

“The More Muslim You Are, the More Trouble You Can Be”:¹ How Government Surveillance of Muslim Americans² Violates First Amendment Rights

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INTRODUCTION

When Imam Hamid Hassan Raza, leader of Brooklyn’s Masjid Al-Ansar, meets newcomers at his mosque, he treads carefully.³ After learning of the New York Police Department (NYPD)’s targeted surveillance of Muslim “hotspots”⁴ such as

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¹ Taken from a quote by a nineteen-year-old female Muslim student at Brooklyn College, New York, on how the NYPD’s surveillance of the Muslim community treats their religious expression and behavior. Her full quote reads: “It’s as if the law says: the more Muslim you are, the more trouble you can be, so decrease your Islam.” MUSLIM AMERICAN CIVIL LIBERTIES COALITION (MACLC) ET AL., MAPPING MUSLIMS: NYPD SPYING AND ITS IMPACT ON AMERICAN MUSLIMS 12 (2012) [hereinafter MAPPING MUSLIMS], available at <http://www.law.cuny.edu/academics/clinics/immigration/clear/Mapping-Muslims.pdf>.

² The term “Muslim Americans” will be used throughout this Comment to describe citizens and residents of the United States who are Muslim, i.e., ascribe to the faith of Islam. For an interesting discussion on the “hyphenated identities” of second generation Muslims in the United States, see generally Selcuk R. Sirin & Michelle Fine, *Hyphenated Selves: Muslim American Youth Negotiating Identities on the Fault Lines of Global Conflict*, 11 APPLIED DEV. SCI. 151 (2007); YVONNE YAZBECK HADDAD, NOT QUITE AMERICAN?: THE SHAPING OF ARAB AND MUSLIM IDENTITY IN THE UNITED STATES (2004). As a reflection of such hybrid identities, according to a 2011 Gallup Report, “Muslim Americans [i]dentify [w]ith the United States and [t]heir [f]aith [e]qually.” ABU DHABI GALLUP CTR., MUSLIM AMERICANS: FAITH, FREEDOM, AND THE FUTURE 50 (2011) [hereinafter GALLUP REPORT], available at http://turcopolier.typepad.com/files/mar_rep_ort_adgc_bilingual_072011_sa_lr_web.pdf.

³ Complaint at 14, *Raza v. City of New York*, 998 F. Supp. 2d 70 (E.D.N.Y. 2013) (No. 13–CV–3448), 2013 WL 6177392 at *1, available at https://www.aclu.org/sites/default/files/assets/nypd_surveillance_complaint_-_final_06182013_1.pdf.

⁴ See Petra Bartosiewicz, *NYPD Surveillance of Muslims Has Created a Climate of Fear*, NATION (Mar. 18, 2013), <http://www.thenation.com/article/173400/nypd-surveillance-muslims-has-created-climate-fear> (“The NYPD’s counterterrorism strategy, which was developed in part by former and current CIA officials, has focused on ‘intelligence collection’ intended to thwart potential terrorist plots through the heavy scrutiny of

Muslim businesses and mosques for counterterror intelligence gathering, he “is hesitant to approach newcomers until they are better known in the Masjid Al-Ansar community.”⁵ Due to multiple “chance” encounters with plainclothes police officers,⁶ threats of his sermons being taken out of context and used against him,⁷ and his fears of what being targeted by the NYPD would mean for his wife and child,⁸ Raza has “considered leaving the pulpit.”⁹

Ironically, Masjid Al-Ansar is named after the Arabic word *ansar*, which means “the helpers” and in the Islamic tradition refers to the support and sense of community fostered during the time when the Prophet Muhammad and his followers had newly arrived to the city of Madina.¹⁰ After the Associated Press broke the news about the NYPD’s “Muslim Surveillance Program” in August 2011,¹¹ mosque

[c]ongregants grew even more suspicious of newcomers [for fear they were informants], and a constant sense of suspicion now exists among the mosque’s congregants. There [was] . . . a steep decline in mosque attendance, as the number of worshippers attending afternoon prayers on weekdays . . . declined from approximately twenty people to just two or three people.¹²

A once “vibrant and lively mosque community” dwindled into a fearful group of isolated individuals apprehensive about the consequences of their mosque attendance and regular interaction with others in their community, disallowing the opportunity for Masjid Al-Ansar to live up to its name.¹³ Raza in particular found that his wariness of new mosque attendees prevented him from

so-called Muslim ‘hot spots’ such as mosques.”); *see also* MAPPING MUSLIMS, *supra* note 1, at 12 (noting that the NYPD “mapped, photographed or infiltrated at least 250 mosques in the New York City [area] . . . and deemed these places of worship ‘hot spots,’ with any activity in or around the mosques meriting surveillance”).

⁵ Complaint, *supra* note 3, at 14.

⁶ *Id.* at 10–11.

⁷ *Id.*

⁸ *Id.* at 14.

⁹ *Id.*

¹⁰ *Ansar - Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/ansar> (last visited Mar. 6, 2014).

¹¹ *See generally* Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, ASSOCIATED PRESS, Aug. 23, 2011, available at <http://www.ap.org/Content/AP-In-The-News/2011/With-CIA-help-NYPD-moves-covertly-in-Muslim-areas>; *Highlights of AP’s Pulitzer Prize-Winning Probe into NYPD Intelligence Operations*, ASSOCIATED PRESS, <http://www.ap.org/media-center/nypd/investigation> (last visited Oct. 13, 2013) [hereinafter *AP NYPD Probe*].

¹² Complaint, *supra* note 3, at 15.

¹³ *Id.* at 16.

“effectively [fulfilling] his role as a religious and spiritual counselor and teacher.”¹⁴

On June 18, 2013, the American Civil Liberties Union (ACLU), Creating Law Enforcement Accountability and Responsibility (CLEAR) Project, and New York Civil Liberties Union (NYCLU) filed a lawsuit on behalf of Raza (the named plaintiff) and other Muslim individuals who were targeted by NYPD surveillance, alleging that they suffered injuries caused by such conduct.¹⁵ The lawsuit was filed against the City of New York, Mayor Bloomberg, Police Commissioner Raymond W. Kelly, and other city officials. The complaint alleged “suspicionless surveillance” of “mapped” Muslim individuals and organizations and the deployment of informants “without any suspicion of wrongdoing.”¹⁶ *Raza v. City of New York* represents one of the more recent and publicized legal challenges to the government’s surveillance of Muslim Americans without any other indication of suspicion or wrongdoing *except* being Muslim, or perhaps, as this Comment will discuss, being “too Muslim.”¹⁷

On April 15, 2014, after months of public outcry—and undoubtedly bad press¹⁸—the NYPD announced it would disband the controversial and constitutionally suspect “Zone Assessment

¹⁴ *Id.* at 14.

¹⁵ *Id.* at 2; Raza v. City of New York - Legal Challenge to NYPD Muslim Surveillance Program, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/national-security/raza-v-city-new-york-legal-challenge-nypd-muslim-surveillance-program> (last visited Oct. 13, 2013).

¹⁶ Complaint, *supra* note 3, at 1.

¹⁷ *Hassan v. City of New York*, filed in federal district court in New Jersey, similarly alleged NYPD spying on Muslim individuals and institutions, including an all-girls Muslim school. Federal District Judge William Martini dismissed the suit on February 20, 2014. It was “[t]he first legal challenge to the New York police department’s blanket surveillance of Muslims in the wake of the 9/11 terrorist attacks.” Ed Pilkington, *Federal Judge Tosses Out Legal Challenge over NYPD Surveillance of Muslims*, GUARDIAN (Feb. 21, 2014), <http://www.theguardian.com/world/2014/feb/21/nypd-muslim-surveillance-legal-challenge-judge>. The *Hassan* plaintiffs alleged similar violations of the First Amendment caused by law enforcement surveillance and its resulting effect on religious expression, such as: lowered mosque attendance, avoidance of public prayer, and discontinuance of religious or political discussions. *Hassan v. City of New York*, No. 2:12–3401 (WJM), 2014 WL 654604, at *2–3 (D. N.J. Feb. 20, 2014). The plaintiffs filed a Notice of Appeal on March 21, 2014. *Hassan v. City of New York*, CENTER FOR CONST. RTS., <http://www.ccrjustice.org/Hassan> (last visited Apr. 27, 2014).

¹⁸ See, e.g., Laila Alawa, *America Is the Land of the Free — Unless You’re Muslim*, POLICYMIC (Feb. 25, 2014), <http://www.policymic.com/articles/83443/america-is-the-land-of-the-free-unless-you-re-muslim> (disapproving of *Hassan* case dismissal); Faiza Patel, *Blanket Spying on Muslims ‘Makes Us Less Safe’*, BRENNAN CENTER FOR JUST. (Mar. 25, 2014), <https://www.brennancenter.org/analysis/blanket-spying-muslims-%E2%80%98mak-es-us-less-safe%E2%80%99> (pointedly critiquing New York City officials’ conduct in connection with NYPD spying); Carla Murphy, *NYPD (Finally) Gets Independent Oversight*, COLORLINES (Mar. 28, 2014, 5:55 PM), http://colorlines.com/archives/2014/03/nypd_finally_gets_independent_oversight.html (applauding the announcement of a first-ever inspector general with subpoena power and oversight authority over the NYPD in the wake of stop-and-frisk and Muslim spying programs).

Unit” (formerly called “Demographics Unit”) within their department used to map Muslim communities in the region.¹⁹ This action by the NYPD could be heralded as the right step towards ending the stigmatization of religious expression by Muslim Americans and tells us that it is possible to refrain from alienating and burdening an entire religious community in the name of counterterrorism. Despite this move, however, some question whether it will mean any real difference.²⁰

This Comment will argue that the government’s targeted, suspicionless surveillance of Muslim Americans in the name of counterterror efforts has effectively restricted the Muslim community’s First Amendment freedoms of association, religion, and speech. Part I will discuss a brief background of surveillance, leading up to a report on the current effects of surveillance programs on Muslim Americans today. The discussion in Part II will turn to the case law and legal standards for First Amendment claims in the context of Muslim surveillance, advocating for and applying the strict scrutiny test to establish that the government’s conduct has in fact infringed on Muslim Americans’ rights to free association, religion, and speech. Part III will then conclude by offering solutions to counterterror efforts which do not criminalize mere adherence to a particular faith, including a cease of widespread government surveillance (i.e., not treating Muslims as a suspect class) and offering gang intervention models as a possible alternative to the current practice of government counterterrorism programs.

I. THE SLIPPERY SLOPE OF SURVEILLANCE

A. What Is Surveillance?

Professor Christopher Slobogin defines surveillance as “government efforts to gather information about people from a distance, usually covertly and without entry into private spaces.”²¹ Surveillance as a general phenomenon is then broken

¹⁹ Editorial, *Spying at the N.Y.P.D.*, N.Y. TIMES, (Apr. 16, 2014), <http://www.nytimes.com/2014/04/17/opinion/spying-at-the-nypd.html>.

