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## Treatment of Domestic Terrorism Cases: Class and Mental Health in the Criminal System

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# TREATMENT OF DOMESTIC TERRORISM COURT CASES: CLASS AND MENTAL HEALTH IN THE CRIMINAL SYSTEM

YOLANDA RONDON, ESQ.\*

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## INTRODUCTION

The Islamophobia and xenophobia messages perpetuated this past decade that Islam and immigrants are dangerous is alarming and distorts the reality of actual terror in the United States. While people who commit acts of violence under a distorted Islamic theology are treated as though they are a part of a terrorist network, those whom engage in violent actions under far-right ideologies are treated as mentally ill “lone-wolfs.”<sup>1</sup> Reviewing violent and terrorist attacks in the United States reveals a large disparate depiction and treatment of far-right terrorism in comparison to distorted Islamist motivated terrorism on criminal charges, sentencing, and court-required mental health assessments.

The fact is that purportedly radical Christians, white supremacists, and far-right militia domestic groups have carried out the majority of recent terrorist

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1. See generally Jason Burke, *The Myth of the ‘Lone Wolf’ Terrorist*, THE GUARDIAN (Mar. 30, 2017, 3:23 AM), <https://www.theguardian.com/news/2017/mar/30/myth-lone-wolf-terrorist> (describing the phenomenon of the “lone wolf” attacker).

activity in the United States.<sup>2</sup> According to the Triangle Center on Terrorism and Homeland Security, non-Muslim Americans were responsible for 254 out of the total 304 American deaths resulting from political violence and mass shootings since 9/11.<sup>3</sup> Human Rights Watch reported that most terrorism-related prosecutions are based on entrapment tactics, which often play a role in the portrayal of the accused person both in the media and the courtroom.<sup>4</sup> Of the more than 300 American deaths from political violence and mass shootings since 9/11, only fifty have been committed by persons that identify as Muslim American.<sup>5</sup> Research further demonstrates that in the United States, inaccurate media depictions and public subconscious prejudices have led Americans to stereotypically categorize perpetrators and fuel attitudes of xenophobia and Islamophobia in public opinion that support the creation of a classism dynamic.<sup>6</sup>

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2. See Scott Shane, *Homegrown Extremists Tied to Deadlier Toll Than Jihadists in U.S. Since 9/11*, N.Y. TIMES (June 24, 2015), [https://www.nytimes.com/2015/06/25/us/tally-of-attacks-in-us-challenges-perceptions-of-top-terror-threat.html?\\_r=0](https://www.nytimes.com/2015/06/25/us/tally-of-attacks-in-us-challenges-perceptions-of-top-terror-threat.html?_r=0). See also New America Foundation, *Terrorism in America After 9/11, Part IV What is the Threat to the United States Today* (International Security Project, Summer 2015), <https://www.newamerica.org/in-depth/terrorism-in-america/what-threat-united-states-today/> (citing the deadliest jihadist inspired threat as those attacks carried out by lone individuals); *Lone Wolf Report*, SOUTHERN POVERTY LAW CENTER, (Feb. 11, 2015), <https://www.splcenter.org/20150212/lone-wolf-report> (recognizing non-Islamic terrorists are responsible for a larger number of deaths than jihadists).

3. See Charles Kurzman & Davis Schanzer, *Law Enforcement Assessment of the Violent Extremist Threat*, \*7-8 (June 25, 2015) (Triangle Center on Terrorism and Homeland Security, Working Paper). See generally Zach Beauchamp, *Terrorism by Muslims Makes Up One-Third of 1 Percent of all murders in the U.S.*, VOX (Jan. 27, 2017, 12:20 PM), <http://www.vox.com/world/2017/1/27/14412420/terrorism-muslims-america-islam-trump> (comparing the 54 deaths resultant from acts involving Muslim Americans tied to violent extremism to the 11,000 gun related deaths).

4. *Illusion of Justice: Human Rights Abuses in U.S. Terrorism Prosecutions*, HUM. RTS. WATCH (July 21, 2014), <https://www.hrw.org/report/2014/07/21/illusion-justice/human-rights-abuses-us-terrorism-prosecutions> (noting that multiple studies have found that nearly 50 percent of the federal counterterrorism convictions since September 11, 2001, resulted from informant-based cases, while almost 30 percent were sting operations in which the informant played an active role in the underlying plot).

5. Kurzman & Schanzer, *supra* note 3, at \*7.

6. See Cherie Parker, *Before and After 9/11: The Portrayal of Arab Americans in U.S. Newspapers* (2008) (Unpublished M.S. thesis, Univ. of Central Florida) (on file with author and Univ. of Central Florida libraries); Valentine Garzon, *Labeling Terrorism: Media Effects on Public Policy Attitudes*, (May 5, 2016) (unpublished B.A. thesis, Georgia State University) (on file with author and Department of Communications Scholarworks, Georgia State University) [http://scholarworks.gsu.edu/communication\\_hontheses/5](http://scholarworks.gsu.edu/communication_hontheses/5). See generally JACK SHAHEEN, REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE 7-8 (2009) (summarizing the genesis of negative

Generally, charges of terrorism encompass the commission of a crime with intent to intimidate the civilian population at large; or influence the conduct or activities of the government of the United States, a state, or locality through intimidation.<sup>7</sup> Federal law defines domestic terrorism as: 1) dangerous acts to human life that are a violation of the criminal laws of the United States or of any State; 2) intended to intimidate or coerce the civilian population, influence the policy of a government by intimidation or coercion—a description meant to encompass, among others, antigovernment anarchists, white supremacists, and animal-rights activists—to affect the conduct of a government by mass destruction, assassination, or kidnapping; and 3) occurred in the United States.<sup>8</sup>

Part I of this Article takes an in-depth look at domestic terrorism incidents and its relation to mental health portrayal in the media and treatment in the legal system post 9/11. Part II analyzes the treatment of the domestic terrorism cases in the criminal system. Finally, Part III, articulates its potential ties to classism.

## I. THE CATEGORIZATION OF DOMESTIC TERRORISM CASES

### *The Case of People v. Ferhani*

Ahmed Ferhani conspired to commit violent acts on various targets in New York City based on a distorted view of Islam. Ferhani was arrested during a New York City Police Department sting operation. According to the New York Supreme Court, Ferhani planned to target persons he perceived as responsible for the mistreatment of Muslims at houses of worship—Christians and Jews—and to detonate a grenade in a synagogue.<sup>9</sup> Ferhani pleaded guilty to state charges of conspiracy to commit crimes of terrorism and hate crime charges.<sup>10</sup>

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stereotypes against Arabs and its continued perpetuation in the film industry).

7. 18 U.S.C. § 2331 (2011).

8. *Id.*

9. Rande Iaboni, *Man Pleads Guilty to Terror Charges in Plot to Blow up NY Synagogues and Churches*, CNN (Dec. 5, 2012, 10:21 AM), <http://www.cnn.com/2012/12/04/us/new-york-terror-plea/index.html>.

10. See Dominique Debucquoy-Dodley, *Man Sentenced in Plot to Blow up N.Y. Synagogues, Churches*, CNN (Mar. 15, 2013), <http://www.cnn.com/2013/03/15/justice/new-york-terror-sentencing/index.html>; William K. Rashbaum & Al Baker, *Suspects in Terror Case Wanted to Kill Jews, Officials Say*, N.Y. TIMES (May 12, 2011), <http://www.nytimes.com/2011/05/13/nyregion/two-men-arrested-in-new-york-terror-case-police-say.html>. Ferhani also pleaded guilty to multiple criminal counts of weapons possession.

The overwhelming majority of mainstream news reports classified Ferhani as a terrorist. Both CNN and the New York Times cited professionals who warned against the real racist and terrorist threat to the public that had been avoided by arresting Ferhani. CNN reported Ferhani was sending a message to all non-Muslims.<sup>11</sup> The New York Times titled one article, “Suspects in Terror Case Wanted to Kill Jews.”<sup>12</sup> Notably, both papers reported that Ferhani’s attorney claimed he had a history of mental illness, but neither paper elaborated or reported on any investigative journalism conducted on Ferhani’s mental health.<sup>13</sup>

The majority of the mainstream coverage framed Ferhani’s actions as being motivated by resentment of Muslim mistreatment.<sup>14</sup> For example, the introduction of a Fox News article read, “Two U.S. residents, including one who complained that the world was treating Muslims ‘like dogs,’ bought guns and a grenade and wanted to carry out a terror plot against a New York synagogue, officials said Thursday.”<sup>15</sup> Only the Guardian discussed Ferhani’s mental health by citing his history of institutionalization and quoting his lawyer’s statement.<sup>16</sup> Ferhani’s attorney, Elizabeth Fink, stated, “They find this man who is mentally ill, who has a criminal record, who has a drug problem and they target him.” Ferhani’s mother also disclosed his hospitalization of more than twenty-four times for mental issues since he was

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11. See Iaboni, *supra* note 9 (noting that these non-Muslims included Americans, Christians, and members of the Jewish community); Debucquoy- Dodley, *supra* note 9.

12. Rashbaum *supra* note 10.

13. See Colin Moynihan, *Queens Man Pleads Guilty in Plot to Blow Up Manhattan Synagogue*, N.Y. TIMES (Dec. 4, 2012), [http://www.nytimes.com/2012/12/05/nyregion/ahmed-ferhani-pleads-guilty-in-plot-to-blow-up-synagogue.html?\\_r=2](http://www.nytimes.com/2012/12/05/nyregion/ahmed-ferhani-pleads-guilty-in-plot-to-blow-up-synagogue.html?_r=2); Iaboni, *supra* note 9.

14. Moyniahn *supra* note 13; Chris Boyette, *Two Indicted in Alleged New York Terrorism Plot*, CNN (June 15, 2011) [http://www.cnn.com/2011/CRIME/06/15/new.york.terror.plot/index.html?hpt=ju\\_c2](http://www.cnn.com/2011/CRIME/06/15/new.york.terror.plot/index.html?hpt=ju_c2); Rocco Parascandola, *NYPD Arrest 2 Queens Terror Suspects, Charged with Plot to hit NYC synagogues with Grenades, Guns*, DAILY NEWS, (May 13, 2011), <http://www.nydailynews.com/news/crime/nypd-arrests-2-queens-terror-suspects-charged-plot-hit-nyc-synagogues-grenades-guns-article-1.146295>; William Rashbaum & Al Baker, *Suspects in Terror Case Wanted to Kill Jews, Officials Say*, N.Y. TIMES (May 12, 2011), <http://www.nytimes.com/2011/05/13/nyregion/two-men-arrested-in-new-york-terror-case-police-say.html>.

15. *Two Men Arrested Over Alleged Synagogue Plot in New York*, FOX NEWS (May 12, 2011), <http://www.foxnews.com/us/2011/05/12/men-arrested-alleged-terror-plot-new-york.html>.

16. *New York Man to be Tried for Allegedly Plotting to Blow Up Synagogues*, THE GUARDIAN (June 25, 2012, 2:30 PM), <https://www.theguardian.com/world/2012/jun/25/new-york-man-tried-synagogues>.

fourteen years old and that he suffered from post-traumatic stress disorder.<sup>17</sup>

The New York Supreme Court did not find Ferhani's mental illness defense to be legitimate. The court only addressed the issue of mental health when the defendant attempted to introduce psychiatric evidence supporting his entrapment and "bad faith prosecution" defenses.<sup>18</sup> According to legal precedent, the mental state and intentions of a defendant are vital to such defenses and thus the court allowed the defendant to access discovery.<sup>19</sup> The court issued a subpoena, ordering the prosecution to provide the defense with a copy of Ferhani's prison health records, mental health-related 911 calls, and aid reports in its possession.<sup>20</sup>

### *The Case of Halder v. Tibals*

On May 9, 2003, Biswanath Hadler indiscriminately fired at persons with a Tech 9 semi-automatic weapon in a seven-hour attack at Weatherhead School of Management at the Case Western Reserve University in Cleveland, Ohio, killing one person.<sup>21</sup> On December 16, 2005, the trial court found Halder guilty of three counts of aggravated murder, thirty-five counts of attempted capital murder, fourteen counts of aggravated burglary, one-hundred forty-three counts of kidnapping, and one count of unlawful possession of a dangerous ordinance.<sup>22</sup> Halder was sentenced to life imprisonment without the possibility of parole.<sup>23</sup>

Mainstream media referred to Halder as a former university employee and an ambitious Master of Business Administration (MBA) student, who was motivated by a grudge—not a terrorist.<sup>24</sup> Halder had previously filed a law

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17. Shayna Jacobs, Queens Man Ahmed Ferhani Pleads Guilty to Plotting to Blow up a String of Manhattan Synagogues, N.Y. DAILY NEWS, Dec. 4, 2012, <http://www.nydailynews.com/new-york/queens-man-pleads-guilty-plotting-blow-synagogues-article-1.1213492>; see Daniel Beekman, Algerian-born Ahmed Ferhani Sentenced to 10 Years in Prison for Plotting to Blow up Synagogues, N.Y. DAILY NEWS, Mar. 15, 2013, <http://www.nydailynews.com/new-york/ferhani-10-years-synagogue-bomb-plots-article-1.1289834>.

18. See *People v. Ferhani*, No. 2461/11 at \*14 (N.Y.S. Jun. 25, 2012).

19. *Id.*

20. *Id.* at \*15.

21. *Halder v. Tibals*, No. 1:09 CV 1701, 2011 WL 9025288 at \*2 (N.D. Ohio Nov. 15, 2011).

22. *Id.* at \*2-3.

23. *Id.*

24. Danny Hakim, *Ex-Employee Held in Campus Attack*, N.Y. TIMES (May 11, 2003), <http://www.nytimes.com/2003/05/11/us/ex-employee-held-in-campus-attack.html>.

suit against another employee, alleging his coworker had destroyed his website. Media coverage painted Halder as becoming a resentful man before committing the crime.<sup>25</sup>

While mainstream media did not outright refer to Hadler as a terrorist, the New York Times made sure to report on Hadler's background as being raised and attending military school in India.<sup>26</sup> While CBS and Fox News did make mention of Halder's mental illness or instability,<sup>27</sup> the two news outlets also reported that Hadler was military-trained in India and disclosed related details of Halder's resume.<sup>28</sup> CBS and NBC News reports also described Halder as unfriendly, a loner, and antisocial.<sup>29</sup>

In the court record, Halder was identified as disabled, diagnosed with personality disorder, dysthymia, and depression.<sup>30</sup> His defense attorney challenged Halder's mental state at the time of the attack and his competency to stand trial.<sup>31</sup> Competency hearings were held, and two out of three psychologists found that Halder was not capable of assisting his attorney in this case. Psychologists indicated that Halder suffered from delusions and

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25. *Id.* In a handwritten motion filed Nov. 4, Halder said the shootings were in response to wrongdoing in the computer lab by someone "hell-bent on destroying the information infrastructure that has elevated humankind to a new level."; see M.R. Kropko, *Man Faces Ohio University Shooting Trial*, WASHINGTON POST (Nov. 13, 2005), <http://www.washingtonpost.com/wpdyn/content/article/2005/11/13/AR2005111300437.html>; M.R. Kropko, *Case Shooting Suspect Getting Toupee*, THE NEWS HERALD (Nov. 15, 2015), <http://www.news-herald.com/article/HR/20051115/NEWS/311159986>.

26. Hakim, *supra* note 24. <http://www.nytimes.com/2003/05/11/us/ex-employee-held-in-campus-attack.html>.

27. See Brian Bernbaum, *Cleveland Shooter Had Military Training*, CBS NEWS (May 9, 2003, 5:15 PM), <http://www.cbsnews.com/news/cleveland-shooter-had-military-training/> (stating that Halder stood out because of his odd behavior and clothing and that Halder believed the school conspired against him); *The Man Behind the Crime*, NBC NEWS, [http://www.nbcnews.com/id/15769598/ns/dateline\\_nbc-crime\\_reports/t/man-behind-crime-%20-%20.V4\\_WfFl\\_dM#.V5fXJE1THz](http://www.nbcnews.com/id/15769598/ns/dateline_nbc-crime_reports/t/man-behind-crime-%20-%20.V4_WfFl_dM#.V5fXJE1THz) [hereinafter "*The Man Behind the Crime*, NBC NEWS"]; *University Shooter Had Grudge Against Employee, Authorities Say*, FOX NEWS (May 10, 2003), <http://www.foxnews.com/story/2003/05/10/university-shooter-had-grudge-against-employee-authorities-say.html> (quoting Jay DiRenzo saying that "He never walked on the sidewalks, always down the middle of the street. To me, it seemed like he was afraid of people.").

28. Bernbaum, *supra* note 27.

29. Bernbaum, *supra* note 27; *The Man Behind the Crime*, NBC NEWS, *supra* note 27.

30. See *Halder*, 2011 WL 9025288, at \*1.

31. *Id.* at \*2.

paranoia.<sup>32</sup> All three mental health experts testified and submitted reports about Halder's competency.<sup>33</sup>

Of the three experts, the testimony and analysis of the expert psychologist Dr. Bergman was the most compelling, competent, and accurate.<sup>34</sup> Dr. Bergman's finding was that Halder suffered from a personality disorder, but otherwise did not suffer from a mental disorder that would make him incapable of understanding the gravity of the charges and crimes.<sup>35</sup> During the competency hearing, another expert determined that, while Halder's symptoms did not prevent him from assisting counsel in preparing his defense, his severe mental disorder prevented him from exhibiting a rational understanding of the legal proceedings.<sup>36</sup> Mental competency was clearly an issue, so the trial court recalled Dr. Bergman to testify, as they found that she was the most credible source, and concluded that nothing had changed since the last decision.<sup>37</sup> The trial court judge ultimately ruled that Halder was competent to stand trial.

#### *The Cases of United States v. Wright*

In 2012, five men were linked to a plot to blow up Brecksville-Northfield High Level Bridge in Cleveland, Ohio. Douglas L. Wright, Brandon L. Baxter, Anthony Hayne, Connor C. Stevens, and Joshua S. Stafford were arrested as part of a Federal Bureau of Investigations (FBI) sting operation.<sup>38</sup> They were charged with conspiracy and attempt to use explosive materials to damage physical property affecting interstate commerce.<sup>39</sup> The men had no true access to working explosives as they were inert and under the control of the FBI undercover officer.<sup>40</sup> In the criminal case that followed, the accused did not raise mental health as a defense nor did the court consider

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32. *Id.* at \*2-3.

33. *State v. Halder*, No. 87974, 2007 WL 3286904 at \*6 (Ct. App. Ohio Nov. 8, 2007).

34. *Id.*

35. *Id.*

36. *Halder*, 2011 WL 9025288, at \*3.

37. *Id.*

38. Press Release, U.S. Attorney Office – Cleveland Division, Five Men Arrested in Plot to Bomb Ohio Bridge (May 1, 2012), <https://archives.fbi.gov/archives/cleveland/press-releases/2012/five-men-arrested-in-plot-to-bomb-ohio-bridge>.

