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A Nation of Informants

REINING IN POST-9/11 COERCION OF INTELLIGENCE INFORMANTS

Diala Shamas[†]

Every person enjoys some measure of protection against being coerced into cooperating with law enforcement authorities by governmental techniques of intimidation and harassment.¹

INTRODUCTION

Muhammad Tanvir was working at a “99 Cents” store in Queens, New York, when Federal Bureau of Investigation (FBI) agents approached him and asked him to work as an informant. Specifically, they wanted him to spy on the local Muslim community, without any particular target. Mr. Tanvir saw no reason to get involved, and he had a number of reservations: he had no knowledge of any unlawful activities; he did not need anything from the FBI; he was concerned about the dangers inherent to working as an informant, and spying on his community went against his religious beliefs. As a result, he declined the agents’ repeated, and increasingly aggressive overtures. Months later, he was not permitted to board a flight to visit his ailing mother in Pakistan. When he called the FBI to complain, they told him he would not be permitted to travel until he agreed to work with them.²

[†] Staff Attorney, the Center for Constitutional Rights. This article draws on my work and clients’ experiences as a supervising attorney at the CLEAR (Creating Law Enforcement Accountability & Responsibility) project at CUNY School of Law, where I represented a number of individuals who were recruited to become informants, and experienced the practices that I explore more fully in this article. I am grateful to Amna Akbar, Chesa Boudin, Catherine Grosso, Babe Howell, Ramzi Kassem, Darryl Li, Alexandra Natapoff, Fionnuala Ní Aoláin, Yaman Salahi, Shirin Sinnar, and David Sklansky for their comments on earlier drafts, and to Naz Ahmad, Nermeen Arastu and Tarek Ismail for their insightful conversations. I also benefitted from the meticulous editing of the *Brooklyn Law Review* team. Any mistakes are my own.

¹ *Angola v. Civiletti*, 666 F.2d 1, 3 (2d Cir. 1981).

² First Amended Complaint at 2, *Tanvir v. Lynch*, 128 F. Supp. 3d 756 (S.D.N.Y. 2015), *rev’d in part sub nom. Tanvir v. Tanzin*, 889 F.3d 72 (2d Cir. 2018) (No.

FBI agents wanted Yassine Ouassif to regularly report what his friends were saying at the mosque he attended in Sacramento, California. When he refused, the agents threatened to take away his green card and deport him, even though it later became clear they would have had no lawful basis to do so.³

Mr. Tanvir and Mr. Ouassif's experiences are not isolated. They are illustrative of FBI efforts to recruit informants for intelligence gathering purposes. Since at least the attacks of September 11, 2001, the U.S. government has engaged in widespread surveillance of Muslim-American communities, including the monitoring of Muslim organizations, religious spaces, neighborhoods, activities and online forums. To operationalize such initiatives, the government relies heavily on recruiting members of those communities as informants. Law-abiding individuals with no prior criminal record make desirable recruits, given their ability to be inconspicuous, and their possession of the linguistic or cultural knowledge of the targeted communities. They are not, however, as vulnerable to traditional criminal-informant-pressuring methods, which are typically effectuated through the criminal process. The stated law-enforcement need for information from members of Muslim-American communities at large has resulted in a turn towards the No-Fly List and immigration processes, such as withholding or delaying immigration benefits from otherwise eligible applicants, as recruiting tools. As executive authority over immigration and travel continues to expand with minimal recourse to judicial oversight, it is increasingly important to examine the rights implicated by these recruitment efforts.

This article examines the legal and regulatory framework governing post-September 11 informant recruitment practices. It shows how existing, albeit limited,⁴ safeguards that deter law enforcement misconduct during the informant recruitment process—whether it is the possibility of exclusion of unlawfully obtained evidence, the promise of a public trial, or the fear of unreliable evidence—do not apply to a large segment of FBI informants. This leaves informant recruitment efforts in the counterterrorism arena virtually unregulated, unrestrained, and with limited avenues for judicial oversight. Individuals like Mr. Tanvir and Mr. Ouassif thus lack protections from

13-CV-6951), ECF No. 15. Note: I represented Mr. Tanvir and the other plaintiffs in *Tanvir v. Lynch*.

³ See Peter Waldman, *A Muslim's Choice: Turn U.S. Informant or Risk Losing Visa*, WALL ST. J. (July 11, 2006, 12:01 AM), <https://www.wsj.com/articles/SB115258258431002991> [<https://perma.cc/8PNW-L5M6>].

⁴ See *infra* Part IV for details about the limits of those safeguards.

government overreach. In light of the turn towards intelligence gathering and away from traditional law enforcement tactics in the counterterrorism context, even the most ambitious proposals for reform leave a growing pool of potential informants at the whim of law enforcement agents.

Currently, unfettered access to a growing arsenal of non-criminal coercive measures allows the government to exert pressure over a vast swath of the Muslim-American population, implicating significant rights. Although the practice is currently focused on Muslim-Americans, it is establishing a precedent that can and may be expanded to other groups as law enforcement priorities shift.

The following analysis of informant recruitment takes as a starting point the experiences of the communities and individuals targeted for this recruitment. Their stories animate the inquiry into the relevant governing standards and regulations, and highlight significant gaps in the existing protections. Part I presents the ways in which informants are used in terrorism investigations and surfaces distinctions between criminal informants and intelligence informants. The intelligence informant, or the “Muslim informant,” is more informal than the criminal one, and is primarily situated outside the criminal process. Part II describes the move towards non-criminal levers for recruitment, and looks at two particularly well-documented forms of pressure: placement on the No-Fly List, and the withholding of immigration benefits. Both forms of pressure present transparency and due process concerns, and grant significant discretion to individual FBI agents, making the techniques prone to abuse. Part III raises the significant legal and societal concerns implicated by coercion of intelligence informants, taking the First Amendment as a focal point of inquiry. This Part underscores the core democratic principle at stake as we move towards a system that leaves unchecked the state’s ability to force whole segments of its population—anyone with a pending immigration matter or a need to travel—to spy on each other. Part IV examines the legal and regulatory limits on law enforcement agents’ recruitment practices. This review concludes that regulatory restrictions on coercive recruitment of intelligence informants are thin. Whatever limited protections exist are rooted in the criminal framework and driven primarily by anti-corruption and evidentiary concerns—they are thus unavailable to intelligence informants. Part V makes several proposals that would expand available protections to reflect this new reality.

I. THE “MUSLIM VERSION” OF THE INFORMANT EXPERIENCE

The identification and recruitment of informants has long been a central part of the law enforcement toolbox,⁵ but the use of informants has steadily grown over time.⁶ Especially since the attacks of September 11, law enforcement agencies have redoubled their efforts to recruit informants,⁷ resulting in a “Muslim version” of the American informant experience. According to the most recent available numbers, the FBI formally counts 15,000 informants among its rolls.⁸ The numbers are even higher than these formally recognized informants, as they don’t count informal, intelligence informants: the individuals who are tapped for information on a daily basis, usually through the use of coercive measures.⁹ These individuals—“intelligence informants”—and their recruitment by the FBI are the focus of this article.

The term “informant” could include any civilian who provides information to the police.¹⁰ This could be an accomplice,

⁵ See generally STEVE HEWITT, SNITCH! A HISTORY OF THE MODERN INTELLIGENCE INFORMER 158, n.103 (2010); Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L. J. 1091 (1951).

⁶ FINAL REPORT OF THE SELECT COMMITTEE TO STUDY UNDERCOVER ACTIVITIES OF COMPONENTS OF THE DEPARTMENT OF JUSTICE, S. REP. NO. 97-682, at 6 n.20 (1982) (noting the increasing reliance of various law enforcement agencies on undercover operations, including informants), <https://www.ncjrs.gov/pdffiles1/Digitization/124269NCJRS.pdf>.

⁷ In the immediate aftermath of September 11, there was a call for intelligence agencies to recruit individuals with the cultural and linguistic knowledge that’s shared with the terrorist organizations. See, e.g., Jonathan Freedland, *Use Brains, Not Brawn*, GUARDIAN (Dec. 3, 2002, 8:25 PM EST), <https://www.theguardian.com/uk/2002/dec/04/military.world> [<https://perma.cc/GN84-E255>]; Andrew Roberts, *Bring Back 007*, SPECTATOR (Oct. 6, 2001), <http://archive.spectator.co.uk/article/6th-october-2001/20/bring-back-007> [<https://perma.cc/SLT6-FT6J>]. This expansion is consistent with historical precedents: as law enforcement priorities shift, new groups find themselves in the crosshairs of law enforcement attention. Because investigating agencies do not already have officers within their ranks to investigate or surveil the new target community, the agencies seek informers who can play the part. HEWITT, *supra* note 5, at 124–25 (“[T]he larger the difference between an investigating agency and those being investigated, the greater the need for informers.”).

⁸ See U.S. DEP’T OF JUSTICE FED. BUREAU OF INVESTIGATION, FY 2008 AUTHORIZATION AND BUDGET REQUEST TO CONGRESS at 4–23, <https://www.documentcloud.org/documents/238034-33-fbi-se-2.html#document/p38/a30817> [<https://perma.cc/TB79-8BVZ>]; NPR Staff, *Terror Probes Have FBI’s Informant Numbers Soaring*, NAT’L PUB. RADIO (Aug. 21, 2011, 5:10 EST), <https://www.npr.org/2011/08/21/139836377/the-surge-in-fbi-informants> [<https://perma.cc/NH7P-T3XG>]. This number was up from 1,500 in 1975. See U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., THE FEDERAL BUREAU OF INVESTIGATION’S COMPLIANCE WITH THE ATTORNEY GENERAL’S INVESTIGATIVE GUIDELINES 34 (Sept. 2005) [hereinafter *OIG Compliance Report*], <https://oig.justice.gov/special/0509/final.pdf> [<https://perma.cc/HY9A-CGLT>].

⁹ See *infra* notes 48–58 and accompanying text.

¹⁰ See Steven Greer, *Towards a Sociological Model of the Police Informant*, 46 BRIT. J. SOC. 509, 510 (1995). According to the FBI’s definition, a Confidential Informant is “any individual who provides useful and credible information to a Justice Law Enforcement Agency (JLEA) regarding felonious criminal activities and from whom the

a concerned citizen, an anonymous tipster, or a paid-off mafia boss. Individuals become informants for a variety of reasons: money, fear of punishment for a crime, fear of criminal associates or revenge, civic duty, repentance for past crimes, and furloughed prisoners to list a few.¹¹ The majority of formal informants are coerced through the criminal process, and agree to inform in exchange for some form of leniency.¹² As a result, most legal scholarship addressing informant recruitment has focused on informers who have broken the law, or who have some other nexus with criminal activity, and have been subsequently recruited in exchange for leniency. Some scholars have raised concerns about the inherently coercive aspects of recruitment in the criminal context,¹³ while most are concerned with the challenges inherent to working with informants who might have themselves committed crimes.¹⁴ Reform proposals have similarly focused on criminal informants.¹⁵ Yet the “intelligence informants” described in this article, while coerced, are not coerced through the criminal process and have thus been subject to little scrutiny.

Despite the widespread, regular prodding of information from Muslim-Americans about their daily life, there has not

JLEA expects or intends to obtain additional useful and credible information regarding such activities in the future.” OIG Compliance Report, *supra* note 8, at 63 (citing the Attorney General’s Guidelines Regarding the Use of Confidential Informants).

¹¹ See DENNIS G. FITZGERALD, *INFORMANTS AND UNDERCOVER INVESTIGATIONS: A PRACTICAL GUIDE TO LAW, POLICY, AND PROCEDURE* 21–24 (2007).

¹² See *id.* at 22 (avoiding punishment for a criminal act is the “most frequently encountered motivation” for someone to become an informant); see also ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* 9 (2009) (“[T]his is not a book about everyone who gives information to the police . . . it addresses the very specific but widespread governmental practice of rewarding informants who have broken the law.”); JAMES Q. WILSON, *THE INVESTIGATORS: MANAGING FBI AND NARCOTICS AGENTS* 64–65 (1978) (“Overwhelmingly, informants are recruited from among persons who are themselves criminals or closely connected with criminals.”); Michael L. Rich, *Coerced Informants and Thirteenth Amendment Limitations on the Police-Informant Relationship*, 50 SANTA CLARA L. REV. 681, 695 (2010).

