

**“A PERSON OTHERWISE INNOCENT”: POLICING
ENTRAPMENT IN PREVENTATIVE, UNDERCOVER
COUNTERTERRORISM INVESTIGATIONS**

Jon Sherman *

I. INTRODUCTION: “THE EARLIEST STAGE POSSIBLE”

In a 2006 speech, former Deputy Attorney General Paul McNulty said the following:

In the wake of September 11, this aggressive, proactive, and preventative course is the only acceptable response from a department of government charged with enforcing our laws and protecting the American people. Awaiting an attack is not an option. That is why the Department of Justice is doing everything in its power to identify risks to our Nation’s security at the earliest stage possible and to respond with forward-leaning—preventative—prosecutions.¹

Though the military’s counterterrorism tactics have dominated our post-9/11 consciousness of counterterrorism, federal criminal investigation and law enforcement directed by the Department of Justice (“DOJ”) and the Federal Bureau of Investigation (“FBI”) have adapted and expanded in an attempt to prevent terrorism with “forward-leaning” strategies. Observers have advanced a few theories for the accelerating shift to preventative policing and prosecutions: constitutional difficulties with military detention, most recently in *Boumediene v. Bush*,² the irrelevance of immigration law enforcement to “homegrown” terrorists; the increasing decentralization of the global jihadist movement; and the prevalence of “unaffiliated” terrorists op-

* Jon Sherman is an Associate at WilmerHale LLP in Washington, D.C. Columbia Law School, J.D. 2008; Harvard College, A.B. 2003. Many thanks to my family for their support, Professors Harold Edgar and Daniel Richman for their invaluable suggestions and insight, and the American Constitution Society, which made this publication possible.

1 Deputy Attorney General Paul J. McNulty, Prepared Remarks at the American Enterprise Institute (May 24, 2006), *available at* http://www.usdoj.gov/archive/dag/speeches/2006/dag_speech_060524.html.

2 128 S. Ct. 2229 (2008) (declaring the jurisdiction-stripping provision of the Military Commissions Act an unconstitutional suspension of the writ of habeas corpus and granting Guantanamo Bay detainees the right to challenge their detention in federal court). In the first Guantanamo case to reach the merits, Judge Richard Leon of the District Court for the District of Columbia subsequently ordered five of the six Bosnian-Algerian petitioners released. *Boumediene v. Bush*, No. 04-1166 (D.D.C. Nov. 20, 2008).

erating without any connection to a designated foreign terrorist organization (“FTO”).³

Whatever the precise reasons, federal criminal prosecutions have played an ever-expanding role in counterterrorism. According to the New York University Law Center on Law and Security, between September 11, 2001 and September 11, 2008, 228 persons have been charged and prosecuted under a “terrorism statute,” with another 465 persons charged under other statutes but “publicly associated with terrorism by the DOJ.”⁴ Of the 130 “Resolved Terrorism Trials” out of 228 resolved or pending terrorism prosecutions, 93 persons have been convicted; 12 have been acquitted; and 25 have seen a mistrial or dismissal.⁵ The other 465 defendants have been charged with general criminal conspiracy, general fraud, immigration violations, racketeering, and other offenses.⁶ Some scholars have noted that pretextual charging has played a significant role in the government’s early intervention strategy.⁷

The Justice Department’s focus on early intervention tactics and “anticipatory prosecution,” as Professor Robert Chesney has called it,

³ See MARC SAGEMAN, *LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY* (2008); see generally Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425 (2007) (describing several reasons why the government has focused on intervening at early stages in terrorist plots).

⁴ NYU LAW CTR. ON LAW AND SEC., *TERRORIST TRIAL REPORT CARD: U.S. EDITION 2* (2008), <http://www.lawandsecurity.org/publications/Sept08TTRCFinal1.pdf>. The Center defines “terrorism” to include “the core terrorism statutes: 18 U.S.C. § 2339A (Material Support to Terrorists), 18 U.S.C. § 2339B (Material Support to a Foreign Terrorist Organization), 18 U.S.C. § 2339C (Terrorism Financing), 50 U.S.C. § 1705 (Financial Support to a Foreign Terrorist Organization), and 18 U.S.C. § 2332 (Terrorism).” *Id.* at 2 n.2. The Center uses 18 U.S.C. § 2332 to encompass 18 U.S.C. §§ 2332 and 2332a through 2332h, statutes “criminalizing acts of terrorism using specific weapons.” *Id.*

⁵ *Id.*; *id.* at 2 n.1 (“Prosecutions’ as used herein are counted per defendant. A proceeding with three co-defendants, for example, counts as three prosecutions. If the same person is prosecuted in two separate proceedings under two separate indictments, they are counted separately.”).

⁶ *Id.* at 5.

⁷ See Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 618–24 (2005) (describing the government’s strategy, employed during organized crime and terrorism investigations, of arresting suspects for lesser offenses in order to prevent the commission of more serious crimes or to maximize the probability of a conviction). Richman and Stuntz also cite a General Accounting Office (“GAO”) study surveying 288 convictions in 2002 which the Justice Department had classified as terrorism-related. *Id.* at 620. According to the GAO, at least 132 convictions were misclassified and the “overall accuracy of the remaining 156 convictions [was] questionable.” U.S. GEN. ACCOUNTING OFFICE, *JUSTICE DEPARTMENT: BETTER MANAGEMENT OVERSIGHT AND INTERNAL CONTROLS NEEDED TO ENSURE ACCURACY OF TERRORISM-RELATED STATISTICS 6* (2003), <http://www.gao.gov/new.items/d03266.pdf>.

under federal conspiracy statutes (18 U.S.C. § 956(a)–(b)) and material support statutes (18 U.S.C. § 2339A and § 2339B) has made undercover investigations followed by sting operations a more attractive strategy.⁸ The FBI increasingly relies on confidential informants to gather intelligence, conduct surveillance of mosques, and pursue suspected terrorist plots.⁹ In several recent cases, including *United States v. Batiste*,¹⁰ *United States v. Hayat*,¹¹ *United States v. Lakhani*,¹² and *United States v. Siraj*,¹³ an undercover agent has “played a crucial cata-

⁸ Robert Chesney, *Anticipatory Prosecution in Terrorism-Related Cases*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR 157 (John L. Worrall & M. Elaine Nugent-Borakove eds. 2008); see also 18 U.S.C. § 956 (2006) (making “conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country” a federal crime if “any of the conspirators commits an act within the jurisdiction of the United States to effect any object of the conspiracy”); 18 U.S.C. § 2339A (2006) (making it a federal crime to provide “material support to terrorists”); 18 U.S.C. § 2339B (2006) (making it a federal crime to provide “material support or resources to designated foreign terrorist organizations”).

⁹ See, e.g., Mark Arax, *The Agent Who Might Have Saved Hamid Hayat*, L.A. TIMES, May 28, 2006, (Magazine), at 16 (describing the trial of a suspected terrorist and the key role an informant played in his conviction); John Caher, *Terrorism Trial of Muslims Raises Issues of Entrapment*, N.Y.L.J., Sept. 14, 2006, at 1 (stating that an investigation of a suspected terrorist “began . . . when a Pakistani immigrant arrested on unrelated charges visited [the suspect’s] pizza shop as a wired government agent”). Eric Lichtblau wrote:

In Albany, two leaders of a mosque are facing trial on charges that they helped launder money as part of an F.B.I. undercover sting in a fictitious plot to acquire a shoulder-fired missile for a New York City attack. In Manhattan, an undercover operation helped the federal authorities in March break up what they described as an international arms-smuggling ring that sold black-market assault rifles in the United States and was plotting to import missiles from Eastern Europe.

In San Diego, two Pakistani men are awaiting sentencing and a third faces trial on charges that they took part in what they thought was a Qaeda plot to trade drugs for missiles

A number of other undercover operations are continuing, officials said, and the Justice Department has committed more prosecutors and investigators to handle informants in terror cases and to initiate undercover operations.

Eric Lichtblau, *Trying to Thwart Possible Terrorists Quickly, F.B.I. Agents Are Often Playing Them*, N.Y. TIMES, May 30, 2005, at A10; Walter Pincus, *FBI Role in Terror Probe Questioned*, WASH. POST, Sept. 2, 2006, at A1 (“[C]ourt records released since then suggest that what Gonzales described as a ‘deadly plot’ was virtually the pipe dream of a few men with almost no ability to pull it off on their own. The suspects have raised questions in court about the FBI informants’ role in keeping the plan alive.”); William K. Rashbaum, *Window Opens On City Tactics Among Muslims*, N.Y. TIMES, May 28, 2006, at 29 (noting the “depth of the [New York] Police Intelligence Division’s clandestine programs . . . to infiltrate mosques and Muslim gatherings around New York City”); see also *Sherman v. United States*, 356 U.S. 369, 372 (1958) (noting the dangers of governmental entrapment).

¹⁰ *United States v. Batiste*, No. 06-20373, 2007 U.S. Dist. LEXIS 61186 (S.D. Fla. Aug. 12, 2007).

¹¹ *United States v. Hayat*, No. 2:05-cr-0240, 2006 U.S. Dist. LEXIS 43737 (E.D. Ca. June 19, 2006).

¹² 480 F.3d 171 (3d Cir. 2007).

¹³ 468 F. Supp. 2d 408 (E.D.N.Y. 2007).

lytic role” in the criminal plot.¹⁴ Though some cases involve career agents, many informants are often enlisted as part of a brokered deal with the government to eliminate or reduce criminal penalties, drop criminal charges, approve a political asylum application, or reverse a removal order.¹⁵ This growing reliance on undercover cooperating witnesses and sting operations for counterterrorism has dramatically increased the risk of entrapment.

This Article seeks to reexamine the entrapment defense against the rise of anticipatory terrorism prosecutions, and specifically, the charging of material support in furtherance of a predicate offense under 18 U.S.C. § 2339A. I argue that entrapment doctrine must be restructured to keep FBI counterterrorism efforts targeted and focused and to safeguard innocent First Amendment activity from the reach of highly inchoate offenses, which are aggressively pursued with undercover informants.

II. THE ENTRAPMENT DEFENSE AND ANTICIPATORY PROSECUTION

A. *The “Unwary Criminal” and the “Unwary Innocent”: A History of the Entrapment Defense*

The Supreme Court first recognized the entrapment defense in *Sorrells v. United States* and did so without grounding it in the Due Process Clause or any other constitutional provision.¹⁶ Conceding that “[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises,”¹⁷ the Court nevertheless barred prosecution of defendants for “a crime where the government officials are the instigators of his conduct.”¹⁸ The dividing line between a legitimate sting operation and an impermissible “instigation” was unclear when the defense was first established and remains so today. The Court tried to establish boundaries for sting operations, arguing that the government exceeds its police powers when it “implant[s] in the mind of an innocent person the disposition to commit the alleged offense and induce[s] its commission in order that . . . [it] may prose-

14 Aziz Huq, *The New Counterterrorism: Investigating Terror, Investigating Muslims*, in LIBERTY UNDER ATTACK 167, 173 (Richard C. Leone & Greg Anrig, Jr. eds., 2007).

