THE LITERAL THIRD WAY IN APPROACHING "MATERIAL SUPPORT FOR TERRORISM": WHATEVER HAPPENED TO 18 U.S.C. § 2339B(C) AND THE CIVIL INJUNCTIVE OPTION?

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The prosecution of persons accused of terrorist conduct has generated a fierce policy and academic debate focused predominantly on two alternatives: traditional criminal prosecution in federal (Article III) courts, or prosecution by military commission. Two other possibilities have also been discussed, but have produced fewer supporters, and even fewer details of how they would be implemented: indefinite detention based either on law of war doctrine or some new, as yet unarticulated

authority, or a new system altogether operating as a "national security court."[1]

This article proposes a different option for qualifying cases and offenders, which certainly would not include all alleged conduct or all defendants: the use of civil injunctive authority as a remedial, prophylactic, and rehabilitative approach rather than a purely punitive model. Such a solution is neither new nor radical, nor the product of anyone allegedly "soft" on terrorism. Rather, as explained in Part I below, it has been provided by *Congress*, as the authority *already exists* in the predominant statute used to prosecute "material support for terrorism."[2]

Subsection 2339B(c) grants the Attorney General authority to "initiate civil action" in federal court for an injunction if it "appears" that "any person is engaged in, or is about to engage in, any act that constitutes, or would constitute, a violation" of § 2339B.[3] This article seeks to invigorate that section, which has lain dormant since it was enacted in 1996. Use of injunctive authority rather than criminal prosecution presents several advantages, not only from the perspective of conserving valuable but finite criminal justice resources, but also through perception, by reducing tensions and suspicions harbored by communities targeted by counterterrorism strategies—namely U.S. Muslim communities—and instead eliciting more cooperation from those communities, and instilling confidence in the U.S. criminal justice system and the fairness and objectivity of U.S. government counterterrorism programs as a whole.[4]

Utilizing the injunctive authority present in § 2339B(c) would also address a looming problem: the release over time of persons convicted of terrorism offenses as their sentences expire, who were warehoused for years without any attempt at rehabilitation or deradicalization. This section would limit that population to persons for whom incarceration is

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1. *See, e.g.*, GLENN SULMASY, THE NATIONAL SECURITY COURT SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR (2009). The application of § 2339B(c) envisioned herein is entirely distinct from a "national security court."

2. 18 U.S.C. § 2339B (1996).

3. 18 U.S.C. § 2339B(c).

4. While counterterrorism enforcement could apply to anyone, or any group or community engaging in terrorist planning or activity, the reality is that the conversation is about Muslims because that is the focus of law enforcement. Consequently, this article discusses the Muslim community in particular.

the only means of vindicating the interests of security, deterrence, and punishment.

Of course, not every defendant would merit the civil alternative, but a fair number would. Section 2339B as contemplated herein would encompass those defendants who are non-violent, or who fell prey to FBI stings but otherwise did not or could not plan or conduct a terrorist act, or whose material support was humanitarian in nature, or supplied by a diaspora element in the context of a civil war in which the U.S. is neither the target of any terrorism, nor possesses any compelling interest beyond abstract geopolitics. Those are just examples, as each case would have to be evaluated individually to determine whether society, the court system, and the defendant (and his community) would benefit from treatment under § 2339B(c) rather than criminal prosecution.

In addition, as detailed below in Part II, adopting a mechanism that is compatible with legal and cultural traditions in the U.S. would replicate other civil, remedial approaches that have been effective in a variety of contexts, including drug courts and other "problem-solving courts," securities regulation and enforcement, and removal of organized crime influence from labor unions and legitimate businesses. Moreover, as discussed in Part III below, non-criminal methods of countering terrorism recruitment and ideology have been developed and employed with increasing enthusiasm and success by nations that have a far more endemic problem of *jihadist* activity.

As set forth in Part IV below, the advantages that can be realized from employing the authority already available under § 2339B(c) are several and substantial:

> (1) it would permit more efficient use of law enforcement and criminal justice resources, concentrating prosecutorial and court efforts on those who present a tangible danger rather than those simply caught in the net of a broad preemptive counterterrorism strategy that deliberately seeks intervention earlier than customary in the time line of inchoate offenses;
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> (2) it would significantly reduce suspicion, resentment, and alienation in Muslim-American communities, which increasingly view, with cause, counterterrorism law enforcement as predominantly oriented toward sting operations that as often as not constitute entrapment of persons who otherwise would not be motivated toward or capable of developing actionable terrorist plots;

(3) it would, conversely, necessarily involve those communities, as well as social services organizations in those communities and families of the persons subject to § 2339B(c) proceedings, in identification, monitoring, and rehabilitation of persons subject to injunction under § 2339B(c), just as those communities, families, and organizations play an essential role not only in analogous programs in other countries, but also in the "problem-solving" courts that exist in the U.S.;

(4) it would, as a result, *enhance* cooperation between the government and Muslim-American communities that otherwise would continue to be more likely to rally around their members whom they perceive are unfairly targeted by law enforcement;

(5) it would further the current preemptive counterterrorism strategy by permitting intervention at an earlier and/or different stage than criminal prosecution, thereby eliminating the need for waiting until criminal conduct occurs, or for choosing between *inducing* criminal conduct or losing any ability to monitor or control the subject's future conduct; and

(6) it would, similar to other programs abroad, constitute an affirmative effort to *resolve* the issues at the roots of Islamic radicalism rather than merely addressing the threat *jihadi* by *jihadi* without regard to eliminating the bases for *jihadist* mentality and recruitment.

Certainly the use of § 2339B(c) as an active element in counterterrorism strategy is neither a panacea nor complete solution to the problem of *jihadism* among disaffected Americans, as the civil alternative would not apply to all potential offenders, some of whose conduct is more appropriately treated by criminal prosecution. It also represents a marked change from current policy, and presents challenges in implementation. No doubt some will reject the proposals herein simply on that ground, or on the related ground that the development of a system that supports use of § 2339B(c), discussed below in Part V, requires too much effort and financial resources, not to mention a commitment from law enforcement, prosecutors, judges, and the defendants themselves.

Yet despite those formidable hurdles, it is still more costly—in economic, social, political (both domestic and international), and cultural terms—to continue down the path of a disproportionate, categorical, one-size-fits-all approach that diverts finite resources from genuinely

dangerous targets, alienates communities, warehouses marginal threats for decades at a time, and fails to distinguish between those who deserve criminal punishment and those who merit a more moderate sanction.

If, as an eminent political scientist has written, "the definition of alternatives is the supreme instrument of power,"[5] then exercise of the authority under § 2339B(c) represents its expression. While some have characterized a non-criminal approach to this specific aspect of counterterrorism as "soft" power, it is more accurately deemed "smart" power.[6]

I. A CIVIL INJUNCTIVE MECHANISM ALREADY EXISTS AS PART OF THE MATERIAL SUPPORT STATUTE

One of the principal attractions of a civil injunctive approach to "material support" for terrorism is that it does not need to be invented. While almost all involved in terrorism law enforcement, prosecution, and defense are completely unaware of its existence, § 2339B(c) has existed since the initial enactment of § 2339B in 1996.

Section 2339B is presently the most popular form of "material support" charge.[7] It proscribes providing "material support"—a widely expansive term including essentially all types of physical and intangible goods and services with the exception of "medicine" or "religious materials"[8]—or attempting or conspiring to do so, to a foreign terrorist organization (hereinafter "FTO," designated as such under the

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5. E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 68 (1960).

6. A judge testifying about problem-solving courts stated he was "tired of everybody talking about being tough on crime. It's about time we get smart on crime." National Association of Criminal Defense Lawyers, *America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform* 12 (Sept. 2009) (*see infra* note 80), *available at* National Association of Criminal Defense Lawyers (quoting the Honorable Tom Bower, Testimony at 1758) [hereinafter *National Association of Criminal Defense Lawyers*].

7. 18 U.S.C. § 2339A, the companion statute to § 2339B, prohibits providing "material support," or attempting or conspiring to do so, in support of any of a variety of criminal conspiracies and/or conduct committed overseas (punished under the federal criminal code).

8. 18 U.S.C. § 2339A(b)(1). "Material support or resources" is defined therein as: "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials[.]" *Id.* "Training" and "expert advice and assistance" are more specifically defined in § 2339A(b)(2) & (3), respectively.

Immigration and Nationality Act).[9] In order to be liable under § 2339B, a defendant must either know of the FTO's designation, or that it engages in terrorism or terrorist activity (as defined in other statutes).[10]

Providing a civil alternative to criminal prosecution, § 2339B(c) reads as follows:

> (c) Injunction.—Whenever it appears to the Secretary [of the Treasury[11]] or the Attorney General that any person is engaged in, or is about to engage in, any act that constitutes, or would constitute, a violation of this section, the Attorney General may initiate civil action in a district court of the United States to enjoin such violation.[12]

The essentially non-existent profile of § 2339B(c)—even among experts—is not surprising, as there is not a single reported instance of its use in the fifteen years since it was enacted as part of the initial statute as a whole.[13] Nor is there *any* legislative history.[14]

Nor is it referred to in the United States Attorney's Manual or any other guideline or policy. It has been cited but once: in *Linde v. Arab Bank, PLC*,[15] the District Court noted that § 2339B(c) granted the Attorney General exclusive authority to seek injunctive relief, thereby implying that a concurrent private right of action did not exist.[16]

While impetus to use § 2339B(c) might benefit from legislative amendment that could provide a more structured framework for the subsection's application, that is a complicated process and, in the current political environment, an unlikely prospect that is, in any event, unnecessary. Just like some of the civil enforcement mechanisms discussed below, all § 2339B(c) needs to be an effective tool in counterterrorism policy is initiative on the part of prosecutors, and

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9. 8 U.S.C. § 1189(a) (2006).

10. 18 U.S.C. § 2339B(a)(1).

11. 18 U.S.C. § 2339B(g)(5).

12. 18 U.S.C. § 2339B. The companion provision § 2339B(b) provides as follows:

> (b) Civil Penalty.—Any financial institution that knowingly fails to comply with subsection (a)(2) shall be subject to a civil penalty in an amount that is the greater of—
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> (A) $50,000 per violation; or
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> (B) twice the amount of which the financial institution was required under subsection (a)(2) to retain possession of control.

13. The same is true for § 2339B(b). *See* Terrorism Prevention Act Report, S. 735, 142 CONG. REC. H3305-01 (1996); *see also* H.R. REP. No. 105-518 (1996).

14. *Id.*

15. 353 F. Supp. 2d 327 (E.D.N.Y. 2004).

16. *Id.* at 331.

innovation on the part of lawyers and judges. As detailed below in Part II, in analogous contexts courts have with relative ease fashioned from skeletal statutory sections an entire apparatus designed to lend civil remedial authority meaning and impact.

II. CIVIL ALTERNATIVES TO CRIMINAL PROSECUTION HAVE PROVEN EFFECTIVE AND EFFICIENT IN A WIDE ARRAY OF CONTEXTS IN THE U.S. JUSTICE SYSTEM

Civil alternatives to criminal prosecution—even in the context of serious, violent, and/or organized crime—are quite common within the U.S. justice system, and have served as a useful adjunct to the more severe punishment and more stringent standards of proof, and provision of rights to defendants available pursuant to criminal prosecution. Indeed, in many instances, the civil avenues have achieved results impossible to accomplish through the traditional series of individual prosecutions.

In addition, "problem-solving" courts in the drug, mental health, and other fields, which divert offenders from the criminal justice system toward rehabilitation programs, are burgeoning, and for good reason: they are cost-effective both short-term and long-term, they offer both the government and defendant a more productive resolution than that available in ordinary criminal courts, and they attack the underlying problem systemically rather than simply concentrating on liability and punishment for individual offenders.

A. The United States Attorney's Manual

The United States Attorney's Manual includes instructions and guidance for federal prosecutors in "determining whether prosecution should be declined because there exists an adequate, non-criminal alternative to [criminal] prosecution[.]"[17] The Manual acknowledges that such alternatives can, under appropriate circumstances, "be expected to provide an effective substitute for criminal prosecution."[18] Among the relevant factors the Manual directs prosecutors to consider are: (1) "[t]he sanctions available under the alternative means of disposition;" (2) "[t]he likelihood that an effective sanction will be imposed;" and (3) "[t]he effect of non-criminal disposition on Federal law enforcement interests."[19]

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17. U.S. Attorney's Manual (hereinafter "U.S.A.M."), at § 9-27.250(A).
18. *Id.* § B.
19. *Id.* § A(1)-(3).

The Manual also notes that just because "a person has committed a Federal offense," that "does not mean, however, that a criminal prosecution must be initiated."[20] Rather, the Manual recognizes that "resort to the criminal process is not necessarily the only appropriate response to serious forms of antisocial activity,"[21] and that "Congress and state legislatures have provided civil and administrative remedies for many types of conduct that may also be subject to criminal sanction."[22] The Manual adds that "[a]nother potentially useful alternative to prosecution in some cases is pretrial diversion."[23]

B. Civil Remedial Approaches To Criminal Conduct

1. Civil Forfeiture

Some civil remedial approaches to criminal conduct are, in fact, quasi-criminal without imposing the stigma of criminal conviction. For example, civil forfeiture of money, assets, and property, which is likely the most commonly utilized civil alternative, has been an extraordinarily effective tool in the past three decades.[24] Primarily employed in the context of drug enforcement, the proliferation of civil forfeiture seizures and complaints against the proceeds of illegal drug activity—whether cash, jewelry, real estate, or investments—has netted the government well more than five billion dollars.[25]

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20. *Id.* § B

21. *Id.*

22. *Id.*

23. U.S.A.M. §9-27.250(B), citing § 9-22.000.

24. The main statute used to forfeit the instrumentalities and proceeds of illegal drug activity, 21 U.S.C. § 881, is civil in nature, and has been actively and increasingly used since the late 1970's. It has resulted in administrative and court-ordered forfeiture of innumerable cars, boats, houses, jewelry, other valuables and collectibles, and untold amounts of cash. Indeed, the seizure of suspicious amounts of cash, including amounts more than $10,000 discovered via border and customs searches, is another popular and profitable government use of the forfeiture authority. *See, e.g.*, Case of One 1985 Nissan, 300ZX, VIN: JN1C214SFX069854, 889 F.2d 1317, 1319 (4th Cir. 1989); United States v. One 1973 Rolls Royce, V.I.N. SRH 16266 By & Through Goodman, 43 F.3d 794 (3d Cir. 1994); Treasury Forfeiture Fund Accountability Report Fiscal Year 2004, *available at* http://www.treasury.gov/resource-center/terrorist-illicit-finance/Asset-Forfeiture/Documents/04-annual-report.pdf.

25. *See Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statements Fiscal Year 2010*, U.S. Department of Justice Office of the Inspector General Audit Division Audit Report 11-12 (2011) ("[t]his is the fifth year since inception of the Fund that it has exceeded $1 billion in deposits. If we remove the effect of the nine major large cases producing $630.3 million, the deposits still exceeded $900 million in FY 2010."); *see also* John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset*

Spurred by the unbridled success of civil forfeiture in drug cases under Title 21, during the 1980's prosecutors began aggressively pursuing civil forfeiture in the organized crime context through the civil provisions of the Racketeer Influenced and Corrupt Organizations statute (hereinafter "RICO").[26] Instituted pursuant to the remedial civil provisions of the RICO statute, the "groundbreaking" civil RICO action in 1982,[27] *United States v. Local 560, International Brotherhood of Teamsters*,[28] which sought to wrest control of the union from organized crime, followed by the landmark civil RICO action, *United States v. Bonanno Organized Crime Family*[29] in 1987, constituted watershed events that opened an entirely new front for attacking organized crime through economic sanctions, and stripping organized crime of its ill-gotten gains without the need for criminal prosecution.

Only recently has the government recognized the utility of civil forfeiture in the context of counterterrorism. In 2009, in *In re 650 Fifth Avenue and Related Properties*,[30] the government instituted a civil forfeiture action against an Iranian foundation, alleging it was the alter-ego of the government of Iran, and involved in the violation of sanctions regulations prohibiting economic transactions with the Iranian

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Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement, 29 J. CRIM. JUST. 171, 171-87 (2001).

26. *See* 18 U.S.C. § 1964(a) & (b); *see also, e.g.*, Adam B. Weiss, *From the Bonannos to the Bin Ladens: The* Reves *Operation or Management Test and the Viability of Civil RICO Suits Against Financial Supporters of Terrorism*, 110 COLUM. L. REV. 1123 (2010); Michael Goldsmith, *Resurrecting RICO: Removing Immunity for White Collar Crime*, 41 HARV. J. ON LEGIS. 281 (2004).

27. James B. Jacobs and Ellen Peters, *Labor Racketeering: The Mafia and the Unions*, 30 CRIME & JUST. 229, 239 (2003).

28. 581 F. Supp. 279 (D.N.J. 1984), *aff'd*, 780 F.2d 267 (3d Cir. 1985); *see also* United States v. Int'l Bhd. of Teamsters, 905 F.2d 610 (2d Cir. 1990).

29. 683 F. Supp. 1411 (E.D.N.Y. 1988), *aff'd*, 879 F.2d 20 (2d Cir. 1989) (holding that an organized crime family, which existed only as association in fact, could not be a RICO defendant; that the federal government lacked standing to sue under RICO for damages to its business or property; and that real property was subject to in rem civil forfeiture for gambling offenses); *see also* Andrew Kinworthy, *To Remedy or Not to Remedy: The Availability of Disgorgement Under Civil RICO*, 84 WASH. U. L. REV. 969 (2006); Randy M. Mastro, Steven C. Bennett, & Mary P. Donlevy, *Private Plaintiffs' Use of Equitable Remedies Under the RICO Statute: A Means to Reform Corrupted Labor Unions*, 24 U. MICH. J.L. REFORM 571 (1991); Brian Goodwin, *Civil Versus Criminal RICO and the "Eradication" of La Cosa Nostra*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 279 (2002); Arthur F. Mathews, *Shifting the Burden of Losses in the Securities Markets: The Role of Civil RICO in Securities Litigation*, 65 NOTRE DAME L. REV. 896 (1990).

30. 777 F. Supp. 2d 529 (S.D.N.Y. 2011).

government and its agents.[31] Concurrent with the filing of the Complaint in *650 Fifth Avenue*, the foundation's U.S. assets, including a building on Fifth Avenue in New York, were frozen, effectively achieving the ultimate goal at the inception of the lawsuit.[32]

2. Blocking and Freezing Orders

Even more recently, in February 2011, pursuant to a PATRIOT Act provision,[33] the Director of the Financial Crimes Enforcement Network of the U.S. Treasury Department ("FinCEN"), published a "Notice of Finding" that the Lebanese Canadian Bank SAL "is a financial institution of primary money laundering concern" because of transactions allegedly involving an international drug-trafficking operation connected to Hezbollah.[34] That Notice of Finding permits the U.S. to impose "special measures" upon the bank's business operations within the U.S.[35]

In addition, the government has since September 11, 2001 (hereinafter "9/11") been very active in using its authority—also dating to the 1996 statutes that created § 2339B (and under the International Emergency Economic Powers Act, enacted in 1977)[36]—to designate organizations and individuals as either Foreign Terrorist Organizations, Specially Designated Global Terrorists, or Specially Designated Terrorists,[37] and freezing and ultimately seizing their assets.[38]

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31. That action was instituted pursuant to 18 U.S.C. § 981, another exceedingly powerful arrow in the government's civil forfeiture quiver. For a selection of over 100 forfeiture statutes at the federal government's disposal, see *Selected Federal Asset Forfeiture Statutes Including Statutes Amended by the Trafficking Victims Protection Reauthorization Act, the Stop Counterfeiting in Manufactured Goods Act, and the USA PATRIOT Improvement and Reauthorization Act* (2006), *available at* http://www.justice.gov/criminal/foia/docs/afstats06.pdf. Moreover, § 2339B(b) clearly contemplates pursuing economic sanctions against financial institutions that engage in transactions with persons or organizations connected to terrorism.

32. Verified Complaint, *In re* 650 Fifth Avenue and Related Properties, 777 F. Supp. 2d 529 (S.D.N.Y. 2011) (No. 8 Civ. 10934).

33. 31 U.S.C. § 5318A.

34. *See* Dept. of the Treasury, Finding That the Lebanese Canadian Bank SAL is a Financial Institution of Primary Money Laundering Concern, *available at* http://www.fincen.gov/statutes_regs/patriot/pdf/LCBNoticeofFinding.pdf.; *see also* Press Release, U.S. Depart. of the Treasury, Treasury Identifies Lebanese Canadian Bank Sal as a "Primary Money Laundering Concern," (Feb. 10, 2011), *available at* http://www.treasury.gov/press-center/press-releases/Pages/tg1057.aspx.

35. *See id.*

36. *See* 50 U.S.C. §§ 1701-1706.

37. *See* 31 C.F.R. 597 (Foreign Terrorist Organization); 31 C.F.R. 594 (Specially Designated Global Terrorists); 31 C.F.R. 595 (Specially Designated Terrorists).

38. *See* Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003).

For example, on September 23, 2001, President George W. Bush issued Executive Order 13224, entitled "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism."[39] The Order decreed that "all property and interests in property of the [listed] persons that are in the United States or that hereafter come within the United States, or that hereafter come within the possession or control of the United States persons are blocked."[40]

That Order, and another issued October 21, 2001, added dozens of organizations and individuals to the list of persons and entities for which

> any transaction or dealing by United States persons or within the United States in property or interests blocked pursuant to this order is prohibited, including but not limited to the making or receiving of any contribution of funds, goods, or services to or for the benefit of those persons listed in the Annex to this order or determined to be subject to this order.[41]

The government's blocking authority under IEEPA has been expanded even to reach "transnational criminal organizations" such as Mexican drug cartels. President Obama issued an Executive Order entitled, "Blocking Property of Transnational Criminal Organizations," on July 25, 2011, determining that "significant transnational criminal organizations constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States," and declaring "a national emergency to deal with that threat."[42]

Like Executive Order (hereinafter EO) 13224, this latest Order blocks interests and property within the U.S., or over which the U.S. exercises possession or control, and directs that they may not be "transferred, paid, exported, withdrawn, or otherwise dealt in[.]"[43] Also, "[a]ny transaction by a United States person or within the United States that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this order is prohibited."[44]

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39. *See* Exec. Order No. 13224, 66 Fed. Reg. 49079 (Sept. 23, 2001), *available at* http://www.treasury.gov/resource-center/sanctions/Programs/Documents/terror.pdf.

40. *See* Exec. Order No. 13224 § 1.

41. *See* Exec. Order No. 13224 § 2(a).

42. *See* Exec. Order No. 13581, 76 Fed. Reg. 44757 (Jul. 24, 2011).

43. *See* Exec. Order No. 13581 § 1(a).

44. *See* Exec. Order No. 13581 § 2(a).

Thus, preemptive and remedial civil enforcement mechanisms in the financial sphere have been robust in the context of counterterrorism for at least a decade, and extend to national security matters generally.