²⁰ See Anna Lekas Miller, *The NYPD Has Disbanded Its Most Notorious Spy Unit, but Is the Age of Muslim Surveillance Really Over?*, NATION (Apr. 23, 2014), <http://www.thenation.com/article/179504/nypd-has-disbanded-its-most-notorious-spy-unit-age-muslim-surveillance-really-over>. One community leader noted that although the Zone Assessment Unit “doesn’t exist anymore, there is all this information that they have compiled . . . [and w]e have questions about whether . . . the forms of profiling that the unit was engaged in will transform or change into newer forms of profiling under the auspices of other units.” *Id.*

²¹ CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 3 (2007); see also NORMAN ABRAMS, *ANTI-TERRORISM AND CRIMINAL ENFORCEMENT* 443 (2003) (explaining that “political surveillance . . . is aimed

down into three categories: 1) communications surveillance, which is “the real-time interception of communications”; 2) physical surveillance, which is “the real-time observation of physical activities”; and 3) transaction surveillance, which is the “accessing [of] *recorded* information about communications, activities, and other transactions.”²² According to Slobogin, since 9/11, “the United States government has been obsessed, as perhaps it should be, with ferreting out national security threats,” but “more than occasionally it has also visited significant intrusion on large numbers of law-abiding citizens—sometimes inadvertently, sometimes not.”²³ Within the context of national security, intelligence gathering²⁴ of pattern occurrences in neighborhoods and communities is intended to “analyze broad or meaningful trends” as a means of assessing the validity and likelihood of a national security threat.²⁵

Such intelligence gathering, however, armed with a prejudicial purpose can result in “selective surveillance” that imposes burdens on Muslim Americans’ First Amendment rights, further alienating this particular community from the government.²⁶ The surveillance of Muslim Americans operates along a similar, yet covert, vein of the “Broken Windows”²⁷ theory of policing. Developed by James Q. Wilson and George L. Kelling, this theory posits that when a community riddled with violence and crime becomes less tolerant of the minor causes of social disorder, a decrease in violent crime will result.²⁸ Implementation of the Broken Windows theory has resulted in aggressive “zero tolerance policing” in New York City, with its stated goal being to increase misdemeanor arrests on the streets

at uncovering criminal behavior” and occurs “in contexts where there is no specific evidence of criminal behavior that triggered the investigatory activity”).

²² SLOBOGIN, *supra* note 21, at 3.

²³ *Id.* at 3–4.

²⁴ Like David Smith’s work, this Comment will treat surveillance and intelligence gathering as synonymous. See generally David Smith, *Presumed Suspect: Post-9/11 Intelligence Gathering, Race, and the First Amendment*, 11 *UCLA J. ISLAMIC & NEAR E.L.* 85, 131 (2012).

²⁵ *Id.*

²⁶ *Id.* at 133; TREVOR AARONSON, *THE TERROR FACTORY: INSIDE THE FBI’S MANUFACTURED WAR ON TERRORISM* 49–50 (2013); see also ABRAMS, *supra* note 21 (noting the “concern about the chilling effect of government’s intrusion into the arena of political and religious discourse and possible trenching on First Amendment freedoms”).

²⁷ This theory is named after an analogy George L. Kelling and James Q. Wilson espoused in a 1982 article they published in *The Atlantic*: “[I]f a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken. . . . One unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing.” GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 19 (1996).

²⁸ *THE ENCYCLOPEDIA OF POLICE SCIENCE* 112 (Jack R. Greene ed., 3d ed. 2007).

in an effort to reduce other, more violent crime.²⁹ While there has been much social science research conducted to test the Broken Windows theory, “there is no reliable empirical support for the proposition that disorder causes crime or that broken-windows policing reduces serious crime.”³⁰

Taken from a broader lens, this theory, which supports the policing and monitoring of one another within a community, creates a problematic phenomenon when placed within the context of Muslim American surveillance. Implementation of forms of the Broken Windows theory into Muslim intelligence gathering has resulted in the widespread distrust and fear of the Muslim community vis-à-vis not only law enforcement, but also vis-à-vis *itself*.³¹ It is an unfortunate and inherently unjust consequence of the billions of dollars the government has invested to survey, track, infiltrate, and even prosecute Muslim Americans.³² Indeed, as civil rights attorney Fatima Dadabhoj poses it, it seems the question now remains: “Does this mean that Muslims are merely subjected to a second tier system of free speech that relates to their faith?”³³

B. A Brief History of Surveillance

While government surveillance of certain individuals and communities is nothing new, its objectionable nature persists. In the 1920s, under the direction of J. Edgar Hoover, the Department of Justice’s General Intelligence Division maintained a list of 450,000 names of individuals who were considered “Bolshevik” or “Soviet-inspired.”³⁴ In addition to wiretapping and trespassing, among the individuals the Justice Department identified for their list were Hellen Keller and future Supreme Court justices Felix Frankfurter and Arthur Goldberg.³⁵

²⁹ *Id.*

³⁰ *Id.*

³¹ See *infra* notes 136–143 and accompanying text.

³² AARONSON, *supra* note 26, at 16–17, 44–45, 49–50, 234; see also STEPHEN DOWNS & KATHY MANLEY, PROJECT SALAM & NAT’L COAL. TO PROTECT CIVIL FREEDOMS, *INVENTING TERRORISTS: THE LAWFARE OF PREEMPTIVE PROSECUTION* 33 (2014), available at <http://www.projectsalam.org/Inventing-Terrorists-study.pdf> (“It may be that in order to bypass constitutional prohibitions against mass surveillance, the government has preemptively prosecuted hundreds of (mostly) Muslims in the last decade in order to create the illusion of a terrorist threat to the U.S.—which would justify the secret mass surveillance spy network.”).

³³ Interview with Fatima Dadabhoj, Civil Rights Manager, Council on Am. Islamic Relations, in Anaheim, Cal. (Jan. 31, 2014).

³⁴ Nancy Murray & Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons from History*, 87 MASS. L. REV. 72, 78 (2002).

³⁵ *Id.* at 78–79.

During World War II, the Japanese community in California was mapped much like the mapping of Muslim communities in the United States today, the justification then being that it would protect America from another attack after Pearl Harbor.³⁶ Local law enforcement have recently implemented mapping and surveillance programs of Muslims, as evinced by the 2007 Los Angeles Police Department (LAPD) plan to map local Muslims and the more recent NYPD surveillance of East Coast/New York area Muslims, which “[e]erily . . . bears [a] striking resemblance to the mistreatment experienced by Japanese Americans in the wake of Pearl Harbor.”³⁷

In 1956, the Federal Bureau of Investigations (FBI) began its Counter Intelligence Program (COINTELPRO), which spied on individuals and groups identified as “subversive” to “neutralize . . . radical or immoral activity.”³⁸ Dr. Martin Luther King, Jr., the NAACP, civil rights groups, the ACLU, and even the Boy Scouts of America were targets of government spying in this era, for fear that these organizations or individuals were infiltrated, or influenced, by Communism.³⁹ A few decades later, during the 1960s and 1970s, the government cast its net of surveillance wider, to include anti-Vietnam War advocates, the Black Panthers, the “New Left,” and women’s rights groups.⁴⁰ It was around this time that local law enforcement set up their own programs to conduct surveillance on a local level, such as the “New York Red Squad,” which “was reported to have files on over one million people.”⁴¹ After the 1972 attacks at the Munich Olympic Games and “[a]s early as 1986, the government was considering plans to use two military bases to detain Arab- and Iranian-Americans in the same vein as the Japanese internment of World War II.”⁴²

³⁶ Rabea Chaudhry, *Effective Advocacy in a Time of Terror: Redefining the Legal Representation of a Suspected Terrorist Facing Secret Evidence*, 8 UCLA J. ISLAMIC & NEAR E.L. 101, 106 (2009).

³⁷ *Id.* at 106–07 (“Just as Asian Americans have been “raced” as foreign, and from there as presumptively disloyal, Arab American[s] and Muslims have been “raced” as “terrorists”: foreign, disloyal, and imminently threatening.”) (quoting Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists”*, 8 ASIAN AM. L.J. 1, 12 (2001)); see also Complaint, *supra* note 3, at 1–3.

³⁸ Murray & Wunsch, *supra* note 34, at 81 (internal quotations omitted); see also Elizabeth Rindskopf Parker, *Civil Liberties in the Struggle Against Terror*, in LEGAL ISSUES IN THE STRUGGLE AGAINST TERROR 141, 163 n.46 (John Norton Moore & Robert F. Turner eds., 2010) (describing COINTELPRO tactics as “generally illegal and focused on repressing political dissent”).

³⁹ Murray & Wunsch, *supra* note 34, at 81; Smith, *supra* note 24, at 140–41.

⁴⁰ Murray & Wunsch, *supra* note 34, at 81; Eric Lane, *On Madison, Muslims, and the New York City Police Department*, 40 HOFSTRA L. REV. 689, 695–96 (2012).

⁴¹ Murray & Wunsch, *supra* note 34, at 81.

⁴² Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687, 705 (2010).

Most recently, the post-9/11 era has been characterized by government surveillance of Muslim American communities in the name of counterterrorism efforts.⁴³ The government's conduct in this surveillance program was highlighted in news stories that broke around August 2011 about the NYPD conducting mass surveillance of Muslim communities in New York.⁴⁴ The Associated Press ran a series of investigative reports on this topic, noting that the NYPD effectively "monitored every aspect of Muslim life and built databases on where innocent Muslims eat, shop, work and pray."⁴⁵ And in July 2014, it was revealed that the U.S. National Security Agency (NSA) had—at the minimum—spied on five "politically active" Muslim American leaders, including a past Bush administration official, a successful attorney, a Rutgers professor, a former California State University professor, and an executive director of the Council on American-Islamic Relations (CAIR).⁴⁶

At the root of these investigations is the tool of profiling, which allows the NYPD, FBI, or other governmental entity to target certain groups of individuals solely based upon their religious affiliation and pursue an almost carte blanche "fishing expedition" for evidence condemning the targeted Muslim of some link to terrorist activity.⁴⁷ Justification for this treatment of Muslim American communities has come from the idea that the post-9/11 era calls for "urgent" action to thwart mass destruction that can come from a potential terror attack, and therefore—as the argument goes—constitutional infringements like this are a "small price to pay for [America's] safety."⁴⁸

C. Surveillance of Muslim Americans

At the core of this issue is what Sahar F. Aziz has called "selective counterterrorism enforcement."⁴⁹ This manifests itself

⁴³ See generally MAPPING MUSLIMS, *supra* note 1; Bartosiewicz, *supra* note 4.

⁴⁴ See generally AP NYPD Probe, *supra* note 11.

⁴⁵ Lane, *supra* note 40, at 699 (citing Matt Apuzzo, *NYPD-CIA Alliance's Authority Questioned*, ASSOCIATED PRESS, Jan. 21, 2012, available at http://usatoday30.usatoday.com/USCP/PNI/NEWS/2012-01-21-BCUSNYPD-Intelligence3rd-LdWritethru_ST_U.htm).

⁴⁶ Elias Isquith, *New Greenwald Bombshell: NSA Spied on 5 Politically Active Muslim-Americans*, SALON (July 9, 2014, 7:11 AM), http://www.salon.com/2014/07/09/new_greenwald_bombshell_nsa_targeted_5_politically_active_muslim_americans/.

⁴⁷ See generally Lane, *supra* note 40, at 702–07 (noting that if the NYPD cannot find their Muslim terror suspect, "they will watch as many [Muslims] as possible in hopes of catching a glimpse of one who appears to be traveling along the route they judge to be leading to committing or aiding in terrorism").