15 See *id.* at 173–74, in LIBERTY UNDER ATTACK 167, 173 (Richard C. Leone & Greg Anrig, Jr. eds., 2007); Caher, *supra* note 9; Lee Romney, *Pressured to Name Names*, L.A. TIMES, Aug. 7, 2006, at A1 (discussing the government’s use of minor immigration violations as leverage in recruiting informants).

16 287 U.S. 435 (1932).

17 *Id.* at 441.

18 *Id.* at 452.

cute.”¹⁹ The entrapment defense authorized an inquiry into the defendant’s predisposition largely forbidden by federal and state rules of evidence.²⁰ However, the Court did insist on restricting the inquiry into the defendant’s predisposition to prevent a fishing expedition for a generalized propensity to commit crimes, demanding: “the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials.”²¹ This suggests that the government may always rebut entrapment by demonstrating predisposition, but that predisposition evidence must be tailored to the specific offense at issue.

After *Sorrells*, the Court revisited entrapment in *Sherman v. United States* to apply a perhaps more restrictive standard: entrapment lies when “the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted.”²² The critical distinction was between “the trap for the unwary innocent and the trap for the unwary criminal,” language fundamentally in tension with the most fundamental of criminal law tenets, the act requirement.²³ It is said that the defendant puts his character in issue by claiming the defense, but it is worth noting that a jury, in rejecting entrapment, may ultimately convict the defendant not only on evidence of the crime in question, but also on an impermissible inference of guilt drawn from predisposition evidence.²⁴ Seeking to apply the vague standards of *Sorrells* and *Sherman*, the federal courts generated a wide array of definitions and evidentiary standards. Scholars have identified and endlessly debated two tests developed in the case law—the “subjective” and “objective”

19 *Id.* at 442.

20 *See* FED. R. EVID. 404(a) (“Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion”); *People v. Zackowitz*, 172 N.E. 466, 469 (N.Y. 1930) (stating that the government may not put forth evidence of defendant’s propensity of character when the defendant has not put character in issue).

21 *Sorrells*, 287 U.S. at 451.

22 *Sherman v. United States*, 356 U.S. 369, 376 (1958).

23 *Id.* at 372; *see also* *United States v. Russell*, 411 U.S. 423, 436 (1973) (affirming a conviction that resulted from an undercover sting of an “unwary criminal,” in this case a methamphetamine producer).

24 Asserting the entrapment defense renders admissible certain character evidence that might otherwise be barred due to prejudice under FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

tests.²⁵ The objective approach addresses the government's conduct and asks whether a reasonable person could have resisted the inducement to commit the offense.²⁶ The subjective approach, officially recognized as the test for entrapment in federal court in *Hampton v. United States*, focuses on the individualized predisposition of the defendant to ascertain whether the government implanted the criminal intent and induced commission or whether the defendant, given an opportunity, would have committed the crime independent of the undercover activity.²⁷ Today, the defendant's predisposition to commit the charged offense is the governing standard for entrapment. Two circuit courts have construed the subjective test to allow the government three related ways to rebut the entrapment defense by demonstrating:

- (1) [A]n existing course of criminal conduct similar to the crime for which the defendant is charged, (2) an already formed design on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement.²⁸

Some courts have also articulated a list of factors for consideration in the predisposition inquiry.²⁹

The constitutional trouble that arises in the prosecution of inchoate terrorism-related offenses originates with this extension of judicial inquiry into the counterfactual possibilities of what the defendant might have done but for the agent's conduct. When the act requirement is so diluted, the admitted predisposition evidence may improperly sway the jury's decision and yield a conviction without the requisite proof. That is why the courts have placed the burden of persuasion on the prosecution after the defense meets its burden of

²⁵ See Ronald J. Allen et al., *Clarifying Entrapment*, 89 J. CRIM. L. & CRIMINOLOGY 407, 408–13 (1999) (arguing that the subjective and objective tests have non-existent practical differences); see also Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125, 151 (2008) (explaining that the objective test is rooted in the Due Process Clause). See generally PAUL MARCUS, *THE ENTRAPMENT DEFENSE* (3d ed. 2002) (providing an overview of the defense, including the tension between the objective and subjective tests).

²⁶ See Allen, *supra* note 25, at 411.

²⁷ *Hampton v. United States*, 425 U.S. 484, 488 (1976).

²⁸ *United States v. Lakhani*, 480 F.3d 171, 179 (3d Cir. 2007) (internal quotation marks omitted) (quoting *United States v. Gambino*, 788 F.2d 938, 945 (3d Cir. 1986)).

²⁹ See, for example, *United States v. Fedroff* for a list of factors:

[1] the character or reputation of the defendant, including any prior criminal record; [2] whether the suggestion of the criminal activity was initially made by the Government; [3] whether the defendant was engaged in the criminal activity for profit; [4] whether the defendant evidenced reluctance to commit the offense, overcome only by repeated Government inducement or persuasion; and [5] the nature of the inducement or persuasion supplied by the Government.

874 F.2d 178, 183 (3d Cir. 1989).

production.³⁰ In *Jacobson v. United States*, the Government failed to meet its burden to overcome the defense's evidence that it had targeted the accused with two and a half years of mailings and communications from fabricated organizations attempting to persuade the defendant that the First Amendment protected child pornography.³¹ While the Court did note the Government's efforts to mislead the defendant as to the legality of child pornography, it did not explicitly incorporate this into the test for entrapment.³² This suggests that an element of misdirection as to lawfulness should be persuasive, but not dispositive, evidence of entrapment.

There is a line of cases which further complicates the definition of the defense. In the Seventh Circuit's decision in *United States v. Hollingsworth*, Judge Posner implied that the ability to commit the crime should play a role in a trial court's determination on the issue of entrapment.³³ Without expressly requiring an additional showing of defendant capability to commit the offense, Posner did, however, elaborate on the scope of predisposition, arguing that though "ability" can usually be "presumed," entrapment should probably be found "when the defendant is not in a position without the government's help to become involved in illegal activity."³⁴ Some courts have interpreted this language to mean a defendant must possess both willingness and "present means" for entrapment to be defeated.³⁵ The Fifth Circuit has explicitly adopted the "positional predisposition" test to supplement the subjective predisposition test in *United States v. Wise* and *United States v. Reyes*.³⁶ The Ninth Circuit in *United States v. Thickstun* rejected

³⁰ See *Jacobson v. United States*, 503 U.S. 540, 549 (1992) (reversing a conviction for purchase of child pornography on entrapment grounds and placing the burden of persuasion squarely on the government to "prove beyond [a] reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents," the equivalent of the absence of entrapment).

³¹ *Id.* at 550.

³² *Id.* at 553-54.

³³ 27 F.3d 1196, 1200 (7th Cir. 1994).

³⁴ *Id.* But see Lori J. Rankin, Case Note, *Entrapment: A Defense for the Willing, yet Unready, Criminal?*, 63 U. CIN. L. REV. 1487, 1507-15 (1995) (critiquing the majority in *Hollingsworth*, arguing that the majority erroneously interpreted the Supreme Court's holding in *Jacobson*); Elliot Rothstein, Note, *United States v. Hollingsworth*, 17 W. NEW ENG. L. REV. 303, 304 (1995) (asserting that the court in *Hollingsworth* incorrectly interpreted *Jacobson* and that "readiness" should not be considered a distinct factor).

³⁵ *Hollingsworth*, 27 F.3d at 1202. Judge Posner explicitly stated that "lack of present means" was insufficient for entrapment to lie, but suggested it should be persuasive evidence. *Id.* See also *United States v. Reyes*, 239 F.3d 722, 739 (5th Cir. 2001); *United States v. Wise*, 221 F.3d 140, 155-56 (5th Cir. 2000).

³⁶ *Reyes*, 239 F.3d at 742; *Wise*, 221 F.3d at 155. Despite this seemingly pro-defendant expansion of the test, both cases affirmed the lower courts' convictions. *Reyes*, 239 F.3d at 746; *Wise*, 221 F.3d at 158.

this view.³⁷ The circuit split remains unresolved, but the weight of opinion seems to side with the rejection of a capacity or “*present means*” test.

B. Anticipatory Prosecution for Material Support to Terrorism Under 18 U.S.C. § 2339A and Entrapment Reconsidered

The prosecution of inchoate terrorism-related offenses has highlighted the dramatic risk of entrapment in undercover operations, which lure defendants into conduct sufficient for an early arrest and conviction. Professor Robert Chesney has explored the prosecution of “unaffiliated” terrorism and the inchoate offenses the government increasingly charges.³⁸ Chesney has identified two statutes that the Government uses in anticipatory prosecution of terrorists unaffiliated with any FTO: conspiracy charges under 18 U.S.C. § 956(a) and material support charges under the lesser-known 18 U.S.C. § 2339A. Section 956(a) criminalizes:

[Conspiracies] to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States . . . if any of the conspirators commits an act within the jurisdiction of the United States to effect any object of the conspiracy.³⁹

Since indictments under § 956(a) read FTOs and the global jihadist movement itself as unitary, ongoing conspiracies, § 956(a) has allowed prosecution for mere membership and other acts in furtherance of an FTO or the global jihadist movement writ large without connecting the defendant’s actions to a specific plot to commit a specific offense.⁴⁰ The recently enacted 18 U.S.C. § 2339D,⁴¹ which cri-

³⁷ 110 F.3d 1394, 1398 (9th Cir. 1997).

³⁸ Chesney, *supra* note 3.

³⁹ 18 U.S.C. § 956(a)(1) (2006).

⁴⁰ For instance, *United States v. bin Laden* (see Ninth Superseding Indictment, 98-cv-1023 (S.D.N.Y. 1998), available at <http://www.terrorisminfo.mipt.org/pdf/binLadenetals2-98cr1023.pdf>) was uncontroversial as it identified a specific plot, but *United States v. Sattar*, 314 F. Supp.2d 279, 303 (S.D.N.Y. 2004), characterized the Egyptian Islamic Group (EIG), an FTO, as a “single, ongoing conspiracy” to kill, maim, or kidnap under § 956(a), and any involvement in it would render the defendant a co-conspirator. Chesney, *supra* note 3, at 466–69.

⁴¹ § 2339D makes an offense to “receiv[e] military-type training from a foreign terrorist organization”:

(a) OFFENSE.—Whoever knowingly receives military-type training from or on behalf of any organization designated at the time of the training by the Secretary of State under section 219(a)(1) of the Immigration and Nationality Act as a foreign terrorist organization shall be fined under this title or imprisoned for ten years, or both. To violate this subsection, a person must have knowledge that the organization is a designated terrorist organization . . . that the organization has

mineralizes unlicensed military-type training abroad, can achieve many of the same goals (if a specific FTO runs a training camp), though proving a violation is perhaps more difficult.⁴² While § 956(a) has surely expanded prosecutorial capabilities, it is most potent when charged as a § 2339A predicate offense. This Article therefore concentrates on § 2339A's interaction with undercover investigations.

