashcroft said that the program helped disrupt potential terrorist activities and also led to meaningful investigative leads. But these officials offered no proof of these assertions; two years later, neither the Department of Justice nor the FBI had bothered to analyze the data from the interviews, and had no plans to do so. From their perspective, people within the Muslim community saw the effort as “one of the most damaging [policies] we’ve ever seen” because it spread fear and confusion in


40 Id.

41 Deputy Attorney General of the United States, Memorandum for All United States Attorneys, All Members of the Anti-Terrorism Task Forces (Nov. 9, 2001) (copy on file with the author); see also HARRIS, supra note 32, at 9-12.

42 See, e.g., Jim McGee, Ex-FBI Officials Criticize Tactics on Terrorism; Detention of Suspects Not Effective, WASH. POST, Nov. 28, 2001 (criticizing the questioning of thousands of men, without any reason to suspect them, as likely to produce nothing more than “‘the recipe to Mom’s chicken soup.’”); HARRIS, supra note 32, at 174 (quoting attorney representing interviewees: “To ask [someone] whether you advocate terrorism? What kind of jackass would say yes?”).


Muslim communities which might have the perverse result of making Muslims hesitate to come forward with important information when they did have it.\textsuperscript{45}

These post-9/11 actions and others by the government thus made it much more difficult for law enforcement to create strong relationships with Muslim communities, because they have stimulated not trust in, but fear of, federal law enforcement. A nationwide study by the Vera Institute of Justice in 2006 showed just how deep the gulf between Muslim communities and federal law enforcement has become. The study, funded by the National Institute of Justice and performed over a two-year period, revealed that Arab Americans feared the intrusion of federal policies and practices even more than hate crimes or acts of violence.\textsuperscript{46} These findings show just how difficult it will be for law enforcement to secure positive relations with Muslims.\textsuperscript{47}

To make matters worse, recall that many Muslims emigrated to the U.S. from countries that functioned as police states, such as Iraq, Syria, Egypt, and Iran. Individuals from such countries would almost certainly begin any relationship with the police or government officials with a presumption of suspicion. In their native countries, a knock on the door of one’s home or business from police or their equivalent officials struck terror into the heart, and every whispered conversation discussing the state or its leadership held the potential for victimization by an informant. This made distrust of

\textsuperscript{45} Kaplan, supra note 8, at 2-3, quoting Hussein Ibish, executive director of the Hala Salaam Maksoud Foundation for Arab-American Leadership.

\textsuperscript{46} Nicole Henderson et al., \textit{Law Enforcement and Arab American Community Relationships After September 11, 2001: Engagement in a Time of Uncertainty}, Vera Institute of Justice, June 12, 2006.

\textsuperscript{47} Fortunately, the study also shows that Arab American communities have significantly more trust in and better relationships with their local police departments than the FBI or other federal agencies, and that efforts to improve relations between these communities and law enforcement are often effective in reducing tensions. \textit{Id.}
police endemic in these communities, and the habits and reflexes of mind learned in such an environment would undoubtedly come with immigrants from those places. 48

But in spite of these obstacles, law enforcement and security officials clearly see the imperative of building, maintaining, and sustaining relationships with their Muslim communities. And this is no accident: they understand that essential rewards can flow from these efforts. Constructing and maintaining these partnerships is absolutely necessary for police/citizen communication; without ongoing, trust-based relationships, fewer avenues and opportunities exist for communication. And less communication means less intelligence will come to the police from those living and working in the community. Again, this insight comes directly from community policing. Robert Trojanowicz and Bonnie Bucqueroux, two of the foremost champions of community policing, explain that when law-abiding people in communities work with the police and participate in the process of law enforcement, as successful community policing requires, they become much more likely to support enforcement efforts. And among the most important kinds of support is supplying law enforcement with information. Trojanowicz and Bucqueroux call this “the lifeblood of policing. Without the facts, police officers cannot solve problems,” whether these problems concern garden-variety crime or terrorism. Thus the community policing approach brings law enforcement “more and

48 E.g., Andrea Elliott, supra note 15 (“… Palestinian, Syrian, and Egyptian immigrants have long engaged in their own form of surveillance, trying to discern the spies in their midst. It is a habit imported from the countries they left behind, where informers for the security services were common and political freedoms curtailed.”).
better information” because officials and the community have already established a bond of trust.  

Given our terrorist enemies, nothing trumps the need for intelligence. And the intelligence we need concerning the danger posed by an exceptionally tiny number of radicalized Muslims can almost certainly come from only one source: Muslim communities themselves. Muslims (especially immigrants) will know the relevant language. They will know the people and the cultural nuances in ways that will likely enable them to tell the crackpot and the crank from the potentially dangerous person. This makes our Muslim communities “our best allies” in the fight, says Deborah Ramirez of Northeastern University. “Without them we are flying blind.”  

Steven Simon, a Senior Fellow at the Council on Foreign Relations, shares this view. “[Muslim Americans are] a community, ultimately, on whom we will rely for our security.” Without engagement and cooperation with Muslim communities in this country, the FBI and law enforcement at all levels “believe they will never penetrate the world of homegrown Islamic extremists and potential terrorists the officials are convinced is out there.” And at least to some degree, this idea has penetrated the highest levels of the federal government. According to Michael Chertoff, Secretary of the Department of Homeland Security under President Bush, “we must build a new level of confidence and trust among the American Muslim community, who are critical partners in protecting our

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50 Kearns, supra note 38.

51 Kaplan, supra note 8, at 2.

community.” Other former government officials agree. Richard A. Clarke, former National Counterterrorism Coordinator for the National Security Council who advised both the Clinton and the second Bush administrations on the danger posed by al Queda, sees alliances with our Muslim communities as our first priority if we want to head off sleeper cells in our midst. “In the first instance,” Clarke says, “we should seek the cooperation of the American Muslim community in identifying possible problem groups and individuals.”

Vincent Cannistraro, former chief of operations and analysis at the CIA Counterterrorism Center and former special assistant for intelligence in the Office of the Secretary of Defense, says that “the problem of terrorism is one of getting intelligence, having information to pre-empt terrorist acts before they occur. If you don’t have good intelligence, you don’t have good antiterror.” And this understanding transcends international boundaries. In the aftermath of the transit bombings in London in the summer of 2005, Sir Ian Blair, head of the London Metropolitan Police and leader of the investigation, appealed directly to British Muslims for help because he understood the importance of having the intelligence necessary to understand the attacks and prevent others. “It is not the police and it is not the intelligence services who will defeat terrorism,” he said; “it is communities who defeat terrorism.”

56 Glenn Frankel, Londoners Warily Resuming Their Lives, WASH. POST, July 10, 2005, at A17 (internal quotation marks omitted).
Thus despite considerable impediments, the FBI and all of American law enforcement have endeavored to build connections and bridges with Muslims. Almost all fifty-six FBI field offices and many local police departments have become engaged in these efforts. “We’re spending more money on outreach … so we can say: ‘Please help us. Please look for people who are turning away from institutions to extremism. Please be our eyes and ears,’” according to Philip Mudd, deputy director of the FBI’s national security operation, who was a career CIA officer before coming to the FBI. Obtaining intelligence on the terrorist threat, Mudd says, requires building a close relationship with Muslim communities and their leaders. Local police have worked hard to build these relationships also, and perhaps no department has done more than the New York Police Department. For example, the Department now has twenty persons acting as liaisons to immigrant communities, especially among Muslims, working to “make inroads and foster trust in the city’s kaleidoscopic and widening sea of immigrants, many of them distrustful of the police.” The liaison personnel understand what they and the Police Department face. “‘We’re aware there’s a fear factor; the question is, how do we bridge that?’” one said. Given the special importance of police/Muslim relations to questions of security against terrorist attacks, the Department has hired two Muslim civilians as liaisons.

57 DeYoung, supra note 52.
58 Id.
59 Cara Buckley, Police Use Liaisons to Spread the Word to Immigrants: Trust Us, N.Y. TIMES, May 31, 2007 (twenty persons acting as police liaisons to immigrant communities, up from twelve in recent months, working to overcome suspicions and connect communities, particularly Muslim communities, with police).
60 Id.
specifically “to do outreach and to train the department’s officers in matters of cultural sensitivity.”

Despite the substantial residue of mistrust accumulated through events like the post-9/11 roundups and the “voluntary” interviews, most Muslim communities have begun working with law enforcement. They have supplied invaluable anti-terrorism information and cooperation – witness the Lackawanna and Toledo cases. Muslim citizens and community members have also joined task forces, advisory boards, and multicultural councils with law enforcement, and they have taught classes for police in the basics of Islam and Middle Eastern cultures. They have also served as liaisons between their communities and the FBI and their local police departments – all in an effort to make our country safe from the threat of terrorism.

Overall, the point could not be simpler, or more central to our safety. To protect ourselves against terrorism, we must have the best intelligence about what happens on our own soil. That information will most likely come from our Muslim communities, because they will have the contacts, the language skills, and the cultural understandings necessary to know this information. And getting this information communicated to our

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61 Id.
62 DeYoung, supra note 52 (many incidents “have regularly challenged the fragile cooperation that law enforcement and Muslims nationwide are struggling to create after years of mutual suspicion”).
63 Kearns, supra note 38.
64 DeYoung, supra note 52 (at the invitation of law enforcement, Muslims have “joined multicultural advisory boards and [taught] classes in the basics of Islam to agents and the police”); HARRIS, supra note 37, at 37-41, 44-47, 47-52 (detailing police and Muslim partnerships in Seattle, Wichita, and Chicago).
65 E.g., Robin Shulman, Liaison Strives to Bridge Police, Muslim Cultures, WASH. POST, Jan. 24, 2007 (explaining how a Muslim man of Turkish descent, serving as part-time civilian liaison to the New York Police Department, both “to redeem the name of the police department to Muslims and the reputation of Islam to police officers” through extensive outreach efforts).
law enforcement agencies depends on the existence of solid, trust-based relationships between law enforcement and these communities.

**B. Informants and the Perception of Betrayal**

During the last two years, efforts to cement productive relationships have undergone severe challenges created by law enforcement itself. This has happened because trials of terrorism cases have revealed that law enforcement has inserted informants into the Muslim community, often in mosques, to spy on people and to gather information.

The use of informants by law enforcement is certainly nothing new; the U.S. Supreme Court itself passed upon the constitutional status and regulation of informants more than thirty years ago. Thus one could not feel surprised that police agencies have used informants to gather information on the threat of terrorism. But when Muslims who had worked with the FBI and their local police departments in order that information on terror threats could flow to police learned of the informants, they felt not just surprise, but betrayal. To ask someone to act as your trusted partner in an important endeavor, as the FBI and some police departments had done with the Muslim community; to take up the challenge and become a partner, as some Muslim communities had done; and then to learn that the same law enforcement agency had turned around and sent spies into the community’s house of worship: for many Muslims, no word except betrayal could adequately capture their feelings and perceptions, especially given the history of the use of informants by government security services in the countries from which they came. And few were mollified by the fact that law enforcement had the legal right under the law

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66 The Supreme Court’s decisions in this area are discussed in detail in Section III, *infra.*
to do what it did. For them, it was a matter not of legality, but of trust. And the use of informants broke that trust.

The experience of Muslims in New York City makes a particularly telling example. In the wake of September 2001, they had joined not just with the FBI but their own New York Police Department to form an alliance against extremists in their community. But in the spring of 2006, a trial began in New York for a young Muslim, Shahawar Matin Siraj, who the authorities accused of planning to bomb the Herald Square subway station in Manhattan. In the course of the trial, testimony revealed that the NYPD had made extensive use of two informants in the case. Many Muslims felt bitter that the NYPD, which had courted them as allies, had placed informants in their community, even in their houses of worship, and they saw it “as proof that the authorities – both in New York and around the nation – have been aggressive, even underhanded in their approach to Muslims.” Muslims felt that the NYPD had talked to them out of both sides of its mouth: on the one hand, they were asked to become the department’s partners; on the other, the Department obviously had not trusted them, since it sent in spies. “This is a real set back to the bridge building,” according to Michael Dibarro, a Jordanian immigrant and a former clergy liaison with the NYPD. “We had meaningful meetings. We thought we were going somewhere” positive with our relations with the police department, he said. Now he is not so sure, because what the NYPD has done seems to be at cross-purposes with all of the bridge building work that had gone on since 9/11.68

67 Andrea Elliott, supra note 15.
68 Id.
The same cycle has also played out elsewhere since 2001. For example, in Lodi, California, a town with a substantial number of Pakistani immigrants, the FBI used an informant it placed to gather evidence against a feckless, unemployed young man and his father, an ice cream truck driver. There had been considerable hard work in Lodi to build law enforcement connections with the Pakistani Muslim community, but the news of the informant’s work in Lodi and the bringing of terrorism-related charges against the man and his father based on the informant’s work shattered these efforts. Taj Khan, one of the leaders in Lodi’s Muslim community who has worked hardest to create and solidify positive relationships between Pakistani Muslims and police in Lodi, says “[w]e were making tremendous progress in this community, but we’ve been significantly set back.” The damage may be impossible to repair. “You can’t exaggerate the damage done [to our efforts] by the FBI’s investigation here.”

All of this shows us the essential conflict that arises with the use of informants in our current situation. We know that we must have the cooperation and trust of Muslim communities to get the intelligence we need in order to have the best possible chance of preventing a terrorist attack. But if law enforcement makes use of informants too often or too casually, it risks undermining the very trust of the Muslim community that law enforcement needs and that we all, ultimately, depend upon for our safety. If we are not careful, we will end up in a situation that hurts everyone. Some Muslims will, quite understandably, begin to distrust or resent law enforcement, or fear contact with it. This will likely make all of us less safe, because less information on potential threats may flow to the police. At the same time, this also weakens the standing and credibility of those

69 Kearns, supra note 38.
moderate voices within the Muslim community who favor working with police and other authorities.

**III. HOW THE LAW REGULATES THE USE OF INFORMANTS: (ALMOST) ANYTHING GOES**

A complete understanding of the context in which law enforcement chooses to use informants requires an appreciation of the law surrounding the use of this tactic. Does the Fourth Amendment restrain police when they use informants, in the same way that it prohibits certain types of searches and seizures? Can defendants raise defenses to the government’s installation of informants among them, or perhaps even sue for damages when the government crosses a line the law has drawn?

**A. Constitutional Regulation: No Limits, and How We Came to “Assume the Risk” that Every Person is a Government Informant**

The U.S. Supreme Court ruled on the use of informants in a series of cases in the 1960s and early 1970s. At its inception, this line of decisions focused on the dangers posed by then-new technologies for electronic surveillance. But by the time of the final decision in this line of cases, the Court had also created a broad standard for the use of informants – one that allowed the government to place and make use of informants at any point, and for any reason, without judicial supervision.

In *Lopez v. United States*, the Supreme Court dismissed the claim that the surreptitious tape recording of a conversation amounted to a seizure that violated the Fourth Amendment. But more important, the Court said that the defendant had risked

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71 The defendant in *Lopez* made an unbidden bribe offer to an IRS agent, who tape recorded conversation between them. *Id.* at 430-32. The defendant objected to the Government’s use of the recorded conversation at trial, arguing that the agent gained access to defendant’s office by deception and had thus “seized” his words illegally. *Id.* at 437. In dismissing the defendant’s claim, the Court relied on an earlier
that someone – here, the agent – might record a conversation he assumed would stay secret. “We think the risk that [defendant] took in offering a bribe to [the IRS agent] fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording.”

In dissent, Justice Brennan objected to the particular recording device that the agent used as a species of electronic surveillance presenting distinctive dangers, but like the majority, he also discussed what the agent had done in the language of risk. “The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.”

The idea of “assumption of the risk” – a concept borrowed from the law of torts – seems a curious way to ground a discussion of the use of informants. Moreover, adopting this “assumption of the risk” view conceals a significant conceptual question that the Court did nothing to answer: even if we do, in some sense, assume the risk that anyone with whom we discuss private matters might reveal them to others, do we also

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case, On Lee v. United States, 343 U.S. 747 (1952), in which the Justices upheld the use of a secret microphone carried by an informant to transmit his conversations with a defendant to a police officer not on the premises.

72 Lopez, 373 U.S. at 439.

73 Id. at 449, 451 (Brennan, J., dissenting). Lewis v. United States, 385 U.S. 206 (1966), a case decided just three years later involving a narcotics purchase by an undercover police officer, indicated that the use of electronic surveillance was not, perhaps, the Court majority’s central concern in these cases, even if it was Justice Brennan’s. Using an informant without any electronic listening or recording device, the Court said, did not raise any Fourth Amendment issue either, coming to the same result the Court had in Lopez.

74 Id. at 465.

75 E.g., Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 174 (N.Y. 1929) (to avoid risks assumed, “the timorous may stay at home”); relatively recent commonly-cited cases apply the assumption of the risk doctrine in the context of sports activities, e.g., Knight v. Jewett, 834 P.2d. 696 (Cal. 1992), and Nabozny v. Barnhill, 31 Ill. App. 3d 212 (Ill. App. 1975). See generally DAN B. DOBBS, DOBBS’ HORNBOOK ON THE LAW OF TORTS § 211.
assume the risk that they would take our words to the government, for purposes of investigation and prosecution? Put another way, does saying that we assume such a risk without questioning this not make it so, without any real analysis?  