¹³ See Rich, *supra* note 12, at 695–96 (arguing that the informant working under the threat of being subjected to criminal process is a form of involuntary servitude). See generally Robert L. Misner & John H. Clough, *Arrestees as Informants: A Thirteenth Amendment Analysis*, 29 STAN. L. REV. 713 (1977); Colleen Melody, Comment, *Trading Information for Safety: Immigrant Informants, Federal Law Enforcement Agents, and the Viability of Non-Deportation Agreements*, 83 WASH. L. REV. 599 (2008) (arguing that the Convention Against Torture and substantive due process protections for immigrants who have served as informants are insufficient).

¹⁴ See generally Mary Nicol Bowman, *Truth or Consequences: Self-Incriminating Statements and Informant Veracity*, 40 N.M. L. REV. 225 (2010); Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT’G. REP. 292 (1996); Amanda J. Schreiber, Note, *Dealing with the Devil: An Examination of the FBI’s Troubled Relationship with Its Confidential Informants*, 34 COLUM. J.L. & SOC. PROBS. 301, 302–03 (2001) (focusing on confidential informants who are not necessarily being investigated, but are themselves a part of a criminal network).

¹⁵ See *infra* Section V.A.

been any attempt to frame this as informant recruitment that deserves critical attention, procedural safeguards, or oversight. Nor has there been much scholarly or political scrutiny of the methods through which the FBI populates its expansive—and expanding—registry of informants with individuals who have the linguistic, cultural, and religious knowledge that would enable them to be effectively used to gather information about the daily life of Muslim-American populations.¹⁶ This article shows how the daily questioning of individuals for intelligence, the recruitment of “eyes and ears” among Muslim communities is not subjected to any oversight—not even the limited oversight that is afforded to the recruitment of criminal informants.

Recent debates around the limits of surveillance have centered around technological surveillance, and we have all but written out humans from the conversation. On all sides of the civil liberties debate, scholars and practitioners scrutinize technological developments, as well as novel surveillance equipment and methods, while battling over regulating the right balance between privacy concerns and security presented by these new forms of infiltration.¹⁷ The development of human sources, however—the oldest form of surveillance—has not been subjected to similar scrutiny, even though it presents distinct harms. Indeed, while this article focuses on the harms of informants as experienced on the “front end” at the recruitment stage, it is crucial to also note the equally devastating harms stemming from the use of informants on the “back end,” as targets and communities are experiencing the harms resulting

¹⁶ One article arguing for the expanded use of S-6 Visas is the only article that addresses the recruitment process in the counterterrorism context. See Emily Stabile, Comment, *Recruiting Terrorism Informants: The Problems with Immigration Incentives and the S-6 Visa*, 102 CALIF. L. REV. 235 (2014).

¹⁷ See, e.g., *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016) cert. granted, 137 S. Ct. 2211 (U.S. June 5, 2017) (No. 16-402) (mem.), and accompanying amicus briefs (presenting the issue of whether the Fourth Amendment prohibits law enforcement from accessing, without a warrant, an individual’s cellular phone records that can reveal his location and movements); Charlie Savage, *Surveillance and Privacy Debate Reaches Pivotal Moment in Congress*, N.Y. TIMES, (Jan. 10, 2018), <https://www.nytimes.com/2018/01/10/us/politics/nsa-surveillance-privacy-section-702-amendment.html> [<https://perma.cc/GLJ7-EY3D>] (describing Congressional debates around increasing privacy protections in light of reports of widespread NSA surveillance); Charlie Savage & Ron Nixon, *Privacy Complaints Mount Over Phone Searches at U.S. Border Since 2011*, N.Y. TIMES (Dec. 22, 2017), <https://www.nytimes.com/2017/12/22/us/politics/us-border-privacy-phone-searches.html> [<https://perma.cc/YF8H-UWC2>]; Sophia Cope, Amul Kalia, Seth Schoen & Adam Schwartz, *Digital Privacy at the U.S. Border: Protecting the Data on Your Devices*, ELEC. FRONTIER FOUND. (Dec. 2017), <https://www.eff.org/wp/digital-privacy-us-border-2017> [<https://perma.cc/5T9U-AKZZ>] (providing advice and guidance to users concerned about information being seized from their devices during travels).

from informant recruitment.¹⁸ This article advocates for a more focused attention to the abuses inherent to the practices of intelligence informant recruitment, draws on some of the lessons learned from the criminal informant setting, and aims to import those lessons into the intelligence setting.

A. *A Heavy Reliance on Informants for Counterterrorism Prosecutions*

The use of informants has been a prominent and deliberate feature of prosecutions that the government has characterized as related to terrorism. In 2002, the Attorney General Guidelines were revised to authorize, among other things, the development and deployment of informants at the earlier stages of investigation that require the lowest quantum of proof to be initiated.¹⁹ A presidential directive from 2004 called for an expansion of the FBI's informant program, and as a result, in 2008 the FBI requested funding for a software program to track and manage the growing number of informants.²⁰ Amendments to the Guidelines followed in 2008.²¹ Documents from 2015 show a further, steady expansion of the role of informants.²² While it is difficult to determine how many informants are utilized for particular law enforcement

¹⁸ See CLEAR PROJECT, ASIAN AM. LEGAL DEF. & EDUC. FUND, & MUSLIM AM. CIVIL LIBERTIES COAL., MAPPING MUSLIMS: NYPD SPYING AND ITS IMPACT ON AMERICAN MUSLIMS 25–30 (2013) [hereinafter MAPPING MUSLIMS] (examining the impact of intensive police surveillance including the use of informants and undercovers on Muslim-American communities in New York City); see also Jeanne Theoharis, “*I Feel Like a Despised Insect*”: Coming of Age Under Surveillance in New York, INTERCEPT (Feb. 18, 2016, 11:04 AM), <https://theintercept.com/2016/02/18/coming-of-age-under-surveillance-in-new-york/> [https://perma.cc/89FN-G4G4], for a powerful account of the deeply personal impacts of betrayal by friends revealed to be informants. For studies on the harmful impacts of informants in other contexts, see PAUL BUTLER, LET’S GET FREE: A HIP HOP THEORY OF JUSTICE (2009); see also NATAPOFF, *supra* note 12. This has also been theorized in other countries and contexts. See PADDY HILLYARD, SUSPECT COMMUNITY: PEOPLE’S EXPERIENCE OF THE PREVENTION OF TERRORISM ACTS IN BRITAIN (1993) (looking at peoples’ experiences under the Prevention of Terrorism Acts in Britain and Northern Ireland).

¹⁹ See OFFICE OF THE ATT’Y GEN., THE ATTORNEY GENERAL’S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS 1, 8–12 (2002).

²⁰ See U.S. DEPT’ OF JUSTICE FED. BUREAU OF INVESTIGATION, *supra* note 8, at 4–24.

²¹ See Memorandum from the Office of the Att’y Gen. to the Heads of Dep’t Components 2–3 (Sept. 29, 2008), <http://www.justice.gov/ag/readingroom/guidelines-memo.pdf> [https://perma.cc/K939-YM87] (explaining how the new guidelines enable the FBI to task “human sources” to seek information about threats to national security).

²² See Trevor Aaronson, *The FBI Gives Itself Lots of Rope to Pull in Informants*, INTERCEPT (Jan. 31, 2017, 7:15 AM), <https://theintercept.com/2017/01/31/the-fbi-gives-itself-lots-of-rope-to-pull-in-informants/> [https://perma.cc/MA9L-X3E8].

investigations,²³ the FBI's counterterrorism priorities suggest that Muslim-Americans dominate the expanding roster.²⁴

Informant involvement has become the hallmark of terrorism prosecutions.²⁵ A 2014 study found that nearly half of federal counterterrorism convictions were cases involving informants, and in many cases, the informants played a central role.²⁶ The use of informants in counterterrorism investigations and prosecutions has received a significant amount of public and scholarly attention, but that attention has primarily focused on the use of informants in the criminal setting. Specifically, observers have focused on the prominent role informants take in securing a prosecution and the possible evidentiary and due process issues that arise for defendants.²⁷ Scholarly work

²³ See Clifford S. Zimmerman, *Toward A New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81, 84 (1994).

²⁴ See Talal Ansari & Siraj Dato, *Welcome to America—Now Spy on Your Friends*, BUZZFEED (Jan. 28, 2016, 4:22 PM), https://www.buzzfeed.com/talalansari/welcome-to-america-now-spy-on-your-friends?utm_term=.fwPo6P7mq#yk6r62jl3 [<https://perma.cc/5K4P-H29Z>] (quoting anonymous FBI agent emphasizing the importance of sources among the Muslim community); see also NPR Staff, *supra* note 8 (for support that the numbers are high); Michael Evans & Richard Ford, *Recruit Muslim Spies in the War on Terror, Urges New Security Chief*, TIMES (London) (July 9, 2007, 1:00 AM), <https://www.thetimes.co.uk/article/recruit-muslim-spies-in-war-on-terror-urges-new-security-chief-50zxfrhlrb> [<https://perma.cc/V2YP-3MC9>]; *Intel Agencies Seek Help Recruiting Immigrants*, ASSOCIATED PRESS (May 17, 2008) <http://newsok.com/article/3244585> [<https://perma.cc/S6UY-CZB2>].

²⁵ In this article, I adopt the U.S. government's labeling of "terrorism prosecutions" for the purposes of making an argument about informant recruitment among Muslim communities. However, it is worth noting that many of the cases that the Department of Justice has labeled as terrorism prosecutions sometime involve charges that are unrelated to terrorism. See HUMAN RIGHTS WATCH, ILLUSION OF JUSTICE: HUMAN RIGHTS ABUSES IN US TERRORISM PROSECUTIONS 201–02 (July 21, 2014) [hereinafter ILLUSION OF JUSTICE], <https://www.hrw.org/report/2014/07/21/illusion-justice/human-rights-abuses-us-terrorism-prosecutions> [<https://perma.cc/DAQ6-ALBB>]; see also Andrew Lindsay, *What the Data Tells Us About Immigration and Terrorism*, BRENNAN CTR. FOR JUSTICE (Feb. 17, 2017), <https://www.brennancenter.org/blog/what-data-tells-us-about-immigration-and-terrorism> [<https://perma.cc/7HT5-BZJ2>]. Moreover, cases that some might argue should be labeled as "terrorism" cases, but do not involve Muslim or Arab defendants, are often not included in the official accounts of "terrorism prosecutions."

²⁶ ILLUSION OF JUSTICE, *supra* note 25, at 21.