39. *Id.*

40. Matt Pearce, *Three Anarchists Get Prison Terms in Ohio Bridge Bomb Plot*, LA Times (Nov. 21, 2012); *Alleged Bridge Bombers Face Judge, Ordered Jail*, CBS NEWS (May 1, 2012), <https://www.cbsnews.com/news/alleged-bridge-bombers-face-judge-ordered-jailed/>.



it.<sup>41</sup>

On appeal, defendant Baxter challenged his sentence on several grounds, including that his counsel during the trial court failed to analyze his mental health.<sup>42</sup> He argued that his weak mental condition made him particularly vulnerable to the government informant's influence as he had been released from a mental health institution just before the plot. Baxter clarified that he was not arguing that he had a mental disease, which would prevent him from providing sufficient assistance in his defense, but that the trial attorney never bothered to investigate it for the purposes of an entrapment defense.<sup>43</sup> The court disagreed and held that his mental health had been presented to the court through several examples in the record. The court also found that Baxter's counsel had sufficiently investigated the mental health issue, and it did not hinder him during trial.<sup>44</sup>

On defendant Stafford's appeal, the Sixth Circuit addressed Stafford's competency to stand trial.<sup>45</sup> The opinion began by mentioning that the district court had found Stafford competent to stand trial after a competency hearing despite his history of mental health illness.<sup>46</sup> At the hearing, doctors addressed his history of treatment which included "diagnoses of [Attention Deficit Hyperactivity Disorder ("ADHD")], atypical psychosis, oppositional defiant disorder, bipolar disorder, and auditory hallucinations."<sup>47</sup> The defense counsel and district court concluded that he was competent enough to represent himself.<sup>48</sup> Stafford appealed this decision, arguing that his request to continue *pro se* should have been rejected.<sup>49</sup> The Court of Appeals disagreed, referring to case law which defined the standard for defendants with mental illness who wish to represent themselves in court.<sup>50</sup> In conjunction with this standard, the Court decided that the district court's ruling was correct because it had accurately observed Stafford's demeanor

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41. See generally *United States v. Wright*, No. 1:12 CR 238, 2012 WL 5507254 (N.D. Ohio Nov. 14, 2012).

42. *Baxter v. U.S.*, 1:15 CV 2056, 2015 WL 9268917, at \*2–4 (N.D. Ohio 2015).

43. *Id.* at \*3–5.

44. See *id.* at \*3–7.

45. See generally *United States v. Stafford*, 782 F.3d 786 (6th Cir. 2015).

46. *Id.* at 788–89.

47. *Id.* at 789.

48. *Id.*

49. *Id.* at 791.

50. *Indiana v. Edwards*, 554 U.S. at 172, 128 S.Ct. 2379 (2008). (explaining that the standard, which is a balancing test of competency to stand trial and competence to conduct proceedings, measures mental fitness for "self-representation").

and abilities to make a decision.<sup>51</sup>

Most the mainstream coverage, however, did not expand on the views or motivations of this group of five men. The media generally focused on the group's plots and subsequent arrest. Mainstream media reported the persons involved as a group of self-proclaimed anarchists.<sup>52</sup> However, these outlets did not paint this as a terrorist act. They mentioned terrorism only to report on the court ruling and Joint Terrorism Task Force's involvement with the case.<sup>53</sup> No mainstream media outlets included 'terror' in their titles and none shaped the incident as an act of terrorism; although, there were reports that the group had discussed plans to target Federal Reserve Banks, a train, and a federal counterterrorism center.<sup>54</sup> Rather, mainstream media actively framed this case as the "Cleveland/Ohio Bridge Bomb Plot."<sup>55</sup> The Guardian was one of the only news outlets to report on Stafford's court-ordered mental competency evaluation.<sup>56</sup>

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51. United States v. Stafford, 782 F.3d 786, 791 (6th Cir. 2015).

52. See David Ariosto, *5 Arrested in Alleged Plot to Blow Up Cleveland-Area Bridge*, CNN (May 1, 2012, 3:38 PM), <http://www.cnn.com/2012/05/01/justice/ohio-bridge-arrests/>; see also Jeremy Pelofsky & Kim Palmer, *Five Arrested in Alleged Cleveland Plot to Blow Up Bridge*, REUTERS (May 1, 2012), <http://www.reuters.com/article/us-usa-security-cleveland-idUSBRE8400UY20120501>.

53. See Michael Winter, *3 Sentenced to Prison for Plot to Blow up Ohio Bridge*, USA TODAY (Nov. 12, 2012, 5:29 PM), <http://www.usatoday.com/story/news/nation/2012/11/20/ohio-bridge-bomb-plot-three-sentenced/1717857/>; see also *5 Arrested for Allegedly Trying to Blow Up Ohio Bridge*, FOX NEWS (May 1, 2012), <http://www.foxnews.com/us/2012/05/01/5-arrested-for-allegedly-trying-to-blow-up-ohio-bridge.html> [hereinafter "*5 Arrested*, FOX NEWS"].

54. Devlin Barrett, *Five Charged in Plan to Bomb Ohio Bridge*, WALL STREET JOURNAL (May 1, 2012), <http://www.wsj.com/articles/SB10001424052702304050304577377851612024974>; *FBI Nabs 5 in Alleged Plot to Blow Up Ohio Bridges*, CBS NEWS (May 1, 2012), <http://www.cbsnews.com/news/fbi-nabs-5-in-alleged-plot-to-blow-up-ohio-bridge/> [hereinafter "*FBI Nabs 5*, CBS NEWS"]; *5 Arrested in Plot to Blow Up Cleveland Bridge*, CHI. TRIB. (May 1, 2012), [http://articles.chicagotribune.com/2012-05-01/news/chi-120501cleveland-bridge-bomb-plot\\_1\\_fbi-informant-plot-fbi-s-cleveland](http://articles.chicagotribune.com/2012-05-01/news/chi-120501cleveland-bridge-bomb-plot_1_fbi-informant-plot-fbi-s-cleveland) [hereinafter "*5 Arrested in Plot*, CHI. TRIB."].

55. Michael Schmidt, *5 Men Charged in Plot to Bomb an Ohio Bridge*, NY TIMES (May 1, 2012), [http://www.nytimes.com/2012/05/02/us/5-men-arrested-in-ohio-bridge-plot.html?\\_r=0](http://www.nytimes.com/2012/05/02/us/5-men-arrested-in-ohio-bridge-plot.html?_r=0); Michael Muskal, *5 in Cleveland Charged with Planning to Blow Up Bridge on May Day*, L.A. TIMES (May 1, 2012), <http://articles.latimes.com/2012/may/01/nation/la-na-cleveland-bomb-plot-20120502>.

56. Arun Gupta, *Cleveland Anarchist Bomb Plot Aided and Abetted by the FBI*, THE GUARDIAN (Nov. 28, 2012, 2:44 PM), <https://www.theguardian.com/commentisfree/2012/nov/28/cleveland-anarchist-bomb-plot-fbi>.

*The Case of United States v. Robertson*

In the case of *United States v. Robertson*, the Government charged defendants Robertson and Jiminez as coconspirators attempting to defraud the government.<sup>57</sup> Robertson, a former marine, was a Muslim religious leader.<sup>58</sup> Robertson met Jiminez through a friend and decided to let him stay at his home.<sup>59</sup> In February 2011, a friend of Robertson filed a fraudulent tax return on Jiminez's behalf, resulting in a tax return of \$5,587. The tax return showed that Jiminez lived at Robertson's address and was filed from Robertson's computer. Additionally, the tax return claimed Robertson's children as dependents. During his stay at the Robertson home, Jiminez was in contact with a confidential informant regarding use of the tax money. Jiminez communicated information about Robertson to the confidential informant, but it seems that Robertson never made incriminating statements directly to the confidential informant.<sup>60</sup> Jiminez maintained that Robertson was neither involved nor had any intent to use the tax return money to commit any violent act.<sup>61</sup> Jiminez pleaded guilty to tax fraud, and Robertson was found guilty of tax fraud after trial.

The government also sought a sentencing enhancement charge under the Foreign Intelligence Surveillance Act for the tax fraud conviction. It argued that the income tax fraud was intended to promote a federal crime of terrorism.<sup>62</sup> Robertson's position was that the trip to Mauritania was for nonviolent purposes, learning Arabic, and studying the Koran. The government's position was that the tax money would be used for costs related to travel to send Jiminez and others to Mauritania to commit terrorism. It alleged that Robertson had been training Jiminez and the trip was for violent means, as he had access to militant Islamic extremist literature.<sup>63</sup>

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57. See *United States v. Robertson*, No. 6:12-cr-63-Orl-31GJK, 2015 WL 3915568, \*1 (M.D. Fla. June 25, 2015).

58. Murtaza Hussain, *Florida Imam Who Claimed to be a Covert Government Operative is Accused of Terrorism*, THE INTERCEPT (June 9, 2015), <https://theintercept.com/2015/06/09/abu-taubah-case/>.

59. *Id.*

60. See Andrew McCarthy, *The Orlando Jihadist and the Blind Sheikh's Bodyguard*, NATIONAL REVIEW (June 14, 2016), <http://www.nationalreview.com/article/436590/omar>.

61. See *Man Accused of Terrorist Aspirations Pleads Guilty to Federal Charges*, WFTV (Aug. 28, 2012), <http://www.wftv.com/news/local/man-accused-terrorist-aspirations-pleads-guilty-fe/288037938>.

62. See *United States v. Robertson*, No. 6:12-cr-63-Orl-31GJK, 2015 WL 3915568, \*1 (M.D. Fla. June 25, 2015).

63. See *id.* at \*1.

However, the court rejected the prosecution's requested imposition of the terrorism enhancement because it failed to meet its burden by a preponderance of the evidence:

The prosecution has failed to show is that Robertson shares these extremist beliefs. The 20-or-so works were part of a 10,000-document Islamic library accessible via Robertson's computer. There was no evidence produced that Robertson ever accessed these particular documents, much less that he took their extremism to heart. Even if the prosecution had shown that Robertson actually read the works in question, it would provide little support for application of the terrorism enhancement. The Government has never disputed Robertson's claim of being an Islamic scholar. It is not at all remarkable for an Islamic scholar to study, among many, many others, the writings of Islamic extremists.<sup>64</sup>

The court continued:

[T]he prosecution never produced any evidence that terrorist training camps exist in Mauritania. On the other hand, both Blake and Gibbons testified that through most of 2011, they expected that Jiminez would be joining them at Blake's school, for entirely peaceful study.<sup>65</sup>

The court also detailed how the prosecution failed to prove its allegations that Robertson was training Jiminez to retaliate against the United States government.<sup>66</sup> It noted the recorded communications were solely composed of Jiminez's claims.<sup>67</sup> Furthermore, the mental state of Jiminez was at issue; he had a history of mental health problems and drug use.<sup>68</sup>

Robertson's case received heavy mainstream media coverage.<sup>69</sup> The

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64. *See id.* at \*5.

65. *See id.* at \*9.

66. *Id.* (noting that a federal terrorism crime is one that is "calculated to influence or affect the conduct of a government by intimidation or coercion or to retaliate against government conduct") (quoting 18 U.S.C. § 3A1.4 (2002)).

67. *See id.* at \*6 (adding that the government's surveillance of Robertson produced no evidence of Robertson engaging in or planning any terrorist acts).

68. *See id.* at \*2; *see also* Hussain, *supra* note 58.

69. *See generally* Hussain, *supra* note 58; Chris Spargo, *US Marine and FBI Agent Turned Muslim Extremist Who Worked for World Trade Center Bomber Radicalizing Dozens of Fellow Prisoners Behind Bars*, DAILY MAIL UK (June 5, 2015, 3:51 PM), <http://www.dailymail.co.uk/news/article-3112544/US-Marine-FBI-agent-turned-Muslim-extremist-worked-World-Trade-Center-bomber-radicalizing-dozens-fellow-prisoners-bars.html>; Mailia Zimmerman, *Gangster-Turned-Radical Imam May Have Radicalized Dozens Behind Bars*, FOX NEWS (June 4, 2015), <http://www.foxnews.com/us/2015/06/04/feds-say-gangster-turned-radical-imam-radicalized-dozens-behind-bars.html> [hereinafter "Zimmerman, *Gangster-Turned-Radical*"].

media described Robertson as a former U.S. Marine who transformed into a Muslim radical.<sup>70</sup> Fox News went beyond the criminal or violent actions of Robertson and reported on personal issues that had nothing to do with criminal conduct, such as his polygamous lifestyle, and tried to link this to Islamic law.<sup>71</sup> Daily Mail reported that since his incarceration Robertson has spent most of his time at the jail's mosque and then identified him as a Muslim extremist.<sup>72</sup> Although Robertson was not convicted on terrorism charges, mainstream media relentlessly identified Robertson as a terrorist, radical or extremist, and terrorist recruiter. It used his criminal history and suspected gang involvement from the 1990s to support this notion.<sup>73</sup> The government attempted to use Robertson's possession of Islamic literature as evidence that he is a violent extremist.<sup>74</sup> One article described the judge finding in favor of Robertson as, "radical imam set free after judge acquits him of recruiting men for terrorist organisations."<sup>75</sup> Meanwhile the fact is that post-1990s, Robertson worked as a confidential informant for the Federal Bureau of Investigations, which had explicit knowledge of Robertson's criminal history.<sup>76</sup>

### *The Case of People v. Casteel*

Raulie Wayne Casteel shot at moving vehicles on various roadways from October 16 to October 18, 2012.<sup>77</sup> Upon a search of his home, police found a nine-millimeter handgun. Casteel's Twitter post stated, "The 2nd Amend is an absolute -- absolutely no compromises -- I carry everywhere I go!"<sup>78</sup>

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70. Hussain, *supra* note 58.

71. Zimmerman, *Gangster-Turned-Radical*, *supra* note 69.

72. Spargo, *supra* note 69.

73. See Malia Zimmerman, *Federal Judge Frees Fla. Imam -- a Former Marine Accused of Radicalizing Homegrown Terrorists*, FOX NEWS (June 30, 2015), <http://www.foxnews.com/us/2015/06/30/federal-judge-frees-former-marine-fla-imam-accused-radicalizing-homegrown.html> [hereinafter "Zimmerman, *Federal Judge*"].

74. See Hussain, *supra* note 58.

75. Oge Okonkwo, *Radical Imam Set Free After Judge Acquits Him of Recruiting Men for Terrorist Organisations*, PULSE (Feb. 7, 2015), <http://pulse.ng/religion/marcus-dwayne-robertson-radical-imam-set-free-after-judge-acquits-him-of-recruiting-men-for-terrorist-organisations-id3932104.html>.

76. See Spargo, *supra* note 69 (explaining that Robertson became an FBI informant as part of a plea deal for an arrest in 1991).

77. *People v. Casteel*, No. 321340, 2015 WL 5440195 at \*1 (Ct. App. Mich. Sept. 15, 2015).

78. See Gina Damron & Tammy Stables Battaglia, *Disturbing Details Emerge in Mich. Highway Shootings*, USA TODAY (Nov. 8, 2012, 9:03 AM), <https://www.usatoday.com/story/news/nation/2012/11/08/michigan-highway-shooting/1691325/>; see

Sixty charges were filed against Casteel, including terrorism and attempted murder charges from six different counties. Casteel was ultimately convicted of terrorism, felonious assault, three counts of possession of a firearm during the commission of a felony, carrying a dangerous weapon with unlawful intent, and intentional discharge of a firearm from a motor vehicle.<sup>79</sup>

The Court of Appeals of Michigan ultimately analyzed Casteel's mental health after the trial court rejected the defense argument of diminished capacity.<sup>80</sup> The defense argued that at the time of the assaults, Casteel did not have the mental capacity to be guilty of terrorism and assault because he could not form the requisite intent.<sup>81</sup> It also asserted the trial court violated Casteel's constitutional right to present a defense when it prohibited expert testimony regarding his mental illness.<sup>82</sup> The Court of Appeals rejected these arguments on ground that the diminished capacity defense was no longer operable in Michigan or required under *People v. Carpenter* and *Clark v. Arizona*.<sup>83</sup>

Nevertheless, mainstream media painted Casteel as a mentally unstable, college-educated, "married father" whose paranoia and delusions led him to commit the shootings.<sup>84</sup> USA Today quoted Casteel's neighbors calling him a "really nice guy" and someone "always willing to help out."<sup>85</sup> The media did not deem the shootings as an act of terrorism. Fox News went out of its way to counteract a terrorism classification when reporting on Casteel's case by highlighting his lawyer's statement at sentencing.

"Is Raulie Casteel actually a terrorist — is this really what the Legislature had in mind when it passed the Michigan anti-terrorism act in wake of attacks

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also John Turk, *Freeway Shooting Suspect Raulie Casteel Will Appear in Novi Court Friday; Details of Case Could Emerge with Video*, OAKLAND PRESS (Feb. 28, 2013, 12:01 AM), <http://www.theoaklandpress.com/article/OP/20130228/NEWS/302289893>.

79. See *Casteel*, 2015 WL 5440195 at \*1.

80. *Id.* at \*2.

81. See *id.* at \*2-4.

82. *Id.*

83. See *id.* at \*3 (citing *People v. Carpenter*, 627 N.W.2d 276 (2001) ("The United States Supreme Court upheld an Arizona evidentiary rule that prohibits criminal defendants from using evidence of a mental disorder short of insanity to negate the specific intent of a crime")); see also *Clark v. Arizona*, 548 U.S. 735, 744-745, 779 (2006).

84. Kevin Dolak, *Michigan Highway Shooting Suspect Identified as Raulie Wayne Casteel*, ABC NEWS (Nov. 7, 2012), <http://abcnews.go.com/US/michigan-highway-shooting-suspect-identified-raulie-wayne-casteel/story?id=17665996>; see also Turk, *supra* note 78.

85. Damron & Battaglia, *supra* note 78.

in 2001?” asked Mullkoff before the sentencing. “I think they were thinking of Osama bin Laden, Timothy McVeigh. Did Raulie Casteel fit into that category? I don’t think so. The post-9/11 law passed by Legislature did not contemplate someone who is mentally ill like Mr. Casteel.”<sup>86</sup>

The mass violence and mass fear that Casteel bestowed on the community was not considered terrorism even though the shooting rampage spanned six counties in Michigan.<sup>87</sup> The media also made sure to include statements from family members in support of Casteel. His mother stated, “she tried to get her son help, but could not get him to see a doctor.”<sup>88</sup> Furthermore, the coverage only referred to the violence as terrorism when describing the specific charges brought by the Government against Casteel, not Casteel himself.<sup>89</sup>

### *The Case of Clayton Lee Waagner*

On December 3, 2003, a jury convicted Clayton Lee Waagner of fifty-one counts of threatening to use a weapon of mass destruction, mailing threatening communications, threatening interstate communications, and violating the Freedom of Access to Clinic Entrances Act.<sup>90</sup> Waagner was arrested after becoming a fugitive for mailing over two-hundred eighty letters claimed to contain anthrax.<sup>91</sup> The envelopes contained a note stating, “We are going to kill you” signed by the “Army of God”.<sup>92</sup> At the time of his arrest, Waagner planned to murder various abortion doctors on a self-described “mission from God.”<sup>93</sup> Waagner was also convicted of interstate transportation of a stolen motor vehicle and of being a convicted *felon* in

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86. *Michigan Man Gets 18 to 40 Years for Freeway Shootings*, FOX NEWS (Mar. 4, 2014), <http://www.foxnews.com/us/2014/03/04/man-gets-up-to-40-years-for-michigan-freeway-shootings.html> [hereinafter “*Michigan Man*, FOX NEWS”].