3. Civil RICO Actions

The availability of criminal RICO provisions notwithstanding, serial prosecutions of individual organized crime figures have generally failed to achieve broad, systemic, or permanent reform of labor unions, or to rid them of organized crime influence. However, government civil RICO actions, instituted pursuant to a provision that, like § 2339B(c), lay dormant for the first dozen years of the statute, *have* served as the vehicle for such fundamental reform.[45]

As described by a prominent proponent of and commentator regarding labor reform, "[t]he use of federal civil RICO suits to purge organized crime from international, regional, and local unions is one of the most ambitious efforts at directing socio-legal change in U.S. history."[46]

The problems with traditional enforcement methods is explained by another academic observer:

> One of the most important pieces of legislation aimed at democratizing unions, the Landrum-Griffin Act of 1959, failed to alter the union's lawless culture. Government attacks on the locals, prosecutions of criminal elements within the union, and even supervision by a government monitor could not identify

45. 18 U.S.C. § 1964(a) (affording district courts jurisdiction "to prevent and restrain violations of [18 U.S.C. §] 1962 . . . by issuing appropriate orders, including . . . ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons"). In turn, § 1964(b) grants the Attorney General authority to institute actions pursuant to § 1964(a).

46. James B. Jacobs, Eileen M. Cunningham, and Kimberley Friday, *The RICO Trusteeships After Twenty Years: A Progress Report*, 19 LAB. LAW. 419 (2004) (footnotes omitted), *available at* http://www.thelaborers.net/documents/rico_trusteeships_jacobs.htm.

> and eliminate the corruption that had infiltrated every level of the Teamsters. La Cosa Nostra ran the Teamsters.[47]

However, RICO, in addition to its criminal provisions, "also gave the Department of Justice authority to sue civilly to enjoin a person's or organization's future RICO violations."[48] While that civil injunctive authority was ignored for more than a decade, "[b]y the early 1980s, some federal prosecutors realized that they could use such civil suits to purge the racketeering influence from mobbed-up unions."[49]

As a result, "[t]he federal organized crime strike forces and the U.S. attorneys began bringing civil racketeering lawsuits against labor racketeers with the goal of having federal courts issue injunctions requiring wide-ranging union reforms, including the purge of racketeers and the restoration of union democracy."[50]

Beginning with *Local 560*, in which the union had been controlled by the same organized crime figures for more than a quarter-century, a tenure unaffected by the imprisonment of those individuals—for example, "[e]ven while serving time for murder, [Anthony Provenzano] ran the union through his brothers and other members of his clique for the benefit of organized crime"[51]—the government embarked on "a novel approach to addressing criminal control of an international union."[52]

Subsequently, in *United States v. District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners*[53] (hereinafter "*District Council*") in the Southern District of New York, the government instituted a civil RICO action against New York City's carpenters unions, which action has achieved a variety of reforms that could not have been imposed in a criminal prosecution of individuals.[54] For instance, the District Council (the umbrella institution for the carpenters unions) was placed in receivership under government

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47. Andrew B. Dean, Note, *An Offer the Teamsters Couldn't Refuse: The 1989 Consent Decree Establishing Federal Oversight and Ending Mechanisms*, 100 COLUM. L. REV. 2157, 2158 (2000) (footnotes omitted).

48. Jacobs & Peters, *supra* note 27, at 239.

49. *Id.*

50. *Id.* at 231 (citation omitted).

51. *Id.* at 240.

52. Dean, *supra* note 47, at 2159 (such lawsuits "ushered in a new era for the Teamsters and unions everywhere when it decided to deploy the provisions of [the civil RICO] statute against the Teamsters") (footnotes omitted).

53. 778 F. Supp. 738 (S.D.N.Y. 1991); No. 90 CV CIV 5722, 1992 WL 208284 (S.D.N.Y. Aug. 18, 1992); 571 F. Supp. 2d 555, 2008 (S.D.N.Y. 2008).

54. *Id.*

monitoring, and a permanent investigator was installed. That investigator was afforded broad authority to subpoena witnesses and documents, and make reports that compelled action against contractors and others despite the District Council's tradition of, and predilection for, continually ignoring violations of the collective bargaining agreements (and concomitant injury to the union's rank-and-file members).[55]

The effect of the government's civil enforcement approach has been significant, as "[c]ivil RICO has been the great engine of the government's onslaught"[56] against organized crime influence on labor unions:

> [t]he most successful of these civil [RICO] lawsuits have demonstrated the capacity of federal courts, when supported by courageous and creative former prosecutors serving as court-appointed trustees, to effectuate impressive institutional reform in thoroughly racketeer-dominated unions. Hundreds of criminals have been purged from union positions, fair election procedures have been instituted, and fundamental changes in union governance and operations have been adopted.[57]

Also, "civil RICO suits have been advantageous for the government because they have led to court-appointed trustees, almost always former prosecutors with major experience investigating and prosecuting organized crime cases."[58] In addition, the relief can be customized to meet particular problems:

> There is no uniform role or set of powers for these court-appointed trustees. Each judge or each consent agreement provides the trustee or trustees with case-specific authority. Moreover, each court or consent decree provides for how the

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55. *Id.*

56. Jacobs & Peters, *supra* note 27, at 274.

57. *Id.* at 231. In the context of the Teamsters civil RICO action, "under siege by the government and with RICO dangling like the sword of Damocles, the Teamsters leadership signed a consent decree ceding decision making power of many important internal matters to a variety of court-appointed outside monitors." Dean, *supra* note 47, at 2159 (footnotes omitted). Similarly, a 1995 civil RICO action against the Hotel Employees and Restaurant Employees International Union ("HEREIU") resulted in a settlement that "established a monitorship that expelled some of the most notorious members from the union and finally managed to secure [General President Edward] Hanley's resignation." Jacobs & Peters, *supra* note 27, at 255.

58. Jacobs & Peters, *supra* note 27, at 274.

> trusteeship will be funded and for how long; funding has varied from generous to inadequate.[59]

The rationale underlying using civil RICO instead of criminal prosecution in certain instances was explained by Professor James B. Jacobs as follows:

> [w]hile the deal with [a corrupt union leader] might seem to some like letting a labor racketeer off too easily, it is well to remember that it is one thing to allege organizational criminality and another thing to prove it. Corruption by high-level officials is almost always difficult to prove because powerful officials have the resources and capacity to cover their tracks and give colorable legitimacy to their exploitative conduct. Furthermore, it might take the government years to prosecute successfully a corrupt labor official. Thus, on balance, prosecutors and court-appointed trustees have sometimes concluded that a settlement that allows union reform to proceed expeditiously justifies forgoing a possible prosecution.[60]

There is no reason why § 2339B(c), like civil RICO which was underappreciated while the government focused exclusively on criminal prosecution for more than a decade, can perform the same nimble, tailored, and innovative function with respect to counterterrorism.

4. "Public Nuisance" Injunctions Against Street Gangs

Municipalities were also active in the 1990's using the authority to abate "public nuisance" to obtain civil injunctions against street gangs.[61] In *People ex rel. Gallo v. Acuna*,[62] the California Supreme Court described the situation in gang-plagued San Jose neighborhoods in terms far graver than what Americans face today with respect to terrorism:

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59. *Id.*

60. *Id.* at 255-56. Professor Jacobs is Chief Justice Warren E. Burger Professor of Constitutional Law and the Courts at New York University School of Law, and Director of that school's Center for Research in Crime and Justice.

61. *See, e.g.*, Brian Stettin, *Cities Are Finding Ways to Sweep Gangs off the Streets*, THE FEDERALIST SOC. FOR LAW AND PUB. POL. STUD. (Aug. 1, 1998), *available at* http://www.fed-soc.org/publications/detail/cities-are-finding-ways-to-sweep-gangs-off-the-streets.

62. 14 Cal. 4th 1090 (1997).

> The community has become a staging area for gang-related violence and a dumping ground for the weapons and instrumentalities of crime once the deed is done . . . . The people of this community are prisoners in their own homes. Violence and the threat of violence are constant. Residents remain indoors, especially at night. They do not allow their children to play outside. Strangers wearing the wrong color clothing are at risk.[63]

Yet civil enforcement authority was viewed as a viable alternative, even though it might not incarcerate every offender, because it provided the prospect of a broader set of remedies and means of alleviating the conditions in the affected neighborhoods. As a result, one commentator has strongly encouraged prosecutors to seek such injunctions:

> While this use of civil injunction law is certainly an expansion of the traditional purview of prosecutors, existing law in most jurisdictions should provide the necessary framework to enable prosecutors to pursue a gang injunction. And while pursuing such a project takes time and effort, the far-reaching preventative aspects of an injunction are worth the additional work required to obtain them. This publication introduces prosecutors and law enforcement agencies to the specific steps necessary to put into place this innovative and effective process.[64]

Similarly, as detailed *infra*, in Part IV, § 2339B(c) can be used to achieve systemic counterterrorism objectives that cannot be accomplished through resort to criminal prosecution as the exclusive avenue of redress.

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63. *Id.* at 1100.

64. *See* Max Shiner, *Civil Gang Injunctions: A Guide For Prosecutors* 1 (2009), *available at* http://www.ndaa.org/pdf/Civil_Gang_Injunctions_09.pdf. For further discussion, both favorable and critical, of gang injunctions, see, e.g., Bergen Herd, *Injunctions As A Tool to Fight Gang-Related Problems in California After People Ex Rel Gallo v. Acuna: A Suitable Solution?*, 28 GOLDEN GATE U. L. REV. 629 (1998); Matthew Mickle Werdegar, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409 (1999); Brittany Vannoy, *Turning Their Lives Around: California Cities Pioneer Gang Injunction Removal Procedures*, 29 J. NAT'L ASS'N ADMIN. L. JUD. 283 (2009); James Leito, *Taking the Fight on Crime from the Streets to the Courts: Texas's Use of Civil Injunctions to Curb Gang Activity*, 40 TEX. TECH L. REV. 1039 (2008); Cathy Wang, *Gang Injunctions Under Heat from Equal Protection: Selective Enforcement As A Way to Defeat Discrimination*, 35 HASTINGS CONST. L.Q. 287 (2008).

5. Enforcement of Securities Laws and Regulations

The Securities and Exchange Commission (hereinafter "SEC"), charged with responsibility for regulating and monitoring the securities markets, and enforcing the laws and regulations that govern those who participate in them, has long used a combination of civil and criminal actions to investigate, punish, deter, and publicize violations of securities laws and regulations.

As the SEC's 2004-2009 Strategic Plan ("SEC Strategic Plan") explains, "[e]ach year, the SEC brings hundreds of civil enforcement actions against individuals and companies for non-compliance with the securities laws."[65] The SEC Strategic Plan adds that the SEC "can seek a wide range of remedies[,]" including:

> civil injunctions, orders requiring special actions (such as audits, accounting for frauds, or special supervisory arrangements), civil monetary penalties and disgorgement of illegal profits, orders that bar or suspend an individual from serving as a corporate officer or director, censures, industry bars, or suspension or revocation of the registration of regulated entities such as broker-dealers and investment advisors.[66]

An example of the SEC choosing civil enforcement in order to achieve broad changes in securities industry practice is the global settlement reached with many brokerage firms regarding charges of fraud on investors resulting from the firms' failure to disclose conflicts of interest with respect to research and recommendations regarding securities whose issuers paid for the research (and favorable treatment). At the April 2003 press conference announcing the settlement, the SEC's Chairman declared that "[t]hese cases are an important milestone in our ongoing effort both to address serious abuses that have taken place in our markets and to restore investor confidence and public trust by making sure these abuses don't happen again in the future."[67]

The SEC Chairman added that "although the monetary relief obtained in the settlement is record-breaking, the structural reforms required by the settlement are, in my view more significant and far-

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65. Securities and Exchange Commission 2004-2009 Strategic Plan, at 30, *available at* http://www.sec.gov/about/secstratplan0409.pdf.

66. *Id.*

67. William H. Donaldson, SEC Chairman, Address at SEC Press Conference Regarding Global Settlement (April 28, 2003), *available at* www.sec.gov/news/speech/spch042803whd.htm.

reaching . . ." because "[t]he numerous obligations [the settlement] impose[s] on the defendants, taken together, will fundamentally change the role and perception of research at Wall Street firms."[68]

Whether the SEC pursues criminal or civil enforcement mechanisms is within the Commission's discretion, but certainly the seriousness of the offense and its effect on the national economy are not decisive factors. Thus, for example, not a single person responsible for the 2008 collapse of the housing and credit markets has been the subject of criminal indictment. Rather, all enforcement actions have been civil in nature.

For instance, in 2011 federal prosecutors in Los Angeles declined to prosecute Angelo R. Mozilo, former chief executive of Countrywide Financial, at one point the U.S.'s largest mortgage lender, but a key entity in the marketing of subprime mortgages that contributed significantly to the financial collapse in 2008. Instead of pursuing criminal charges of insider training, the SEC agreed to a settlement with Mr. Mozilo for $67.5 million ($45 million of which was paid by Countrywide and Bank of America, which had purchased Countrywide).[69]

Similarly, the SEC sued Goldman Sachs civilly for defrauding its clients by failing to disclose its internal (negative) opinion of securities it marketed to those customers.[70] The SEC deems the settlements in those

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68. *Id.*; *see also* Ethiopis Tafara, SEC Director, Office of International Affairs, Speech by SEC Staff at the IOSCO Annual Conference: Public discussion Panel on Combating Financial Crime Globally (Oct. 17, 2003), *available at* www.sec.gov/news/speech/spch101703iosco.htm (trumpeting new powers granted SEC by Sarbanes-Oxley Act authorizing civil asset freezes, and PATRIOT Act permitting civil seizure of correspondent accounts in the U.S. when assets overseas constitute proceeds of a crime).

69. *See* Gretchen Morgenson, *Case on Mortgage Official Is Said to Be Dropped*, N.Y. TIMES, Feb. 19, 2011, http://www.nytimes.com/2011/02/20/business/20mozilo.html. The *Times* also reported that "[e]-mails and other documents supplied to regulators in the S.E.C.'s case against Mr. Mozilo showed him discussing the company's lending practices and describing some of its loans as 'toxic' and 'poison.' Nevertheless, the company kept selling the types of loans Mr. Mozilo was denigrating." *Id.* Mr. Mozilo also reaped $140 million from selling Countrywide stock even as he was aware the company was in decline. *Id. See also* John C. Coffee, Jr., *Illusory Victories?: Do SEC Settlements Deter?* N.Y. L.J. (Nov. 18, 2010), *available at* http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202474993462&slreturn=1&hbxlogin=1. While the SEC's choices of civil enforcement over criminal prosecution may have generated controversy within the securities community, they have yet to galvanize the media, politicians, or the public at large. *See, e.g.*, Jean Eaglesham, *Challenges in Chasing Fraud*, WALL ST. J., June 23, 2011, at C1.

70. Sec. & Exch. Comm'n v. Tourre, No. 10 Civ. 3229, 2011 WL 350286 (S.D.N.Y. Jan. 31, 2011); *see also* Securities and Exchange Commission, *The SEC Charges*

cases, and others,[71] sufficient to deter others who might contemplate conduct that transgresses the securities laws. Yet the misconduct of Mr. Mozilo and Goldman Sachs more than arguably constitutes a greater threat to, and had more impact on, U.S. national security than even 9/11. After all, al Qaeda did not cause the collapse of the U.S. housing and credit markets. Prestigious long-standing firms such as Merrill Lynch, Bear Stearns and Lehman Brothers—not to mention the U.S. auto industry—survived 9/11, but not 2008.

The rescue of the financial, banking, and auto industries cost taxpayers nearly a trillion dollars in bail-out money (no doubt eclipsing that figure in true costs).[72] Yet the SEC has considered civil enforcement adequate. Similar use of the civil injunctive authority in § 2339B(c) for persons not constituting a genuine threat would represent merely *some* semblance of symmetry in treatment. The government, and certainly not the law, should not make adverse distinctions for persons suspected or accused of "material support" either because they are Muslim, or cannot afford to buy their way out of criminal prosecution through hefty civil penalties (amounting to a fraction of their net worth), or are not affiliated with powerful establishment institutions that more often than not pick up the tab for such settlements.[73]

Also, while some institutions may legitimately be deemed "too big to fail," it is equally true that a fair number of defendants charged with and convicted of "material support" merit the designation "too insignificant to prosecute."[74]

Goldman Sachs With Fraud In Connection With The Structuring And Marketing of A Synthetic CDO (Apr. 16, 2010), *available at* http://www.sec.gov/litigation/litreleases/2010/lr21489.htm; *see* Complaint, Sec. & Exch. Comm'n v. Tourre, No. 10 Civ. 3229, 2011 WL 350286 (S.D.N.Y. Jan. 31, 2011), *available at* http://www.sec.gov/litigation/complaints/2010/comp-pr2010-59.pdf.

71. *See* John C. Coffee, Jr., *The 'Inside Baseball' of Insider Trading*, N.Y. L.J. (Mar. 17, 2011), *available at* http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202486385950&The_Inside_Baseball_Of_Insider_Trading (noting advantages SEC gained from administrative proceeding against Goldman Sachs executive suspected of insider trading, including lower standard of proof, relaxed evidentiary standards, and avoidance of a jury trial).

72. The automobile industry bailout alone cost more than $80 billion dollars. *See* Joseph R. Szczesny, *Adding up the Auto Bailout: $80 Billion and Growing*, TIME (May 11, 2009), *available at* http://www.time.com/time/business/article/0,8599,1897321,00.html. The Troubled Asset Relief Program has cost taxpayers more than $700 billion dollars. *See The True Cost of the Bank Bailout*, PBS (Sept. 3, 2010), *available at* http://www.pbs.org/wnet/need-to-know/economy/the-true-cost-of-the-bank-bailout/3309/.

73. *See* Coffee, *supra* note 71.

74. It is certainly not the purpose of this article to *expand* criminal coverage and prosecution to those examples cited above. Indeed, over-criminalization is a genuine

6. Immigration Proceedings

Another civil method of counterterrorism enforcement is already used extensively: deportation and removal pursuant to immigration laws.[75] Indeed, the criminal "material support" statutes borrowed heavily from the language in immigration laws.[76] In addition, PATRIOT Act amendments expanded the bases for denying admission to the U.S.[77] However, deportation and removal are inferior means of counterterrorism enforcement, as once the person is outside U.S. jurisdiction, monitoring and supervision cease, all enforcement leverage is lost, and the person is free to return to "material support" behavior.[78] In contrast, a civil monitoring/supervision/sanction regime implemented under § 2339B(c) would ensure that persons subject to injunctive and other court-imposed conditions do not disappear from the radar before they have demonstrated their abandonment of illegal activity and intention.

These examples are not intended to provide an exhaustive survey of the entire system of civil alternatives, but rather only an illustration of how conduct that could clearly be considered criminal, and *serious*—even a threat to national security in its existential sense—has been addressed regularly, and effectively, in other contexts, and in ways that provide far more meaningful impact than serial criminal prosecution of individual offenders.

Also, with respect to certain subjects, *i.e.*, organized crime, the mechanisms for such civil remedial action were underutilized until innovative prosecutors and academics recognized their capacity for achieving systemic and permanent reform that was at the heart of the objectives of criminal prosecution, but unattainable via that mechanism.

Counterterrorism is simply another subject matter that could benefit from a two-pronged approach that incorporated the civil proscriptive provisions that *already exist* in § 2339B(c). As experience in those other areas demonstrates, a multidimensional approach is more nuanced, efficient, and effective.

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problem in the law today, rather than a solution. *See, e.g.*, THE HERITAGE FOUNDATION, www.overcriminalized.com (last visited Sept. 28, 2011); Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005). Consistent with that position, the point is that certain violators of § 2339B should also be channeled to civil, rather than criminal, proceedings.

75. 8 U.S.C. § 1227(a)(4)(B) (deportable for terrorist activity described in 8 U.S.C. § 1182(a)(3)(B) or (F)); 8 U.S.C. § 1183(a)(3)(B) (inadmissible for terrorist activity).

76. 8 U.S.C. § 1189.

77. 8 U.S.C. § 1182(a)(3)(B).

78. *Id.*

C. *The Example of Problem-Solving Courts*

So-called "problem-solving courts" provide another useful analogy for § 2339B(c). Since the first drug court in the U.S., offering treatment as an alternative to incarceration, commenced operation in Miami in 1989, the number of such courts has mushroomed to more than 2,000.[79] "Problem-solving" courts now "include mental health courts, domestic violence courts, community courts, drunk driving courts, and [even] gun courts."[80] One judge has described her mental health court as "a criminal justice diversionary strategy built around constitutional and consumer-oriented principles."[81] An academic characterizes such courts as concentrating on "the underlying problem and not the crime."[82]

From 2007-2009, the National Association of Criminal Defense Lawyers ("NACDL") conducted an investigation and hearings regarding problem-solving court in the U.S., and ultimately issued a report detailing its findings. The NACDL's 2009 report, entitled *America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform* (hereinafter "NACDL Report"), characterizes "problem-solving" courts as follows: "[t]he key components of any problem-solving court are diversion from the traditional prosecutorial track, treatment (graduated sanctions and rewards, tolerance for relapse), comprehensive rehabilitative services, staffing (a team-oriented approach with all parties involved), and ongoing judicial intervention."[83]

Similarly, the Department of Justice has listed "ten key components" of a problem-solving court. Those that could conceivably be superimposed on § 2339B(c) include:

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79. *History: Justice Professionals Pursue a Vision*, NADCP, http://www.nadcp.org/learn/what-are-drug-courts/history (last visited Sept. 28, 2011). Recently, *The New York Law Journal* reported on the opening of Manhattan's first "mental health court," which, the article noted, constituted the 26th mental health court in the state of New York among its 317 problem-solving courts. It also noted that "New York City has 40 problem-solving courts; eight of which are in Manhattan." Rick Kopstein, *Manhattan Health Court Opens*, N.Y. L.J. (Mar, 17, 2011), http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=12024864137258Manhattan_Mental_Health_Court-Opens&SLreturn=1&hbxlogin=1.

80. National Association of Criminal Defense Lawyers, *supra* note 6, at 15 (quoting Hon. Ginger Lerner-Wren, Transcript at 245-46).

81. *Id.* at 15 (quoting John A. Bozza, *Benevolent Behavior Modification: Understanding the Nature and Limitations of Problem-Solving Courts*, 17 WIDENER L.J. 97, 98-102 (2007)).

82. *Id.* at n.14 (quoting testimony of Mae C. Quinn, Transcript at 1274).

83. *Id.* at 15 (citation omitted).

> [1] "Use of a non-adversarial approach, in which prosecution and defense promote public safety while protecting the right of the accused to due process;"
>
> [2] "Early identification and prompt placement of eligible participants;"
>
> [3] "Access to a continuum of treatment [and] rehabilitation;"
>
> [4] "A coordinated strategy among the judge, prosecution, defense, and the treatment providers to govern offender compliance;"
>
> [5] "Ongoing judicial interaction with each participant;"
>
> [6] "Monitoring and evaluation to measure achievement of program goals and gauge effectiveness;"
>
> [7] "Continuing interdisciplinary education to promote effective planning, implementation, and operation;" and
>
> [8] "Partnerships with public agencies and community-based organizations to generate local support and enhance drug court effectiveness."[84]

While not all of those elements identified in the NACDL Report may be transferable to the circumstances inherent in an allegation of "material support" for terrorism (*i.e.*, the degree of tolerance for "relapse" may well depend on the type of relapse),[85] many are easily and naturally integrated into a system applying § 2339B(c).