²⁷ See *id.*; CTR. FOR HUMAN RIGHTS & GLOB. JUSTICE, TARGETED AND ENTRAPPED: MANUFACTURING THE "HOMEGROWN THREAT" IN THE UNITED STATES 39–40 (2011); see also Trevor Aaronson, *The Informants*, MOTHER JONES (Sept./Oct. 2011), <https://www.motherjones.com/politics/2011/07/fbi-terrorist-informants/> [<https://perma.cc/4RSZ-YXPN>]; Paul Harris, *The Ex-FBI Informant With a Change of Heart: 'There Is No Real Hunt. It's Fixed'*, GUARDIAN (Mar. 20, 2012, 12:50 PM EDT), <https://www.theguardian.com/world/2012/mar/20/fbi-informant> [<https://perma.cc/R6V6-JTBA>]; Anjali Kamat & Jacquie Soohen, *Entrapment or Foiling Terror? FBI's Reliance on Paid Informants Raises Questions About Validity of Terrorism Cases*, DEMOCRACY NOW! (Oct. 6, 2010), https://www.democracynow.org/2010/10/6/entrapment_or_foiling_terror_fbis_reliance [<https://perma.cc/EP5Z-VA4Q>]; Eric Lichtblau, *F.B.I. Steps Up Use of Stings in ISIS Cases*, N.Y. TIMES (June 7, 2016), <https://www.nytimes.com/2016/06/08/us/fbi-isis-terrorism-stings.html> [<https://perma.cc/XXU8-LWW4>]; (T)ERROR (Charlotte Street Films, 2015) (documentary following FBI informant during an undercover operation).

examining the use of informants in the terrorism context has also primarily focused on entrapment or other abuses by informants engaging in unlawful activity.²⁸ Others have written about the privacy and due process concerns that result from the more permissive rules surrounding the deployment of informants in national security investigations.²⁹

Some of the informants themselves have publicly spoken out, and been profiled by prominent media outlets,³⁰ while others' identities have been revealed when their work eventually led to a prosecution.³¹ While it is impossible to draw generalized conclusions about the identity of informants given the inherent secrecy around informant practices, these profiles all reveal one common feature—the informants used in terrorism prosecutions

²⁸ For the most definitive summary of entrapment concerns, see Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687 (2010); see also Wadie E. Said, *The Message and Means of the Modern Terrorism Prosecution*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 175, 190–92 (2012); Dru Stevenson, *Effect of the National Security Paradigm on Criminal Law*, 22 STAN. L. & POL'Y REV. 129, 162 (2011). See generally Francesca Laguardia, *Terrorists, Informants, and Buffoons: The Case for Downward Departure as a Response to Entrapment*, 17 LEWIS & CLARK L. REV. 171 (2013) (looking at the cases of entrapment in terrorism prosecutions, arguing that it should be considered at sentencing); Jesse J. Norris, *Entrapment and Terrorism on the Left: An Analysis of Post-9/11 Cases*, 19 NEW CRIM. L. REV. 236 (2016); Jesse J. Norris, *Why the F.B.I. and the Courts Are Wrong About Entrapment and Terrorism*, 84 MISS. L.J. 1257 (2015); Jessica A. Roth, *The Anomaly of Entrapment*, 91 WASH. U.L. REV. 979 (2014); Dejan M. Gantar, Note, *Criminalizing the Armchair Terrorist: Entrapment and the Domestic Terrorism Prosecution*, 42 HASTINGS CONST. L.Q. 135 (2014);

²⁹ See generally Daniel Ward, Note, *Confidential Informants in National Security Investigations* 47 B.C. L. REV. 627 (2006) (Ward's note focuses on the differences between how evidence obtained from informants may be used in the criminal setting and the terrorism context).

³⁰ A few prominent examples: Craig Monteilh spoke with the press about his work as an informant infiltrating a mosque in Orange County, California. *The Convert*, THIS AM. LIFE (Aug. 10, 2012), <https://thisamericanlife.org/471/the-convert> [<https://perma.cc/377E-A3QJ>]. Saeed Torres was the subject of an award-winning documentary, (T)ERROR, which allowed the cameras to roll while he was undertaking an FBI sting operation. (T)ERROR, *supra* note 27. Shahed Hussain testified in public proceedings, and was subsequently profiled by Trevor Aaronson. Trevor Aaronson, *Timeline: The Making of an FBI Superinformant*, MOTHER JONES (Sept./Oct. 2011), <https://www.motherjones.com/politics/2011/07/shahed-hussain-fbi-informant/> [<https://perma.cc/8WEW-F4B2>]. Shamiur Rahman, an NYPD informant, also spoke to the press. Matt Apuzzo & Adam Goldman, *Informant: NYPD Paid Me to 'Bait' Muslims*, ASSOCIATED PRESS (Oct. 23, 2012), <https://www.ap.org/ap-in-the-news/2012/informant-nypd-paid-me-to-bait-muslims> [<https://perma.cc/9AXH-7DW7>].

³¹ Osama Eldawoody, an informant who was recruited by the NYPD, was publicly identified after he was made to testify in court. Robin Shulman, *The Informer: Behind the Scenes, or Setting the Stage?* WASH. POST (May 29, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/28/AR2007052801401.html> [<https://perma.cc/236K-XN4Q>]. An undercover officer (not an informant) who was sent to Brooklyn College by the NYPD also ultimately had her identity revealed when community members pieced together the information made public through the prosecution of two young women in New York. Aviva Stahl, *Brooklyn College Students: NYPD Illegally Spied on Us and Lied About It*, GOTHAMIST (Jan. 5, 2016, 3:01 PM), http://gothamist.com/2016/01/05/nypd_brooklyn_college_cuny_spy.php [<https://perma.cc/Y884-FL7X>].

had been touched by the criminal justice system in some way. Some cooperated in exchange for leniency when they were suspected or accused of a crime, while others had a criminal record and cooperated for remuneration.³² In this way, their recruitment does not differ significantly from that of an informant in the drug or white-collar crime context. Our understanding of the details of the Muslim informant experience, however, suffers from a selection bias: other than the rare instances where informants speak to the media or whose identities are revealed through the prosecution of their targets, their identities generally remain unknown.

B. *Intelligence Informants*

Intelligence informants can be distinguished from the informants that are more prominently reported on in the terrorism context.³³ Perspectives from community-based groups and organizations, as well as attorneys working with these communities, along with information gleaned through litigation or leaked documents all suggest that there is a broader informant recruitment effort underway among Muslim communities in the United States. Intelligence informants are typically non-criminal sources that the FBI seeks to cultivate from among the communities it aims to infiltrate. As a result of the FBI's shift from a prosecutorial model towards a preventative,³⁴ or

³² For example, after Shahed Hussein was arrested for helping test-takers cheat at the Department of Motor Vehicles, he wore a wire to uncover his partners in the DMV scam in exchange for avoiding charges. He was later used as an informant in at least two terrorism-related prosecutions. See Aaronson, *supra* note 30; Saeed Torres was first arrested for grand larceny and became an informant to reduce his sentence. (T)ERROR, *supra* note 27.

³³ See *supra* notes 28–32.

³⁴ See *Homeland Threats and Agency Responses: Hearing Before the S. Comm. on Homeland Sec. & Gov't Affairs*, 112th Cong. 1 (2012) (statement of Robert S. Mueller, Director, Fed. Bureau of Investigation) <http://www.hsgac.senate.gov/download/?id=7ab6dc14-f3f9-43e9-aae0-4ea144c89447> [<https://perma.cc/2B3Y-H6Y2>]; GARRETT M. GRAFF, *THE THREAT MATRIX: THE FBI AT WAR IN THE AGE OF TERRORISM*, 404 (2011) (citing Memorandum from Robert S. Mueller III, Director, FBI, to Special Agents in Charge of FBI Field Offices) (“While every office will have different crime problems that will require varying levels of resources, the FBI has just one set of priorities . . . stop the next attack.”); Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 10–11 (2008) (noting that law enforcement is increasingly preventative, rather than focused on prosecution); Scott Shane & Lowell Bergman, *F.B.I. Struggling to Reinvent Itself to Fight Terror*, N.Y. TIMES (Oct. 10, 2006), http://www.nytimes.com/2006/10/10/us/10fbi.html?pagewanted=print&_r=0 [<https://perma.cc/47ES-V3M3>] (noting that building prosecutions is no longer a top FBI priority); Press Release, FBI, FBI Response to ACLU Report, <https://archives.fbi.gov/archives/news/pressrel/press-releases/fbi-response-to-aclu-report> [<https://perma.cc/DJZ6-RZS5>] (Oct. 20, 2011) (“FBI cannot simply wait for people to report potential threats.”).

deterrence model,³⁵ it has also shifted towards broad-based intelligence gathering and monitoring of Muslim communities.³⁶ Much of the intelligence gathering and monitoring has utilized emerging technological developments and other data-gathering techniques—including scaling government records, reviewing census data,³⁷ utilizing geospatial or domain mapping,³⁸ engaging in online surveillance and community outreach,³⁹ or the installation of monitoring and surveillance equipment, or other types of surveillance (with or without warrants).⁴⁰

Of interest here are the techniques that involve human sources: human infiltration of community and personal spaces. In order to serve as “eyes and ears” and participate in the surveying of Muslim communities, membership or familiarity with those communities is of primary significance. Some informants pose as newcomers or converts,⁴¹ but most are

³⁵ See Samuel J. Rascoff, *Counterterrorism and New Deterrence*, 89 N.Y.U. L. REV. 830, 830–32 (2014) (arguing that counterterrorism efforts are premised on a deterrence rationale, and that the American legal framework must be updated to account for this emerging practice).

³⁶ A central pillar of this move has been the attempt to identify behavior that might signal potential terrorism—a virtually impossible proposition. This has resulted in the proliferation of radicalization theories premised on the notion that certain speech or associations might be precursors to terrorism. See generally Amna Akbar, *Policing “Radicalization”*, 3 U.C. IRVINE L. REV. 809 (2013).

³⁷ Press Release, Am. Civil Liberties Union, Government Linking Various Criminal Behaviors to Certain Racial Ethnic Groups, Documents Obtained by ACLU Reveal (Oct. 20, 2011), <https://www.aclu.org/news/foia-documents-fbi-show-unconstitutional-racial-profiling> [https://perma.cc/7MYN-7JHD].

³⁸ The FBI’s Domestic Investigation and Operations Guide allows for “Domain Management,” which involves understanding the territory in which the FBI operates, and amounts to mapping communities. *ACLU Eye on the FBI: The FBI is Engaged in Unconstitutional Racial Profiling and Racial “Mapping,”* AM. CIVIL LIBERTIES UNION (Oct. 20, 2011), <https://www.aclu.org/aclu-eye-fbi-fbi-engaged-unconstitutional-racial-profiling-and-racial-mapping> [https://perma.cc/343W-Z3VV].

³⁹ See *Nine Years After 9/11: Confronting the Terrorist Threat to Homeland: Hearing Before the S. Comm. on Homeland Sec. & Gov’t Affairs*, 111th Cong. 5–6 (2010) (statement of Robert S. Mueller, III, Director, FBI) <https://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/09/22/10/09-22-10-mueller-9yrs-after-911.pdf> [https://perma.cc/5ECB-9T78] (discussing FBI’s Specialized Community Outreach Team, composed of special agents and community outreach specialists); Cora Currier, *Spies Among Us: How Community Outreach Programs to Muslims Blur Lines Between Outreach and Intelligence*, INTERCEPT (Jan. 21, 2015, 11:10 AM), <https://theintercept.com/2015/01/21/spies-among-us-community-outreach-programs-muslims-blur-lines-outreach-intelligence/> [https://perma.cc/75A2-ZZFB] (2009 documents described a plan in Minnesota to use community outreach efforts to gather information about radicalized individuals, gang members and violent offenders); Press Release, Am. Civil Liberties Union, *FBI Storing Information on Activities Protected by the First Amendment, Memos Obtained by ACLU Show* (Dec. 1, 2011), <https://www.aclu.org/news/foia-documents-show-fbi-illegally-collecting-intelligence-under-guise-community-outreach> [https://perma.cc/G4N6-5N49].

⁴⁰ See Akbar, *supra* note 36, at 854–68 (detailing range of post-September 11 counterterrorism techniques and practices).

⁴¹ Paid informant Craig Monteilh posed as a convert, taking his *shahada* (public declaration of Muslim faith) at the mosque he was infiltrating. See First Amended Complaint Class Action at ¶¶ 86–146, *Fazaga v. Fed. Bureau of Investigation*, 884 F.

recruited from within the same communities that the FBI seeks to infiltrate.⁴² While some are recruited through the criminal process, many are recruited with the use of non-criminal forms of pressure.