Nevertheless, the Court cemented the assumption of the risk theory into Fourth Amendment law on informants in Hoffa v. United States,\textsuperscript{77} in which the government used an informant, who the defendant’s friends had let into the defendant’s hotel suite, to gather evidence.\textsuperscript{78} The Court found that “no interest legitimately protected by the Fourth Amendment is involved…. [Hoffa], in a word, was not relying on the security of the hotel room; he was relying upon the misplaced confidence that [the informant] would not reveal his wrongdoing.”\textsuperscript{79} The Court went on to state that the defendant had made the crucial mistake of trusting that the informant, and assuming that the informant would not report the defendant’s words and actions to the government. To reinforce the point, the majority quoted Justice Brennan’s dissent in Lopez to make clear that the risk of betrayal by an informer “‘is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.’”\textsuperscript{80}

\textsuperscript{76} See United States v. White, 401 U.S. 745, 786 (Harlan, J., dissenting) (stating that “the so-called ‘risk analysis’ approach” may “represent an advance” over prior approaches, it can “ultimately, lead to the substitution of words for analysis”).

\textsuperscript{77} 385 U.S. 293 (1966).

\textsuperscript{78} Id. at 296. The defendant argued that the informant’s deception (i.e., the informant never said that he came not as a trusted friend, but as an informant) “vitiates” any consent that the defendant may have given for the informant’s entry into his hotel rooms. Therefore, listening to the defendant’s statements amounted to “an illegal ‘search’ for verbal evidence.” Id.

\textsuperscript{79} Id. at 302.

\textsuperscript{80} Id.
The Court solidified its doctrine on informants in 1971 in *United States v. White*, a case that involved electronic eavesdropping carried out by an informant without a warrant. If any doubts remained about whether the Fourth Amendment required warrants in order to use informants, *White* put them to rest for good.

Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubts he has, *the risk is his.*

Put another way, use of the assumption of the risk rule made any real Fourth Amendment analysis superfluous. If one must risk betrayal any time one has any communication with another person, the idea of police investigation tempered by the standard of probable cause or scrutinized by a judicial officer in a request for a warrant never enters the discussion. After all, the Fourth Amendment only regulates government conduct – the actions of the police. Though most informers certainly act as agents of the police, the risk that the defendant’s actions will be betrayed to the government is not the result of action by the police or their agents; rather, it simply inheres in the risky actions of the defendant himself. Therefore, the Fourth Amendment does not regulate these police actions. Police need no warrants to use informants, and their actions need not measure up to any standard (such as probable cause). Thus the police may use informants as they wish in any case at any stage prior to the initiation of adversary

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82 The informant did not testify at trial; instead, government agents, who listened to the electronically-gathered communication between defendant and the informant, told the jury what the defendant had said. *Id.* at 746-47.
83 *Id.* at 752 (emphasis added).
proceedings, with none of the usual types of judicial supervision. Put more simply, police need not have probable cause to allow them to use an informant against someone, and they need not ask a judge for a warrant to place an informant. Those decisions are entirely within their discretion.

B. Defenses and Litigation as Regulation of Informant Use: Entrapment, “Outrageous Government Conduct,” and Civil Suits

1. Substantive Criminal Law Defenses

*Lopez*, *Lewis*, *Hoffa*, and *White* make clear that the government may use informants as it chooses in the investigation phase of any given case, without any Fourth Amendment-based justification (e.g., meeting a standard of probable cause) or judicial supervision (i.e., obtaining a warrant). But other plausible possibilities exist in the law for regulating informant use. For example, during any trial, the defendant may raise substantive criminal law defenses regarding the use of informants. Specifically, he may argue that the government entrapped him, or that the government engaged in conduct so outrageous as to violate the Due Process Clause.

The defense of entrapment may nevertheless serve as a brake on some types of informant behavior. Entrapment becomes an issue when the government informant has in some way contributed to the criminal activities charged. But the government informant’s participation in the criminal scenario does not, by itself, make the

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84 Under the Sixth Amendment, the government may not use informants to question defendants after the initiation of judicial proceedings, when the right to counsel in the Sixth Amendment attaches. *Massiah v. United States*, 377 U.S. 201 (1964). The Court has held that this protection extends to jailhouse informants’ elicitation of statements from defendants, *United States v. Henry*, 447 U.S. 264 (1980), except if the jailhouse informant is merely a passive listener who does nothing to elicit the statements, *Kuhlman v. Wilson*, 477 U.S. 436 (1986). The facts of any particular case may also violate the Due Process Clause of the Fourteenth Amendment if the government informant uses coercion or its equivalent to elicit a statement from the defendant. *Arizona v. Fulminante*, 499 U.S. 279 (1991) (statement given to informant by defendant in order to obtain protection from violence inside prison directed at defendant violated Due Process Clause).
investigation vulnerable to an entrapment defense. The government may, without hesitation, attempt to ensnare the criminal; in the words of Chief Justice Earl Warren, entrapment draws a line “between the trap for the unwary innocent and the trap for the unwary criminal.”85 Entrapment law prohibits the former, but allows the latter. To tell whether any given defendant is an innocent or a criminal, “the thrust of the entrapment defense [focuses] on the intent or predisposition of the defendant to commit the crime.”86 This point has always remained central: as the law has stood for at least thirty-five years, a defendant predisposed to commit the crime cannot claim entrapment simply because the government supplied the opportunity for the defendant to commit the crime. We look not at the fact that the government has dirtied its hands by involving itself in criminal activity, but at whether the defendant had the inclination to become involved in the crime irrespective of the government’s actions.87 Most defendants will not benefit from the entrapment defense if they participated in the criminal activity prior to the informant.

87 Id. at 433. The Supreme Court qualified this rule in 1992 in Jacobson v. United States, 503 U.S. 540 (1992). In Jacobson, postal inspectors and the Customs Service used falsified advocacy materials and bogus offers of illegal child pornography to contact a man who had purchased such items one time in the past, before Congress made possession of this type of material criminal. The man sent replies to some of the advocacy materials, indicating an interest in these illicit publications. When the man ordered and received an illegal pornographic magazine in response to one of the government’s decoy offers, officers arrested him. Id. at 542-47. Thus despite his communicated interest in the pornography – which would seem to suggest a predisposition – defendant claimed entrapment. The Supreme Court, which had previously held to the predisposition idea as the cornerstone of the entrapment law, qualified it in Jacobson. “In their zeal to enforce the law,” the Court held, government agents “may not originate a criminal design, implant in an innocent person’s mind the predisposition to commit a criminal act, and then induce the commission of the crime so that the government may prosecute.” When law enforcement “has induced an individual to break the law and the defense of entrapment is at issue … the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.” Id. at 548-49. In other words, a showing of predisposition is not enough to defeat a claim of entrapment when law enforcement has induced the defendant to commit the crime; in such a situation, the government must prove a predisposition to commit the crime that the government did not create.
becoming involved, or showed any inclination toward it. Further, the fact that informants may even have encouraged defendants – egged them on, even pushed them to act – does not mean an entrapment defense will succeed. Two recent terrorism prosecutions involving informants, mentioned above, make this clear. In the prosecution of Shahawar Siraj for planning to bomb the Herald Square subway station in New York City, the informant, Osama Eldawoody, made deliberate attempts to get the defendant to take the very type of actions that prosecutors said he planned to do. According to the testimony at the trial, informant Eldawoody, who worked for the New York Police Department, made persistent effort to arouse anti-American feelings in Siraj. He showed Siraj dozens of inflammatory photographs, including images of the abuse of Iraqi prisoners by American soldiers at the Abu Ghraib prison,\textsuperscript{88} and a video of the fatal shooting of a twelve-year-old boy who died in Gaza during an Israeli-Palestinian battle.\textsuperscript{89} The informant also talked to Siraj about blowing up buildings on Wall Street in New York, and convinced him that religious leaders had issued a fatwa – a religious edict – that allowed the killing of American soldiers, police officers, and FBI agents.\textsuperscript{90} The facts of the Siraj case paint a picture of the defendant as a suggestible young man – his own lawyer called him a

\textsuperscript{88} Defendant Says Police Informer Pushed Him Into Subway Bomb Plot, Associated Press, May 16, 2006 (informer showed defendant “dozens of images, including pictures of prisoners being abused at the Abu Ghraib prison in Iraq); William K. Rashbaum, Terror Case May Offer Clues Into Police Use of Informants, N.Y. Times, Apr. 24, 2006 (defense charges that informer “goaded” defendant into involvement in the bombing plot by showing him inflammatory pictures of Abu Ghraib abuse).

\textsuperscript{89} William K. Rashbaum, Defendant Says Police Informer Pushed Him Into Bomb Plot, N.Y. Times, May 16, 2006 (images shown to defendant by informant included those of abuse at Abu Ghraib Prison in Iraq and video of death of boy in arms of father during Israeli-Palestinian violence).

\textsuperscript{90} Id.
“dimwit” — who the informant led into making grandiose statements in order to impress the informant, a man twice his age. When the talk turned to causing bloodshed, Siraj testified that he broke off the discussion, telling the informant that he needed to ask his mother’s permission to participate. Siraj’s lawyers mounted an entrapment defense, but it failed. The evidence the government offered at trial indicated that, long before ever meeting the informant, Siraj had made some statements that indicated his belief in the legitimacy and desirability of violent terrorist action against Americans and Israelis; the court allowed the jury to hear this evidence of these statements to rebut the defense contention that the defendant had no predisposition to commit the crime. Jurors indicated after the trial that the actions of the informant were beside the point; rather, as entrapment law requires, they looked for evidence that the informant had first suggested the violence – that the idea of bombing the Herald Square station “had not originated with Mr. Siraj.” Since they did not hear any such evidence, they rejected the defense of entrapment. According to one juror, “to prove entrapment you had to show that [the action] was initiated by the informant, that he persuaded [the defendant] to do this, and

91 John Marzulli, Queens Man Gets 30 Years for Role in Subway Bombing Plot, N.Y. DAILY NEWS, Jan. 8, 2007 (counsel stated that defendant was “a dimwit who was manipulated by a crafty paid informer trying to impress his police handlers).

92 Id. (quoting defendant as telling informant that he did not want to do participate, and “I told [the informant] I wanted to ask my mother’s permission”). This may not be quite so outlandish a statement as it first appears. To participate in what is sometimes called non-defensive jihad, the person must obtain the permission of parents. See MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM 86 (1955).

93 William K. Rashbaum, Trial Spotlights Undercover Contact with Bomb Plot Suspect, N.Y. TIMES, May 17, 2006 (court allowed government to offer the testimony of undercover detective who had contact with defendant approximately one year before defendant met informant with whom he formed bombing plot, during which contacts defendant expressed approval of suicide bombings by Palestinians against Israelis and the hope that “America will be attacked very soon”).

the [defendant] was not ready and willing to do this.”\textsuperscript{95} Without that kind of evidence, the jurors said, an entrapment defense failed even if the informant had plainly pushed Siraj.\textsuperscript{96} The conviction of Hamid Hayat, the feckless young man from Lodi, California, reveals similar sorts of actions by the informant involved in that case. The informant befriended the defendant, an unemployed sixth-grade dropout, and his father, an ice cream truck driver, often eating at the family’s home and spending the night there. The informant often spoke about “jihad” to Hamid and the rest of the Pakistani Muslim community in Lodi.\textsuperscript{97} Many people in the community later said he was “an aggressive provocateur in conversation,”\textsuperscript{98} and this seems to have been especially true in his conversations with Hamid. In June 2003, during Hamid’s visit to Pakistan for an arranged marriage, the informant spoke with Hamid by telephone. He repeatedly pressed Hamid to attend a terrorist training camp, and expressed exasperation when Hamid said he could not do so because the camps no longer operated after the 2001 terrorist attacks.\textsuperscript{99}

The informant would not accept this “excuse” from the defendant, and berated him furiously. “You’re just sitting around doing nothing…. You f___ing sleep for half a day. You wake up. You light a f___ing cigarette. You eat. You sleep again. That’s all you

\textsuperscript{95} Id.

\textsuperscript{96} Id.

\textsuperscript{97} Demian Bulwa, \textit{Muslims in Lodi Believe Mystery man Who Spoke of Jihad was a Federal Mole in Terror Investigation}, S.F. CHRONICLE, Aug. 27, 2005 (man not seen since arrests in Lodi who often talked of jihad, in what some thought was “an attempt to get others to express radical sentiments,” thought to have been a federal informant).

\textsuperscript{98} Id.; Rone Tempest, \textit{FBI Informer Testifies in Terrorism Trial}, L.A. TIMES, Feb. 23, 2006 (Lodi residents who had contact with informant describing informant as “often an instigator, asking young men about waging jihad and encouraging travelers to Pakistan to bring back firebrand speeches and extremist documents”).

\textsuperscript{99} Don Thompson, \textit{FBI Informant’s Focus Shifted From Mosque to School in Lodi Probe}, MERCED SUN-STAR, Mar. 3, 2006.
do. A loafer guy,” the informant said. When Hamid asked the informant what he should do, the informant said, “You sound like a f___ing broken bitch. Come on. Be a man. Do something,” the informant implored him. “When I come to Pakistan and I see you, I’m going to f___ing force you, get you from your throat and f___ing throw you in the madrassa.”

In another call to Pakistan, the informant, “who had long been pushing [Hamid] Hayat to get involved in radical Islamic activities,” asserted strongly that Hamid had a duty to join a terrorist training camp. “No, no, no vacation, man,” the informant said in the recorded phone conversation. “If you – you’re sitting there in Pakistan. You told me: ‘I’m going to a camp. I’ll do that.’ You’re sitting idle. You’re wasting time.”

Despite this pushing and pulling of the defendant by the government’s informant, the jury convicted the defendant.

As the Siraj and Hayat cases – as well as more run-of-the-mill cases – illustrate, entrapment rarely results in an acquittal for the defendant. The defense is simply too narrowly focused on the state of mind of the defendant to make much of a difference.


102 *E.g.*, *United States v. Pedraza*, 27 F.3d 1515 (10th Cir. 1994) (defendants’ initiation of contact with undercover agent shows they were not induced to commit criminal activity); *see also United States v. Nolan-Cooper*, 155 F.3d 221, 229-30 (3d Cir. 1998) (defendant’s continuing involvement in crime before agent approached her meant that defense of entrapment would not prevent conviction).

103 The point made here is intended to be quite simple and instrumental: the law of entrapment does almost nothing to protect defendants against what most would see as significant government action pushing the defendant toward the commission of the crime, instead of simply providing him the opportunity to commit the crime according to his own predisposition, unaffected by any government pushing and pulling. For deeper and more nuanced overview and critique of entrapment, see Richard H. McAdams, *The Political Economy of Entrapment*, 96 J. CRIM. L. & CRIMINOLOGY 107 (2005); *see also Maura F.J. Whelan, Lead Us Not Into (Unwarranted) Temptation: A Proposal to Replace the Entrapment Defense with a Reasonable Suspicion Requirement*, 133 U. PA. L. REV. 1193 (1985).
Since it rarely succeeds, entrapment will do little if anything to restrain the government’s use of informants.

Another defense, related to entrapment, examines whether the government’s investigative efforts went too far in an effort to secure a conviction. This idea, usually referred to as the “outrageous government conduct” defense, focuses not on the defendant and his predisposition to commit the crime, but on whether the conduct of the government violated the Due Process Clause of the Fourteenth Amendment. In United States v. Russell, Justice Rehnquist explained that the outrageous government conduct defense would present a court “with a situation in which the conduct is so outrageous that due process principle would absolutely bar the government from invoking the judicial process to obtain a conviction.”

It is worth noting that the Court described this defense as one that the justices “may some day” see, but had not seen yet, including in the case before it. In a subsequent case, the decisive concurring opinion of Justice Powell emphasized the narrowness of the “outrageous government conduct” doctrine. The cases, Powell said, “in which proof of predisposition is not dispositive will be rare. Police over-involvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction.” He stressed that in offenses involving possession of contraband offenses, in particular, courts should label law enforcement conduct “outrageous” only reluctantly, and should give extraordinary deference to law

104 Russell, 411 U.S. at 431-32.
105 Id. at 432 (noting that “the instant case is distinctly not of that breed”).
107 Id. at 495 n.7.
enforcement. Lower courts have responded accordingly, construing the outrageous government conduct defense narrowly and seldom finding that it prevents conviction, even with evidence of considerable government involvement in criminal activity. As one commentator said, “it appears that it will be the rare case where the government’s conduct in supervising or operating an informant warrants dismissal of an indictment” on the basis of outrageous government conduct.