Section 2339A does not restrict the class of material support recipients to FTOs.⁴³ Instead, it prohibits providing “[m]aterial support or resources, knowing or intending that they are to be used in preparation for, or in carrying out” one of forty-seven predicate offenses, thirty-five of which are conspiracy-capable (§ 956(a) is among them).⁴⁴ Material support or resources is defined to include:

[A]ny property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.⁴⁵

Since there is no restriction to FTOs, § 2339A is frequently charged in unaffiliated terrorism prosecutions.⁴⁶ Prosecutors have charged this offense in novel ways to push the outer limits of inchoate criminal liability.⁴⁷

Several factors make the statute particularly effective as an early prevention measure and therefore more vulnerable to manipulation in anticipatory prosecution on the fringes of criminal liability: (1) the predicate offense need not be committed, nor even attempted; (2) no agreement is necessary for an underlying conspiracy, so material support liability can attach before a conspiracy even forms; (3) the support may be in furtherance of completed crimes or of other preparatory acts; and (4) the statute's conspiracy-capable predicate

engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism

18 U.S.C. § 2339D (2006).

⁴² The provision was enacted as part of the Intelligence Reform and Terrorism Prevention (IRTPA) Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, 3761 (2004). As of September 11, 2008, there were no prosecutions publicly announced as terrorism cases under this statute. NYU LAW CTR. ON LAW AND SEC., *supra* note 4, at 2 n.2.

⁴³ 18 U.S.C. § 2339A (2006).

⁴⁴ *Id.* Of the forty-six predicate offenses enumerated at the time, Chesney's tabulation for prosecutions between 2001 and 2004 shows that § 956 was charged in twenty-seven counts. Chesney, *supra* note 3, at 476-77.

⁴⁵ 18 U.S.C. § 2339A(b)(1) (2006).

⁴⁶ Chesney, *supra* note 3, at 474.

⁴⁷ *Id.* at 479.

offenses essentially criminalize “aiding-and-abetting a conspiracy.”⁴⁸ One other aspect that broadens the scope of liability is the expansive definition of “material support,” which defines the provision of “personnel” in subsection (b)(1) as “1 or more individuals who may be or include oneself.”⁴⁹ The combination of these factors permits federal prosecutors to seek conviction for the earliest stage of liability currently allowable under federal criminal law.

Chesney identifies three categories in the cases, which vary in the nexus between a defendant’s actual intentions and actions and the underlying predicate offense.⁵⁰ Notably, even in the uncontroversial “close-nexus” category, a jury acquitted defendant Gale Nettles on the § 2339A count due to possible discomfort with the sting operation (Nettles had sold ammonium nitrate to a government informant posing as a terrorist representative), while still convicting Nettles on counterfeiting and explosives charges.⁵¹ A notion akin to entrapment may have informed the jury’s decision to acquit even when the defendant’s conduct was not particularly inchoate.

The “intermediate-nexus” category encompasses “overlap” cases in which § 956(a) likely could have constituted independent grounds for the material support conviction or cases in which conspiracy will be unavailable to prosecutors, and § 2339A is the only remaining alternative. Chesney writes that if “the circumstances are such that the only available inchoate crime charge would involve attempt rather than conspiracy, the relative need for the § 2339A charge is much higher.”⁵² Since a conspiracy cannot be formed with a government agent who does not have an actual criminal intent and attempt would have been difficult to prove at trial, § 2339A was the only realistic charge available to the government in *United States v. Lakhani*.⁵³

The “open nexus” scenario illustrates how § 2339A and § 956(a) have been charged in tandem to establish liability at a pre-conspiracy stage capturing preparatory, and in certain cases equivocal, conduct. The U.S. Attorney will charge § 956(a) or another conspiracy-capable

48 *Id.* at 479–80.

49 18 U.S.C. § 2339A(b)(1) (2006).

50 Chesney, *supra* note 3, at 480–86.

51 *United States v. Nettles*, 400 F. Supp. 2d 1084, 1086 (N.D. Ill. 2005); Chesney, *supra* note 3, at 481–82.

52 Chesney, *supra* note 3 at 482. *United States v. Babar*, in which the procurement of bomb-making materials at a training camp in Pakistan could have been viewed as either conspiracy or material support, is arguably a case of the former, whereas *United States v. Lakhani*, a sting operation concerning a surface-to-air missile purchase, is arguably a case of the latter. *Id.* at 482–83.

53 *Id.* at 484.

crime as the predicate offense for § 2339A, criminalizing the preparatory steps to a conspiracy.⁵⁴ Several cases have reached this new frontier of liability with forms of support including fundraising, recruiting, procuring equipment, creating a “support cell,” providing one’s self as personnel, and establishing and running training camps, in furtherance of no identifiable agreement to commit a specific offense.⁵⁵ These cases involve the criminalization of acts taken in preparation of a conspiracy. Whether an agreement to commit a specific offense ever results is irrelevant to conviction under § 2339A. So long as the defendant intended such preliminary support to facilitate the formation of a conspiracy, he or she can be convicted under § 2339A.

Though stacked inchoate offenses are not unknown in federal criminal law, the § 2339A–§ 956(a) charge is fairly radical. In *Salinas v. United States*, Justice Kennedy applied settled rules of federal conspiracy law when he wrote:

A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. . . . If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators.⁵⁶

The hard question in Racketeer Influenced and Corrupt Organizations⁵⁷ (“RICO”) cases is whether the conspiracy reaches a peripheral actor who only contributed minor support; the conspiracy itself, of course, must actually exist. By contrast, in § 2339A cases, liability for material support attaches whether or not an underlying conspiracy ever materializes. While RICO conspiracy is uncomfortably expansive in certain cases, it is not as problematic as allowing prosecutors to contend that certain actions are in furtherance of an as yet *unrealized* conspiracy, a specific meeting of the minds. Alternatively, one might

⁵⁴ See *id.* at 484–85.

⁵⁵ See *United States v. Sattar*, 314 F. Supp. 2d 279 (S.D.N.Y. 2004) (convicting defendant for facilitating communications between Sheikh Omar Abdel Rahman and the Egyptian Islamic Group); Indictment, *United States v. Abdi*, No. 2:04-CR-88 (S.D. Ohio 2004) (indicting defendant on a § 2339A count, material support in furtherance of § 956(a) conspiracy by seeking jihadist military training in Africa and plotting bombing of mall); Indictment, *United States v. Mustafa*, No. 04-CR-356 (S.D.N.Y. 2004) (indicting London’s famous jihadist cleric Abu Hamza for attempting to establish a training camp in Oregon and facilitating attempts to reach camps in Afghanistan); Second Superseding Indictment, *United States v. al-Hussayen*, No. 3-CR-48 (D. Idaho 2003) (indicting for charges of online activity and fundraising in support of jihadists in Israel, Chechnya, and elsewhere); Indictment, *United States v. Arnaout*, No. 02-CR-892 (N.D. Ill. 2002) (indicting for financing various jihadist organizations through Arnaout’s charity, the Benevolence International Foundation).

⁵⁶ 522 U.S. 52, 63–64 (1997).

⁵⁷ 18 U.S.C. §§ 1961–1968 (2006).

argue that 18 U.S.C. § 1962(c)'s "pattern of racketeering" essentially criminalizes an ongoing conspiracy.⁵⁸ Application of § 1962(d) would then criminalize conspiracy to form a racketeering conspiracy. Even if this were an accurate portrayal of subsection (c), the underlying conspiracy or "pattern of racketeering" must be *actual* under RICO, not merely conjectural or aspirational as with § 2339A.⁵⁹ Combined with the government's broad reading of "conspiracy" under § 956(a), criminal liability is pushed to the earliest point now countenanced under American law and dangerously close to the punishment of unpopular speech or thought. There is one case, however, that seems to have transgressed that ultimate boundary, the act requirement.⁶⁰

When the government criminalizes such inchoate, equivocal acts, the undercover informant is charged with an even more delicate task of avoiding entrapment, while securing evidence of a crime. The earlier the intervention, the greater the risk of entrapment will be. Similarly, the more inchoate the offense charged, the greater the risk of entrapment. There are two overlapping issues in these cases: (1) the questionable fixity of intent in a defendant accused of inchoate crimes (i.e., whether an inchoate, equivocal act would have led to a completed crime); and (2) the possible implantation of criminal intent in a defendant who would not have completed an offense but for the government's inducement.

58 18 U.S.C. § 1962(c) (2006).

59 Federal District Judge Gerard Lynch has gone further to describe RICO as the criminalization of status: this is suggestive of how expansive or vague conspiracy offenses can run afoul of the act requirement. Hon. Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 661–63 (1987); see also *Robinson v. California*, 370 U.S. 660, 666–67 (1962) (holding that defendant may not be punished for his "status" as an addict, lest the state violate the Eighth and Fourteenth Amendments; an act is required).

60 In *United States v. Hayat*, a young Pakistani-American, who had been encouraged by an undercover informant to return to Pakistan and attend a militant training camp, was convicted under § 2339A on the thinnest of evidence: statements supportive of jihadists; a scrapbook with similar articles; a prayer kept in a wallet that the jury found violent; a videotaped "confession" with ambiguous, noncommittal responses to agents who asked leading questions about his time in Pakistan and suggested answers; and various taped conversations, which according to the government, revealed the defendant's willingness to commit an act of terrorism. First Superseding Indictment, *United States v. Hayat*, No. 05-240 (E.D. Cal. 2005); see also Arax, *supra* note 9; Amy Waldman, *Prophetic Justice*, THE ATL. MONTHLY, Oct. 2006, at 82. The real indeterminate question was whether Hayat intended to act on his training, if he had even acquired such in Pakistan (the evidence was all circumstantial and inconclusive). Hayat was convicted of a violation of § 2339A with the predicate offense of § 2332b (an act of terrorism transcending national boundaries). *Hayat*, No. 05-240. As Professor Chesney describes it, this essentially constituted a conviction for "providing himself as 'personnel' in furtherance of his *own potential* violation of § 2332b in the future." Chesney, *supra* note 3, at 491.

According to the Attorney General's Guidelines on FBI Undercover Operations, "[e]ntrapment occurs when the Government implants in the mind of a person who is not otherwise disposed to commit the offense the disposition to commit the offense and then induces the commission of that offense in order to prosecute."⁶¹ The Guidelines list a series of criteria for authorization of an undercover sting operation which are somewhat more stringent than the case law, including requirements that:

- (4) . . . (i) There is reasonable indication that the subject is engaging, has engaged, or is likely to engage in the illegal activity proposed or in similar illegal conduct; or,
- (ii) The opportunity for illegal activity has been structured so that there is reason to believe that any persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal conduct.⁶²

Informants, who are frequently pressured into the role and pushed to secure results,⁶³ may not realize how fine the line between artifice and implantation is in the context of material support to terrorism. Their superiors may also dispense with these vague standards designed to avoid ensnaring the "unwary innocent." The informant may even willfully transgress the Guidelines in the hope of catching a "terrorist" to secure the promised reward.