87. *See id.*

88. Damron & Battaglia, *supra* note 78.

89. Dolak, *supra* note 84 (referring to Casteel’s actions as a “shooting”); Turk, *supra* note 78 (listing the charges against Casteel)

90. *See United States v. Waagner*, No. 02-582-1, 2014 WL 2710953 at \*1 (E.D. Penn. 2014).

91. *Suspected Anthrax Hoaxer Nabbed*, CNN (Dec. 6, 2001), <http://edition.cnn.com/2001/US/12/05/anthrax.abortion/> [hereinafter “*Hoaxer Nabbed*, CNN”].

92. Francis X. Clines, *Man Is Arrested in Threats Mailed to Abortion Clinics*, N.Y. TIMES (Dec. 6, 2001), <http://www.nytimes.com/2001/12/06/us/man-is-arrested-in-threats-mailed-to-abortion-clinics.html>.

93. *Abortion Foe Who Escaped Jail Gets 30-Year Sentence*, CHI. TRIB. (Jan. 26, 2002), [http://articles.chicagotribune.com/2002-01-26/news/0201260266\\_1\\_dewitt-county-jail-clayton-lee-waagner-abortion](http://articles.chicagotribune.com/2002-01-26/news/0201260266_1_dewitt-county-jail-clayton-lee-waagner-abortion)

possession of *firearms*.<sup>94</sup>

Federal prosecutors sought a life sentence for the anthrax letter spree, arguing that Waagner's actions fit the federal definition for terrorism. Under federal law, terrorism involves an offense that is calculated to influence or affect the conduct of the government by intimidation or coercion or to retaliate against the government.<sup>95</sup> Waagner's attorney argued that Waagner's crime did not meet the definition of terrorism because "Waagner intended to influence, not the government, but the conduct of reproductive nonprofit clinics, namely Planned Parenthood."<sup>96</sup> The court seemed to be persuaded by the arguments of Waagner's attorney that because the actions were not targeted at the government, Waagner's actions did not meet the terrorism standard.<sup>97</sup> The court sentenced him to nineteen years in prison.<sup>98</sup> Mental illness was raised in these court proceedings, with the record reflecting that Waagner was diagnosed with Adjustment Disorder, with disturbance of emotions and conduct; Chronic Delusional Behavior, grandiose type; and Adult Antisocial Behavior.<sup>99</sup> The court referenced the Presentence Investigation Report as noting that Waagner believed God wanted him to kill abortion doctors.<sup>100</sup>

The mainstream news reports did not classify Waagner as a domestic terrorist. CNN referred to Waagner as an "anthrax hoaxer" with ties to anti-abortion extremism.<sup>101</sup> The New York Times deemed Waagner an

94. Press Release, Fed. Bureau Investigation, The FBI Announces New Information Regarding Top Ten Fugitive Clayton Lee Waagner, (Nov. 30, 2001), <https://archives.fbi.gov/archives/news/pressrel/press-releases/the-fbi-announces-new-information-regarding-top-ten-fugitive-clayton-lee-waagner> [hereinafter "Press Release, Fed. Bureau Investigation, New Information"].

95. 18 U.S.C. § 2332b (2011).

96. Elliot Grossman, *Prosecutors Want Life Term for Waagner*, THE MORNING CALL (June 26, 2004), [http://articles.mcall.com/2004-06-26/news/3533554\\_1\\_clayton-lee-waagner-life-sentence-anti-abortion](http://articles.mcall.com/2004-06-26/news/3533554_1_clayton-lee-waagner-life-sentence-anti-abortion).

97. *Waagner*, 2014 WL 2710953 at \*1.

98. Press Release, U.S. Dep't of Just., Clayton Lee Waagner Found Guilty of Making Anthrax and Death Threats – Faces Maximum Possible Sentence of Life Imprisonment (Dec. 3, 2003), [https://www.justice.gov/archive/opa/pr/2003/December/03\\_crt\\_661.htm](https://www.justice.gov/archive/opa/pr/2003/December/03_crt_661.htm) [hereinafter "Press Release, U.S. Dep't of Just."]; see also Elliot Grossman, *Prosecutors Want Life Term for Waagner*, MORNING CALL (Jun. 26. 2004), [http://articles.mcall.com/2004-06-26/news/3533554\\_1\\_clayton-lee-waagner-life-sentence-anti-abortion](http://articles.mcall.com/2004-06-26/news/3533554_1_clayton-lee-waagner-life-sentence-anti-abortion).

99. *Waagner*, 2014 WL 2710953 at \*1.

100. *Id.*

101. *Hoaxer Nabbed*, CNN, *supra* note 98.



antiabortion advocate.<sup>102</sup> The Times mentioned that Waagner believed he was gathering weapons at God's direction to "be my warrior" and kill doctors who provided abortions. It quoted his wife as saying, "I know he believed this came from God." Yet, it made no other mention of Waagner's ties to Christianity; but, instead, wrote that he was "described by his pursuers as a wily man with survival skills."<sup>103</sup> The Guardian called him a "leading anti-abortion activist," in an article that focused on US military production of anthrax powder.<sup>104</sup>

*The Case of Lucas John Helder*

In 2002, Lucas John Helder, a twenty-one year old college student, was arrested for rigging pipe bombs attached with nine-volt batteries to eighteen mailboxes in the rural Midwest.<sup>105</sup> Helder engineered the bombs to explode when the mailboxes were opened.<sup>106</sup> A total of six bombs were detonated.<sup>107</sup> He selected mailboxes to target in a pattern to show a happy face and placed, inside the mailboxes, notes espousing anti-government sentiments in the mailboxes.<sup>108</sup> Helder injured six people in Nebraska, Colorado, Texas, Illinois, and Iowa.<sup>109</sup> BBC News also reported that Helder sought media attention so that he could spread his message against government control over daily life, against the legalization of marijuana, and to promote astral projection.<sup>110</sup> Helder was charged with using an explosive to maliciously destroy property affecting interstate commerce and using a destructive device to commit a crime of violence.<sup>111</sup>

The FBI called the pipe bombings acts of domestic terrorism.<sup>112</sup> However,

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102. Clines, *supra* note 92.

103. Clines, *supra* note 92.

104. Duncan Campbell, *FBI Uncovers US Military Production of Anthrax Powder*, THE GUARDIAN (Dec. 13, 2001, 8:37 PM), <https://www.theguardian.com/world/2001/dec/14/anthrax.uk>.

105. *Police: Suspect Planned Smiley Face Bomb Pattern*, CNN (May 9, 2002), <http://edition.cnn.com/2002/US/05/09/mailbox.pipebombs/index.html>.

106. *Id.*

107. *See id.*

108. *See id.*

109. *See id.*

110. *'Pipe-Bomber' Baffles Friends and Family*, BBC NEWS (May 9, 2002), <http://news.bbc.co.uk/2/hi/americas/1978381.stm>.

111. Dan Eggen, *Pipe Bomb Suspect Arrested*, THE WASH. POST (May 8, 2002), <https://www.washingtonpost.com/archive/politics/2002/05/08/pipe-bomb-suspect-arrested/2ed89b01-c5dc-4016-8fd8-80112955180c/>.

112. Press Release, Fed. Bureau Investigation, Statement by FBI Director Muller on

the mainstream media did not call Helder a domestic terrorist, it humanized him. The media dubbed Helder the “Midwest Pipe Bomber” or “the Smiley Face Bomber,” and frequently mentioned his status as a musician prior to the bombings.<sup>113</sup> CNN, for example, described Helder as “the clean-cut college student and one-time rock band member.”<sup>114</sup> The BBC similarly cited Helder’s character in an article titled “Pipe-bomber Baffles Friends and Family.”<sup>115</sup> It reported on Helder’s good character in-depth by quoting numerous neighbors and peers.<sup>116</sup> Furthermore, BBC presents him as a polite and well-behaved young man.<sup>117</sup> This character trend was also seen in *The Washington Post*, which reported that Helder’s peers were shocked he could commit such acts.<sup>118</sup> Moreover, the *Post* reported that Helder was an “angst-ridden college student” who played in a band and “loved the grunge band Nirvana.”<sup>119</sup>

News sources further reported that Helder did not think people could actually die, instead believing that their souls just went to another dimension.<sup>120</sup> In April 2004, a federal judge found Helder incompetent to stand trial and institutionalized him at the Federal Medical Center in Rochester, Minnesota.<sup>121</sup> Helder was diagnosed with schizoaffective disorder that caused delusions and feelings of grandiosity.<sup>122</sup> Periodic competency hearings have been ordered, including one conducted in 2013 by U.S. District Judge Mark Bennett.<sup>123</sup> Helder will remain in a mental institution until he is determined competent to stand to trial.<sup>124</sup>

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Arrest of Luke John Helder, (May 8, 2002), <https://archives.fbi.gov/archives/news/pressrel/press-releases/statement-by-fbi-director-robert-s.-mueller>.

113. See generally BBC NEWS, *supra* note 110; Eggen, *supra* note 111; *Suspect Planned Smiley Face*, *supra*, note 105.

114. *Suspect Planned Smiley Face*, *supra*, note 105.

115. BBC NEWS, *supra* note 110.

116. *Id.*

117. *Id.*

118. Eggen, *supra* note 111.

119. *Id.*

120. Debbie Howlett, *Suspect Said He Wanted to Create Happy Face Pattern*, USA TODAY (May 9, 2002), <http://usatoday30.usatoday.com/news/nation/2002/05/09/helder.htm>.

121. *Minnesotan in 2002’s ‘Smiley Face Bomber’ Case Could Finally Face Trial*, TWIN CITIES PIONEER PRESS (May 15, 2013), <http://www.twincities.com/2013/05/15/minnesotan-in-2002s-smiley-face-bomber-case-could-finally-face-trial/>.

122. *Id.*

123. *Id.*

124. TWIN CITIES PIONEER PRESS, *supra* note 121.

*The Case of John Allen Muhammad and Lee Boyd Malvo*

The case of John Allen Muhammad and Lee Boyd Malvo was an isolated case where one of the perpetrators, Muhammad, was a person of Muslim faith who had engaged in mass violence was not outright categorized as a terrorist. They were arrested for conducting the Beltway sniper attacks—a series of shootings that took place over several weeks around Virginia, Maryland and Washington D.C.<sup>125</sup> Muhammad and Malvo killed a total of ten people and critically injured three.<sup>126</sup> The Virginia Supreme Court ruled that because the rampage was “pursuant to the direction or order” of terrorism, Muhammad could be sentenced to death. Malvo, who was seventeen years old at the time of the crimes, was sentenced to life in prison.<sup>127</sup>

Notably, according to several reports, investigators had previously said they had all but eliminated terrorist ties or political ideologies as a motive.<sup>128</sup> A series of trial exhibits suggested an affinity for Islamist jihad motivated the men.<sup>129</sup> This was despite the fact that Muhammad’s lawyer described him as mentally ill and suffering from Gulf War syndrome.<sup>130</sup> Similarly, the New York Times also focused on Muhammad’s race, releasing a headline that read “THE HUNT FOR A SNIPER: AN ASSUMPTION UNDONE; Many Voice Surprise Arrested Men Are Black”.<sup>131</sup>

The mainstream media also focused its attention on presenting the two men as involved in a mentor-mentee relationship and Muhammad as a

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125. See *Muhammad v. Commonwealth*, 619 S.E.2d 16, 24 (Va. 2005); see also Julia Borger, *Captured in Their Sniper’s Nest: Gulf Veteran and the Teenager*, THE GUARDIAN (Oct. 25, 2002, 3:31 AM), <https://www.theguardian.com/world/2002/oct/25/usgunviolence.usa3>.

126. See *id.*

127. *Muhammad*, 619 S.E.2d at 33-36, 43-44 (explaining that a criminal who orders or directs the killing shares the intent to kill with the one who carries out the murder and is therefore subject to the death penalty).

128. See Opening Brief of Appellant, *Muhammad v. Virginia*, No. 041050, 2004 WL 3641588 at \*63 (Va. Jul. 19, 2004).

129. See Borger, *supra* note 125 (noting that Muhammad had converted to Islam seventeen years prior to the attacks and voiced sympathy for the aims of the September 11 attackers).

130. Jeanne Meserve & Mike M. Ahlers, *Sniper John Allen Muhammad Executed*, CNN (Nov. 11, 2009, 3:42 AM).

131. Steven Holmes, *THE HUNT FOR A SNIPER: AN ASSUMPTION UNDONE; Many Voice Surprise Arrested Men Are Black*, N.Y. TIMES (Oct. 25, 2002), <http://www.nytimes.com/2002/10/25/us/hunt-for-sniper-assumption-undone-many-voice-surprise-arrested-men-are-black.html>.

confused and out-of-control war veteran.<sup>132</sup> The New York Post referred to Muhammad and Malvo as the Army veteran and his “teenage sidekick” and the shootings as a “psycho slay spree.”<sup>133</sup> Additionally, the Washington Post described Muhammad as a “serial loser,” a “failed businessman, a twice-divorced father whose ex-wives didn’t trust him with their children, a mediocre soldier, and a man whose unremarkably messy life disintegrated into homelessness and theft.”<sup>134</sup> The Guardian painted a similar picture of Muhammad, explaining a time line of events that led him to “slip off the rails.”<sup>135</sup>

Though it was not its focus, the media did mention that Muhammad had converted to Islam, and the New York Times explored the religion’s role in the crimes.<sup>136</sup> Still, it described Muhammad as a psychopath and did not portray the acts as religious terrorism.<sup>137</sup> Overall, the media did not portray the shootings as an act of domestic terrorism, or the men as terrorists. The media only reported on terrorism in connection to the crimes when it reported that the men were facing gun possession charges.<sup>138</sup> Although it was well covered in the media that Muhammad was Muslim, the media did not refer to his case as one of “Islamic terrorism.”

#### *The Case of State v. Knotts*

In September 2010, Zachary Allen Knotts, Jr. was arrested for threatening to place explosive devices on the vehicles of the Fairmont Federal Credit Union’s employees.<sup>139</sup> The credit union had closed Knotts’ account due to his inappropriate conversations with customers involving circumcision.<sup>140</sup>

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132. See Dean Murphy, David Gonzalez, Jeffrey Gettleman, *RETRACING A TRAIL: THE SUSPECTS; The Mentor and the Disciple: How Sniper Suspects Bonded*, N.Y. TIMES (Nov. 3, 2002), <http://www.nytimes.com/2002/11/03/us/retracing-trail-suspects-mentor-disciple-sniper-suspects-bonded.html>.

133. Niles Latham, *Psycho Slay Spree is Over – Trail of Gory Clues Leads to Accused Beltway Killer and His Teenage ‘Partner’*, N.Y. POST (Oct. 25, 2002 4:00 AM), <http://nypost.com/2002/10/25/psycho-slay-spree-is-over-trail-of-gory-clues-leads-to-accused-beltway-killer-and-his-teenage-partner/>.

134. April Witt & Justin Blum, *John Allen Muhammad*, WASH. POST (Oct. 25, 2002), <https://www.washingtonpost.com/archive/politics/2002/10/25/john-allen-muhammad/d16d7395-1bb3-4b0b-8e05-36932a278f8d/>.

135. Julie Borger, *Bonded by Guns and Indifference to Human Life*, THE GUARDIAN (Oct. 24, 2002), <https://www.theguardian.com/world/2002/oct/25/usgunviolence.usa1>.

136. See *id.*; see also Murphy et al., *supra* note 132.

137. Murphy et al., *supra* note 132.

138. Borger, *supra* note 135.

139. State v. Knotts, 760 S.E.2d 479, 481-82 (W. Va. 2014).

140. *Id.* at 481; see also Misty Poe, *Man Charged with Threat of Terrorist Attacks*,

According to police, Knotts also had a history of posting anti-establishment rantings online.<sup>141</sup> Initially, the trial was delayed because competency hearings in March 2011 indicated that Knotts was not mentally fit to stand trial.<sup>142</sup>

Knotts unsuccessfully argued that his threats to the bank were merely the rantings of a mentally unstable person who was angry. The defense filed an appeal, and the Court of Appeals affirmed that there was sufficient evidence to support Knotts' conviction for the commission of terroristic threat and held him in custody.<sup>143</sup> Based on Knotts' three prior competency hearings finding him incompetent to stand trial, it is unlikely a court will ever deem Knotts competent to stand trial and subject him to civil commitment to a mental institution for the rest of his life. If convicted, Knotts faces the maximum punishment of a one-to three-year sentence, a \$5,000 to \$25,000 fine, or both.<sup>144</sup> Knotts was arrested again in 2016 for making violent threats against a Marion County circuit judge, a prosecuting attorney, a defense attorney, and police officers.<sup>145</sup>

Despite a criminal history, the Knotts case was not clearly classified as terrorism in the media, and when sources did use the term "terrorism," there was a conscious effort to use the words "alleged" or "charged" with "terroristic threats."<sup>146</sup> The title of one article, for example, was simply: "Fairmont Man Arrested for Making Violent Threats."<sup>147</sup> There was no national media coverage on this case, only local news. The local news coverage simply reiterated what was stated on Knotts' arrest record and cited the police statement. There was no elaboration of opinion, the impact on the

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TIMES WEST VIRGINIAN (Oct. 2, 2010), [http://www.timeswv.com/news/local\\_news/man-charged-with-threat-of-terrorist-acts/article\\_53ae3a2c-d48a-5656-84d1-1ff36cf9a800.html](http://www.timeswv.com/news/local_news/man-charged-with-threat-of-terrorist-acts/article_53ae3a2c-d48a-5656-84d1-1ff36cf9a800.html).

141. Nicole Porter, *Police: Man Threatened Lives of Judge, Two Attorneys*, 5NEWS – WDTV (July 15, 2016, 3:45 PM), <http://www.wdtv.com/content/news/Police-Man-Threatened-Lives-of-Judge-Two-Attorneys-387009051.html>.

142. *Knotts*, 760 S.E.2d at 480-81.

143. *See id.* at 486.

144. Poe, *supra* note 140.

145. *Fairmont Man Arrested for Threatening to Kill Judge*, Prosecuting Attorney, NEWS 12 – WV, July 8, 2016, <http://www.wvalways.com/story/32404107/fairmont-man-arrested-for-threatening-to-kill-judge-prosecuting-attorney>.