This process is sometimes formal, and sometimes informal. Formal recruitment as a Confidential Human Source is a multistage process, involving some, albeit limited, oversight and approval.⁴³ Those who are formally recruited to the FBI's arsenal of informants, however, do not represent the full extent of the FBI's human sources. This is in part because the requirements for recruiting Confidential Human Sources, discussed further below, have been described as "cumbersome" by FBI agents.⁴⁴ Indeed, an Inspector General report investigating FBI compliance with those requirements has found that the current framework encourages agents to "use sources [that] are not formally registered [within] the informant program."⁴⁵

Informal informants appear ubiquitous. Law enforcement documents suggest that informant recruitment occurs on a daily basis, as a matter of policy, at borders.⁴⁶ Requests for information from Muslim community members occur on a widespread basis, through what are sometimes called "voluntary interviews."⁴⁷ Although such an activity is not formally categorized as informant recruitment, these individuals are effectively being used as informants.⁴⁸ During these encounters, law enforcement agents

Supp. 2d 1022 (C.D. Cal. 2012) (No. 8:11-cv-00301-CJC (VBKx)). He noted that the FBI asked him to collect as much information as he could about the regular goings on in the mosque community in Orange County, California. *Id.* An undercover officer tasked with infiltrating Muslim student groups at Brooklyn College also publicly converted to Islam in front of the students. Stahl, *supra* note 31.

⁴² Cora Currier, *The FBI Wanted to Target Yemenis Through Student Groups and Mosques*, INTERCEPT (Sept. 29, 2016, 2:33 PM), <https://theintercept.com/2016/09/29/the-fbi-wanted-to-target-yemenis-through-student-groups-and-mosques/> [<https://perma.cc/93Y7-QGV2>].

⁴³ See *infra* Section IV.A.

⁴⁴ OIG Compliance Report, *supra* note 8, at 8.

⁴⁵ *Id.*

⁴⁶ Cora Currier, *Revealed: The FBI's Secret Methods for Recruiting Informants at the Border*, INTERCEPT (Oct. 5, 2016, 2:52 PM) (discussing Customs and Border Patrol documents stating "that the 'airport is a great place to spot/ assess' sources," and FBI documents that detail the recruitment process.).

⁴⁷ See Shirin Sinnar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, 77 BROOK. L. REV. 41, 51 (2011).

⁴⁸ There are many other ways in which the government is turning citizens into informants that fall outside the scope of this article because the techniques do not entail the same degree of coercion, even though they have been criticized on other grounds. For example, the current priority on "Countering Violent Extremism" has focused on obtaining information from Muslim community leadership as well as service providers, enlisting them in efforts to counter extremism aimed at recruiting leadership, as well as other agencies, into the intelligence-gathering apparatus. See generally Sahar F. Aziz, *Policing Terrorists in the Community*, 5 HARV. NAT'L SEC. J. 147 (2014) (criticizing the community policing in counterterrorism model as currently deployed, arguing that its

approach an individual at their home, workplace, or in the street, and ask them for information. This ranges from information about people they know, their travels, their political views or religious practices.⁴⁹ As a result of their quotidian nature, there is no formal reporting of the numbers or frequency of these encounters. Available data is scarce but staggering.⁵⁰ Anecdotal evidence suggests that encounters such as the ones described above occur as a matter of course in some communities.⁵¹

Civil rights organizations have taken to educating communities about their rights during such encounters, including their right to decline having that conversation, or to insist on having an attorney present for it.⁵² While these interviews are technically “voluntary,” they have been described as quite coercive in reality.⁵³ Many individuals feel coerced into speaking with law enforcement agents—for some, the pressure stems from feeling the need to prove that they have “nothing to

aim to coopt Muslim community leaders into gathering intelligence for law enforcement cannot be reconciled with a community policing model); *see also* Martin Innes, *Policing Uncertainty: Countering Terror Through Community Intelligence and Democratic Policing*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 222, 232 (2006) (noting that community engagement is often intended to develop a “community intelligence feed” about communities).

⁴⁹ Diala Shamas, *Where’s the Outrage When the FBI Targets Muslims?*, NATION (Oct. 31, 2013), <https://www.thenation.com/article/wheres-outrage-when-fbi-targets-muslims/> [<https://perma.cc/B4NU-M8RB>]; *see also* Sinnar, *supra* note 47, at 45–46 (arguing that interviews based on First-Amendment expression deserve heightened scrutiny because they impose a substantial burden on those First Amendment rights, including stigmatic harm, and have chilling effects on speech).

⁵⁰ *See* Sinnar, *supra* note 47, at 47 (citing to some estimates between 200,000 and 500,000 such interviews in 2005).

⁵¹ *See* Thomas Ginsberg, *Officials Begin ‘Voluntary Interviews’ of Iraqi Nationals*, PHILA. INQUIRER, Mar. 21, 2003, at A15; Mary Beth Sheridan, *Interviews of Muslims to Broaden*, WASH. POST (July 17, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A56080-2004Jul16.html> [<https://perma.cc/6KL7-A5YD>] (noting a spurt in interviews in the Washington area of individuals the FBI identified by “intelligence or investigative information”; for example, a student of Iranian descent was asked about Iranian groups based in the Middle East, while others were asked broad questions, such as their opinion of the U.S. invasion of Iraq or the Syrian government).

⁵² *See, e.g., Know Your Rights: What To Do in Interactions With Law Enforcement*, CREATING LAW ENFORCEMENT ACCOUNTABILITY & RESPONSIBILITY (CLEAR) PROJECT http://www.cunyclear.org/wp-content/uploads/2011/11/LE-pamphlet_11082012.pdf [<https://perma.cc/WV5S-96BB>]; *Got Rights?*, MUSLIM ADVOCATES https://www.muslimadvocates.org/got_rights/ [<https://perma.cc/Q27L-EM68>]; *Know Your Rights with Law Enforcement*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS <https://www.cair.com/know-your-rights.html> [<https://perma.cc/2JYV-XALY>]; *If An Agent Knocks*, CTR. FOR CONSTITUTIONAL RIGHTS (Sept. 25, 2009), <https://ccrjustice.org/if-agent-knocks-booklet> [<https://perma.cc/V679-TTKF>].

⁵³ *See* Tracey Maclin, “Voluntary” Interviews and Airport Searches of Middle Eastern Men: *The Fourth Amendment in a Time of Terror*, 73 MISS L.J. 471, 507 (2003) (arguing that the reasonable person test is a “hoax” and is “misguided,” and that the notion that reasonable people feel free to ignore the police “has never been supported by empirical evidence”); Shamas, *supra* note 49; Sinnar, *supra* note 47, at 42, 50–51.

hide.”⁵⁴ Others might have concerns about being stigmatized as “uncooperative” or as not supporting the fight against terrorism.⁵⁵ Yet others, particularly those individuals who come from immigrant backgrounds, have concerns about pending immigration matters—and FBI agents frequently raise these matters in their initial encounters.⁵⁶ FBI agents are reported to engage in overtly aggressive, intimidating tactics.⁵⁷ These concerns are exacerbated by the notion that many members of Muslim communities come from immigrant backgrounds, and have culturally-rooted fears about disobeying state authorities.⁵⁸

II. COERCING MUSLIM INFORMERS: TARGETING TRAVEL, IMMIGRATION STATUS

A. *The Search for Non-Criminal Levers*

The criminal process does not give FBI agents access to the needed population of potential informants. The desirable informants are generally Muslim, their primary role is to provide information on the broader community,⁵⁹ and they may never be implicated in a criminal prosecution. Indeed, as one leaked FBI presentation puts it, agents are instructed to “look[] for ‘good guys,’ not ‘bad guys,’” when identifying potential informants.⁶⁰

⁵⁴ See Aziz, *supra* note 48, at 148 (describing how community policing divides Muslim communities into “Good Muslims” willing to cooperate with law enforcement, and “Bad Muslims” who assert their rights).

⁵⁵ See Ramzi Kassem & Diala Shamas, *Rebellious Lawyering in the Security State*, 23 CLIN. L. REV. 671, 684–87 (2017).

⁵⁶ U.S. GOV’T ACCOUNTABILITY OFF., GAO-03-459, HOMELAND SECURITY: JUSTICE DEPARTMENT’S PROJECT TO INTERVIEW ALIENS AFTER SEPTEMBER 11, 2001, 9 (Apr. 2003), <https://www.gao.gov/assets/240/237849.pdf> [<https://perma.cc/P37T-SQML>] (The U. S. Attorney’s Office review noted that its interviewees reported being afraid of repercussions on their immigration matters if they declining to participate).

⁵⁷ See Trevor Aronson, “*You Have The Way Out*”: Recordings Capture the Brutal FBI Tactics to Recruit a Potential Informant, INTERCEPT (Oct. 10, 2017, 10:45 AM), <https://theintercept.com/2017/10/10/recordings-capture-brutal-fbi-tactics-to-recruit-potential-informant/> [<https://perma.cc/8CMS-MW35>]; Kassem & Shamas, *supra* note 55, at 683 (describing Dr. Azem’s case).

⁵⁸ See Kassem & Shamas, *supra* note 55, at 694; *FBI Accused of Targeting Islamic Leaders, Pressuring Them to Become Informants*, REUTERS (Nov. 6, 2014, 18:11) <https://www.rt.com/usa/202927-muslim-fbi-informants-pressure/> [<https://perma.cc/RA2D-RM9Q>] (quoting an attorney from a Muslim civil liberties group who stated: “Many Muslims come from Third World countries where such practices are common fare for the secret police. But in the U.S. you don’t expect such blackmail, with threats of deportation or worse.”).

⁵⁹ Akbar, *supra* note 36, at 869 (noting that Muslim individuals are widely viewed as either potential terrorists, or potential sources of information).

⁶⁰ Currier, *supra* note 46.

For a criminal informant, a nexus with a criminal network is a desirable trait,⁶¹ or as one expert described it, an individual who has “guilty knowledge.”⁶² When the goal is to gather intelligence, however, the focus is not on criminal association, but rather on social networks: the relevant nexus is with the population or group that is subject to scrutiny.⁶³ The target for infiltration under current counterterrorism practices is much broader than a criminal network: it is an entire religious or cultural group.⁶⁴ For example, a now public FBI training document contained an instruction to focus on recruiting potential confidential human sources and recommended targeting informants from within Muslim student groups. The document explained that targeting the Muslim student demographic was likely to yield individuals who “are in the social circles where travel for overseas study is discussed,” and urged FBI agents to use them as “human tripwires.”⁶⁵ Other informants report being told that they are desirable because they “look Middle Eastern.”⁶⁶

In order to coerce individuals who have neither a criminal record nor any reason to be arrested to regularly provide information to the government, FBI agents are utilizing the variety of both formal and informal tools that are increasingly at their disposal.⁶⁷ Of course, criminal charges or threats of criminal charges are used to pressure informants in the

⁶¹ Agents are encouraged to recruit informants who have proximity to criminals or crime. MALACHI L. HARNEY & JOHN C. CROSS, *THE INFORMER IN LAW ENFORCEMENT* 40 (2d ed., Thomas Books 1968); Rich, *supra* note 12, at 693.

⁶² WILSON, *supra* note 12, at 65.

⁶³ HEWITT, *supra* note 5, at 108–09 (noting that Stasi officials needed to recruit informers who had the backgrounds or shared identities with the groups they were seeking to infiltrate.); Gary T. Marx, *Thoughts on a Neglected Category of Social Movement Participant: The Agent Provocateur and the Informant*, in *TERRORISM: THE THIRD OR NEW LEFT WAVE* 194, 201 (David C. Rapoport, ed., 2006).

⁶⁴ Professor Shirin Sinnar made a variation of this observation about voluntary interviews. Her analysis focused on law enforcement interviews triggered by protected speech, as opposed to membership to a particular community, or placement as a potential informant. *See generally* Sinnar, *supra* note 47.

⁶⁵ FED. BUREAU OF INVESTIGATION, *RESPONDING TO THE YEMENI THREAT, SCENARIOS FOR CHS DEVELOPMENT* 16–17 <https://www.documentcloud.org/documents/3116066-Yemen-slideshow-Doc.html#document/p1> [<https://perma.cc/9QZR-PFDP>]; *see also* Currier, *supra* note 42.