For § 2339A prosecutions, which criminalize fundraising, recruiting, procuring equipment, creating a "support cell," providing one's self as personnel, and establishing and running training camps, among other preparatory acts, an informant may more easily implant a criminal disposition and elicit the act when there is such a tenuous connection to the underlying predicate offense, which need not be successful or even attempted. The line between permissible artifice and impermissible inducement blurs for extremely inchoate crimes, because it would be difficult for the government to set a trap without simultaneously inducing the very criminality it intends to identify and neutralize. Provision of one's self as personnel and recruitment, as activities preliminary to a still unrealized conspiracy, may be easily and inadvertently induced by a government agent who believes he or

61 UNDERCOVER AND SENSITIVE OPERATIONS UNIT: ATTORNEY GENERAL'S GUIDELINES ON FBI UNDERCOVER OPERATIONS (1992), available at <http://www.usdoj.gov/ag/readingroom/undercover.htm#general>.

62 *Id.*

63 One Moroccan informant was threatened with designation as a person "likely to engage in terrorist activity," if he did not work undercover for the state. Romney, *supra* note 15 (describing coercive tactics that government officials use to pressure immigrants to become informants).

she is merely setting a trap for the “unwary criminal.”⁶⁴ At the margins of criminal liability, giving a suspect the opportunity becomes the equivalent of forcing the crime. For instance, an undercover informant could not likely use artifice to lure a willing criminal into attendance at a training camp without in part inducing that offense.

Stated another way, since entrapment is rebutted by establishing the relevant predisposition, the Government might arrest and convict persons based on their “predisposition” to be trained or recruited by jihadists. A predisposition to commit such an inchoate (pre-conspiracy) offense could only be established by pointing to the defendant’s ideology and statements. And though § 2339A charges have survived First Amendment challenges,⁶⁵ no court has treated these First Amendment issues in the context of an aggressive undercover investigation and sting operation.

Professor Bruce Hay has written of the “signaling” effect of sting operations and the dangers of entrapment. He has argued that if the unwary innocent may be as easily convinced to commit the act as the unwary criminal, then the sting is not probative of criminality and more likely to constitute entrapment.⁶⁶ However, Hay, who characterizes sting operations as tests to separate potential from actual law-breakers, seemingly misses the irony in the search for a pre-inducement criminal:

The background odds are derived from whatever information is made available to the decision maker concerning the *defendant’s likelihood of being a criminal*. It might be *statements* that the defendant makes to police or third parties, either before or after the sting. It might be earlier arrests or convictions for similar offenses. It might be other evidence of the *defendant’s character or criminal propensities*.⁶⁷

The predisposition inquiry is at base an adjudication of character, not conduct. When the criminalized act is highly inchoate, commission requires so little, and a predicate offense need not even be attempted, an undercover operation is far more likely to trigger commission by a person with no predisposition to commit the actual underlying crime.

If completion, attempt, or even an agreement to commit the underlying offenses were required by § 2339A, the risk of entrapment would be substantially lower. But where the underlying offense is

64 *Sherman v. United States*, 356 U.S. 369, 372 (1958).

65 *See United States v. Amawi*, 545 F. Supp. 2d 681 (N.D. Ohio 2008); *United States v. Sattar*, 314 F. Supp. 2d 279 (S.D.N.Y. 2004).

66 *See Bruce Hay, Sting Operations, Undercover Agents, and Entrapment*, 70 MO. L. REV. 387, 397–401 (2005).

67 *Id.* at 405 (emphases added).

committed in preparation for a conspiracy to commit a listed crime or conspiracy itself under § 956(a), the risk of entrapment is decidedly more pronounced. Though the Government, in rebuttal, will likely offer evidence of the defendant's predisposition to furnish material support to the underlying conspiracy to commit an offense, the remoteness of the defendant's actions and intentions from any underlying prohibited conduct indicates prosecutors run a far higher risk of convicting the "unwary innocent" whose conduct may well have been within the law, widely despised but not illegal. With respect to § 2339A – § 956(a) charges, "aiding-and-abetting a conspiracy" which may or may not materialize, the State may find itself prosecuting the only "crimes" of which it has evidence: unpopular speech and unpopular association. Speech, association, training, recruitment, and provision of one's self to the jihadist movement with no involvement in a conspiracy may all be evidence of a generalized "dangerousness," but not a crime. There is a defect in § 2339A that undercover operations have exploited.

The risk of entrapping the innocent is particularly high when the Government conceives of the plot and takes substantial steps to aid in its commission, without waiting for the suspects to take the bait and reveal themselves as "would-be violators of the law."⁶⁸ While most § 2339A cases arise from arrests that are the product of tips, surveillance, or other forms of detection, only a few cases have arisen from aggressive, long-term undercover operations. In the next part, I analyze the fact patterns of four prominent cases that arose from such circumstances.

III. CASE STUDIES IN ANTICIPATORY PROSECUTION AND THE LINE SEPARATING PERMISSIBLE STINGS FROM ENTRAPMENT

A. *United States v. Batiste*

The most prominent ongoing case built on an undercover counterterrorism operation is *United States v. Batiste*.⁶⁹ In June 2006, the FBI arrested a group of young Haitian-Americans ("the Liberty City Seven"),⁷⁰ five of whom were citizens, none of whom had ties to a ji-

68 *Sorrells v. United States*, 287 U.S. 435, 442 (1932).

69 Indictment, *United States v. Batiste et al.*, No. 06-20373 (S.D. Fla. June 22, 2006), available at http://www.usdoj.gov/opa/documents/cts_batiste_indictment.pdf.

70 See Kirk Semple, *U.S. Falters In Terror Case Against 7 In Miami*, N.Y. TIMES, Dec. 14, 2007, at A28.

hadist group.⁷¹ They allegedly conspired to blow up federal buildings in Miami and the Sears Tower in Chicago.⁷² The seven defendants were indicted on four counts of § 2339A for providing material support and resources, including the provision of themselves as “personnel,” in preparation for the following predicate crimes: (1) agreeing to work under al Qaeda’s “direction and control”; (2) provision of personnel for the destruction or attempted destruction of buildings and the attempt to conceal that support; and (3) levying war against the U.S. government.⁷³ None of the accused is Muslim; rather Batiste had used the “embassy” for religious instruction, according to neighbors interviewed, in the Moorish Science Temple of America, a syncretic religion which was founded in the early twentieth century.⁷⁴ The undercover agent submitted that Batiste had initially sought help from terrorists to execute their plan through an acquaintance before formally swearing allegiance to al Qaeda.⁷⁵ The indictment alleges that the undercover investigation was initiated after Batiste reached out to a third party who informed the FBI of Batiste’s intentions to secure jihadist support for his plans in the United States.⁷⁶ The agent stated that Batiste was “willing to work with al Qaeda to accomplish the mission and wanted to travel with [the informant] overseas to make appropriate connections.”⁷⁷ The indictment states that Batiste wanted to create an “Islamic Army” and contends that Batiste requested “radios, binoculars, bullet proof vests, firearms, vehicles, and \$50,000 cash” from the agent.⁷⁸

The defense disputed this account, arguing the informant provided the defendants with a list of necessary hardware for jihadists, led them in an oath of allegiance to al Qaeda which was videotaped, and even informed them that al Qaeda wanted to blow up an FBI

71 See Carol J. Williams & Richard B. Schmitt, *FBI Says 7 Terror Suspects Were Mostly Talk*, L.A. TIMES, June 24, 2006, at A5.

72 See Vanessa Blum, *6 Held in Terror Case Denied Bail*, L.A. TIMES, July 6, 2006, at A21; Christopher Drew & Eric Lichtblau, *Two Views of Terror Suspects: Die-Hards or Dupes*, N.Y. TIMES, July 1, 2006, at A1; Pincus, *supra* note 9; Williams & Schmitt, *supra* note 71.

73 Indictment, *Batiste*, *supra* note 69, at 3, 9, 11. At the time bail was denied, a seventh defendant was detained in Atlanta. See Blum, *supra* note 72; Williams & Schmitt, *supra* note 71.

74 See Pincus, *supra* note 9; Williams & Schmitt, *supra* note 71. The FBI later shifted them to a warehouse so surveillance could proceed without agents being noticed. See Pincus, *supra* note 9.

75 See Blum, *supra* note 72; Williams & Schmitt, *supra* note 71. The second and principal informant was paid \$17,000 and also received approval of his petition for political asylum. See Pincus, *supra* note 9.

76 Indictment, *Batiste*, *supra* note 69, at 4–5.

77 Pincus, *supra* note 9 (alteration in original).

78 Indictment, *Batiste*, *supra* note 69, at 4–5.

building in Miami.⁷⁹ Significantly, the informant told Batiste that a televised bin Laden statement warning of a strike inside the United States was a reference to his plot.⁸⁰

The Government informant was the group's only link to a terrorist organization.⁸¹ Batiste's counsel emphasized that the FBI had unearthed "no evidence that his client had met with any real terrorist, received e-mails or wire transfers from the Middle East, possessed any al-Qaeda literature, or had even a picture of bin Laden."⁸² In fact, FBI Deputy Director John Pistole described the defendants as "more aspirational than operational," with no real capability of committing the acts.⁸³ In seven months of undercover surveillance, the group only received six pairs of boots and the use of a digital video camera from the agent. The raid uncovered no weapons, and the authorities refused to say what, if anything, had been seized.⁸⁴ The prosecutor did contend that Narseal Batiste, the group's alleged leader, had asked the FBI informant to provide the group with rockets and semi-automatic rifles.⁸⁵ According to the indictment, Batiste had also allegedly communicated his plans to the informant, stating he wanted to "kill all the devils we can" in an attack that would "be just as good or greater than 9/11."⁸⁶ Batiste, who claimed he wanted al Qaeda's training, invited the informant at one point to travel with him to Chicago to meet his "top two generals" for the plot, but the trip never

79 See Blum, *supra* note 72 ("[D]efense lawyers argued . . . that the government informant—not their clients—drove the alleged plot."); Drew & Lichtblau, *supra* note 72 (stating that a lawyer for one of the defendants believed the government informant had played a "large role . . . in the case. In one tape, the informant recited what F.B.I. agents said was an authentic Qaeda oath, while the seven men sat on a sofa and chairs in a warehouse that the F.B.I. had wired with eavesdropping equipment. As the informant repeated the words for a second time, each defendant stood and stated his name before they all said in unison that they were committing themselves to the 'path of jihad.'"); Williams & Schmitt, *supra* note 71 ("[T]his case was developed exclusively through information provided by the undercover operative, a circumstance that could allow defense lawyers to argue entrapment.").

80 Pincus, *supra* note 9.

81 See Williams & Schmitt, *supra* note 71 (noting that "the 'Al Qaeda representative' [the suspects] were dealing with was an operative with the South Florida Joint Terrorism Task Force").

82 Pincus, *supra* note 9.

83 Williams & Schmitt, *supra* note 71 (internal quotation marks omitted); see also Pincus, *supra* note 9 ("[C]ourt records released since then suggest that what Gonzales described as a 'deadly plot' was virtually the pipe dream of a few men with almost no ability to pull it off on their own.").