⁴⁸ Andrew E. Taslitz, *Racial Profiling, Terrorism, and Time*, 109 PENN. ST. L. REV. 1181, 1199 (2005).

⁴⁹ Sahar F. Aziz, *Policing Terrorists in the Community*, 5 HARV. NAT'L SECURITY J. 147, 183–84 (2014).

in: the disproportionate targeting of Muslims for surveillance;⁵⁰ government-sent informants tasked with infiltration and what many have argued should be legally considered entrapment of individuals;⁵¹ and mapping and spying on predominantly Muslim neighborhoods, Muslim-owned businesses, mosques, and Muslim Student Associations.⁵² Outside the scope of this Comment, but still critically troubling, are the deportations of religious leaders and imams for sermons “deemed too critical of the American government,”⁵³ the criminalization and prosecution of *charitable* and *humanitarian aid* organizations under sweeping material support statutes,⁵⁴ and private acts of prejudice against Muslims in the form of mosque vandalism and employment discrimination.⁵⁵

As author and investigative journalist Trevor Aaronson argues, in the context of surveillance of Muslims, the government has used intelligence gathering as a means of “manufacturing” counterterrorism prosecutions that result in “what a federal judge has called a ‘fantasy terror operation’” created and incited by a government informant.⁵⁶ Such intelligence gathering assists the government “in furtherance of an adversarial system that prioritizes bolstering the number of terrorism investigations, prosecutions, and convictions of Muslims in America.”⁵⁷

50 See Kirstie Ball & Frank Webster, *The Intensification of Surveillance, in THE INTENSIFICATION OF SURVEILLANCE: CRIME, TERRORISM AND WARFARE IN THE INFORMATION AGE 1*, 20 (Kirstie Ball & Frank Webster eds., 2003) (“Responses to September 11 have increased possibilities for ‘racial’ profiling along ‘Arab’ lines in particular, the consequences of which are already seen in the American detention of several thousand ‘suspects’ and a FBI trawl of more than 200 campuses to collect information about ‘Middle Eastern’ students.”).

51 Aziz, *supra* note 49; see also AARONSON, *supra* note 26, at 146, 195.

52 *AP NYPD Probe*, *supra* note 11; Complaint, *supra* note 3, at 5–9.

53 Aziz, *supra* note 49, at 184.

54 *Id.* at 184–85; 18 U.S.C. § 2339A (2012). “The government employs an extremely broad criminal substantive standard—material support—which encompasses any activity in association with a group classified as a terrorist organization. Giving [an] organization money is the most obvious example of material support, but even the volunteering of one’s time also constitutes material support.” Symposium, *Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America*, 57 AM. U. L. REV. 1203, 1213–14 (2008).

55 Aziz, *supra* note 49, at 186; see, e.g., Press Release, U.S. Equal Emp’t Opportunity Comm’n, *Abercrombie & Fitch Liable for Religious Discrimination in EEOC Suit*, Court Says (Sept. 9, 2013), available at <http://eeoc.gov/eeoc/newsroom/release/9-9-13.cfm> (noting employer unlawfully discriminated against female Muslim employee wearing a headscarf). The “secret evidence” problem similarly strips Muslim defendants of their rights. David Cole, professor of law at Georgetown University Law Center, has stated that in the context of terror prosecutions, “[t]he government has . . . informed us that it is relying on classified evidence that it cannot tell us about. So we must defend the group without knowing the accusations against it, and without seeing most of the evidence in the file.” Symposium, *supra* note 54, at 1216. See generally Chaudhry, *supra* note 36.

56 AARONSON, *supra* note 26, at 234–35.

57 Aziz, *supra* note 49, at 182.

Additionally, Aziz refutes the presumption about domestic or “homegrown” terrorism in the United States being the result of radicalization of all Muslim Americans within their own communities.⁵⁸ One category of these “homegrown terrorism” cases involve most often “young, vulnerable men with mental health or financial problems upon whom paid informants prey. Often, these informants also play leading roles in concocting and implementing the fake terrorist plot.”⁵⁹

Ironically, for all the emphasis placed on rooting out the “homegrown” terrorists in Muslim communities, Aziz argues that “[i]ndeed, Muslim communities know much less than law enforcement about these cases because, unlike community members, law enforcement has information drawn from extensive surveillance networks and intelligence databases at the local, state, and federal level.”⁶⁰ As a result of this “[p]ervasive government scrutiny of Muslim communities,” Muslims feel “pressured to downplay their religious identity” and “fear becoming too active in . . . religious activities” because they worry that these are “indicative” to the government of “terrorist inclinations.”⁶¹

In a report prepared by the Muslim American Civil Liberties Coalition (MACLC), the Creating Law Enforcement Accountability & Responsibility (CLEAR) project, and the Asian American Legal Defense and Education Fund (AALDEF), East Coast Muslims were interviewed to assess their experiences with being a part of a community targeted by NYPD surveillance. Most interviewees acknowledged that the public appearance of a Muslim identity would “invite[] unwanted attention or surveillance from law enforcement.”⁶² Traditional or Islamic garb, a beard, a *hijab* (headscarf), or a *niqaab* (face covering) were such displays of a Muslim identity which, to the NYPD, would “serve as indicators of ‘dangerousness.’”⁶³ Some Muslims

⁵⁸ See *id.* at 215.

⁵⁹ *Id.* at 214–15. See generally Said, *supra* note 42. See also Jon Sherman, “A Person Otherwise Innocent”: Policing Entrapment in Preventative, Undercover Counterterrorism Investigations, 11 U. PA. J. CONST. L. 1475, 1478 (2009); Interview with Fatima Dadabhoy, *supra* note 33; see AARONSON, *supra* note 26, at 146, 195; HUMAN RIGHTS WATCH, COLUMBIA LAW SCH. HUMAN RIGHTS INST., ILLUSION OF JUSTICE: HUMAN RIGHTS ABUSES IN US TERRORISM PROSECUTIONS 22 (2014), available at http://www.hrw.org/sites/default/files/reports/usterrorism0714_ForUpload_0_0_0.pdf (noting that in the sting operation cases studied, the government “often chose targets who were particularly vulnerable—whether because of mental disability, or because they were indigent and needed money that the government offered them”).

⁶⁰ Aziz, *supra* note 49, at 215.

⁶¹ *Id.* at 180–81; Interview with Fatima Dadabhoy, *supra* note 33.

⁶² MAPPING MUSLIMS, *supra* note 1, at 15.

⁶³ *Id.*

have stopped religious expression through praying in public, wearing headscarves, growing beards (an Islamic tradition), or donning Islamic or “Muslim looking” garb.⁶⁴ As one interviewee, an interfaith community organizer, put it, “[a] *hijab* or beard isn’t just about being different and not fitting in . . . it’s also that people will see me as [someone who is] prone to violence.”⁶⁵

One Muslim student attending Brooklyn College said his parents forbid him from attending Muslim Student Association events on campus and wearing the Islamic skullcap in public, out of fear of being openly identified as a Muslim based on appearances.⁶⁶ In addition, “[l]aw enforcement scrutiny of outward manifestations of ‘Muslim’ characteristics” prompted some Muslims to alter their appearances and *the practice of their faith*.⁶⁷ A City University of New York (CUNY) student found that this scrutiny of outward Muslim appearances made some people “water down” the practice of their religion, an unfortunate and unwarranted consequence of the government surveillance.⁶⁸ One professor at Baruch College stated that in a class discussion, her Muslim students told her that participating in a Muslim Student Association could lead to law enforcement scrutiny and being labeled an extremist.⁶⁹

These actions by the government and the resulting response of fear by the Muslim community raise serious First Amendment concerns, including the chilling of free association, which is considered an expressive right. Implementing a form of guilt by association, government surveillance and law enforcement create a presumption that “Muslims . . . know more about each other than other communities with members that have engaged in domestic terrorism.”⁷⁰

64 Aziz, *supra* note 49, at 181.

65 MAPPING MUSLIMS, *supra* note 1, at 15.

66 *Id.*

67 *Id.* at 17.

68 *Id.* One interviewee in the report said she hid her religious identity at her place of employment, and another interviewee “wondered whether she should ‘water down’ her ‘Muslimness’ on her resume.” *Id.* at 30–31. The stigma Muslims carry for merely *being Muslim* are stifling and stunting their opportunities for growth in society and the workplace, forcing them to choose between their ability to freely express their religion or practice a form of socially palatable Islam (if, even that, is palatable to begin with).

69 *Id.* at 31.

70 Aziz, *supra* note 49, at 182.

For example, law enforcement has yet to invest in community policing programs focused on Christian evangelical communities that support bombing abortion clinics or attacking doctors who administer abortions, far-right Christian communities that stockpile weapons because they wish to overthrow the government or believe the end of the world is near, or predominantly Anglo

II. FIRST AMENDMENT RIGHTS INFRINGED

A. Freedom of Association

Freedom of association is a fundamental right expressly recognized by the Supreme Court under the First Amendment.⁷¹ Associational freedoms have been recognized in two forms: expressive and intimate.⁷² The United States Supreme Court in *Griswold v. Connecticut*⁷³ held that while freedom of association “is not mentioned in the Constitution nor in the Bill of Rights,” it is a peripheral First Amendment right.⁷⁴ Moreover, the Court declared “the First Amendment has a penumbra where privacy is protected from government[] intrusion.”⁷⁵ And emphasizing its sanctity in relation to free expression, Justice Douglas noted that

[t]he right of “association,” like the right of belief . . . is more than the right to attend a meeting; it includes the right to express one’s attitudes or philosophies by *membership in a group or by affiliation with it or by other lawful means*. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.⁷⁶

The right to associate is thus a penumbral right of the First Amendment, an “emanation[] from those guarantees [of the Bill of Rights] that help give them life and substance.”⁷⁷ The government may, however, punish an individual with membership in a particular association, but only if it can make a showing that the individual “actively affiliated with a group, knowing of its illegal objectives, and with the specific intent to further those objectives.”⁷⁸

patriot groups that engage in violence against undocumented immigrants based on their opposition to immigration reform.

Id.

⁷¹ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1198 (4th ed. 2011).

⁷² David A. Anderson, *Jail, Jail, the Gang’s All Here: Senate Crime Bill Section 521, The Criminal Street Gang Provision*, 36 B.C. L. REV. 527, 529 (1995); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984).

⁷³ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁷⁴ *Id.* at 482.

⁷⁵ *Id.* at 483.

⁷⁶ *Id.* (emphasis added); see also SUSAN N. HERMAN, TAKING LIBERTIES: THE WAR ON TERROR AND THE EROSION OF AMERICAN DEMOCRACY 212 (2011) (“Civic associations have proven indispensable in enabling individuals to stand up to the government in the past decade, as they have at other points in our history.”).

⁷⁷ *Griswold*, 381 U.S. at 484.

⁷⁸ CHERMERINSKY, *supra* note 71, at 1199.