2. Civil Litigation

Civil litigation represents one other possible strategy to challenge the use of informants. In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, the U.S. Supreme Court gave individuals the right to bring suit in federal court when federal actors violate their constitutional rights during a criminal investigation, even if the government ultimately brings no criminal charges. Bivens stands as the analogue to Section 1983, the statute that created a federal right to sue state and local government actors who violate the constitutional rights of citizens under color of state law. In the 1960s, 1970s, and 1980s, plaintiffs brought numerous lawsuits to

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108 Id.
109 E.g., United States v. DeSapiro, 435 F.2d 272 (2d Cir. 1970) (due process not violated when informant, inter alia, participated in a conspiracy in to extort money to induce official action and keep proceeds for himself, and therefore was inadequately supervised by law enforcement); United States v. Myers et al., 692 F.2d 823 (2d Cir. 1982) (government’s “ABSCAM” sting operation, in which government operatives posed as Arab sheiks willing to pay bribes for “help” with immigration problems, and in which government operatives worked from scripts for the deception, was not outrageous government conduct violating the Due Process Clause).
111 403 U.S. 388 (1971).
112 Id. at 392. Bivens involved a claim for violation of Fourth Amendment rights.
address their claims of illegal surveillance and disruption of political groups by police.¹¹⁴ Federal courts showed some willingness to find for these plaintiffs, perhaps influenced by the revelations of large-scale federal wrongdoing in domestic intelligence gathering uncovered in Congressional investigations led by U.S. Senator Frank Church.¹¹⁵ In New York and Chicago, for example, groups of individuals sued their police departments for illegal surveillance activities. Both departments ultimately agreed to settlements that put them under consent decrees supervised by the federal courts, tightly circumscribing their surveillance activities, including the use of informants. In Chicago, the Alliance to End Repression, the American Civil Liberties Union, and others brought suit to end abuses of civil rights by the so-called “Red Squad” of the Chicago Police Department, which had actively spied upon allegedly subversive groups. As a result, a federal court began


¹¹⁵ U.S. Senate, Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Hearings – The National Security Agency and Fourth Amendment Rights, Vol. 6, 94th Cong., 1st Sess., 1975; U.S. Senate, Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Final Report – Book II, Intelligence Activities and the Rights of Americans, 94th Cong., 2d Sess., 1976; U.S. Senate, Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Final Report – Book III, Supplementary Detailed Staff Report on Intelligence Activities and the Rights of Americans, 94th Cong., 2d Sess., 1976. This era of wrongdoing by the CIA explored by the Church Committee received new scrutiny in 2007, when Michael Hayden, then the relatively new director of the Agency, made the decision to release the so-called “family jewels” documents – internal memoranda prepared in the 1970s detailing the Agency’s many Cold War era transgressions. Karen DeYoung & Walter Pincus, _CIA Releases Files On Past Misdeeds_, WASH. POST, June 27, 2007; Mark Mazzetti & Tim Weiner, _Files on Illegal Spying Show C.I.A. Skeletons From Cold War_, N.Y. TIMES, June 27, 2007.
supervision of the Chicago Police Department in 1982.\textsuperscript{116} In similar circumstances in New York, a federal court began supervisions of the NYPD in 1985 in the \textit{Handschu} case.\textsuperscript{117} Both the Chicago and New York cases put restrictions on the use of surveillance, including the use of informants, by these police departments, and required ongoing monitoring of specified departmental activities. Since the settlements took the form of federal court orders with continuing judicial oversight, the courts could enforce the decrees with the contempt power.

Both the Chicago and New York consent decrees stayed in place for almost two decades, but courts have largely lifted these orders in the last few years. In the Chicago case, the U.S. Court of Appeals for the Seventh Circuit reversed a lower court’s decision and granted the Police Department the relief it sought from almost all restrictions on its surveillance power. Writing for the Court, Judge Richard Posner first explained that the law had changed during the preceding twenty years, moving away from the once-common practice of federal courts retaining long-term supervision of local institutions. Federal courts should not remain supervisors of state and local governmental agencies indefinitely under such consent decrees, Judge Posner said. Rather, proof of long-term compliance should result in the return of these institutions to local control.\textsuperscript{118} During the 1980s and 1990s, the period of time that the consent decree had remained in force, “the Supreme Court and this court have become ever more emphatic that the federal judiciary must endeavor to return the control of local governmental activities at the earliest

\textsuperscript{116} \textit{Alliance to End Repression et al. v. City of Chicago}, 561 F. Supp. 537 (N.D. Ill. 1982).

\textsuperscript{117} \textit{Barbara Handschu et al. v. Special Services Division et al.}, 605 F. Supp. 1384 (S.D.N.Y. 1985) (approving settlement), \textit{aff’d}, 787 F.2d 828 (2d Cir. 1986).

\textsuperscript{118} \textit{Alliance to End Repression et al. v. City of Chicago}, 237 F.3d 799, 800 (2001). This case is one of many incarnations of the Red Squad cases that sprang from this multi-year litigation.
possible opportunity compatible with achievement of the objectives of the decree that transferred that control to the federal courts.”119 Second, Judge Posner said, the original decree had indeed protected the First Amendment rights of citizens, but at too high a price in the potential danger to public safety. The world had changed, with new threats – especially “ideologically motivated terrorism” that might strike both globally and locally. Unless the Chicago Police Department had the increased flexibility it wanted, it could not keep the citizens of Chicago safe.120 Blending these federalism and public safety points, Posner said that “[t]o continue the federal judicial micromanagement of local investigations of domestic and international terrorist activities in Chicago is to undermine the federal system and trifle with public safety.”121

In the Handschu case in New York, a drastic reduction in the scope of the consent decree came as a direct response to the terrorist attacks on the city on September 11, 2001. In the wake of those events, the New York Police Department told the supervising federal district judge that the mandatory guidelines for police surveillance in Handschu had become too onerous in light of the threat of international terrorism and the increased surveillance necessary to meet this challenge.122 The judge decided that these changed circumstances warranted a substantial scaling back of the requirements of the decree, because it “severely handicap[ped] police efforts to gather and utilize information about

119 Id.
120 Id. at 802. Judge Posner’s words about ideologically-driven terrorism seem prescient: the decision actually came before the attacks of September 11, 2001.
121 Id.
potential terrorist activity." When reports surfaced several years later revealed that the New York Police Department had routinely violated even the scaled-back Handschu guidelines by routinely videotaping law-abiding people at public gatherings protected by the First Amendment, without any indication that the people taped would engage in law breaking, the judge – the same judge that lifted most of the Handschu requirements just a few years before – issued an order limiting the taping, but did not re-impose any stricter level of supervision. In the meantime, new revelations emerged in 2007: the New York Police Department appears to have engaged in widespread surveillance, including the use of informants and undercover police officers, against numerous activist groups around the country in the run-up to the Republican National Convention, held in New York City in 2004. As of this writing, legal action remains pending.

Thus both the Alliance to End Repression case in Chicago and the Handschu case in New York leave one with the impression that, while litigation to rein in police use of informants remains a possibility, this path seems, to put it mildly, less than promising. It is hard to imagine a federal court, in today’s post-9/11 climate, issuing directives limiting police use of surveillance activities like the planting of informants.

One can imagine at least one other possibility for litigation against the use of informants in houses of worship and other religious settings: a claim that the use of this

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123 Id. at 340.
125 Barbara Handschu et al. v. Special Services Division et al., Memorandum Opinion and Order, 71 Civ. 2203 (CSH), Feb. 15, 2007 (copy on file with the author).
126 Jim Dwyer, City Police Spied Broadly Before G.O.P. Convention, N.Y. TIMES, Mar. 25, 2007 (detailing actions by NYPD officers against individuals and groups all over the country dating well back into 2003).
tactic would violate the First Amendment, because it would chill the free exercise of religious belief and practice. Such a claim makes perfect sense in terms of the real and tangible damage inflicted on religious institutions when law enforcement utilizes informants in these settings. But even proponents of such a claim concede that such a lawsuit would face formidable, if not insurmountable, obstacles. First, plaintiffs would have to show that they had standing to sue, which requires (to start with) proof that plaintiffs suffered some actual or threatened injury as a result of the government’s conduct. Second, the question would become whether the government could show an interest sufficient to justify its actions. As long as the government bases its actions on policies that are “neutral and of general applicability,” courts judge the actions under the highly deferential rational basis standard, under which almost all government action withstands challenges. According to one commentator, under the rational basis standard, most such lawsuits would have “virtually no chance” to succeed. At least one such case made its way through the federal courts in the past, and the results highlight the difficulties a plaintiff would have to surmount. During the 1980s, the

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128 See notes 184–200, infra, and accompanying text.

129 See, e.g., Lininger, supra note 24, 1237–42 (2004) (discussing the difficulties involved in such a lawsuit, concluding at one point that given the likely analysis a court would use, “there is virtually no chance” that such a lawsuit might succeed).

130 Along with proof of real or threatened injury, plaintiffs would also have to show that the injury comes from the challenged government action, and that a favorable decision will likely redress the injury. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982). In a closely related context, a federal appeals court recently found that plaintiffs alleging that their communications with legal clients, journalistic sources, and the like would suffer a chilling effect had no standing to sue to stop the so-called “Terrorist Surveillance Program,” under which the National Security Agency tapped phone calls without warrants. American Civil Liberties Union et al. v. National Security Agency et al., Nos. 06-2095, 06-2140, U.S. Court of Appeals for the Sixth Circuit, 2007 U.S. App. LEXIS 16149; 2007 FED App. 0253P, decided July 6, 2007.

131 Employment Division v. Smith, 494 U.S. 872, 878, 890 (1990) (generally applicable test that is neutral toward religion must be judged under “rational basis” test).

132 Lininger, supra note 24, at 1240.
Immigration and Naturalization Service initiated an investigation of the “Sanctuary Movement” at churches in Arizona, which allegedly assisted immigrants coming into the U.S. illegally; as part of the investigation, the government placed two informers into some of the churches. The investigation resulted in indictments of eleven leaders of the “Sanctuary Movement” on felony charges; eight were ultimately convicted. A number of the churches that the government had spied upon brought suit, arguing that the use of informants and the informants’ actions in their churches chilled the exercise of their religious freedom, observable in terms of, inter alia, reduced membership, decreases in contributions to the churches, and cancellation of Bible classes. The district court found that the plaintiffs lacked standing, but the U.S. Court of Appeals for the Ninth Circuit reversed in part and affirmed in part. The district court then decided that while the chilling effect was real, the government need only have “a good faith purpose for the subject investigation” and must adhere to the scope of the “invitation” that the informants received to participate in church activities. Under this standard, plaintiffs in mosques in which the government placed informants would have little to work with. In the present climate, with fervor against terrorism at a high point, courts would likely have no trouble


134 These claims were summarized in the Ninth Circuit’s opinion. Presbyterian Church (U.S.A.) v. United States, 870 F.2d 518, 521-22 (9th Cir. 1989).

135 Id. at 520.

136 Presbyterian Church (U.S.A.) v. United States, 752 F. Supp. 1505, 1516 (D. Ariz. 1990). Of course, this “invitation” is a fiction, premised on the informants’ deception of the targets of the investigation; had the informants told the targets that they were not fellow believers or members of the public but government agents, no “invitation” would have been forthcoming.
finding a “good faith purpose” and actions within the scope of the “invitation” that mosques issue (in theory) to members of the public to come and worship.

C. Internal Regulations

The regulation of the use of informants in religious institutions has also taken the form of internal police agency regulation. Internal police regulation can serve as an effective method of controlling police behavior. The FBI, which has had such internal regulations on the use of informants for decades, makes a particularly pertinent example.

During the 1970s, Congressional investigations led by Senator Frank Church revealed a long pattern of abusive and illegal domestic surveillance of political, religious, and social groups. According to committee findings, “[t]he Government has often undertaken the secret surveillance of citizens on the basis of their political beliefs, even when those beliefs posed no threat of violence or illegal acts on behalf of a hostile foreign power.”

Targets of illegal government surveillance included proponents of racial and gender equality, and advocates of non-violence – particularly the Rev. Dr. Martin Luther King, who the FBI attempted to destroy, both personally and professionally. The federal government spied on political figures, investigated and conducted surveillance religious groups, including church youth groups and priests’ conferences. But among all of the government’s illegal spying tactics, “[t]he most pervasive surveillance

137 See Wayne R. LaFave, Controlling Discretion By Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication, 89 Mich. L. Rev. 442 (1990) (“[P]olice rulemaking regarding their fourth amendment activities is a highly desirable undertaking.”).


139 Id. at 9-10.

140 Id. at 6, 8.
technique has been the informant. In a random sample of domestic intelligence cases, 83% involved informants [while only] 5% involved electronic surveillance.”

Informants were often used against peaceful, law-abiding groups, the Committee found, and informants sometimes engaged in violent activity as members of the targeted groups.

These abuses led the Attorney General, Edward Levi, to establish internal guidelines for the use of informants by the FBI. Beginning with the first version of these guidelines – which became known as the Levi Guidelines – the FBI restrained its investigations into political and religious groups by requiring that, to recruit or place informants in such groups, the FBI had to have “specific and articulable facts giving reason to believe that an individual or a group is or may be engaged in activities which involve the use of force or violence.” In addition, the guidelines required permission from FBI headquarters. The bottom line was that the FBI, either through its own sworn agents or through informants, could not infiltrate religious groups without some factual basis to suspect that the persons concerned had taken part, or were about to take part, in a crime.

141 Id. at 11.
142 Id.
144 Id. at 237.
145 Id.
146 By the end of the 1970s, police departments in a number of states and cities followed the example of The Levi Guidelines, either because of state laws, municipal ordinances or court decrees in lawsuits. See notes 116-26, supra, and accompanying text, concerning the Handschu and Alliance to End Repression cases and associated matters.
During succeeding decades, the Department of Justice modified the Guidelines in reaction to scandals concerning the use of informants. But the requirement that the FBI have some fact-based reason to monitor First Amendment-sensitive contexts like religious services or political meetings always remained in place. This changed in 2002, when Attorney General John Ashcroft stripped away the requirement for fact-based suspicion. Citing the disastrous attacks of September 11, 2001, as a justification, Ashcroft issued new guidelines that allowed the use of informants and other types of

147 Following the Abscam sting operation of the late 1970s, when a con man working as an informant for the FBI acted as a front man for an FBI corruption probe that eventually ensnared a U.S. Senator, six members of the U.S. House of representatives, and a number of state and local politicians on corruption charges, Attorney General Benjamin Civiletti issued new guidelines. See generally Irvin B. Nathan, Abscam: A Fair and Effective Method for Fighting Public Corruption, in ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT 2, 5 (Gerald E. Caplan ed., 1983); United States v. Myers, 527 F. Supp. 1206 (E.D.N.Y. 1981), aff’d, United States v. Myers, 692 F.2d 823 (2d Cir. 1982). There were allegations that the informant may have been paid on a contingency basis – that is, his compensation from the government may have depended upon the success of the prosecution in the cases brought based on his work, giving him an incentive to push the envelope, including the legal and factual proprieties involved in his role. Other disclosures indicated that the informant had used his government-created front business to commit unrelated frauds. See, e.g., Howard Kurtz, The Sting and the Innocent Bystander, S.F. CHRON., Oct. 6, 1985. The Civiletti Guidelines, requiring somewhat more rigor in the supervision in the use of informants, can be found at Attorney General’s Guidelines on FBI Use of Informants and Confidential Sources (Dec. 2, 1980), reprinted in Final Report of the Select Committee to Study Undercover Activities of Components of the Department of Justice to the U.S. Senate, S. REP. NO. 682, 97th Cong., 2d Sess. 504-16 (Dec. 2, 1980) [hereinafter The Civiletti Guidelines]. The pattern repeated in the late 1990s, with a far-reaching scandal in Boston involving the FBI and organized crime informants who were protected and allowed to commit many violent crimes. The details of the case come alive in DICK LEHR & GERARD O’NEILL, BLACK MASS: THE TRUE STORY OF AN UNHOLY ALLIANCE BETWEEN THE FBI AND THE IRISH MOB (Harper Paperbacks, 2001) by two Boston Globe reporters. A court examined the facts and put the details of the case before the public for the first time in United States v. Salemme, 91 F. Supp. 2d 141 (D. Mass. 1999), rev’d in part, United States v. Flemmi, 225 F.3d 78 (1st Cir. 2000). In response, Attorney General Janet Reno issued new Guidelines. Department of Justice Guidelines Regarding the Use of Confidential Informants, www.usdoj.gov/ag/readingroom/ciguidelines.htm, accessed June 5, 2007 [hereinafter The Reno Guidelines]. The Reno Guidelines superceded both the Levi Guidelines and the Civiletti Guidelines. Id. § I(A)(3). Both the Civiletti and Reno Guidelines retained the requirement for fact-based suspicion to allow any intrusion into a religious institution or political setting.

monitoring in religious and other settings without any predicate of suspicious conduct.  
From May of 2002 forward, the FBI no longer had to have a basis in fact in order to place informants in a mosque or a church, even for equipping the informant with eavesdropping or recording or video equipment. Rather, these investigations could be undertaken without any prior reason to suspect any untoward conduct by congregants. The new guidelines were not targeted only at Muslim religious institutions, or even only at religious institutions generally; rather, they allowed this type of spying anywhere the public might be. And as of the end of 2008, Attorney General Michael Mukasey has reaffirmed the Ashcroft position with the new Attorney General’s Guidelines for Domestic FBI Operations. Thus the use of internal regulation regarding informants, utilized by the FBI itself in years past, no longer presents a viable alternative for regulating informants in mosques or any other religious setting.