84 See Williams & Schmitt, *supra* note 71.

85 Drew & Lichtblau, *supra* note 72.

86 Indictment, *Batiste*, *supra* note 69, at 6; Williams & Schmitt, *supra* note 72.

took place.⁸⁷ Counsel for Batiste's codefendants disputed that their clients knew of Batiste's intentions, but authorities countered that at least two had confessed to knowledge of the Sears Tower plot. The subordinates had elected to participate in the photographing and videotaping of target buildings in Miami.⁸⁸

The Government alleges the Sears Tower idea was Batiste's alone, but does not dispute that the informant suggested bombing the FBI and other federal buildings in Miami and suggested four other cities to add to the plot.⁸⁹ Nor does it dispute that the informant supplied the men with camera equipment and urged them to case the government buildings in Miami. Federal officials also did not dispute that Batiste's group had "no ability to carry out the proposed attacks."⁹⁰ The prosecutor stated that the group ultimately disbanded after a dispute with another Moorish leader from Chicago, Charles James Stewart, also known as Sultan Khan Bey, with whom Batiste had discussed the plot. Recorded conversations between the two leaders revealed the pair smoking marijuana and talking about a "Moorish nation" to come.⁹¹ Material support of terrorism does not appear to have been central in their thoughts.

Then-Attorney General Alberto Gonzales stated, "[t]hese men were unable to advance their deadly plot beyond the initial planning phase."⁹² To Gonzales, the fact that the South Florida Joint Terrorism Task Force informant was the group's only link to al Qaeda did not diminish their liability. Another senior DOJ official acknowledged that the men had been arrested well before they acquired any capacity to pull off the crimes and even well before there was any clear idea as to what the FBI had actually foiled, if anything, with the arrests: "You may never know what you prevented," he said, "but those may be our greatest successes."⁹³ On December 13, 2007, one defendant in the *Batiste* case was acquitted, and a mistrial was declared for the six others.⁹⁴ In April 2008, the retrial resulted in a second hung jury. Nevertheless, prosecutors are seeking to convict the defendants for a

87 Pincus, *supra* note 9, at A6.

88 See Drew & Lichtblau, *supra* note 72.

89 See Pincus, *supra* note 9.

90 Drew & Lichtblau, *supra* note 72.

91 See Pincus, *supra* note 9. When he arrived in Miami on the FBI's dollar, Stewart told Batiste that he wished to create a Moorish nation with his wife, whom he called Queen Zakiyaah, and a Moorish army. *Id.*

92 See Williams & Schmitt, *supra* note 71, (internal quotation marks omitted).

93 Drew & Lichtblau, *supra* note 72 (internal quotation marks omitted).

94 See Semple, *supra* note 70.

third time.⁹⁵ The third trial began in February 2009 and resulted in five convictions and one acquittal.⁹⁶

B. United States v. Hayat

Hamid Hayat, a twenty-three-year-old Pakistani-American citizen, was convicted on one count of § 2339A for provision of “material support and resources . . . [and] personnel in the form of his person” in preparation for a violation of 18 U.S.C. § 2332B (Acts of Terrorism Transcending National Boundaries) and three counts of making false statements (18 U.S.C. § 1001) for concealing “the fact that he had received jihadist training, and that he [had] return[ed] to the United States for the purpose of waging jihad.”⁹⁷ The evidence for the material support conviction was that Hayat had allegedly attended a jihadist training camp in Pakistan between the Fall of 2003 and the Fall of 2004 and had returned to the United States with the “[i]ntent to [w]age [j]ihad.”⁹⁸ The government offered recorded “confessions” in which the FBI elicited non-committal responses to leading questions. It is unclear from the transcript whether Hayat fully understood the questions or their import. The interrogation was so poorly crafted and coercive that a veteran decorated FBI agent was ready to testify for the defense when the trial judge denied him the opportunity.⁹⁹ An FBI agent admitted at one point during the trial that he had never been able to conclusively establish that Hayat had attended a jihadist

95 See Editorial, *A Trial Too Far*, WASH. POST, May 2, 2008, at A20; Editorial, *Give Up on “Liberty City Seven” Case*, TAMPA TRIB., May 8, 2008, at 12.

96 See Carmen Gentile, *U.S. Begins Third Effort to Convict 6 in Terror Case*, N.Y. TIMES, Feb. 19, 2009, at A19; Damien Cave and Carmen Gentile, *Five Convicted in Plot to Blow Up Sears Tower*, N.Y. TIMES, May 13, 2009, at A19.

97 First Superseding Indictment at 2–4, *United States v. Hayat*, No. 05-240 (E.D. Cal. 2007), available at <http://www.milnet.com/terr-cases/Lodi-Five/1st-superseding-indictment-hayat-dist-court.pdf>.

98 *Id.* at 3.

99 The following is an excerpt from the crucial “confession”:

“Targets in the U.S?” the agent asked again.

“You mean like buildings?”

“Yeah, buildings,” the agent nodded. “Sacramento or San Francisco?”

“I’ll say Los Angeles and San Francisco.”

“Financial, commercial?”

“I’ll say finance and things like that.”

“Hospitals?” the agent suggested.

“Maybe, I’m sure.”

“Who ran the camp?”

“Maybe my grandfather.”

“Al Qaeda? Al Qaeda runs?”

“I’ll say they run the camp. . . . Yeah, that’s what I’ll say.”

Arax, *supra* note 9 (omission in original).

training camp in Pakistan.¹⁰⁰ The indictment stated that Hayat had “among other things, received training in physical fitness, firearms, and means to wage jihad.”¹⁰¹ Upon returning to the United States, Hayat’s plane was diverted to Narita, Japan, where in an interrogation he denied (the Government said “concealed”) that he had attended a jihadist training camp.¹⁰²

Naseem Khan, the undercover informant, had developed a close relationship with the Hayat family, encouraging Hamid to speak about his views on jihad, his scrapbook of jihadist clips, and his grandfather’s alleged training camp in Pakistan. Hayat resisted his suggestion that he join the movement:

“I’m going to fight jihad,” Khan declared. “You don’t believe, huh?”

“No man, these days there’s no use in doing that. Listen, these days we can’t go into Afghanistan The American CIA is there.”¹⁰³

At other points during the *four years* Khan spent pushing Hayat, Khan’s questions elicited different responses. In reference to the murder of Daniel Pearl, an American reporter in Pakistan, Hayat said, “I’m pleased about that. They cut him into pieces and sent him back. That was a good job they did. Now they can’t send one Jewish person to Pakistan.”¹⁰⁴ But in response to Khan’s prodding to attend a camp, he was non-committal: “I’m ready, I swear. My father tells me, ‘Man, what a better task than this.’ But when does my mother permit it?”¹⁰⁵ It remains unclear why Hayat was not detained in Japan and refused entry to the United States if he was such a security threat and would only be arrested soon thereafter.¹⁰⁶

Significantly, a crucial piece of evidence at trial was a prayer Hayat kept in his wallet, a *tawiz*, which suggested violent motives to jurors unfamiliar with Islam.¹⁰⁷ In fact, the *tawiz* was commonplace and most frequently interpreted as a non-violent plea for protection against enemies.¹⁰⁸ That this piece of evidence was so central to the prosecu-

100 *Id.*

101 First Superseding Indictment, *Hayat*, *supra* note 97, at 3.

102 *Id.* at 3–4.

103 *Arax*, *supra* note 9 (omission in original) (internal quotation marks omitted).

104 *Id.*

105 *Id.* (internal quotation marks omitted).

106 *See id.* (“Why, if . . . [Hayat] was such a threat to national security, did the FBI take him off a ‘No Fly’ list and let him reenter the U.S.?”).

107 *See* Waldman, *supra* note 60.

108 *Id.* Some of the translations of the prayer include the following. The government’s expert witness testified that the prayer translated was: “Oh Allah, we place you at their throats, and we seek refuge in you from their evil.” *Arax*, *supra* note 9. A book entitled *The Prophet’s Prayers* translated it as: “Oh Allah, we pray that you put fear in the hearts of our enemies and ask for your protection against their mischief.” *See* Waldman, *supra* note

tion's case demonstrates the paltriness of the evidence against Hayat. The defendant's motion for a retrial based on juror bias and misconduct was denied in May 2007.¹⁰⁹

C. United States v. Lakhani

In New Jersey's first post-9/11 terrorism case, British citizen Hemant Lakhani was convicted of material support under § 2339A: providing material support and resources preparatory to violations of three predicate offenses, 18 U.S.C. § 32 (destruction of aircraft or aircraft facilities), § 2332a (use of weapons of mass destruction) and § 2332b (acts of terrorism transcending national boundaries).¹¹⁰ Lakhani stood accused of willfully and knowingly engaging in the brokering of Russian portable, shoulder-fired surface-to-air missiles (SAMs) without a license.¹¹¹ A Pakistani-born undercover agent, Muhammad Habib Ur Rehman, who in approximately twenty months had 150 conversations with Lakhani, represented himself as a buyer for the Ogaden Liberation Front in Somalia interested in purchasing anti-aircraft missiles.¹¹² During this conversation, Lakhani also stated that bin Laden had "straightened them all out" and "did a good thing."¹¹³ Lakhani produced an arms brochure and claimed that he had contacts inside a military production company. At a meeting in New Jersey, Lakhani was informed that the missiles were to be used by jihadists who wanted to target airliners on the anniversary of 9/11. The agent stated "this is not a legal business," and Lakhani acknowledged this.¹¹⁴ After allegedly discussing prior arms sales, Lakhani

60. The Muslim Students Association/University of Southern California hadith database translates the prayer as: "O Allah, we make thee our shield against them, and take refuge in Thee from their evils." *Id.* See also Press Release, U.S. Dep't of Justice, Hamid Hayat Sentenced to 24 Years in Connection with Terrorism Charges (Sept. 10, 2007), available at http://www.usdoj.gov/opa/pr/2007/September/07_nsd_700.html (citing only the translation of the government's expert witness in Islamic law).

109 See *Judge Rejects Retrial in Pakistan Training Case*, REUTERS, May 17, 2007, <http://www.reuters.com/article/domesticNews/idUSN1743994020070518>; see also Order Denying Defendant's Motion for Retrial, *United States v. Hayat*, No. 2:05-cr-240-GEB (E.D. Cal. May 17, 2007), available at <http://207.41.19.127/caed/DOCUMENTS/Opinions/Burrell/05-240.2.pdf>.

110 Superseding Indictment at 6–7, *United States v. Lakhani*, No. 03-880 (D.N.J. 2007).

111 See *Man Guilty of Trying to Sell Missiles in Sting Operation*, L.A. TIMES, Apr. 28, 2005, at A11; Ronald Smothers, *Man Pleads Not Guilty in Plot to Sell Missiles for Terror Use*, N.Y. TIMES, Jan. 10, 2004, at B6.

112 See *United States v. Lakhani*, 480 F.3d 171, 174–75 (3d Cir. 2007); Tareco Affidavit at 1, *United States v. Lakhani*, No. 03-7106, (D.N.J. Aug. 11, 2003); Robert Hanley, *Jury Hears 2 Views of Man Accused in Missile Scheme*, N.Y. TIMES, Jan. 5, 2005, at B5.