In fact, the evolution from Draconian drug laws to diversionary drug courts that avoid criminal convictions altogether provides lessons learned and a model that can and should apply to counterterrorism enforcement *now*, without the need for further trial and error and the waste of human and government resources and lives. Indeed, the language of a 1996 *National Review* editorial could just as easily apply its conclusions to counterterrorism enforcement today as it did then to drug enforcement:

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84. *Id.* at 16 (citing U.S. Department of Justice, Office of Justice Programs, *Drug Courts: The Second Decade* 3 (2006)).

85. For example, if the "relapse" is viewing a *jihadist* web site on the internet, that would be far more tolerable than more active forms of "relapse" such as independently conceiving or joining a specific terrorist plot.

"[t]hat the war on drugs has failed, that it is diverting intelligent energy away from how to deal with the problem of addiction, that it is wasting our resources, and that it is encouraging civil, judicial, and penal procedures associated with police states."[86]

The best "problem-solving" courts also recognize that addressing underlying mental health issues is critical, while they are at best secondary, if relevant at all, in ordinary criminal prosecutions.[87] And such courts can succeed.[88] In fact, there are currently at least 150 mental health courts in the U.S., many of which receive positive reviews.[89] Those courts "focus [on] mental health services and resources [for] defendants whose mental illness [i]s the primary [purpose] for their recidivism."[90]

In the context of § 2339B(c), mental health issues appear to be critically important, as *jihadist* wannabees, and those who attempt to work out life crises through *jihadist* rhetoric or dangerous affiliations and ideations, represent an increasing proportion of the "material support" defendant population.[91] They are also the most impressionable, and the

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86. National Association of Criminal Defense Lawyers, *supra* note 6, at 20 (quoting Editorial, *The War On Drugs Is Lost*, NAT'L REV. (Feb. 12, 1996), *available at* http://www.nationalreview.com/12feb96/drug.html)).

87. *Id.* at 23 n.114.

88. *Id.* at 27 (Pennsylvania) & 48 (Milwaukee). *See also* Gretchen Beall Schumann, *Alternate Approaches Offer Promise*, N.Y. L.J. (May 2, 2011) (Special Law Day Supplement), *available at* http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202492128499&slreturn=1&hbxlogin=1.

89. National Association of Criminal Defense Lawyers, *supra* note 6,at 50 & n.498-99.

90. *Id.* at 50 & n.499 (quoting Tamara M. Meekins, *"Specialized Justice": The Over-Emergence of Specialty Courts and The Threat of a New Criminal Defense Paradigm*, 12 SUFFOLK U. L. REV. 1, 24-25 (2006)).

91. While the NACDL Report objects to certain aspects of problem-solving courts, there are several reasons why those objections are not germane to § 2339B(c), including:

(1) § 2339B(c) does not require a guilty plea prior to diversion from the criminal justice system, as the section is civil in nature;

(2) § 2339B(c) represents a less expensive alternative than criminal prosecution;

(3) the volume of cases "diverted" under § 2339B(c) will not so great as to create docket pressure to resolve cases disadvantageously to defendants; and

(4) even if § 2339B(c) results in "widening the net," it is still on balance preferable to the current system in which *all* offenders are channeled to the criminal justice system without *any* option.

Thus, the NACDL Report's objections notwithstanding, § 2339B(c) functioning as a form of problem-solving court still represents a significant improvement over the current monochromatic system of terrorism enforcement in the U.S. *See* National Association of Criminal Defense Lawyers, *supra* note 6.

most vulnerable to the clever and persistent importuning of paid confidential informants masquerading as *jihadist* recruiters or instigators.

The intensive monitoring and rehabilitation programs that community social service organizations provide are often superior to ordinary criminal justice supervision. The NACDL Report notes the irony of a substance abuser convicted of domestic violence—ineligible for diversion by nature of the offense—reporting to a probation officer every six weeks, while a nonviolent substance abuser will attend 90 meetings in 90 days, and undergo far more regular urine testing.[92]

D. Importing Principles from the Restorative Justice Model

While the concept of "restorative justice" is unlikely to be imported wholesale into counterterrorism enforcement, certainly a number of the principles and methodology espoused by and practiced in restorative justice are applicable to § 2339B(c) enforcement.[93] Although most observers might not expect veteran counterterrorism experts (formerly with military, law enforcement, and intelligence agencies) to afford restorative justice any place in a counterterrorism strategy, a report sponsored by the Qatar International Academy for Security Studies ("QIASS") notes that Singapore's program for countering violent extremism ("CVE") includes offenders "[m]eeting victims as part of reconciliation and restorative justice initiatives."[94]

For example, the following elements of restorative justice models could be productively incorporated in the § 2339B(c) framework:

> 1) "[o]ffenders are provided opportunities and encouragement to understand the harm they have caused to victims and the community and to develop plans for taking appropriate and responsibility[;]"
>
> 2) "[v]oluntary participation by offenders is maximized; coercion and exclusion are minimized. However, offenders may

92. *See* National Association of Criminal Defense Lawyers, *supra* note 6, at 11.

93. Certainly restorative justice has its limitations in the context of counterterrorism enforcement, and the U.S. justice system generally. However, while this article does not suggest adopting wholesale a restorative justice framework or methodology, the concepts and principles underlying restorative justice transpose neatly onto the structure of how § 2339B(c) ought to function.

94. QATAR INT'L ACAD. FOR SEC. STUDIES (QIASS), RISK REDUCTION FOR COUNTERING VIOLENT EXTREMISM: EXPLORATIVE REVIEW BY THE INTERNATIONAL RESOURCE CENTER FOR COUNTERING VIOLENT EXTREMISM 10 (2010), *available at* www.qiass.org [hereinafter *QIASS Report*].

> be required to accept their obligations if they do not do so voluntarily[;]"
>
> 3) "[t]he community has responsibilities to support to integrate offenders into the community, to be actively involved in the definitions of offender obligations and to ensure opportunities for offenders to make amends[,]" and
>
> 4) "[j]ustice monitors and encourages follow-through since healing, recovery, accountability and change are maximized when agreements are kept."[95]

Restorative justice programs have been implemented in some U.S. communities, and have been judged successful by some observers.[96] Also, if restorative justice could serve as a sufficient means to address and resolve recriminations resulting from the dismantling of South African apartheid (through the Truth and Reconciliation Commission),[97] certainly it can contribute to the U.S.'s approach to counterterrorism.[98]

III. EXAMINATION OF PROGRAMS ABROAD DESIGNED TO COUNTER VIOLENT EXTREMISM

The U.S. would not be the first nation to use more than simply the criminal process to address violent political or religious extremism. Several other nations have implemented such programs—collectively, for purposes of this article, denominated programs to counter violent extremism ("CVE programs")—and others, following that example, have

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95. *Fundamental Concepts of Restorative Justice*, NAT'L INST. OF JUST, (Dec. 3, 2007), *available at* http://www.nij.gov/nij/topics/courts/restorative-justice/fundamental-concepts.htm. The National Institute of Justice is the "Research, Development, and Evaluation Agency of the U.S. Department of Justice." About NIJ, NAT'L INST. OF JUST., http://www.nij.gov/about/welcome.htm (last modified Apr. 4, 2011).

96. *See* Kay Pranis, *The Minnesota Restorative Justice Initiative: A Model Experience*, NAT'L INST. OF JUST. (Dec. 3, 2007), *available at* http://www.nij.gov/nij/topics/courts/restorative-justice/perspectives/minnesota.htm.

97. *See, e.g.*, TRAGGY MAEPA, *Ch. 6: The Truth and Reconciliation Commission as a Model of Restorative Justice*, BEYOND RETRIBUTION: PROSPECTS FOR RESTORATIVE JUSTICE IN SOUTH AFRICA, (Traggy Maepa ed., 2005), *available at* http://www.iss.co.za/pubs/Monographs/No111/Chap6.htm.

98. For general reading regarding restorative justice, see Jeremy Travis, *But They All Come Back: Rethinking Prisoner Reentry*, SENT'G & CORRECTIONS (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/181413.pdf; Jeremy Travis, *Building from the Ground Up: Strategies for Creating Safe and Just Communities In Criminal Justice: Retribution vs. Restoration*, 23 J. OF RELIGION & SPIRITUALITY IN SOC. WORK 173 (2004).

chosen, cafeteria style, those elements of such programs that suit the legal, cultural, and political landscape in each country.

Section § 2339B(c), as envisioned in this article, would serve as a CVE program. Unlike some other CVE programs, it would not function as a direct adjunct to the criminal process, or for criminal defendants/detainees preparing for the transition from incarceration to liberty. However, many of the components of the CVE programs adopted by other countries could be adapted for use in applying the injunctive authority provided under § 2339B(c).

A. Examples of and Lessons from CVE Programs

1. The 2010 Qatar International Academy for Security Studies Report

In 2010, the Qatar International Academy for Security Studies (hereinafter "QIASS") sponsored a study of five nations' approach to CVE programs, including France, which eschewed such programs altogether in favor of a criminal enforcement/intelligence regime only. The report, entitled *Risk Reduction for Countering Violent Extremism: Explorative Review by the International Resource Center for Countering Violent Extremism*[99] (hereinafter "*QIASS Report*"), was investigated and prepared by law enforcement and intelligence veterans (mostly from the U.S.) whose experience in and commitment to counterterrorism is beyond reproach.[100]

However, as experts, they also recognize that a multi-pronged approach is more flexible in responses, proportional in punishment, and capable of addressing CVE systemically rather than piecemeal through law enforcement alone. As the *QIASS Report* notes, "[t]he risk reduction framework might be productively viewed as a comprehensive model

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99. *QIASS Report, supra* note 94.

100. The *QIASS Countering Violent Extremism (CVE) Risk Reduction Project*, Qatar International Academy for Security Studies (QIASS), Management Team includes former FBI Supervisory Special Agent Ali Soufan and former Naval Criminal Investigative Service ("NCIS") Special Agent Mark Fallon, and its Site Visit Team includes Steve Kleinman, former director of the U.S Air Force Combat Interrogation Course, all of whom have extensive experience in counterterrorism law enforcement and intelligence both domestically and internationally. *See QIASS Report, supra* note 94, at ii. *See also* LAWRENCE WRIGHT, THE LOOMING TOWER: AL-QUEDA AND THE ROAD TO 9/11, 309-10 (2006) (discussing Ali Soufan).

covering the full spectrum of CVE efforts, from primary prevention through rehabilitation."[101]

As a result, the *QIASS Report* cautions that

> [i]n countering violent extremism, one size does not fit all (or even most). There may be no single "right" answer to understanding violent extremism, but two suggestions are clear: local knowledge is often a good place to start and people's motivational pathways in and through terrorism are often complicated. Extremism is not always driven by the explicit ideology or the "cause."[102]

The mandate of the *QIASS Report* was deliberately broad in scope. As the *Report* points out,

> [t]he QIASS Countering Violent Extremism (CVE) Risk Reduction Project was a descriptive, exploratory study, not just of "deradicalization" or "terrorist rehabilitation" programs, but also of strategic counter-terrorism approaches in France, Indonesia, Northern Ireland, Singapore, and Great Britain. The diversity among the objectives and approaches in these countries was striking. Reducing the risk of engagement (and/or re-engagement) in terrorism was the key and singularly common feature across this array of programs.[103]

While the CVE programs studied in the *QIASS Report* were procedurally distinct, the *Report* nevertheless was able to identify features and objectives common to all of them, including those directed at:

- Re-orienting ideological views and attitudes of the participants[;]
- Re-socializing ex-members to a lawful and productive life[;]

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101. QIASS REPORT, *supra* note 94, at 53. *See also* John Horgan, WALKING AWAY FROM TERRORISM: ACCOUNTS OF DISENGAGEMENT FROM RADICAL AND EXTREMIST MOVEMENTS, at 13 (2009) ("the area of terrorist risk assessment is critically underdeveloped, yet may be of vital importance as a practical alternative to terrorist financing").

102. *QIASS Report*, *supra* note 94, at 2.

103. *Id.* at 1; *see also id.* at 7 ("[p]ractically speaking, reducing the risk of engagement (and/or re-engagement) in terrorism is the key and singularly common feature across a diverse array of programs.").

- Acquiring intelligence, evidence and witnesses in court cases[;]

- Using repentant ex-terrorists as opinion builders[;]

- Sowing dissent within the terrorist milieu[;]

- Providing an exit from terrorism and underground life[;]

- Replacing repressive means with approaches that are more respectful of human rights[;]

- Reducing the economic and social costs of keeping a large number of terrorists in prison for a long time[; and]

- Increasing the legitimacy of the government or state agency[.][104]

The *QIASS Report* also preferred the goal of "risk reduction" rather than "de-radicalization" because

> [e]mpirical research suggests that individuals may *disengage* from terrorism (with low risk of re-engagement) without necessarily changing their views about the legitimacy or morality of their actions. If true, then attitude change would not necessarily have to precede behavior change. De-radicalization, however, by definition, focuses on changing thoughts, beliefs and attitudes, presumably with the hope that behavior change will follow.[105]

That attitude is also reflected in Saudi Arabia's CVE program[106] as "recent changes suggest new emphasis on educational efforts aiming to modify a detainee's behavior, not change his religious beliefs."[107] As explained by one observer of the Saudi program,

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104. *Id.* at 7.

105. *Id.* at 7 & n.4 (*citing* Horgan, WALKING AWAY FROM TERRORISM, *supra*, note 101) (internal citations omitted).

106. Discussed in more detail, *infra* note 117.

107. Marisa Porges, *The Saudi Deradicalization Experiment*, COUNCIL ON FOREIGN RELATIONS (Jan. 22, 2010), *available at* http://www.cfr.org/terrorism/saudi-deradicalization-experiment/p21292.

> [i]t's not unreasonable, however, to place less emphasis on ideological change and more on behavior modification. Certainly some Muslims may sympathize with some of Al-Qaeda's objectives, but they would never think to act upon those sympathies. Likewise, a former militant may keep his extremist ideology but never act on it.[108]

Consistent with that philosophy, the *QIASS Report* states that "[t]he government [of Northern Ireland] did not seek to 'rehabilitate' the militants' political ideas, but to engage them cooperatively to address problems related to violence. Extreme—even radical—ideas were acceptable; violence, however, was not."[109] That path again mirrors that adopted by Saudi Arabia in its CVE program, as, according to those who have studied the program, "[s]uccess of the program also is based in part on the recognition that being radical is not inherently a bad thing. Acting on radical beliefs with violence, however, is, and that is the behavior that needs to be modified."[110]

Regarding specific national programs, and their relevance to § 2339B(c), the *QIASS Report* notes that

> [t]he Singapore Government has operated a multi-dimensional risk reduction program for violent extremists since 2002. It is a long-term, resource-intensive program with perpetual follow-up, targeted specifically toward persons who have become involved with the militant group *Jemaah Islamiya* (JI). Approximately 60 persons have been enrolled since the program's inception. The program is operated primarily by Singapore's Internal Security Department (ISD), but also includes specialists in religious

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108. Rob Wagner, *Rehabilitation and Deradicalization: Saudi Arabia's Counterterrorism Successes and Failures*, PEACE AND CONFLICT MONITOR 3 (Aug. 1, 2010), *available at* http://www.monitor.upeace.org/archive.cfm?id_article=735.

109. *QIASS Report*, *supra* note 94, at 28; *see also* Horgan, WALKING AWAY FROM TERRORISM, *supra* note 101, at 155 ("[h]owever, attempting to *prevent* radicalisation, broadly speaking, may be both unrealistic and unfeasible. A major problem in recent years has been that we have allowed much of the discourse on counter-terrorism to be influenced by language that reflects unrealistic goals. *Radicalisation* is perceived as the major problem, not *violent radicalisation*, which is synonymous with becoming involved in terrorism. There remains a critical failure to acknowledge that the vast majority of those who identify themselves as 'radical' do not engage in violent activity").

110. Christopher Boucek, *Saudi Arabia's 'Soft' Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare*, 97 CARNEGIE PAPERS 23 (2008), *available at* http://www.carnegieendowment.org/files/cp97_boucek_saudi_final.pdf.

education, social services, and health/mental health from both the public and private sectors.[111]

Thus, while Singapore's CVE program—the primary purpose of which, according to officials, is "to keep the country safe"[112]—does involve some detention, the resources devoted to the program—psychological, social, and religious (generally common to all the CVE programs studied)—could all easily be part of a program designed to support the injunctive authority under § 2339B(c).[113]

Indeed, in Northern Ireland, the CVE program elements have "spawned dozens of public and privately sponsored programs designed to maintain peace, ensure security, address grievances and perceived inequalities, promote healing, and build trust between the police and the community."[114] Similarly, another program operated elsewhere in the UK, "CHANNEL," conducts interventions that are—to the extent possible—individually tailored and are administered through a myriad of NGOs and community-based organizations. These programs generally aim to educate persons at risk for recruitment about the fallacies preached by violent extremists; empower them to make positive and pro-social choices about their future; and communicate core values of British citizenship pertaining to respect, rights and responsibilities. Community-level engagement and trust building based on "mutual interest" are also broader themes. These initiatives aim to address underlying conditions and grievances.[115]

Given the experience with problem-solving courts in the U.S., it is completely logical and even nearly certain that social services organizations and institutions would react to the use of § 2339B(c) in the same manner, and adjust and develop their services to meet the needs of monitoring and/or rehabilitation objectives of a § 2339B(c) injunction.

2. The Saudi Arabia Program

According to a 2008 report by the Carnegie Endowment for International Peace:

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111. *QIASS Report*, *supra* note 94, at 11.

112. *Id.* at 12.

113. Unlike Singapore, "Indonesia's government has no nationally coordinated strategy or any formal risk reduction programs for countering violent extremism; instead, it uses targeted personal relationship building as a form of CVE intervention. CVE efforts are distributed among the government and NGO sectors." *Id.* at 47.

114. *Id.* at 25.

115. *Id.* at 33; *see also id.* at 37-38.

> The impetus for [Saudi Arabia's] soft approach came in large part from the recognition that violent extremism cannot be combated through tradition [sic] security measures alone. This Saudi strategy is composed of three interconnected programs aimed at prevention, rehabilitation, and postrelease care (PRAC).[116]

The Carnegie report adds that the Saudi program, commenced in 2004,

> is the most expansive, best funded and longest continuously running counter-radicalization program in existence. When Singapore developed a program to combat extremism, its approach was based in part on the Saudi model. The strategy employed by the U.S. Marine Corps in its Task Force 134 "House of Wisdom" project, which deals with insurgent Iraqi detainees, was devised, in turn, with input from Singaporean officials.[117]

A Council on Foreign Relations paper on the Saudi program reports that Saudi security officials and agencies intended to "balance traditional security efforts with techniques that address ideological sources of violent extremism."[118] Thus, "[t]he indirect Saudi 'soft' counterterrorism policy seeks to address the underlying factors that have facilitated extremism in the hope of preventing further radical violent Islamism."[119]

The Saudi prevention, rehabilitation, and aftercare strategy, which is applied to imprisoned extremists before their release "is composed of three separate yet interconnected programs aimed at deterring individuals from becoming involved in extremism; promoting the rehabilitation of extremists and individuals who get involved with them; and providing aftercare programs to facilitate reintegration into society after their release from custody."[120]

According to the Carnegie report, the Saudi

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116. Boucek, *supra* note 110, at 1.

117. *Id.* at 23; *see also* Porges, *supra* note 107, at 7 (Saudi program has been "heavily resourced."). *See also infra* pp. 38-39 (discussing the U.S. military's Task Force 134).

118. Porges, *supra* note 107, at 2.

119. Boucek, *supra* note 110, at 3.

120. *Id.* at 4; *see also* Porges, *supra* note 107, at 7 ("even with recent changes, [the Saudi program] still relies heavily on after-care elements like monitoring by security forces and parole-like reporting requirements, financial support for detainees after release, and ongoing contact with both the individual and his family").

> perspective reflects the belief that the struggle to eradicate support for extremism is not one to be waged solely as a security contest but as one that will require a concerted effort by the entire state apparatus, from schools and mosques, to local and provincial administrations, the mass media, and social service providers and organizations.[121]

Aftercare programs "make use of an individual's extended social network, such as securing the family's cooperation in helping to keep a released detainee on the right path."[122] The programs also include counseling, religious reeducation, and leisure activity.[123] The latter "activities are considered important in the counter-radicalization process, because they not only build teamwork but also encourage acceptance and develop notions of inclusion."[124]

An interesting aspect of the Saudi program experience is that "[m]ost of the program participants had an incomplete understanding of Islam."[125] Indeed, "[a]ccording to program officials, many of the detainees in the program knew relatively little about Islam, and it was their desire to become more religious that led them into contact with the extremists who propagated a corrupted understanding of Islam."[126]

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121. Boucek, *supra* note 110, at 6.

122. *Id.* at 17. *See also* Porges, *supra* note 107, at 5 ("Saudi efforts have also expanded the role of a detainee's family." In fact, "family members now provide input on how to design specialized programs for each detainee and inform how his progress is evaluated.").

123. *See* Porges, *supra* note 107, at 1 ("[o]ne critical component of this new approach was the rehabilitation of extremists in prison through religious reeducation and psychological counseling"); *see also* Wagner, *supra* note 108 ("[a]ftercare not only includes ongoing counseling, but consistent and sustained monitoring of individuals to determine who the person keeps company with and who is his spiritual guide and mentor at the neighborhood mosque. Healthy family relationships and emotional support also are key factors.").

124. Boucek, *supra* note 110, at 18. An indication of the Saudis' willingness to innovate is the fact that "[o]ne of the most revolutionary rehabilitation activities is art therapy. Getting radicalized young men who previously would have rejected any type of visual art as forbidden by Islam to participate in art therapy is a major accomplishment. And for the government to engage in art therapy, absent rebuke from religious conservatives and staunch social traditionalists, is indicative of the progressive nature of the rehabilitation program as a whole." *Id.* at 18.

125. *Id.* at 14.