⁶⁶ Kiran Khalid, *Iowa Muslim Leader: Law Enforcement Betrayed Us*, CNN: IN AMERICA (Feb. 3, 2012, 8:48 PM EST), <http://inamerica.blogs.cnn.com/2012/02/03/iowa-muslim-leader-law-enforcement-betrayed-us/> [<https://perma.cc/V7FY-LFC3>].

⁶⁷ In addition to the tools discussed at length in this article, there is evidence that “traditional” non-criminal coercive methods are used, such as blackmail and psychological pressure. *See, e.g.*, Aaronson *supra* note 22 (describing internal FBI documents encouraging the identification of a target’s “motivations and vulnerabilities”).

counterterrorism context.⁶⁸ Similarly, the more informal pressure tactics listed in the previous Part are frequently used—and in this context, this has often taken the form of accusations of being uncooperative or unpatriotic.⁶⁹ This article, however, specifically focuses on FBI discretion to influence the adjudication of immigration benefits, and to deny people boarding through placement on the No-Fly List.

As agents are being instructed to be creative in their recruitment of sources, they look towards the most powerful levers at their disposal vis-à-vis the individuals they are seeking to recruit.⁷⁰ In the context of the war on drugs and day-to-day policing of street crimes, the criminalization of a broad range of behavior associated with poverty and broken windows policing have brought almost everyone from certain over-policed communities within the reach of the state's criminal apparatus.⁷¹ Officers are often able to credibly threaten desired informants with regular searches, arrest, or even prosecution. This concern has driven many of the legal, social, and cultural pushes for reforming the criminal justice system's heavy reliance on "snitching."⁷²

Muslim-American communities, on the other hand, present different target demographics. While they are diverse, many in the community are immigrants either themselves, or

⁶⁸ See JUDE MCCULLOCH & DEAN WILSON, PRE-CRIME: PRE-EMPTION, PRECAUTION AND THE FUTURE, 115–16 (2016) (noting the increased use of inchoate crimes as a way to threaten prosecution over a growing category of people and force people to become informants); Arun Kundnani, Emily Keppler & Muki Naiaer, *How One Man Refused to Spy on Fellow Muslims for the FBI—and then Lost Everything*, NATION (Oct. 14, 2014), <https://www.thenation.com/article/how-one-man-refused-spy-fellow-muslims-fbi-and-then-lost-everything/> [<https://perma.cc/8DEN-7CXS>] (describing the case of Ayyub Abdul-Alim, an African-American Muslim who was charged with gun possession charges, and told that he could walk away if he agreed to become an informant and incite FBI targets to violent action); Aaronson, *supra* note 57. The New York City Police Department also set up the "Citywide Debriefing Team" which focused on seeking out arrestees with a Muslim last name and attempting to recruit them to become informants. See Joseph Goldstein, *New York Police Recruit Muslims to Be Informers*, N.Y. TIMES (May 10, 2014), <https://www.nytimes.com/2014/05/11/nyregion/new-york-police-recruit-muslims-to-be-informers.html> [<https://perma.cc/B3KE-XRS9>].

⁶⁹ Kassem & Shamas, *supra* note 55 at 687–88.

⁷⁰ See WILSON, *supra* note 12, at 70 ("Manipulating the threats and opportunities facing a would-be informant so as to produce a net incentive sufficient to induce him to cooperate becomes a key skill of a narcotics agent.")

⁷¹ See NATAPOFF, *supra* note 12, at 101–03 (describing the disproportionate use and presence of informants among poor, black, urban communities and projecting how large segments of this population are either drug offenders or chemically dependent, and therefore vulnerable to recruitment). Recently, Justice Sotomayor's dissent in *Utah v. Strieff* highlighted how common outstanding warrants are. See *Utah v. Strieff*, 136 S. Ct 2056, 2068 (2016) (Sotomayor, J., dissenting).

⁷² See NATAPOFF, *supra* note 12, at 121–37 for a more thorough discussion of the "stop snitching" movement in urban centers and overly policed communities.

have immediate relatives who are immigrants.⁷³ As a result, they need to travel, to naturalize, to obtain work permits and spousal visas, and they are regularly interacting with the state on these matters. The No-Fly List and the possibility of putting holds on immigration petitions both operate largely in secrecy. Because officers can deploy these coercive measures with little to no oversight, use of the measures do not require an onerous showing of cause and present weak procedural safeguards, they are ripe for this type of exploitation.⁷⁴

B. *Leveraging Immigration Status*

Since the rush to recruit informants in the aftermath of September 11, the immigration system has been among the most prominent pressure points for Muslim and Middle Eastern communities.⁷⁵ Enlisting those vulnerabilities to recruit human sources, an FBI training presentation obtained by civil liberties groups “on recruiting informants in the Muslim community suggest[ed that] agents exploit ‘immigration vulnerabilities’ because Muslims in the United States are ‘an immigrant community.’”⁷⁶ Another presentation urged agents to leverage the “immigration relief dangle.”⁷⁷ The Confidential Human Source Policy Guide, as outlined below, provides detailed instructions to agents seeking to leverage immigration status.

⁷³ Three quarters of Muslims in America are either immigrants or the children of immigrants. *U.S. Muslims Concerned About Their Place in Society, but Continue to Believe in the American Dream*, PEW RESEARCH CTR. (July 26, 2017), <http://www.pewforum.org/2017/07/26/demographic-portrait-of-muslim-americans/#how-many-muslims-are-there-in-the-united-states-and-how-do-we-know> [<https://perma.cc/85XG-BGQA>].

⁷⁴ Of course, the criminal process is also secretive. Professor Natapoff argues that this secrecy is also a principal reason why the criminal informant system is such a core feature of law enforcement. See NATAPOFF, *supra* note 12, at 83–84.

⁷⁵ Neil Lewis, *A Nation Challenged: The Informants; Immigrants Offered Incentives to Give Evidence on Terrorists*, N.Y. TIMES (Nov. 30, 2001), <http://www.nytimes.com/2001/11/30/us/nation-challenged-informants-immigrants-offered-incentives-give-evidence.html> [<https://perma.cc/3942-FMCK>] (describing an early program to provide immigration incentives to those who would provide information to the government). Immigration was also leveraged in other ways fairly early on, including as a way to substitute counterterrorism arrests based on suspicion. Attorney General John Ashcroft defended such pretextual arrests, warning the “terrorists among us” that: “If you overstay your visa—even by one day—we will arrest you.” Att’y Gen. John Ashcroft, Prepared Remarks for the U.S. Mayor’s Conference (Oct. 25, 2001), https://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm [<https://perma.cc/R6X9-YW4G>].

⁷⁶ AM. CIVIL LIBERTIES UNION, UNLEASHED AND UNACCOUNTABLE 40 (Sept. 2013) (citing Fed. Bureau of Investigation, Targeting—Understanding the Fundamentals, Islamic Ummah—Where to Target, Bates #FBI036163-FBI036173), <https://www.aclu.org/sites/default/files/assets/unleashed-and-unaccountable-fbi-report.pdf> [<https://perma.cc/QF6J-GNY2>].

⁷⁷ Currier, *supra* note 46.

Publicly available information suggests that this instruction has been taken seriously by FBI agents. In Michigan, a Muslim civil rights group filed a complaint with the FBI about informant recruitment, stating that the most common incidences involved individuals with pending immigration matters who were approached to monitor mosques in exchange for assistance.⁷⁸ Muslim individuals have reported threats of stalled asylum applications,⁷⁹ of deportation⁸⁰ or revocation of residency status,⁸¹ and even revocation of refugee status determinations.⁸² Other documented cases illustrate retaliation for refusal to become informants through adverse action on pending immigration matters,⁸³ including the withdrawal of asylum applications.⁸⁴ In addition to the aforementioned “sticks,” FBI agents also reportedly offered “carrots” or “immigration dangles,”⁸⁵ including accelerated processing of relatives in need of a visa or other benefit,⁸⁶ often after having a role to play in putting them in abeyance.⁸⁷

⁷⁸ *FBI Recruiting Muslim Spies, Group Says*, CBS NEWS (Apr. 16, 2009, 10:54 AM), <http://www.cbsnews.com/news/fbi-recruiting-muslim-spies-group-says/> [<https://perma.cc/DLK7-QNEE>].

⁷⁹ ILLUSION OF JUSTICE, *supra* note 25, at 170 (interviewing a lawyer who reported that FBI threatened to stall asylum application of her clients).

⁸⁰ See Trevor Aaronson, *FBI Tries to Deport Muslim Man for Refusing to Be an Informant*, MIAMI NEW TIMES (Oct. 8, 2009, 4:00 AM), <http://www.miaminewtimes.com/news/fbi-tries-to-deport-muslim-man-for-refusing-to-be-an-informant-6366555> [<https://perma.cc/4F8S-AFEE>].

⁸¹ See Waldman, *supra* note 3.

⁸² See Ansari & Dato, *supra* note 24 (FBI agents attempted to recruit Mr. Osman—when he refused to be an informant, he was informed by USCIS that an earlier determination finding him to be a member of a persecuted Tuni clan was deemed false and his refugee status was revoked. After he obtained a lawyer, a judge on review eventually found the revocation to be improper, and reinstated his refugee status.).

⁸³ See JENNIE PASQUARELLA, AM. CIVIL LIBERTIES UNION, MUSLIMS NEED NOT APPLY 30, 31 (2013), https://www.aclusocal.org/sites/default/files/field_documents/161849063-muslims-need-not-apply-aclu-socal-report.pdf [<https://perma.cc/FXZ5-5CBY>]; Yesenia Amaro, *Little-Known Law Stops Some Muslims from Obtaining US Citizenship*, LAS VEGAS REVIEW-JOURNAL (Apr. 16, 2016, 6:09 PM), <https://www.reviewjournal.com/news/little-known-law-stops-some-muslims-from-obtaining-us-citizenship/> [<https://perma.cc/Y4H9-3PU3>].

⁸⁴ See Jared Goyette, *Miami Imam Faces Deportation to Iran*, MIAMI HERALD (Sept. 18, 2013, 5:47 PM), <http://www.mcclatchydc.com/news/nation-world/national/article24545977.html> [<https://perma.cc/U4E8-2FW4>] (When a religious leader informed his FBI agent recruiters that he would not provide the FBI with information about the local Muslim community, he was made to withdraw his asylum application, and threatened with deportation.); Aaronson, *supra* note 80.

⁸⁵ Currier, *supra* note 46.

⁸⁶ See First Amended Complaint, *supra* note 2, at ¶121; Kundnani, Keppler & Naiaer, *supra* note 68 (speculating that Mr. Abdul-Alim’s wife, who acted as an informant against her husband, may have been pressured by the FBI through her and her family’s pending citizenship applications).

⁸⁷ See PASQUARELLA, *supra* note 83 (describing an FBI agent’s offer to expedite Mr. Razmara’s naturalization petition if he agreed to work as an informant). Mr. Razmara declined to work as an informant, and his naturalization petition was delayed

FBI agents' threats are credible. While precise details about the contours of the FBI's authority to influence immigration outcomes remain murky, the existence of a United States Citizenship and Immigration Services (USCIS) program called the Controlled Application Review and Resolution Program (CARRP) presents one procedural vehicle through which FBI agents can interfere in a pending immigration matter.⁸⁸ CARRP uses a U.S. government database that flags immigration cases involving "national security concerns," or names that turn up on the U.S. Government's Terrorist Screening Database (TSDB).⁸⁹ This database is known to be overinclusive and quickly expanding.⁹⁰ Moreover, individuals on this list are not notified of their placement on the TSDB, nor are they provided with any reasons for that placement.⁹¹

The CARRP program effectively cedes USCIS decision making to the FBI, giving individual agents significant discretion.⁹² CARRP directs USCIS agents to delay determinations pending deconfliction, a process that is delegated to law enforcement agencies—primarily the FBI.

for years after his refusal to become an informant and to answer questions about his mosque. *Id.* at 8, 30.