146. *See Fairmont Man Arrested for Making Violent Threats*, W. VA. METRONEWS NETWORK (July 9, 2016, 8:20 AM), <http://wvmetronews.com/2016/07/09/fairmont-man-arrested-for-making-violent-threats/>; Poe, *supra* note 84; Porter, *supra* note 85.

147. W. VA. METRONEWS NETWORK, *supra* note 140, <http://wvmetronews.com/2016/07/09/fairmont-man-arrested-for-making-violent-threats/>.

community, or connections to other terrorist or criminal acts.<sup>148</sup> Furthermore, no reporter examined Knotts' background or anti-establishment views.<sup>149</sup>

*The Case of People v. Osantowski*

In 2005, Andrew Paul Osantowski was convicted of making a threat of terrorism, using a computer to further a terrorist act, and possessing stolen weapons in connection with his online threat to carry out a massacre at Chippewa Valley High School.<sup>150</sup> In internet chat room messages, Osantowski threatened to kill students at his high school.<sup>151</sup> Osantowski's screen name in the internet chat was "Nazi-botsadistic."<sup>152</sup> Upon search of Osantowski's home, police found weapons including an AK47, pipe bombs, ammunition, chemicals, and bomb-making instructions; as well as, Nazi flags and books about white supremacy and Adolf Hitler.<sup>153</sup> He was sentenced to a two-year prison term for a felony-firearm charge served along with existing terms of thirty months to twenty years for other convictions.<sup>154</sup> The prosecution sought 100 points in sentencing under offense variable twenty on appeal which the Court of Appeals granted.<sup>155</sup> In 2008, the Supreme Court of Michigan overruled, holding that the 100 points would be inappropriate because the threats themselves did not qualify to meet the definition of an act of terrorism.<sup>156</sup>

In 2010, Osantowski went back to court when the Michigan Department of Corrections considered him for parole.<sup>157</sup> The parole board deemed that

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148. *Id.*

149. *See id.*

150. *People v. Osantowski*, 748 N.W.2d 799, 800 (Mich. 2008).

151. *Officer's Daughter Foils Internet Bomb Plot*, USA TODAY, (Sept. 20, 2004 12:16 PM), [http://usatoday30.usatoday.com/tech/news/2004-09-20-bomb\\_x.htm](http://usatoday30.usatoday.com/tech/news/2004-09-20-bomb_x.htm) [hereinafter "*Officer's Daughter*, USA TODAY"].

152. *Id.*; *Teen Pleads Guilty in Internet Terror Case*, FOX NEWS (June 9, 2005) <http://www.foxnews.com/story/2005/06/09/teen-pleads-guilty-in-internet-terror-case.html> [hereinafter "*Teen Pleads Guilty*, FOX NEWS].

153. *See Osantowski*, 748 N.W.2d. at 800; *Officer's Daughter*, USA TODAY, *supra* note 149.

154. *See Osantowski*, 748 N.W.2d at 800.

155. *See id.*

156. *See id.* at 802 (explaining that knowing and premeditated threats that lead to acts of are punishable up to life in prison, while threats and false reports are only punishable for up to 20 years in prison).

157. *Macomb Cnty. Prosecutor v. Osantowski*, No. 291628, 2010 WL 2384977 at \*1 (Ct. App. Mich. June 25, 2010).

he was not a threat to society and granted him parole for twenty-four months.<sup>158</sup> However, the decision was soon revoked as the parole board realized that his scores for probability of violence, criminal thinking, and depression/mental health were quite high.<sup>159</sup> Osantowski's mental health was a central part of the parole board's assessment of him. The parole board determined that—despite his ability to rationalize his crimes, victim-blaming, refusal to take ownership of his actions, and history of depression and suicidal tendencies—Osantowski was worthy of parole.<sup>160</sup> While the trial court and court of appeals agreed that the parole board had abused its discretion and that he was not fit for parole at this time, the Supreme Court of Michigan reversed the decision and allowed for parole in the future.<sup>161</sup>

A search of Osantowski's name on mainstream news sources returned two results, one from Fox and the other from USA Today. This limited mainstream media coverage focused on the police officer's daughter who reported Osantowski, not Osantowski's actual conduct or actions.<sup>162</sup> No media reports refer to Osantowski as a terrorist. Local news covered the Osantowski case tangentially as outlets covered separate court proceedings but not the terrorism charges, including Macomb Daily and the Oakland Press.<sup>163</sup> These local news media sources declined to discuss the Nazi and white supremacist paraphernalia that was found in Osantowski's room. The demographic of the population that lived in Clinton Township or attended the Detroit suburb's Chippewa Valley High School, played a role in categorization of the violence Osantowski intended to commit as not terrorism.

The Computer Crime Research Center discussed how Osantowski threatened to blow the head off a school police liaison officer.<sup>164</sup> It reported his father, a Member of the Knights of Columbus, was aware of the stolen

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158. *Id.*

159. Ed White, *No Release for Man Who Threatened Clinton Township High School*, OAKLAND PRESS NEWS (June 16, 2010), <http://www.theoaklandpress.com/article/OP/20100616/NEWS/306169932>.

160. *Id.* (stating the parole board found that he would not be a risk to the public).

161. Macomb Cnty Prosecutor v. Osantowski, 790 N.W. 2d 687, 688 (Mich. 2010).

162. *Officer's Daughter*, USA TODAY, *supra* note 93; *Teen Pleads Guilty*, FOX NEWS, *supra* note 151.

163. *Teen Who Plotted School Massacre Faces New Charges*, MACOMB DAILY NEWS (June 21, 2016), <http://www.macombdaily.com/article/MD/20060621/NEWS01/306219999>; White, *supra* note 159.

164. Dmitri Kramarenko, *Quiet Teen's Terror Plot Stuns School*, COMPUTER CRIME RESEARCH CENTER (Sept. 27, 2004), <http://www.crime-research.org/news/27.09.2004/665/>.

weapons and Osantowski's neighbor taught him how to blow up objects.<sup>165</sup> However, the Center, at the same time, referred to Osantowski as a "quiet teen" and Osantowski's Nazi and white supremacy materials as "memorabilia."<sup>166</sup> The Center's article also discussed how Osantowski suffered from depression and tended to his autistic brother.<sup>167</sup>

The judge in the case ruled that the prosecution could not introduce the Nazi and white supremacist paraphernalia as evidence at trial. In 2009, the parole board granted release to Osantowski stating that Osantowski was no longer a public threat after serving the minimum sentencing of fifty-four months with a maximum of 264 months, or twenty-two years.<sup>168</sup>

### *The Case of State v. Elphic*

In 2013, the Hampton Police Department in Iowa arrested Jonathan Elphic on disorderly conduct and harassment charges, related to Facebook posts from November 2011 of photos about mass murder.<sup>169</sup> The Hampton Police Department considered the photos on the social media platform to be of a threatening nature. Using Facebook, Elphic sent private messages and published public posts with the statement, "There Will be a Human under Mind Control Lunch Time High school it's our Job, no one can stop us, if you Love your Child You'll send them home for lunch . . . K?!",<sup>170</sup> along with photographs of known shooters, bloody bodies, and decapitations.<sup>170</sup>

During his trial, the State charged Elphic with threat of terrorism and harassment in the first degree.<sup>171</sup> Elphic entered a guilty plea in exchange for the state dropping the terrorism charge.<sup>172</sup> Additionally, he promised that as part of his possible probation, he would undergo a mental health evaluation.<sup>173</sup> In 2014, the court sentenced him to an indeterminate two years in prison, which he later appealed.<sup>174</sup> On appeal, the court did not discuss Elphic's mental health any further because it found there was ineffective

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165. *Id.*

166. *See id.*

167. *See id.*

168. White, *supra*, note 159.

169. *See* Mike Bunge, *Conviction Reversed in Case of Facebook Threats About Killing School Kids*, KIMT (Jan. 28, 2015 12:50 PM), <http://kimt.com/2015/01/28/conviction-reversed-in-case-of-facebook-threats-about-killing-school-kids/>.

170. *See id.*

171. *State v. Elphic*, No. 14-0600, 2015 WL 408092 at \*2 (Iowa Ct. App. Jan. 28, 2015).

172. *Id.*

173. *See id.*

174. *See id.*



assistance of counsel based on his attorney allowing him to enter a guilty plea.<sup>175</sup> The case was remanded for further proceedings.

Later, Elphic's conviction was overturned based on lack of factual basis to support that Elphic actually threatened to commit the crime.<sup>176</sup> Elphic asserted that he did not threaten to kill children but that he only stated his belief that someone should shoot up the school.<sup>177</sup> Except for the Washington Times,<sup>178</sup> only local news media covered the Elphic case. No news reports or articles referred to Elphic as a terrorist. The reports typically only explained the case and court proceedings, without reporting on Elphic's history or motivations.<sup>179</sup>

### *The Case of Schipke v. United States*

In October 2004, Mary Elizabeth Schipke told a post office clerk, "God, I pray a bomb falls on your stupid, fucking head."<sup>180</sup> Schipke was convicted of threatening a federal facility with weapons of mass destruction, and sentenced to four years.<sup>181</sup> In 2011, Schipke attempted to vacate her conviction before the United States District Court of Arizona.<sup>182</sup>

Schipke contested her conviction on several grounds, including diminished mental capacity.<sup>183</sup> The court brushed it aside as a miscellaneous claim that was unsupported and barred because it was not raised in the lower court.<sup>184</sup> Schipke claimed that she was involuntarily mentally impaired due to taking large amounts of pain medication and that she had inadequate representation of counsel as her lawyer failed to utilize a temporary insanity

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175. See *id.* at \*4.

176. *Id.*

177. See *Man Who Made Facebook Postings about Mass Murder Wins Appeal*, DAILY HERALD (Jan. 28, 2015, 12:06 PM), <http://www.dailyherald.com/article/20150128/news/301289829/>; see also *Man Who Made Facebook Postings about Mass Murder Wins Appeal*, DAILY HERALD (Jan. 28, 2015, 12:06 PM), <http://www.dailyherald.com/article/20150128/news/301289829/>.

178. See generally *KXEL News, Hampton Man's Conviction Thrown Out by Appeals Court*, ROCK 108 (Jan. 29, 2015); *Man Who Made Facebook Postings About Mass Murder Wins Appeal*, WASH. TIMES (Jan. 28, 2015), <http://www.washingtontimes.com/news/2015/jan/28/man-who-made-facebook-postings-about-mass-murder-w/>.

179. See generally ROCK 108, *supra* note 178.

180. See *Schipke v. U.S.*, No. CV 10—001—TUC—CKJ, 2011 WL 10550694 at \*11 (D. Ariz. 2011).

181. See *id.* at \*1.

182. See *id.*

183. See *id.* at \*6.

184. See *id.* at \*9–10.

defense.<sup>185</sup> The court analyzed this claim in-depth, referring to case law and statutes, and held that it would not have ruled evidence of her claimed mental impairment as admissible.<sup>186</sup> The court found that Schipke did not show a likely probability that she would have acted differently without the influence of medication or that such a defense would have been successful had her counsel looked into it.<sup>187</sup>

Only local media covered the Schipke case.<sup>188</sup> No coverage referred to Schipke as a terrorist.<sup>189</sup> The Tucson Weekly reported Schipke's arrest and detailed her personal concerns with DNA testing while she was incarcerated.<sup>190</sup> The paper described her attorney's legal arguments and the American Civil Liberties Union's position that Schipke does not qualify as a terrorist.<sup>191</sup> Prior to this incident in 2004 incident, the Tucson Citizen had reported on another, which also raised questions on Schipke's mental instability. A court ordered for Schipke to undergo a psychiatric evaluation, after she barricaded herself and her child in a trailer during a twenty-five-hour standoff where she pointed a gun at the police.<sup>192</sup>

#### *The Case of People v. Carrier*

In August 2013, Brandon Carrier was charged with threat of terrorism and felony firearm charges, following a five-hour armed standoff with the police.<sup>193</sup> According to media reports and court testimony, after drinking at a bar, Carrier told a friend that he was going to shoot the Bay County Sheriff Deputy and put his ex-girlfriend in a wood chipper.<sup>194</sup> A few hours later,

185. *See id.* at \*9, 12.

186. *See id.* at \*10–11.

187. *See id.* at \*11.

188. *See generally* *Woman Convicted of WMD Threat*, TUCSON NEWS NOW, <http://www.tucsonnewsnow.com/story/3731366/woman-convicted-of-wmd-threat>.

189. *See id.*

190. *See generally* Mari Herras, *Forced Submission: After Serving Time Following a 'Terrorism' incident, a Local Woman Fights to Keep the Feds from Taking her DNA*, TUCSON WEEKLY (July 9, 2009), <http://www.tucsonweekly.com/tucson/forced-submission/Content?oid=1230792>.

191. *See id.*

192. Linda Witt, *Standoff with Mother Ends Peacefully*, TUCSON CITIZEN (Nov. 9, 1998), <http://tucsoncitizen.com/morgue2/1998/11/09/207509-standoff-with-mother-ends-peacefully/>.

193. Cole Waterman, *Auburn Man Charged with 'Threat of Terrorism' in Connection with 5-Hour Police Standoff*, MLIVE MEDIA GROUP (Aug. 15, 2013, 4:15 PM), [http://www.mlive.com/news/bay-city/index.ssf/2013/08/auburn\\_man\\_charged\\_with\\_threat.html](http://www.mlive.com/news/bay-city/index.ssf/2013/08/auburn_man_charged_with_threat.html).

194. *See* *People v. Carrier*, 867 N.W.2d 463, 465 (Mich. Ct. App. 2015);

Carrier called Bay Arenac Behavioral Health Authority, a mental health crisis hotline. During the eighty-minute call, Carrier expressed agitation and anger toward his ex-girlfriend who he claimed he could see “down his gun.”<sup>195</sup> During the conversation, the police showed up at Carrier’s home, at the end of the call, Carrier threatened to shoot up the Bay Community Mental Health facility and the mental health hotline crisis employee.<sup>196</sup> Two rifles were found in Carrier’s home.<sup>197</sup>

Carrier filed an appeal to the Court of Appeals of Michigan to have the conversation with the mental health hotline employee excluded as privileged communication.<sup>198</sup> The court held that while the content of the conversation was generally privileged it was waived in this case because his comments were threatening specific third parties whom he could intentionally and easily target.<sup>199</sup> The court allowed the communications into evidence.

Michigan Live is seemingly the only outlet that reported on the Carrier case. Michigan Live framed Carrier’s case and arrest as a mental health issue, citing his bipolar and anxiety struggles.<sup>200</sup> Carrier was placed in a mental health facility.

#### *The Case of United States v. Eckenrode*

In December 2012, Justin Eckenrode was charged with interstate communication of a threat.<sup>201</sup> Eckenrode posted a public message to the Rossford Police Department’s Facebook page stating, “So I guess it’s that time for me if you come to my house for any reason you will die . . . sry [sic]” and, “WHAT YOU WAITING FOR THE DEATH OF OTHERS? That should be my only curse.”<sup>202</sup> Upon search of Eckenrode home, police found a semi-automatic rifle and ammunition.<sup>203</sup>

When a Magistrate Judge granted Eckenrode pretrial release on bond, the

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195. See *id.* at 466; see also Waterman, *supra* note 193.

196. See *Carrier*, 867 N.W.2d at 465.

197. See *id.* at 468.

198. See *id.* at 465.

199. See *id.* at 465.

200. Waterman, *supra* note 193.

201. *Rossford Man Held After Threatening Police Department on its Facebook Page*, TOLEDO BLADE (Dec. 29, 2012), <http://www.toledoblade.com/Police-Fire/2012/12/29/Rossford-man-held-after-posting-of-threats-to-police.html>.

202. Chris Delcamp, *Facebook Messages Threaten Police*, NBC24 (Dec. 28, 2012), <http://nbc24.com/news/local/facebook-messages-threaten-police>.

203. *U.S. v. Eckenrode*, No. 3:13-cr-00021, 2013 WL 3992595 at \*1 (N.D. Ohio 2013).

Government appealed the decision.<sup>204</sup> Among the Government's concerns were that the National Guard discharged Eckenrode due to mental health reasons; Eckenrode suffered from depression, anxiety, and ADHD; a mental health professional had prescribed Eckenrode psychotropic medication in the past; and Eckenrode currently exhibited suicidal ideation.<sup>205</sup> The district judge understood these concerns but ultimately denied the Government's request.<sup>206</sup>

Only local media in Toledo, Ohio, covered the case.<sup>207</sup> No media coverage referred to Eckenrode as a terrorist. The articles only described Eckenrode's arrest and the contents of his threatening Facebook messages.<sup>208</sup> The media reported Eckenrode suffered from anxiety and depression and was under the influence of drugs when he committed the crime.<sup>209</sup>

#### *The Case of United States v. Long*

In April 2002, Stephen Long was arrested for threatening to use a weapon of mass destruction, mailing threatening communications, and transmitting threats by wire. In total, he was charged with seventy-nine counts of various crimes.<sup>210</sup> Long sent more than 200 letters containing bomb threats and a white powdery substance that led to an anthrax scare; police later found the substance to be baby powder.<sup>211</sup> The trial court found Long guilty at trial.

Long appealed, arguing the trial court improperly denied his defense's request for an insanity instruction to the jury.<sup>212</sup> The Fifth Circuit's review of the case focused on the question of Long's sanity as a legal issue. It sought to determine if the lower court should have allowed Long to present an affirmative defense before the jury in the first place; not whether a jury could have found him insane.<sup>213</sup> The Fifth Circuit ruled against Long, finding that an affirmative defense was unnecessary because there was enough evidence presented before the jury for it to determine his mental state in an insanity defense.<sup>214</sup>

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204. *Id.* at \*1.

205. *Id.* at \*2-3.

206. *Id.* at 3.

207. TOLEDO BLADE, *supra* note 201.

208. *Id.*

209. *See id.*

210. *United States v. Long*, 562 F.3d 325, 328 (5th Cir. 2009).

211. *Id.*

212. *Id.*

213. *Id.* at 328-29, 331-45.

214. *Id.* at 345.