1. *NAACP v. Alabama ex rel. Patterson*

In *NAACP v. Alabama ex rel. Patterson*,⁷⁹ the Court proclaimed that the of right of freedom of association warranted strict scrutiny protection in the face of state coercion requiring the NAACP's Alabama regional office to produce membership lists of their "rank-and-file" to the Alabama Attorney General.⁸⁰ In *Patterson*, the state Attorney General sought to enjoin and oust the NAACP from operating in Alabama because it was allegedly violating an Alabama statute that required foreign (i.e., out of state) corporations to file a corporate charter with the Secretary of State and designate a place of business for service of process.⁸¹ When the NAACP refused to comply because it believed it fell under an exemption in the state statute, the Attorney General obtained a court order against the NAACP, forcing it to produce "a large number of the Association's records and papers, including bank statements, leases, deeds, and records containing the names and addresses of all Alabama 'members' and 'agents' of the Association."⁸² After being held in civil contempt and assessed a \$10,000 fine, the NAACP "substantially" complied with the production request, except for producing the membership lists, which the Association argued was a constitutional violation of their freedoms of speech and assembly (as incorporated against the state of Alabama under the Fourteenth Amendment).⁸³

In agreeing with the NAACP, the Court reasoned that "[i]t is *beyond debate* that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."⁸⁴ In applying strict scrutiny⁸⁵ to government action that "may have the *effect* of curtailing the freedom to associate," the Court highlighted the NAACP's "uncontroverted showing" of the past harmful effects members of the Association suffered as a result of revealing their

79 *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

80 *Id.* at 460, 466.

81 *Id.* at 451–52.

82 *Id.* at 453.

83 *Id.* at 453–54. At this point, the Alabama Circuit Court declared the NAACP in continuing contempt and increased the fine to \$100,000. *Id.* at 454.

84 *Id.* at 460 (emphasis added).

85 In this test the Supreme Court applies to certain highly protected rights, the Court asks whether the governmental action in question is narrowly tailored (or necessary) to achieve a compelling government interest. *Id.* at 460, 463. See generally *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (announcing a new standard of "the most rigid scrutiny" for suspect government classifications); CHEMERINSKY, *supra* note 71, at 554; MILTON R. KONVITZ, *FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE* 16–18 (2001).

rank-and-file members, including “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”⁸⁶ The Court held that such state action—compelled disclosure of membership lists revealing the identities of members and the resulting stigma that came with it—was

likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that *it may induce members to withdraw from the Association and dissuade others from joining it* because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.⁸⁷

Thus, the Court prioritized the right of individuals as a group to be free from government action that targeted them in a manner that would cause them to feel reluctant or afraid to continue participating in that group, because of the very important right at the root of associational rights: free expression and speech.

2. *Roberts v. U.S. Jaycees*

Notwithstanding the strength of First Amendment protections of the freedom of association, the Court in *Roberts v. U.S. Jaycees*⁸⁸ still noted that “[t]he right to associate for expressive purposes is not, however, absolute.”⁸⁹ The government may infringe on that right if their conduct is justified and “serve[s] compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”⁹⁰ One compelling state interest the Court has already recognized is an interest in eradicating discrimination.⁹¹ *Roberts* dealt with the U.S. Jaycees, a national organization of young men seeking to exclude female membership and deny them equal benefits, which allegedly violated a Minnesota state statute that prohibited discrimination in public accommodation on the basis of race, religion, sex, color, creed, disability, or national origin.⁹²

⁸⁶ *Patterson*, 357 U.S. at 460–62.

⁸⁷ *Id.* at 462–63 (emphasis added). The Court went on to reject the State’s argument that those “harmful effects” were merely due to private conduct (i.e., private biases, societal prejudices, etc.) not attributable to the state action of compelled production of membership lists. *Id.* at 463. It emphasized that such a distinction is immaterial and that “[t]he crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold.” *Id.*

⁸⁸ *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

⁸⁹ *Id.* at 623.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 609.

The Court held that the state's goal in fighting historical discrimination of minorities and women was a compelling interest that did not attempt to suppress any particular message of the U.S. Jaycees, and therefore justified state interference in forcing the association to allow female members full benefits.⁹³ Thus, *Roberts* establishes some limits on the right to the freedom of association, namely, that the state may infringe upon the right if it can prove: (1) a compelling interest, (2) the state action is unrelated to the suppression of the association's ideas, and (3) there is no other less restrictive means of achieving that compelling state interest.⁹⁴ This test will later be applied to the government surveillance of Muslim Americans.

3. *Presbyterian Church v. United States*

In 1989, the Ninth Circuit Court of Appeals decided in the affirmative on standing issues regarding the infiltration by the Immigration Naturalization Services (INS) of several churches in Arizona, upon the suspicion that these churches were harboring refugees from El Salvador and Guatemala.⁹⁵ The plaintiff churches in *Presbyterian Church v. United States* alleged violations of their First and Fourth Amendment rights due to the INS's covert surveillance and infiltration of churches with agents wearing "body bugs" that recorded prayers and church services without a warrant or probable cause.⁹⁶ The allegations regarding the government's violation of First Amendment rights to free exercise of religion, speech, and association stemmed from what the Court of Appeals concluded were "actual injuries as the result of the INS' conduct."⁹⁷

The churches alleged that, as a result of the INS surveillance, the organization suffered from the withdrawal of members from active participation in church, a decline in the amount of support given to the church, members' reluctance in seeking counseling or being open during prayer, and a diversion of the clergies' time from regular pastoral duties to those related to handling the shortfall due to the surveillance.⁹⁸ News of the government infiltration and "bugging" of conversations also left congregants with a sense of fear and apprehension that led to a distinct impact on their church attendance and morale.⁹⁹ The

⁹³ *Id.* at 623–29.

⁹⁴ *Id.* at 623; Smith, *supra* note 24, at 139.

⁹⁵ *Presbyterian Church v. United States*, 870 F.2d 518, 520 (9th Cir. 1989).

⁹⁶ *Id.* at 520–21.

⁹⁷ *Id.* at 521.

⁹⁸ *Id.* at 521–22.

⁹⁹ *Id.* at 522.

Court of Appeals rejected the INS's argument that the alleged "chilling effect" on the congregants' religious exercise and expression was too speculative and conjectural, and that it did not derive from "coercive action" by the government.¹⁰⁰ In fact, the court held that "[t]he alleged effect on the churches is not a mere subjective chill on their worship activities; it is a concrete, demonstrable decrease in attendance at those worship activities. The injury to the churches is 'distinct and palpable.'"¹⁰¹

The court's analysis here also distinguished *Laird v. Tatum*¹⁰² from the case at bar.¹⁰³ In *Laird*, the plaintiffs alleged injury from the mere "existence and operation" of a domestic surveillance program administered by the Army, and did not claim a "specific present objective harm or threat of specific future harm."¹⁰⁴ While *Presbyterian* was mostly decided on standing issues,¹⁰⁵ the plaintiffs would only need to substantiate their factual allegations regarding the diminished church attendance, cancellation of Bible class, and the diversion of clergy time to non-pastoral duties related to handling the fallout from the surveillance in order to establish that the INS's surveillance "directly interfered with the churches' ability to carry out their religious mission."¹⁰⁶ Thus, the court set forth as persuasive authority the principle that "[c]hurches, as organizations, suffer a cognizable injury when assertedly illegal government conduct deters their adherents from freely participating in religious activities protected by the First Amendment."¹⁰⁷

B. Muslim American Associational Rights Infringed

The jurisprudence on associational rights discussed above provides a few key methods of first assessing whether government conduct rises to the kind of level that merits strict

¹⁰⁰ *Id.*

¹⁰¹ *Id.* Interestingly, the court also pointed out the idea that the church suffered something similar to "reputational" or "professional" harm because of the negative impact that knowledge of the INS infiltration had on the church's image, ability to raise funds, and the religious services they offered. *Id.* at 522-23.

¹⁰² *Laird v. Tatum*, 408 U.S. 1 (1972).

¹⁰³ *Presbyterian*, 870 F.2d at 522.

¹⁰⁴ *Laird*, 408 U.S. at 9-11; *Presbyterian*, 870 F.2d at 522.

¹⁰⁵ See *Presbyterian*, 870 F.2d at 520-23.

¹⁰⁶ *Id.* at 523; Smith, *supra* note 24, at 143.

¹⁰⁷ *Presbyterian*, 870 F.2d at 523. The plaintiffs had pled for, *inter alia*, injunctive relief in the form of a court order prohibiting the INS from continuing the surveillance without first showing a compelling interest. *Id.* at 521. The court went on to note that because the criminal prosecution related to the investigation and surveillance was already underway, it was unable to assess the likelihood that the churches would be subjected to the surveillance again, and therefore remanded that issue to be decided by the district court. *Id.* at 523.

scrutiny, and then deciding whether the “compelling interest” and “narrowly tailored” elements of the strict scrutiny test itself are met. As established by case law, government conduct that may have the effect of curtailing the freedom to associate should be subjected to strict scrutiny.¹⁰⁸ Such “effects” have included “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”¹⁰⁹ The Ninth Circuit provided more relevant examples of suppression of religious expression, including (1) withdrawal by congregants from actively participating, (2) decline in financial support or donations, (3) congregants’ reluctance in seeking religious counseling or being open during prayer, (4) diversion of clergies’ or religious leaders’ time from congregation duties to dealing with the effects of surveillance, and (5) fear or apprehension of conversations being “bugged” (recorded), which have a negative impact on congregants’ morale.¹¹⁰ Muslim American surveillance has exhibited similarly chilling effects on mosque-goers, demonstrating the need for strict scrutiny application of the government programs aimed at widespread Muslim surveillance.

Like the curtailment the Court found in *Patterson*, Muslim Americans in regions like the East Coast have also suffered from the loss of business; diminished or affected employment opportunities;¹¹¹ “other manifestations of public hostility” such as stigma;¹¹² and the enabling or furthering justification of hate crimes against Muslims¹¹³ because of the specter left upon the

¹⁰⁸ NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460–61 (1958).

¹⁰⁹ *Id.* at 462.

¹¹⁰ *Presbyterian*, 870 F.2d at 521–22.

¹¹¹ MAPPING MUSLIMS, *supra* note 1, at 30–31 (“Several young, educated [Muslim] professionals . . . expressed concern that the public discourse about radicalization within Muslim communities, further propagated by the NYPD’s surveillance program, would affect their colleagues’ impressions of them. . . . [For example, two] interviewees, both young attorneys working at corporate law firms, felt that they could not engage in pro bono work on issues relating to Muslim civil rights and Muslim immigrants generally because the firm does not want to get entangled (even indirectly) in these controversial issues.”).

¹¹² *Id.* at 29 (noting that such state-sponsored targeting of Muslim Americans has ingrained stigmatic harm against their community). Muslim Americans “fear that their colleagues, neighbors, classmates or customers will view them with suspicion because law enforcement has branded them a population ‘of concern’ that is prone to dangerous behavior. . . . [This can] contribute to an overall public discourse that is hostile towards Muslims.” *Id.*; see also Susan J. Tabrizi, *At What Price? Security, Civil Liberties, and Public Opinion in the Age of Terrorism*, in AMERICAN NATIONAL SECURITY AND CIVIL LIBERTIES IN AN ERA OF TERRORISM 185, 193–95 (David B. Cohen & John W. Wells eds., 2004) (discussing American public support for racial profiling based measures to fight terrorism in the years after 9/11, such as stopping and questioning “anyone who fits the general description of suspected terrorists” and questioning 5000 immigrants from the Middle East without more cause than their religion or national origin).