126. *Id.* at 21; *see also* Wagner, *supra* note 108, at 2 ("[r]eligious subcommittee members discovered that many prisoners never had formal religious training. Detainees relied on non-government approved literature, friends and acquaintances, and extremist websites for information on Islamic interpretations.") (footnote omitted); *see also QIASS Report*, *supra* note 94, at 5 (noting that those vulnerable to extremist ideology "may not

While the Carnegie paper reports "promising results" from the program,[127] which has had 4,000 entrants, and an approximate failure rate of 10-20 per cent, the Council on Foreign Relations analysis cautions that results are difficult to judge because there has not been sufficient "time to study long-term effects of deradicalization."[128] However, even that report concludes that "rehabilitation efforts have already helped serve Saudi Arabia's broader counterterrorism goals."[129] In addition, "[t]hough very time consuming and difficult to implement for more than small groups at a time, [Saudi] security officials point to potential long-term benefits in this approach—particularly regarding broader efforts to combat radicalization in Saudi society."[130]

According to the Carnegie report, due to the relative success of the Saudi program "[s]imilar programs designed to demobilize violent extremists and their supporters are increasing in popularity, with a number of countries adopting comparable counter-radicalization programs."[131] The report mentions Algeria, Egypt, Jordan, Yemen, Singapore, Indonesia, and Malaysia among those nations that have implemented some form of program based on the Saudi model, and notes that the U.S. military has done so through Task Force 134.[132] Indeed, according to the Council on Foreign Relations report, the U.S. has "encouraged Yemen and other countries to replicate" the Saudi program.[133] In addition, in repatriating (or finding other countries willing to accept) Guantanamo Bay detainees, the U.S. has attempted to offset those nations' moving and education costs associated with integrating those detainees into society.[134]

Moreover, more programs that follow the Saudi model, although calibrated to account for local conditions and institutions, are likely to

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receive a recruitment 'cold call,' but instead are 'spotted' by influencers who focus on their grievances or capitalize on their limited knowledge of religion and history").

127. Boucek, *supra* note 110, at 21.

128. Porges, *supra* note 107, at 3-4.

129. *Id.* at 4.

130. *Id.* at 5-6.

131. Boucek, *supra* note 110, at 1.

132. *Id.*; *see also infra* pp. 38-39.

133. Porges, *supra* note 107, at 1.

134. Testimony of Ambassador Daniel Fried, appointed in 2009 as U.S. Department of State Special Envoy for the Closure of the Guantanamo Bay Detention Facility, before the House Armed Services Subcommittee on Oversight and Investigations, hearing on Guantanamo Detainee Transfer Policy and Recidivism (Apr. 13, 2011) [hereinafter *Fried HASC Testimony*], *available at* http://armedservices.house.gov/index.cfm/2011/4/guantanamo-detainee-transfer-policy-and-recidivism. According to Ambassador Fried, those costs have not exceeded $100,000 at one time. *Id.*

follow, as "counterterrorism experts are also interested in whether these efforts provide a suitable prototype for countries struggling to deal with domestic terrorism, especially in places where kinetic counterterrorism tactics have not yet been matched by 'soft' approaches like counter-radicalization."[135]

Certainly, even in the U.S., the Saudi experience, as well as the other CVE programs around the globe, "warrant[] greater evaluation, especially as other nations struggling with extremism look at what is being accomplished in the kingdom for lessons they can apply in their homeland."[136] As the Council of Foreign Relations paper concluded, "[w]hile not the unambiguous solution U.S. policymakers would prefer, rehabilitation programs like those underway in Saudi Arabia nonetheless have a place in larger efforts to handle terrorist threats."[137]

Perhaps the impact of the Saudi program is best characterized by the Carnegie report, which reasons "[t]hat other nations emulate the Saudi program is ultimately based upon the recognition that the defeat of extremism cannot be achieved through hard security measures alone. That, in itself, is a major accomplishment."[138]

For the U.S., clearly § 2339B(c) can serve as the template for a viable alternative to criminal prosecution for appropriate offenders.

3. The United Kingdom's Review of Counterterrorism Measures

Probably the principal lesson from the British experience is that counterterrorism is not a static endeavor. Strategies should constantly be subject to review and reconsideration, consultation with a wide range of sources is valuable on a practical and political level, specific elements should be analyzed individually as well as in combination with other facets of the broader strategy, and decisions need to be made periodically with respect to which elements of the broad strategy are working, which are not, and what should be changed about them (*i.e.*, modified, or perhaps eliminated altogether).[139]

In that context, in January 2011 the British Home Secretary completed a comprehensive evaluation of certain counterterrorism

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135. *Id.* at 6.

136. Boucek, *supra* note 110, at 23.

137. Porges, *supra* note 107, at 7.

138. Boucek, *supra* note 110, at 23.

139. As the QIASS Report explains, "[a]fter decades of social policy evaluations, one consistent lesson about intervention is re-learned time and time again—from studies of psychotherapy effectiveness to crime control—you will never discern "what works" if you only ask "what works?" Interventions must "fit" the problem, the context, and sometimes the individual." *QIASS Report*, *supra* note 94, at 49.

measures in order to "correct the imbalance that has developed between the State's security powers and civil liberties, restoring those liberties wherever possible and focusing those powers where necessary."[140] The resulting *Review of Counter-Terrorism and Security Powers* ("UK Review") included a section on "control orders," which the UK Review described as follows:

> [c]ontrol orders were introduced in 2005 as emergency legislation. They were designed to address the threat from a small number of people engaged in terrorism in [the United Kingdom] whom the Government could neither successfully prosecute nor deport. The objective of the orders was to prevent these individuals engaging in terrorism-related activity by placing a range of restrictions on their activities, including curfews, restrictions on access to associates and communications and, in some cases, relocation.[141]

Thus, while control orders in the UK were aimed at a different set of individuals—those who would be prosecuted if sufficient competent evidence existed (rather than, as § 2339B(c) is contemplated in this article, those whose conduct and threat level merits some diversion from the harsh penalties and stigma of criminal prosecution and conviction)—the broader objective is the same: constructing a system outside the criminal justice system for the monitoring and supervision of persons suspected of some form of terrorist activity or association.[142]

The UK Review pointed out problems associated with control orders during their six years of operation (and 48 persons made subject to them), including the use of "secret evidence," the indefinite length of

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140. *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations* 3 (2011), *available at* http://www.official-documents.gov.uk/document/cm80/8004/8004.pdf [hereinafter *UK Review Findings*].

141. *Id.* at 36. *See also Review of Counter-Terrorism and Security Powers: Summary of Responses to the Consultation,* at 14 (2011), *available at* http://www.official-documents.gov.uk/document/cm80/8005/8005.pdf [hereinafter *UK Summary*]; Ken Macdonald, *Review of Counter-Terrorism and Security Powers: A Report By Lord MacDonald of River Glaven QC*, 9-16 (2011), *available at* http://www.official-documents.gov.uk/document/cm80/8003/8003.pdf.

142. The UK control orders covered persons suspected of a wide range of conduct, some quite potentially dangerous (as well as what would constitute "material support" under U.S. law), including "the planning of mass casualty attacks in the UK, providing financial, material or other logistical support for terrorism-related activity, travelling overseas to attack British or allied military forces or travelling to attend a terrorist training camp." *UK Review Findings*, *supra* note 140, at 36.

such orders, and several absconders (although none since 2007).[143] The review concluded that the control order system was necessary, but required revision because it was insufficiently sensitive to due process.

The UK Review enumerated certain "[e]ssential features of any [control order] regime" that are fully compatible with § 2339B(c) as envisioned in this article, including:

> • Prosecution of people engaged in terrorist activity in [the UK] must remain [the] priority: imposing restrictions on the actions of those believed to be engaging in terrorism will be an imperfect if sometimes necessary alternative[;]
>
> . . . .
>
> • Some restrictions on communications, association and movement will be required for the regime to be effective[;]
>
> • Restrictions should be compatible with work and study provided these do not affect public safety. Where possible we should allow individuals to continue to maintain a typical pattern of daily activity[;]
>
> • Restrictions should be more closely comparable with those which exist under other prevention measures intended to prevent sexual crimes and anti-social behaviour[;]
>
> • Restrictions introduced by a judge would increase the level of court oversight and would reflect practice in other civil preventative orders such as ASBOs [Anti-Social Behavior Orders] and football banning orders which are court-made[;] and
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> . . . .
>
> • The courts could be made responsible for setting the obligations at the start of the process, rather than reviewing the Home Secretary's decisions later in the process.[144]

Consistent with those principles, the UK Review recommended that "[t]he Government . . . move to a system which will protect the public but will be less intrusive, more clearly and tightly defined and more

143. *Id.* at 38.

144. *UK Review Findings*, *supra* note 140, at 40.

comparable to restrictions imposed under other powers in the civil justice system."[145] The UK Review also listed "key features of these new measures[,]" including (a) limiting control orders to two years with the possibility of renewal only if "after that time . . . there is new evidence" of re-engagement in terrorism-related activity; (b) a mandatory right of appeal; (c) authorizing "only tightly defined exclusion from particular places and the prevention of travel overseas[;]" (d) "placing only limited restrictions on communications, including use of the internet, and on the freedom to associate[;]" (e) "plac[ing] only limited restrictions in certain defined circumstances on financial transactions overseas[;]" and (f) requiring regular reporting to police.[146] The UK Review also recommended making breach of control order terms and conditions "without reasonable excuse" a criminal offense.[147]

4. The U.S. Marine Corps' Task Force 134 in Iraq

The United States military recognizes that its long-term security interests are promoted by a policy that distinguishes among various persons involved in radical Islamic organizations, conduct, and ideation. In Iraq, Task Force 134 (hereinafter "TF-134") was designed particularly for the purpose of providing a rehabilitative alternative for eligible detainees.[148]

For example, the "ultimate purpose of [TF-134's] strategic communication plan" was to "[d]emonstrate to the citizens of Iraq and the greater Muslim Umma that we are dedicated to establishing an alliance with moderate Muslims and empowering them to marginalize violent extremists."[149] Likewise, TF-134's "Mission Statement" explains that "Task Force 134 detains persons deemed an imperative risk to Iraqi security, assesses and engages internees, and releases those no longer considered a threat in order to *empower moderates, marginalize violent extremists and defeat the insurgency within our battlespace.*"[150]

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145. *Id.* at 41. A distinguishing feature of the British control order system from that in § 2339B(c) would be that the British authorities would continue to investigate in an effort to obtain sufficient evidence to institute a criminal prosecution, while this article treats a § 2339B(c) injunction as an end in itself that would replace and even foreclose criminal prosecution for the particular conduct at issue. *See id.* at 41; *see also infra* Part V.

146. *UK Review Findings*, *supra* note 140, at 42-43.

147. *Id.* at 43.

148. *See* Task Force 134, Multi-National Force-Iraq, Detainee Operations, *Strategic Communication Plan* (Apr. 2008), *available at* http://info.publicintelligence.net/TF-134_StratCom_Plan_Iraq.pdf [hereinafter *TF-134*].

149. *Id.* at 2.

150. *Id.* at 3 (emphasis added).

TF-134 realized that "[b]uilding toward long-term security requires that we interrogate, parse out, identify paths to engagement and enable reconciliation that ultimately sets the conditions for reintegration of the predominance of internees back into Iraqi society."[151] TF-134 also recognized that "[d]etainee operations are dynamic,"[152] requiring that TF-134 "embrace the fact that many of our 'extremists' are potential 'former extremists,' and understand that our greatest achievement is the internees who leave our custody, return to their families and prosper in Iraqi society—never again to take up arms against us."[153]

Elements of TF-134's "engagement" strategy included "continual re-assessment and communication with our internees," as well as recognition that "[t]he family is an essential part of Iraqi culture and central to every successful anti-radicalization program."[154] TF-134 also emphasized the value of educational programs, as "[e]ducation empowers internees to develop their own world view, making them less reliant upon others to shape their ideology and less vulnerable to exploitation. Providing educational opportunities also serves to make them less susceptible to financial coercion and less likely to be influenced by religious or sectarian motivators."[155]

In addition, monitoring was an essential component of TF-134's programs: "[a]ctive documentation of individual internee behaviors, participation in reconciliation programs, and accomplishments is essential to properly assess and communicate with our internees working toward reconciliation."[156]

B. The Guantanamo Recidivism Conundrum

Occasionally, the U.S. government releases figures regarding recidivism by former Guantanamo detainees who have since been released.[157] While those figures have been widely disputed as inaccurate

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151. *Id.* at 4.

152. *Id.* at 5.

153. *Id.* at 4.

154. *TF-134, supra* note 148, at 5.

155. *Id. See also* Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *Report: Visit of the Special Representative for Children & Armed Conflict to Iraq and the Region*, at 14 (Apr. 14, 2008), *available at* http://www.un.org/children/conflict/_documents/countryvisits/IraqVisitReport.pdf (reviewing Task Force 134's *Dar al-Hikmah* ["House of Wisdom"] juvenile education and recreation facility at Camp Cropper, "which observers have stated has quite good educational and recreational facilities for boys eligible for the program.")

156. *TF-134, supra* note 148, at 5.

157. *See* Director of National Intelligence, *Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba* (2010), *available at*

and skewed for political purposes,[158] and leaving aside the question of what constitutes "recidivism," and the "chicken or the egg" problem regarding whether those detainees considered "recidivists" were radicalized before or *because* of their detention at Guantanamo Bay, the correct numbers are immaterial to the need for and efficacy of § 2339B(c), as either version supports utilizing § 2339B(c).

If the government's highest recidivism figures are accurate that approximately 25 percent of former Guantanamo Bay detainees have engaged in post-release "terrorist or insurgent activity,"[159] they demonstrate that the U.S.'s current approach to counterterrorism is woefully ineffective in reducing *jihadist* recidivism by any means other than incapacitation.[160]

Conversely, if the U.S. government's figures are *not* accurate, but in fact inflated (as independent analysts maintain), then incapacitation is not necessary in many cases, as recidivism is not as significant a danger as is perceived. As a result, there is ample room for § 2339B(c) to operate as an alternative to criminal prosecution.

Moreover, Colonel Lawrence B. Wilkerson, a senior State Department official in the Bush administration, has averred in an affidavit that the U.S. government "knew early on that the majority of the men at Guantanamo were wrongfully detained, but did not release them

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http://www.dni.gov/electronic_reading_room/120710_Summary_of_the_Reengagement_of_Detainees_Formerly_Held_at_Guantanamo_Bay_Cuba.pdf (claiming that 13.5 percent of released Guantanamo detainees are confirmed and 11.5 percent are suspected of "reengaging in terrorist or insurgent activit[y] . . .").

158. For example, Peter Bergen, Katherine Tiedemann, and Andrew Lebovich, in a New America Foundation report, calculated the rates of recidivism as six percent confirmed and an additional two percent suspected. *See How Many Gitmo Alumni Take Up Arms?* (Jan. 11, 2011), *available at* http://www.foreignpolicy.com/articles/2011/01/11/how_many_gitmo_alumni_take_up_arms; *see also* Mark Denbeaux, *Revisionist Recidivism: An Analysis of the Government's Representations of Alleged "Recidivism" of the Guantanamo Detainees* (June 5, 2009), *available at* http://law.shu.edu/ProgramsCenters/PublicIntGovServ/CSJ/upload/GTMO_Final_Final_Recidivist_6-5-09-3.pdf; William Fisher, *GITMO By The Numbers*, OPEDNEWS (Jan. 14, 2011), *available at* www.opednews.com/articles/GITMO-By-The-Numbers-by-William-Fisher-110114-68.html.

159. Most recently, in April 2011, Ambassador Daniel Fried testified in Congress that only three of the 68 Guantanamo detainees released during President Obama's tenure have engaged in terrorism or insurgency subsequent to their release. *See supra* note 134.

160. The U.S. government has acknowledged that it "has struggled in the years since the Sept. 11, 2001, attacks to develop an effective campaign to counter the ideology and messages of Al Qaeda and other extremist groups." Eric Schmitt, *Governments Go Online in Fight Against Terrorism*, N.Y. TIMES, Jan. 30, 2011, http://www.nytimes.com/2011/01/31/world/middleeast/31terror.html.

because of political concerns that doing so could harm the government's push for war."[161] That, of course, begs the same question asked by this article with respect to low-level criminal defendants in "material support" cases who could be subject instead to the civil provisions of § 2339B(c): imagine the resources saved—money, manpower (military and otherwise), political, and legal—if the choice had been made differently, and persons presenting only a marginal or unsubstantiated threat were treated more magnanimously as part of a multifaceted counterterrorism strategy that tolerated something other than the strictest and longest detention available? Clearly, as well, those narrow parochial political considerations (disclosed by Col. Wilkerson) that drove Guantanamo detention policy did not serve the U.S.'s long-term national security interests, as the alienation of allies and others as a result of Guantanamo overrode the illusory security gain of detaining persons who simply were not dangerous.

In the context of criminal counterterrorism enforcement, the failure to modulate policy similarly achieves mostly phantom short-term gains at the expense of addressing the problem systemically, and, as a result, long-term security. As detailed *infra* Part V, the U.S.'s monochromatic counterterrorism law enforcement policy may well be contributing to recidivism rather than reducing it.[162]

IV. THE ADVANTAGES OF USING § 2339B(C) AS AN ALTERNATIVE TO CRIMINAL PROSECUTION

Employing § 2339B(c) in appropriate cases offers multiple advantages over a "one size fits all" strategy that relies exclusively on criminal prosecution. Even law enforcement speaks in the language of

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161. Press Release, Center for Constitutional Rights, CCR GTMO Attorneys Call Government Recidivism Claims Unfounded (Dec. 9, 2010), *available at* http://www.ccrjustice.org/newsroom/press-releases/ccr-gtmo-attorneys-call-government-recidivism-claims-unfounded.

162. The flaws in any "national security court" are not the subject of this article. However, to the extent some proponents might argue that what is proposed herein would involve constructing a new legal apparatus just as a national security court would entail, there are fundamental and dispositive distinctions:
(1) implementation of §2339B(c) would not require any new legislation, as the section is already in place (as is the courts' broad authority to fashion equitable remedies);
(2) implementation of §2339B(c) would not introduce an *entirely* new, controversial, and untested system that—if the Guantanamo military commissions are any guide—would precipitate legal challenges that would delay if not derail the entire system for years; and
(3) implementation of §2339B(c) would not create a second-class legal system designed to dilute defendants' rights and only worsen proportionality, balance, and image problems for which §2339B(c) provides a solution. *See infra* Part IV.

"neutralization," and any objective analysis would concede that some violators—or prospective violators, as subsection (c) permits injunctions also against those "about to" provide "material support"—of § 2339B can be "neutralized" short of a stiff jail sentence.

As the preceding section demonstrates, other countries have realized that a multi-pronged approach to counterterrorism enforcement is a better strategy for long-term security. As detailed below, among the advantages § 2339B(c) provides are (a) significantly improved relations between law enforcement (and the government at large) and Muslim communities in the U.S.; (b) improved proportionality of punishment for certain offenders; (c) a partial but important answer to the problem of entrapment in the context of counterterrorism investigations; (d) a systemic approach to CVE that attacks the problem at its roots rather than piecemeal; (e) earlier interventions in appropriate situations without the need for drawn-out stings that serve only to alarm the populace and alienate Muslim communities; (f) a superior option for a number of specific actual prior criminal prosecutions; and (g) substantially improved efficiency with respect to allocation of resources and the ability to address the problem of CVE on more than a serial case-by-case basis.

The result would have a lasting positive impact on long-term U.S. security, as well as on those who would be directly affected by § 2339B(c) actions: defendants, their families, and their communities.

A. Community Cooperation and Involvement As Stakeholders

A major benefit of utilizing § 2339B(c) would be to increase cooperation and awareness among Muslim communities. Currently, Muslim communities believe they are targeted unfairly by law enforcement with respect to terrorism investigations and stings, leading to a "circling the wagons" mentality. That sentiment provides a disincentive to cooperate with authorities on a routine basis. The consequences of being on U.S. law enforcement's radar with respect to terrorism—arrest, detention, criminal conviction, and lengthy jail sentences—would make anyone reluctant to provide information on an ongoing basis.[163]

163. In this context, the author, as a criminal defense attorney for three decades, does not observe a significant distinction between the reaction of Muslim-American communities and other ethnic, racial, religious, or other identifiable groups that have been the subject of a series of prosecutions pursuant to a particular set of federal statutes.

Indeed, communities would view their role as *assisting* offenders if, by cooperating with law enforcement, they were channeling those offenders to a civil alternative that offered the opportunity to reform behavior without the consequences of a criminal prosecution and conviction. Thus, communities could affect the welfare of both the offender and the community in a positive manner through § 2339B(c)—an avenue decidedly unavailable in an enforcement environment devoted exclusively to criminal prosecution.[164]

A consequence of the concentration on Islamic terrorism is that, as the UK Review concluded, "[t]he impact of counter-terrorism law and policies are experienced and felt more acutely and directly amongst Muslims than non-Muslims."[165] In that regard, "[a] number of other respondents to the consultation were also concerned that the existing system of control orders is perceived as discriminating against Muslims (whether or not it does in fact do so) and that in doing so it impacted on community relations."[166] As a result, the UK Review suggested that "[t]he change in [control order] policy would further reduce the theoretical potential for indirect discrimination against Muslim ethnic groups."[167]

Section 2339B(c), if applied in the manner prescribed in this article, would necessarily involve the offender's community, and grant it a stake in a successful outcome. Consistent with the experience of other countries that have implemented CVE programs, community social service organizations would adapt and/or develop to provide rehabilitative programming as well as monitor compliance. Community responsibility and participation would replace community suspicion, resentment, and helplessness.

While the offender's community rarely has an active stake in justice outcomes from criminal prosecutions generally, and § 2339B prosecutions in particular, such a community investment constitutes an integral part of restorative justice. For example, as a National Institute of Justice ("NIJ") publication about restorative justice points out,

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164. As the *UK Review* reported, "[c]ommunity groups felt that more could be done to deradicalise the individuals involved and there should be some independent figure that could represent the suspect and look after their welfare. There was a concern about obligations which would cut the suspect off from their communities." *UK Summary*, *supra* note 141, at 15.

165. *Review of Counter-Terrorism and Security Powers—Equality Impact Assessment* 10 (2011), *available at* http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/eia?view=Binary [hereinafter *Equality Impact*].

166. *Id.* at 11.

167. *Id.* at 13.

> [t]he community is not generally involved in crafting an appropriate resolution which promotes healing or community peace. The community must live the consequences of the way the crime is handled, but has little engagement in the process. If the process creates a more isolated victim and a more isolated offender the community will suffer.[168]

Similarly, "[t]he current system does not recognize community strengthening as an important outcome of effective interventions and makes no attempt to measure the impact of the intervention on the community."[169] As in restorative justice models, § 2339B(c) would enlist the community as a crucial, if not primary, element in (a) identifying behavior *before* it ripened into criminal conduct (in violation of § 2339B) that generated a *criminal* prosecution; (b) funneling such persons into *civil* proceedings under § 2339B(c) rather than expose them to criminal prosecution; (c) assisting in and enabling compliance with §2339B(c) injunctions; and (d) facilitating the person's re-integration in the community as a law-abiding and productive member.