According to the court proceedings, Long suffered from schizotypal personality disorder, and experienced “episodic psychosis ’where he basically lost contact with reality’” and that “delusions or hallucinations [were] kind of primary symptoms in his case.”<sup>215</sup> Long was institutionalized at thirteen years old.<sup>216</sup> The majority and dissent opinions in the Fifth Circuit decision differed on whether Long must prove by clear and convincing evidence that he did not know that his acts were wrong because of the delusional beliefs and hallucinations from which he suffered during his psychotic episodes.<sup>217</sup> The dissent position held that Long could not show that at the time of the criminal acts, he was going through a psychotic episode, and thus the denial of jury instruction was moot.<sup>218</sup> In contrast, the majority found that a reasonable juror could conclude Long had an inability to appreciate the wrongfulness or the nature of his actions because of his illness.<sup>219</sup>

There was little to no actual investigative news coverage on the *United States v. Long* case. The limited news coverage summarized the incident as, “man arrested in anthrax hoax.”<sup>220</sup> None of the news coverage refers to the *Long* case as terrorism. A copy of a Times of Acadiana, article posted to an anthrax blog site, elaborates on Long’s history of sexual abuse and mental illness.<sup>221</sup> It also details Long’s medical treatment and hospitalizations stemming from psychological concerns, stating that Long’s “[s]uffering [s]tarted [e]arly.”<sup>222</sup> The media’s narrative asserted that Long is not to blame for his actions, rather that they were part, or symptom, of abuse and mental health issues. Despite this portrayal in the media, Long testified that he “needed to test the government, to expose its weaknesses, and to demonstrate how easily chaos similar to that of 9/11 could be wrought because he wanted the government to better guard against terror”<sup>223</sup>

### *The Case of Robert Dear*

Robert Dear fatally shot two civilians and one police officer and wounded

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215. Long, 562 F.3d, at 343, 335-36.

216. *Id.* at 337.

217. *See id.* at 339-43, 345, 348.

218. *Id.* at 345-48 (Garza, J., dissenting).

219. *Id.* at 341, 344-45.

220. Louis Rom, *Seeds of Mistrust* (July 3, 2002), <http://www.anthraxinvestigation.com/hoaxes.html>.

221. *Id.*

222. *Id.*

223. Long, 562 F. 3d at 329.

nine others at the Colorado Springs Planned Parenthood.<sup>224</sup> The shooting occurred around the time Planned Parenthood was under scrutiny for videos of officials discussing using fetal organs for research.<sup>225</sup> After police took Dear into custody, he stated, “no more baby parts”<sup>226</sup> and described a dream that “[w]hen he died and went to heaven, [that] he would be met by all the aborted fetuses at the gates of heaven and they would thank him . . . for what he did because his actions saved lives of other unborn fetuses.”<sup>227</sup> Dear was charged with first degree murder, not terrorism. If convicted, he could face the death penalty or life in prison.<sup>228</sup> On May 11, 2016, a judge found Dear incompetent to stand trial.<sup>229</sup> He is held at a Colorado state mental hospital where he will remain until deemed competent to stand trial.<sup>230</sup>

During the shooting, Vicki Cowart, president of Planned Parenthood of the Rocky Mountains, called the incident domestic terrorism.<sup>231</sup> Some

224. Wesley Lowery, Danielle Paquette, & Jerry Markon, *No More Baby Parts, Suspect in Attack at Colo. Planned Parenthood Clinic Told Official*, WASH. POST (Nov. 28, 2015), [https://www.washingtonpost.com/politics/no-more-baby-parts-suspect-in-attack-at-colo-planned-parenthood-clinic-told-official/2015/11/28/e842b2cc-961e-11e5-8aa0-5d0946560a97\\_story.html?tid=a\\_inl&utm\\_term=.f04e02464cd0](https://www.washingtonpost.com/politics/no-more-baby-parts-suspect-in-attack-at-colo-planned-parenthood-clinic-told-official/2015/11/28/e842b2cc-961e-11e5-8aa0-5d0946560a97_story.html?tid=a_inl&utm_term=.f04e02464cd0).

225. Lowrey, *supra* note 224.

226. *Id.*

227. *Id.*; see also Fred Barbash & Yanan Wang, *The Twisted ‘Dream’ of Accused Planned Parenthood Killer Robert Dear Jr.*, WASH. POST (Apr. 12, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/04/12/the-twisted-remorselessness-of-accused-planned-parenthood-killer-robert-dear-jr/?utm\\_term=.2482f2d38331](https://www.washingtonpost.com/news/morning-mix/wp/2016/04/12/the-twisted-remorselessness-of-accused-planned-parenthood-killer-robert-dear-jr/?utm_term=.2482f2d38331).

228. *Robert Dear, Colorado Planned Parenthood Shooter, Deemed Mentally Incompetent*, ASS. PRESS (May 11, 2016), <http://www.nbcnews.com/news/us-news/robert-dear-colorado-planned-parenthood-shooter-deemed-mentally-incompetent-n572431>.

229. *Id.*; Jack Healy, *Judge Finds Planned Parenthood Shooting Suspect Unfit for Trial*, NY TIMES (May 11, 2016), <https://www.nytimes.com/2016/05/12/us/judge-declares-planned-parenthood-suspect-unfit-for-trial.html>; *Judge Rules Colorado Planned Parenthood Shooter Mentally Incompetent*, CHICAGO TRIBUNE (May 11, 2016 5:55 PM), <http://www.chicagotribune.com/news/nationworld/ct-planned-parenthood-shooting-court-20160511-story.html>.

230. Lance Benzel, *Accused Planned Parenthood Shooter Robert Dear Claims he’s Being Forced Medication at State Mental Hospital*, THE GAZETTE (Oct. 8, 2016), <http://gazette.com/accused-planned-parenthood-shooter-robert-dear-claims-hes-being-forced-medication-at-state-mental-hospital/article/1588065>; Jesse Paul, *Planned Parenthood Shooter Remains Incompetent to Stand Trial, State Hospital Says*, THE DENVER POST (Aug. 11, 2016), <http://www.denverpost.com/2016/08/11/accused-planned-parenthood-shooter-robert-dear-competency-hearing/>.

231. Julie Turkewitz & Jack Healy, *3 are Dead in Colorado Springs Shootout at Planned Parenthood Center*, NY TIMES (Nov. 27, 2015), [www.nytimes.com/2015/](http://www.nytimes.com/2015/)

United States politicians and groups described the shooting as domestic terrorism, including Colorado Governor John Hickenlooper, Colorado Springs Mayor John Suthers, NARAL Pro-Choice Texas, and former Republican Arkansas Governor Mike Huckabee.<sup>232</sup> The New York Times reported that “a number of people who knew Dear said he was a staunch abortion opponent,” that “Mr. Dear . . . had praised people who attacked abortion providers, saying they were doing ‘God’s work,’” and that “Dear described as ‘heroes’ members of the Army of God, a loosely organized group of anti-abortion extremists that has claimed responsibility for a number of killings and bombings.”<sup>233</sup> Dear’s ex-wife said he was quite religious, and he probably targeted the clinic for its abortion-related activities.<sup>234</sup>

Despite these reports, the media declined to classify Dear as a domestic terrorist. Instead, it presented him as a “loner.” A Washington Post headline read, “Alleged Colorado Gunman Was Adrift and Alienated.”<sup>235</sup> The word terrorist was absent from the Post’s coverage of the incident.<sup>236</sup> The Guardian ran a story titled “Planned Parenthood Shooting: Suspect was Recluse Who Lived in Remote Trailer,” but did not mention domestic terrorism.<sup>237</sup> A New York Times profile described Dear as a “gentle loner who occasionally unleashed violent acts toward neighbors and women he knew.”<sup>238</sup> Charles Kurzman, a professor of sociology and Middle East

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11/28/us/colorado-planned-parenthood-shooting.html.

232. *Id.*

233. Richard Fausset, *For Robert Dear, Religion and Rage Before Planned Parenthood Attack*, NY TIMES (Dec. 1, 2015) <https://www.nytimes.com/2015/12/02/us/robert-dear-planned-parenthood-shooting.html>.

234. *See id.*

235. *See id.*; see William Wan, Kevin Sullivan, & Mary Jordan, *Alleged Colorado Gunman was Adrift and Alienated*, WASH. POST (Nov. 28, 2015), [https://www.washingtonpost.com/national/alleged-colorado-gunman-was-adrift-and-alienated/2015/11/28/7cb93b62-95f5-11e5-8aa0-5d0946560a97\\_story.html?utm\\_term=.403f9822db60](https://www.washingtonpost.com/national/alleged-colorado-gunman-was-adrift-and-alienated/2015/11/28/7cb93b62-95f5-11e5-8aa0-5d0946560a97_story.html?utm_term=.403f9822db60).

236. *See id.*

237. *See generally id.*; see Generally Amanda Hopluch, *Planned Parenthood Shooting: Suspect was Recluse who Lived in Remote Trailer*, THE GUARDIAN, (Nov. 28, 2015 10:42 PM), <https://www.theguardian.com/us-news/2015/nov/28/colorado-springs-shooting-suspect-planned-parenthood-robert-lewis-dear>.

238. Paula Y. Lee, *Robert Dear, “Gentle Loner”*: *The New York Times Reveals a Load of Biases in Early Round of Colorado Springs Planned Parenthood Coverage*, SALON (Nov. 30, 2015 3:45 PM), [https://www.salon.com/2015/11/30/robert\\_dear\\_gentle\\_loner\\_the\\_new\\_york\\_times\\_reveals\\_a\\_load\\_of\\_biases\\_in\\_early\\_round\\_of\\_colorado\\_springs\\_planned\\_parenthood\\_coverage/](https://www.salon.com/2015/11/30/robert_dear_gentle_loner_the_new_york_times_reveals_a_load_of_biases_in_early_round_of_colorado_springs_planned_parenthood_coverage/).

specialist at the University of North Carolina at Chapel Hill, told the Washington Post, “The very headlines used for [Dear], the focus on how much of a loner he was . . . those are not the sorts of words used with Muslim terrorism defendants.<sup>239</sup> They suggest that the individual is being treated as not representative of some larger community, but as an outlier and a fringe element.”<sup>240</sup>

*The Case of People v. Turnage*

On September 3, 2006, Turnage placed a box, with “C-4” written on two-sides, at the Yolo County Communications Center’s gate.<sup>241</sup> The Communications Center is the twenty-four-hour dispatch headquarters for the county’s police, fire, and ambulance services. Turnage was convicted of maliciously placing a false bomb at a government building with the intent to cause others to fear for their safety.<sup>242</sup> In August 2008, Turnage was sentenced to twenty-five years to life, due to his prior convictions.<sup>243</sup> Upon search of Turnage home, the police found 200 pictures of the county courthouse parking area, the district attorney’s office parking lot, police and fire stations, the probation office, and other county facilities.<sup>244</sup> In the limited press coverage, the media neither referred to Turnage as a terrorist nor a criminal.<sup>245</sup>

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239. Anna Swanson, *When Should a Shooting Really be Called Terrorism?*, WASH. POST (Dec. 3, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/12/03/when-should-a-shooting-really-be-called-terrorism/>.

240. See William Wan, *supra* note 228; see Anna Swanson, *When Should a Shooting Really be Called Terrorism?*, WASH. POST (Dec. 3, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/12/03/when-should-a-shooting-really-be-called-terrorism/>.

241. *People v. Turnage*, 281 P.3d 464, 467 (S. Ct. Cal. 2012); *People v. Turnage*, 107 Cal. Rptr. 3d 783, 785 (Ct. App. 2010).

242. See *People v. Turnage*, C075175, 2017 WL 915105, at\*1 (Cal. Ct. App. Mar. 08, 2017).

243. *Id.* (noting that this sentencing is up for review on remand due to California Court of Appeals recent decision to resentence defendant under the Three Strikes law, as it stood at the time of his original sentencing).

244. *Turnage*, 281 P.3d at 467.

245. See generally Bob Egelko, *Phony Bomb Scarier than Fake WMD, Judges rule*, SAN FRANCISCO CHRONICLE (Aug. 7, 2012), <http://www.pressreader.com/usa/san-francisco-chronicle-late-edition/20120807/282415576428925>; see Bob Egelko, *Third Strike Conviction Upheld for Fake Bomb*, WEST-SACRAMENTO NEWS LEDGER (Sept. 5, 2012), <http://www.westsac.com/news-ledger/2012/09/05/third-strike-conviction-upheld-for-fake-bomb/>.



Turnage pleaded not guilty by reason of insanity.<sup>246</sup> However, the jury found Turnage to be “legally sane;” specifically mentioning the lack of evidence of angry manifestos or writings.<sup>247</sup> However, a psychologist found that Turnage had paranoid beliefs and fragmented and tangential thinking,<sup>248</sup> stating, “In discussing the charges against him, [Turnage] said he had placed the bomb to scare off women who had been sexually harassing him and wanted to kill him because they ‘wanted to get rid of all the blacks’ as ‘they’re too smart.’”<sup>249</sup> Turnage had a history of psychiatric treatment for schizophrenia, dating back to 1983.<sup>250</sup> In a later interview, he claimed the fake bomb was just a joke but again alluded to the need to scare off women interested in him.<sup>251</sup> Upon search of Turnage’s home, police found books on the supernatural and parapsychology.<sup>252</sup> There were random writings on a newspaper and “Angry 19” was written on a Watchtower pamphlet, as well as a drawing of a box with an antenna and radio towers.<sup>253</sup> A witness testified to seeing Turnage near the Health and Social Services building a few days before false bomb placed. The witness described that Turnage was “pacing back and forth, and making gestures that looked like he was pretending to shoot a rifle at the building.”<sup>254</sup>

#### *The Case of People v. Markham*

Markham made threats of murder, arson, and suicide, targeting Manistique City government officials for water bill fees imposed on his property.<sup>255</sup> The city was automatically billing Markham for water service, but he refused to pay the bills because he did not actually use water on his property.<sup>256</sup> His refusal to pay subjected him to fee penalties included in his property taxes and threatened the potential loss of his property.<sup>257</sup> Markham filed a complaint with the FBI, claiming the city was attempting to take his property

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246. *False Bombmaker Decision Overturned*, DAILY DEMOCRAT (Aug. 9, 2012), <http://www.dailydemocrat.com/20120809/false-bombmaker-decision-overturned>.

247. *Turnage*, 281 P.3d at 463; *Turnage*, 107 Cal. Rptr. 3d at 785-86.

248. *Turnage*, 107 Cal. Rptr. 3d at 787.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 786.

253. *Id.*

254. *Turnage*, 107 Cal. Rptr. 3d at 786

255. *People v. Markham*, No. 303734, 2012 WL 6178273 at \*1-2 (Mich. Ct. App. Dec. 11, 2012).

256. *Id.*

257. *Id.*

through extortion and describing his consideration of arson, murder, and suicide.<sup>258</sup> After the city offered to remove all water bill fees, including penalties and interest associated with it, Markham continued to post threats of arson, murder, and suicide to his website.<sup>259</sup>

Markham was convicted of making a terrorist threat, among other crimes of extortion under Michigan Law.<sup>260</sup> The court proceedings revealed that Markham had sought the opinion of a mental health professional. Markham was “seeking some resolution to a perceived problem,” which he described as “see[ing] the world different than ninety-five percent of the people [he] [ran] into,” and he “want[ed] to know that what [he] see [was] real, that [it was] not [his] imagination.”<sup>261</sup> In the limited press coverage, the media neither referred to Markham as a terrorist nor a criminal.<sup>262</sup>

### *The Case of United States v. Bell*

On March 19, 2014, Bell pleaded guilty to conspiracy to provide material support to terrorists and attempt to provide material support to terrorists.<sup>263</sup> The District Court for the Middle District of Florida conducted a sentencing hearing on October 23 and October 24, 2015.<sup>264</sup> The U.S. Attorney’s office sought the statutory maximum of thirty years but the Court sentenced Bell to twenty years with lifetime supervised upon release.<sup>265</sup>

Upon sentencing, Bell’s defense attorney raised issues on the Appropriate Guideline Sentencing level. The U.S. Attorney’s office argued that the appropriate “underlying offense” is conspiracy to commit murder, which has a base offense level of thirty-three under the Appropriate Guideline Sentencing Level. USSG § 2A1.5(a).<sup>266</sup> While the defense argued that the base underlying offense was “providing material support or resources to designated foreign terrorist organizations or specially designated global terrorists, or for a terrorist purpose,” which has a base offense level of twenty-six, USSG § 2M5.3(a),<sup>267</sup> the court found that the conspiracy to

258. *Id.* at \*1–2.

259. *Id.* at \*2.

260. *Id.* at \*1.

261. *Id.* at \*6.

262. See generally *Man Accused of Manistique City Employee Threats*, ABC NEWS (Apr. 9, 2010), <https://abc10up.com/2010/04/09/man-accused-of-manistique-city-employee-threats/>.

263. *United States v. Bell*, 81 F. Supp. 3d 1301, 1304 (M.D. Fla. 2015).

264. *Id.* at 1305.

265. *Id.* at 1303-04.

266. *Id.* at 1310. USSG refers to the U.S. Sentencing Guidelines.

267. See *id.* at 1310–26. The twenty six base offense level is set where “the offense

commit murder offense was the most appropriate.<sup>268</sup> It held that the twelve-level terrorism enhancement and two-level leadership enhancement to sentencing should apply.<sup>269</sup>

According to the sentencing proceedings, Anwar al-Awlaki influenced Bell as a teenager. He encouraged Bell to convert to Islam at the age of seventeen years old, to train to become a terrorist, and to travel to the Middle East and join Ansar al-Shari'a.<sup>270</sup> On his way to the Middle East, government officials intercepted Bell and returned him to the United States before he could commit any acts. At sentencing, Bell expressed remorse and stated his actions were an immature mistake.<sup>271</sup>

In June 2012, the Islamic Center of Northeast Florida ("Center") reported its concerns about Bell to the FBI. It claimed Bell was speaking about jihad in June 2012.<sup>272</sup> According to sentencing proceedings, the members of the Center had recognized that Bell was troubled and had tried to intervene.<sup>273</sup> During this time, with the FBI watching, Bell continued to consume the propaganda of al-Awlaki, train with firearms, and fashion homemade explosives.<sup>274</sup> A neuropsychologist provided testimony that Bell's ADHD diagnosis makes him fixated on a plan or idea to the exclusion of its details and without recognizing the consequences of the plan.<sup>275</sup> The neuropsychologist assessment indicates that Bell's condition made him

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involved the provision of (A) dangerous weapons; (B) firearms; (C) explosives; (D) funds with the intent, knowledge, or reason to believe such funds would be used to purchase any of the items described in subdivisions (A) through (C); or (E) funds or other material support or resources with the intent, knowledge, or reason to believe they are to be used to commit or assist in the commission of a violent act." 18 USC Appx § 2M5.3. For more information about sentencing guidelines in terrorism cases, see Construction and Application of Federal Domestic Terrorism Sentencing Enhancement, U.S.S.G. § 3A1.4, 186 A.L.R. Fed. 147.

268. See generally *id.* at 1311 (noting that the Court received eight cases supporting the 2A1.5(a) application, but could not receive details about the decision-making in three cases supporting the 2M5.3(a) application).

269. SEE *BELL*, 81 F. SUPP. 3D, AT 1311-12. Section 3B1.1 of the Guidelines provides for two-level increase in a defendant's offense level, if the criminal activity was not as extensive and did not involve five or more participants, but the defendant was still an organizer, leader, manager, or supervisor. USSG §3B1.1(c). See *id.* at 1312. Bell received twelve level terrorism enhancement due to use of a minor.