⁸⁸ See Press Release, Am. Civil Liberties Union, Lawsuit Charges U.S. Uses Secret, Unfounded 'National Security Concerns' to Deny Muslim Immigrants Citizenship (July 31, 2014), <https://www.aclu.org/news/lawsuit-charges-us-uses-secret-unfounded-national-security-concerns-deny-muslim-immigrants> [<https://perma.cc/K282-K3R9>] ("[A]gency data reveals that between fiscal years 2008 and 2012, more than 19,000 people from 21 Muslim-majority countries or regions were subjected to the program.").

⁸⁹ *Id.*; see also PASQUARELLA, *supra* note 83, at 19. For a thorough description of the CARRP program based on documents that were obtained through FOIA and interviews, see generally PASQUARELLA, *supra* note 83.

⁹⁰ See *infra* notes 102–103; see also Editorial, *A Rebuff to Overbroad Watch Lists*, N.Y. TIMES (Jan. 21, 2014), <https://www.nytimes.com/2014/01/22/opinion/a-rebuff-to-overbroad-watch-lists.html> [<https://perma.cc/XMR4-MMXG>] (describing *Ibrahim v. Dep't of Homeland Sec.* 62 F. Supp. 3d 909, 911 (N.D. Cal. 2014)); Ramzi Kassem, *I Help Innocent People Get Off the Terrorism Watch Lists. As a Gun Control Tool They're Useless*, WASH. POST (June 28, 2016), https://www.washingtonpost.com/posteverything/wp/2016/06/28/i-help-innocent-people-get-off-terror-watch-lists-as-a-gun-control-tool-theyre-useless/?utm_term=.d376c39570bb [<https://perma.cc/6T7G-BDJQ>].

⁹¹ See *Latif v. Holder*, 969 F. Supp. 2d 1293, 1297–98 (D. Or. 2013) ("[A]t no point in the available administrative process is a complainant told whether he or she is in the TSDB or a subset of the TSDB or given any explanation for his or her inclusion on such a list."). There have been some changes to the procedures applicable to the No-Fly List. See *infra* notes 108–109 and accompanying text.

⁹² CARRP is not the only way in which FBI agents may influence immigration outcomes. FBI agents have the ability to charge individuals with offenses like lying on a government form, resulting in charges of immigration violations—sometimes legitimate, other times not. See Mary Beth Sheridan, *Immigration Law as an Anti-Terrorism Tool*, WASH. POST (June 13, 2005), https://www.washingtonpost.com/archive/politics/2005/06/13/immigration-law-as-anti-terrorism-tool/26d96635-cc67-44d9-b6fa-852a2de4d8cb/?utm_term=.978fdd587a23 [<https://perma.cc/BS37-AN7G>] (discussing the use of immigration charges against people who have been scrutinized for national security investigations, even though some charges were ultimately found to have no merit).

CARRP also provides the FBI an opportunity to comment on USCIS's proposed action on a case, to submit questions for USCIS to ask in interviews, and to suggest Requests for Evidence. The program also requires USCIS to notify the FBI as soon as certain individuals have applied for immigration benefits, thus allowing the FBI easy leverage in its attempts to question or recruit the individuals as sources.⁹³ In doing so, CARRP enlists the immigration system into the service of the intelligence-gathering apparatus. This raises various legal and constitutional concerns.⁹⁴

While the potential for CARRP abuse for intelligence-gathering purposes has been noted by civil liberties groups, this form of abuse has not been directly challenged in court. Policy proposals to rein in this form of abuse have recommended that, "at a minimum . . . USCIS must make clear [to an applicant that their] eligibility for an immigration benefit is not contingent on their cooperation with the FBI."⁹⁵ Nor would access to counsel play the same mitigating role that it plays in the equivalent criminal setting. Certainly, an attorney could improve an individual's ability to assess the risks associated with refusal. An attorney could also create a record of improper FBI conduct, acting as some deterrent. Moreover, an attorney can also intervene through filing a mandamus action in federal district court to force the adjudication of a naturalization application.⁹⁶ Such avenues for relief, however, are costly and time-consuming. They are also potentially risky as they cannot guarantee a favorable outcome.⁹⁷

⁹³ PASQUARELLA, *supra* note 83 at 3.

⁹⁴ The authority to delay or deny applications based on secret evidence and without notice also raises due process concerns. *Id.* at 51. At least two lawsuits have been filed challenging CARRP holds on constitutional grounds. *See generally* Complaint, Muhanna v. U.S. Citizenship & Imm. Servs., 2:14-CV-05995 (C.D. Cal. dismissed Dec. 23, 2014), ECF No. 1; Complaint, Alwan v. U.S. Citizenship & Imm. Servs., No. 4:16-CV-00692 (E.D. Mo. Aug. 24, 2017), ECF No. 1 (arguing that CARRP violated Art. 1, Section 8 Clause 4 of the U.S. Constitution, the Fifth Amendment and the Administrative Procedure Act). Moreover, delays of pending applications appear to be in violation of statutory requirements that USCIS adjudicate applications for immigration benefits within 180 days of the initial filing of the application. 8 U.S.C. § 1571(b) (2012).

⁹⁵ PASQUARELLA, *supra* note 83, at 5.

⁹⁶ 8 U.S.C. § 1447(b) (2012) gives an applicant a right to seek a hearing before a U.S. district court if USCIS has not reached a decision on an application for naturalization within 120 days. 8 U.S.C. § 1447(b) (2012). Applicants awaiting decisions on other forms of immigration relief may also pursue a mandamus action pursuant to 28 U.S.C. § 1361. 28 U.S.C. § 1361 (2012).

⁹⁷ A mandamus action under 8 U.S.C. § 1447(b) gives a district court jurisdiction over the naturalization petition and the court may either determine the matter by granting or denying the naturalization application, or it may remand the matter for determination by USCIS. 8 U.S.C. § 1447(b). Despite the statutory grant of authority, many district courts are reluctant to determine the matter for USCIS when there are "security matters" pending, and instead will simply remand. *See, e.g.*, Hussein

C. *The No-Fly List*⁹⁸

The No-Fly List is a federal database created with the purpose of securing aviation safety as well as national security. A subset of the broader, consolidated Terrorist Screening Database (sometimes referred to as the TSDB, or the “watchlist”), placement on the No-Fly List results in a denial of boarding any flight in the United States, or one that transits over United States airspace.⁹⁹ As a result, individuals on the No-Fly List are prevented from visiting loved ones, traveling for business, or pursuing an education, for indeterminate periods of time. In addition, there are a number of other collateral consequences, as watchlist information is disseminated to local law enforcement agencies,¹⁰⁰ and, even though it is non-criminal information, it has appeared on individuals’ criminal rap sheets.¹⁰¹ In recent years, names on the No-Fly List have skyrocketed; as of June 2016, official reports stated that there were 81,000 names listed.¹⁰²

Despite the significant liberty interests at stake, the threshold for nomination is low. The U.S. government has adopted a “reasonable suspicion” standard for nomination to the watchlist—specifically, reasonable suspicion that the individual is “engaged in conduct constituting, in preparation for, in aid of or related to, terrorism or terrorist activities.”¹⁰³ The term “related to,” a catch-all, is even broader than the already low threshold of reasonable suspicion applied in other contexts, including that of stop-and-frisk encounters, which requires law

v. Gonzales, 474 F. Supp. 2d 1265, 1269 (M.D. Fla. 2007) (noting several other courts’ decisions declining to make a determination and instead remanding to USCIS when the reason for delay involves a security-related matter).

⁹⁸ This article focuses on the abuse of the No-Fly List, a subcategory of the broader Terrorist Screening Database, because its use for informant recruitment has been more broadly reported. However, many of the arguments and vulnerabilities discussed in this Section apply to other categories of the TSDB.

⁹⁹ For thorough context and a summary of the terrorism database and its various consequences, see JEFFREY KAHN, MRS. SHIPLEY’S GHOST: THE RIGHT TO TRAVEL AND TERRORIST WATCHLISTS (2013).

¹⁰⁰ For a study of some of these collateral consequences, see CIVIL LIBERTIES & NAT’L SEC. CLINIC, YALE LAW SCH. & AM. CIVIL LIBERTIES UNION, TRAPPED IN A BLACK BOX: GROWING TERRORISM WATCHLISTING IN EVERYDAY POLICING 21–27 (2016), https://www.law.yale.edu/system/files/area/clinic/wirac_9-11_clinic_trapped_in_a_black_box.pdf [<https://perma.cc/8ECF-822W>].

¹⁰¹ Alex Kane, *Terrorist Watchlist Errors Spread to Criminal Rap Sheets*, INTERCEPT (Mar. 15, 2016, 12:02 PM), <https://theintercept.com/2016/03/15/terrorist-watchlist-errors-spread-to-criminal-rap-sheets/> [<https://perma.cc/Y792-7XMJ>].

¹⁰² Stephen Dinan, *FBI No-Fly List Revealed: 81,000 Names, but Fewer Than 1,000 Are Americans*, WASH. TIMES (June 20, 2016), <https://www.washingtontimes.com/news/2016/jun/20/fbi-no-fly-list-revealed-81k-names-fewer-1k-us/> [<https://perma.cc/M8K6-JGLC>].

¹⁰³ Latif v. Holder, 28 F. Supp. 3d 1134, 1141 (D. Or. 2014).

enforcement to have reasonable suspicion of criminal activity, as opposed to conduct that is *related to* terrorist activities.¹⁰⁴ This lower suspicion standard is rendered even less meaningful because it is so unlikely to be reviewed by a court. Unlike in the police context where the potential suppression of evidence serves as a check on police overreach,¹⁰⁵ there is no parallel consequence here. Leaked official guidance on the watchlisting process reveals that a single Facebook post or Tweet may provide the basis for watchlist placement.¹⁰⁶

The process for challenging placement on the No-Fly List is also onerous. In 2014, a District Court in Oregon found the process that had been in place for several years to challenge placement on the No-Fly List to be constitutionally inadequate.¹⁰⁷ New procedures were announced in April 2015, likely the result of multiple lawsuits filed and years of litigation.¹⁰⁸ Under newly revised procedures, a U.S. person who, after being denied boarding on a flight, files a redress inquiry with appropriate documentation, will now receive a letter confirming whether he or she is on the No-Fly List. The individual will then have the option of submitting and receiving further information, to which the DHS should disclose “the specific criteria or criterion under which the person has been included on the No Fly List” as well as a summary of the information supporting placement, “to the extent feasible and consistent with the national security and law enforcement interests at stake.”¹⁰⁹ Consequently, such a summary might never be provided.

¹⁰⁴ The phrase “terrorist activities” is also broadly defined. For a discussion on the comparison of the “reasonable suspicion” standard in this context as opposed to others, see Shirin Sinnar, Essay, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566, 1581–1600 (2016).

¹⁰⁵ *Mapp v. Ohio*, 367 U.S. 643, 648, (1961) (describing the exclusion of evidence as a “deterrent safeguard.”). *But see* *United States v. Janis*, 428 U.S. 433, 448–54 (1976) (discussing the deterrent effect of the exclusionary rule, including doubting the empirical evidence supporting deterrence).

¹⁰⁶ U.S. NAT’L COUNTERTERRORISM CTR., MARCH 2013 WATCHLISTING GUIDANCE 34 (2013) https://www.eff.org/files/2014/07/24/2013-watchlist-guidance_1.pdf [<https://perma.cc/B78Z-XESV>] (“Single source information, including but not limited to ‘walk-in’, ‘write-in’, or postings on social media sites, however, should not automatically be discounted merely because of the manner in which it was received.”).

¹⁰⁷ *Latif*, 28 F. Supp. 3d at 1161.

¹⁰⁸ Notices of the revisions to the TRIP procedures were filed in several cases in April 2015. See Notice Regarding New Redress Procedures, *Mohamed v. Holder*, No. 1:11-CV-50-AJT-MSN (E.D. Va. Apr. 13, 2015), ECF No. 188; Notice Regarding Revisions to DHS TRIP Procedures, *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014) (No. 3:10-CV-00750-BR) ECF No. 197; Memorandum in Support of Government’s Motion for a Limited Stay of Proceedings with Regard to Plaintiff’s Official Capacity Claims at 1, *Tanvir v. Lynch*, 128 F. Supp. 3d 756 (S.D.N.Y. 2015), *rev’d in part sub nom.* *Tanvir v. Tanzin*, 889 F.3d 72 (2d Cir. 2018) (No. 1:13-cv-06951), ECF No. 90.