Thus we are left with one overarching impression of the law that governs the use of informants. The Fourth Amendment affords law enforcement full discretion to decide


150 Id. (“For the purpose of detecting or preventing terrorist activities, the FBI is authorized to visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally.”). But to say that these regulations simply allow the government’s police spies to do what the public does surely misses the crucial difference between the presence of a member of the public and investigation by a government agent. Laurence Tribe explained this well in a recent paper. Discussing the Supreme Court’s statement that, there was no real difference between the government and a private party as property owners, Professor Tribe said that “[t]he [Court’s] analogy shockingly ignores the Constitution’s central premise that the government, being uniquely powerful, is uniquely in need of restraints that would be wholly out of place in our fundamental law’s treatment of private parties.” Laurence H. Tribe, Death by a Thousand Cuts: Constitutional Wrongs without Remedies after Wilkie v. Robbins, 2006-2007 CATO SUP. CT. REV. 23 (2007), accessed at http://ssrn.comabstract=1019560.

151 See notes 22 through 26, supra, and accompanying text.
when and how to use informants, imposing no limits.\textsuperscript{152} Defenses like entrapment remain available at trial, but these defenses seem more theoretical than real in terms of what they might accomplish in terms of reigning in informant activity. While individuals can bring civil suits, relief seems unlikely. And the FBI has largely abandoned internal regulation as a way to regulate discretion over when and why agents can place informants in First Amendment-sensitive places like religious institutions.

IV. BENEFITS, BUT ALSO COSTS

Given what we know now concerning the terrorist threat we face, and the almost unlimited discretion that police have on this issue, it seems certain that the FBI and local police agencies will continue to place informants into Muslim communities to gather intelligence. To some degree, this is not just unavoidable, but necessary. But it is too simplistic to view this as an unalloyed good – that is, to pretend that one can pursue the benefits of this strategy without incurring costs. We may decide that the benefits we receive outweigh the costs. But we cannot simply assume the truth of this proposition, or, worse yet, pretend that no costs exist. On the contrary, we must acknowledge both costs and benefits, and then attempt to work out the right accommodation between them.

A. The Benefit: Using Informants to Address a Risk That We Cannot Discount Entirely

Given the fact that no other terrorist attacks have occurred in the U.S. since September 11, 2001, and that even the plots allegedly foiled since seem much smaller in

\textsuperscript{152} State law could play an important role here. While some state law limiting the use of informants exists, \textit{see} note 215, \textit{infra}, and accompanying text, new laws along these lines seem unlikely to pass now, given the current climate regarding terrorism. It is also important to point out that there has been at least some interest in legislative reform of the use of informants. \textit{See, e.g.}, U.S. House of Representatives, Committee on the Judiciary, \textit{Oversight Hearing on Law Enforcement Confidential Informant Practices}, Testimony of Professor Alexandra Natapoff, Washington, D.C., July 19, 2007.
scale than the World Trade Center and Pentagon attacks, one might conclude that no
terrorist presence exists on U.S. soil. And indeed many authoritative sources have. In
the aftermath of the exhaustive investigation by the independent September 11
Commission, Thomas Kean, co-chairman of the Commission and former Governor of
New Jersey, said flatly that there were no sleeper cells in the U.S. assisting the 9/11
hijackers, as some feared; the attackers came from overseas, and go no help with their
plot from anyone from the U.S. “[P]eople talked about cells and sleeper cells and all of
that; we didn’t find any.”153 But this does not mean that members of new cells could not
enter the U.S. now or in the future. And we must also ask whether “homegrown
terrorists” – people from inside our country, either citizens or long-time residents – might
turn to terrorism, as FBI Director Robert Mueller fears.154 This has become a real
problem in Western Europe, as demonstrated by the attacks on trains in Madrid in March
of 2004,155 the attacks on public transit in London in July of 2005,156 and the
assassination of the filmmaker and commentator Theo Van Gogh in the Netherlands on a
city street in 2004157 – all by Islamic extremists native to these countries.

153 Interview transcript, Thomas Kean, Co-Chairman, National Commission on Terrorist Attacks
154 See notes 1-6, supra, and accompanying text.
http://news.bbc.co.uk/2/hi/europe/3597885.stm (ten bombs exploded on four full commuter trains in
Madrid, killing 191 people and injuring at least 1,800).
156 Full Statement of the Prime Minister of the United Kingdom on the July 7, 2005 Attacks,
157 IAN BURUMA, MURDER IN AMSTERDAM: THE DEATH OF THEO VAN GOGH AND THE LIMITS OF
TOLERANCE (Penguin Press, 2006).
Some have argued that, next to the scope of this problem as it presents itself in Western Europe, the U.S. faces far less danger. This may be true. Nevertheless, we cannot completely discount the possibility of either sleeper cells introduced into our country or homegrown terrorism on our soil, nor can we say that infiltration by informants could not serve as an effective, even decisive, weapon against such groups. We cannot wish away the possibility of danger from terrorism; indeed, many public officials – even those charged with the job of preventing terrorism – have said that it is not a matter of whether terrorists will strike us again, but when. On the fifth anniversary of the September 11, 2001 attacks, Secretary Michael Chertoff of the U.S. Department of Homeland Security said that the government cannot eliminate the risk of terrorist attack. “The fact is that terrorists continue to plot, even as we strike against them.” In the summer of 2007, Chertoff again sounded the alarm, telling the press that he had a “gut feeling” that al Qaeda would soon attack the U.S. mainland. Former Homeland Security Secretary Tom Ridge thinks al Qaeda will strike the U.S. again, and will wait as long as necessary to attack successfully. “I’m convinced they’re prepared to wait” as many years as they have to, Ridge says. “They’re looking much longer term than we are.” Many experts agree. Michael Scheuer, a long-time counterterrorism officer, former head of the Bid Laden unit in the Central Intelligence Agency, and author of a

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158 See note 8, supra, and accompanying text.


best-selling book about the West’s struggle against al Queda and other Middle Eastern extremists,\textsuperscript{162} has studied the problem extensively. He believes that while terrorists, homegrown or otherwise, have not yet launched another attack inside the U.S., they will, and when they do so it will dwarf the attacks of 9/11. According to Scheuer, al Queda or its affiliates will detonate a weapon of mass destruction in the U.S. The terrorists will use “[a] nuclear weapon of some dimension, whether it’s actually a nuclear weapon, or a dirty bomb, or some kind of radiological device,” he says. “… I think it’s pretty close to being inevitable…. Yes, I think it’s probably a near thing.”\textsuperscript{163}

Looking at the facts with a cold, analytical eye, approximating the risk of another terrorist attack in the U.S. seems difficult. But if estimating this risk is not easy, saying no risk exists is impossible, and probably foolhardy. And we need only look to events in this country to see that this is true. The investigation in Lackawanna, New York, netted six young men who admitted that they trained in terrorist camps in the Middle East. The training prepared them to launch attacks against Americans in the U.S. upon their return to this country.\textsuperscript{164} Perhaps they presented little actual danger; further, some facts seemed to support the defendants’ contentions that at least some of them had only a half-hearted commitment (if that) to the training and its goals.\textsuperscript{165} The three terror suspects charged in

\textsuperscript{162}Anonymous, \textit{Imperial Hubris: Why the West is Losing the War on Terror} (2004). Scheuer used the pen name Anonymous until he left the CIA, in 2004.
\textsuperscript{164}See notes 9-12, supra, and accompanying text.
\textsuperscript{165}Interview with Sahim Alwan, \textit{Frontline: Chasing the Sleeper Cell}, PBS, July 24, 2003, http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/interviews/alwan.html, accessed Jan. 29, 2004 (Alwan, one of six men from Lackawanna who traveled to an al Queda camp in Afghanistan, left after just a short time in the camp by feigning an injury: “I pretended like I hurt my ankle. So I went back and I told the guy that was running the camp … I said, ‘I want to leave … I want to leave the camp.’”).
Toledo, Ohio, seemed not to have formed any plan to launch an attack in the U.S., but federal prosecutors allege that at least one actually traveled to Jordan in a failed attempt to deliver tactical assistance to the anti-American insurgents killing American soldiers in Iraq. In the first of these, in the spring of 2007, the authorities made arrests in two terrorism cases in the New York region, both of which raised the specter of so-called homegrown terrorism. In May of 2007, the federal government charged six foreign-born men with plotting to attack soldiers at Fort Dix, in New Jersey. Of the six, all lived in the U.S. – some for more than two decades, highlighting law enforcement’s fears about the “homegrown” nature of the danger. Then, in June of 2007, the federal government charged four men, including one naturalized American citizen, with involvement in a plot to destroy Kennedy Airport in New York by bombing the jet fuel lines that supply the airport. The group included a former member of the Guyanese parliament and two others

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166 Indictment, United States v. Mohammed Zaki Amawi et al., 3:06CR0719, Feb. 16, 2006 (1 … AMAWI traveled to Jordan in October 2003, and returned to the United States in March 2004. While in Jordan, AMAWI unsuccessfully attempted to enter Iraq to wage violent jihad, or ‘holy war,’ against the United States and coalition forces.”). Note that, at this writing, these remain unproven allegations; no trial has taken place, and no admissions have occurred as part of any plea agreement.

167 Michael Isikoff & Mark Hosenball, Fort Dix Suspects Illegally in U.S. for 20 Years, NEWSWEEK, May 16, 2007 (three Albanian brothers involved in plot crossed into the U.S. illegally in 1984); Dale Russakoff & Dan Eggen, Six Charged in Plot to Attack Fort Dix, WASH. POST, May 9, 2007 (federal law enforcement portrayed defendants “as a leaderless, homegrown cell of immigrants … who came together” but who had “no apparent connection to al-Qeda or other international terrorist organizations” but “appears to be an example of the kind of self-directed sympathizers widely predicted – and feared – by counterterrorism specialists”); Dina Temple-Raston, FBI Pins Fort Dix Plot on ‘Homegrown’ Terrorists, Morning Edition, NATIONAL PUBLIC RADIO, May 9, 2007 (suspects “are thought to have created the jihad mission themselves, without outside support” from al-Qaida or other international terrorist groups, quoting one agent as stating that ‘these homegrown terrorists can prove as dangerous as any known group, if not more so’”); Dina Temple-Raston & Michele Norris, Six Accused of Plot to Attack Fort Dix, All Things Considered, NATIONAL PUBLIC RADIO, May 8, 2007 (all suspects lived in the U.S., one was a citizen, two were legal residents, and three had been in the U.S. illegally for more than a decade); Christine Hauser & Anahad O’Connor, 6 Arrested in Plot to Attack Fort Dix, N.Y. TIMES, May 8, 2007 (suspects aimed to kill approximately 100 soldiers with rocket propelled grenades). In December 2008, a jury convicted all of the defendants of conspiracy to kill soldiers, but acquitted the men of attempted murder charges. Paul von Zielbauer and Jon Hurdle, Five Are Convicted of Conspiring to Attack Fort Dix, N.Y. TIMES, Dec. 23, 2008.
from the Caribbean island country of Trinidad and Tobago.\textsuperscript{168} According to the
government’s allegations, the American leader of the plot hatched the plans, conducted
surveillance, and he and others went to Trinidad to seek financing and support from a
violent Muslim group that had attempted a coup in Trinidad in 1990.\textsuperscript{169} And there have
also been the convictions of Shahawar Siraj in New York City for plotting to bomb the
Herald Square subway station, and of Hamad Hayat in Lodi, California, for attending a
terrorist training camp in Pakistan, both described above. In at least four of these cases –
Siraj, Hayat, the Fort Dix plot, and the targeting of Kennedy Airport – the authorities
used informants to gather crucial facts. The Siraj and Hayat cases may seem like small
potatoes; an examination of the facts of both cases shows that defendants seemed to have
presented real danger of terrorist attacks only in the broadest possible sense that one
could use that term.\textsuperscript{170} Nevertheless, at least in the Fort Dix and Kennedy Airport plots,
one can say that, had the plots matured, they could have presented some real danger, even
if not as much danger as some might think.\textsuperscript{171} All of this shows that the potential danger

\textsuperscript{168} Cara Buckley & William K. Rashbaum, \textit{4 Men Accused of Plot to Blow Up Kennedy Airport Terminals and Fuel Lines}, \textit{N.Y. Times}, June 3, 2007 (ringleader of plot, a retired cargo handler at the airport, is “a 63-year-old Guyanese native and naturalized American,” emphasizing homegrown nature of plot); Greg Miller & Erika Hayasaki, \textit{Arrests Made in Alleged Plot Against JFK Airport}, \textit{L.A. Times}, June 3, 2007 (characterizing the case as “the latest in a series of alleged domestic terrorist threats involving Muslims residing legally in the U.S.,” including the Fort Dix plot); Anthony Faiola & Steven Mufson, \textit{N.Y. Airport Target of Plot, Officials Say}, \textit{Wash. Post}, June 2, 2007 (charges “provided yet more evidence of the threat posed by homegrown terrorists, embittered extremists who hail from the Middle East or, in this case, from the Caribbean and northeastern South America”).

\textsuperscript{169} Buckley & Rashbaum, supra note 168; Greg Miller & Erika Hayasaki, supra note 168 (groups attempted to solicit money and support from Jamat al Muslimeen, a radical Muslim group that staged a violent coup attempt in Trinidad in 1990).

\textsuperscript{170} See notes 88-101, supra, and accompanying text, describing the informant pushing the defendant to make incriminating statements (Siraj) or to attend a training camp in Pakistan (Hayat).

\textsuperscript{171} Michael Powell & William K. Rashbaum, \textit{Papers Portray Plot as More Talk than Action}, \textit{N.Y. Times}, June 4, 2007 (calling the plot “a less than mature terror plan, a proposed effort longer on evil intent than on operational capability,” with one official calling the terrorists “‘capability low, intent very high,’” and another saying “‘the ambitions were horrific, the capacities were very limited, but they kept trying’”).
of homegrown terrorist plots, though perhaps not great, remains real; in any event, we cannot dismiss it. And even a small-scale plot could do considerable damage, even if it does not do all the damage for which the terrorists might hope. For example, the attack on Kennedy Airport’s fuel lines or even an airport fuel tank would probably not have resulted in the destruction of the airport or even the entire fuel system, and would most likely have caused relatively limited (or no) loss of life, but it would have disrupted the U.S. aviation system for at least a short time and perhaps crippled a major U.S. air travel hub for a long period, as well as increased fear throughout the American public. Since law enforcement has sometimes used informants to nip these nascent dangers in the bud, we should not expect police to abandon this tactic now.

B. The Costs: Crippling Police/Community Cooperation, the Possibility of Abuse, and the Danger of Police Activity in the Areas Crucial to First Amendment Values

1) The Damage to Relations Between Law Enforcement and Muslim Communities. For purposes of this discussion, the most important cost of the use of informants within mosques and other religious institutions remains the damage this tactic may do to law enforcement’s ability to receive crucial intelligence and information from the Muslim community. As discussed above, law enforcement and intelligence officials agree on the importance of finding common ground between police and Muslim communities. Building relationships that can engender trust between them must become a top priority, because police need trusted partners in the Muslim communities if they

172 Buckley & Rashbaum, supra note 168 (quoting experts as saying that system of safety valves would have limited the damage); Faiola & Mufson, supra note 164 (successful completion of the plot might have “resulted in major damage but relatively limited loss of life”).

173 See notes 51-61, supra, and accompanying text.
want intelligence on the activities of anyone in those communities who might seem suspicious. Members of Muslim communities know the facts on the ground where they live; this makes them the best source of information on suspicious activity. When police and Muslim community members have strong, positive relationships, information concerning suspicious activity can make its way to the police; if police do not have alliances with the people who live in these communities, this diminishes their chances of gaining knowledge of what goes on there.

Of course, opportunities for intelligence and information gathering are not the only potential benefits of creating these relationships. For example, at Chicago’s two airports, Chicago Police Department officers play an integral role in airport security. Former Chicago Police Superintendent Terrance Hillard, who had worked hard to create strong relationships with many minority communities in his city, including Muslims, tapped the alliances he had created to enlist the Muslim community to help design training for police officers concerning how they could deal more sensitively and successfully with Muslim airport patrons. The results were applauded by both the Muslim community and the police themselves; a training video that resulted from this joint effort has found a wide circulation among police departments across the country that wish to develop better relationships with their Muslim citizens. The point is that there is much to gain for everyone in this debate – not just intelligence and information for the police, but also a way to cooperate on many issues of concern to both police and these communities.

\[\text{\textsuperscript{174} HARRIS, supra note 37, at 47-52.}\]

\[\text{\textsuperscript{175} Id. at 51-52.}\]
communities. It is an opportunity that neither the police nor the Muslim community should undervalue.

But as important as these related benefits can be, the potential gains in terms of the availability of intelligence on potential terrorism loom larger. As the comments above from Muslim New Yorkers\textsuperscript{176} surely make clear, the foundation for any relationship that will foster communication, and therefore the sharing of intelligence, remains police and community trust; the use of informants in a community can damage or destroy that trust all too easily. Without that kind of partnership, there exists little chance that real relationships can flourish, and this in turn reduces the chances that community members will share the information they have with law enforcement – whether our of fear of or discomfort with police, out of a feeling that they suffer unfair mistreatment like ethnic profiling, or simply because they feel that law enforcement does not have their interests at heart. The placement and use of informants in mosques strikes directly at the trust necessary to overcome these feelings, undermining trust before it can take root.