113 Tareco Affidavit, *supra* note 112, at 1 (internal quotation marks omitted).

114 *Id.* at 2. (internal quotation marks omitted).

agreed to the deal. At another meeting, Lakhani inquired about the planned terrorist strike, suggesting it was to “make one explosion . . . to shake the economy.”¹¹⁵ Through intermediaries, Lakhani secured payment from the cooperating witness to make the purchase from Russia.¹¹⁶ According to the indictment, Lakhani did manifest some technical knowledge throughout.¹¹⁷ Not only was he a trader of groceries, rice, textiles, and oil; he had also lawfully traded weapons.¹¹⁸

Finally, in July 2003, after the FBI money was wired, Lakhani and the cooperating witness traveled to Moscow to finalize the transfer with the suppliers, who were undercover Russian Federal Security Service (FSB) agents also cooperating with the FBI.¹¹⁹ Lakhani did not recognize that the missile on display was a decoy; the FBI transferred the actual weapon to the United States by plane.¹²⁰ In St. Petersburg, Lakhani discussed the possibility of purchasing an additional fifty SAMs and a multi-ton quantity of C-4 plastic explosive.¹²¹ A bill of lading was produced to confirm authorization to pay \$70,000 for the SAMs.¹²² Lakhani was finally arrested in Newark, after meeting with the informant at a hotel overlooking the Newark airport.¹²³

Lakhani’s counsel argued that this supply-and-buy sting amounted to an elaborate scheme to entrap the “unwary innocent,” who otherwise would not have had the intent or means to orchestrate the deal.¹²⁴ These sting operations raise questions about the defendant’s predisposition, since undercover agents were on both sides of the exchange with the defendant ensnared as an unwitting mediator. The defense ultimately failed to persuade the jury that the plot and intent were implanted by the government.¹²⁵ In affirming the jury’s rejection of the entrapment defense, the Third Circuit found that Lakhani’s “ready response” was “amply demonstrated by his multiple,

115 *Id.* at 3 (omission in original) (internal quotation marks omitted).

116 *Id.* at 7.

117 Superseding Indictment, *Lakhani*, *supra* note 110, at 2–3.

118 *United States v. Lakhani*, 480 F.3d 171, 174 (3d Cir. 2007).

119 Tareco Affidavit, *supra* note 112, at 7.

120 *Lakhani*, 480 F.3d at 177.

121 Tareco Affidavit, *supra* note 112, at 7.

122 *Lakhani*, 480 F.3d at 177.

123 *Id.* (“Lakhani remarked, ‘[I]f we strike fifty at one time, simultaneously, it will f— their mother. . . . It will shake them. Then they will run. . . . Strike simultaneously at . . . whatever time you decide. All at once in different cities at the same time. . . . They will think the war has started.’”) (omissions in original); *Man Guilty of Trying to Sell Missiles in Sting Operation*, *supra* note 111.

124 Lichtblau, *supra* note 9.

125 *Id.*

self-financed trips to the Ukraine in search of a missile.”¹²⁶ Along with his orchestration of the money laundering scheme and the fraudulent bill of lading, this established predisposition and the absence of any “reluctance.”¹²⁷ However, the court did reject the Government’s assertion that it could establish predisposition based on a prior course of criminal conduct, since none of the evidence proved Lakhani’s prior arms deals were unlawful.¹²⁸

D. United States v. Siraj

Shahawar Matin Siraj was indicted on one count of conspiracy to use explosives to destroy a building or other real property (here, the Herald Square subway station in New York), one count of plotting to derail or disable a mass transportation vehicle, one count of conspiracy to place a destructive device upon or near a facility used for a mass transportation vehicle, and one count of conspiracy to discharge and detonate an explosive device in a public transportation system.¹²⁹ Though he was not charged with § 2339A, Siraj is included in this part due to the FBI’s aggressive use of an undercover informant in building the case. In a case that reveals “the depth of the Police Intelligence Division’s clandestine programs,” Siraj, a twenty-four-year-old Pakistani immigrant, frequently worshipped at the Islamic Society of Bay Ridge in Brooklyn, a mosque that was tracked by no fewer than three NYPD undercover agents.¹³⁰ Siraj’s trial was the first based on an NYPD, not an FBI, investigation since 2001.¹³¹ The defense contended that the division’s extensive monitoring of the Brooklyn Muslim community violated a 1985 consent decree, which restricted such targeted surveillance of political and religious groups.¹³² The two government witnesses at trial, a fifty-year-old informant named Osama Eldawoody and an undercover officer, did not even know of each other’s existence throughout the investigation. Eldawoody attended 575 prayer services at the Bay Ridge mosque and another mosque in

126 *Lakhani*, 480 F.3d at 179–80 (internal quotation marks omitted).

127 *Id.* at 180.

128 *Id.* at 179 n.11.

129 Superseding Indictment at 1–3, *United States v. Siraj*, No. 05-104 (E.D.N.Y. Mar. 14, 2006).

130 Rashbaum, *supra* note 9.

131 *Id.*

132 *Handschu v. Special Servs. Div.*, 605 F. Supp. 1384 (S.D.N.Y. 1985), *aff’d*, 787 F.2d 828 (2d Cir. 1986) (establishing the Handschu consent decree); Rashbaum, *supra* note 9; *see also* Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201, 1213 n.43 (2004) (describing the *Handschu* litigation and noting other lawsuits brought against police agencies).

Staten Island over the course of thirteen months, supplying his supervising detective with intelligence twice daily for a grand total of 350 reports based on these visits to the mosque and the Islamic bookstore where Siraj worked.¹³³ NYPD documents refer to numbered cases, such as M3 and M24, suggesting that the Intelligence Division's Terrorist Interdiction Unit may have had active investigations at that time in at least two dozen mosques citywide.¹³⁴

The Egyptian nuclear-engineer-turned-undercover-informant had recorded hours of conversations with Siraj, in which the defendant described aspirations to blow up bridges and subway stations.¹³⁵ In August 2004, Siraj and co-conspirator James Elshafay, who testified against Siraj, inspected the subway station and drafted diagrams to facilitate bomb placement.¹³⁶ Upon arrest, no explosives were found.¹³⁷ At trial, the defense counsel argued that Eldawoody had entrapped Siraj, eliciting violent, anti-American, and anti-Semitic statements, declarations of support for bin Laden, and comments on the Israeli-Palestinian crisis, by showing the young man photos of Abu Ghraib's torture victims, talking about the suffering of the Palestinians, and promising that his superiors would supply the explosives for the plot.¹³⁸ The jury ultimately rejected the entrapment defense.¹³⁹ However, while Siraj described a willingness to commit terrorist acts and even boasted of past crimes, much of the predisposition evidence constituted protected speech divorced from any conspiracy.¹⁴⁰ Though the admission of this evidence probably was not outcome-determinative, constitutionally protected speech should not be invoked in the service of disproving entrapment, especially when equally probative evidence exists. Eldawoody testified that Siraj had stated he hoped Al Qaeda would attack America again and that suicide bombings were justified to avenge the deaths of family members. He called bin Laden "a talented brother and a great planner" and said

133 Rashbaum, *supra* note 9.

134 *Id.*

135 Press Release, U.S. Dep't of Justice, Shahawar Matin Siraj Sentenced to Thirty Years of Imprisonment for Conspiring to Place Explosives at the 34th Street Subway Station in New York (Jan. 8, 2007), *available at* http://www.usdoj.gov/siraj_pr.pdf.

136 *Id.*

137 *Id.*

138 *See* Rashbaum, *supra* note 9; William K. Rashbaum, *Closing Arguments in Trial Of Subway Bombing Case*, N.Y. TIMES, May 23, 2006, at B3.

139 Press Release, U.S. Dep't of Justice, *supra* note 135.

140 *See* United States v. Siraj, 468 F. Supp. 2d 408, 420 (E.D.N.Y. 2007) (noting that even though Siraj's statements "may be described as reflecting defendant's political views, those statements were properly admitted").

he hoped bin Laden “planned something big for America.”¹⁴¹ However odious these assertions are to American jurors’ ears, they constitute protected speech and are not probative of a predisposition to *personally* commit an act of terrorism. As a result of their extensive surveillance, the Assistant US Attorneys had accumulated other evidence that suggested such a predisposition for Siraj to commit an act of terrorism, not merely to support the acts of others.¹⁴² Siraj was sentenced to thirty years in prison on January 8, 2007.¹⁴³

IV. UNAFFILIATED TERRORISM AND MATERIAL SUPPORT RECONSIDERED: REVISING THE CRITERIA FOR PROVING AND DEFEATING ENTRAPMENT IN TERRORISM PROSECUTIONS

A. *The Federal Courts Must Redefine Entrapment in the Context of Anticipatory Terrorism Prosecutions Under § 2339A and Require a Revised Jury Instruction*

The *Batiste*, *Hayat*, *Lakhani*, and *Siraj* cases all demonstrate the haziness of the distinction between permissible government artifice and entrapment. The *Siraj* court stated that, in the context of the entrapment defense, “[i]nducement by the government includes ‘soliciting, proposing, initiating, broaching or suggesting the commission of the offense charged.’”¹⁴⁴ But the complexity of sting operations demands more nuanced guidance. The common threads in these cases include: (1) FBI initiation of contact in all four cases (as distinguished from drug stings, in which the defendant may initiate the contact and sale); (2) FBI provision of equipment or money in *Lakhani* and *Batiste*; (3) FBI incitement to participate in the global jihadist movement in *Hayat*, *Batiste*, and *Siraj*; (4) FBI contribution to the criminal plot or complete design of the plot in all four cases; (5) FBI encouragement against the defendant’s resistance, ambivalence, uncertainty or rejection in *Hayat*; (6) FBI (and cooperating agents of foreign governments) acting as both buyer and seller in a sting operation in *Lakhani*; and (7) FBI cultivation of a close relationship with the defendant over the course of many months or years in order to set a trap in *Hayat* and *Siraj*.¹⁴⁵ All of these actions are cause for

141 Rashbaum, *supra* note 138.

142 *Siraj*, 468 F. Supp. 2d at 416.

143 Press Release, U.S. Dep’t of Justice, *supra* note 135.

144 *Siraj*, 468 F. Supp. 2d at 415 (quoting *United States v. Brand*, 467 F.3d 179, 190 (2d Cir. 2006)).

145 *See supra* Part III.

heightened concern when the Government charges inchoate crimes under a statute like § 2339A.

Several principles and proposals for guarding against entrapment emerge from the case law. The definitional changes to entrapment in § 2339A prosecutions should begin with requiring the Government to offer evidence of the defendant's initiation and initiative to execute the terrorist plot. If the FBI supplies the overwhelming majority of material, plans, targets, and ideological fervor, the crime should be deemed *per se* "implanted."

Similarly, courts should instruct juries to be wary of the Government's charges when the informant is the defendant's only link to an FTO or the global jihadist movement. In *Batiste*, the agent not only created an opportunity for the would-be violators, but instigated and secured jihadist loyalty from the defendants. A court should find it difficult to conclude this investigation was not a naked attempt to manufacture predisposition evidence for a vulnerable group that perhaps shared violent aspirations but likely did not have the capability or initiative to commit an act of terrorism. In addition to the Attorney General's Guidelines' requirement of a reasonable expectation of precision in isolating unwary criminals, a good faith requirement would ensure that undercover agents hew closely to the mission of identifying criminals and restrain their complicity and orchestration to the essential core of the ploy.