¹¹³ Mark Potok, *FBI Reports Dramatic Spike in Anti-Muslim Hate Violence*, HUFFINGTON POST (Nov. 14, 2011, 2:34 PM), <http://www.huffingtonpost.com/mark-potok/>

Muslim community in the wake of media reports of NYPD surveillance.¹¹⁴ Moreover, the surveillance of Muslims has placed a particularly ominous mark on the community through the government's use of informants to infiltrate mosques, Muslim Student Associations on college campuses, and the Muslim community in general.

1. The Informant Problem

The government's use of informants to infiltrate mosques throughout the country is particularly troubling, reminiscent of the days of COINTELPRO and the massive distrust the government sowed throughout the politically dissident community.¹¹⁵ Agencies like the FBI—and by extension local law enforcement like the NYPD—have aggressively sought to recruit and send informants to mosques to infiltrate Muslim American communities, befriend unwitting mosque attendees, Muslim community leaders, and even Muslim student organization members to record, report, and in many instances, incite violence or discussions of violence to see which Muslims will be caught in the dragnet.¹¹⁶ Investigative journalist and author Trevor Aaronson dedicated years to studying the terrorism prosecutions that resulted from the use of government informants.¹¹⁷ According to data he collected in August 2011, almost ten years since 9/11, out of 508 terrorism defendants, “243 had been targeted through an FBI informant, 158 had been caught in an FBI terrorism sting, and 49 had encountered an agent provocateur.”¹¹⁸ By numbers alone, then, during that time period, nearly forty-eight percent of the defendants prosecuted for

fbi-reports-dramatic-spik_b_1092996.html; see also GALLUP REPORT, *supra* note 2, at 40 (noting that compared to other major national religious groups—Protestant, Catholic, Jewish, and Mormon—and people who do not ascribe to a religion, Muslims are most likely to have experienced racial or religious discrimination); Interview with Fatima Dadabhoy, *supra* note 33 (highlighting that the prosecution of Muslim Americans through what “should be legally considered entrapment” fuels the fire for hate groups to speak in favor of such surveillance and prosecutions against Muslims).

¹¹⁴ See MAPPING MUSLIMS, *supra* note 1, at 31 (“By singling out Muslims as potentially dangerous, as meriting close law enforcement attention, and by *not* applying the same standards as varied as other New Yorkers, the NYPD communicates, and perpetuates, negative stereotypes about all American Muslims.”) (emphasis added).

¹¹⁵ “In fact, the FBI today has ten times as many informants as it did in the 1960s, when former FBI director J. Edgar Hoover made the Bureau infamous for inserting spies into organizations as varied as Reverend Dr. Martin Luther King Jr.’s and the Ku Klux Klan.” AARONSON, *supra* note 26, at 26; see also *id.* at 44–45.

¹¹⁶ See generally Aziz, *supra* note 49, at 187–90. The NYPD’s Intelligence Division went as far as sending one informant to canvass a white-water river-rafting trip held by a Muslim Student Association, because such an activity apparently merited suspicion. MAPPING MUSLIMS, *supra* note 1, at 40.

¹¹⁷ AARONSON, *supra* note 26, at 11–15.

¹¹⁸ *Id.* at 15.

terrorism-related crimes had been apprehended by the use of a government-sent informant, tasked with setting up—and often supplying materials for—a terror plot and bringing the targeted individual into the fold of it.¹¹⁹

The informant stories are all quite similar.¹²⁰ An FBI informant—usually with a checkered past¹²¹—is tasked with posing as a Muslim with “contacts” to terrorist organizations and told to approach certain targets who are often antisocial, almost “loner” types with few ties to a community¹²²—and sometimes with mental health issues¹²³—to conjure a terror plot that will lead to those individuals’ prosecution and conviction.¹²⁴ Hefty financial incentives abound for the informants, who can be paid up to \$100,000 or more per case, with the added possibility of earning tens of thousands more if their operation results in a conviction.¹²⁵ The FBI does not stop there, supplying the informants with thousands of dollars at their disposal to offer as financial inducements to their targets, thereby increasing the likelihood they will get a “prosecutable” case.¹²⁶ In addition, the FBI often uses the vulnerable immigration statuses of some Muslims (e.g., an overstayed student visa or undocumented status) to coerce or exert immense pressure upon immigrant Muslims to become informants in exchange for their immigration problems “going away.”¹²⁷ Such individuals are faced with the

119 *Id.* at 234 (“Most of the targets in these stings were poor, uneducated, and easily manipulated. In many cases, it’s likely they wouldn’t have come up with the idea at all without prodding by one of the FBI’s 15,000 registered informants.”).

120 See Sherman, *supra* note 59, at 1499.

121 AARONSON, *supra* note 26, at 155–80 (discussing the FBI’s use of criminals as informants, including—among others—a convicted rapist and child molestor, drug dealers, a man on parole for bank fraud, and a suspected murderer).

122 Interview with Fatima Dadabhoy, *supra* note 33.

123 AARONSON, *supra* note 26, at 138, 175–76, 195.

124 For a survey of several informant stories that Aaronson and others have argued verge on or constitute entrapment, see generally *id.* at 9–11, 19–24, 31–33, 91–97, 106–07, 115–35, 137–51; Aziz, *supra* note 49, at 214–15, 217; MAPPING MUSLIMS, *supra* note 1, at 40–45; Said, *supra* note 42, at 712–32; Teresa Watanabe & Paloma Esquivel, *L.A. Area Muslims Say FBI Surveillance Has a Chilling Effect on Their Free Speech and Religious Practices*, L.A. TIMES (Mar. 1, 2009), <http://articles.latimes.com/2009/mar/01/local/me-muslim1> (discussing infamous infiltration of informant Craig Monteilh into mosque communities in Orange County, California and the Muslim community response).

125 AARONSON, *supra* note 26, at 45.

126 See *id.* at 146, 148, 177, 187 (describing, for example, how during one operation, an informant paid for the targeted individuals’ rent, offered to buy one target a barbershop, and was authorized by the FBI to offer \$5000 to each of the four recruited men to stage a terrorist plot); see also Interview with Fatima Dadabhoy, *supra* note 33 (noting one case where an informant in his thirties befriended two young converts in their early twenties, bought them laptops, and *paid* them to participate in a terrorist plot).

127 For accounts of some ways the FBI has used immigration status or threats of deportation to strong arm individuals into becoming informants, see AARONSON, *supra* note 26, at 91–93, 98–101; see also Said, *supra* note 42, at 710. According to renowned immigration law expert Ira Kurzban, “It’s clearly the *modus operandi* of the FBI to (a)

“choice” of either being deported, or, if they refuse, being prosecuted for terrorism crimes themselves.¹²⁸ Even Muslim Americans with lawful status are approached by the FBI to become informants and threatened with being placed on the no-fly list and barred from commercial air travel.¹²⁹

The lengths to which the FBI has gone and is apparently willing to go to keep the informant system in place—despite its legally dubious nature—shows how adamant the agency is in employing morally suspect informants to catch would-be terrorists in terror plots orchestrated by the FBI.¹³⁰ Also troubling is the fabrication of reports by informants that are later used in prosecuting the suspected terrorists who were the targets of such operations all along.¹³¹ But perhaps most disconcerting is the FBI’s heavy hand in, as Aaronson argues, “manufacturing” these terror plots in order to implicate an easy target into taking the blame. Prosecuting someone and placing them behind bars creates palpable, tangible evidence the Bureau can point to as proof they are doing their job.¹³² In fact, during the 2011 “Newburgh Four” sentencing of four ill-equipped and impressionable men who were walked through the steps of a terrorism plot with an experienced FBI informant, presiding U.S. District Judge Colleen McMahon noted:

“The essence of what occurred here is that the 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 [The government] created acts of terrorism out of his fantasies of bravado and bigotry, and then made those fantasies come true I suspect real terrorists

recruit people who are going to be informants and (b) to use whatever leverage they can to get them to be informants.” AARONSON, *supra* note 26, at 99.

¹²⁸ AARONSON, *supra* note 26, at 91–98.

¹²⁹ See, e.g., Eyder Peralta, *In Lawsuit, American Muslims Claim FBI Used No-Fly List to Bully Them*, NPR (Apr. 23, 2014, 2:33 PM), <http://www.npr.org/blogs/thetwo-way/2014/04/23/306223445/in-lawsuit-american-muslims-claim-fbi-used-no-fly-list-to-bully-them>; AARONSON, *supra* note 26, at 103–05.

¹³⁰ See AARONSON, *supra* note 26, at 106 (noting the FBI told informant Craig Monteilh to dig up any information that could be used to pressure Muslims into becoming informants, including immigration status issues, criminal activity, drug use, and extramarital affairs and sanctioned his engagement in sexual relationships with women to “engender trust” with people); see also Complaint, *supra* note 3, at 8–9. For a detailed overview of major cases Human Rights Watch studied, looking at the kinds of “inciting tactics” used by informants against their targets, see generally HUMAN RIGHTS WATCH, *supra* note 59, at 23–26 (noting, among other tactics, an informant sending one target websites and photographs of human rights abuses of Muslims, including a young Iraqi girl’s rape by an American and children mangled, decapitated, or burned alive).

¹³¹ See Said, *supra* note 42, at 726–27 & n.245 (describing how “wholly fabricated” words and “routinely exaggerated” reports by one informant served as the basis of one FBI case that led to a fifteen year prison sentence).

¹³² AARONSON, *supra* note 26, at 234.

would not have bothered themselves with a person who was so utterly inept . . . Only the government could have made a terrorist out of Mr. Cromitie [the primary defendant], whose buffoonery is positively Shakespearean in scope.”¹³³

She went on to say, “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.”¹³⁴ As Judge McMahon so succinctly put it, the reality is that the government can make a terrorist out of even the most unassuming and incompetent individuals, which bears a striking resemblance to classic entrapment cases like *United States v. Hollingsworth*.¹³⁵

While a full discussion on the legality and utility of informants is beyond the scope of this Comment, the effects of government informants on the Muslim American community is particularly relevant to Muslims’ right to freedom of association. Aside from the ramifications of distrust and suspicion that such use of informants has on the Muslim community, sending informants amongst Muslim groups—whether they are mosques or Muslim Student Associations—“may . . . interfer[e] with a group’s expressive association merely by occupying membership positions for reasons other than furthering the group’s goals.”¹³⁶ Informant infiltration has sent waves through Muslim American communities throughout the country, and understandably so.¹³⁷ It breeds fear amongst individual Muslims, who are forced to

¹³³ *Id.* at 150 (quoting U.S. District Court Judge Colleen McMahon). Judge McMahon sentenced the defendants to twenty-five years in prison, the minimum allowed under federal guidelines, refusing to order life in prison, which the government had sought. *Id.* at 150–51; Graham Rayman, *Newburgh 4 Terror Case: Judge Sentences Three to 25 Years in Prison, U.S. Constitution Shivers*, VILLAGE VOICE (June 29, 2011, 3:33 PM), http://blogs.villagevoice.com/runninscared/2011/06/newburgh_4_terr_3.php. For an account of the FBI informant’s pursuit of Cromitie as a potential terrorist target and the progression of the terrorism scheme, see Paul Harris, *Newburgh Four: Poor, Black, and Jailed Under FBI ‘Entrapment’ Tactics*, GUARDIAN (Dec. 12, 2011), <http://www.theguardian.com/world/2011/dec/12/newburgh-four-fbi-entrapment-terror>, and AARONSON, *supra* note 26, at 137–51.