270. *Id.* at 1317.

271. *Id.* at 1304.

272. *Id.* at 1306.

273. See *id.* at 1306.

274. See *id.* at 1307.

275. *Bell*, 81 F. Supp. 3d at 1318.

particularly receptive to influence from the messaging like that of al-Awlaki.<sup>276</sup> The court also noted that Bell had a troubled adolescence, “marked by an inability to adjust to his parents’ divorce” and during which he engaged in drug use—marijuana and alcohol.<sup>277</sup>

*The Case of United States v. Nayyar*

On March 27, 2012, Patrick Nayyar was convicted of conspiracy to provide material support or resources to a designated foreign terrorist organization; providing material support to a designated foreign terrorist organization; agreeing to provide Hizballah, a political party and terrorist organization in Lebanon, with guns, ammunition, vehicles, bulletproof vests, and night vision goggles; providing Hizballah with a handgun, a box of ammunition, and a pick-up truck; and conspiring to traffic in firearms and ammunition in interstate commerce.<sup>278</sup> In July 2009, Nayyar began planning to traffic weapons; along with Conrad Mulholland and an FBI confidential informant, whom was posing as an agent for Hizballah.<sup>279</sup>

In this case, Nayyar faced seventy-five years in prison, but the Southern District of New York sentenced Nayyar to fifteen years.<sup>280</sup> This represented a significant departure from the Terrorism Sentencing Advisory Guidelines. The sentencing order memorialized the government’s acknowledgment that there was “no claim here that the defendant [was] a terrorist.”<sup>281</sup> The court held that the Terrorism Enhancement Sentencing Guidelines should not apply here, as Nayyar did not commit actual violence.<sup>282</sup> The court cited *States v. Stewart*, holding, “it was not unreasonable for the district judge to decide that the fact that no injury in the case mitigated the gravity of [the defendant’s] offense.”<sup>283</sup> Furthermore, the court reasoned that Nayyar’s past criminal conduct did not raise the same concerns associated with other cases involving charges of terrorism. Consequently, the court’s sentencing reflected the government’s concession that Nayyar was not a terrorist.<sup>284</sup>

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276. *See id.* at 1318.

277. *See id.*

278. *United States v. Nayyar*, No. 09 Cr. 1037 (RWS), 2013 WL 2436564 at \*1 (S.D. N.Y. June 5, 2013); *see generally Foreign Terrorist Organizations*, U.S. DEP’T. STATE, <https://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited Dec. 26, 2017) (designating Hizballah as a terrorist organization).

279. *Id.* at \*2-3.

280. *Id.* at \*1.

281. *Id.* at \*8.

282. *Id.* at \*8.

283. *Id.*; *United States v. Stewart*, 590 F.3d 93, 139 (2d Cir. 2009).

284. *Nayyar*, 2013 WL 2436564 at \*8-9.

Media coverage painted Nayyar's motivations as driven by money and greed, not violence or intent to cause harm.<sup>285</sup> Some news reports characterized Nayyar as a family man and lifted him up as a Good Samaritan—referencing an event where he stopped a cab driver from speeding off with a passenger's wife's feet dangling out of the door.<sup>286</sup> His defense did not raise mental health questions or the potential need for a mental health assessment.

*The Case of United States v. Mandhai*

In 2000, Imran Mandhai was approached by an undercover FBI agent posing as an ex-Marine and Islam convert.<sup>287</sup> The FBI agent expressed to Mandhai that he wanted to wage jihad in the United States.<sup>288</sup> Mandhai began training with the FBI agent and the FBI agent suggested waging jihad through the bombing of electrical substations.<sup>289</sup> The FBI agent continued to work with Mandhai, even after his superiors ordered him off the case.<sup>290</sup>

This led to Mandhai meeting another "FBI cooperating individual," who posed as a terrorist with ties to Osama Bin Laden.<sup>291</sup> Subsequently, Mandhai requested money to help fund the bombing of electrical substations.<sup>292</sup> Court proceedings showed that on several occasions, Mandhai expressed that he did not want to go through with the plot. Moreover, Mandhai changed his mind each time and was ready to move forward with the plan after speaking with the FBI cooperating individual.<sup>293</sup> In 2002, Mandhai was charged with conspiring to damage and destroy a National Guard armory's electrical power stations by means of fire and explosives, ultimately pleading guilty to the charges.<sup>294</sup>

On appeal to the Eleventh Circuit, the majority acknowledged that this case was outside the "heartland" of the Terrorist Enhancement Sentencing

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285. Antonio Antenucci, *NYC Building Super Gets 15 years for Hezbollah Weapons Plot*, N.Y. POST (Oct. 27, 2014), <http://nypost.com/2014/10/27/nyc-building-super-gets-15-years-for-hezbollah-weapons-plot/>.

286. Al Baker, *Men Accused of Trying to Supply Hezbollah*, N.Y. TIMES (Oct. 27, 2009), [http://www.nytimes.com/2009/10/28/nyregion/28plot.html?\\_r=0](http://www.nytimes.com/2009/10/28/nyregion/28plot.html?_r=0).

287. *United States v. Mandhai*, 375 F.3d 1243, 1245 (11th Cir. 2004).

288. *Id.* at 1245.

289. *Id.*

290. *Id.* at 1245-46.

291. *See id.* at 1246.

292. *See id.* at 1246.

293. *See id.*

294. *Id.*

Advisory guidelines.<sup>295</sup> The court noted in the case's sentencing hearing that Mandhai was guilty of an inchoate offense, an incomplete crime, especially because he withdrew from the conspiracy.<sup>296</sup> This was tied to the fact that Mandhai was a teenager at the time of this plot, the FBI unduly influenced Mandhai to continue forward with the conspiracy plot when he wanted to back out, and the FBI essentially created the terrorist plot itself, by putting the idea in Mandhai's head. Nevertheless, the court did not provide mental illness and competency adequate weight in this case. Mandhai was still subject to sentencing enhancement even though it was evident that Mandhai likely would not have engaged in terrorism act but for the government's role and the government taking advantage of the Mandhai's mental capacity.

## II. TREATMENT AND CLASSIFICATION OF DOMESTIC TERRORISM CASES

Review of cases involving informant, entrapment, or law enforcement as a driving factor reveals that four out of five cases involved Muslim defendants—*Nayyar*, *Ferhani*, *Robertson*, and *Mandhai*—and that mental health was an issue in two out of the four Muslim defendant cases—*Ferhani* and *Robertson*.<sup>297</sup> In cases with Muslim defendants, where no one was harmed—no actual violence—the media classified the defendants as terrorists but not as mentally ill, and their attempt to seek mental illness defenses were unsuccessful. Alternatively, in three out of six cases implicating non-Muslim defendants, where people were actually harmed—actual violence, *Lopez*, *Helder*, and *Dear*—the media classified defendants as mentally ill but not as terrorists, and their mental illness defenses were successful.<sup>298</sup> Only *Tibals* and *Casteel* were outliers.<sup>299</sup> While a number of

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295. *See id.* at 1249-50.

296. *See id.* at 1250-51.

297. *United States v. Nayyar*, No. 09 Cr. 1037 (RWS), 2013 WL 2436564 at 1 (S.D. N.Y. June 5, 2013); *Ferhani*, 2012 WL 655489237 Misc.3d 1232(A), \*1 (N.Y. Supp. 2d. June 25, 2012); *United States v. Robertson*, No. 6:12-cr-63-Orl-31GJK, 2015 WL 3915568, \*1 (M.D. Fla. June 25, 2015); *United States v. Mandhai*, 375 F.3d 1243, 1245 (11th Cir. 2004); *United States v. Stafford*, 782 F.3d 786, 786 (6th Cir. 2015).

298. *United States v. Waagner*, *supra* note 88; *What We Know About Fort Hood Gunman*, CBS NEWS (Apr. 3, 2014), <http://www.cbsnews.com/news/fort-hood-shooting-gunman-identified-as-ivan-lopez-treated-for-depression/> [hereinafter "*What We Know*, CBS NEWS"]; *Robert Dear*, *Colorado Planned Parenthood Shooter, Deemed Mentally Incompetent*, ASS. PRESS (May 11, 2016 5:53 PM), <http://www.nbcnews.com/news/us-news/robert-dear-colorado-planned-parenthood-shooter-deemed-mentally-incompetent-n572431>.

299. *See People v. Casteel*, No. 321340, 2015 WL 5440195 at \*1 (Ct. App. Mich. 2015) (holding that Casteel was rejected on the basis of a Michigan law prohibiting evidence of diminished capacity because a person does not qualify under the legal

factors may have contributed to the difference in treatment, one apparent distinction is that Tibals was an immigrant.<sup>300</sup> In the case of Casteel, his counsel did not assert insanity as a defense; his attorney only argued Casteel had a diminished capacity, which was disclosed under state law.

This is also demonstrated in the cases of Ivan Lopez and Nidal Hasan. Army Specialist, Ivan Lopez, killed four and wounded sixteen people at the Fort Hood army base and subsequently committed suicide. Authorities ruled him out as a terrorist and classified him as mentally ill. A similar event had occurred four years earlier at the same location. U.S. Army Major, Nidal Hasan, killed thirteen and wounded over thirty people.<sup>301</sup>

There were several similarities between the men who perpetrated these crimes. Both Lopez and Hasan were disconnected from their colleagues.<sup>302</sup> Lopez felt that members of his unit mistreated him and Hasan similarly felt discriminated against.<sup>303</sup> Lopez was upset the Army denied his leave request and Hasan did not want to deploy to Iraq despite orders<sup>304</sup> to do so. Both men sought mental health treatment; Lopez sought help for post-traumatic stress disorder after serving in Iraq and Hasan for his anxiety as an Army psychiatrist.

Mainstream news depicted the two Fort Hood shootings in a very different light. It determined Lopez's acts were a result of his depression.<sup>305</sup> The

definition of insanity); *Halder v. Tibals*, No. 1:09 CV 1701, 2011 WL 9025288, at \*3 (N.D. Ohio 2011).

300. *Halder*, 2011 WL 9025299, at \*1.

301. Billy Kenber, *Nidal Hassan Sentenced to Death for Fort Hood Shooting Rampage*, WASHINGTON POST (Aug. 28, 2013), [https://www.washingtonpost.com/world/national-security/nidal-hasan-sentenced-to-death-for-fort-hood-shooting-rampage/2013/08/28/aad28de2-0ffa-11e3-bdf6-e4fc677d94a1\\_story.html?utm\\_term=.74628692517b](https://www.washingtonpost.com/world/national-security/nidal-hasan-sentenced-to-death-for-fort-hood-shooting-rampage/2013/08/28/aad28de2-0ffa-11e3-bdf6-e4fc677d94a1_story.html?utm_term=.74628692517b).

302. Barbara Starr & Pamela Brown, *Official: Fort Hood Gunman Claimed He Was Picked on by Fellow Soldiers*, CNN (Apr. 7, 2014), <http://www.cnn.com/2014/04/07/us/fort-hood-shooter/>; *Fort Hood Suspect's Religion Was an Issue, Family Says*, CNN (Nov. 7, 2009), <http://www.cnn.com/2009/CRIME/11/06/fort.hood.suspect.muslim/> [hereinafter "*Fort Hood Suspect's Religion*, CNN"].

303. See Starr, *supra* note 302; see *Fort Hood Suspect's Religion*, CNN *supra* note 302.

304. Erin McClam, *Fort Hood Victim's Dad: Gunman Snapped After Seeking Time Off*, NBC NEWS (Apr. 4, 2014), <http://www.nbcnews.com/storyline/fort-hood-shooting/fort-hood-victims-dad-gunman-snapped-after-seeking-time-n72081>; Julian E. Barnes & Andrew Zajac, *Fort Hood Shooting Suspect Was to Deploy to Iraq Soon*, LA TIMES (Nov. 6, 2009), <http://articles.latimes.com/2009/nov/06/nation/na-fort-hood-profile6>.

305. Ray Sanchez & Ben Brumfield, *Fort Hood Shooter was Iraq Vet Being Treated for Mental Health Issues*, CNN (Apr. 4, 2014), <http://www.cnn.com/2014/04/02/us/fort->

introductory line of the CNN article, “Fort Hood Shooter Was Iraq Vet Being Treated for Mental Health Issues,” read, “Spc. Ivan Lopez’s friendly smile apparently gave no hint of a history of depression, anxiety, and other psychiatric disorders.”<sup>306</sup> Similarly, the NBC News article, “Fort Hood Gunman Was Treated for Depression and Anxiety,” opened by stating, “The gunman in the Fort Hood shooting was an active-duty enlisted soldier who served four months in Iraq and was being evaluated for PTSD, military officials said Wednesday night.”<sup>307</sup> Lopez was again portrayed as a man in despair in a CBS News headline that read, “Gunman ID’d as Ivan Lopez, Treated for Depression.”<sup>308</sup>

In contrast, the media coverage surrounding the incident involving Hasan did not focus on his mental instability but delved into his religious life – potentially as an indicator of terrorism.<sup>309</sup> The beginning of a CNN article, “Fort Hood Suspect’s Religion Was an Issue, Family Says,” referenced a time where others targeted Hasan’s faith, reiterating, “The bumper sticker reading ‘Allah is Love’ was torn off and the car was keyed. . . . But what kind of impact that incident, and possibly others, had on Hasan remains a mystery.”<sup>310</sup> A 2009 cover of Time magazine featured Hasan with the word

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hood-shooter-profile/index.html; *What We Know*, CBS NEWS, *supra* note 298; Craig Whitlock & Carol Leonnig, *Fort Hood Shooter had Psychiatric Issues But Showed ‘No Sign of Likely Violence,’ Officials Say*, WASHINGTON POST (Apr. 3, 2014), [https://www.washingtonpost.com/world/national-security/2014/04/03/d6d39986-bb30-11e3-9a05-c739f29ccb08\\_story.html?utm\\_term=.f73cf7c39c3e](https://www.washingtonpost.com/world/national-security/2014/04/03/d6d39986-bb30-11e3-9a05-c739f29ccb08_story.html?utm_term=.f73cf7c39c3e); David Montgomery, Manny Fernandez, & Timothy Williams, *Fort Hood Gunman Was Being Treated for Depression*, NY TIMES (Apr. 3, 2014), <https://www.nytimes.com/2014/04/04/us/fort-hood-shooting.html>; *see also Fort Hood Shooter Ivan Lopez Showed No Warning Signs Before Spree – Army*, THE GUARDIAN (Jan. 23, 2015), <https://www.theguardian.com/us-news/2015/jan/23/fort-hood-shooter-ivan-lopez-warning-signs>.

306. *What We Know*, CBS NEWS, *supra* note 298.

307. Courtney Kube & Jim Miklaszewski, *Fort Hood Gunman Was Treated for Depression and Anxiety*, NBC NEWS (Apr. 2, 2014), <http://www.nbcnews.com/storyline/fort-hood-shooting/fort-hood-gunman-was-treated-depression-anxiety-n70441>.

308. *What We Know*, CBS NEWS, *supra* note 298.

309. *See* Manny Fernandez & Alan Blinder, *At Fort Hood, Wrestling with Label of Terrorism*, NY TIMES (Apr. 8, 2014), <https://www.nytimes.com/2014/04/09/us/at-fort-hood-wrestling-with-label-of-terrorism.html>.

310. *Fort Hood Suspect’s Religion*, CNN, *supra* note 305; Lauren Cox, *Fort Hood Motive Terrorism or Mental Illness*, ABC NEWS (Nov. 9, 2009), <http://abcnews.go.com/Health/MindMoodNews/fort-hood-shooters-intentions-mass-murder-terrorism/story?id=9019410>; Dee Dee Myers, *Is Nidal Hassan a Terrorist or Not?*, VANITY FAIR (Nov. 11, 2009), <https://www.vanityfair.com/news/2009/11/is-nidal-hasan-a-terrorist-or-not>; *see* Juliet Lapidus, *Is Nidal Malik Hasan a “Terrorist?”*, SLATE (Nov. 11, 2009), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2009/11/is\\_nidal\\_malik\\_has](http://www.slate.com/articles/news_and_politics/explainer/2009/11/is_nidal_malik_has)



“Terrorist?” across his eyes.<sup>311</sup> Within the cover story, “The Fort Hood Killer: Terrified . . . Or Terrorist?,” the opening emphasized his Islamic faith in a stereotypical fashion.

In the case of *United States v. Bell*, new articles only labelled Bell as a terrorist on one occasion, despite the fact that there was evidence that Bell was inciting people to join his violent fight, some articles even referencing this activity.<sup>312</sup> Bell did not fit society’s Muslim narrative—the immigrant who comes to the United States with violent intentions, motivated to indoctrinate Americans with Islam. Bell was a White American born teenager. While the judge did not accept the argument that Bell’s ADHD mitigated his actions, the sentencing decision characterized him as a Muslim convert that was seduced by al-Awlaki’s distorted teachings, and the benefits and necessity of violence by terrorists.<sup>313</sup>

The case of *United States v. Hassan*<sup>314</sup> also provides a unique case comparison. It demonstrated the difference in treatment between multiple codefendants, who were purportedly driven by Islam. Daniel Boyd, Zakariya Boyd, Dylan Boyd, Anes Subasic, Mohammad Omar Aly Hassan, Ziyad Yaghi, and Hysen Sherifi were charged with providing material support to terrorism and conspiracy to murder, kidnap, maim, and injure persons abroad.<sup>315</sup>

Both national mainstream news and smaller local news outlets widely covered the case.<sup>316</sup> Coverage did not mention any related mental health

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an\_a\_terrorist.html; see also Sara Kamali, *Our Shooting Double Standard: How do We Decide Which Madman Are Terrorists*, SALON (May 11, 2014), [https://www.salon.com/2014/05/11/our\\_shooting\\_double\\_standard\\_how\\_do\\_we\\_decide\\_which\\_madmen\\_are\\_terrorists/](https://www.salon.com/2014/05/11/our_shooting_double_standard_how_do_we_decide_which_madmen_are_terrorists/).

311. *Terrorist?*, TIME (Sept. 23, 2009), <http://content.time.com/time/covers/0,16641,20091123,00.html>.

312. See *United States v. Bell*, 81 F. Supp. 3d 1301, 1301 (M.D. Fla. 2015); *Florida Man Planned to Join Overseas Holy War, Feds Say*, ORLANDO SENTINEL (July 19, 2013), [http://articles.orlandosentinel.com/2013-07-19/news/os-terrorists-jihad-holy-war-florida-man-20130719\\_1\\_indictment-holy-war-florida-man](http://articles.orlandosentinel.com/2013-07-19/news/os-terrorists-jihad-holy-war-florida-man-20130719_1_indictment-holy-war-florida-man); *Florida Man Pleads Guilty to Attempting to Join Al Qaeda Group*, REUTERS (Mar. 18, 2014), <http://www.reuters.com/article/us-usa-florida-jihad-idUSBREA2I2BC20140319>.