¹⁰⁹ See Defendants’ Consolidated Memorandum in Support of Cross-Motion for Partial Summary Judgment and Opposition at 22, *Latif v. Holder*, No. 3:10-cv-00750-BR

Civil liberties groups and academics question whether the improved procedures are adequate. They argue that the procedures still fail to provide adequate notice to individuals as to the reasons for their nominations, do not disclose the evidence against watch-listed individuals, and do not provide a hearing, among other things.¹¹⁰ Moreover, the “reasonable suspicion” standard for nomination itself has not been altered. As a result, the No-Fly List remains a powerful tool in the hands of law enforcement agents.

While the major litigation in this area has highlighted the significant risk of error,¹¹¹ public reports of abuses of the No-Fly List also raise real concerns about the potential for deliberate exploitation. The low threshold for nomination and minimal review on the front end, combined with a procedurally inadequate process for challenging placement on the back end, turn the list into a powerful coercion mechanism. Individual field agents have the ability to place a name on the No-Fly List.¹¹² For example, in one case that came to light after years of litigation, a Muslim woman who was also a Stanford scholar was denied boarding a U.S.-bound flight.¹¹³ Over the course of the lawsuit that challenged her placement on the list and the sufficiency of the process she was afforded, a deposition of the nominating FBI agents revealed that her nomination was in fact a result of human error: the agent had checked the wrong box on a form, resulting in her placement on the No-Fly List.¹¹⁴ In fact, the agent had interviewed her as part of an FBI outreach program to Muslims and Muslim institutions in the South Bay.¹¹⁵ Reports that the Terrorism Screening Center rejects

(D. Or. May 28, 2015), ECF No. 251 (citing Notice Regarding Revisions to DHS TRIP Procedures, *Latif v. Holder*, No. 3:10-CV-00750-BR (D. Or. Apr. 14, 2015), ECF No. 197).

¹¹⁰ See Plaintiffs’ Opposition to Defendants’ Cross-Motion for Summary Judgment and Reply in Support of Plaintiffs’ Renewed Motion for Partial Summary Judgment at 5, *Latif v. Lynch*, No. 3:10-CV-00750–BR (D. Or. Aug. 7, 2015) 2015 WL 10520493, ECF No. 267; Margaret Hu, *Big Data Blacklisting*, 67 FLA. L. REV. 1735, 1790 (2015) (analyzing revised procedures, noting that they do not include rights to access the underlying evidence that leads to nomination, live adversarial proceedings among other things).

¹¹¹ See Plaintiffs’ Opposition to Defendants’ Cross-Motion for Summary Judgment and Reply in Support of Plaintiffs’ Renewed Motion for Partial Summary Judgment at 5, *Latif v. Lynch*, No. 3:10-CV-00750-BR (D. Or. Aug. 7, 2015) 2015 WL 10520493, ECF No. 267.

¹¹² While the watchlists are coordinated by the Terrorism Screening Center (TSC), a multi-agency organization that is overseen by the FBI, it delegates nomination authorities to various agencies. See generally U.S. DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GEN. AUDIT DIVISION, Audit Report 09–25, THE FEDERAL BUREAU OF INVESTIGATION’S TERRORIST WATCHLIST NOMINATION PRACTICES (2009).

¹¹³ *Ibrahim v. Dep’t of Homeland Sec.*, 62 F. Supp. 3d 909, 911 (N.D. Cal. 2014).

¹¹⁴ *Id.* at 915–16 (detailing the process through which FBI agent Kelley erroneously nominated Dr. Ibrahim to the No-Fly List).

¹¹⁵ *Id.* at 916.

approximately 1 percent of nominations to the Database¹¹⁶ suggest significant control of the content of the list by the FBI since it is the primary nominating agency.

Perhaps unsurprisingly, the use and abuse of the No-Fly List to pressure individuals to become informants has been widely reported. For example, Mr. Tanvir and three other American-Muslim men who had all been placed or kept on the No-Fly List after refusing FBI agents' overtures to become informants filed suit in the Southern District of New York.¹¹⁷ The agents sought to task them with a range of behavior, including spying on their Muslim communities and neighborhoods, attending certain mosques, and participating in online Islamic forums and reporting back to the agents.¹¹⁸ It was not until the day before scheduled oral argument in this case that the FBI notified all four men that they would be able to travel.¹¹⁹ The plaintiffs argued that the lack of transparency and accountability in which the No-Fly List operates make it ripe for abuse by FBI field agents seeking leverage to recruit informants.¹²⁰ There have been numerous other examples, making it clear that individual agents view their power to list and de-list people as an additional tool in their toolbox as they seek out information from individuals about their communities.¹²¹ In

¹¹⁶ See Defendants' Objections and Responses to Plaintiff's First Set of Interrogatories at 11, *Mohamed v. Holder*, No. 1:11-CV-00050-AJT/MSN, (E.D. Va. July 16, 2015), ECF No. 91-3

¹¹⁷ First Amended Complaint, *supra* note 2 at 2.

¹¹⁸ First Amended Complaint, *supra* note 2, at 29.

¹¹⁹ Press Release, Ctr. for Constitutional Rights, American Muslims Who Refused to Become FBI Informants Finally Removed from No-Fly List (June 10, 2015), <https://ccrjustice.org/home/press-center/press-releases/american-muslims-who-refused-become-fbi-informants-finally-removed> [<https://perma.cc/8YTU-6QX8>].

¹²⁰ Press Release, Ctr. for Constitutional Rights, Lawsuit Exposes FBI Abuse of No Fly List to Coerce Individuals to Become Informants (Apr. 23, 2014), <https://ccrjustice.org/home/press-center/press-releases/lawsuit-exposes-fbi-abuse-no-fly-list-coerce-individuals-become> [<https://perma.cc/YR6E-AAR7>]; see also Nusrat Choudhury, *The No-Fly List: Where the FBI Goes Fishing for Informants*, AM. CIVIL LIBERTIES UNION (Sept. 27, 2013, 10:21 AM), <https://www.aclu.org/blog/no-fly-list-where-fbi-goes-fishing-informants> [<https://perma.cc/6ZHD-4K9V>] (making a similar argument in the context of another case).

¹²¹ Mr. Yonas Fikre, a U.S. citizen, alleged that FBI agents placed him on the No-Fly List in order to coerce him to become a government informant. *Fikre v. Fed. Bureau of Investigation*, 23 F. Supp. 3d 1268, 1274 (D. Or. 2014). Mr. Amir Meshal was denied boarding, and an FBI agent offered to remove Mr. Meshal from the No-Fly list if he agreed to serve as a government informant. Mr. Ibrahim Mashal was similarly offered to serve as a government informant in exchange for assistance in removing his name from the No-Fly List. See *Latif v. Holder*, 969 F. Supp. 2d 1293, 1300-01 (D. Or. 2013). Mr. Yaseen Kadura, a twenty-five-year-old medical student and U.S. citizen, was placed on the No-Fly List, and told by FBI agents that the only way he would be able to get off the list would be to work as their informant in Libya, where he has family. See Murtaza Hussain, *How a Young American Escaped the No-Fly List*, INTERCEPT (Jan. 21, 2016, 7:30 AM), <https://theintercept.com/2016/01/21/how-a-young-american-escaped-the-no-fly-list> [<https://perma.cc/477M-KRRA>]. Kevin Iraniha had a similar experience. See

an environment where agents are encouraged to recruit individuals in ways that are “limited only by the imagination,”¹²² the coercive potential of the No-Fly List is significant.

III. THE HARMS OF UNFETTERED INFORMANT RECRUITMENT

A. *The Anti-Democratic Nature of an Informer Society*

Unlike the totalitarian practice, the informant in America serves of his own free will, fulfilling one of the citizenship obligations of our democratic form of government.

J. Edgar Hoover, 1955¹²³

There is a fundamentally anti-democratic character to a state’s ability to force its citizens or residents to provide information about their beliefs, thoughts, associations, and daily lives. At present, that is the reality borne primarily by Muslims—however, this current infrastructure may be easily expanded.

The recruitment of terrorism informants described in this article is different from the coercion of criminal informants, equally omnipresent in some communities.¹²⁴ Society tolerates a certain degree of coercion against prospective informants who are also accused or suspected of their own wrongdoing. A negotiation of rights is a central pillar of the criminal system, as is evidenced by the centrality of the plea agreement. It draws on the notion that the government may justifiably impinge upon the liberty of a person who has committed a crime.¹²⁵ Or, in

Shirin Sadeghi, *U.S. Citizen Put on No-Fly List to Pressure Him Into Becoming FBI Informant*, HUFFINGTON POST (Aug. 7, 2012), https://www.huffingtonpost.com/shirin-sadeghi/kevin-iraniha-no-fly-list_b_1579208.html [<https://perma.cc/2UKQ-SJNJ>]. Michael Migliore, a dual citizen of the United States and Italy, had traveled by ship to Europe because he was on the U.S. government’s No-Fly List. Mr. Migliore believes he was placed on the list after he refused to be interrogated by the FBI without an attorney present. See Nick Baumann, *Michael Migliore, the FBI, and Shadowy Interrogations Abroad*, MOTHER JONES (Sept. 22, 2011, 10:00 AM), <https://www.motherjones.com/politics/2011/09/michael-migliore-fbi-interrogations/> [<https://perma.cc/3C2J-GV63>]; see also Press Release, Council on American-Islamic Relations Greater L.A. Area Chapter, *The FBI’s Use of Informants, Recruitment and Intimidation Within Muslim Communities* (Mar. 26, 2009), <https://www.scribd.com/document/106515982/CAIR-LA-The-FBI-s-use-of-Informants-Recruitment-and-Intimidation-within-Muslim-Communities> [<https://perma.cc/X46J-ZJDY>] (listing additional examples).

¹²² See, e.g., FITZGERALD, *supra* note 11, at 43–58 (describing recruitment process of informants, encouraging investigators to “strike”, using forms of pressures that are “limited only by the imagination, experience and skill of the investigator.”).

¹²³ HEWITT, *supra* note 5, at 158 (citing HARNEY & CROSS, *supra* note 61, at 15).

¹²⁴ See *supra* note 12–15 and accompanying text.

¹²⁵ Jean-Jacques Rousseau presents the most pointed version of the rationale that a criminal essentially “consents” to some form of retributive punishment when committing a crime. (“[I]t is in order to avoid becoming the victim of a murderer that one

political terms, criminal defendants are not sympathetic by virtue of the crimes they have committed.¹²⁶ In contrast, similar moral judgments—whatever their validity—may not be drawn against the prospective informants in the intelligence context, as well as the unknown number of informants coerced through other non-criminal methods.¹²⁷

Sociologist and surveillance studies scholar Malin Åkerström observed that

[a]ll societies demand that citizens report on each other to a certain extent. How much and the range of behavior expected to be reported varies between countries. . . . The more totalitarian and the more interested their leaders are in suppressing criticism, the more such informer systems will be used.¹²⁸

The way a society treats its informants or handles its covert police actions provides insight into its broader political, cultural, and social dynamics. Gary Marx, in his sociological work on informants, noted that “[b]y studying the changes in covert tactics, a window on something much broader can be gained.”¹²⁹ Writing in 1988, he had prescient awareness of the evolving nature of his field, noting how perceptions of privacy were significantly different from those fifty years earlier—and that they would undoubtedly be different from someone reading his book decades later.¹³⁰

Presently, the burden of surveillance is disproportionately borne by certain communities—Muslim, Arab, South Asian and Middle Eastern communities have experienced the brunt of post-September 11 law enforcement policies. Indeed, there is a distinct difference between the mass surveillance as experienced universally in light of revelation of technologically-enabled metadata collection,¹³¹ and the intimate, quotidian, and acute in-

person consents to die if one becomes a murderer oneself.”). JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* 79 (Maurice Cranston trans. Penguin Books 1968) (1762).