2) Abuse in the Use of Informants. Another potential cost of the use of informants in mosques may come in the form of abuse by law enforcement. Almost any investigative tactic carries with it the potential for abuse; for example, officers may fail to follow search and seizure rules based on the Fourth Amendment rulings of the Supreme Court, or may conduct interrogations of suspects in ways that flout the strictures of the \textit{Miranda} ruling. But the use of informants, particularly (though not only) in sensitive contexts like religious or political organizations, has proven a perennial source of abuse.

\textsuperscript{176} See notes 67-68, supra, and accompanying text; see also Carolyn Marshall, 24-Year Term for Californian in Terrorism Training Case, N.Y. TIMES, Sept. 11, 2007 (according to executive director of Muslim organization, Hamid Hayat’s sentencing “sent a clear message to the Muslim community. You do not speak to an FBI agent unless you have an attorney present.”).
over many years, one to guard against with particular vigor. Congressional investigations in the 1970s exposed these abuses, bringing to light some of the truly disturbing ways in which our own government spied upon Americans whose conduct fell within the zone of First Amendment protection. Because of this, the FBI and the Department of Justice have issued guidelines over the past three decades, beginning with the Levi Guidelines in the 1970s, to address these issues. While the Levi Guidelines allowed the government to spy domestically on First Amendment activities only if there was reason to suspect a crime, but under the current Guidelines, federal law enforcement now enjoys much wider discretion to spy and use informants.

One might have hoped that the Guidelines, whatever drawbacks they might have, would at least have changed the Bureau’s prior patterns of failing to follow rules. That is, whether the new Guidelines seem strict enough or not, agents would at least follow them. But the evidence shows that this has not happened. A 2005 report by the Inspector General of the Department of Justice indicated that the FBI continues to fail to follow its Guidelines for using informants — a sobering finding, considering that the FBI adopted the Guidelines for the express purpose of forcing its own agents to do a better job handling informants and avoiding the many pitfalls and ethical dilemmas that prior scandals illuminated. In a comprehensive analysis of compliance with all of the FBI’s Investigative Guidelines, the Inspector General found that “[t]he most significant problems were failures to comply with the Confidential Informant

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177 See notes 138-142, supra, and accompanying text.
178 See note 143, supra, and accompanying text.
179 Id.
Guidelines. … [W]e identified one or more Guidelines violations in 87 percent of the confidential informant files we examined.”

Two possible explanations stand out for the FBI’s failure to regulate itself with successive sets of guidelines. First, the FBI and the Department of Justice have always said explicitly that the various guidelines create no enforceable rights. That is, failure to follow the guidelines does not give any person any legal right to sue over what the FBI did. Thus FBI agents may or may not receive instruction and training on the guidelines and may or may not follow the guidelines, but not doing so carries no penalty either against the Bureau or the agent in a lawsuit brought by the victim. This effectively makes the guidelines unenforceable from outside the Bureau. Second, and just as important, the guidelines focus on how to use informants, sometimes in great detail; they do not consider under what circumstances the government should use informants – i.e., with how much justifying evidence, and for what purpose, the government should deploy informants. This, of course, is the very question the Supreme Court’s cases on the subject did not answer, since (according to the Hoffa and White cases) everyone “assumes the risk” that anyone could be a government informant. Without any rules concerning the circumstances under which the law should allow law enforcement to use informants, the FBI retains full flexibility without supervision or accountability, except as it chooses.

181 Id. at 2 (emphasis supplied). It is also worth noting that the FBI does not stand alone in having violated guidelines on the use of surveillance and informants. Recall that the New York Police Department violated the Handschu Guidelines even after a federal court relaxed them considerably – videotaping law-abiding people at demonstrations, and spying extensively on political and social-cause groups in the run-up to the 2004 Republican Convention in New York City. See notes 122-24, supra, and accompanying text.

182 E.g., The Attorney General’s Guidelines Regarding the Use of Confidential Informants, § 1.H, p. 7 (2003) (“Nothing in these Guidelines is intended to create or does create an enforceable legal right of action by a [confidential informant] or any other person.”).

183 See notes 72 through 84, supra, and accompanying text.
Without any real standards that the FBI must follow in order to avoid real consequences imposed from the outside, nothing changes and abuses continue. We would be naïve to hope for anything different.

3) The Damage to Religious and Associational Values Caused By Informant Activity in First Amendment-Protected Settings. The use of informants in any situation that enjoys First Amendment protection – a political meeting of any kind or scale, an academic environment, or a religious setting – calls for special care. This may seem obvious, but the findings of investigation after investigation, from the Congressional hearings in the 1970s onward, show a remarkably consistent disregard for the damage done by surveillance in these contexts.

Surely, when people suspect their presence, the use of informants can chill the exercise of free speech and the expression of political opinions, particularly unpopular ones. And by all accounts this has happened among Muslims in the United States. Muslim communities now know that police and government agencies have infiltrated them. “They think we don’t know, but we know who they are,” said one Muslim community activist in Brooklyn in the wake of revelation that the NYPD used informants to infiltrate mosques and other religious institutions in the Herald Square case.184 And when any community knows that informants or undercover police officers have infiltrated it, political discourse (and freewheeling speech on any topic that may seem even vaguely political) can easily become the first casualty. People get the idea that they must take care in what they say and to whom they say it. Said one young man, a high

184 Andrea Elliott, supra note 15. My colleague Haider Ala Hamoudi says that few in the Muslim community feel surprised when events expose the presence of informants in their midst; instead, most assume that informants are present at every public gathering.
school senior who enjoys frequenting the cafes in his Brooklyn neighborhood, “when you sit down and politics comes to your head, you think, ‘Who’s around?’” Another man, an assistant teacher at a public high school, said “It’s like a police state here.” Yet another said that “sometimes you look a person in the eye, there’s a feeling…. You can say anything you want, but don’t curse the system. That’s what they care about.” This kind of self-censorship – not of speech aimed at advocating or planning criminal or terrorist acts, but simple discussion of political issues of concern to individuals and the community at large – is directly at odds with the constitutional protection of, and American preference for, robust and open debate on social and political questions.

Among First Amendment-protected venues, most people would certainly think of religious institutions – churches, synagogues, temples, and mosques – as the most sensitive of settings. After all, it is to these establishments that people come for the fulfillment of their deepest spiritual needs – to feel God’s presence as individuals and as a community in prayer. We set aside these places for the expression and the experience of the most personal and profound beliefs about the divine, about humanity, and about our relations with the world. Our houses of worship afford us a place to feel open and secure with our beliefs, our traditions, and our fellow believers. The First Amendment’s Free Exercise Clause allows us to participate in religious life and to partake of its spiritual bounty. Legal scholars agree that infiltration of religious institutions may indeed have a

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185 Id.
186 See also Lininger, supra note 24, at 1236-37 (“[A] religious service is uniquely sensitive. Worshippers seek refuge in their religious institutions. They seek a setting that is conducive to introspection and spiritual growth. Many people believe that religion is the most urgent of human affairs … Government intrusion in a religious institution compromises the sense of security that is a necessary condition for the practice of religion.”).
chilling effect on the exercise of these important rights,\textsuperscript{187} and even some former federal law enforcement officials have joined this consensus.\textsuperscript{188} Any government actions that potentially intrude on such a place, or on religious activities, should only take place when absolutely necessary, and the government should carry them out as carefully and as narrowly as possible, consistent with a keen awareness of the damage that such an intrusion may cause.

The recent upsurge in surveillance by informants in mosques has brought to light examples of the sort of damage that intrusion into houses of prayer can do, much of it lasting. For example, after a series of terrorism-related arrests in the Portland, Oregon area, Salma Ahmad of the Bilal Mosque in suburban Beaverton, just outside Portland, remembers that she and her fellow congregants became aware that the government had planted informants in their mosque, resulting in some of the arrests.\textsuperscript{189} She recalls that the bonds between congregants instantly began to break down, because news of the

\begin{footnotesize}
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\item[187] Mike Bothwell, \textit{Facing God or the Government – United States v. Aguilar: A Big Step for Big Brother}, 1990 B.Y.U. L. Rev. 1003, 1009 (1990) (“People generally refrain from open expression of religious views under the eye of government … the free exercise clause arose specifically to protect religious from government intrusion, not public intrusion.”); Eric William Cernyar, \textit{The Checking Value of Free Exercise: Religious Clashes with the State}, 3 Tex. Rev. L. & Pol. 191, 216-17 (1999) (“Government infiltration destroys a church body’s sense of security, trust, openness, and fellowship.”); Ellif, \textit{supra} note 21, at 785, 786-87 (“The absence of specific guidelines to control government overreaching may lead courts to find that domestic security investigations unduly chill the exercise of constitutional rights.”); Rubin, \textit{supra} note 21, at 453, 456 (government intelligence gathering on religious or political groups “may ‘chill’ the exercise of a first amendment right to express views in a public forum by individuals or organizations.”).
\item[188] \textit{E.g.}, Adam Liptak, \textit{Traces of Terror: Changing the Standard}, N.Y. Times, May 31, 2002 (official with national Muslim organization says that the use of surveillance in mosques by law enforcement “starts to erode some of the trust and good will that exists in these institutions if you’re afraid they have been infiltrated by an undercover agent”); Paul Rosenzweig, Senior Legal Research Fellow, Center for Legal and Judicial Studies at the Heritage Foundation and former federal federal prosecutor, \textit{Terrorism Investigations and the Constitution: Hearings Before the Subcommittee on the Constitution, House Committee on the Judiciary}, 108th Cong. (2003) (“There should, as well, be a hesitancy in visiting public places and events that are clearly intended to involve the exercise of core First Amendment rights, as the presence of official observers may chill expression.”).
\item[189] Telephone interview with Salma Ahmad, Mar. 15, 2007 (transcript on file with the author).
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presence of the informant, himself a Muslim, “brought mistrust among the brothers in the
mosque…” \textsuperscript{190} This mistrust led people to act in ways contrary to Muslim custom and
practice almost immediately. When people pray at Bilal, Ms. Ahmad explains, they do so
in an atmosphere of love for each other, as instructed by the Prophet Mohammed, and
many mosques traditionally make a conscious effort to continue this feeling between
congregants with some brief socializing after the worship service concludes. When the
news of the informant’s presence emerged, Ms. Ahmad says, congregants no longer
wished to stay around when the service ended. The congregational bonding “was cut,
because you don’t know who is going to inform what.” \textsuperscript{191} Ms. Ahmad points to the
Muslim command to welcome strangers, Muslims and non-Muslims alike, as one of the
highest obligations in Islam – one that applies especially to welcoming strangers to one’s
mosque. A visitor to a mosque at prayer time must receive a warm and respectful
welcome: “he is your brother and you are supposed to welcome him. The Prophet tells
us that when there is a new brother welcome [him], you hug, you kiss.” \textsuperscript{192} (Most
mosques do not have the same kind of congregational structure one typically sees in
churches or synagogues, in which people “belong” to a particular religious institution;
rather, Muslims may attend one mosque steadily, but may also attend others, depending
on where they happen to be when the five-times-daily call to prayer occurs. Therefore,
Muslims see unfamiliar faces with some regularity at worship services, and they must
welcome the visitors.) The news that informants had been among the people at Bilal
directly undermined this important custom, Ms. Ahmad said. “Because when you are in

\textsuperscript{190} \textit{Id.} at 2-3.
\textsuperscript{191} \textit{Id.} at 2.
\textsuperscript{192} \textit{Id.} at 3.
congregations [sic] you are supposed to be one, you love your brother, you hug each other…. [But now,] nobody will welcome the new people [because of] the situation and the utmost fear, it is gone, that love … that trust is gone.”

Ms. Ahmad feels that this lack of trust in a Muslim community, especially in a mosque, cuts directly against the core of Islam because “in Islam we think you should trust your brother and that [lack of trust] gives them the feeling of alienation.”

In March 2004, sometime after the revelation of the presence of informants at Bilal Mosque, federal authorities mistakenly arrested Brandon Mayfield, a local attorney who regularly attended worship services at Bilal, for involvement with the train bombings in Madrid. Mayfield’s arrest and several weeks of incarceration without bail (for which the FBI later apologized and paid Mayfield two million dollars in damages) became the occasion for the earlier informant-related trauma at Bilal to re-surface. Normally, with a fellow worshipper such as Mayfield arrested and detained, the Bilal community would have rushed to his defense and actively moved to support Mayfield’s family. But the exposure of the infiltration by the informant during the earlier investigation had taken its toll on the community’s usually supportive spirit. “When Brandon was arrested there was a hesitation of the members of the community to even

193 Id.
194 Id.
195 E.g., Les Zaitz, Noelle Crombie, Joseph Rose & Mark Larabee, Fingerprint Links Oregon with Spain, THE OREGONIAN, May 8, 2004 (detailing government’s argument that Brandon Mayfield was involved in Madrid train bombings on March 11, 2004, and his arrest on a material witness warrant).
call the family, or go to Brandon’s house to see them,” Ms. Ahmad recalls. People said “‘oh my God [the FBI] would see my car, they would see my license [plates] that I went to Brandon’s.’” The implication, she said, is that they feared becoming the subject of government scrutiny and perhaps arrest themselves, “even though [they were] innocent.”

The experiences of Muslims nationwide mirror those of Ms. Ahmad and her fellow worshippers at the Bilal Mosque. Across the country, leaders of mosques have noticed reduced attendance at services. People at mosques have become cautious and wary in expressing themselves to each other. Trust in fellow congregants has subtly but noticeably worn away, replaced by suspicion. In short, Muslims have begun to fear that mere presence at their houses of worship, or any conspicuous expression of their faith and tradition, could bring the full weight of a government investigation down upon them.

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197 Interview with Salma Ahmad, supra note 185, at 4.

198 E.g., Teresa Watanaabe, Quakers Promote Immigrant Rights, L.A. TIMES, Nov. 11, 2003 (even law-abiding worshippers have stayed home for holiday and daily prayer rituals rather than attending services at a mosque which might be under surveillance); Lewis Diuguid, Big Brother Echoes in the New Year, K.C. STAR, Jan. 7, 2004 (describing decreased mosque attendance because of investigations of Muslims there); Lynn Duke, Worship and Worry: At a Brooklyn Mosque, Muslims Pray in the Shadow of Terrorism, WASH. POST, Apr. 16, 2003 (because of investigations by police agents, attendance at Brooklyn mosque has dropped, financial support has dried up, and worshippers must live under suspicion); Dina Temple-Raston, Mosque Attendance Falls After Terrorism Arrests, NATIONAL PUBLIC RADIO, May 30, 2007, http://www.npr.org/templates/story/story.php?storyId=10529148, accessed May 30, 2007 (downward pressure on mosque attendance as a result of enforcement continues into the present).

199 E.g., Warren Richey & Linda Feldman, Has Post-9/11 Dragnet Gone Too Far?, CHRISTIAN SCI. MON., Sept. 12, 2003 (quoting one community leader, “[s]ome people are afraid to cite verses of the Koran that include the word ‘jihad’ when leading prayers, because they think the government is listening”).

200 E.g., Liptak, supra note 188 (one day after Ashcroft announcement that agents would enter and conduct surveillance on, inter alia, religious institutions, without any reason to suspect criminal activity, Zachary Carter, former U.S. Attorney for the Eastern District of New York, stated that this kind of investigation should be limited to situations in which facts support a reasonable suspicion of criminal activity, because without such a standard, “a chilling effect [on] the free exercise of religion” may follow).
C. The Bottom Line: The Importance of Looking at the Whole Picture

Thus we see the whole picture only when we appreciate not just the potential benefits of using informants, but also the costs. Any perspective that includes only the former risks an incomplete and therefore incorrect calculus on the question of whether to use this tactic. Of course, if one takes the view that since law enforcement can use informants, they must do so if this might help in even a small way, the costs may seem to vanish. Because we the law says we can use informants, the thinking goes, and because the need seems great and it might help, we should not hesitate to do so. But we should not deceive ourselves: the costs do not disappear just because we decide to blind ourselves to them. They remain, they count, and eventually these costs will come due.

The wiser course of action is not to assume them away by simply doing what we want to do anyway, but to consider them along with the benefits that may accrue. We might argue about the scope of the costs. For example, some might say that the damage to relationships among worshippers in a church or mosque can only seem trivial next to the possibility of preventing a terrorist attack that causes death, injuries, and destruction, perhaps on a massive scale. They might assess the damage done by abusive use of informants as much ado about nothing, because, they might say, the only people harmed by this abuse have arguably engaged in criminal activity. Others, however, might argue that the benefits of using informants have in fact seemed small. Shahawar Siraj, the man who told an informant he wanted to bomb the Herald Square subway station, but needed to ask his mother first, could not have posed a serious threat. Hamid Hayat, the young man from Lodi, California, who traveled to Pakistan to get married at his parents’ insistence and who allegedly went to a terrorist training camp there, did not seem to constitute a real danger by any measure, and the men arrested in Miami did not even
seem like Muslims, let alone real terrorists. All of us might assess these possibilities differently, and that is certainly fair. But the point remains that assessing just the benefits, and not the costs, may yield misleading, and perhaps downright inaccurate, answers.

V. FIXING THE PROBLEM: RECOGNIZING MUTUALLY REINFORCING NEEDS

On the one hand, law enforcement wants and badly needs the type of relationships with Muslim communities that would result in mutual cooperation and frequent communication, so as to insure the maximum possible flow of intelligence on potential terrorist threats from within the Muslim community. The Muslim community has responded, for the most part, with willing (if at times understandably wary) cooperation.