As NIJ notes, "The community must become the first line of defense in maintaining community standards of behavior, with the criminal justice system used as a measure of last resort. Too often now the criminal justice system is the measure of first and last resort."[170] Currently, a community's resources are essentially ignored and, at times, rejected. Yet, as the NIJ publication notes,

> [t]he criminal justice system cannot deliver improved public safety without the active involvement of the community. The community has tools which the system does not have. The community has resources which the system does not have. The community has power which the system does not have. Criminal justice system activity needs to be built around a core of community activity—not the reverse, which is generally true even in those places which have dramatically increased the level of community involvement.[171]

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168. *See* Kay Pranis, *Communities and the Justice System: Turning the Relationship Upside Down*, NAT'L INST. OF JUST. 2 (Dec. 4, 2007), *available at* http://www.nij.gov/topics/courts/restorative-justice/perspectives/updside-down.htm; *see also* Podgor, *supra* note 74; THE HERITAGE FOUNDATION, *supra* note 74.

169. Pranis, *supra* note 168.

170. *Id.*

171. *Id.*

Moreover, use of a civil enforcement option in appropriate cases will help avoid alienating moderates within the Muslim (or other) communities—both domestically and internationally—who otherwise might blanch at certain criminal prosecutions that appear either disproportionate, or which involve unsavory confidential informants and the specter of entrapment.[172]

Conversely, judicious application of § 2339B(c)—again, both domestically and internationally—denies paranoid elements and extremists facts and arguments that can be seductive for those susceptible to *jihadist* recruitment, or that polarize a community by injecting extremist rhetoric that has *some* factual support (thereby discouraging moderates from publicly rejecting the extremists for fear of being labeled "sell-outs").[173]

Other countries have noted the difference in reactions from communities that result from different treatment by law enforcement and government. For example, the *QIASS Report* cited "the Indonesian National Police's prior experiences with JI militants, many of whom had become more defiant and active when the police treated them (or their families) harshly, but became more cooperative when approached with respect, support and occasional kindness in a manner conforming to Islamic traditions."[174] Likewise, the UK Review surmised that reform of the control order regime "may therefore help to improve community relations with the police and authorities."[175]

As Professor Jacobs reports with respect to the reception received by government officials due to the achievements civil RICO has attained in reforming labor unions, "[w]here they were once vilified, former FBI agents and federal prosecutors had access to IBT headquarters, president Hoffa, and his top staff."[176] A flexible approach to § 2339B, incorporating § 2339B(c) as a civil option, could augur that same transformation in the field of counterterrorism.

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172. The entrapment issue is detailed *infra* at Part IV(C).

173. *See* Horgan, *supra* note 101, at 148 ("[w]hile an individual community that is 'represented' by a terrorist movement may condemn and reject an atrocity that is conducted in its name, members of that community may still remain *broadly* supportive of the terrorist group").

174. *QIASS Report*, *supra* note 94, at 19.

175. *UK Equality Impact Assessment*, *supra* note 165, at 14.

176. Jacobs & Peters, *supra* note 27, at 250.

B. Improving Proportionality of Treatment and Punishment of Disparate Cases

Employing § 2339B(c) would introduce proportionality in the realm of counterterrorism enforcement, evolving from the "all or nothing" approach that alienates communities and precludes addressing larger, systemic issues. Indeed, proportionality in enforcement would greatly assist in achieving the companion goals noted in Part IV(A): appealing to and strengthening the position of moderates, while marginalizing extremist and paranoid elements.

1. Proportional Punishment Is An Important Element of Any Justice System

The influential 18th Century Italian philosopher and criminologist Cesare Beccaria[177] provided three incontestable reasons why proportionality in punishment represents an essential component of any justice system:

> (1) punishment should be only that severe enough necessary to deter crime, and any penalty in excess of that objective constitutes an abuse of power by the state;[178]
>
> (2) the lack of any distinction between punishments for crimes of unequal kind or degree creates a dangerous and counterproductive equation: an offender contemplating two offenses, a greater and a lesser, that are punished alike is presented no disincentive to forego the greater for the lesser. If the punishments are identical, there is no greater risk in attempting the greater;[179] and

177. Beccaria's analysis was praised and quoted with favor by such varied readers as Voltaire, Jeremy Bentham, and John Adams. *See* John D. Bessler, Revisiting Beccaria's Vision: The Elightenment ,America's Death Penalty, and the Abolition Movement, 4 Nw J. L. Soc. Pol'y 195 (2009).

178. Cesare Beccaria, On Crimes and Punishments (Edward D. Ingraham trans. 2009) (1764). Beccaria also postulated that it was *certainty* of punishment, and not its *severity*, that deterred crime. *Id. See also* Bernard E. Harcourt, The Illusion of Free Markets: Punishment and the Myth of Natural Order 106 (2011).

179. Beccaria, *supra* note 177. *See also* Richard Posner, *An Economic Theory of the Criminal Law*, 85 Colum. L. Rev. 1193, 1207 (1985) (noting, in regard to "punishment of different crimes by the same, severe fine[,]" that "[t]his uniformity, however, eliminates marginal deterrence—the incentive to substitute less for more serious crimes. If robbery is punished as severely as murder, the robber might as well kill his victim to eliminate a witness. Thus, one cost of making the punishment of a crime more severe is

(3) the punishment should fit the crime, *i.e.*, those who defraud the public should build public works.[180]

Current counterterrorism enforcement fails on all three counts. In many instances, punishment well exceeds that tied to deterrent value; routinely maximum punishments (due to federal Sentencing Guidelines ranges that eclipse the statutory maximum penalty for "material support" offenses, regardless of the precise nature of the illegal conduct or the background of the defendant) eliminate any differentiation between grades of "material support;"[181] and incarceration without any accompanying rehabilitative objective separates the crime from the punishment.

Thus, proportionality in counterterrorism enforcement is essential in order to imbue the justice system with integrity, consistency, fairness, and logic, and to achieve success in making communities safer.

3. Proportionality Is Sorely Needed In Counterterrorism Enforcement

As a threshold matter, proportionality is sorely needed in counterterrorism enforcement. According to a Rand Corporation expert, the probability of an American being killed in a terrorist attack is one in 650,000, compared with a one in 7,000 chance of being killed in a car accident.[182] Yet all cases involving *any* scent of terrorism, regardless of the imminence or likelihood of danger, are treated with a seriousness that carries not only disproportionate punishment, but also the problem of saddling society and the prison system with the future burden of persons

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that it reduces the criminal's incentive to substitute that crime for a more serious one. To put this differently, reducing the penalty for a lesser crime may reduce the incidence of a greater crime. If it were not for considerations of marginal deterrence, more serious crimes might not always be punishable by more severe penalties than less serious ones") (footnote omitted). *See also id.* at 1206 n.25 (noting that an increase in the length of prison sentences would not correspond to a commensurate decrease in the crime rate, and that the larger the increase in sentences, the larger the gap in crime reduction).

180. Beccaria, *supra* note 177.

181. *See* UNITED STATES SENTENCING GUIDELINES MANUAL §§ 2M5.3 & 3A1.4(a) (2004). For example, the "terrorism enhancement" embodied in § 3A1.4 of the Guidelines not only raises a defendant's Offense Level by 12 (corresponding to an increase of approximately 14 years in prison time), but also assigns the defendant a Criminal History Category of VI (the highest, corresponding to an approximately ten-year difference from Category I) regardless of defendant's prior criminal history (including none at all). *Id.*

182. *See* Geneva Security Forum Final Report, at 6 (June 20-21, 2007) (quoting Brian Jenkins), *available at* http://genevasecurityforum.org/files/report-final-07.pdf.

released from prison without any effort at rehabilitation or reintegration into the community.

Counterterrorism law enforcement should not dominate the headlines, or politics, or the criminal justice system's resources every time there is an arrest. Yet currently the government and media treat every terrorism case as a catastrophe averted, even when, as discussed *supra*, the only potential for specific terrorist activity was induced, instigated, and sometimes inflated by government informants.

Using § 2339B(c) would provide a natural return to proportionality: civil enforcement would telegraph that not *all* terrorism cases are alike, not all terrorism *defendants* are alike, and the difference in treatment would reflect a difference in threat level presented by the defendant, as well as the individual's capacity for rehabilitation. The public would learn to distinguish between such cases (based on the deservedly disparate treatment) and, consequently, the media could no longer pander to sensationalism in every instance, and politicians could no longer profit from persistent fear-mongering.

3. Reducing Warehousing of Marginal Offenders

Resort to the civil option for appropriate offenders also offers a better strategy for undermining *jihadist* recruitment and, ultimately, reducing recidivism by not warehousing inmates, but rehabilitating them instead. While those considered most dangerous are subject to solitary confinement in maximum security prisons, the remainder are lumped together in a handful of Communications Management Units ("CMU's")[183]—a relatively recent Bureau of Prisons "innovation" that comprise a veritable Muslim ghetto of persons convicted of terrorism-related offenses.

Of course, as with ordinary prison populations, mixture of the hardcore inmate with the marginally dangerous (or capable) is toxic. The more radical and violent will transform the less so, not *vice versa*. The *QIASS Report* confirms that devolution:

> [c]apture and detention are just tools; they are not long-term solutions. A substantial number of persons with alleged connections to violent extremist organizations have been incarcerated over the past decade, and some are now being released back to the community. A proportion of them have *more* extreme views and commitments to violence than when

183. *See* 28 C.F.R. § 540.

> they began their detention. In Indonesia, our project team heard directly from former terrorists about how, while in jail, they were given books on martyrdom, materials to plan future attacks, and even control of prayer groups, which presented the opportunity to influence other prisoners.[184]

That traditional trend is exacerbated by the invariably long sentences in "material support" cases, and the lack of any legitimate rehabilitative programs for inmates in such facilities. Also, while other inmates in high security institutions are eligible for "step-down" programs that reward good behavior with transfer to lower-security prisons and/or general population, CMU-based inmates are ineligible.[185] In addition, to the extent a particular inmate's criminality was the product of mental or emotional instability, the separation from other stimuli will only drive them to further emotional and ideological isolation.[186]

As the *QIASS Report* warns:

> [p]revention poses a new set of questions for the counterterrorism effort, including how to prevent incarcerated terrorists who are about to be released from rejoining extremist groups, and how to prevent criminals or less committed extremists either from becoming terrorists or from increasing their commitment to violent ideologies while they are incarcerated or detained. These may be viewed as "strategic counterterrorism approaches" and it is relatively new territory.[187]

Yet the U.S. already has at hand a vehicle for addressing this potential problem: § 2339B(c) actions against the less dangerous and more sympathetic defendants will insulate them from exposure to radical mentors and prison recruitment. All that is required is that the section no longer be mothballed.

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184. *QIASS Report*, *supra* note 94, at 5.

185. 28 C.F.R. § 540.

186. Special Administrative Measures ("S.A.M.s"), 28 C.F.R. § 501.3(a), beginning before trial, severely restrict an inmate's communications, produce the same effect. However, in recent years the government has exercised more discretion in imposing S.A.M.s, as opposed to the earlier practice of imposing them as a matter of course in all terrorism cases.

187. *QIASS Report*, *supra* note 94, at 4.

C. *The Entrapment Problem: Perception Is Reality*

An essential component of community relations is the perception in the community that Muslims are being unfairly targeted in counterterrorism investigations, and that many of the cases developed by confidential informants and undercover agents constitute entrapment of the defendants.[188] Nor does it matter whether that is in fact true, because in this instance, from the community perspective, perception *is* reality, and it informs community reaction to counterterrorism enforcement. If the predominant mode of investigation involves something at least *bordering* on entrapment, why would the community cooperate in those cases?

Certainly the statistics do not diminish the concerns regarding entrapment. The Terrorist Trial Report Card prepared by New York University Law School's Center on Law and Security reported in 2010 that of 156 criminal prosecutions categorized as the 50 most significant terrorism cases since 2001, informers were employed in 62 percent of such cases—and that does not include who knows how many cases in which informants *attempted* to entice and induce Muslims to commit crimes, only to fail.[189]

As one commentator has opined, "[t]his growing reliance on undercover cooperating witnesses and sting operations for counterterrorism has dramatically increased the risk of entrapment."[190] Correspondingly, the levels of disenchantment with counterterrorism enforcement rise as well within the affected communities. The *QIASS Report* wisely advises that "[i]t may also be useful to reflect on the actions of the state itself and whether its actions, inactions, or reactions might be *filling* rather than draining the swamps or perhaps even creating new ones[,]" adding that "[t]his is yet another reason why it is useful to

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188. *See* Islamic Shura Council of Southern California v. FBI, 779 F. Supp. 2d 1114, 1118 (C.D. Cal. 2011) ("[a]lthough the government maintains that its programs are critical to protecting national security, others, particularly within the Muslim and Arab communities, have argued that the government is engaging in illegal religious and ethnic profiling. *See, e.g.*, Richard B. Schmitt & Donna Horowitz, *FBI Starts to Question Muslims in U.S. About Possible Attacks*, L.A. TIMES, July 18, 2004; Richard A. Serrano, *Muslims Angered by FBI Radiation Checks at Mosques*, SEATTLE TIMES, Dec. 24, 2005.").

189. Terrorist Trial Report Card: September 11, 2001-September 11, 2010, CTR ON L. & SEC., NEW YORK UNIV. SCH. OF L. 19, *available at* http://www.lawandsecurity.org/Portals/0/documents/01_TTRC2010Final1.pdf.

190. Jon Sherman, *"A Person Otherwise Innocent": Policing Entrapment In Preventative, Undercover Counterterrorism Investigations*, 11 U. PA. J. CONST. L. 1475, 1477 (2009).

evaluate [CVE] programs, and to have ways to measure whether they are working, so that these issues can be identified early."[191]

Cases involving confidential informants, and the odor of entrapment, also create a proportionality problem because it will always be unclear just what the defendant would have done—or *not* done—absent the solicitation, encouragement, and assistance of government operatives.[192] In that context, should a defendant who might not have presented a danger except in conjunction with a confidential informant working at the direction of the government be punished as a full-fledged terrorist? Yet that is as often the case as not, and the lengthy sentences imposed for "material support" convictions rarely distinguish such defendants from those who independently pursue terrorist intentions.[193]

A converse problem with entrapment is that in the courtroom, it is an all-or-nothing proposition. Even if the defendant is 90 percent entrapped, but acting ten percent on his own volition, it is that ten percent that controls. In addition, while the government's inducement of the offense may be incontestable, that is but one element of the entrapment defense. A defendant must also lack "predisposition" to commit the offense, and, as discussed *infra*, that is a unique and significant problem for defendants claiming entrapment in "material support" cases.

Utilizing § 2339B(c), however, can aid in avoiding those thorny entrapment issues, providing a viable alternative that identifies, monitors, and rehabilitates such offenders without imposing disproportionate punishment and alienating communities. In that fashion, as detailed below in Part 6 of this section, § 2339B(c) can serve as an outlet for the concept of "entrapment-lite" that recognizes that some offenders ensnared in sting and undercover operations do not deserve criminal

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191. *QIASS Report*, *supra* note 94, at 53.

192. In his 1985 article, Judge Posner explains the economic disutility of undercover operations that *create* rather than merely *facilitate* criminal activity:

> But suppose that instead of just simulating the target's normal criminal opportunities, the police go further and induce him to commit crimes that he would never commit in his ordinary environment. The police offer a poor man who has no criminal record one thousand dollars to steal a bicycle; he does so, and is arrested. The resources used to apprehend and convict the man of bicycle theft are socially wasted, because they do not prevent any crimes. Had it not been for the police offer, he would not have stolen a bicycle (only doing so at a time when they were not looking); the expected benefits of theft were negative to him. Nothing is achieved by the police conduct except deflecting scarce resources from genuine crime prevention, and a defense of entrapment will lie. Police inducements that merely affect the timing and not the level of criminal activity are socially productive; those that increase the crime level are not.

Posner, *supra*, note 179, at 1220.

193. *See infra*, note 217 (regarding the sentences imposed in the *Cromitie* case).

prosecution and/or imprisonment even if technically guilty because they capitulated to an informant's inducement.

1. The Entrapment Doctrine

The technical contours of the entrapment defense have been set by Supreme Court precedent.[194] Generally, the defense consists of two elements: "inducement"—meaning that the government must induce the offense—and "predisposition," meaning that the defendant "was independently predisposed to commit the crime for which he was arrested[.]"[195] The former is usually relatively easy to establish in cases involving confidential informants and undercover agents; the latter, however, is far more difficult to establish/prove, particularly in "material support" cases.[196]

Entrapment is an "affirmative defense," requiring the defendant to satisfy a burden of "persuasion"—presenting some evidence establishing the elements, which, if accomplished, shifts to the government the burden of disproving either element beyond a reasonable doubt.[197] The trial judge serves as the gatekeeper, and can preclude the defense if it finds that the defendant has not presented sufficient evidence to warrant the jury's consideration of it.[198]

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194. *See, e.g.*, Sorrells v. United States, 287 U.S. 435 (1932); Jacobson v. United States, 503 U.S. 540 (1992).

195. *Jacobson*, 503 U.S. at 542.

196. Some courts have also required that the defendant have the capacity to perform the illegal act(s) induced by the government. *See, e.g.*, United States v. Reyes, 238 F.3d 722, 739 (5th Cir. 2001); United States v. Wise, 221 F.3d 140, 155-56 (5th Cir. 2000). However, other courts do not impose that burden on the government. *See, e.g.*, United States v. Thickstun, 110 F.3d 1394, 1398 (9th Cir. 1997). While this circuit split has yet to be resolved, "the weight of opinion seems to side with the rejection of a capacity or 'present means' test." Sherman, *supra* note 190, at 1481-82 & n.34-37.

197. *See, e.g.*, United States v. Orr, 622 F.3d 864 (7th Cir. 2010); United States v. Blassingame, 197 F.3d 271, 279 n.2 (7th Cir. 1999) (citing *Orr*, 622 F.3d at 868) ("[i]t is well established that some minimal showing is required to entitle a defendant to maintain an affirmative defense"); United States v. Gomer, 764 F.2d 1221, 1227 (7th Cir. 1985). *See also* United States v. Santiago-Godinez, 12 F.3d 722, 728 (7th Cir. 1993) (citing United States v. Cervante, 958 F.2d 175, 179 (7th Cir. 1992) (if defendant meets burden of persuasion, "the burden shifts to the government, which can defeat the entrapment defense by proving beyond a reasonable doubt either that the defendant was predisposed to commit the offense or the absence of government inducement"); United States v. Hollingsworth, 27 F.3d 1196, 1198 (7th Cir. 1994) (citing *Jacobson*, 503 U.S. 540 (1992)); United States v. Perez-Leon, 757 F.2d 866, 871 (7th Cir. 1985).

198. *See, e.g.*, *Santiago-Godinez*, 12 F.3d at 728 (citing United States v. Sanchez, 984 F.2d 769, 773 (7th Cir. 1993)).

In ordinary criminal jurisprudence, the entrapment defense arises most often in the context of drug-trafficking stings, but also to a lesser extent with respect to other contraband offenses (*i.e.*, illegal firearms transactions, child pornography), as well as bribery of public officials.[199] In counterterrorism enforcement, though, the use of informants and undercover agents, and the consequent danger of entrapment, has been particularly controversial.

A considerable share of the responsibility must be ascribed to the Department of Justice's counterterrorism policy, and how it differs from ordinary enforcement practices in a manner that directly implicates the defense of entrapment. For example, in 2006, former Deputy Attorney General Paul McNulty explained the guiding post-9/11 principles:

> [i]n the wake of September 11, [an] 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.*[200]

Nor has that philosophy changed over time, or with a new federal administration. In November 2010, Attorney General Eric H. Holder, Jr., reiterated, in response to criticism of a Portland, Oregon, prosecution,[201] that the sting operation in that case was "part of a foward-leaning way in which the Justice Department, the F.B.I., our law enforcement partners at the state and local level are trying to find people who are bound and determined to harm Americans and American interests around the world."[202]

The conflict between this preemptive strategy of law enforcement—arresting and prosecuting persons demonstrably earlier in the continuum of conduct—and entrapment is obvious. Attorney General Holder's precise language is also instructive: U.S. counterterrorism enforcement is actively dedicated to "finding" persons who have not yet committed any

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199. *See, e.g.*, Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125 (2008).

200. Sherman, *supra* note 190, at 1475 & n.1 (emphasis added).

201. United States v. Mohamud, No. 10-475-KI, 2011 WL 654964 (D. Ore. Feb. 23, 2011), discussed *infra* at 80-81.

202. Eric Schmitt and Charlie Savage, *In U.S. Sting Operations, Questions of Entrapment*, N.Y. TIMES, Nov. 29, 2010, www.nytimes.com/2010/11/30/us/politics/30fbi.html?.

crime, and create the circumstances that will enable prosecution. Thus, this is not the equivalent of passively casting a line in the water, waiting and hoping for a fish to bite, but affirmatively picking and choosing from among the fish population.

Naturally, such strategy presents constitutional issues, as "criminal liability is pushed to the earliest point now countenanced under American law and dangerously close to the punishment of unpopular speech or thought."[203] In addition,

> [t]he 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.[204]

As set forth below, § 2339B(c) can serve as the antidote to this problem without either denying the government the ability to identify and neutralize potential threats, or sacrificing long or short-term security. Otherwise, entrapment issues will continue to undermine not only the public's confidence in counterterrorism law enforcement, but also the Muslim community's willingness to trust the government's assurances that such enforcement is not designed to target or single out Muslims.

2. The Example of United States v. Cromitie

A prime case study of the issues raised in preemptive law enforcement strategy is *United States v. Cromitie*,[205] in which four defendants were prosecuted for a plot to plant explosive devices at a synagogue in The Bronx, New York, and to use Stinger missiles to destroy military aircraft at the New York Air National Guard Base at Stewart Airport in Newburgh, New York.[206] All four defendants presented the defense of entrapment, but were convicted nonetheless.[207]

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203. Sherman, *supra* note 190, at 1486 n.60. *See also* United States v. Farhane (Sabir), 634 F.3d 127, 175-76 (2d Cir. 2011) (Dearie, C.D.J., dissenting).

204. Sherman, *supra* note 190, at 1480. *See also Farhane (Sabir)*, 2011 WL 338054, at *39 (Dearie, C.D.J., dissenting) ("the substantive crime was so remote in time, place and objective that one is left only to speculate as to what, if anything, would have happened had Sabir in fact been in a position to pursue the conspiratorial goal").

205. No. 09 Cr. 558 (CM), 2011 WL 1842219 (S.D.N.Y. May 10, 2011).

206. *Cromitie*, 2011 WL 1842219, at *1.