¹³⁴ Harris, *supra* note 133.

¹³⁵ *U.S. v. Hollingsworth*, 9 F.3d 593, 595–96, 599–600 (7th Cir. 1993), *aff’d en banc*, 27 F.3d 1196, 1199–200 (7th Cir. 1994); see also Said, *supra* note 42, at 697–98 (“[T]he government creates a serious risk of inducing crime when it provides the means for individuals to carry out crimes that they otherwise would not have been able to commit.”).

¹³⁶ Smith, *supra* note 24, at 148. Smith describes the usual trajectory that comes from the aftermath of the informant’s infiltration: “Once the alleged plot is complete, and the government prosecutes the individuals involved, members become suspicious of each other, attendance declines, and individuals become reluctant to discuss religious or political issues.” *Id.*

¹³⁷ See, e.g., Watanabe & Esquivel, *supra* note 124; H.G. Reza, *New Fears in Muslim Community Follow Reports of U.S. Monitoring*, L.A. TIMES (May 29, 2008), <http://articles.latimes.com/2008/may/29/local/me-mosques29>; FAIZA PATEL, BRENNAN CTR. FOR JUSTICE, RETHINKING RADICALIZATION 21–23 (2011), available at http://brennan.3cdn.net/f737600b433d98d25e_6pm6beukt.pdf.

wonder whether their Muslim neighbor, new friend from the Muslim Student Association, or person praying next to them at the mosque is actually an informant.¹³⁸ For example, one report on the NYPD surveillance of Muslims found that “[n]early all interviewees thought they knew someone who was an informant or an undercover officer.”¹³⁹ Whether or not they were right is beside the point. Only one religious group, Muslim Americans, in the greater New York City area admitted that they knew or thought they knew of an individual who was specifically sent by their local law enforcement to their mosque or religious community simply to track their movements and record and report on their statements to find and prosecute terrorists. This shows the disproportionate burden placed on American Muslims today.¹⁴⁰

The actions of the government have created a climate of suspicion amongst the Muslim American community. In the wake of reports of informant Craig Monteilh infiltrating Orange County mosques in Southern California, Hussam Ayloush, Executive Director of the Council on American-Islamic Relations (CAIR) in Los Angeles, stated in 2010 that “[e]very Muslim I know just assumes that the person praying next to them is an informant.”¹⁴¹ Much like the observations of Imam Raza,¹⁴² religious leader of the Brooklyn mosque and named plaintiff in the 2013 lawsuit, “[i]n mosques around the country, newcomers are met with a suspicion that didn’t exist before 9/11—a particularly sad state of affairs, as for centuries mosques had

138 Interview with Fatima Dadabhoy, *supra* note 33 (“When cases like these break, it doesn’t just impact the defendant or even his family. It impacts the whole community, because all those who know that individual are then approached by the FBI to get more information from them about themselves and about the defendant.”).

139 MAPPING MUSLIMS, *supra* note 1, at 26.

140 In *Presbyterian*, the Ninth Circuit Court of Appeals held: “When congregants are chilled from participating in worship activities, when they refuse to attend church services because they fear the government is spying on them and taping their every utterance . . . we think a church suffers organizational injury because its ability to carry out its ministries has been impaired.” *Presbyterian Church v. United States*, 870 F.2d 518, 522 (9th Cir. 1989).

141 AARONSON, *supra* note 26, at 112; see also HUMAN RIGHTS WATCH, *supra* note 59, at 23 (“Some of the cases we reviewed appear to have begun as virtual fishing expeditions, where the FBI had no basis to suspect a particular individual of a propensity to commit terrorist acts. In those cases, the informant identified a specific target by randomly initiating conversations near a mosque. Assigned to raise controversial religious and political topics, these informants probed their targets’ opinions on politically sensitive and nuanced subjects, sometimes making comments that appeared designed to inflame the targets. If a target’s opinions were deemed sufficiently troubling, officials concerned with nascent radicalization pushed the sting operation forward.”). Given the backdrop of an environment like this, it is no wonder that Muslim Americans attending a mosque would reasonably fear that the person who just came up to speak with them may in fact be an informant, casting out his net for potential sting operation leads.

142 See *supra* notes 1–16 and accompanying text.

been considered welcoming places for strangers and travelers, a tradition that dates back to . . . the earliest days of Islam.”¹⁴³

2. Self-Censorship of Religious and Political Expression

According to civil rights attorney Fatima Dadabhoy, Muslim religiosity has become a reason for closer government scrutiny. Based on questions FBI agents pose in “voluntary interviews,” it is as if “just the act of going to a mosque and being religious is suspicious.”¹⁴⁴ Questions such as “What mosque do you go to?” “How often do you go to the mosque?” and “What made you decide to become religious?” are commonly asked by the FBI and are apparently meant to gauge the level of the individual’s “suspiciousness.”¹⁴⁵ Such forms of surveillance and intelligence gathering have resulted in what the Ninth Circuit Court of Appeals called a “withdrawal” of mosque attendees.

In 2009, after news broke of Craig Monteilh, the notorious FBI informant who infiltrated mosques and Muslim communities in Orange County, California, many Muslims in the area simply stopped attending their mosque, unable to partake in and receive their religious services out of fear that the FBI would spy on them too.¹⁴⁶ Donations at the Islamic Center of Norco in Corona, California declined thirty to fifty percent in the years leading up to the revelation of the informant, which was attributed in part to the economy’s decline, but also to the very real consequences of prosecutions under the “material support” statute.¹⁴⁷

In 2011, when Associated Press investigative reporting revealed the NYPD surveillance of Muslims and the existence of a pervasive informant named Shamiur Rahman, “[there was] a steep decline in mosque attendance, as the number of worshippers attending afternoon prayers on weekdays . . . declined from approximately twenty people to just

¹⁴³ AARONSON, *supra* note 26, at 112.

¹⁴⁴ Interview with Fatima Dadabhoy, *supra* note 33; see also HUMAN RIGHTS WATCH, *supra* note 59, at 18–19 (noting the FBI’s use of “voluntary interviews” and events presented as “community outreach” to gather information from American Muslims, further fueling the Muslim American community’s fears and distrust of law enforcement).

¹⁴⁵ Interview with Fatima Dadabhoy, *supra* note 33; see also MAPPING MUSLIMS, *supra* note 1, at 12 (noting that due to NYPD surveillance, “attendance at a mosque—a religious duty for many Muslims—has become tantamount to placing oneself on law enforcement’s radar”); AARONSON, *supra* note 26, at 53 (discussing how an FBI training manual released by *Wired* magazine instructed that “[t]he more devout a Muslim was . . . the more likely he was to be violent”). Such “radicalization theories” have been largely debunked in Patel’s report. See generally PATEL, *supra* note 137, at 3–18.

¹⁴⁶ Watanabe & Esquivel, *supra* note 124.

¹⁴⁷ *Id.* (“Since 9/11, federal authorities have also shut down at least six of the Muslim community’s major charitable organizations, accusing them of involvement in terrorist financing.”); see also Reza, *supra* note 137; 18 U.S.C. § 2339A (2012).

two or three people.”¹⁴⁸ With news of such informant operations, some Muslim Americans have become much more wary of what they say in the presence of others, out of fear it will be recorded or misconstrued in a manner that can incriminate them.¹⁴⁹ In fact, even speaking Urdu or Arabic in public could prompt surveillance.¹⁵⁰ Muslim business owners, who have also been targeted, are affirmatively censoring what TV programming is shown in their establishment and what kinds of discussions are had there.¹⁵¹ To some, it is a frustrating result of sweeping generalizations, a burden Muslims have to shoulder simply because of the religion they belong to.¹⁵² What makes their situation even more challenging is the fact that Muslim Americans are so afraid they do not even wish to speak out openly against the surveillance leveled against them, lest they come on the government’s radar or trigger even more scrutiny for their actions.¹⁵³ Such effects of government surveillance have resulted in the kind of fear and apprehension that the church members in *Presbyterian* felt upon learning that government agents were infiltrating their churches wearing “body bugs” and recording conversations.¹⁵⁴

Moreover, just like the clergy in *Presbyterian* who were diverted away from their religious duties in order to deal with the effects of the surveillance on their congregants,¹⁵⁵ mosque leaders like Imam Raza have had to divert time away from their responsibilities to their congregation to handle the fallout in

¹⁴⁸ Complaint, *supra* note 3, at 15. See *Presbyterian Church v. United States*, 870 F.2d 518, 522 (9th Cir. 1989) (“The alleged effect on the churches is not a mere subjective chill on their worship activities; it is a concrete, demonstrable decrease in attendance at those worship activities.”).

¹⁴⁹ MAPPING MUSLIMS, *supra* note 1, at 18. One New York area Sunday school teacher stated, “I have to think twice about the sentences I say just in case someone can come up with a different meaning to what I’m saying.” *Id.*

¹⁵⁰ *Id.* at 20.

¹⁵¹ *Id.* In a feat of illustrative irony, leaked NYPD documents showed that the law enforcement agency already knew that one Muslim business owner stopped showing *Al-Jazeera* on his television because he did not want to bring unwanted attention from the government. *Id.* at 22. It appears his attempts were in vain.

¹⁵² One Muslim woman felt caught in a Catch-22: “When your speech is limited, you can’t really do much: you can’t write on the internet, you can’t talk on the phone because they’re tapped, you can’t speak in public.” *Id.* at 23; see also Complaint, *supra* note 3, at 13.

¹⁵³ MAPPING MUSLIMS, *supra* note 1, at 41 (noting some Muslim Student Associations implemented bans on political discussions to prevent further surveillance). For a personal account of the NYPD surveillance experience from a New York University Muslim law student, see Elizabeth Dann, *Singling Us Out: NYPD’s Spying on Muslim Americans Creates Fear and Distrust*, AM. CIV. LIBERTIES UNION (Apr. 19, 2012), [https://www.ac lu.org/blog/racial-justice-national-security-religion-belief/singling-us-out-nypds-spying-muslim-americans](https://www ACLU.org/blog/racial-justice-national-security-religion-belief/singling-us-out-nypds-spying-muslim-americans).

¹⁵⁴ See *Presbyterian Church v. United States*, 870 F.2d 518, 522 (9th Cir. 1989).

¹⁵⁵ *Id.*

their membership caused by the government surveillance. For example, Raza purchased a professional camera and three external hard drives to save the videos of sermons he gave, in order to have proof of his own words in case he would need to defend himself if his words were taken out of context—all of which cost the mosque about \$2200.¹⁵⁶ He has had to devote hours to mediate conflicts that arise between mosque congregants about the suspicion and distrust that has come between some due to informant infiltration.¹⁵⁷ Thus, the government’s conduct within the sphere of surveillance in the name of counterterrorism has caused a “distinct and palpable”¹⁵⁸ chilling effect upon the Muslim American community and their freedom of association.