On the other hand, law enforcement has begun to use informants in mosques and other sensitive settings, and the Muslim community’s reaction of betrayal threatens to swamp any efforts to create the important positive connections that law enforcement wants and needs. Using informants can produce useful information, but using informants also has significant costs in terms of public safety. Faced with such a dilemma, how can we insure that law enforcement get the benefits of using informants when necessary, while minimizing the costs?

A. Bringing the Use of Informants Under the Warrant Clause, and Getting Rid of the Hoffa and White Assumption of the Risk Standard

One solution would begin with the reconsideration of the Supreme Court’s decisions in the Hoffa and White cases, in which the Court declared the Fourth Amendment did not apply to the government’s placement and use of informants. Recall that these cases gave police unfettered discretion to use informants, without having to submit the reasons for suspicion to independent examination by a court under any
Ordinarily, obtaining a warrant by meeting the probable cause standard constitutes the *sine qua non* of general Fourth Amendment jurisprudence. Given the sensitivity of placing government spies in homes, political gatherings, or (as discussed here) religious institutions, having a judge – someone not involved in the investigation – make a decision that the available evidence gives the government probable cause to support an intrusion into these sensitive domains seems like the least that we owe our fellow citizens. Unfettered police discretion, like any unchecked executive power, almost inevitably leads to abuse at some point. This has certainly proven true in the context of the use of informants. Professor Tracey Maclin has made the case for subjecting the use of informants to traditional constitutional restraints, consistent with his belief that “the central meaning of the Fourth Amendment is distrust of police power.” Instead of the unfettered discretion to plant and use informants that law enforcement has under the current law, Maclin argues, “the government’s authority to use informants and secret agents can and should be controlled by the Warrant Clause of the Fourth Amendment. Police operations involving the planting of informants in a home or the recording of private conversation should be subject to the same [rules] that currently control governmental wiretapping and bugging.” The complete discretion of police, local or federal, to use informants however and whenever they wish and to pick the targets of this kind of surveillance as they like, Maclin says, “is at odds with the

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201 See notes 70-84, *supra*, and accompanying text.
202 See notes 138-142, *supra*, and accompanying text.
204 *Id.*
values that inspired the Fourth Amendment.” 205 This type of judicial supervision would not form any significant barrier to the legitimate use of informants. The Supreme Court has stressed that lower courts should understand and apply the probable cause standard in a non-technical, non-legalistic way, interpreted through the viewpoints not of “library scholars” but of police officers making common-sense judgments. 206 Requiring a warrant and probable cause would simply recognize that these intrusions have a cost, and should occur only with a reason.

Moreover, returning to the warrant and probable cause requirements would have the salutary effect of implicitly forcing an overdue re-examination of the “assumption of the risk” doctrine the Court adopted in Hoffa and White. The idea that we should base the scope of constitutional protection afforded by the Fourth Amendment on a common law tort concepts seems downright antiquated. The Supreme Court rejected similar reliance on property concepts in 1966 in United States v. Katz, 207 the case that installed the “reasonable expectations of privacy” test as the fountainhead of much of our Fourth Amendment jurisprudence more than forty years ago. More importantly, the Supreme Court’s use of the assumption of the risk idea represents a poor doctrinal choice. Recall that the Court majority in Hoffa went out of its way to sanction Justice Brennan’s words in his dissenting opinion in Lopez, which involved his special concerns about electronic

205 Id.

206 United States v. Cortez, 449 U.S. 411, 418 (1980) (“[T]he evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.”).

207 United States v. Katz, 389 U.S. 347, 352-53 (1967) (rejecting common law property concepts as the basis for measuring scope of Fourth Amendment, because “‘the premise that property interests control the right of the government to search and seize has been discredited,’” quoting Warden v. Hayden, 387 U.S. 294 (1967)).
surveillance. Making the point that electronic surveillance posed a danger to privacy and security of a different order than traditional kinds of surveillance, Brennan said that the risk of someone betraying us is kind of risk we run as a result of associating with other human beings. But, he pointed out, the risks inherent in the use of electronic listening and recording systems threatened to take the danger of betrayal to new heights. By using just the first half of Justice Brennan’s thought – that people with whom we interact can, at any point, betray us – the majorities in Hoffa and White took his analysis beyond any reasonable interpretation. Making “assumption of the risk” that anyone might betray another to the government into a baseline assumption of Fourth Amendment jurisprudence transforms the fact that some of the people one confides in might talk out of turn into an unlimited license for the government to seek out informants, plant them in any social or political situation, and have them prospect for crimes, whether or not there is any reason to think anything illegal has happened or might yet occur.

Put another way, the Court’s mistake in both Hoffa and White in legally enshrining the “assumption of the risk” idea was to do so without questioning whether the risk that anyone may be working as a police informant was a risk with which the Court should burden the country’s citizens. The risk of betrayal by a government-induced, government-placed informant is not the same as the everyday risk of which Justice

\[\text{Lopez, 373 U.S. at 450 (“The risk [of betrayal] inheres in all communications which are not in the sight of the law privileged. It is not an undue risk to ask persons to assume, for it does no more than compel them to use discretion in choosing their auditors, to make damaging disclosures only to persons whose character and motives may be trusted.”) (Brennan, J., dissenting).} \]

\[\text{Id. at 450. 469 (“But the risk [of electronic surveillance … is of a different order. It is the risk that third parties … who cannot be shut out of a conversation as conventional eavesdroppers can be, merely by a lowering of voices, or withdrawing to a private place … may give independent evidence of any conversation. There is only one way to guard against such a risk, and that is to keep one’s mouth shut on all occasions…. [I]t must be plain that electronic surveillance imports a peculiarly severe danger to the liberties of the person.”).} \]
Brennan spoke: the risk that any friend or acquaintance might reveal one’s confidences to another person. This type of risk may be an unavoidable fact of everyday life in any human society; gossips and blabbermouths will always be with us, and perhaps we have only ourselves to blame if we trust them. But when using informants, the government actively and purposely seeks the opportunity to gain knowledge of our private business for the purpose of prosecuting us. This is not always a bad thing; it may necessary to catch certain criminals who may cause great damage if left at large. But the Court’s perfunctory adoption of the “assumption of the risk” analysis sidestepped any real debate on this question, and on the issue of how best to accommodate the conflicting interests that using informants would inevitably present in some cases. Instead of questioning the practice, the Court used the assumption of the risk language to ratify existing police practice. In his dissenting opinion in *White*, Justice Harlan expressed a desire for a better approach.

Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules, the customs and values of the past and present. Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society.210

We might bring the use of informants brought under the Warrant Clause of the Fourth Amendment, as Professor Maclin recommends, in one of two ways. First, the Supreme Court could reverse *Hoffa* and *White*, at least insofar as abandoning the “assumption of the risk” principle in favor of treating the use of informants as it does other potential Fourth Amendment intrusions. From the vantage point of 2008, with two

relatively new conservative jurists – Chief Justice John Roberts and Associate Justice Samuel Alito – placed on the Court recently, one of whom replaced the relatively moderate Justice Sandra Day O’Connor, broadening the scope of any aspect of Fourth Amendment doctrine seems unlikely. Legislative action presents a second possibility. The Congress and even state legislatures can step in and regulate police practices. Even if the Fourth Amendment, as interpreted by the Supreme Court, does not require that law enforcement’s desire to use informants receive any judicial scrutiny or meet any legal standard, the Congress could require that federal law enforcement do this by passing a statute. Title III of the Omnibus Crime Control and Safe Streets Act, which regulates the use of wiretapping, functions this way. It is actually even more strict and detailed than mere Fourth Amendment regulation, by itself, would be, imposing a tighter set of restraints on law enforcement than the Fourth Amendment alone would have. And some state laws impose greater obligations on law enforcement wanting to engage in electronic eavesdropping than either the Fourth Amendment or the federal Title III statute. Several states have imposed their own legislative curbs on the use of informants, mandating that law enforcement in these jurisdictions can only infiltrate First

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211 See, e.g., Hudson v. Michigan, 547 U.S. 586, 126 S. Ct. 2159 (2006), in which the Court seems to have come within just one vote of overturning the exclusionary rule altogether, id. at 2166-68; only Justice Kennedy’s concurrence prevented seems to have this outcome, id. at 2170 (“… [T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.”).

212 The Constitution sets the floor – the minimum acceptable level – of these rights, but legislatures remain free to provide greater protections. See notes 214-215, infra.


214 See, e.g., The Maryland Wiretapping and Electronic Surveillance Act, MD. CODE ANN. § 10-401 et seq. (2007), which provides broader protection to surveillance targets than Title III of the Omnibus Crime Control and Safe Streets Act, e.g., Maryland requires consent from all parties to a conversation, not just one, before a conversation may be taped or otherwise intercepted without a court order authorizing law enforcement officials to conduct a wiretap. Miles v. State, 365 Md. 488, 781 A.2d 787 (2001), cert. denied, 534 U.S. 1163 (2002).
Amendment-sensitive contexts like houses of worship if police have fact-based reasons to suspect involvement in criminal activity, echoing the FBI’s Levi Guidelines.\textsuperscript{215}

But while legislation at either the federal or state level could impose judicial supervision requirements and legal standards on the use of informants, this seems as unlikely in the current political climate as a reversal of the \textit{Hoffa} and \textit{White} cases by the Supreme Court. In the past several years, Congress has re-authorized the expiring provisions of the USA PATRIOT Act with very little change, despite strong opposition.\textsuperscript{216} In the Fall of 2006, the Congress passed the Military Commissions Act,\textsuperscript{217} which among other things withdrew the possibility of using the writ of habeas corpus in cases arising from detention at Guantanamo Bay, Cuba;\textsuperscript{218} the summer of 2007 saw the enactment of legislation largely legalizing the highly controversial warrantless wiretapping program conducted by the National Security Agency.\textsuperscript{219} The state laws discussed above regulating the use of informants passed years ago;\textsuperscript{220} in more recent

\textsuperscript{215} For example, in Indiana, “No criminal justice agency shall collect or maintain information about the political, religious, or social views … of any individual … unless such information directly relates to an investigation of past or threatened criminal acts or activities and there are reasonable groups to suspect the subject of the information is or may be involved in criminal acts or activities.” \textsc{Ind. Code} 5-2-4-5 (2002). Both Oregon, \textsc{Or. Rev. Stat.} 181.575 (2003), and Pennsylvania, \textsc{Pa. Cons. Stat.} 9106(b)(2) (2000) have substantially similar statutes.


\textsuperscript{218} \textit{Id.} § 950j (removing habeas corpus jurisdiction). This aspect of the Military Commissions Act was struck down by the Supreme Court in \textit{Boumediene v. Bush}, No. 06-1195, 553 U.S. ____ (2008).


\textsuperscript{220} These laws passed in Indiana (1977), Oregon (1981), and Pennsylvania (1979).
years, states have instead leaned the other way, passing their own “Patriot Acts.” In all, one sees no legislative stomach in 2007 for any law making that a political opponent could spin as “soft on terrorism” or “handcuffing our police and national security forces.”

Professor Tom Lininger, one scholar who has recognized the complex and difficult issues presented by the use of informants and other law enforcement surveillance tactics in mosques, agrees that the judicial and legislative routes to reform seem unpromising. He suggests instead the creation of provisions in state codes of legal ethics which would “prohibit prosecutors from supervising the surveillance and infiltration of religious organizations, absent a specific suspicion of criminal activity by the organization or its members.” These rules, he argues would keep law enforcement from using these dangerous tactics except when specific suspicion of criminal activity exists, because prosecutors now serve increasingly as gatekeepers in the criminal justice process. FBI agents and police officers increasingly work with and rely upon the advice and consent of prosecutors when conducting investigations, and prosecutorial ethics rules

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221 For example, Ohio Senate Bill 9, introduced and passed by the General Assembly in 2005 and known colloquially as Ohio’s Patriot Act, inserted language into state law that, inter alia, required state officials to cooperate with federal officers enforcing the USA PATRIOT Act, and bolstered federal criminal laws against “material support for terrorism” with parallel state statutes.

222 Lininger, supra note 24.

223 Id. at 1262-66. Professor Lininger also discounts the possibility of using law enforcement own internal regulations for this purpose. Id. at 1267-68. We do not agree on this point. I view internal regulation as, generally, a more successful strategy for regulating police behavior than Professor Lininger does. See generally HARRIS, supra note 37. More to the point, I would look at internal regulation as including the kind of local negotiation between police and citizens that I recommend here, infra. While I would concede some of the points he makes, e.g., the fact that such self-regulation involves a conflict of interest, and that it is more than a bit like having the fox guard the henhouse, Lininger, supra note 21, at 1268, I see the dynamic in the situation changed by the mutually reinforcing interests created by law enforcement’s need for cooperation. Professor Lininger alludes to this dynamic himself in a slightly different context when he says that prohibiting the use of informants without specific suspicion “would actually improve … investigations [of terrorism] by fostering greater comity between the Muslim Community and law enforcement officials. Lininger, supra note 24, at 1210.

224 Id. at 1207.
could effectively cause law enforcement officers to use surveillance tactics like placing informants in mosques only in situations in which the facts could support an inference of specific suspicion.

Assuming that such a rule would find wide acceptance in the legal community of any particular state, this is a promising idea. Its transitive effect on police conduct makes it especially attractive. Ultimately, however, it depends upon enforcement of the ethics rules against prosecutors by state bar organizations. In other words, the question is what happens after the rule is enacted and a prosecutor declines to follow it, believing in perfect good faith that the rule would undermine her ability to help police and security officials foil potential terrorists. This does not seem so unlikely a scenario, given the highly charged nature of the anti-terrorism efforts. One wonders whether the bar would have the spine to sanction such a prosecutor. Given the long history of the failure of the organized bar to sanction prosecutors for blatant, even venal misconduct of a more pedestrian nature, one wonders where the courage would come from to stand up to

225 Professor Lininger argues that state bars include both prosecutors and defense attorneys, and as unelected bodies are not as susceptible to political pressures as legislative bodies. Moreover, he says, the rules state bars adopt must have state supreme court approval, ensuring that state bars will not overreach. Id. at 1269. I have no real quarrel with any of these assertions, but I feel it is important to point out that they all represent significant assumptions. A state bar laying out rules might, in the end, take just as conservative a point of view on these issues as government bodies do.

226 See ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 143 (2007) (professional discipline of prosecutors “has proven to be woefully inadequate and ineffective…. [R]eferrals [of prosecutors] to state disciplinary authorities have been few and far between…. [I]n the relatively few cases that have been referred to state authorities, prosecutors rarely receive serious discipline.”); SUSAN MARTYN & LAWRENCE FOX, TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY (2d ed.) (forthcoming 2008), Chapter 7, Conflicts of Interest, notes 37-38 and accompanying text (copy on file with the author) (stating that professional discipline of prosecutors is “not common”); Richard A. Rosen, Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger, 65 N.C. L. Rev. 693, 697 (1987) (despite rules prohibiting prosecutorial suppression of evidence and falsification of evidence in every state, “disciplinary charges have been brought infrequently and meaningful sanctions rarely applied”); Kenneth Rosenthal, Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence, 71 TEMP. L. REV. 887, 889 (1998) (observing “a notable absence of disciplinary sanctions against prosecutors, even in
prosecutor willing to say, “I’m trying to catch terrorists and I am being sanctioned for doing it” in his or her re-election campaign. Thus making Professor Lininger’s idea work would require more than just a significant change in state legal ethics rules; in fact, that could be the easy part. It might be much tougher – perhaps impossible – to find the institutional backbone necessary to enforce the rules he proposes.227

B. The Negotiated Approach: What It Is, and What It Might Strive to Attain

But if change on the issue of informants at the Supreme Court or at the Congressional or state legislative level seems unlikely, there is one way in which change in how law enforcement uses informants in mosques might yet come to pass. It depends not on raw political power or legal reasoning, but on something else: the recognition of

the most egregious cases”); Fred C. Zacharias, The Professional Discipline of Prosecutors, 79 N.C. L. REV. 721, 774 (author’s statistical study shows “an overall trend of infrequent [disciplinary] prosecutions” against prosecutors); Monroe H. Freedman, Professional Discipline of Prosecutors: A Response to Professor Zacharias, 30 Hofstra L. Rev. 121, 126-27 (asserting that the conventional wisdom, “that prosecutors are far too seldom subjected to professional discipline, even for serious violations of their ethical obligations in the administration of justice,” is supported by Professor Zacharias’s research).