The informant's assistance in the plot must be narrowly tailored to eliciting the criminal intent of the targets. The Supreme Court would be wholly justified in mandating a form of heightened scrutiny for government conduct in the context of inchoate terrorism-related offenses, specifically § 2339A. A tiered system of scrutiny, in which inchoate offenses merit a more robust review of entrapment than attempted or completed offenses, would protect defendants from impermissible implantation of criminal intent. Correspondingly, juries should be instructed that the Government's burden on rebuttal will be more demanding for inchoate offenses. If, as in *Lakhani* and *Batiste*, the undercover agent has crafted an elaborate plot in order to better situate the unwary innocent, the Government should not be permitted to prosecute crimes it largely invented and set in motion with meager participation from a vulnerable defendant. The defendant may very well have different intentions, such as persuading the FBI to part with its money. This appears to be a highly probable ex-

planation of the *Batiste* case.¹⁴⁶ In comparison, the evidence hints that Lakhani may well have had the requisite intent and predisposition to further an act of terrorism, but the FBI's heavy involvement in executing the arms transaction tainted the evidence against him. Though Lakhani was clearly pleased with his work, had the FBI engaged in surveillance, without assisting quite as much in the procurement and transfer of the missile, it would have made for a sting more probative of Lakhani's actual wrongdoing.

In contrast to this call for heightened scrutiny in § 2339A cases, Professor Dru Stevenson has argued that the predisposition test should be "relaxed" by creating a rebuttable presumption of predisposition whenever entrapment is claimed in a terrorism case.¹⁴⁷ Stevenson argues that this proposal is rooted in the unique features of terrorism, as compared to the set of vice crimes in which the entrapment defense has its roots, namely: (1) the higher stakes of prevention; (2) the difficulty of detection and arrest; (3) the lack of compulsiveness and addiction, which leads to self-disclosure; (4) the heinous nature of the offense suggesting that only those *actually* predisposed would be caught in the sting; (5) the positive externalities of undercover operations in instilling mistrust and fear in terrorist organizations or cells and giving prosecutors more leverage to flip defendants and thereby further the goal of prevention; and (6) the higher cost and danger which function as independent regulation of undercover terrorism investigations and the diminishing returns of applying entrapment.¹⁴⁸

Though this thesis would be compelling for cases involving actual attempts, Stevenson inadequately justifies this burden-shifting in the context of inchoate crimes like material support. His argument depends on the "heinous" nature of the crime (though many violent crimes fit this imprecise label), as well as questionable assumptions about the fixity of terrorism suspects' ideology, intent, and ultimate willingness to act.¹⁴⁹ In one part, Stevenson essentially argues entrapment is irrelevant in terrorism cases, because "a normal person would be immune to inducements. We can infer predisposition merely by the fact that the person agreed to engage in such a horri-

146 The defense noted in opening arguments of the third trial that Batiste, a construction worker and father of four, repeatedly asked about the promised money on their recordings. *Miami Men Face Third Trial in Terror Plot*, ASSOCIATED PRESS, <http://www.msnbc.msn.com/id/29261709/> (last visited May 8, 2009).

147 Stevenson, *supra* note 25, at 133–48, 179–97.

148 *Id.*

149 *Id.* at 138, 179–97.

ble act, and that other evidence of predisposition is unnecessary.”¹⁵⁰ However, the earlier the government intervenes, and the more inchoate the charges, the less plausible such an argument is. Given the broad swath of ambiguous conduct swept in by § 2339A (which requires neither a formulated conspiracy to violate a predicate offense nor a recipient FTO), including provision of one’s self as personnel, it is not so clear that anyone caught in a material support sting would have done the deed without the inducement.

In particular, heightened scrutiny of stings is necessary when the government and its collaborators act as both buyer and seller in material support cases. To remedy this problem, federal courts should adopt the rule set forth in *State v. Overmann* and *State v. Johnson*, which categorically rejected the use of “take-back” drug stings to reveal criminal predisposition.¹⁵¹ Most courts reject the idea that these stings betray pre-inducement criminality, since “the operation scarcely signals . . . that the target would sell drugs on his own.”¹⁵²

Persistent and ultimately successful government persuasion to commit a felony over demonstrable resistance, ambivalence, uncertainty or rejection on the part of the defendant should be an absolute bar to prosecution. When an investigation requires years of undercover involvement, an appellate court should closely examine whether the defendant succumbed early in the process or only after intensive, longstanding pressure.¹⁵³

Misrepresentation of the legality of the conduct should be another bar to prosecution. *Jacobson* did not explicitly incorporate this into the definition of entrapment, but strongly suggested that government misrepresentation of the law should bar prosecution.¹⁵⁴ This is arguably already covered in the Attorney General’s Guidelines re-

¹⁵⁰ *Id.* at 144.

¹⁵¹ *State v. Johnson*, 268 N.W.2d 613, 615 (S.D. 1978); *State v. Overmann*, 220 N.W.2d 914, 917 (Iowa 1974).

¹⁵² Hay, *supra* note 66, at 410. With the exception of some courts that extend the subjective approach to even these extreme practices, many hold for automatic acquittal for fear of a higher rate of false positives with such tactics. *Id.* at 410–11.

¹⁵³ This principle has been cited by courts and scholars alike. See Stevenson for a discussion of this principle:

The predisposition inquiry also considers factors like the alacrity with which the defendant embraced the undercover agent’s offer or inducement, the time or number of attempts required to obtain the defendant’s participation, and the defendant’s subsequent resolve or hesitation in pursuing the criminal activity. The cases also take note of who initiated the first contact, and if it was the government, then what reasons the government had to initiate contact with this target.

Stevenson, *supra* note 25, at 137–38 (citing PAUL MARCUS, THE ENTRAPMENT DEFENSE (3d ed. 2002)).

¹⁵⁴ *Jacobson v. U.S.*, 503 U.S. 540, 553–54 (1992).

quirement that “[t]he illegal nature of the activity is reasonably clear to potential subjects.”¹⁵⁵ However, those provisions do not confer enforceable rights on defendants.¹⁵⁶ Since the Attorney General’s Guidelines are more restrictive than the case law, it is possible that making the FBI’s own requirements legally binding will ensure that the Government’s investigatory efforts do not squander resources. However, most of the criteria do not sound in terms of reasonableness and arguably do not create judicially manageable standards.

Especially for § 2339A charges based on § 956(a) or other conspiracy-capable predicate offenses, there must be a more substantial connection to a terrorist organization, an unaffiliated group of jihadists, or any terrorism-related conspiracy, than a single informant’s cover story. In *Batiste*, which did not include an underlying § 956(a) charge, the only preparatory acts were taping the buildings and providing one’s self as personnel. Arguably, the defendants could be prosecuted under § 956(a) independently if they had agreed upon a specific offense, but the FBI intervened before such a meeting of the minds. But to the extent the government ever relies on § 2339A liability instead, the prosecution cannot be allowed to depend solely on the false identity of an undercover agent. This proposed principle is supported by the rule that a conspiracy cannot be formed between two people if one is an undercover agent. If that presents a bar to actual conspiracy liability, what justification can there be for dismissing its relevance in the context of pre-conspiracy material support liability? There must be an independent and adequate basis to establish that the defendant knowingly or intentionally furthered a conspiracy or other predicate offense.

For acts in furtherance of a conspiracy, it is hard to conceptualize this pre-conspiracy liability as crime, due to the overlap with lawful activity. Actions such as fundraising, recruiting, procuring equipment, creating a “support cell,” providing one’s self as personnel, and establishing and running training camps, if proven, will usually suffice for conviction on a different charge, such as § 2339D (unlicensed military-style training abroad). Since an “aiding-and-abetting-conspiracy” offense is quite vague and allows the prosecution to con-

155 ATTORNEY GENERAL’S GUIDELINES ON FBI UNDERCOVER OPERATIONS, *supra* note 61.

156 The “Section VII. Reservation” states explicitly that the guidelines are “solely for the purpose of internal DOJ guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable by law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.” *Id.*

jure an as yet unrealized meeting of the minds, the courts should at least strike § 956(a) from the list of predicate offenses in § 2339A.

Government incitement of religious or ideological fervor, be it to attend a militant training camp or madrasa, or to take an oath of loyalty to al Qaeda, should be an absolute bar to prosecution. If the Government cannot identify and reveal illegal activity without pressuring a target to accept that violence is his or her religious duty, it should have no power to convict. This is primarily because the Government should have a disincentive to instigate the very criminal intent and ideological extremism that counterterrorism operations and prosecutions seek to deter. Not only do these tactics run afoul of the federal government's strategic priorities, but arguably they also impermissibly entangle the government in matters of faith and free exercise. In *Batiste*, *Siraj* and *Hayat*, incitement could have been instrumental in solidifying both the defendant's commitment to a particular material support or conspiracy, and in generating evidence of predisposition. It is likely that the FBI understands such tactics verge on entrapment. However, the FBI probably gambles that if enough unpopular speech or threats are elicited from the accused, then the jury will find entrapment rebutted on predisposition grounds, despite the fact that the defendant's statements were, in fact, post-inducement.

B. The Appellate Courts Must Bar Certain Categories of "Predisposition" Evidence in the Government's Rebuttal of Entrapment in Anticipatory Terrorism Prosecutions

May the Government introduce protected speech, or associational and religious expression to rebut entrapment? The district court in *Siraj* defined predisposition strictly as the "state of mind of a defendant before government agents make any suggestion that he should commit a crime."¹⁵⁷ In one § 2339A case involving an undercover agent's testimony, *United States v. Nettles*, the court listed factors for determining "if a defendant was (or was not) predisposed to commit a crime," including:

- (1) [T]he defendant's character or reputation;
- (2) whether law enforcement officers initially suggested the criminal activity;
- (3) whether the defendant engaged in the criminal activity for profit;
- (4) whether defendant showed a reluctance to commit the offense that was overcome by

¹⁵⁷ *United States v. Siraj*, 468 F. Supp. 2d 408, 420 (E.D.N.Y. 2007) (quoting *United States v. Williams*, 705 F.2d 603, 618 (2d Cir. 1983)).

government persuasion; and (5) the nature of the inducement or persuasion offered by the government.¹⁵⁸

Though the courts in *Hayat*, *Lakhani*, *Siraj*, and *Batiste* all admitted protected speech as predisposition evidence, there is arguably such a high risk of prejudice to the defendant that this evidence cannot be probative of whether the defendant would have committed the offense independent of government inducement. Inchoate offenses particularly lend themselves to abuse in this sense, as the threshold act requirement is so minimal.¹⁵⁹

Is speech or religious belief probative of a predisposition or willingness to actually commit a terrorism-related offense? In *Hayat*, the court admitted the defendant's praise of Daniel Pearl's murderers.¹⁶⁰ In *Siraj*, the district court certainly believed such evidence was probative when it admitted defendant's statements supporting violent, terrorist activities, statements supporting Osama bin Laden, statements boasting of prior terrorist acts, statements supporting violence against a religious or ethnic minority (in this case, Jews), statements outlining plots to bomb the subway station, statements conveying a desire to blow up bridges and subway stations, books and videotapes advocating jihad, and videos of terrorist strikes and other attacks on civilians that the narrator blames on Americans.¹⁶¹ These were all admitted to rebut the defendant's claim that he never entertained such violent criminal designs before meeting the informant, who "inflamm[ed] him with political discussions on subjects such as the war in Iraq and . . . pictures of prisoner abuse at Abu Ghraib."¹⁶² Though the court held that the First Amendment does not bar admission of verbal support for jihadist activity as predisposition evidence,¹⁶³ federal courts should revisit the answer to this question.