3. Applying the *Roberts* Strict Scrutiny Test to Surveillance of Muslim Americans

Under the strict scrutiny test as applied here, (1) the government purpose for the surveillance must be compelling, (2) it must be unrelated to the suppression of ideas, and (3) there must be no other less restrictive means of achieving that purpose.¹⁵⁹ First, while gross injustices have been carried out against racial minorities in the name of national security, the Court has repeatedly held that national security is a compelling interest that would suffice the “purpose” prong of the strict scrutiny test.¹⁶⁰ It cannot be denied that the true costs of life, limb, stability, and security that come from terrorism of all forms are serious and tragic. They warrant true vigilance and swift action by authorities when a pressing danger presents itself. While the debates about the existence of “real” national security

¹⁵⁶ Complaint, *supra* note 3, at 10–11.

¹⁵⁷ *Id.* at 15.

¹⁵⁸ *Presbyterian*, 807 F.2d at 522 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

¹⁵⁹ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *see supra* notes 85, 88–94 and accompanying text.

¹⁶⁰ *See, e.g., Korematsu v. United States*, 323 U.S. 214, 217–18 (1944) (upholding Japanese and Japanese American internment for national security threats in World War II); *Haig v. Agee*, 453 U.S. 280, 305 (1981) (“The Court recognized that the legitimacy of the objective of safeguarding our national security is ‘obvious and inarguable.’”) (citing *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964)); *Snapp v. United States*, 444 U.S. 507, 509 n.3 (1980) (“The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.”). *But see United States v. U.S. Dist. Court for the E. Dist. of Mich., S. Div.*, 407 U.S. 297, 313 (1972) (“National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of ‘ordinary’ crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech.”); *Parker, supra* note 38, at 162 (“Too often in our history unfounded suspicions based on free association have led to intrusive forms of unwarranted domestic information collection in the name of national security.”).

issues¹⁶¹ are outside the scope of this discussion, if the government's asserted purpose in the widespread surveillance of Muslim Americans, informant infiltration, and sting operations is national security, past precedent has established that such a purpose is, indeed, compelling.

Second, while the government may argue that its purpose or intention with the surveillance is not to dissuade expression, the reality is that it is still having a concrete impact on Muslim American expression. Nonetheless, absent facts indicating otherwise, this analysis will operate upon the assumed presumption that the government's purpose was not related to an intent to actually dissuade expression.

Third, and finally, this leaves the primary issue: whether the government's methods are truly narrowly tailored. The Court has held that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."¹⁶² The means used here have consisted of sweeping, undiscerning surveillance; the targeting of the Muslim American community; and the act of doing so without articulable suspicion or probable cause, other than the observation that the group targeted belongs to—or appears to belong to—the Islamic faith.

As many have argued,¹⁶³ the government need not use such sweeping methods of law enforcement to achieve their goal of counterterrorism. In fact, these approaches have proved counterproductive, and instead have led to significant backlash from the Muslim American community itself, which feels suspicious and distrustful of the government.¹⁶⁴ This, in turn, has

¹⁶¹ See generally HERMAN, *supra* note 76, at 207 (discussing how during *Korematsu*, the government withheld facts in the report provided to the Supreme Court of the United States in order to establish that a "national security" threat existed).

¹⁶² *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (declaring unconstitutional a state law requiring all teachers to annually disclose their group memberships).

¹⁶³ See, e.g., Aziz, *supra* note 49, at 222–23 (asserting that current counterterrorism methods subordinate Muslim Americans by targeting them unnecessarily); Atif Choudhury, *Confessions of a Former Muslim Students Association Board Member*, HUFFINGTON POST (Mar. 25, 2014, 2:31 PM), http://www.huffingtonpost.com/atif-choudhury/confessions-muslims-students-association_b_4863368.html ("Categorically bugging all mosques and 'infiltrating' [Muslim Student Associations] might be the quick and easy option for our government to show us that it is 'doing something' to combat terror, but is it really the most optimal method for serious law enforcement?").

¹⁶⁴ Muslim Americans have the lowest confidence in the FBI, compared to other major national religious groups (Protestant, Catholic, Jewish, Mormon) and those who do not have a religion. GALLUP REPORT, *supra* note 2, at 24; see also Aziz, *supra* note 49, at 198 ("When coupled with multiple discoveries that informants have induced young Muslim men with diminished mental capacity or financial problems toward violence, it

shut off the possibility of fruitful cooperation amongst the government and the Muslim American community, because they constantly feel treated as a suspect class, rather than a productive, equal partner.¹⁶⁵ As Part III will discuss, there are many other means the government can employ that are less restrictive than the ones currently in place.

III. PROPOSED SOLUTIONS: OPTIMISTIC, BUT REALISTIC

As discussed in Parts I and II, the government's current methods of fighting domestic terrorism are exceeding constitutional bounds because they are not narrowly tailored to achieving the goal of fighting domestic terrorism. While much has been discussed about the problems that the government's methods pose,¹⁶⁶ articulating solutions for this issue is particularly difficult, given the varied and competing interests of all the players involved.¹⁶⁷ Thus, it may be fruitful to step outside the traditional bounds of this discussion to seek possible solutions from other contexts. At the heart of the government's concern here is domestic terrorism. Analyzing the government's domestic counterterrorism strategies through the lens of gang injunction and gang intervention models in the United States proves illuminating in understanding what methods, articulated goals, and types of administration have been effective—or at least promising—and which have been detrimental.

Before embarking on this analysis, however, it should be noted that while there are some common themes between both, domestic terrorism and gang violence also have their obvious differences.¹⁶⁸ On the one hand, the problem of gang violence in

should come as no surprise that some Muslim communities are distrustful of state and federal law enforcement agencies[. . .].”

¹⁶⁵ PATEL, *supra* note 137, at 29–31 (urging the repudiation of prior biases regarding Muslim “radicalization”); MAPPING MUSLIMS, *supra* note 1, at 46–47 (describing boycotts and protests in response to NYPD surveillance); Aziz, *supra* note 49, at 223 (“[A]s they beseech their government to respect their civil liberties, Muslims must also seek the protection of law enforcement against private acts of violence and discrimination. For many Muslims, the government may come across as more foe than friend.”).

¹⁶⁶ See *supra* notes 49–70 and accompanying text.

¹⁶⁷ E.g., Muslim Americans, Muslim community leaders, local law enforcement, and the federal government to name a few.

¹⁶⁸ Interestingly, there was a case in New York where gang violence was prosecuted under an anti-terrorism statute. In 2012, a gang member who shot and wounded another rival gang member to avenge his friend's death also accidentally shot and killed a ten-year-old girl. Glenn Greenwald, *New York's Top Court Highlights the Meaninglessness and Menace of the Term 'Terrorism'*, GUARDIAN (Dec. 16, 2012, 6:36 AM), <http://www.theguardian.com/commentisfree/2012/dec/16/court-terrorism-morales-gangs-meaningless>. In *People v. Morales*, the gang member was prosecuted and found guilty at the trial court level under an anti-terrorism statute. *Id.* The New York Court of Appeals overturned the conviction. *Id.*

the United States is similar to domestic terrorism due to both of their troubling potential to cause loss of life and disruption of social stability. Both threats often also come from those individuals who are, or feel, marginalized by society.¹⁶⁹ However, both phenomena are different in that gang violence is more embedded within the fabric of daily life in many urban centers of the United States, such that its effects are largely localized; while threats of terrorism are more sporadic or intermittent, unpredictable, and have a wider effect on a national—and even international—level.¹⁷⁰ Nonetheless, the most common thread between the two issues is how the government has attempted to address them and the challenges they each pose, not only to law enforcement, but also those communities most affected by it. This Comment presents two recommendations: First, there should be end to the constitutionally suspect practice of surveillance of Muslim Americans without prior evidence of wrongdoing because this method is not narrowly tailored to achieve the compelling interest of national security. Second, to address those individuals who have found themselves feeling marginalized by society, the Muslim American community could implement grassroots “intervention” or “prevention” programs for individuals who exhibit signs of potentially going down a path of violence because they lack access to proper resources to address the sources of their marginalization.

A. Cease Widespread Surveillance of Muslim Americans

The government—both federal and local—should stop the practice of widespread, suspicionless surveillance of Muslim Americans in the form of mosque infiltration and informant sting operations. Community and grassroots activists, legal civil rights groups, and Muslim American leaders are all calling for the end of such a practice.¹⁷¹ Choosing to spy on Muslims simply because

¹⁶⁹ See, e.g., Irving A. Spiegel, *Youth Gangs: Continuity and Change*, 12 CRIME & JUST. 171, 259 (1990) (noting that in particular, youths become gang members to “develop[] alternate social, cultural, and economic sub-systems to meet common human needs in an increasingly complex urban society”); Thomas A. Myers, Note, *The Unconstitutionality, Ineffectiveness, and Alternatives of Gang Injunctions*, 14 MICH. J. RACE & L. 285, 302 (2009) (quoting the Sergeant of the Washington D.C. Police Department as stating that the root of the gang violence problem is a social one).

¹⁷⁰ E.g., drive-by shooting on a street corner targeting local individuals versus a bombing in a large public place targeting many and prompting national and international attention.

¹⁷¹ See MAPPING MUSLIMS, *supra* note 1, at 50–51 (calling for the end of “blanket surveillance of the Muslim population of New York City and its environs”); Noa Yachot, *NYPD Shatters Muslim Mapping Unit – But What About Other Tactics?*, AM. CIV. LIBERTIES UNION (Apr. 15, 2014, 7:01 PM), <https://www.aclu.org/blog/national-security-religion-belief/nypd-shatters-muslim-spying-unit-what-about-its-tactics> (noting discriminatory surveillance practices that still exist after the NYPD officially disbanded

they are Muslim and attend a mosque is based upon a faulty¹⁷² and invidious presumption that terrorist threats only come from Muslims, and namely those Muslims who are more “religious.”¹⁷³ Such a presumption must be retracted in order for the government’s approach to be narrowly tailored. Moreover, the current surveillance techniques have not proved effective in achieving their stated goals. In 2012, Assistant Chief Thomas Galati of the NYPD himself attested under oath that during the more than six years of its implementation, the surveillance program did not yield a single lead, nor did it spark the need to initiate any terror investigations.¹⁷⁴ There are also limits to how useful a tool surveillance can be for crime prevention.¹⁷⁵

Myers argues that gang injunctions, which literally criminalize associative behaviors such as walking down the street or riding in a car with another individual who is suspected to be a gang member, are unconstitutional for the same reasons that Muslim surveillance is: there are other reasonable alternatives to achieving the government’s goal of fighting gang violence.¹⁷⁶ The criteria that law enforcement use to label someone a gang member has been seen as too subjective, arbitrary, and burdensome of expressive rights, such as the ability to wear a certain colored t-shirt, sport a tattoo, or speak with another person on the street.¹⁷⁷ These are much like the

its Muslim mapping unit); Interview with Fatima Dadabhoy, *supra* note 33 (proposing as part of the solution that the Muslim American community not be treated as a suspect class).

¹⁷² In the United States, compared to other major religious groups (Protestant, Catholic, Jewish, and Mormon) and those with no religion, Muslim Americans are the most likely to reject violence through individual attacks on civilians. GALLUP REPORT, *supra* note 2, at 31.

¹⁷³ In fact, frequent mosque attendance and a strong religious identity are associated with greater civic engagement and emotional health among Muslim Americans. *Id.* at 44; see also Aziz, *supra* note 49, at 182.