227 Professor Lininger’s idea brings to mind another, less global but perhaps easier solution. Instead of bar association rules, a successful effort to stem the use of surveillance in mosques and other religious institutions without specific suspicions might be undertaken locally, by individual prosecutors. That is, just as with the local law enforcement/Muslim community negotiations recommended here infra, a local prosecutor – that is, a county district attorney or a federal district’s U.S. Attorney – might adopt Professor Lininger’s rule as his or her own internal policy. That is, the prosecutor might declare that it would bring to court no case using these tactics in religious institutions, unless specific suspicion of criminality existed prior to the use of the tactic. This would effectively end the use of informants in cases in which the facts did not meet this standard, as long as the prosecutor stood by the policy and would enforce it in the face of an attempt by law enforcement to bring a case. Precedent exists for such an approach. Taking the controversy over racial profiling on the highways as a starting point, some prosecutors observed the heavy reliance of officers involved in drug interdiction efforts on the use of consent searches. These searches consistently irritated those drivers subject to them; a disproportionate share of these drivers were African American and Latino; and the consent searches of members of these minority groups consistently turned up less contraband than the consent searches of white drivers. Seeing all of this, one elected prosecutor in a county in Michigan stated that his office’s policy would henceforth require that consent searches have a basis of reasonable suspicion – something that the law does not require, Schneckloth v. Bustamonte, 412 US. 218 (1973) (police need have no evidence of criminal activity to request consent for a search, and consent given in response is legally sufficient so long as it is given voluntarily). His office would not pursue cases involving consent searches in which the officer could not articulate a fact-based reason to suspect criminal conduct before requesting consent. DAVID A. HARRIS, Profiles in Injustice: Why Racial Profiling Cannot Work 158-59 (2002).
how the interests of law enforcement and the community overlap. Viewed correctly, these mutual interests can serve as the springboard for the negotiation of a set of agreed-upon local practices for using informants. Such a negotiation process could get law enforcement what it most needs: good (or at least workable) relations with the Muslim community, a continued flow of information from the Muslim communities with which they interact, and an ability to use informants when a real need exists for them. The process could also get those same communities at least some of what they need: a recognition of their opposition to the use of informants, and protection from some of the worst (as they might see it) uses of informants against them. Law enforcement would give up the right to use informants with total freedom, and the community would find itself protected to some degree from the possibility that police would place informants into mosques or other religious settings without some solid, fact-based reason.

Identifying coinciding interests is an important part of what is sometimes called problem-solving negotiation, in which the parties or their representatives seek out multiple interests, so as to give them possible areas of overlap that might allow them to come to some kind of mutual agreement. See, e.g., STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION 170-73 (2001) (identifying ways for lawyers engaged in problem-solving negotiations to find avenues of agreement that may lead to positive-sum outcomes).

With its goal of bringing together overlapping interests of opposing parties to create a set of workable administrative rules, my approach owes something to the negotiated rulemaking process that has been used in administrative law contexts, much of it based on the seminal work of Philip Harter. Harter looked at the importance of including groups affected by regulations in the development of those regulations. Philip Harter, Negotiated Regulations: A Cure for the Malaise, 71 GEO. L. J. 1, 18 (1982) (stating that those “affected by a regulation need the opportunity to actually participate in its development if they are to have faith in it.”). Harter argued that using a negotiated rulemaking process would have intrinsic benefits because the rules that resulted “would be based on consensus of those who would be affected by it.” Id. at 18. The situation discussed in this article involving the use of informants is obviously somewhat different: there are already existing rules, which give all the power in the situation to the police, in the sense that they alone can decide whether to use informants. The point here is to effectively change those rules, by entering into a negotiation, to something that better reflects the overlapping interests of the parties and therefore can satisfy not just one party, but both. This dovetails neatly with the central principles of community policing, which requires consultation between police and community stakeholders to set local priorities and parameters for policing and crime prevention. See, e.g., WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS 92 (1990) (explaining that community policing requires “that police be responsive to citizen demands when they decide what local problems are, and set their priorities.”); Stephanos Bibas,
path would be difficult, fraught with obstacles, and in certain respects downright unsatisfactory. But it represent the most promising – and perhaps the only – way forward for both law enforcement and Muslim communities.

1) Description of the Process. What might such an approach look like? To start, such arrangements would be both local and informal. As for the local aspect, any given mosque or Muslim organization would work toward agreement on the use of informants with its local FBI field office and local agents of the Department of Homeland Security, and its local police department (if the local department involves itself in this type of informant-based investigation.\footnote{This would not be an issue for many local police departments. But some of the larger police departments in the U.S. might be extensively involved in this type of intelligence gathering. The New York Police Department, well known for its intelligence work, has made use of informants for these matters, most notably in the Herald Square bombing case. \textit{See} notes 88-96, \textit{supra}, and accompanying text; \textit{see also} William Finnegan, \textit{The Terrorism Beat: How is the N.Y.P.D. Defending the City?}, THE NEW YORKER, July 25, 2005, at 58.}) A negotiation between local people on both sides of the issue stands the best chance of succeeding, because those involved in the negotiations may already know each other, from efforts already made and in place to build bridges and connections. And the negotiations themselves could serve as trust-building measures that could enhance and strengthen relationships that already exist, or help create these relationships in places where efforts are new. These efforts would be informal in the sense that they would strive not for the imposition of a strict set of legal standards – e.g., a free-standing system for procuring “informant warrants” – but rather for a set of agreed-upon practices that the parties would follow. If one of the parties came to feel that the agreed-upon practices no longer work, the parties could, together, agree to adjust them. Best and most importantly, these practices could be tailored to fit the local facts and

circumstances – the realities that both the community and law enforcement face day after day in that place.

Why would any law enforcement agency agree to negotiate away any of its power to use informants as part of an arrangement with precisely the people it may want to spy upon? In fact, some police agencies already use internal guidelines to (at least attempt to) limit some of the ways in which they use informants, effectively conceding the point.\footnote{See notes 137-151, supra, and accompanying text. While the FBI Guidelines generally preserve the agency’s right to conduct surveillance and explicitly purport not to create any rights for those affected by a failure to follow the Guidelines, they nevertheless represent efforts to channel agency discretion toward preferred methods. In this respect, they concede the idea that limiting agency power to something less than what the Fourth Amendment would allow can in fact represent the best available practice.} Given that the FBI, NYPD, and other law enforcement groups want something from the Muslim communities – continued and increased cooperation, and especially intelligence on suspicious activities – and given that use of informants in an unregulated fashion puts those very benefits in jeopardy by undermining connections with the community, law enforcement may prove more willing than one might think to engage in such a negotiation.

\textit{2) What Might Negotiations Strive to Attain?} What of the substance of the negotiations? What exactly might the Muslim community and the police try to agree upon? Both the interests of the parties and the contours of different types of anti-terror investigations suggest some initial goals.

\textit{i) Passive vs. Active Informants, and the Standards for Using Them.} First, we must examine the methods by which, and the circumstances within which, law enforcement might use informants. For the sake of simplicity, let us break the methods of using informants – that is, the types of informants – into two categories: passive
informants and active informants. In passive informant activity, the informant attends or participates in any activity – goes to a political rally, takes part in a worship service, listens to a speech or a sermon, or the like – to the same extent that any private citizen might. The passive informant observes, and reports to the police what he or she saw and heard. In other words, the passive informant acts as a walking camera and audio recorder,\textsuperscript{232} absorbing everything around him, and reporting what he sees. The passive informant could not target any particular individual, and could not do anything more than observe. He or she might interact with others present at the scene of the observation, but only in ways that prove necessary to deflect suspicion. No other involvement would be permitted. An active informant, on the other hand, would target a particular person or specific groups for observation and interaction, and would seek to actively connect with these individuals in an effort to gather evidence of wrongdoing, plotting, or the like. An active informant might “work” a targeted individual closely, perhaps befriending him and his family, as long as the informant did not in any way press the target toward illegal conduct.\textsuperscript{233}

\textsuperscript{232} The term “walking camera” was actually used in court to describe the New York Police Department’s undercover police officer in the Herald Square bombing case. Elliot, \textit{supra} note 17.

\textsuperscript{233} Concededly, it may not always be easy to distinguish between passive and active informants and their activity at the margin. The Supreme Court itself must shoulder responsibility for some of this confusion. In \textit{United States v. Henry}, 447 U.S. 264 (1980), defendant, a suspect in a bank robbery, was in custody and under indictment when an inmate acting as a government informant heard the defendant make incriminating statements. The government then sought to introduce these statements into evidence against defendant at his trial. The Government argued that “the federal agents instructed Nichols not to question Henry about the robbery,” \textit{id.} at 271; in an affidavit, the federal agent involved said that he specifically instructed the informant not to question or initiate any conversations with the defendant about the bank robbery. \textit{Id.} at 271 n.8. But the Supreme Court said that even given these explicit instructions and no evidence that the informant disobey them, the informant did not active passively. “[A]ccording to his own testimony, Nichols was not a passive listener; rather, he had ‘some conversations with Mr. Henry’ while he was in jail and Henry’s incriminatory statements were ‘the product of this conversation.”” \textit{Id.} at 271. Thus the Court stressed that even a situation in which the informant does little more than listen still constitutes more than passive informant activity. But just six years later, the Court tacked back. In \textit{Kuhlman v. Wilson}, 477 U.S. 436 (1986), the Court declared that, when government agents instruct an informant in a
The critical distinction between passive and active informants could serve as the basis for negotiating the circumstances under which law enforcement would use informants. Given that we cannot exclude the possibility that religious groups might (knowingly or unknowingly) harbor small groups or individuals bent on terrorism, law enforcement should retain the ability to use informants in these settings but only passively, as a way to check leads or find out if any activity exists which deserves some greater degree of attention. They would not need to have any proof of wrongdoing to do this; in other words, law enforcement could use passive informants at their discretion, as they may now under existing law. The change that the parties might negotiate for such situations would center on a pledge to have informants work only in a strictly passive way, unless and until some proof of activity indicating possible terrorist or criminal behavior emerged during passive observation – exactly as the FBI’s rules used to dictate under the Levi Guidelines. This would allow law enforcement to have the presence it sometimes needs in these settings to ascertain whether any untoward activity may be taking place. On the other hand, they would agree to exercise this power only passively.
so as to minimize intrusion and interference. The idea would be an informant who would blend in completely, and act no differently from any other person present – a good idea from both the points of view of law enforcement success (because it allows police and security agencies to look and listen for any indicators of real trouble) and community values (assurance that the worship and fellowship that form the core of activity at religious institutions would not encounter government interference or disruption that is not absolutely necessary).

Something more would be required in order to make use of active informants. Put simply, the use of active informants would require that law enforcement have some evidence. Law enforcement could use active informants only if some reasonable, fact-based suspicion existed to link (a) particular suspect(s) to engagement in criminal conduct or terrorist activity. That is, the police could not use an active informant “just to be on the safe side” or just to make sure nothing is happening. Rather, the use of active informants would require some minimal evidence – something more than a hunch or a feeling or an intuition, but some facts – indicating that untoward activity has been, is, or will be, taking place. Police officers involved in any investigation would have no difficulty understanding this reasonable fact-based suspicion rule; it comes from Terry v. Ohio,\(^{234}\) under which courts have used the same standard to test police officers’ decisions to stop and frisk suspects for almost forty years. The Terry case gave law enforcement a workable, non-technical way of deciding whether they could temporarily detain a suspect and then perform a cursory search of the suspect for weapons. Over the years, the Supreme Court has stressed that the Terry reasonable suspicion standard mandates a

\(^{234}\) 392 U.S. 1 (1968).
common sense, practical approach.\textsuperscript{235} The evidence must concern conduct by particular individuals,\textsuperscript{236} but it need not support proof beyond a reasonable doubt or even probable cause; reasonable suspicion, while fact based and more than a mere hunch or suspicion, requires less evidence than probable cause.

A system regulating informant use according to whether the facts would support a passive or active informant operation would allow the government to use relatively unintrusive passive informants without seeking permission; more intrusive (i.e., active) informant activity would require fact-based suspicion that criminal and/or terrorist activity might be afoot. This would give the government the flexibility it needs to gather information or check out leads, but would also require some evidence to conduct active informant investigations and limits these investigations to situations potentially posing real danger.

\textit{ii) The “entrapment” problem: no encouragement.} Second, the community and the police could use negotiated agreements to address the issue of entrapment. As earlier discussion makes clear, neither the entrapment defense nor its cousin, the claim of outrageous government conduct, do much to secure targets of police informants against government or informant overreaching,\textsuperscript{237} at worst, entrapment actually permits the government to create crimes as long as the defendant has the appropriate


\textsuperscript{236} Id. (explaining that the demand for particularized suspicion about (an) individual(s) lies at the core of the \textit{Terry} requirement, noting that “[t]his demand for specificity in the information upon which police action is predicated is \textit{the central teaching of this Court’s Fourth Amendment jurisprudence},”\textsuperscript{237} quoting \textit{Terry}, supra, at 21 n.18 (emphasis added)).

\textsuperscript{237} See notes 85-110, supra, and accompanying text.
“predisposition.” Speaking in a strictly legal sense, one can say that no entrapment problem exists; the defenses of entrapment and outrageous government conduct simply have a narrow focus. And in and of itself, this narrowness does not make either of these defenses or the results reached under them wrong. But the lack of protection these defenses afford targets in practice begins to rankle in view of the particulars of some of these cases when viewed with an eye more lay than legal. In Hamad Hayat’s case in Lodi, California, the informant deliberately and purposely pushed and goaded the target to attend a terrorist training camp. Even the U.S. Attorney whose office charged and convicted Hayat admitted that this conduct by the informant seemed wrong and said that he wished it had not occurred. Testimony in the Siraj case in New York also showed a naïve, impressionable target, led on by an informant using strong suggestiveness. Cases like these may not constitute entrapment in the legal sense, but they leave the impression that law enforcement will push hard and perhaps not play fair in pursuit of a conviction at any price. Put another way, just because the law of entrapment says the police can use informants in this aggressive way, without running afoul of entrapment law, does not mean that law enforcement should do this. All Americans want law enforcement to apprehend and halt the plans of terrorists actually bent on causing real death, damage, and destruction. But when the public gets the impression that the government uses highly

238 See notes 85-87, supra, and accompanying text.

239 See notes 97-101, supra, and accompanying text.

240 Interview with McGregor W. Scott, U.S. Attorney for the Eastern District of California, PBS, Frontline: The Enemy Within, July 24, 2006, http://www.pbs.org/wgbh/pages/frontline/enemywithin/interviews/scott.html, accessed Feb. 22, 2007 (commenting on the informant’s recorded efforts to push Hayat to go to a terrorist training camp in Pakistan, Scott states that “That is correct …. Certainly we wish other things had occurred on some occasions during the course of those conversations…. [T]hese things never go exactly as prosecutors would hope that they would.”).
aggressive tactics that seem to border on unfairness to pursue persons who seem to pose little in the way of real threats, this undermines the public’s confidence in anti-terror work – especially, though not only, among Muslims themselves. The government portrays these cases as victories over dangerous terrorists, but at least some of the public may instead see individuals with limited capacities and big mouths, strongly pushed by informants who receive substantial payments from the government or who are “working off” their own criminal charges. Whether right or wrong, these perceptions do damage to law enforcement’s ability to obtain cooperation from the public. Thus as a second subject of their negotiations, police and Muslim communities could agree that informants would not act in any way to encourage or shape the behavior of those under surveillance. They could not become agitators or inciters. Surely, any particular case might pose questions at the margins. In some instances, it might be difficult to tell the difference between encouragement and providing an opportunity for criminal conduct. But an agreed-upon rule against pushing or goading targets would, in most cases, not prove difficult to apply. For example, the type of goading behavior reflected in the recordings quoted above from the testimony in the Hayat case, in which the informant threatened the target and belittled him for failing to go to a terrorist camp, would not be allowed.

iii) Use of informants as a last (or at least latter) option. When it becomes known or when congregants suspect it, the placing of informants into religious institutions like mosques does considerable damage. The presence of informants, either

\[\text{\textit{See Paul von Zielbauer and Jon Hurdle, supra note 167, at A 18 (one informant in case of Fort Dix defendants was “an Egyptian-born illegal immigrant on probation,” who received more than 230, 000 dollars, and the other informant “was paid about $150,000”).}}\]

\[\text{\textit{See notes 97-101, supra, and accompanying text.}}\]
real or imagined, can undermine religious custom and practices, undercut the ability of believers to trust each other, and pull apart the social fabric that binds co-religionists together. Given the explicit First Amendment protections provided for the free exercise of religion in the U.S., and the chilling effect that even the possibility of informant use may bring with it, the use of informants in mosques and other religious settings ought not to occur regularly.

Thus the community and the police might agree that, because the insertion of informants into religious institutions carries with it significant First Amendment implications and the potential for damage both to individuals and to the whole religious community spied upon, the use of informants will not become a routine practice. Rather, law enforcement should strive to use informants in these settings as little possible consistent with its mission. Police agencies should use active informants only when other, less intrusive methods either have not worked or could not work. Both law enforcement and the Muslim community gain if the use of informants becomes a tactic of last resort (or nearly so), and not a method employed regularly. Under such a rule, law enforcement will make use of informants only when a good reason exists for doing so and when use of an informant will most likely produce solid evidence. For the Muslim community, use of informants only when other methods will not work will reassure them that they need not fear the presence of informants at every point, and that the government will exercise some restraint in using this tactic. It should also maximize the chances that informants will catch those who pose a real danger, and minimize the chances that informants will snare only the hapless, the boastful, and the weak.
iv) Education across the divide. Fourth, the parties might agree on a process of mutual education. For its part, law enforcement might educate Muslim groups and congregations so that they could recognize actual suspicious behavior, as opposed to simply hunches about people who have unusual opinions. It has become common for police agencies and the FBI to appeal to Muslim communities to report to them anything suspicious, much as FBI Director Mueller did in the speech quoted at the beginning of this article. While there is no reason to doubt the sincerity of Mueller’s exhortation, it was also quite general. It is all very well to ask community members to report their suspicions, and even such a general request may produce leads for law enforcement. But leads, and leads that actually help law enforcement, may differ greatly. No doubt every investigation of crime or terrorism involves some sifting of evidential wheat from chaff. This is a problem even when all the leads in an investigation originate from law enforcement professionals. But untrained members of the public asked to provide information to the police on something as unusual as possible terrorist activity will, in perfect good faith, inevitably produce mostly (if not wholly) useless leads for police, upon which officers and agents must spend their valuable time. Only training can improve the amount of useful information law enforcement receives, and the FBI, the Department of Homeland Security, and even local police are in a good position to provide it. Without some concrete indication of what “suspicious action” means, most lay people would stand little chance of spotting the real thing.