Limiting predisposition evidence to only that which betrays an intent to engage in "imminent lawless action,"¹⁶⁴ would sweep too

158 United States v. Nettles, 400 F. Supp. 2d 1084, 1091 (N.D. Ill. 2005).

159 See generally Wayne McCormack, *Inchoate Terrorism: Liberalism Clashes with Fundamentalism*, 37 GEO. J. INT'L L. 1 (2005) (exploring the tension between prosecution of inchoate terrorism-related offenses and guarding protected speech and association, which are hallmark rights of democratic life, with particular attention to the distinction between supporting or joining an organization and furthering its unlawful purposes).

160 Arax, *supra* note 9.

161 See *supra* Part III.D.

162 *Siraj*, 468 F. Supp. 2d at 419.

163 *Id.* at 419–20.

164 See *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (invalidating an Ohio statute that punished people who advocate violence as a means of political reform or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism," among other actions).

broadly in excluding both statements of generalized support and statements of intent to carry out acts of terrorism. A revised, slightly narrower test would substantially contribute to the goal of protecting unwary innocents from entrapment, while still preserving flexibility for the Government to prove predisposition. Building on cases such as *Scales v. United States*, which prohibited Smith Act prosecutions of mere “expression[s] of sympathy with the alleged criminal enterprise,”¹⁶⁵ the Court held in *Brandenburg v. Ohio* that the First Amendment will not allow the prosecution of “advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹⁶⁶ Similarly, mere statements of sympathy or advocacy should not be admissible as predisposition evidence unless the government can demonstrate that this speech constituted the announcement of a concrete plan, boasting of past terrorism-related offenses, or incitement to “imminent” terrorism.¹⁶⁷ Only the latter categories of content are relevant to whether the defendant would have committed the crime in the absence of government inducement.

The optimal rule would be a compromise that preserves the Government’s access to verbalized intentions to commit acts of terrorism: communications or statements that describe future or present plans to commit violent terrorism-related crimes would be admissible, whereas political statements of support that do not contain elements of incitement or revelations as to criminal plots would be inadmissible. The *Siraj* court was therefore partly right and partly wrong. The sympathetic statements for al Qaeda, terrorist activity, and media advocating the same were not probative of the defendant’s predisposition to commit a crime. Hamid Hayat’s support for the murderers of Daniel Pearl was equally irrelevant to proving predisposition or the § 2339A charge.

To protect First Amendment rights and guard against abusive stings and entrapment, the courts should only admit evidence that is probative of a readiness to engage in a violation of § 2339A and fur-

¹⁶⁵ *Scales v. United States*, 367 U.S. 203, 228 (1961) (“[T]he statute is found to reach only ‘active’ members having also a guilty knowledge and intent . . . which therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action.”).

¹⁶⁶ *Brandenburg*, 395 U.S. at 447.

¹⁶⁷ It should be noted that Congress has never enacted nor could it constitutionally enact a law prohibiting the “glorification” of terrorism, as the amended British anti-terrorism law of 2006 did. Terrorism Act, 2006, c. 11, § 3 (Eng.), available at http://www.opsi.gov.uk/acts/acts2006/ukpga_20060011_en.pdf.

ther the predicate offenses. Though these forms of evidence will not always be separable—in which case the Government should win the tie—the dangers posed by combining potential jury bias, pre-conspiracy preparatory offenses, and undercover agent pressure are simply too significant to admit evidence that demonstrates generalized sympathy for jihadist activity, but not a willingness to personally engage in that conduct. The court in *Siraj* erred in concluding that in spite of the First Amendment, the fact that “defendant’s statements contain political expression does not insulate defendant from their use at trial,” since his statements also boasted of committing violent acts, and regularly expressed support for terrorism.¹⁶⁸

Siraj was not a § 2339A case and, even still, the court ostensibly restricted the permissible forms of predisposition evidence to:

- (1) [A]n existing course of criminal conduct similar to the crime for which the defendant is charged; (2) an already formed design on the part of the accused to commit the crime for which he is charged; or (3) a willingness to commit the crime for which he is charged as evidenced by the accused’s ready response to the inducement. With respect to a defendant’s “ready response” to the inducement, a defendant is predisposed to commit a crime, if he is “ready and willing” without persuasion to commit the crime charged and awaiting any propitious opportunity to do so.¹⁶⁹

In *Hayat*, the danger of baseless conviction was realized. It is likely that the jury would not have been persuaded of the defendant’s material support to *himself* to commit a further crime if his statements had been excluded. Given the consequences of admitting such unpopular, but protected, speech, the court should rule it inadmissible when the statements do not contain any information on probable past or future plots.

C. There Are Inherent Defects in 18 U.S.C. § 2339A That Require Amendment

Statutory amendment may ultimately be required to clarify the scope of liability under § 2339A and the relation of inchoate terrorism-related offenses to entrapment. First, § 2339A should be amended to require that if the predicate offense is a conspiracy, then the conspiracy must be formulated. Forcing the Government to defer arrests until the conspiracy is formed will not vastly increase the

¹⁶⁸ *Siraj*, 468 F. Supp. 2d at 420.

¹⁶⁹ *Id.* at 415 (citing *United States v. Brand*, 467 F.3d 179, 191, 194 (2d Cir. 2006)).

risk of a plot's execution.¹⁷⁰ Second, § 2339A and § 956(a) could expressly outline what acts must be the defendant's alone and what acts may permissibly be facilitated by an undercover agent. Considering the equivocal nature of these preliminary, inchoate steps to commission and the wide latitude it confers on the prosecution, Congress could more specifically restrict the scope of material support with an agency restriction. The overlap with lawful speech and associational activity strongly supports a call for clarification of which acts may be committed or facilitated by the undercover agent in a sting.

D. Policy Reasons for Revising the Entrapment Defense

First, while the FBI, the NYPD Intelligence Division, and other investigative agencies will more frequently deploy undercover informants, and not just in a listening mode, they risk alienating the Muslim-American and immigrant communities that police and undercover agents rely on for tips. It is no secret to these communities that undercover agents have infiltrated and monitored their religious and communal lives. Vigorously policing entrapment in the context of inchoate terrorism-related offenses will reign in abusive practices. While this will not assure Muslim Americans that they are free from police surveillance, it will send signals that the government disapproves of aggressively preying on disaffected, volatile youth and unpopular, though protected, beliefs.

Second, creating a more robust entrapment defense will incentivize greater creativity amongst federal and local agents to devise traps that will draw out the willing terrorist's plot without implanting criminal intent in the minds of vulnerable innocents. It may also create incentives to monitor suspects for a longer period of time before turning to an informant or arresting a suspect. Choosing surveillance over early intervention is always a risk, as the Department of Justice would probably argue. A strong counterargument is that deferring intervention in favor of persistent surveillance allows the police to discover the full scope of a plot and the greatest number of participants.¹⁷¹

170 The charging of § 956(a) and § 2339A together could very well be unconstitutional if the Supreme Court ever considered that combination's near-eradication of the act requirement.

171 Many analysts have said that London's MI5 was able to make sweeping arrests in July 2006 to foil the British Airways plot because it had waited and watched suspects for nearly a year. The investigation into the previous summer's bus and underground bombings led to the July 2006 arrests. See John Ward Anderson & Karen DeYoung, *Britain Arrests 24*

A third reason for this adjustment concerns the FBI's resources. The FBI should embrace the revision of entrapment (in doctrine, jury instructions and the Attorney General's Guidelines) as an opportunity to direct finite resources with surgical precision toward pursuing unwary terrorists with live plots, not those who might succumb to years of pressure and persuasion. If the FBI terrorism task forces aim to identify all persons on U.S. soil who sympathize with al Qaeda and test them to see if they will join a terrorist plot, they will inevitably fail to identify an actual, materializing threat with this overbroad strategy. But if the FBI aims to identify suspects with a plan in search of an opportunity, their conviction rates will almost definitely improve. In this respect, federal material support statutes, freewheeling charging under § 2339A, pretextual charging, and weak enforcement of the entrapment prohibition are allowing investigations to become unfocused and incomplete. An investigation that can secure conviction or removal quite readily with meager evidence is an investigation that may stop short of discovering all of a suspect's contacts and plans. It is shortsighted to think that keeping entrapment ineffectual will benefit law enforcement in the long run.¹⁷²

Fourth, in a similar vein, more stringent application of the entrapment defense should cause the FBI to rethink how it recruits undercover informants. Instead of leaving its most sensitive cases to coerced informants whose interests in the venture arise from the potential for personal gain, not public duty, the FBI should only be recruiting full-time undercover agents with relevant language skills and background. Training agents to investigate crimes undercover and lay traps for those suspected of a desire to personally engage in an act of terrorism would likely reduce abusive practices that result in the implantation of criminal intent. The current hired guns are not formally associated with the FBI and probably harbor no sense of loyalty or duty to the criminal justice system that has essentially blackmailed them into this role. Eliminating this practice of recruitment by coercion could ensure that the undercover operatives understand the danger of entrapment, at least in a practical sense, and are grounded in the institution's goals and responsibilities. A higher conviction rate could well be the result.

Suspected Conspirators, WASH. POST, Aug. 11, 2006, at A1; Craig Whitlock & Dafna Linzer, *Tip Followed '05 Attacks on London Transit*, WASH. POST, Aug. 11, 2006, at A1.

¹⁷² *But cf.* Stevenson, *supra* note 25, at 179–97 (arguing that a relaxed entrapment standard would enhance the benefits of sting operations, which include a reduction in government surveillance and its attendant risks to civil liberties, and the deterrence and weakening of terrorist cells consumed by mistrust and fear due to the infiltration).

Finally, revising entrapment in the context of inchoate terrorism-related offenses is particularly necessary to safeguard the freedoms of speech and association that American government officials swear to uphold, no matter how unpopular. But the reason is not only constitutional; there is also a practical dimension. Speech, worship, and association are all outlets for strong personal emotions—if chilled or blocked, some will inevitably interpret this as hostile to their identity and turn to crimes of violence. Prosecutors need to ensure that their charges of choice do not unconstitutionally infringe these protected outlets. American values, the way Muslims inside and outside America perceive the U.S. government and police forces, and the ability of agents to identify legitimate suspects depend on keeping these outlets open. Balancing effective surveillance against the possibility of chilling speech, worship, and association is a delicate exercise. However, the FBI and other investigative bodies have not fully grappled with the negative consequences of unrestrained undercover infiltration. This suggests that the FBI needs to reconsider how aggressively it uses undercover sting operations and whether it is trapping a criminal or implanting the very designs it seeks to prevent.