¹⁷⁴ Adam Goldman & Matt Apuzzo, *NYPD: Muslim Spying Led to No Leads, Terror Cases*, ASSOCIATED PRESS, Aug. 21, 2012, available at <http://www.ap.org/Content/AP-In-The-News/2012/NYPD-Muslim-spying-led-to-no-leads-terror-cases>.

¹⁷⁵ Bell & Webster, *supra* note 50, at 24 (“Surveillance can only anticipate up to a point, and in some very limited circumstances. Searchable databases and international communications interception were fully operational on September 10 to no avail. The likely result will be that internal surveillance of citizens by the state will increase.”); see also HUMAN RIGHTS WATCH, *supra* note 59, at 22 (quoting former FBI agent Michael German) (“Today’s terrorism sting operations reflect a significant departure from past practice. When the FBI undercover agent or informant is the only purported link to a real terrorist group, supplies the motive, designs the plot, and provides all the weapons, one has to question whether they are combatting terrorism or creating it. Aggrandizing the terrorist threat with these theatrical productions only spreads public fear and divides communities, which doesn’t make anyone safer.”).

¹⁷⁶ Myers, *supra* note 169, at 303.

¹⁷⁷ *Id.* Those who were labeled as gang members are disproportionately low income, young, and people of color, which has led to “the criminalization of the[ir] daily lives.” Beth Caldwell, *Criminalizing Day-to-Day Life: A Socio-legal Critique of Gang Injunctions*,

“indicators” law enforcement use to label Muslims as terrorist threats because of their garb, physical appearance, or political ideologies. Thus, Myers’s call for “[t]ighter and more definite standards, like beyond a reasonable doubt” for law enforcement to meet before subjecting an individual to closer scrutiny within the gang injunction context also applies to Muslim surveillance.¹⁷⁸ In the early 1990s, Irving A. Spergel, an expert on gangs, also suggested that gang intervention programs for youth should focus on those who “are *already engaged* in law-violating behaviors.”¹⁷⁹ The latter idea is key in implementing a successful approach, for then it means the government’s method will truly be narrowly tailored to achieve the government’s national security interest. Such a standard, albeit simple, does not infringe upon free exercise, association, or speech rights, but still does offer a basic minimum standard to follow, creating something closer to a “bright line” rule. Approaches such as the ones suggested for the gang context may equally apply to the Muslim surveillance issue, for the government should operate upon more than an individual’s mere adherence to Islam to target them. This will also be more narrowly tailored to achieve the government’s purpose of protecting against domestic terrorism, because it will attempt to target real criminals, rather than everyday mosque congregants.

B. Muslim American Community-Based Intervention Programs

The final proposition involves controversial and constantly changing attitudes about how to address crime by using “the community” as a vehicle for counterterrorism. The government’s decision to conduct mosque surveillance and infiltration of Muslim groups—along with the slew of prosecutions that have resulted from such programs—has left Muslim Americans feeling wary of who to trust in their own communities and, more particularly, in the government.¹⁸⁰ While many law enforcement branches have community relations liaisons to attempt to

37 AM. J. CRIM. L. 241, 243 (2010). This is strikingly similar to the effect NYPD surveillance had on the daily lives of Muslim Americans. See *generally supra* Part I.

178 Myers, *supra* note 169, at 303–04.

179 Spergel, *supra* note 169, at 262 (emphasis added).

180 Muslim Americans are afraid of providing information directly to the FBI due to its aggressive use of informants, and instead prefer to provide information to civil rights groups like CAIR, which then relay it to the government. AARONSON, *supra* note 26, at 113; see also HUMAN RIGHTS WATCH, *supra* note 59, at 20 (noting that the FBI justifies its “domain mapping” program “by arguing that ‘terrorist and criminal groups target ethnic and geographic communities for victimization and/or recruitment’”). The Human Rights Watch report concludes that such an “approach to investigation is discriminatory and counterproductive, undermining trust in authorities in precisely the communities where law enforcement claims to want to build that trust.” *Id.*

collaborate and forge ties with groups such as Muslim Americans, much of these attempts by law enforcement have been viewed with skepticism by Muslim American leaders.¹⁸¹

In the context of American gangs, Spergel has suggested creating collaborative agencies consisting of many key players, such as local government agencies, law enforcement, and community groups, to address the issues of gang violence through gang intervention.¹⁸² However optimistic the idea sounds, the reality is that many conflicts arise with such a multi-faceted body of groups attempting to work together, because although they are all united in the cause of addressing the same issue, they each may have decidedly different, if not sometimes conflicting, interests.¹⁸³ That is not to say, however, that the gang intervention model is not a useful tool in addressing true potential “at-risk” individuals. Currently, when law enforcement, through its channels of intelligence, finds an individual who appears susceptible to going down a path of potential violence due to mental health, economic, or social factors, rather than intervening to direct them to help, law enforcement sends them an informant, who hatches a prosecutable terror plot, which lands that individual in prison. Not only does this exploit and permanently damage the individual’s future, it does not really fight true terrorist threats.

This Comment proposes that instead of swooping in to prosecute that individual, that person should be directed to the proper services and resources to address the underlying issues that placed this individual in such a position in the first place.¹⁸⁴

¹⁸¹ See, e.g., MAPPING MUSLIMS, *supra* note 1, at 36–37 (discussing how NYPD outreach efforts are counterproductive because they operate on the premise that all the Muslims they interact with need to be “de-radicalized”); Aziz, *supra* note 49, at 150–52 (arguing that community policing “co-opts” Muslim American leaders into gathering intelligence on their fellow Muslims because the government would not be able to constitutionally reach such information); Jessica Garrison, *Counter-Terrorism Becomes Part of Law Enforcement*, L.A. TIMES (Sept. 6, 2011), <http://articles.latimes.com/2011/sep/06/nation/la-na-911-homeland-security-enforcement-20110907/2> (noting concerns by some officials that the LAPD’s counterterrorism department trainings were spreading misinformation and false rumors about how Muslim Americans wanted to impose Shari’ah law the United States).

¹⁸² Spergel, *supra* note 169, at 261. He also suggested it be run by an official agency with law enforcement or other rehabilitative or educational functions. *Id.*

¹⁸³ E.g., the FBI or local law enforcement may feel the need to justify its budget and seek to aggressively prosecute suspected Muslims of terror crimes, while Muslim community leaders may seek to avoid making their members more vulnerable to already targeted scrutiny by refusing to give any information about their congregation. See AARONSON, *supra* note 26, at 113.

¹⁸⁴ See Choudhury, *supra* note 163 (“Would not a smarter more effective use of our law enforcement resources be to work with Muslim communities and organizations to help identify these outliers rather than treating ‘existing while openly Muslim’ as a crime?”).

Such a plan of action would be a remarkable improvement upon the current sense of distrust that exists between the Muslim community and law enforcement. To address the problems of gang violence, Myers suggested as an alternative to gang injunctions social programs providing employment, education, and even recreation opportunities to “would-be” gang members.¹⁸⁵ Such “prevention” or “intervention” programs would aim to keep “would-be” gang members from following that path, and similarly could allow law enforcement and community relations to soften.¹⁸⁶

Myers’s suggested gang intervention model fits quite well into the Muslim American community context. As can be seen from the stories Aaronson chronicled,¹⁸⁷ the individuals prosecuted for terrorism are precisely those “would-be” terrorists who are more likely to suffer from mental, social, or emotional problems than pose a real terrorist threat. One important distinction, however, persists. It would be more fruitful to have those social services programs provided from the “ground up” by grassroots Muslim American community organizations. Their presence would be a welcome sight to many Muslims who have felt they have been treated as a suspect class for years. Additionally, it would still help law enforcement accomplish its goals of diminishing the threat of potential terrorism-related violence, because such programs would reach out to the—as Aaronson coins it—“wannabe” terrorists who, in reality, likely need mental health counseling or social programs, not prosecution and jail time.¹⁸⁸ While there is no way for such organizations to reach out to all these individuals—who are often social outcasts outside the circle of a mosque or other community—for those they can serve, such an effort would be welcome relief from prosecution and imprisonment, cataclysmic events that send waves through an entire community, not just the defendant’s family and friends.

Perhaps most importantly, such a project could prove particularly empowering to the Muslim American community, which has experienced years of political and social “subordination.”¹⁸⁹ Unlike the kind of community policing Aziz

¹⁸⁵ Myers, *supra* note 169, at 305.

¹⁸⁶ *Id.* (“If would-be gang members are employed at a job, at an after-school program, or are engaged in a recreational program[,] . . . then they will not be on the streets engaging in violent gang activity.”).

¹⁸⁷ See *supra* notes 120–135 and accompanying text.

¹⁸⁸ See *supra* notes 120–135 and accompanying text.

¹⁸⁹ Aziz, *supra* note 49, at 177–78 (“Subordination theory posits that particular groups are racialized into the outsider ‘Other’ deserving of harsh treatment by the state to protect the majority from a perceived threat. These ‘out-groups’ disproportionately carry

describes and wholly refutes,¹⁹⁰ this campaign would not be instigated by government intervention, but rather would be inspired by its own local Muslim communities that would seek to provide social services to its community members. The only law enforcement role present here would be its *lack of* a role, in that it should refrain from targeting and prosecuting such vulnerable individuals, along with implementing the suggested methods of narrowing their surveillance methods to only those whose actions constitute illegal conduct.

This model, based on the current realities of the Muslim American experience, is cognizant of the discriminatory policies and practices in place that perpetuate and erroneously conflate terrorism and Islam. The only way society can move away from such stigmatic stereotypes of an entire religious class is to firmly reject such biased presumptions, in order to stop government practices of *de facto* discrimination that offend the constitutional principles of free exercise, speech, and association.

CONCLUSION

Although the government has proffered the compelling interest of national security as a justification for its widespread network of surveillance and informants for the purpose of essentially monitoring Muslim American daily life, the means it has employed are not sufficiently narrowly tailored to survive strict scrutiny in the face of constitutional First Amendment protections of free association and speech. This has led to a significant “chilling” of religious and political expression, as well as the curtailment of actual religious activities such as mosque attendance, donations for charity, or participation in a Muslim Student Association on college campuses. Through the refining of the government’s scope of surveillance, and the creation of objective, transparent criteria for individuals who *do* warrant such government scrutiny, Muslim Americans can be secured their fundamental rights, while still allowing law enforcement to accomplish its goal of fighting actual terrorism. Additionally, the government should not prosecute those vulnerable, and easily susceptible individuals who were unsuspectingly caught in the government “dragnet” of informant sting operations. Instead, law enforcement should allow the Muslim American community its own space to address the issue on its own terms, by offering such individuals social programs and mental health services as

the burden of distributional inequalities arising from abusive practices sanctioned by the majority.”) (footnotes omitted).

¹⁹⁰ *Id.* at 213–17.

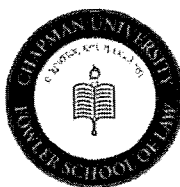
needed, without fear of government scrutiny or prosecution. This will not only empower Muslim Americans, a community largely marginalized post 9/11, but also allow them to mold their own destinies in this nation. It is not the place of a government based on fundamental constitutional principles of freedom to punish individuals for mere adherence to their faith, no matter how stigmatized they are. Courts must now step in to uphold those fundamental rights that have been pushed aside out of misunderstanding and fear.

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