313. See *Bell*, F. Supp. 3d at 1304.

314. *United States v. Hassan*, No. 5:09-CR-216-FL, 2011 WL 3217072, at 4 (E.D.N.C 2011).

315. *Id.* (discussing that the defendants attacked the Quantico, Virginia, Marine Corps base).

316. Declan Walsh & Daniel Nasaw, *Background: ‘North Carolina Taliban’*, THE GUARDIAN, (Sept. 3, 2009), <https://www.theguardian.com/world/2009/sep/03/background-daniel-boyd-fbi-case>; *Anti-Terror Agents Arrest Seven in Raleigh*, WRAL,

issues. Instead, it delved into the men's lives and explored their motivations, backgrounds, families, and previous travels.<sup>317</sup> The media reported the men's motivation was related to their religious beliefs and jihadist ambitions.<sup>318</sup> Many articles outlined the men's travel history, individually and with their families, to the Middle East.<sup>319</sup>

Some news outlets reported extensively on the proffered religious motivations. Fox News consistently described the men's beliefs, reporting, "Federal authorities said [Daniel] Boyd talked about loving jihad, fighting for Allah, and loathing a U.S. military presence at Muslim holy sites."<sup>320</sup> Another Fox News article, "Accused North Carolina Terror Plot Leader: Jihadist . . . or Regular Family Man?," further pushed the religious motivation narrative by inclusion of this idea of what a "good Muslim" is through the terminology used.<sup>321</sup> For example, Fox News refers to the act of conducting Friday prayers (Jumah) in home rather than mosque as a flag of his drastic change in faith. To be clear, changing mosques or conducting Jumah prayer services at home is not a conclusive precursor to violence. Fox News further sought to frame the narrative that Daniel Boyd could not be a

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(July 27, 2009), <http://www.wral.com/news/local/story/5666837/>.

317. M.J. Stephey, *Daniel Boyd: A Homegrown Terrorist?*, TIME (July 30, 2009), <http://content.time.com/time/nation/article/0,8599,1913602,00.html>; *Wife and Mother of Terror Suspects Says FBI Tricked Her*, CNN, (July 29, 2009), <http://www.cnn.com/2009/CRIME/07/29/north.carolina.terrorism.wife/index.html>.

318. Mandy Locke, Yonat Shimron, & Josh Shaffer, *7 Arrested in Terror Plot*, THE NEWS OBSERVER (Sept. 22, 2009), <http://www.newsobserver.com/news/local/crime/article10367504.html>; Terry Mancour, *Homegrown Terrorism*, THE GUARDIAN (Aug. 2, 2009), <https://www.theguardian.com/commentisfree/cifamerica/2009/aug/02/daniel-boyd-north-carolina-terrorism>; *see also The Blond Jihadist: North Carolina Man Admits Plotting Terror Attacks*, DAILY MAIL (Feb. 10, 2011), <http://www.dailymail.co.uk/news/article-1355654/The-blond-jihadist-Daniel-Boyd-admits-aiding-terror-plots.html>; *FBI Informant say Triangle Terrorist Cell Leader Intent on Jihad*, WRAL (Sept. 21, 2011), <http://www.wral.com/news/local/story/10163920/>.

319. Carrie Johnson & Spencer Hsu, *Terror Suspect Daniel Boyd Seemed to Have Typical Suburban Life*, Washington Post (July 29, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/28/AR2009072803193.html>; Steve Coll, Daniel Boyd, *The New Yorker* (July 28, 2009), <https://www.newyorker.com/news/steve-coll/daniel-boyd>.

320. *Ringleader Allegedly Told FBI He Went to Terror Camps*, FOX NEWS, (Aug. 4, 2009), <http://www.foxnews.com/story/2009/08/04/accused-american-violent-jihad-ringleader-allegedly-told-fbi-went-to-terror.html> [hereinafter "*Ringleader*, FOX NEWS"].

321. *Accused North Carolina Terror Plot Leader: Jihadist . . . or Regular Family Man?*, FOX NEWS, (July 30, 2009), <http://www.foxnews.com/story/2009/07/30/accused-north-carolina-terror-plot-leader-jihadist-or-regular-family-man.html> [hereinafter "*Jihadist . . . or Regular Family Man?*, FOX NEWS"].

family man and be Muslimas if they are unequivocally not synonymous. The media categorized the Daniel Boyd as a veteran terrorist to push unsubstantiated allegations that he had trained at terrorist camps in Pakistan.<sup>322</sup> The government never provided actual proof that Daniel Boyd trained at terrorist camps in Pakistan, this was merely an allegation in the indictment. The court record is full of conditional language that Daniel Boyd “talked of” going to Pakistan, “desired” to travel to join violent jihad.<sup>323</sup> CNN reported that while authorities escorted the accused in handcuffs from the court room “one uttered ‘Peace be on you’ in Arabic to well-wishers.”<sup>324</sup> Various articles’ titles referred to the case as the “North Carolina terrorism case,” the “North Carolina jihad case,” the “terror conspiracy,” or the “violent jihad,” and referred to the men as the jihad or terror suspects.<sup>325</sup>

However, these same news reports failed to readily identify Daniel Boyd (“Boyd”) as a terrorist, even though they fingered him as the ringleader of the terrorist plot.<sup>326</sup> Fox News reported that authorities called Boyd a “veteran terrorist,”<sup>327</sup> while making sure to include positive or supportive statements from his family members. Yet, it failed to show the same courtesy to the family members of Hassan, Sherifi, Yaghi, or Subasic.<sup>328</sup>

While all of the accused in this case are American citizens, except for Sherifi who was a legal permanent resident, the mainstream media went to great lengths to differentiate between codefendants’ citizenship, immigration, and identity. Mainstream media coverage seemingly made conscious attempts to separate the three Boyd men (“the Boyds”) from their codefendants, Subasic, Hassan, Yaghi, and Sherifi, whom have foreign-sounding names, effectively classifying them as “others.”<sup>329</sup> News coverage

322. *Id.*

323. 742 F. 3d 104, 115, 121 (4th Cir. 2014)

324. Mike Ahlers, *No Bail for Jihad’ Suspects Despite Judge’s Skepticism*, CNN, (Aug. 5, 2009), <http://www.cnn.com/2009/CRIME/08/05/nc.terror.suspects/>.

325. *8th Suspect Sought in North Carolina ‘Jihad’ Case*, CNN (July 29, 2009), <http://www.cnn.com/2009/CRIME/07/29/north.carolina.terrorism.charges/index.html> [hereinafter “8th Suspect Sought, CNN”]; *7 Charges in North Carolina Terror Plot*, NBC NEWS (July 27, 2009), [http://www.nbcnews.com/id/32178723/ns/us\\_news-security/t/charged-north-carolina-terror-plot/%20-%20.V4-4olfl\\_dM#.V5fagU1THzI](http://www.nbcnews.com/id/32178723/ns/us_news-security/t/charged-north-carolina-terror-plot/%20-%20.V4-4olfl_dM#.V5fagU1THzI) [hereinafter “7 Charges, NBC NEWS”]; Ahlers, *supra* note 324.

326. See Carol Cratty, *Three Men Sentenced in North Carolina Terrorist Ring*, CNN, (Jan. 13, 2012), <http://www.cnn.com/2012/01/13/justice/nc-terror-ring-sentencing/index.html>

327. *Jihadist . . . or Regular Family Man?*, FOX NEWS, *supra* at note 1.

328. See *8th Suspect Sought*, CNN, *supra* note 325; see also *7 Charges*, NBC NEWS, *supra* note 325.

329. See *8th Suspect Sought*, CNN, *supra* note 325; see also *7 Charges*, NBC NEWS,

referred to the Boyds as U.S. native born, where it referred to Hassan as a U.S.-born citizen, and Yaghi and Subasic as naturalized U.S. citizens.<sup>330</sup>

The disparity in how defense attorneys use and the rate at which courts accept mental illness as the cause or factor in Muslim versus non-Muslim defendant cases in relation to mandatory sentencing minimums and sentencing enhancements is also telling. Interestingly, the court in *Nayyar*, a Muslim defendant case, acknowledged the abuse and padding of duplicative terrorism charges in terrorism cases, stating, “The prosecutor’s ability to lengthen sentences in these circumstances by simply adding essentially duplicative counts, each describing the same criminal conduct, is a circumstance that was not adequately considered by the Sentencing Commission when it devised the formula for consecutive sentencing under § 5G1.2(d).”<sup>331</sup> Here, the court even referenced *United States v. Booker*—drug possession of cocaine—and *United States v. Crosby*—firearm violation—where the Supreme Court of the United States found the sentences in each case to be excessive and unreasonable.<sup>332</sup>

Research has shown that these sentencing guidelines factors are arbitrary and that their application has a disparate impact on Black and Brown communities.<sup>333</sup> These factors include deterrence, to provide the needed “correctional treatment in the most effective manner,” and the sentencing guidelines themselves, that have the effect of double jeopardy—using one offense as the basis for multiple sentencing enhancements.<sup>334</sup>

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*supra* note 325.

330. Walsh *supra* note 316; Locke *supra* note 318; Ahlers *supra* note 324; *see e.g.*, *8th Suspect Sought*, CNN, *supra* note 328; *see e.g.*, *7 Charges*, NBC NEWS, *supra* note 328.

331. *United States v. Rahman*, 189 F.3d 88, 157 (2d Cir.1999).

332. *United States v. Nayyar*, No. 09 Cr. 1037(RWS), 2013 WL 2436564 at \*2 (S.D. N.Y. June 5, 2013); *United States v. Booker*, 543 U.S. 220 (2005); *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005).

333. *See* LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (2000), <http://www.civilrights.org/publications/justice-on-trial/sentencing.html><http://www.civilrights.org/publications/justice-on-trial/sentencing.html?referrer=https://www.google.com/>; AM. C.L. UNION, THE PERSISTENCE OF RACIAL AND ETHNIC PROFILING IN THE UNITED STATES: A FOLLOW-UP REPORT TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (JUNE 2009), [https://www.aclu.org/sites/default/files/assets/141027\\_iachr\\_racial\\_disparities\\_aclu\\_submission\\_0.pdf](https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf) [hereinafter “AM. C.L. UNION, RACIAL AND ETHNIC PROFILING”]; Marc Mauer, *The Impact of Mandatory Minimum Penalties in Federal Sentencing*, 40:1 *Judicature* 6 (2010), Project, <http://www.sentencingproject.org/wp-content/uploads/2016/01/Judicature-Impact-of-Mandatory-Minimum-Penalties-in-Federal-Sentencing.pdf>.

334. *Nayyar*, 2013 WL 2436564, at \*2.

This issue arose in *United States v. Meskini*, where a Muslim defendant, Haouari. He was found guilty on one count of providing material support to a terrorist act and four counts of fraud, based largely on his aiding his codefendants to flee the United States by providing them with visas and passports.<sup>335</sup> He appealed the lower court's sentencing determination, challenging the process of "double counting the same criminal act, once for the offense level and once for the criminal history category," on due process grounds; especially in light of the fact that he had no prior convictions or violent criminal history.<sup>336</sup> "As long as the court does not augment a sentence 'in contravention of the applicable statute or Sentencing Guideline,' no forbidden double counting occurs."<sup>337</sup> There was no such contravention here. The wording of § 3A1.4 could not be clearer. It directs courts to increase both the offense level and the criminal history category based on a single crime involving terrorism.<sup>338</sup>

As is evident in the terrorism cases discussed in Sections I and II, the media's framing of terrorism and society's willful blindness or deliberate indifference to the role of mental illness as a driving force toward action—opposed to an ideology, identity, or belief system—generates dynamics of classism towards Arabs.<sup>339</sup> The Arab identity and Islam belief system is criminalized under our criminal legal system<sup>340</sup> through greater use of sentencing enhancements against alleged Islam-motivated acts or acts committed by persons of Arab ancestry versus "non-Islam" motivated acts. This further enshrines bias against Arab or Muslim defendants. in all facets of law.<sup>341</sup>

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335. *United States v. Meskini*, 319 F.3d 88, 91-92 (2d. Cir. 2003).

336. *Id.* at 91.

337. *Pedragh*, 225 F.3d at 243 (citing *Torres–Echavarria*, 129 F.3d at 699).

338. *Id.* at 92.

339. BETH HALLOWELL, AMERICAN FRIENDS SERVICE COMMITTEE, MIXED MESSAGES: HOW THE MEDIA COVERS "VIOLENT EXTREMISM" (May 11, 2016), [https://www.afsc.org/sites.afsc.civicaactions.net/files/documents/Mixed%20Messages\\_WEB.pdf](https://www.afsc.org/sites.afsc.civicaactions.net/files/documents/Mixed%20Messages_WEB.pdf).

340. See Michael Whidden, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 68 FORDHAM L. REV. 2825, 2829, 2860-69 (2001).

341. See e.g. *Farraj v. Cunningham*, 659 Fed. App'x 925 (9th Cir. 2016) (No. 14-55091), [http://www.adc.org/fileadmin/ADC/Pdfs/ADC\\_Amici\\_Curiae\\_Farraj\\_v\\_Cunningham\\_14-55091.pdf](http://www.adc.org/fileadmin/ADC/Pdfs/ADC_Amici_Curiae_Farraj_v_Cunningham_14-55091.pdf) (explaining that bias against Arabs or Muslims in the legal system is not limited to criminal cases, but throughout the legal system, including allegations of bias by judges in family court cases); see e.g. Marc Pearce & Samantha L. Schwartz, *Can Jurors' Religious Biases Affect Verdicts in Criminal Trials?*, 41.7 AM. PSYCH. ASS. 26 (July/Aug. 2012), <http://www.apa.org/monitor/2010/07-08/jn.aspx>.

## III. CRIMINALIZATION

The dehumanization of Arabs and Muslims as inherently violent is one of the foundational steps for the justice system to criminalize these communities as a class. Lawyers and activists see it played out in media and through policies that support the notion that authorities must watch and confine these communities to secure the rest of our safety.<sup>342</sup> Americans should know from the plights of the Black community in this country that dehumanization enables people to easily mass incarcerate members of a population without second thought or care and leads to the creation of a class.<sup>343</sup> The same false propaganda the media uses against Blacks is recycled against Arabs and Muslims—”at risk, un-American, need for assimilation, culturally uncivilized, suspicious and violent, criminals.”<sup>344</sup> These are viewpoints that have played out in and had a negative impact on domestic terrorism cases.

The treatment of domestic terrorism cases in the court system and the media plays a role in the criminalization of Arabs and Muslims and institutionalizing them as a distinct class in the criminal legal system.<sup>345</sup> The criminalization of Black people in the criminal legal system, where government policies attempted to incarcerate society out of the drug epidemic, evidences that imprisonment cannot cure all society ills and society ills cannot be blamed on a particular group<sup>346</sup> Mandatory sentence

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342. See Michael Hirsh, *Inside the FBI's Secret Muslim Network*, POLITICO, (Mar. 24, 2016), <http://www.politico.com/magazine/story/2016/03/fbi-muslim-outreach-terrorism-213765>; Aaron Blake, *Trump Says We've Known His Muslim Ban and Database Plans 'All Along.' But We Still Don't — Not Really*, WASH. POST, (Dec. 21, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/11/17/the-evolution-of-donald-trump-and-the-muslim-database/?utm\\_term=.f973d7831366](https://www.washingtonpost.com/news/the-fix/wp/2016/11/17/the-evolution-of-donald-trump-and-the-muslim-database/?utm_term=.f973d7831366); Dean Obeidallah, *Donald Trump's Horrifying Words About Muslims*, CNN (Nov. 21, 2015), <http://www.lawandsecurity.org/wp-content/uploads/2011/09/TTRC-Ten-Year-Issue.pdf>.

343. See Ta-Nehisi Coats, *The Case for Reparations*, THE ATLANTIC, (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>; see also Bryan Stevenson, *Why Are Millions of Americans Locked Up?*, CNN (Mar. 12, 2012), <http://www.cnn.com/2012/03/11/opinion/stevenson-justice-prison/>.

344. See NATIONAL BLACK CHILD DEVELOPMENT INSTITUTE, BEING BLACK IS NOT A RISK FACTOR (2013), [https://www.nbcdi.org/sites/default/files/resource-files/Being%20Black%20Is%20Not%20a%20Risk%20Factor\\_0.pdf](https://www.nbcdi.org/sites/default/files/resource-files/Being%20Black%20Is%20Not%20a%20Risk%20Factor_0.pdf).

345. See Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 N.Y.U. ANN. SURV. AM. L. 29 (2014), hereinafter [“Beydoun, *Between Muslims and White*”]; see Marie A. Failinger, *Islam in the Mind of American Courts: 1800 to 1960*, 32 B.C.J.L. & SOC SCOT, JUST. 1, 4–5 (2012) (presenting a comprehensive review of the common stereotypes and flat judicial understanding of Muslims and Islam).

346. See LEADERSHIP CONFERENCE ON CIVIL RIGHTS at 2, <http://www.civil>

minimums were implemented against Black defendants charged with crimes involving crack cocaine, while White defendants charged with crimes involving powder cocaine were not.<sup>347</sup> This effectively reaffirmed the presence of systematic social structures of racism and discrimination within the criminal legal system.<sup>348</sup>

As resources poured into the War on Terrorism, with the U.S. Government focusing on Arabs and Arab Muslims, there are serious concerns about the disparate, harsher sentencing of Arabs and Muslims charged with terrorism in comparison to others.<sup>349</sup> The War on Terrorism was identified and implemented as a war against people that look Muslim or Arab, not violence itself. Similar to the War on Drugs, judges and prosecutors can use sentencing minimums and enhancements as an intimidation tactic and coercive tool to get Arab and Muslim youth, who may be facing material support terrorism charges, to sign plea deals instead of going to trial.<sup>350</sup> Material support charges can subject individuals to terms of incarceration over twenty years, even where the person did not actually commit a violent

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[rights.org/publications/justice-on-trial/sentencing.html](https://rights.org/publications/justice-on-trial/sentencing.html).

347. HUM. RTS. WATCH, PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS, n.93 (2000), [http://www.hrw.org/reports/2000/usa/Rcedrg00-05.htm#P323\\_67487](http://www.hrw.org/reports/2000/usa/Rcedrg00-05.htm#P323_67487) [hereinafter "HUM. RTS. WATCH, PUNISHMENT AND PREJUDICE"]; Troy Duster, *Pattern, Purpose, and Race in the Drug War: The Crisis of Credibility in Criminal Justice*, in CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 260, 280–282 (Craig Reinerman & Harry G. Levine eds., 1997); Carissa Byrne Hessick, *Race and Gender as Explicit Sentencing Factors*, 14 J. GENDER RACE & JUST. 127, 138 (2010); MICHAEL D. LYMAN, DRUGS IN SOCIETY: CAUSES, CONCEPTS AND CONTROL 367 (Ellen S. Boyne ed., 6th ed. 2011) ("More than 80 percent of the increase in the federal prison population from 1985 to 1995 is due to drug convictions . . . . In 1986, the year Congress enacted federal mandatory drug sentences, the average federal drug sentence for African Americans was 11 percent higher than for whites. Four years later, the average federal drug sentence for African Americans was 49 percent higher").