207. *Id.*

The confidential informant who induced the defendants was, as described by the trial Court in a post-trial opinion upholding the convictions, an ex-con with his own shady past and a pronounced history of lying for his personal benefit.[208] He was working with the FBI as a confidential informant, and his real "mission" was to locate disaffected Muslims who might be harboring terrorist designs on the United States.[209]

According to the court, while Mr. Cromitie "certainly talked the talk of a terrorist during the long courtship between him and [the informant,]"—indeed, the Court remarked that "the tapes are replete with some of the most hateful, bigoted and ignorant statements to which this court has ever been exposed"—Mr. Cromitie was nevertheless manifestly "reluctant to walk the walk."[210]

Thus, "while Cromitie, who was desperately poor, accepted meals and rent money from [the informant], he repeatedly backed away from his violent statements when it came time to act on them."[211] Indeed, the informant offered Mr. Cromitie a BMW automobile and as much as $250,000 "to organize a jihadist venture[,]" but without success.[212]

Ultimately, Mr. Cromitie avoided contact with the informant for six weeks, but then lost his job. Destitute, Mr. Cromitie contacted the informant to avail himself of the informant's prior promises of financial assistance.[213] As the court recounted, "[o]nly when the offers became outrageously high[,] and when Cromitie was particularly vulnerable to them, because he had lost his job[,] did he finally succumb."[214]

Following that renewed contact,

> [t]hings came together quickly after that. The FBI created phony improvised explosive devices (IEDs), and even a fake Stinger missile, which were placed in an empty warehouse just across the New York State line in Danbury, Connecticut. [The informant] chauffeured the four defendants through the whole operation. He drove them everywhere—to "inspect" the ordnance at the Connecticut warehouse (thereby federalizing their criminal activity), to purchase illegal handguns, to surveil the chosen targets, to "training" exercises where the four were

208. *Id.* at *2.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Cromitie*, 2011 WL 1842219 at *2.
213. *Id.* at *3.
214. *Id.* at *7.

> schooled in how to arm and plant IEDs and shoot Stinger missiles.[215]

The four defendants, under FBI surveillance the entire time, were arrested in the process of planting the phony explosive devices at the Bronx synagogue.[216] At sentencing, explaining why it had not imposed a life sentence as recommended by the federal Sentencing Guidelines,[217] the Court noted that "[b]ased on the evidence known to me, certainly the evidence credited by me, it is the government, not Cromitie, that first introduced the idea of an attack on Stewart several months after the [confidential informant] proposed attacking Jewish targets."[218]

Distinguishing the case from terrorist plots interrupted by government investigation and infiltration, the court pointed out that

> [h]ere, by contrast, the defendants were not engaged in any terrorist activity before they encountered the [informant]. In fact, they were not engaged in any sort of criminal activity at all . . . . [The FBI] did not stumble upon an existing conspiracy and render it effectively inoperative by taking it over. Rather, [the FBI] (through the ears of [a] confidential informant) heard chilling expressions of hatred uttered by a bigoted human being and transformed that man's fantasies—fantasies . . . James Cromitie[] had no way of bringing . . . into being[]into very real criminal activity, whose every movement was directed and dictated by the Government.[219]

As a result, the court concluded at sentencing that:

> [t]here is no way that [the] defendants in this case would have dreamed up the idea of shooting a Stinger missile at an airplane or at anything else . . . . Nothing in the record suggests that these four men would have had a clue about how to contact an illegal

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215. *Id.* at *3. Even that "training" was ineffectual, as the informant had to "arm" the fake explosive devices because the defendants were unable to do so. *Id.*

216. *Id.*

217. For a discussion of the federal sentencing guidelines in the context of terrorism prosecutions, see U.S. SENTENCING GUIDELINES MANUAL, *supra* note 181 and accompanying text.

218. *Cromitie*, 2011 WL 2693297, at *2 (S.D.N.Y June 29, 2011) (Decision of Sentencing) [hereinafter *Cromitie* sentencing]. *See also id.* at *3 ("[i]t is beyond cavil that the idea for the missile was the government's . . . . Indeed, I very much doubt that James Cromitie had any idea what a Stinger missile was.").

219. *Id.* at *3.

> arms trafficker, or they could have come up with the kind of money it really takes to acquire deadly armaments.[220]

However, because the defendants eventually responded to the informant's entreaties, the court added that "[t]hat does not mean that there was no crime."[221] Consequently, the court denied the defendants' motions for acquittal or a new trial, and sentenced them each to the mandatory minimum sentence: 25 years in prison.[222]

3. "Just Because You're Paranoid Doesn't Mean They're Not After You"

Claims of entrapment resonate among lay persons regardless of whether, as a technical matter, the defense is legally viable in court. When instances multiply, and the vast majority of such defendants share a particular religious, racial, or ethnic background (or all three), a sense of persecution is sure to follow.

Indeed, Muslim commentators have cautioned that law enforcement sting operations using informants "contribute towards a deepening polarising wedge between law enforcement officials and some of their most important assets in the war against extremism: Muslim American communities."[223] Consequently, "Muslim American[s] . . . legitimately feel fear and alienation from, and a deepening mistrust of their government, as a result of such harassment."[224]

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220. *Id. See also* Karen Greenberg, *Taking the Justice Out of the Justice System*, THE NATION (Aug. 22, 2011), *available at* http://www.thenation.com/article/162894/taking-justice-out-justice-system (quoting Judge Colleen McMahon) ("I believe beyond a shadow of a doubt . . . that there would have been no crime here except the government instigated it, planned it, and brought it to fruition").

221. Greenberg, *supra* note 220.

222. *3 Men Convicted in Riverdale Synagogue Plot Learn Their Fates*, CBS NEW YORK (June 29, 2011), *available at* http://newyork.cbslocal.com/2011/06/29/sentencing-awaits-men-convicted-in-nyc-temple-plot/. The court declined to sentence Mr. Cromitie more severely than his co-defendants. *See* Decision on Challenges to the Guidelines Calculation, *Cromitie*, 2011 WL 2693297 (June 29, 2011) (No. 09 Cr. 558 (CM)).

223. Wajahat Ali, *Time for FBI to Stop Spying On American Muslims*, GUARDIAN.CO.UK (Dec. 7, 2010), *available at* http://www.guardian.co.uk/commentisfree/cifamerica/2010/dec/07/islam-terrorism?INTCMP=SRCH.

224. *Id.* Not surprisingly, the *UK Review* concluded that "Muslim communities have expressed concerns that Muslims generally are being targeted by counter-terrorism laws rather than individual suspects." *Equality Impact Assessment*, *supra* note 165, at 8. Regarding the United States, see, e.g., *Rally and March in Support of Muslims Targeted by Preemptive Prosecution*, PROJECT SALAM (July 25, 2010), *available at* http://www.projectsalam.org/events/07-25-10.html; *Events: Personal Stories of*

a. The Allegations In the Monteilh Complaint

Nor need Muslims look far for evidence confirming—even if only by accusation—their sense that undercover operations in their communities have transcended the bounds of good faith, and have been aimed not merely at the proverbial "few bad apples," but indiscriminately at the community at large. In addition to the facts of some of the cases themselves, the allegations in the civil Complaint in *Craig F. Monteilh v. Federal Bureau of Investigation, et al.*,[225] a federal civil rights lawsuit instituted by a former FBI confidential informant against the Bureau for allegedly violating his constitutional rights (in terminating his status as an informant, and exposing him to subsequent arrest by California state authorities), would, if true, confirm anyone's worst fears.

For example, the complaint in *Monteilh* contains the following attestations:

> ¶ 34, that the FBI "implemented [Mr. Monteilh] as a human intelligence operative within a secret surveillance program aimed at spying on the Islamic community in the counties of Orange, Los Angeles and San Bernadino[;]"[226]
>
> ¶ 37, that an Assistant United States Attorney ("AUSA") provided Mr. Monteilh "special permission [in writing] to engage in jihadist rhetoric, including but not limited to conducting terrorist operations, possessing weapons and initiating conversations to further terrorist acts against the United States[;]"[227]
>
> ¶ 38, that Mr. Monteilh "was tasked . . . with infiltrating mosques in the counties of Orange, Los Angeles, and San Bernadino, a task he successfully achieved[;]"[228]
>
> ¶ 41, that "Mr. Monteilh was highly trained by the FBI to use cutting edge and sophisticated electronic surveillance devices and equipment to assist in the task of spying on the Islamic community. As per the FBI tasking orders, Mr. Monteilh

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Preemptive Prosecution Part II: A Call to Action, CTR. FOR HUM. RTS. AND GLOBAL JUST., *available at* http://www.chrgj.org/events/2010.html.

225. 10 Civ. 102 (JVS/RNB) (C.D. Cal. Jan. 22, 2010) (hereinafter "*Monteilh*").

226. Complaint at ¶ 34, *Monteilh* (No. 10 Civ. 102 (JVS/RNB)).

227. *Id.* ¶ 37.

228. *Id.* ¶ 38.

surveilled individual Muslims and the Islamic community in general by using the electronic surveillance devices and equipment by surreptitiously recording Muslims speaking in or around places such as mosques, homes, restaurants, businesses, schools, parks, vehicles, offices, gyms and hotels. Mr. Monteilh was successful in performing these tasks[;]"[229]

¶ 44, that "Mr. Monteilh was tasked by the FBI with gaining the confidence of high priority targets, leading prayer in the mosques, dating Muslim women and engaging in sexual relations with Muslim women. Mr. Monteilh was successful in performing these tasks[;]"[230]

¶ 66, that "Mr. Monteilh [was] . . . informed that Assistant Special Agent in Charge Barbara Walls became paranoid that Mr. Monteilh would speak to the press about the illegal activities directed by Assistant Special Agent in Charge Barbara Walls' office of the National Security Branch of the FBI[,]" and was "informed that the illegal activities Assistant Special Agent in Charge Barbara Walls was concerned about coming to light were racial profiling, religious profiling, instigating extremist rhetoric to entrap Muslims, blackmailing Muslims to become informants, the breach of security at Berlitz language center, Mr. Monteilh being armed to attend mosques, Mr. Monteilh being told to engage in sexual relations with Muslim women, misuse of surveillance devices in the Islamic community and warrantless wiretapping."[231]

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229. *Id.* ¶ 41.

230. *Id.* ¶ 44. However, members of the mosque were worried about Mr. Monteilh's radical ideas and suggestions, so much so that "[o]n or about June 2007 persons at the Islamic Center of Irvine became suspicious of Mr. Monteilh and sought a restraining order against him in the Superior Court of California, County of Orange, Harbor Justice Center, concerning acts he performed under his tasking orders." *Id.* ¶ 53.

231. *Id.* ¶ 66. At its worst, the government's persistent sting campaign reeks of the random "integrity testing" that gains popularity from time to time before being reined in by the courts. *See, e.g.*, Miller v. State, 121 Nev. 92, 96 (2005) ("[t]hus, we have drawn a clear line between a realistic decoy who poses as an alternative victim of potential crime and the helpless, intoxicated, and unconscious decoy with money hanging out of a pocket. The former is permissible undercover police work, whereas the latter is entrapment."); Rivera v. State, 846 P.2d 1, 26 (Wyo. 1993) ("[t]he undercover agent acted like a passed out drunken bum with money hanging out of his pockets, which constituted entrapment").

Juxtaposed against these accusations was the appearance of J. Stephen Tidwell, then head of the FBI's Los Angeles office, at the Islamic Center of Irvine in June 2006, years before Mr. Monteilh's allegations became public. Mr. Tidwell insisted in a speech captured on video (according to *The Washington Post*) that, "If we're going to mosques to come to services, we will tell you . . . . The FBI will tell you we're coming for the very reason that we don't want you to think you're being monitored. We would come only to learn."[232] Yet two months later, in August 2006, Mr. Monteilh began attending that very same mosque.[233]

After the dispute between Mr. Monteilh and the FBI became public, the only terrorism-related case he had made while working in Irvine collapsed, and was dismissed.[234] Shakeel Syed, executive director of the Islamic Shura Council of Southern California, told *The Washington Post* that "[t]he community feels betrayed."[235] Similarly, when a terrorist plot in Portland, Oregon formulated by an informant, was halted by the target's arrest, and the government emphasized the potential threat posed by the fake explosive device used, the Muslim community was indeed affected. According to Imtiaz Khan, president of the Islamic Center of Portland and Masjed As-Saber (a mosque), community members are saying, "'Why allow it to get to this public stunt? To put the community on edge?"[236]

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232. Jerry Markon, *Tension Grows Between Calif. Muslims, FBI After Informant Infiltrates Mosque*, WASH. POST, (Dec. 5, 2010), *available at* www.washingtonpost.com/wp-dyn/content/article/2010/12/04/AR2010120403710_pf.html.

233. Federal authorities have had difficulty managing informants. A 2005 study by the Department of Justice's Inspector General reviewed 120 FBI informants and discovered that in 85 percent of the cases, Bureau guidelines had been violated, "ranging from paperwork errors to unauthorized illegal acts." Justin Scheck and John R. Emshwiller, *Rogue Informants Imperil Massive U.S. Gang Bust*, WALL ST. J. (June 18, 2011), *available at* http://online.wsj.com/article/SB10001424052702304906004576369980920377592.html. *See also* THE FEDERAL BUREAU OF INVESTIGATION'S COMPLIANCE WITH THE ATTORNEY GENERAL'S INVESTIGATIVE GUIDELINES, DEP'T OF JUST. (2005), *available at* http://www.justice.gov/oig/special/0509/final.pdf [hereinafter DOJ Report]. The DOJ Report noted that with respect to informants, there was "inadequate training at every level." DOJ Report at 116, 123. Also, in a February 2011 Report by New York University's Brennan Center for Justice criticized the FBI. Emily Berman, *Who Will Watch the Watchers?*, BRENNAN CTR. FOR JUST. (February 7, 2011).

234. Markon, *supra* note 232.

235. *Id.*

236. Schmitt & Savage, *supra* note 202. *See also* William K. Rashbaum, *Window Opens On City Tactics Among Muslims*, N.Y. TIMES, May 28, 2006, at 29 (reporting the "depth of the [New York] Police Intelligence Division's clandestine programs . . . to

b. The Islamic Shura Council's Freedom of Information Act Lawsuit

The Islamic Shura Council of Southern California also filed a Freedom of Information Act ("FOIA") request in 2006 seeking information from the FBI. [237] As the District Court noted in an opinion issued in the context of the subsequent lawsuit to compel the FBI to produce certain documents, the Council "requested information reflecting any investigation or surveillance of them by [the FBI]."[238] The District Court observed that

> [t]he Government represented to the Court in pleadings, declarations, and briefs that it had searched its databases and found only a limited number of documents responsive to Plaintiffs' FOIA request and that a significant amount of information within those documents was outside the scope of Plaintiffs' FOIA request.[239]

However, the District Court declared that "[t]he Government's representations were then, and remain today, blatantly false[,]" because "[a]s the Government's *in camera* submission makes clear, the Government located a significant number of documents that were responsive to Plaintiffs' FOIA request."[240] Indeed, as the District Court elaborated, "[v]irtually all of the information within those documents is inside the scope of Plaintiffs' FOIA request."[241] Nor did the District Court accept the government's rationale:

> [t]he Government asserts that it had to mislead the Court regarding the Government's response to Plaintiffs' FOIA request to avoid compromising national security. The Government's argument is untenable. The Government cannot, under any circumstance, affirmatively mislead the Court.[242]

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infiltrate mosques and Muslim gatherings around New York City"). *See also* Sherman, *supra* note 190, at n.9.

237. *Islamic Shura Council*, 779 F. Supp. 2d. at 1116.

238. *Id.*

239. *Id.* at 1117.

240. *Id.*

241. *Id.*

242. *Id.*

In light of tactics such as those described by the Court in *Islamic Shura Council*, it is small wonder that Muslim communities lack confidence in the bona fides of U.S. law enforcement's intentions.

c. "The Policeman Is Your Friend"—Until He's Not

Another example of practices that alienate a community is provided by the recent investigation and arrest in Maryland, in which an immigrant family allowed the FBI access to a juvenile for multiple uncounseled interviews (at which not even his parents were present). As a family member told the media, "We had thought everything was taken care of and fine because he talked to the FBI so many times—but the next thing you know, a year later, without any warning, the FBI took [the juvenile suspect] away [and arrested him]."[243] Another relative was quoted as remarking, "When [the FBI] said, 'Can we take him out for a few hours?' it seemed so informal. And now, in a way, we feel cheated."[244]

4. First Amendment Implications of Counterterrorism Enforcement

Current counterterrorism enforcement implicates First Amendment activity in two related ways. Not only can constitutionally protected expression provide the basis for the genesis of the investigation itself, but it also can be the source of the most powerful evidence of a defendant's "predisposition" to commit the offense (should that defendant claim entrapment), or the defendant's criminal intent generally.

Regarding the former, for instance, in *United States v. Antonio Martinez*, the criminal complaint avers that a confidential source informed the FBI of internet postings by the defendant on his Facebook page (which protested the oppression of Muslims and professed hatred for the enemies of Allah), which precipitated the investigation, which in turn involved the confidential source contacting the defendant to promote further discussion.[245]

Regarding the latter ("predisposition" and intent), entrapment, always difficult to interpose in even the ordinary case, is a particularly

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243. *See* John Shiffman, *Maryland Teen Arrested By FBI In Jihad Jane Plot, Sources Say*, PHILADELPHIA INQUIRER (Aug. 25, 2011), *available at* http://www.philly.com/philly/news/breaking/20110825_The_FBI_has_secretly_arrested_a_Maryland_juvenile_who_NO_HEAD_SPECIFIED.html?viewAll=y.

244. *Id.*

245. Complaint at 3, United States v. Antonio Martinez (D. Md. 2010) (No. 10 Cr. 4761 (JKB)), available at http://documents.nytimes.com/criminal-complaint-united-states-v-antonio-martinez.

difficult defense in terrorism cases because of the nature of predisposition evidence the government has routinely been permitted to introduce at trial. Often that evidence of a defendant's predisposition to provide "material support" to an FTO consists of First Amendment-protected activity (i.e., the contents of personal libraries or computers, political activism, religiosity, rhetoric, and idle chatter) introduced to prove either predisposition or intent (or both).

While the Supreme Court's decision last year in *Humanitarian Law Project v. Holder*,[246] placed First Amendment activity squarely within the confines of "material support" under certain conditions,[247] the use of such traditionally protected conduct to prove "predisposition" merely aggravates the Muslim community's sense that "material support" prosecutions that emanate from sting operations (using confidential informants) target Muslims unfairly, and deny Muslims the constitutional protections afforded other Americans.

There exists the suspicion, supported by experience and observation, that while a non-Muslim can espouse anti-U.S. opinions, and possess *jihadist* literature and a hard drive full of provocative materials without attracting a confidential informant's attention, Muslims who criticize U.S. policy are considered criminals just waiting for an opportunity to transform rhetoric into action. Using § 2339B(c) would restore some of the balance missing from current law enforcement concentration on using First Amendment expression as a means of measuring a commitment to violent criminal behavior.[248]

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246. 130 S. Ct. 2705 (2010).

247. In *Humanitarian Law Project*, the court rejected a civil pre-enforcement challenge to § 2339B's constitutionality, in the process ruling that even activity protected by the First Amendment could constitute "material support" if performed in "coordination" with an FTO. 130 S. Ct. at 2709-10. Also, even before *Humanitarian Law Project*, otherwise lawful First Amendment expression could be used as evidence for the purpose of proving intent or another element of the charged offense.

248. The obtuseness of the government's attitude is perhaps most graphically illustrated by its arguments for an anonymous jury in *United States v. Hashmi*, 621 F. Supp. 2d 76 (S.D.N.Y. 2008), in which the government's memorandum of law cited as a basis for the motion public demonstrations in support of defendant, arguing "it is likely that jurors will see in the gallery of the courtroom a significant number of the defendant's supporters, naturally leading to juror speculation that at least some of these spectators might share the defendant's violent radical Islamic leanings." Mark Hamblett, *Rebuffing Defense Objections, Federal Judge Authorizes Anonymous Jury in Trial on Support for al-Qaida*, N.Y. L.J. (Apr. 27, 2010), *available at* http://www.law.com/jsp/article.jsp?id=1202453228280&Rebuffing_Defense_Objections_Federal_Judge_Authorizes_Anonymous_Jury_in_NY_Terrorism_Trial. It is not at all difficult to understand how a Muslim could be seriously offended by that rationale (and by the court's statement, in justifying granting the motion, that "[t]his defendant is said to have enthusiastically declared his support for jihad and the killing of non-Muslims . . . .

One commentator has proposed altering the standards in "material support" cases in order to require something more than simply activity protected by the First Amendment:

> [s]imilarly, 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. Only the latter categories of content are relevant to whether the defendant would have committed the crime in the absence of government inducement.[249]

That same commentator also recognizes another salutary effect of foregoing sting operations, and the attendant use of First Amendment-protected activity, to sustain criminal "material support" prosecutions: that by engaging in such activities, the government is undermining a specific benefit of the First Amendment, namely that by not restricting expression, it provides a means of "blowing off steam" that often serves to diminish the prospect that such venting will evolve into violence—replicating in the political sphere what everyone knows to be true in the personal:[250]

> 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.

He faces 70 years in prison. The defendant is a former resident of New York City *who was leading protests for a radical Islamic organization while living in Queens several years ago*)." *Id.* (emphasis added). The author is aware of at least one other case in which the government made the same argument in the context of seeking an anonymous jury. That pleading remains under seal. Thus, for Muslims, not all protests are created—or treated—equal.

249. Sherman, *supra* note 190, at 1506 (footnote omitted).

250. *See, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis. J., *concurring*); Shaw v. State, 134 P.2d 999, 1019 (1943); Eric Neisser, *Charging for Free Speech: User Fees and Insurance In the Marketplace of Ideas*, 74 GEO. L.J. 257, 281-82 & nn.122-23 (1985); *see also* Dennis v. United States, 341 U.S. 494, 568 (1951) (Jackson, J., concurring).

> Prosecutors need to ensure that their charges of choice do not unconstitutionally infringe these protected outlets.[251]

Again, § 2339B(c) provides a middle ground for addressing extremism before it ripens into illegal action, but in a manner that does not impose criminal punishment for First Amendment activity that is tolerated when conducted by other segments of society.

5. The FBI As Jihadist Recruiters

Another problem with relying extensively on undercover sting operations in counterterrorism enforcement is that in the course of building their relationships with an investigation's target(s), confidential informants and undercover law enforcement agents deliberately (but perhaps not self-consciously) assume the role of *jihadist* recruiters. That masquerade—phony for the agents but real to the targets—presents several additional problems that resort instead to § 2339B(c) would cure.

In evaluating targets for undercover sting operations, government agents perform the same analysis as do *authentic jihadist* recruiters: they look for persons who present the potential for terrorist activity, but who need to be cultivated by a mentor to reach that stage. Otherwise, generally, stings would not be necessary, as the targets would be acting already, and not need prodding. The targets of recruiters, both real and pretend, are *not* actively engaged (because they are ambivalent types, and not the self-committed, *who do not need recruiting*, and instead volunteer).

As the facts underlying the *Cromitie*, *Mohamud*, and *Martinez* cases—and a legion of others—demonstrate, elaborate stings are needed because the informants and agents require *months* to lure their targets to the precipice of criminality. Yet that is exactly how genuine recruiters work, and it begs the question: if either the government or the recruiter had simply left the target alone, would he ever have moved beyond rhetoric and ideation to action?[252]

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251. Sherman, *supra* note 190, at 1510. *See also* Posner, *supra* note 179, at 1206 ("If there is a risk either of accidental violation of the criminal law or of legal error, an expected penalty will induce innocent people to forgo socially desirable activities at the borderline of criminal activity. The effect is magnified if people are risk averse and penalties are severe. If, for example, the penalty for carelessly injuring someone in an automobile accident were death, people would drive too slowly, or not at all, to avoid an accidental violation or an erroneous conviction.").