For its part, the community could educate law enforcement about its social and religious customs, and particularly its habits of language. A considerable amount of such

243 See note 6, supra, and accompanying text.
cultural and religious training regarding the customs and mores of Islam, by Muslims for
police and FBI agents, already takes place.²⁴⁴ Many police chiefs and law enforcement
administrators at all levels have expressed enthusiastic support for these efforts and stated
that this type of training has greatly enhanced their agencies’ capabilities and
relationships with the Muslim communities they have.²⁴⁵ Language is a special area of
concern. Arabic speakers may sometimes express opinions in Arabic in stronger, more
vehement ways than one might hear elsewhere; these kinds of comments can hit Western
ears as angry, radical, or extremist – even when speakers intend nothing of the sort. As
one translator in a domestic terrorism case explained, this is a linguistic and cultural
characteristic that some outside the Arab world may not understand: “Arabic is a more
flowery language. They use figures of speech…. In English we tend to be more
direct.”²⁴⁶ Clearly, law enforcement must react vigorously to any words expressing an
intention to take some illegal or dangerous action. But we must also exercise caution,
because linguistic, stylistic, and idiomatic differences can give a listener a misleading
impression.

²⁴⁴ Buckley, supra note 59 (discussing NYPD liaison personnel with immigrant communities,
particularly with Muslim communities, one of whom gives seminars to police officers on “Islam 101” and
all of whom attempt to bridge the gap between police and mosque attendees).

²⁴⁵ For example, in the Chicago Police Department under former Superintendent Terrance Hillard,
Muslims who worked with the Department as part of the Superintendent’s outreach efforts helped the
Department produce a short film for police officers on how to handle Muslim travelers at Chicago’s
O’Hare International Airport, where Department officers have significant security responsibilities. The
film was used to train officers, and the results were positive: officers trained with the film “loved it,” and
Muslims themselves told their representatives that their treatment by the police at the airport had improved
considerably. HARRIS, supra note 37, at 47-52. See also Buckley, supra note 59 (NYPD liaison teaches
basics of Islam to police officers).

²⁴⁶ E.g., Carmen Gentile, Defense at Padilla Trial Raises A Dispute Over Translations, N.Y.
TIMES, July 24, 2007 (Arabic translator testified that language in wiretapped conversation was not code for
waging jihad, as government witnesses had asserted, but rather were “references to fund-raising for
children whose parents were killed in conflicts like those in Kosovo, Lebanon, and Somalia.”); Vanessa
Blum, Translator in Padilla Case Pokes Holes in Prosecution Case, S. FLA. SUN-SENTINEL, July 23, 2007
(quoting Kamal Yunis, Arabic translator, testifying in trial of terrorism defendant Jose Padilla).
A couple of recent examples will help illustrate just how important this kind of linguistic understanding – or misunderstanding – can be. In the trial of Hamid Hayat, the twenty-two year old unemployed and uneducated man in Lodi, California accused of, among other things, providing material support for a transnational terrorist act, prosecutors needed to prove the mens rea of the offense: Hayat’s intention that acts of terrorism would actually occur. They had presented only fairly thin evidence on this critical point, and so they offered into evidence what became known as “the throat note,” a fragment of paper with Arabic writing on it that police found on Hayat when they arrested him. The prosecution translated the words as “Lord, let us be at their throats, and we ask you to give us refuge from their evil.” The prosecution told the jury that the note proved that Hayat had “a jihadi heart and a jihadi mind.” But the defense challenged this translation; rather, they said, the words said, “Oh Allah, we place you at their throats, and we seek refuge in you from their evil.” According to authoritative sources, the defense had the correct interpretation; the passage contained a traditional prayer “reported to have been said by the Prophet [Mohammad] when he feared harm from a group of people.” For the jury, Hayat’s intent became the central question in deliberations, and the throat note played a crucial role in persuading the jury to convict him.

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247 See notes 97-101, supra, and accompanying text.
249 Id. at 83.
250 Id. at 82.
251 Id. at 83.
252 Id. at 90.
253 Id. at 92-93
language arose. The government's case against Padilla and his two co-defendants relied heavily on hours of wiretapped phone calls, few of which included Padilla; government witnesses testified that the defendants had used “code words” to speak about jihad and weapons that they hoped to provide for Islamic extremist fighters.\textsuperscript{254} An expert witness, a translator of Arabic, disagreed. He said that the men on the tapes were simply speaking indirectly – something common in the Arab world – and not in code.\textsuperscript{255}

Police need education so that they can tell the difference between an opinion – even a strongly expressed, non-mainstream, anti-American one – and clues to acts of terrorism. Having such opinions does not make people dangerous, and American citizens (if not all people living in America) have a right to hold and express such views. A person who says he approves of the actions of Osama Bin Laden, or who expresses his wish that the president of the United States were dead, or who says that America deserved what it got on 9/11, may strike us as intemperate, wrongheaded, or repugnant – someone with whom we would not wish to spend even a minute. But those statements only make the person a holder of repellent and terribly misinformed opinions, not a terrorist. Expressing opinions, even objectionable ones, remains an American right; doing so in a fashion that seems harsh or even aggressive has to do with style and custom of speech, and does not necessarily make it likely that these opinions will ripen into action.

These four suggestions – distinguishing between active and passive informant activity and regulating accordingly, prohibiting encouragement, use of informants as a

\textsuperscript{254} Blum, \textit{supra} note 241.

\textsuperscript{255} \textit{Id.}
last resort, and mutual education – just scratch the surface of what police agencies and the members of American Muslim communities could agree to between themselves. And given the local focus of the negotiations, many concerns particular to the jurisdiction might also surface. This would constitute a major advantage for this process, because the better tailored the process is to its own context, the better its chances for success. The local negotiation of a set of practices acceptable to both sides in the debate presents a workable alternative – one they might only achieve because of the mutually re-enforcing needs of law enforcement and the Muslim communities in our country, and the common need to take the most effective actions we can to make ourselves safe from terrorism.

C. Obstacles and Shortcomings of the Negotiated Approach

To be sure, the negotiated approach has flaws. It is not a perfect system for accomplishing the twin goals of winning help and intelligence for law enforcement, on the one hand, and winning respect for the Muslim community on the other. As things stand, no existing solution can put these two objectives perfectly in balance. But while some degree of tension between them seems inevitable, the negotiated approach comes closest to a reasonable balance. Nevertheless, any proponent of this approach must reckon with at least three problems.

First, the negotiated approach would carry with it substantial questions concerning enforceability. What if police agree to an arrangement with their Muslim partners, perhaps including the four points described above, but in some particular case decide that they will not abide by it, for what they believe to be good and sufficient reasons? For example, suppose that law enforcement hears rumors of suspicion surrounding a very religious foreigner, new to the Muslim community. Besides the orthodox nature of the person’s appearance and practices, no known factual basis for
suspicion exists. The police may simply decide that they do not want to take a chance that someone harmful will slip through their fingers, so they decide, without any reasonable suspicion, that the case calls for the use of an active informant. Should this become known, no one – no institution, no court, no judge, no inspector or ombudsman – can do anything to enforce the rules that the police have agreed to with the Muslim community; neither the community nor anyone else would have standing to litigate the matter or any enforceable right to take action. The possibility of enforcement by a court gave power to the consent decrees against surveillance by police in both New York and Chicago. Without this kind (or any kind) of enforcement mechanism, negotiated agreements of the type proposed here would bind the police only in the most formal sense.

Second, one could hardly ignore the issues of unbalanced power inherent in such a negotiation. On the one hand, law enforcement does not have to agree to anything; it now has all the power it needs to use informants any way, any time it wants, and need not seek anyone’s permission to use this power, least of all permission from the (Muslim) community under scrutiny. While this unilateral approach clearly has costs, law enforcement may freely ignore them under the status quo if it wishes. The Muslim community, for its part, has no power to force the police to the bargaining table, and cannot force any change in police policy. They can only caution the police that, while they surely want the best for the country in which they live, they cannot prevent, and perhaps can even anticipate, that some number of Muslims will become more fearful and less trusting of the police, and above all less likely to approach the police with vital

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256 See notes 173-200, supra, and accompanying text.
Surely, both of these ideas constitute fair criticism. But both merely redirect us to the underlying premise of the whole negotiated approach. The police both want and need the cooperation of the community and the crucial intelligence that a cooperative relationship facilitates. If and when law enforcement recognizes this, the desire of the police to facilitate the building of such relationships will serve as the enforcement mechanism. Plainly, this will not always be enough to restrain law enforcement and force it to consistently honor its obligations under a negotiated agreement. But it is

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257 An imbalance of power between parties can potentially leave little room for an outcome that might actually form an acceptable basis for going forward. But this problem is not unfamiliar, especially in the context of negotiation between government units and citizens. E.g., LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE 4-11, 93-94, 101-05, 200-01, 241-43 (1987) (discussing the fact that, once an agreement is ratified, “the negotiating parties must find a way to link the ad hoc, informal agreement they have fashioned to the formal decision-making processes of government”). More to the point, citizens and public interest advocates often have “concerns about entering negotiations when resources and political power are unequally distributed…. Power and politics are essential ingredients in all public disputes, and they cannot be ignored. But consensus-building approaches to dispute resolution place a premium on problem solving rather than ‘settling’ disputes…. When a powerful group commits to work for consensus, it tacitly agrees that raw political power is not a sufficient basis for resolving public disputes. This empowers those who are less politically powerful.” Id. at 241-43. STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROGERS & SARAH RUDOLPH COLE, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 513 (2007) (“Instead of the eternally frustrating political and judicial stalemate that often accompanies decisions involving siting of waste-disposal facilities or low-income housing, might it not be more productive to seek negotiated agreement of such disputes?”). One way to deal with this reality of unequal power unequally distributed between negotiating parties is suggested by ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 97-106 (2d ed. 1991), in which the authors advocate developing one’s “BATNA” – best alternative to a negotiated agreement – as a way to generate power in an unequal situation. “No method can guarantee success if all the leverage lies on the other side…. People think of negotiating power as being determined by resources like wealth, political connections, physical strength, friends, and military might. In fact, relative negotiating power of two parties depends primarily upon how attractive to each is the option of not reaching agreement…. [But] [a]tractive alternatives are not just sitting there waiting for you; you usually have to develop them.” Id. at 97, 102-03. One alternative to a negotiated agreement that would be useful to increase the leverage of the Muslim community vis-à-vis law enforcement in the situation outlined in this article, either within the context of the type of negotiation suggested here or within a situation in which law enforcement refuses to enter into negotiations on the issue of the use of informants, would be to prepare to have the Muslim community reduce or end its cooperative, voluntary contacts with police and the FBI. These contacts are obviously something that law enforcement wants and needs; being prepared to withdraw them (and letting the other side know this, id. at 104-05) could be an effective way of forcing the discussion along.
preferable to the alternative – better than the current “we make the rules” approach, in which law enforcement may knowingly or unknowingly cut off their own noses to spite their own faces, and certainly preferable from the perspective of the community, for which a negotiated arrangement limiting the use of informants can only be an improvement.

Third, the local aspect of the negotiated approach proposed here, explained here as one of its strengths, may also constitute a weakness. A local police department – even a large one, like the New York Police Department – could adopt its own policies on these matters; even if a precinct commander could not, the Commissioner certainly could. But the same may not be true of a local FBI field office. The FBI has fifty-six field offices around the country (as well as more than four hundred regional agencies in smaller towns and cities). Each one of these field offices reports to FBI headquarters in Washington, and must follow Bureau policy, set in Washington. And the FBI itself is only one part of U.S. Department of Justice, which has the final say over FBI policy. So even if a local FBI office wishes to negotiate and agree to a set of limits and rules for the use of informants, it remains less than clear that it would have the power to do this, or that the people at either FBI headquarters or the Department of Justice would allow this.

Given these obstacles, the outlook for local control of policy on informant use is decidedly mixed, but it is not hopeless. In the recent past, locally-generated ideas have

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258 Federal Bureau of Investigation, Quick Facts, http://www.fbi.gov/quickfacts.htm (last accessed July 18, 2007) (“We have 56 field offices located in major cities throughout the U.S., 400+ resident agencies in smaller cities and towns across the nation….”).

259 Federal Bureau of Investigation, Facts and Figures, http://www.fbi.gov/priorities/priorities.htm (last accessed July 18, 2007) (“The Special Agents and support personnel who work at Headquarters organize and coordinate FBI activities around the world. Headquarters personnel determine investigative priorities, oversee major cases, and manage the organization’s resources, technology, and personnel.”).
proven very helpful to the FBI in some sensitive anti-terrorism efforts. For example, after the Department of Justice ordered the FBI to conduct 5,000 “voluntary” interviews with young Arab and Muslim men not suspected of terrorism in late 2001, many in law enforcement expressed doubts about this plan. More importantly, many thought that the Bureau would endanger the budding relationships it had built with the Arab and Muslim communities after 9/11. These relationships constituted crucial assets in the struggle against terror, and some FBI agents wanted very much to avoid the damage that would follow if agents began showing up unannounced at the homes and business of the 5,000 “nonsuspects.” When FBI agents and others in one federal district came up with an alternative plan – sending letters to potential interviewees – the Department of Justice showed flexibility, and allowed them to try this. The returns on this investment in the instincts of the field agents were considerable; the FBI field office that took the alternative approach had the highest rate of successfully completed interviews of any office in the nation. Thus it is certainly possible that the Bureau and its governmental parent could see their way to doing this again.

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260 U.S. Department of Justice, Office of the Deputy Attorney General, Memorandum for All United States Attorney, All Members of Anti-Terrorism Task Forces (Nov. 9, 2001) (copy on file with the author).

261 For some, the plan’s legality was questionable. E.g., Fox Butterfield, Police Are Split on Interviewing Mideast Men, N.Y. TIMES, Nov. 22, 2001 (quoting police chiefs who stated that the program violated laws of their state or was unconstitutional). For others, it was just plain bad anti-terrorism work. McGee, supra note 37 (eight former high-ranking FBI officials, including former FBI director, ridiculing the chances that the program would produce anything of value).

262 HARRIS, supra note 37, at 10.

263 Id. at 34-35.

264 Id.
VI. CONCLUSION

The possibility of terrorists on American soil, particularly the prospect of homegrown terrorists, means that we should expect law enforcement to use every legal tool at its disposal to gather intelligence necessary to head off attacks. Given the law as it exists, these tools include almost complete discretion for police to plant and use informants. Thus we should expect to see informants do almost anything to succeed in producing cases against targets.

Every person living in this country, whether they have American citizenship or not, has a strong interest in securing the nation against terrorist attacks. But just because the law says that police can use informants almost any time, in any setting, does not mean that they should do this. And the particular contours of the struggle in which we now find ourselves illuminates the can/should question as few others have. As the law enforcement officials and intelligence officers in charge of our safety and security know better than almost anyone, our ability to track potential terrorists and stop them before they act depends wholly on the availability of intelligence. And the best, if not the only, source of crucial intelligence on potential extremists with Islamic backgrounds will continue to be American Muslim communities, both native and foreign born. As our intelligence personnel and others have said repeatedly, this means that we must have solid, well-grounded relationships with our Muslim communities. These relationships are not a matter of public relations, political correctness, or making people feel good. Rather, these communities must feel that they can regard law enforcement as trusted partners, because such relationships create the avenues and opportunities for the passing of critical information from the communities on the ground to law enforcement. The widespread use of informants in Muslim institutions, particularly mosques, will corrode these
important relationships by sewing distrust. By causing Muslims to think that the FBI or any other police agency regards them not as trusted partners but as potential suspects, fear displaces trust. And fear will cause members of the Muslim community to become less likely to come forward with information – just as the members of any community would, given this type of scrutiny. We simply cannot afford this. Yet we know that there will be cases – indeed, from the government’s point of view, there already have been cases – in which the use of informants can play a role.

Given these tensions, as well as the mutual interests of law enforcement and Muslim communities in the U.S., the situation presents an ideal situation to try to modulate the use of informants by the government through local, negotiated agreements on acceptable practices. In at least the four ways identified here, law enforcement and Muslim communities could agree to limit on the use of informants, without either ruling out their use or allowing their unrestricted use. Both sides would benefit. And while the approach proposed here would certainly face substantial obstacles, it represents a chance to recalibrate an important aspect of the government’s power to investigate, while at the same time preserving the sanctity of the community’s institutions of worship to the greatest extent possible.