348. See Sarah Childress, *Michelle Alexander: "A System of Racial and Social Control"*, FRONTLINE (Apr. 29, 2014), <http://www.pbs.org/wgbh/frontline/article/michelle-alexander-a-system-of-racial-and-social-control/>; see also Nekima Levy-Pounds, *Going Up in Smoke: Impacts of the Drug War on Young Black Men*, 6 ALBANY GOV'T L. REV. 561, 570 (2013); See generally MICHELLE MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012).

349. See generally Sahar Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 4 GONZ. L. REV. 429 (2012), <https://www.law.gonzaga.edu/law-review/files/2012/04/Aziz-final.pdf>; see generally Khaled Beydoun, *Between Indigence, Islamophobia, and Erasure*, 104 CAL. L. REV. 1463 (2016) [hereinafter "Beydoun, *Between Indigence*"].

350. See CTR ON L. & SEC., TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001 – SEPTEMBER 11, 2011, at 11 (Karen J. Greenberg ed., Sept. 11, 2011), <http://www.lawandsecurity.org/wp-content/uploads/2011/09/TTRC-Ten-Year-Issue.pdf>.

act or have knowledge of the act—like writing a post on the internet that is not a true threat or buying goods from a business you thought was a charity.<sup>351</sup>

In the War on Drugs, there is an improper notion that the Black community is the source of the social problem or ill. As such, law enforcement sought to stop the Black child “super predator” through the use of entrapment and informant tactics.<sup>352</sup> It relied upon this concept of “pre-crime,” but failed to prevent crime. Pre-crime is the idea that the government can identify particular traits or factors that will predict violent behavior and use these factors to identify persons that will be subject to monitoring, intervention, investigation, or arrest to prevent the possibility that this person may commit a crime. But in reality, persons who have not committed a crime, innocent persons, are placed into the criminal law enforcement apparatus for being arbitrarily identified by a checklist. Often being Arab or Muslim, or associated innocent behaviors that are common to an Arab or Muslim, whether explicitly or implicitly, meets a factor on a checklist. For example, this may include travel to a Middle East or North African country for cultural or religious institutions, and the individual’s country of birth or family’s national origin.<sup>353</sup>

In actuality, the War on Drugs made people criminals through harsh on crime tactics and played a major role in the mass incarceration of Black men.<sup>354</sup> But for law enforcement’s coercion or provision of the means to

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351. See Ryan Felton, *Alleged Facebook Threats Against Police Lead to Terrorist Charges for Detroit Man*, THE GUARDIAN (Oct. 5, 2016), <https://www.theguardian.com/us-news/2016/oct/05/facebook-threats-white-police-officers-terrorist-charges>; see *Ohio Drops Terror Charges Against Phone Buyers*, NBC NEWS (Aug. 16, 2006), [http://www.nbcnews.com/id/14358871/ns/us\\_news-security/t/ohio-drops-terror-charges-against-phone-buyers/#.WQp8tdzXLzI](http://www.nbcnews.com/id/14358871/ns/us_news-security/t/ohio-drops-terror-charges-against-phone-buyers/#.WQp8tdzXLzI) [hereinafter “*Ohio Drops Terror Charges*, NBC NEWS”]; see Kavitha Rajagopalan, *Charitable Donation or Material Support for Terrorism*, PBS (Aug. 18, 2010), <http://www.pbs.org/wnet/need-to-know/opinion/charitable-donation-or-material-support-for-terrorism/2905/>.

352. See Sarah Framer, *Criminality of Black Youth in Inner-City Schools: ‘Moral Panic’, Moral Imagination, and Moral Formation*, 13.3 RACE ETHNICITY & EDU. J. 367, 371 (2010); see Linda S. Beres & Thomas D. Griffith, *Demonizing Youth*, 34 LOY. L.A. L. REV. 747, 753–54, 764–65 (2001), see also Allison Graves, *Did Hillary Clinton Call African-American Youth ‘Superpredators?’* POLITIFACT (Aug. 28, 2016), <http://www.politifact.com/truth-o-meter/statements/2016/aug/28/reince-priebus/did-hillary-clinton-call-african-american-youth-su/>, (citing C-SPAN, 1996: Hillary Clinton on ‘Superpredators’, Video Clip).

353. Prime examples of this include the Watch-list, CVE programs, Selectee Passport List policy, as discussed later in this article.

354. See Beres & Griffith *supra* note 352, at 764–65; see Stevenson, *supra* note 343; see also Lynette Holloway, *5 Policies That Prove The War On Drugs Targeted*



commit such a crime, many Black men would not have committed the crime. The institutionalization of stop and frisks as primary law enforcement functions in Black communities effectively sentenced a generation of primarily young Black men to a life of crime. Under stop and frisk and racialized traffic stop polices many young Black men's first interaction with law enforcement for minor non-violent drug offenses were met with padded charges under a harsh sentencing regime with sentencing enhancements that would coerce individuals to plead guilty over and over to violations, misdemeanors and eventually felonies.<sup>355</sup> This made two generations of young Black men neglected by the criminal justice system, because these individuals were not violent offenders, unemployable, ineligible for many public services and benefits, limited opportunities and access to education, personal and professional development.<sup>356</sup> Mass incarceration of young Black men feed the prison pipeline and recidivism rate for these same nonviolent minor drug offenders in the population and increased susceptibility to commit more violent or risky behavior.<sup>357</sup> Many young Black men would have avoided that path if offered mental health assistance and help, but, similar to the War on Terrorism, mental health is not raised

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*Black People*, NEWSONE (Mar. 26, 2016), <https://newsone.com/3391639/5-policies-that-prove-the-war-on-drugs-targeted-black-people/>; see also COUNT THE COSTS, THE WAR ON DRUGS: CREATING CRIME, ENRICHING CRIMINALS, <http://www.countthecosts.org/sites/default/files/Crime-briefing.pdf>.

355. Jennifer M. Cox, *Frequent Arrests, Harsh Sentencing, and the Disproportionate Impact They Have on African Americans and their Community*, 3 S. REGIONAL BLACK L. STUDENTS ASS'N L. J. 17, 18, 21–26 (2009) (“Studies show that African Americans make up only thirteen percent of all the nation’s drug users.”) (citing to Kary L. Moss & Daniel S. Korobkin, *Destination Justice*, 80 MICH. BAR J. 37, 39 (2001)); see generally Derrick Augustus Carter, *To Catch the Lion, Tether the Goat: Entrapment, Conspiracy, and Sentencing Manipulation*, 42 AKRON L. REV. 135 (2009) (discussing how entrapment tactics purposefully encourage commission of particular criminal conduct in order to support mandatory minimum sentencing, also known as sentencing manipulation); see generally GREGG BARAK, JEANNE FLAVIN, PAUL LEIGHTON, CLASS, RACE, GENDER, AND CRIME: SOCIAL REALITIES OF JUSTICE IN AMERICA (1st ed. 2001); see also Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173 (2016); Kenneth Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks”*, 6 J. GENDER, RACE & JUST. 381 (2002) (noting that similar to the war on terrorism in domestic cases, the use of informants and entrapment tactics are prevalent in the War on Drugs).

356. Nekima Levy-Ponds, *Going Up in Smoke: The Impacts of the Drug War on Young Black Men*, 6 ALB. GOV'T L. REV. 563, 583–88 (2013); Jennifer Cox, *supra* note 361 at 17–19, 26–28.

357. Cox, *supra* note 355 at 28–30; Levy-Ponds, *supra* note 356 at 583–88; see generally Ernest Drucker, *Drug Law, Mass Incarceration, and Public Health*, 91 OR. L. REV. 1097 (2013).

when a person is Black or Brown. This sounds eerily familiar to the War on Terrorism.

The Countering Violent Extremism (“CVE”) programs are government programs and government funded activities that purport to prevent radicalism and target Arab and Muslim populations for these programs. CVE programs are built on this “pre-crime” concept. The “pre-crime” concept supposes that law officials attempt to police thought, political opinion, and religious beliefs to pre-determine who—mainly youth—are at risk.<sup>358</sup> Pro-CVE advocates identify a particular group based on their identity—Arab and Muslim—as the most vulnerable population to becoming a terrorist and imply that the government and society watch them.<sup>359</sup> It suggests that teachers, religious leaders, and soccer coaches must watch their children.<sup>360</sup> Most alarming is that there is no scientific basis to substantiate the need for or effectiveness of CVE.<sup>361</sup> Organizations, police departments, schools, and community groups have received government funds to conduct evaluations, perform interventions, and, ultimately, provide determinations and recommendations to law enforcement of whether an at-risk person is

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358. See FAIZA PATEL & MEGHAN KOUSHIK, BRENNAN CTR. FOR JUST., COUNTERING VIOLENT EXTREMISM 20 (March 2017); see Amna Akbar, *National Security’s Broken Windows*, 62 UCLA L. REV. 834, 856–77 (2015) [hereinafter “Akbar, *National Security*”]; see also Yolanda Rondon, *Do Not Target Our Children, Do Not Make Our Teachers Government Puppets*, HUFFPOST BLOG (Feb. 8, 2016, 2:05 PM), [http://www.huffingtonpost.com/yolanda-rondon/do-not-target-our-children\\_b\\_9169538.html](http://www.huffingtonpost.com/yolanda-rondon/do-not-target-our-children_b_9169538.html) [hereinafter “Rondon, *Do Not Target*”].

359. See Sahar Aziz, *Policing Terrorists in the Community*, 5 HARV. NAT’L SEC. J. 147 (2014); see Beydoun, *Between Indigence* *supra* note 349, at 1466.

360. Akbar, *National Security*, *supra* note 263, at 834; see Laura Goodstein, *FBI Tool to Identify Extremists is Criticized*, N.Y. TIMES (Nov. 2015), <https://www.nytimes.com/2015/11/02/us/fbi-tool-to-identify-extremists-is-criticized.html>; see OFF. OF PARTNER ENGAGEMENT, PREVENTING VIOLENT EXTREMISM IN SCHOOLS 3 (Jan. 2016), <https://info.publicintelligence.net/FBI-PreventingExtremismSchools.pdf>; see Michael German, *Is Your Kid a Threat?*, USA TODAY (June 17, 2017), <https://www.usatoday.com/story/opinion/2016/06/17/fbi-program-countering-violent-extremism-speech-terrorism-theories-column/85650404/>; see AMERICAN-ARAB ANTI-DISCRIMINATION COMM., TEACHERS’, SCHOOLS, AND UNIONS DO NOT BECOME THE GOVERNMENT’S PUPPET TO MONITOR OUR CHILDREN: THE IMPACT OF THE FBI’S “DON’T BE A PUPPET” CVE WEB-BASED PROGRAM IN YOUR SCHOOLS 2 (2015), [http://www.adc.org/wp-content/uploads/2016/03/Dont-be-a-puppet\\_Education-Stakeholders-Revised-April-2016.pdf](http://www.adc.org/wp-content/uploads/2016/03/Dont-be-a-puppet_Education-Stakeholders-Revised-April-2016.pdf); see also YOLANDA RONDON, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, THE FBI’S “DON’T BE A PUPPET” PROGRAM TURNS STUDENTS AND TEACHERS INTO SPIES AND ENCOURAGES PROFILING OF MUSLIM AND ARAB STUDENTS, <http://www.adc.org/countering-violent-extremism-cve/>.

361. Patel, *supra* note 358, at 15.

likely to become a terrorist or not.<sup>362</sup> This, in particular, showcases why CVE raises concerns.

Whether law enforcement will affirmatively use CVE programs as a direct tool to conduct enforcement and entrapment tactics is yet to be seen. However, the history of profiling, law enforcement's continuous use of informant and entrapment tactics in policing the Arab and Muslim communities, and antiterrorism tools suggest that it will be used as an entrapment tactic.<sup>363</sup> As a result, persons with mental illnesses will be caught up in the system, with their mental health ignored because of their identity. The criminalization of particular thoughts and actual or perceived religious activity is not a foreign concept but historically familiar to the Black community. In the Antebellum South, slave codes criminalized religious

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362. Murtaza Hussein & Jenna McLaughlin, *FBI's "Shared Responsibility Committees" To Identify "Radicalized" Muslims Raised Flags*, THE INTERCEPT (Apr. 9, 2016), <https://theintercept.com/2016/04/28/letter-details-fbi-plan-for-secretive-anti-radicalization-committees/>; LETTER FROM BERNIE G. THOMPSON, RANKING MEMBER, COMMITTEE ON HOMELAND SECURITY, TO DAVID MEDINE, CHAIRMAN, PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD (Apr. 29, 2016), <https://democrats-homeland.house.gov/sites/democrats.homeland.house.gov/files/sitedocuments/pclobletter.pdf>.

363. U.S. COMM'N ON CIV. RTS., REPORT ON RACIAL AND RELIGIOUS PROFILING POST 9/11 IN ARAB AND MUSLIM COMMUNITIES 6 (Sept. 30, 2014), [http://www.usccr.gov/pubs/ARAB\\_MUSLIM\\_9-30-14.pdf](http://www.usccr.gov/pubs/ARAB_MUSLIM_9-30-14.pdf); MICHAEL PRICE, BRENNAN CTR. FOR JUST., COMMUNITY OUTREACH OR INTELLIGENCE GATHERING?: A CLOSER LOOK AT "COUNTERING VIOLENT EXTREMISM" PROGRAMS 1 (Jan. 1, 2015), [https://www.brennancenter.org/sites/default/files/analysis/Community\\_Outreach\\_or\\_Intelligence\\_Gathering.pdf](https://www.brennancenter.org/sites/default/files/analysis/Community_Outreach_or_Intelligence_Gathering.pdf); see Tami Abdollah & Philip Marcelo, *'It Sets People Off': Some Muslims See Profiling in U.S. Anti-Terror Program*, NBC NEWS (Apr. 20, 2015). Cora Currier, *Spies Among Us: How Community Outreach Programs to Muslims Blur Lines Between Outreach and Intelligence*, THE INTERCEPT (Jan. 21, 2015), <https://theintercept.com/2015/01/21/spies-among-us-community-outreach-programs-muslims-blur-lines-outreach-intelligence/>; see AMNESTY INT'L, THREAT AND HUMILIATION, RACIAL PROFILING, DOMESTIC SECURITY, AND HUMAN RIGHTS IN THE UNITED STATES 18–31 (Oct. 2004), [https://www.amnestyusa.org/pdfs/rp\\_report.pdf](https://www.amnestyusa.org/pdfs/rp_report.pdf); Beydoun, *Between Indigence*, supra note 264, at 1495–96 (discussing how the CVE "Knock and Talk" interviews are conducted based on profiling by national origin, culture and religion) (citing to Shirin Sinnar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, 77 BROOK. L. REV. 41–42 (2011); Brenda Gazzar, *Long Angeles Picked for Pilot Program to Counter Homegrown Jihadists*, L.A. DAILY NEWS (Sept. 23, 2014); see also Joel Kurth, *Michigan State Police Using Cell Snooping Devices*, DETROIT NEWS (Oct. 23, 2015); see also Andrea Elliot, *After 9/11, Arab-Americans Fear Police Acts, Study Finds*, N.Y. TIMES (June 12, 2006); see generally AM. C.L. UNION, THE PERSISTENCE OF RACIAL AND ETHNIC PROFILING IN THE UNITED STATES: A FOLLOW-UP REPORT TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (June 2009), <https://www.aclu.org/report/persistence-racial-and-ethnic-profiling-united-states>.

activity and the expression of Blacks.<sup>364</sup>

The cases discussed earlier indicate that even when a defendant may have a mental illness and should be offered mental health services, the government remains primarily focused on prosecuting him for the crime.<sup>365</sup> At times, the government will even create the right conditions to entrap the individual into committing a crime. This is best demonstrated in the cases where government informants and undercover agents targeted specific persons and then baited them into the conspiracy terrorism charges.<sup>366</sup> These persons are often vetted for weakness, social alienation, depression, or having suffered significant loss, and then convinced by government operatives that violence is the only answer.

#### IV. CONCLUSION

Defendants in domestic terrorism cases face different classifications of the same crime depending on their religion or identity. The War on Drugs as the War against Blacks is often compared in civil rights and academic circles to the War on Terrorism as the War against Muslims.<sup>367</sup> Government policies have acknowledged, to a certain degree, that the War on Drugs first and foremost did not work and disparately targeted and impacted the Black community. As a result, the movement for the de-privatization of prisons, social reentry supports for released felons, and measures to repeal three-strike policies and mandatory minimums has gained traction. But the prison complex needs to be fed to survive and has historically benefited from the

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364. See Nicholas May, *Holy Rebellion: Religious Assembly Laws in Antebellum South Carolina and Virginia*, 49 AM. J. LEGAL HIST. 237, 239 (2007); see also Khaled Beydoun, *Antebellum Islam*, 58 HOWARD L.J. 141, 185–88 (2014).

365. See *supra* Part I.

366. See e.g., *United States v. Wright*, No. 1:12 CR 238, 2012 WL 5507254 (N.D. Ohio Nov. 14, 2012); *Baxter v. U.S.*, 2015 WL 9268917 (N.D. Ohio 2015); *United States v. Stafford*, 782 F.3d 786 (6th Cir. 2015); *United States v. Robertson*, No. 6:12-cr-63-Orl-31GJK, 2015 WL 3915568 (M.D. Fla. June 25, 2015); *United States v. Mandhai*, 375 F.3d 1243, 1245 (11th Cir. 2004); *United States v. Nayyar*, No. 09 Cr. 1037 (RWS), 2013 WL 2436564 (S.D. N.Y. June 5, 2013); *People v. Ferhani*, No. 2461/11 at \*14 (N.Y.S. Jun. 25, 2012); see also John Knefel, *A Muslim Man was Ensnared in a Terror Plot by the NYPD – He Just Attempted Suicide*, THE NATION, Apr. 10, 2016, <https://www.thenation.com/article/a-muslim-man-was-ensnared-in-a-terror-plot-by-the-nypd-he-just-attempted-suicide/> (discussing the case of Ahmed Ferhani); *FBI Informant say Triangle Terrorist Cell Leader Intent on Jihad*, WRAL, (Sept. 21, 2011), <http://www.wral.com/news/local/story/10163920/>.

367. See Naomi Braine, *Crime Control & Political Repression: From the War on Drugs to the War on Terror*, THE PUBLIC EYE, Winter 2016, [https://www.politicalresearch.org/wp-content/uploads/2016/02/PE\\_Winter2016\\_Braine.pdf](https://www.politicalresearch.org/wp-content/uploads/2016/02/PE_Winter2016_Braine.pdf).

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overrepresentation of Blacks in the criminal justice system. Is it now also being fed by Arabs and Muslims? Is that the plan, to replace one class with another?