252. Credit goes to Steven Holmes, Walter E. Meyer Professor of Law at New York University Law School, for that insight. *See also* STEPHEN HOLMES, THE MATADOR'S CAPE: AMERICA'S RECKLESS RESPONSE TO TERROR (2007).

Asked in another form, the *QIASS Report* recommends that governments "should also examine how the state's own actions, inactions, or reactions might be fueling rather than mitigating militant sentiments."[253] Certainly transforming marginal or undecided or unfocused potential extremists into committed terrorists does not constitute "mitigating sentiments."[254]

The *Cromitie* case[255] provides a sterling example recognized by no less an objective observer than the federal judge who presided over the trial, who commented that

> [t]he essence of what occurred here is that a government, understandably zealous to protect its citizens from terrorism, came upon a man both bigoted and suggestible, one who was incapable of committing an act of terrorism on his own, created acts of terrorism out of his fantasies of bravado and bigotry, and made those fantasies come true.[256]

As the court pointed out, "[u]nlike other domestic terrorism cases with which this court is familiar, in this case the government did not infiltrate and foil some nefarious plot. There was no pre-existing plot to foil."[257] Rather, the Court "suspect[ed] that real terrorists would not have bothered themselves with a person who was so utterly inept, and that only the government could have made a terrorist out of Mr. Cromitie, a man whose buffoonery is positively Shakespearian in its scope."[258]

Perhaps more ominous is the prospect of those who may have been convinced by government informants to engage in violent *jihad*, only to stop short of criminal conduct and therefore be immune from criminal prosecution. They might for some random reason lay dormant until another, unmonitored opportunity presents itself—and which cannot be stopped before fruition. Or they could simply be more attuned to recognizing government informants, and withdraw before consummating a crime—again, free to commit violent acts once disengaged from the

253. *QIASS Report*, *supra* note 94, at 3.

254. *See also* Sherman, *supra* note 190, at 1487-88.

255. The *Cromitie* case is discussed *supra,* notes 205-222.

256. *Cromitie* sentencing, *supra* note 218, at 57. *See also Cromitie*, 2011 WL 1842219, at *8 ("[t]here is not the slightest doubt in my mind that James Cromitie could never have dreamed up the scenario in which he actually became involved. And if by some chance Cromitie had imagined such a scenario, he would not have had the slightest idea how to make it happen.").

257. *Cromitie* sentencing, *supra* note 218, at 57-58.

258. *Id.* at 63.

informant.[259] Either way, armed with expertise and inspiration from government informants, they are loose among the populace. Section 2339B(c) provides a solution, as the civil mechanism could still be used against them.

Informants also impart to their recruits *dis*information about Islam that is not productive in any fashion. Informants stoke anti-Semitism and violence, thereby propagating a virulent form of Islam that is precisely the *opposite* of what the U.S. claims it wishes to promote among Muslims. For example, as *The New York Times* reported with respect to the investigation of Mohamed Mohamud, in Portland, Oregon: "the informer suggested five ways that Mr. Mohamud could help the cause of Islam, some of which were peaceful, like proselytizing, and some of which were violent and illegal."[260]

In addition, at the trial in *United States v. Cromitie*, the informant regaled the jury with the manner in which he confirmed and amplified the principal defendant's negative stereotypes about Jews and opinions about Israel, thereby inciting the defendant to agree to action. [261] At sentencing, the trial court in *Cromitie* acknowledged that "[i]n its earliest days, the sting operation directed toward Cromitie appealed blatantly to his anti-Semitism, and the first criminal activity that [the informant] discussed with Cromitie was directed towards Jews."[262]

As a non-Muslim observer at the trial recounted,

> [t]he government hired a Pakistani who basically found an African-American, and through him, three other African-Americans, have-nots, at least one of them off the grid almost, and the government took what was anti-Semitism that manifested itself in this case – and there was certainly a lot of

259. That encapsulates an irony of sting operations that is heightened in the counterterrorism context: they usually successfully ensnare only the unsophisticated, while the craftier targets—who constitute a more significant danger—are more careful to avoid becoming prey for informants. *See* Sherman, *supra* note 190, at 1500 ("the Government should not be permitted to prosecute crimes it largely invented and set in motion with meager participation from a vulnerable defendant"). *See also* Glenn Greenwald, *The FBI Successfully Thwarts Its Own Terrorist Plot*, SALON.COM (Nov. 28, 2010), *available at* http://www.salon.com/news/opinion/glenn_greenwald/2010/11/28/fbi.

260. Schmitt & Savage, *supra* note 202. *See also Cromitie*, 2011 WL 1842219, at *2 (informant, in encouraging defendant to engage in violent *jihad*, "suggest[ed] that [the defendant] would be rewarded in the afterlife . . . .").

261. 09 Cr. 558 (CM) (S.D.N.Y.).

262. No. 09 Cr 558, 2011 WL 2693297.

> very nasty anti-Semitism—and turned it into *jihad.* That to me is a certain type of entrapment.[263]

That raises a second question: Would it be tolerated if informants routinely instructed anti-abortion advocates that Christianity compelled the killing of doctors who performed abortions? And what happens when persons who do not agree to or who attempt criminal acts, but nevertheless, equipped with an informant's distorted version of Islam, share it with others who might be moved to action? The problem is particularly acute given the lack of proper or formal religious training among nascent *jihadis.*[264] The government should not be spreading an inaccurate and viral form of Islam (particularly when it condemns it in the same breath), but instead should be providing benign and mainstream religious instruction akin to the CVE programs in other countries. Section 2339B(c) can provide that vehicle.

As Sherman argues,

> [g]overnment 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.[265]

There are other unintended consequences that flow from the government's current one-trick pony counterterrorism enforcement strategy. In Oregon, following Mr. Mohamud's arrest, a mosque that he sometimes attended was the subject of arson. As blogger Glenn

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263. Richard Bernstein, *A Defense That Could Be Obsolete*, N.Y. TIMES (Dec. 1, 2010), *available at* http://www.nytimes.com/2010/12/02/us/02iht-letter.html (quoting Karen Greenberg, Executive Director of New York University Law School's Center on Law and Security). Ms. Greenberg herself reported that:

> Cromitie wasn't the only person in the case to utter antisemitic remarks. The informant . . . was caught on tape urging Cromitie to think about acting "for the cause"—by attacking a synagogue—rather than merely by lashing out at a few individual Jews. Towards that end, [the informant] even schooled Cromitie about the Mumbai attack and the targeting of many Jews in one place. In fact, it was [the informant] who had referred to the Jews as "the root of all evil"—to which Cromitie initially responded, "I don't want to go that far."

Karen Greenberg, *The FBI's Synagogue Bomb Plot*, THE GUARDIAN (June 30, 2011), *available at* http://www.guardian.co.uk/commentisfree/cifamerica/2011/jun/30/fbi-terrorism?INTCMP=SRCH.

264. *See* Greenberg, *supra* note 263.

265. Sherman, *supra* note 190, at 1504. *See also Farhane (Sabir)*, *supra* note 203.

Greenwald noted bitterly with respect to the arrest of Mr. Mohamud, "[s]o the FBI did not stop any actual Terrorist plots, but they may have helped inspire one."[266]

The trumpeting of arrests, and the breathless description of the potential plots foiled—plots for the most part hatched and nurtured by undercover law enforcement operatives—also is counterproductive, as it alarms the public unnecessarily, and conflicts with the otherwise healthy message that Americans should pursue their everyday affairs without being cowed by terrorists and their destructive designs.[267]

Sherman identifies another possible adverse effect of the government's concentration on those who yield to an informant's or agents entreaties:

> [t]he 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.[268]

Ultimately, the government should be dedicated to catching and rehabilitating *jihadis*, rather than cultivating or creating them.[269]

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266. Greenwald, *supra* note 259.

267. *See, e.g.*, Walter Pincus, *FBI Role in Terror Probe Questioned*, WASH. POST (Sept. 2, 2006), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/09/01/AR2006090101764.html ("Court records released since then [regarding the "Liberty Seven" case] suggest that what [Attorney General Alberto] 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"). *See also* Eric Lichtblau, *Trying to Thwart Possible Terrorists Quickly, F.B.I. Agents Are Often Playing Them*, N.Y. TIMES (May 30, 2005), *available at* http://www.nytimes.com/2005/05/30/politics/30terror.html?pagewanted=1. *See also* Sherman, *supra* note 190.

268. Sherman, *supra* note 190, at 1509. *See also supra*, note 233.

269. Following the stir caused by the Mohamud case, a former Department of Justice attorney who had been in charge of the national security division, defended the government's policy by claiming that:

> [i]t doesn't matter whether it's a would-be terrorist who has expressed his desire to launch an attack, or a would-be-drug dealer who has indicated an interest in moving a kilo of crack cocaine. So long as that person has expressed an interest in committing a crime, it's appropriate for the government to

6. The Expansion of Inchoate Crimes and Attempts

The government's preemptive strategy has also resulted in the expansion of inchoate crimes such as attempt and conspiracy, as making arrests earlier along the time continuum further distances the defendant's conduct from a completed substantive crime, or even an agreement to commit a specific offense.[270] In addition to increasing criminal liability altogether, this development also allows the government to charge multiple offenses—attempt and conspiracy—thereby increasing the penalties available after conviction.

For example, recently, in *United States v. Farhane*,[271] the Second Circuit upheld the defendant's attempt and conspiracy convictions (for providing material support) on the basis of the defendant's agreement to treat wounded insurgents for al-Qaeda in Iraq.[272] The decision promtped a spirited dissent that, although agreeing the defendant had joined a conspiracy, asserted, "[t]his is not an attempt."[273] The dissent further declared that the majority appears to expand the reach of "personnel" to include those who do nothing beyond "pledge[ ] to work under the

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respond by providing the purported means of carrying out that crime so as to make a criminal case against him.

Schmitt & Savage, *supra* note 202.

However, that attempted answer fails for several reasons, including:

(1) in drug cases, the targets are almost always *already* involved in drug-dealing, and therefore already on the law enforcement radar. Indeed, the entrapment defenses that are successful in such cases involve defendants who do not have any prior connection to illegal behavior. Here, the government's interest is piqued not by previous illegal conduct, but rather by otherwise protected First Amendment expression about United States policy, Islam, and other political subjects;

(2) such persons have *not* "expressed an interest in committing a crime," but instead have merely exercised their First Amendment rights to disagree, however vehemently and provocatively, with U.S. policy; and

(3) the government cannot have it both ways: it cannot analogize counterterrorism sting operations to ordinary undercover investigations of criminal activity, while at the same time claiming a right to pursue, and in fact pursuing, in counterterrorism investigations, a preemptive strategy that encourages arrests earlier in the chain of events because of the extraordinary stakes involved in terrorism cases.

270. *See, e.g.*, Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 499-50 (2007); Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt By Association Critique*, 101 MICH. L. REV. 1410, 1446 n.164 (2003); *see also* Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1 (1989); United States v. Yu-Leung, 51 F.3d 1116, 1122 n.3 (2d Cir. 1995) (characterizing "attempted conspiracy" as "a creature unknown in federal criminal law"); *see also* Robbins at 15 nn. 271 & 272.

271. 634 F.3d 127 (2d Cir. 2011).

272. *Id.* at 132.

273. *Id.* at 175 (Dearie, C.D.J., dissenting).

direction of the organization." This conclusion is without precedent and hinges upon what is, in my view, a seriously flawed interpretation of the material support statutes.[274]

In assessing the defendant's conduct, the dissent pointed to "[the defendant's] swearing an oath to al Qaeda, which the government acknowledges is not a criminal act, and his providing contact numbers, which the decisions of this Circuit confirm is not a substantial step toward the commission of a crime" (required to constitute an attempt).[275] The dissent added that it could "find no case, in any court, that even remotely supports the majority's conclusion that a defendant attempts a crime simply by agreeing to commit the crime and providing a phone number,"[276] finding "[j]ust as troubling as the majority's 'substantial step' analysis is its suggestion that a person actually *completes* the crime of providing 'material support in the form of personnel as soon as he pledges to work under the direction of the organization.'"[277]

The dissent also appreciated the impact of moving the line of criminal liability further back in time, particularly with respect to predicting just what a defendant would have done if the ordinary time line had not been interrupted by an arrest so early in the process:

> [c]onspiracy charges unaccompanied by a completed substantive crime are relatively rare, and can be troubling when the available evidence leaves one to speculate whether the criminal objective would have been realized. In this case, such concern is compounded by the need to find the line between radical beliefs and radical action. The law of attempt has evolved to take the guesswork out of finding that line.[278]

As the dissent explained, "[a]t the one meeting Sabir attended, he indeed chanted the mantra of the terrorist, led by the government agent and inspired by his co-defendant. *But we are left to wonder whether his apparent enthusiasm would have, or even could have, led to action on his*

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274. *Id.* (footnote omitted).

275. *Id.*

276. *Id.* at 176.

277. *Farhane*, 634 F.3d at 180. *See also id.* at 177 ("The cases routinely hold that mere preparation is not an attempt. *See, e.g.*, United States v. Manley, 632 F.2d 978, 987 (2d Cir. 1980) ('A substantial step must be something more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime.'). As the majority notes, a substantial step must be part of 'a course of conduct planned to culminate in [the] commission of the crime.' *Ivic*, 700 F.2d at 66 (quoting Model Penal Code §5.01(1)(c)).").

278. *Id.* at 182.

part. That should not be, and no imaginable view of the evidence removes this uncertainty."[279]

Yet § 2339B(c) is perfectly suited to fill the void created by that uncertainty, as it does not require a *criminal* attempt or even conspiracy, and therefore does not expand the scope of criminal liability to a point too distant in time from a completed act (or even substantial step) or criminal agreement. In addition, in *Farhane*, the impact of the conviction on *two* counts—conspiracy *and* attempt—was not limited to abstract legal principles, but instead had a direct effect on punishment. It permitted the district court to impose a twenty five-year prison sentence (the maximum of fifteen years on one count, and ten years on the other, to run consecutively), rather than only fifteen years for a single count of conviction.[280]

In contrast, ironically, Dr. Sabir's co-defendant, whose exposure was limited by a plea bargain that permitted him to plead guilty to *one* count only, and who by all accounts was the more culpable defendant between the two, received a 15-year prison sentence.[281] Again, § 2339B(c) would eliminate such inequities and disproportionate punishment based on multiplying offenses for the same conduct, thereby further reducing the adverse effects of entrapment on law enforcement-community relations.[282]

7. Operating § 2339B(c) As An Outlet for "Entrapment-Lite"

Ultimately, § 2339B can alleviate the entrapment problem in current counterterrorism enforcement considerably by application as a mechanism for "entrapment-lite." Those defendants whose criminal conduct has been induced, but whose predisposition is provable only or predominantly by constitutionally protected activity—speech, association, and/or political activism, including seeking redress of grievances—should be subject to civil action only. Similarly, § 2339B(c)'s injunctive authority would also be more appropriate for those

279. *Id.* (emphasis added).

280. *Id.* at 181 ("By transforming offers to provide services into attempted provision of personnel, the majority's holding may sanction multiple punishments for a single offense.").

281. The presence of "vicarious entrapment," in which a primary defendant, as a result of his contact with an undercover government agent, induces criminality by a second defendant, further attenuates that second defendant's conduct from fruition, and complicates matters even more—although such a defendant would be just as liable if found guilty. *See* United States v. Valencia, 645 F.2d 1158 (2d Cir. 1980), *amended*, 669 F.2d 37 (2d Cir. 1981) (endorsing the concept of "vicarious entrapment").

282. *See also id.* at 182 (Dearie, C.D.J., dissenting).

defendants who were unduly influenced or assisted by government operatives, and whose manifestation of intent was ambiguous or marginal.

Thus, defendants who have been subjected to a significant level of entrapment—even if not on a scale ultimately viable for a defense at trial—would not suffer the problem of needing to be 100 percent entrapped in order to be spared a long prison sentence.

D. § 2339B(c) Offers a Systemic Approach That Attacks the Problem At the Roots

Among the long-term advantages of civil RICO is that it "allows the government to address an entire crime problem, like a mobbed-up union."[283] § 2339B(c) possesses that same potential, as it has the capacity to attack the problem of violent extremism at its roots: at its ideological core, where rhetoric and recruitment converge. The most advanced CVE programs target that vortex, and § 2339B(c) injunctions can replicate that approach.

As demonstrated in Part II, *supra*, civil means of enforcement can, when used strategically, accomplish systemic results unattainable through serial criminal prosecutions. The *QIASS Report*, recognizing the inefficiency and even futility of pursuing a *jihadi* by *jihadi* approach to eliminating violent extremism, cautions that "[t]rying only to counter those violent extremists that already exist will have limited long term benefit, since new ones are continuously being created."[284]

Again, the principles of restorative justice provide an applicable analysis:

> [t][he current system treats each crime individually and provides no systematic way to learn broader lessons from patterns of crime which reflect underlying social issues. Thus the long term health of the community is unattended by the current process.[285]

Also, civil enforcement pursuant to § 2339B(c) will reduce the government's acting at cross-purposes to its counterterrorism goals. Instead of cultivating would-be terrorists in sting operations and providing them explosives training and virulent misinformation about Islam (quite often anti-Semitic in character) and geopolitics (pandering to paranoid conspiracy theories, resentment stemming from personal

283. Jacobs & Peters, *supra* note 27, at 274.
284. *QIASS Report*, *supra* note 94, at 52.
285. Pranis, *supra* note 168, at 2.

failure, and the culture of victimization that rationalizes retaliatory violence), the government would be engaged in *rehabilitating* such offenders—providing *accurate* history and religious instruction, counseling, and vocational training and opportunities.

As a commentator explained with respect to why the government should be more restrained in engaging in sting operations:

> [t]his 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.[286]

The government does not do the U.S.'s long-term security a service by making borderline-dysfunctional wannabe *jihadis* full-fledged terrorist disciples. Rather, security is better served by moving such persons in the opposite direction as quickly, affirmatively, and decisively as possible.

E. § 2339B(c) Permits Earlier Interventions Prior to Criminal Conduct

A related advantage of § 2339B(c) is that, because it authorizes injunctive relief not only for completed violations of § 2339B, but also when it "appears" that "any person is engaged in, or is about to engage in, any act that constitutes, or would constitute, a violation" of § 2339B. Thus, substantive or even inchoate *criminal* conduct—i.e., the completed offense, or conspiracy or attempt—that would be required for a criminal prosecution is *not* a prerequisite for an action pursuant to § 2339B(c). Rather, injunctive relief is also available when it merely "appears" that a person is in violation of § 2339B, or even when it "appears" that the person "is about to" provide material support.[287]

The elasticity in the § 2339B(c) standard presents several benefits:

> (1) it obviates the need for elaborate sting operations designed to induce *criminal* conduct;

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286. Sherman, *supra* note 190, at 1504.

287. That standard is of course well below the threshold for probable cause.

(2) instead, intervention can occur at an even earlier point in the continuum, i.e., well before consummation of a crime, than permitted for criminal prosecution;

(3) it is entirely consistent with the government's proactive, preemptive strategy, and promotes that strategy without the negative and dangerous aspects of entrapment;[288] and

(4) because it can be employed earlier in the conduct continuum, it allows for more prompt reaction to, and correction of, potentially threatening behavior; and

(5) it resolves a bureaucratic imperative in favor of justice and efficiency: while the political and bureaucratic realities currently combine to compel law enforcement agents to err on the side of criminal prosecution when a target's conduct is ambiguous—imagine the recriminations if a year after a sting operation or surveillance was concluded *without* an arrest and indictment, that same target performed a successful and deadly terrorist act[289]—§ 23339B(c) provides a more appropriate option that reflects more accurately, and punishes more proportionately, those marginal cases that in objective terms do not merit criminal prosecution, but nevertheless are prosecuted in obedience to the maxim, "better safe than sorry;"

(6) relatedly, if a person manifests some intention to provide "material support," but does not respond to an informant's entreaties to commit a *crime*, §2339B(c) would permit the court to monitor that person through injunctive conditions, and would help establish a middle ground in marginal cases on either side of the line of criminal liability.

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288. *See supra* notes 75-78.

289. Law enforcement veterans have confided that once a person is on the radar and identified as potentially dangerous, it would be—for in large part political and bureaucratic reasons—unthinkable not to pursue an investigation of that person in order to "neutralize" them through prosecution, rather than permit them to mature into an actionable terrorist. Otherwise, the professional and often very public blame for a subsequent terrorist act would fall squarely on the shoulders of those who let a terrorist "get away" without earlier prosecution. The scapegoating that occurred with respect to the decision not to search Zacarias Moussaoui's computer prior to 9/11 (although no one has pointed to anything on that computer that could have led law enforcement to intercept the plot) is a prime educational example that is not lost on law enforcement professionals. *See, e.g., The 9/11 Commission Report, NAT'L COMMISSION ON TERRORIST ATTACKS UPON THE U.S.* (2004).

An illustrative example of how the scope of § 2339B(c) would enhance security is the case of U.S. Army Maj. Nidal Hasan:[290] someone whose conduct attracts attention, and clearly warrants some intervention, but does not rise to the level of criminal conduct. Section § 2339B(c) would have provided a viable alternative, as Maj. Hassan's contacts with Islamic radical figures overseas, and his statements to co-workers, would likely have satisfied § 2339B(c)'s relaxed standard: "appear[ing]" that he was "about to" provide "material support" to an FTO.[291]

As the *QIASS Report* points out,

> [r]adicalization is better viewed as a process rather than an event. Similarly, violent extremism itself is affected by an array of factors that interact with one another, often in different ways at different points in time. There are different points in the process and different factors for possible intervention . . . and just as many points where things can go wrong.[292]

In response, "[r]isk reduction interventions can occur at any point in the CVE activity spectrum, and different contexts will require different kinds of initiatives to address different problem points on that continuum."[293] As demonstrated above and below, § 2339B(c) can be employed at "problem points on that continuum" more flexibly, nimbly, and efficiently than criminal prosecution.

In addition, the amelioration of the severity of criminal sanctions for those whose conduct is best addressed through § 2339B(c) (rather than criminal prosecution) overrides the likelihood that application of § 2339B(c) will "widen the net"—the phrase describing the natural inclination of expanded discretion and jurisdiction (in this instance, over conduct that is covered by § 2339B(c) but *not* by the corresponding criminal provisions) leading to an increase in persons subjected to government action. In terms of policy preferences, the reduction in criminal prosecutions for those whose conduct is more appropriately addressed under § 2339B(c) far outweighs the likely additional §

290. Mr. Hasan was charged with killing 13 military service members at Fort Hood in November 2009.

291. Manny Fernandez, *Major is Arraigned in Fort Hood Killings*, N.Y. TIMES (July 20, 2011), *available at* http://www.nytimes.com/2011/07/21/us/21hood.html.

292. *QIASS Report*, *supra* note 94, at 49.

293. *Id.*

2339B(c) actions that would not be commenced if criminal prosecution were the only option available.[294]

Thus, § 2339B(c)'s possibility for earlier intercession provides a substantial benefit over the current reliance solely on criminal prosecution in counterterrorism enforcement.

F. Prior Cases In Which §2339B(c) Would Have Provided the Better Option

When thinking prospectively about the applicability of § 2339B(c), it is useful to examine prior criminal prosecutions that would have benefitted from civil action instead. For purposes of this analysis, the cases listed below are not intended to set forth an exhaustive roster, but merely a sampling, and have been divided into five specific categories. Generally, they involve defendants (a) who were non-violent; (b) whose "material support" was not connected to specific terrorist plots (leaving aside the issue of those generated by law enforcement sting operations); and (c) who did not present a threat or danger once their conduct was disclosed publicly.

The five categories, and the cases within them—assuming, for the purposes of this article, and because each of these cases resulted in convictions, the truth of the allegations—are:

(1) misdirected humanitarianism:

United States v. Holy Land Foundation (humanitarian aid provided to West Bank Palestinian charity institutions alleged to be affiliated with Hamas);[295]

United States v. Islamic American Relief Agency (violation of Iraq sanctions via provision of humanitarian aid);[296]

(2) misguided political activism:

United States v. Thavaraja (using money provided by the Liberation Tigers of Tamil Elam ("LTTE") to fund a U.S. Congressman's trip to Sri Lanka);[297]

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294. The "widening the net," as a result of problem-solving courts, constitutes one of the objections raised in the NACDL Report. *See* National Association of Criminal Defense Lawyers, *supra* note 6, at 42 & nn.387-89.

295. 493 F.3d 469 (5th Cir. 2007).

296. No. 07-00087-CR-W-NKL, 2009 WL 5169536 (W.D. Mo. Dec. 21, 2009).

297. No. 08-3589-cr, 2009 WL 692113 (2d Cir. Mar. 18, 2009).

United States v. Sattar (Lynne Stewart) (as part of legal strategy, lawyer violating rules on transmitting client's statements to followers in Egypt);[298]

(3) material support that even the government acknowledged was provided without political or ideological motivation, and which was not designated or intended for violent means:

United States v. Iqbal (satellite broadcaster carrying *Al Manar* [identified as *Hezbollah*'s broadcast network] without any terrorist purpose);[299]

United States v. Chiquita Brands International, Inc. (engaging in Transactions with a Specially Designated Global Terrorist, in violation of 50 U.S.C. § 1705(b) and 31 C.F.R. § 594.204, based on "protection" payments to South American designated terrorist organization);[300]

(4) material support not directed at harming the U.S., and/or related to intrastate conflicts in which self-defense is a plausible and legitimate motive:

United States v. Thavaraja (material support to LTTE in Sri Lanka);[301]

United States v. Benevolence International, et al. (alleging defendant "made efforts to provide the Chechen mujahedeen with money");[302] and

(5) material support for groups politically aligned with U.S. foreign policy, but which are nevertheless designated as FTO's:

United States v. Taleb-Jedi (involving the Iranian exile resistance group People's Mojahedin Organization of Iran ["PMOI"], also known as MEK);[303] and

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298. No. 02 Cr. 395 (JGK), 2009 WL 4038461 (S.D.N.Y. Nov. 18, 2009).
299. No. 06 Cr. 1054 (RAB) (S.D.N.Y. filed Jan. 20, 2007).
300. No. 07 Cr. 55 (RCL) (D.D.C. Mar. 13, 2007).
301. No. 08-3589-cr, 2009 WL 692113 (2d Cir. Mar. 18, 2009).
302. No. 02 Cr. 414, 2002 WL 31050156 (N.D. Ill. Sept. 13, 2002).
303. 566 F. Supp. 2d 157, 161 (E.D.N.Y. 2008). *See also* Benjamin Yaster, *Resetting Scales: An Examination of Due Process Rights in Material Support Prosecutions*, 83 N.Y.U. L. REV. 1353, 1354 (2008); Margaret D. Stock, *Providing Material Support to a*

United States v. Afshari (same).[304]

In addition to those cases, there have a been a fair number of cases involving defendants whose prosecution represented a colossal waste of resources, and/or punitive sanction that so far outweigh the defendants' practical capacity to inflict harm on a scale commensurate with terrorism. The "Liberty City Seven" case certainly qualifies, as the "Newburgh" case (also known as the "Bronx Synagogue" case) does for at least some of the four defendants.[305]

In both cases, absent the FBI informant's entreaties and assistance there more than likely would never have been any specific plot, and even if the informant's conduct did not constitute entrapment, the defendants' conduct did not merit criminal penalties, much less the extended imprisonment attendant to nearly every "material support" conviction. Yet in the Newburgh case (*Cromitie*), the defendants faced, and received, 25 year prison sentences.[306]

G. §2339B(c) Would Improve Efficiency and Resource Allocation

All of the above-described advantages of incorporating § 2339B(c) into counterterrorism enforcement compel an ultimate conclusion: it would substantially improve efficiency and permit a more efficient and productive allocation of resources. Whether the example is something as macro as Guantanamo Bay, or as micro as The Liberty Seven case, the benefits of a more flexible policy that transfers costs and effort to the community, and which eventually could achieve a reduction in violent extremism and its adherents, are obvious and undeniable.[307]

As an NIJ publication regarding restorative justice explains,

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Foreign Terrorist Organization: The Pentagon, the Department of State, the People's Mujahedin of Iran, & The Global War on Terrorism, BENDER'S IMMIGRATION BULLETIN (2006), *available at* http://www.rcusa.org/uploads/pdfs/ms-rptresearch-bstock5-15-06.pdf.

304. 635 F. Supp.2d 1110 (C.D. Cal. 2009).

305. United States v. Batiste, 06 Cr. 20373-Cr, 2007 WL 5303053 (S.D. Fla. Nov. 7, 2007) (three trials, involving seven court-appointed attorneys in each, required to obtain convictions for only some of the seven defendants); United States v. Cromitie, No. 09 Cr. 558 (CM), 2011 WL 1842219 (S.D.N.Y. May 10, 2011). *See also Cromitie, supra* notes 205-220.

306. *See Cromite*, 2011 WL 1842219.

307. *See* Posner, *supra* note 179, at 1206 n.25 (explaining that "[l]arge increases in the probability of apprehension and conviction, on the other hand, would require heavy additional investments in police forces, prosecutors' offices, and courts").

> [i]n general, communities manage individual behavior more effectively than governments do. However, communities need government support and resources and the perspective of an oversight mechanism which is separate from the community.[308]

Also, current law enforcement methodology—particularly in the context of undercover stings—does not focus on the larger objectives. As Karen Greenberg, then Executive Director of New York University Law School's Center on Law and Security observed:

> [o]ne question is whether [these undercover stings are] the best place to put our resources . . . It's whether these cases lead to information about a larger network. In the synagogue bombing [Cromitie] case, for example, these were guys who knew nobody and were connected to nobody . . . . This is the standard we need to apply to terrorism-related entrapment cases . . . . Were the defendants part of a larger network prior to the sting operation, or did the F.B.I. connect the individual, through them, to a wider terrorist network or group?[309]

The description of the initiation and evolution of the government's investigation in the Mohamud case in Portland, Oregon[310] is instructive in this regard. As *The New York Times* reported,

> "[f]ederal agents say they followed up on intercepted e-mails and other information showing that Mr. Mohamud was seeking to contact Islamic extremists. Undercover investigators then spent months helping him plan to detonate a bomb. Planted by undercover agents, the bomb was fake.[311]

That, of course, begs another question: What if upon that initial discovery of Mr. Mohamud's intentions, the government, instead of embarking on a long, complex sting that has raised as many questions as it has answered, had filed a § 2339B(c) injunctive action to halt an incipient violation of the statute? The same question is relevant to the Martinez case, as well, which began with concern over Mr. Martinez's

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308. *Pranis, supra* note 168, at 3.

309. Bernstein, *supra* note 263 (quoting Karen Greenberg).

310. United States v. Mohamud, No. 10-475-KI, 2011 WL 654964 (D. Ore. Feb. 23, 2011).

311. William Yardley, *Entrapment Is Argued in Defense of Suspect*, N.Y. TIMES (Nov. 29, 2010), *available at* www.nytimes.com/2010/11/30/us/30mohamud.html?partner=rss&emc=rss&pagewant.

Facebook postings.[312] In addition, would not they both (and everyone) have benefitted more from an injunction under § 2339B(c) that requires counseling and a proper Islamic education? Public identification of both Mr. Mohamud and Mr. Martinez would have effectively neutralized them as threats, would have offered them (and their families) the opportunity to address their prospective illegal conduct—and any other relevant personal issues[313]—in a constructive, cost-effective manner that would also enjoy community support

Imagine the savings in *all* resources (not just monetary, or at the investigative stage, as the costs of many criminal material support prosecutions—particularly since a majority involve court-appointed, taxpayer-funded defense attorneys—are prohibitive) if in the Mohamud and Martinez cases, a § 2339B(c) injunction was sought rather than a complex, time-consuming, and community-alienating undercover sting operation. Once prosecutors and law enforcement have adjusted to the need to make determinations of dangerousness, or capacity, or imminence of possible harm, § 2339B(c) savings would multiply, and the woefully inefficient bureaucratic imperative of "when in doubt, prosecute lest blame accrue as a result of a subsequent terrorist event" would disappear.

V. ENVISIONING THE MECHANICS FOR ENFORCEMENT PURSUANT TO § 2339B(C)

As a threshold matter, undoubtedly the proposal underlying this article will be met with resistance, whether that is in the form of the idea itself (any alternative to jail), or related to costs, logistics, and other difficulties, including the potential creation of another bureaucratic structure administered by and through the already heavily burdened federal courts.

Those objections notwithstanding, resort to § 2339B(c) on a systematic level would *still be superior to the current system*, just as those who pioneered drug courts and drug rehabilitation and mental

312. 10 Cr. 4761 (JKB) (D. Md.) available at https://ecf.mdd.uscourts.gov/cgi-bin/DktRpt.pl?638479756784033-L_452_0-1.

313. For example, while Mr. Mohamud apparently did not have any history of strong religious beliefs, he was subject to a prior sexual misconduct allegation at college. *See* Kristian Foden-Vencil, *All Things Considered: Two Different Views of Alleged Would-Be Bomber*, NAT'L PUBLIC RADIO (Dec. 1, 2010), *available at* http://www.npr.org/2010/12/01/131733485/Two-Different-Pictures-Of-An-Alleged-Would-Be-Bomber. Also, Mr. Mohamud was unemployed in part because he had been prevented from traveling to Alaska to take a fishing job as a result of his being on the government's "no-fly" list.

health approach to what had traditionally been purely a law enforcement model recognized in offering an unconventional and imperfect alternative.[314] Also, even a period in which the kinks need to be worked out would represent progress, and worth the growing pains. Thus, delay until a flawless system supporting § 2339B(c) is created would be counterproductive.

Nor is the cost issue simply one of financial numbers. It also includes the cost with respect to the continuing toll the current system exacts on defendants, their families, and their communities, and the price the U.S. pays in alienating domestic communities that want to be cooperative, and international audiences that have been focused on U.S. criminal justice for the past decade.

Moreover, utilizing § 2339B(c) would be cost-effective in the long run, as it would reduce the cost of many of the criminal cases, as well as the costs of unnecessary (and unnecessarily long) imprisonment. Also, as the matrix of community and social service organizations begin to incorporate § 2339B(c) defendants in their programs, much of the costs of supervision and monitoring will be transferred from government to those institutions.[315] As the *QIASS Report* notes, "[n]ational governments administer most of the formal risk reduction programs, but there is often a prominent role for non-governmental organizations as well. In some of the reportedly successful cases, cross-agency collaboration between security (police and intelligence organizations) and social services (welfare agencies, educational institutions) is critical."[316]

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314. For a recent story regarding one such pioneer, see Andrew Car, *Drug Court Pioneer Speaks at County Graduation*, OBSERVER (Sept. 24, 2011), *available at* http://www.observertoday.com/page/content.detail/id/563648/Drug-Court-pioneer-speaks-at-county-graduation.html?nav=5047.

315. The U.S. detention operation at Guantanamo Bay, Cuba is a paradigmatic example of an inflexible, unitary policy costing far more than a nuanced approach. More than $500 million has been spent *on renovations alone* (which does not include salaries for soldiers, contractors, and other support staff, the costs of transportation to and from the island, the costs of litigation involving Guantanamo, the supplies necessary for the detention operation, and the cost in resources diverted from other, more pressing civilian, military, and justice projects and objectives), and accomplished less than nothing. *See* Scott Higham and Peter Finn, *At least $500 million has been spent since 9/11 on renovating Guantanamo Bay*, WASH. POST (Jun. 7, 2010), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/06/06/AR2010060604093.html. Also, as even the President agrees, the Guantanamo detention and military commission operation has resulted in a net loss for the U.S. in more than monetary terms. *Id. See also* Remarks by the President on National Security, National Archives, Washington, D.C. (May 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/.

316. *QIASS Report*, *supra* note 94, at 9.

Nor is this article the product of naiveté. Rather, it reflects decades of experience in the criminal justice system, including witnessing the "war on drugs" in the courts and communities, and more exposure to terrorism cases (from before 9/11) and Muslim communities than all but a few in the U.S. government (present or former).

A. The Essentials of An Action Pursuant to § 2339B(c)

As § 2339B(c) itself suggests, an action pursuant to it would seek an injunction from a federal district court to enjoin to prevent an ongoing or potential provision of "material support." In that context, a court's authority to fashion equitable relief is vast.[317] Equipped with that discretion, courts can be innovative and affirmative in imposing customized conditions such as (and this list, too, is not exhaustive) counseling and other programming (including vocational if appropriate), religious instruction,[318] some form of supervision and reporting, restricted internet access, associational and travel limitations, financial monitoring, and even home detention and/or electronic monitoring. Injunctive provisions should be designed not only to prevent further violative behavior, but also to provide the defendant an incentive—by setting benchmarks and rewards for compliance (such as an expiration date on the conditions)—to successfully complete rehabilitation.

As a commentator writing about civil RICO's transformation of labor unions noted,

> [e]quity, it has long been said, will not suffer a wrong without a remedy. Accordingly, "equity has been characterized by a practical flexibility in shaping its remedies." That flexibility has been stretched to dramatic new limits in the last twenty-five years, first in school desegregation and later in such areas as the

317. *See, e.g.*, Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) ("[i]n shaping equity decrees, the trial court is vested with broad discretionary power; [and] appellate review is correspondingly narrow"); Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982); United States v. Oakland Cannabis Buyers Co-op., 532 U.S. 483, 495-96 (2001) ("District courts whose equity powers have been properly invoked have discretion in fashioning injunctive relief[,] . . . unless a statute clearly provides otherwise."); Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 381 (2008) ("[a]n injunction is a matter of equitable discretion"); Lacks v. Fahmi, 623 F.2d 254, 256 (2d Cir. 1980) ("[a]s a general matter, a court operates with broad discretion when fashioning equitable relief"); Thomas v. Bryant, 614 F.3d 1288 (11th Cir. 2010); Reynolds v. Giuliani, 506 F.3d 183 (2d Cir. 2007).

318. While this might not be constitutional as a compulsory condition, it is difficult to imagine a defendant who would be offered such treatment under § 2339B(c) not agreeing to such a condition if the alternative was criminal prosecution.

> reform of prisons and mental institutions, as the courts have responded to the development of new substantive rights by entering "squarely into the business of reforming bureaucracies".[319]

In addition, most of the above conditions are already present in some form or another for convicted defendants as part of their probation or supervised release.[320] Given the drastic nature of the alternative—criminal prosecution and lengthy imprisonment—it is more likely than not that the issue of fashioning conditions would not be time-consuming or substantially adversarial. Would any defendant now incarcerated for material support not choose that alternative? Even if some did, they would be few in number (and perhaps innocent altogether). After all, how many SEC civil actions end in trial, or are contested beyond the initial phase? Rather, they most often result in settlements, consent decrees and/or other forms of limited sanctions that are far more palatable than extended, expensive, and, most of all, risky litigation. There is no reason to believe that § 2339B(c) actions would have a different distribution of results.

Non-compliance would be governed by ordinary standards: the contempt power. That is a considerable disincentive in ordinary

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319. *See* Michael J. Goldberg, *Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement*, 1989 DUKE L.J. 903 (1989) (citation omitted).

320. For example, while there is a split in the circuits regarding the *extent* of internet restriction permitted in child pornography cases (which is often imposed even prior to trial as a condition of bail), the courts agree that *some* restrictions can be imposed. *See, e.g.*, United States v. Paul, 274 F.3d 155 (5th Cir. 2001); John L. Sullivan III, *Federal Courts Act as a Toll Booth to the Information Super Highway—Are Internet Restrictions Too High of a Price to Pay?*, 44 NEW ENG. L. REV. 935 (2010); Emily Brant, *Sentencing "Cybersex Offenders": Individual Offenders Require Individualized Conditions When Courts Restrict Their Computer Use and Internet Access*, 58 CATH. U. L. REV. 779 (2009). Regarding limits on association, see Neil P. Cohen, *The Law of Probation and Parole*, § 9.11, at 9-19 (2d ed. 1999) (observing that associational conditions are frequently challenged, but that courts routinely uphold them and interpret them not to apply to chance meetings); United States v. Balderas, 358 F. App'x. 575, 581 (5th Cir. 2009) ("the supervised-release condition prohibiting a defendant from associating with convicted felons without permission is a standard condition of supervised release"). *See also* United States v. Lovelace, 257 F. App'x. 773 (5th Cir. 2007); United States v. Loy, 237 F.3d 251, 268 (3d Cir. 2001) (citing *Cohen*); United States v. King, 608 F.3d 1122 (9th Cir. 2010); United States v. Rodriguez, 558 F.3d 408 (5th Cir. 2009) (residency and association conditions of supervised release imposed on defendant convicted of assault were permissible). The same is true regarding required mental health programming. *See, e.g.*, United States v. Lopez, 258 F.3d 1053, 1056 (9th Cir. 2001) ("[a] condition requiring participation in a mental health program is a routine (albeit 'special') condition of supervised release").

litigation, and, again, the prospect of non-compliance resulting in referral for criminal prosecution only amplifies that motivation to comply.

B. Possible Amendments to § 2339B(c) to Facilitate Its Operation

While legislative amendment is not *necessary* for § 2339B(c) to operate in the manner described above,[321] certain amendments could indeed be salutary. They include:

1. expressly permit conversion of criminal complaints to § 2339B(c) injunctive actions. That would provide the government flexibility if subsequent information and circumstances militate in favor of the civil option. It would also obviate the need for the government to make decisions (whether the case should be civil or criminal) in situations in which information is incomplete at the time of the initial charging determination;

2. provide authority for the U.S. Probation Department and/or Pre-Trial Services Division to administer certain conditions, *i.e.*, electronic monitoring, and to refer defendants in § 2339B(c) actions to appropriate rehabilitative programs;

3. provide for appointment of counsel for indigent defendants in § 2339B(c) cases. The involvement of counsel would likely be cost-effective, as an accurate and realistic explanation of the alternatives to an injunction would facilitate prompt resolution of the cases;

4. provide for sealing of § 2339B(c) actions when appropriate in order to limit media and other harassment of a defendant and/or his or her family (as that could interfere not only with resolution of the case, but also the successful completion of any rehabilitative program);[322]

5. provide for immunization of a defendant's statements made for the purpose of negotiating a cooperative disposition of a § 2339B(c) action, *i.e.*, statements made to facilitate placement in an appropriate rehabilitative program, or in relation to arranging or agreeing to any other court-imposed condition; and

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321. As discussed *supra* Part I.

322. Media and other harassment was a concern articulated in the *UK Review* with respect to "control order" policy. *See Equality Impact Assessment*, *supra* note 165, at 14.

> 6. expressly provide for some limited form of Double Jeopardy protection for those who successfully comply with injunctive conditions. For example, if a defendant completes a treatment and/or rehabilitation program to the satisfaction of the court, that person should not thereafter be subject to criminal prosecution for the same conduct that was the subject of the § 2339B(c) proceeding.[323]

C. The Necessity of a Multifaceted Approach to Counterterrorism Enforcement

As the *QIASS Report* notes,

> [a] steadily increasing number of countries have adopted initiatives to prevent involvement in terrorism, disrupt the activities of terrorists, and reduce the likelihood of re-engagement. Countries concerned with the challenges of terrorism are looking beyond defending against current threats and instead are focusing on identifying and mitigating the risk posed by emerging ones. Accordingly, these efforts are less about "de-radicalization" and more about "risk reduction."[324]

It is critical that the U.S. join those countries that have developed alternatives to a purely incarcerative approach to counterterrorism enforcement. Otherwise, the problem of violent extremism will continue to be addressed piecemeal rather than comprehensively. As a consequence, U.S. law enforcement will continue to investigate and apprehend an innumerable series of individuals rather than achieving systemic and lasting success.

Also, the U.S. cannot continue to treat every offender and set of factual circumstances the same—through a lens in which each refracts as

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323. Generally courts have permitted evidence gathered for a civil proceeding to be used in parallel criminal proceedings. *See* United States v. Stringer, 521 F. 3d 1189 (9th Cir. 2008). *See also* Alain Leibman, *Ninth Circuit Endorses Government's Use of Parallel Proceedings*, WHITE COLLAR DEFENSE & COMPLIANCE (2008), http://whitecollarcrime.foxrothschild.com/2008/06/articles/grand-jury-1/ninth-circuit-endorses-governments-use-of-parallel-proceedings/; United States v. Kordel, 397 U.S. 1 (1970) (approval of the government's use in a criminal case of evidence gathered in a related civil proceeding, often by a civil agency of the government).

324. *QIASS Report*, *supra* note 94, at 6 & n.2 (citing Horgan, J. and Braddock, K., *Rehabilitating the Terrorists? Challenges in Assessing the Effectiveness of De-radicalization Programs*, 22 TERRORISM AND POLITICAL VIOLENCE 1, 1-25 (2010).

the potential worst case scenario. That is a poor and imprudent means of resource allocation, and completely abandons proportionality—an essential element of any justice system that instills public confidence—holding it hostage to political grandstanding and opportunism.

This article does not represent the conclusive vision of incorporating the civil alternative embodied in § 2339B(c), but instead merely the *beginning* of this discussion. In Attorney General Eric Holder's August 3, 2009, remarks to the American Bar Association, he emphasized that "[g]etting smart on crime requires talking openly about which policies have worked and which have not. And we have to do so without worrying about being labeled as too soft or too hard on crime."[325]

While the Attorney General was speaking specifically about drug enforcement and sentencing policy, his challenge applies equally to counterterrorism law enforcement methodology and strategy, which rarely invites objective review and analysis. It is time that § 2339B(c), too long ignored, be incorporated in a counterterrorism law enforcement strategy that seeks long-term security in conjunction with proportional and efficient enforcement.

325. Eric Holder, U.S. Attorney General, Address at the 2009 American Bar Association Convention (Aug. 3, 2009), *available at* http://www.usdoj.gov/ag/speeches/2009/ag-speech-090803.html.