¹²⁶ See Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 40 (1992) (“The cooperating witness is not a strong candidate for sympathy. He is likely getting much better than he deserves—either full immunity or a lenient outcome, unmerited in terms of the degree and nature of his criminal activity, and purchased by his often unrepentant and selfish willingness to assist in ensuring that others get what they deserve.”).

¹²⁷ See, e.g., Alice Goffman, *On the Run: Wanted Men in a Philadelphia Ghetto* 74 AM. SOC. REV. 339, 350 (2009) (describing instances where police officers in Philadelphia threatened to call Child Protective Services on a woman with young children if she fails to provide information about her older fugitive son’s whereabouts).

¹²⁸ MALIN ÅKERSTRÖM, *BETRAYAL AND BETRAYERS: THE SOCIOLOGY OF TREACHERY* 21 (1991).

¹²⁹ GARY T. MARX, *UNDERCOVER: POLICE SURVEILLANCE IN AMERICA*, at xxv (1988).

¹³⁰ *Id.* at 2.

¹³¹ Privacy scholars have thought about and theorized harms of this type of surveillance. See, e.g., Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV.

person surveillance to which Muslim-Americans have been subjected in the aftermath of September 11. This daily, widespread surveillance has had chilling consequences on speech, religious practice, and many other aspects of Muslim life in America.¹³² While the harms of surveillance on the communities subjected to it are important to further understand, this article is particularly focused on the unique harms that result from a system that requires entire segments of a community to do the government's bidding.

The reality is that certain groups experience surveillance disproportionately. Gary Marx calls this "categorical suspicion";¹³³ David Lyons calls it "social sorting."¹³⁴ Lyons' social sorting theory of informant societies posits that some groups will be intensively targeted, and the majority of society will not feel the impact. In this way, surveillance is not only a means of control, but also a means of perpetuating and reinforcing differences and assigning worth.¹³⁵ But these different realities also make the majority-based political forces less likely to intervene to protect the rights of those most marginalized and acutely affected by these policies. In fact, early attempts by the Bush administration in the immediate aftermath of the September 11 attacks to mandate "average citizens" and certain employees to provide information to the government were met with severe backlash.¹³⁶ Yet in Muslim communities, the expectation of becoming informants is underway in far more aggressive and coercive ways. This expectation of American Muslims is reflected in the national discussion of government relationship with Muslims. Public officials and presidential candidates' statements regularly express an expectation that Muslim-Americans come

1934, 1934–35 (2013); Daniel J. Solove, *Data Mining and the Security-Liberty Debate*, 75 U. CHI. L. REV. 343, 343–45 (2008).

¹³² See generally MAPPING MUSLIMS, *supra* note 18.

¹³³ MARX, *supra* note 129, at 219.

¹³⁴ DAVID LYON, SURVEILLANCE STUDIES: AN OVERVIEW 185–87 (2007) (describing social sorting and terrorist watchlists).

¹³⁵ See HEWITT, *supra* note 5, at 136.

¹³⁶ TIPS was designed to provide "millions of American truckers, letter carriers, train conductors, ship captains, utility employees, and others, whose routines allow them to be the 'eyes and ears' of police, a formal way to report suspicious or potential terrorist activity." *Id.* at 138. The program was met with extreme backlash, from the American Civil Liberties Union, to Republican Congressmen. *Id.* at 139. Congress defunded the program fairly early on. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 880, 116 Stat. 2135, 2245 (2002) (codified as amended at 6 U.S.C. § 460 (2000 & Supp. III) ("Any and all activities of the Federal Government to implement the proposed . . . Operation TIPS . . . are hereby prohibited.")).

forward or provide information to the government, even in the absence of any particular knowledge that they might have.¹³⁷

The potential reach of these practices, if gone unchecked, is unlimited. While this article focuses on the No-Fly List and the CARRP program, there is a growing use of civil, non-criminal punitive tools across the board.¹³⁸ These tools raise concerns that similar techniques might already be proliferating in other directions, and these may be used to coerce people to act as informants with minimal to no oversight. The propagation of policing theories encouraging agents to “pull levers” appears to endorse the idea that law enforcement agents should reach their targets by utilizing whatever tools they have at their disposal.¹³⁹

B. *The Constitutionality of Coercing Informants*

Coercing individuals to become informants also raises constitutional concerns. While the case law directly speaking to situations like Mr. Tanvir’s and Mr. Ouassif’s is thin, this is more of a reflection of the degree of stigmatization and marginalization of the targets rather than any dispute as to the significant constitutional implications of such coerced informancy.¹⁴⁰ A case from the 1980s attests both to the

¹³⁷ This approach was put on exhibit during the 2016 Presidential elections, as both major party candidates regularly referred to Muslims as needed, or required, to provide information. Then-candidate Donald Trump spoke to Muslims “We love you . . . We want you to turn in the bad ones. We want you to practice vigilance. We know that you know a lot, in many cases, we want you to turn in the bad ones.” David Sherfinski, *Donald Trump to Muslims: ‘We love you,’ ‘we want you to turn in the bad ones’* WASH. TIMES (Dec. 8, 2015), <https://www.washingtontimes.com/news/2015/dec/8/donald-trump-muslims-we-love-you-we-want-you-turn-/> [<https://perma.cc/L5JD-XZGX>]. Similarly, candidate Hillary Clinton said, “[w]e need American Muslims to be part of our eyes and ears on our front lines.” Deepti Hajela, Jeff Karoub & Noreen Nasir, *U.S. Muslims Cringe at How Presidential Nominees Portray Them*, ASSOCIATED PRESS (Nov. 2, 2016), <https://elections.ap.org/content/us-muslims-cringe-how-presidential-nominees-portray-them> [<https://perma.cc/RU74-Q9X6>].

¹³⁸ See Jennifer Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Noncustodial Prevention*, 99 CORNELL L. REV. 327, 335–55 (2014) (noting the proliferation of pre-crime restraints, discussing the Specially Designated Global Terrorist List, the No-Fly List, the Sex Offender Registries, among others, and the related erosion of core civil liberties).

¹³⁹ See David M. Kennedy, *Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention*, 31 VAL. U. L. REV. 449, 449–51 (1997) (arguing that criminal mechanisms for enforcement are insufficient at curbing repeat offenders—and proposes an alternative of using “characteristics of chronic offenders . . . as a route toward the control of selected dimensions of criminal behavior”).

¹⁴⁰ Only a few civil claims have been brought by individuals who were coerced into becoming intelligence informants. A review of civil claims brought by informants reveals that the majority of them involve a criminal informant scenario: individuals seeking damages for harms incurred during the course of their work. There are two primary theories—the state-created danger doctrine, and the “special relationship” doctrine. See *Butera v. District of Columbia*, 235 F.3d 637, 647–52, 654 (D.C. Cir. 2001) (A mother of a confidential informant brought a wrongful death action after her son was

uncontroversial nature of the notion that one cannot be forced to become an informant, as well as the challenges ahead for any plaintiff brave enough to challenge such FBI activity. It also serves as an important reminder of the historic precedents to modern FBI practices: Ms. Bibi Angola, a lawyer, and a friend of prison escapee and black liberation activist Assata Shakur, filed suit after FBI agents, through aggressive intimidation and harassment, attempted to force her into providing information about Ms. Shakur. According to the complaint, FBI agents came to her home, “terrorized her son,” threatened to damage her legal career, and repeatedly slashed her tires. In addition, they also questioned her friends and neighbors.¹⁴¹ Ms. Angola sought injunctive and declaratory relief, claiming a violation of her associational rights. The Second Circuit found that she had sufficiently stated a claim, and asserted a broader anti-coercion principle enshrined in the Constitution. The court wrote:

Every person enjoys some measure of protection against being coerced into cooperating with law enforcement authorities by governmental techniques of intimidation and harassment. Whether this protection derives from the liberty interest protected by the Fifth Amendment or the privacy interest protected by the First and Fourth Amendments or the interest in procedural regularity protected by the Due Process Clause is not crucial to our decision in this case.¹⁴²

The court, however, underscored the rarity of this kind of finding—that the threshold for establishing a motive to intimidate was high, and occurrences of such improper law enforcement motives are “infrequent.”¹⁴³ *Angola* is among the very few examples of civil claims brought by individuals who were coerced into becoming intelligence informants.¹⁴⁴

beaten to death while acting as a confidential informant. The District of Columbia Circuit concluded that endangering the informant may violate his substantive due process—namely an individual’s constitutional right to protection by police officers from a state-created danger. However, this was not clearly established at the time of the violation, and therefore the court found that the officers were entitled to qualified immunity); *see also* *Matican v. City of New York*, 524 F.3d 151, 156 (2d Cir. 2008) (there is no special relationship between police and informant because the informant freely agreed to serve as a confidential informant in exchange for more lenient treatment); *Vaughn v. City of Athens*, 176 Fed. App’x 974, 976–78 (11th Cir. 2006) (finding that police do not have a duty to protect an informant while not in custody, despite knowledge of threats on the informant’s life); Rich, *supra* note 12, at 702–03. These theories are not applicable to the intelligence informant scenario described here. First, the informal intelligence informant is not typically asked to engage in dangerous conduct in the same way that an informant participating in a sting operation would be. Second, it does not address the coercive recruitment aspect that is the focus of this piece.

¹⁴¹ *Angola v. Civiletti*, 666 F.2d 1, 2 (2d Cir. 1981).

¹⁴² *Id.* at 3.

¹⁴³ *Id.* at 4.

¹⁴⁴ *See Kennedy, supra* note 139.

Had the *Angola* court further need to elaborate, it might have turned to the First Amendment. The First Amendment protects against compelled speech or compelled association; in other words, it protects the right not to speak and not to associate.¹⁴⁵ Refusing to work as an informant or to provide information to the government is a form of protected speech,¹⁴⁶ because under the compelled speech doctrine, a person may not be compelled to express either an opinion or a fact.¹⁴⁷ Though the Supreme Court has prohibited compelled speech, it has not examined the doctrine in the context of compelled informant activities, or compulsory cooperation with law enforcement.¹⁴⁸ In addition to providing information, many intelligence informants are required to engage in religious activities or attend certain mosques; to make assertions about their faith, or their religious or political views; to pretend to act “extremist;” to take an oath to convert to Islam; and to make a variety of other religious or

¹⁴⁵ See *Tanvir v. Lynch*, 128 F. Supp. 3d 756, 759 (S.D.N.Y. 2015), *rev'd in part sub nom.* *Tanvir v. Tanzin*, 889 F.3d 72 (2d Cir. 2018) (The four plaintiffs argued that their refusal to become informants was a First Amendment protected activity, and that FBI agents retaliated against them by placing or keeping them on the No-Fly List.).

¹⁴⁶ Prisoners, however, have not generally been recognized to have a right to not be an informant or “snitch” due to the different standard of review applicable to the prison context. See *Burns v. Martuscello*, No. 9:13-CV-04, 2015 WL 541293, at *1 (N.D.N.Y. Feb. 10, 2015) (a prisoner’s refusal to be a “snitch” does not amount to protected speech under the First Amendment); *Allah v. Juchenwioz*, 176 F. App’x 187, 189 (2d Cir. 2006) (finding that it was not clearly established that a prisoner enjoys a constitutional right not to become an informant); *Tennyson v. Rohrbacher*, Civ. Action No. 11-35, 2012 WL 366539 at *6 (W.D. Pa. Jan. 25, 2012) (no circuit has held that a prisoner enjoys a constitutional right not to become an informant); *Koch v. Lewis*, 96 F. Supp. 2d 949, 966 (D. Ariz. 2000) (A prisoner challenged a prison policy granting greater privileges if the prisoner renounced his affiliation with a prison gang and acted as an informant. The prisoner argued that his Christian beliefs forbade his acting as an informant. The court applied the more deferential review applicable in the prison context and dismissed the claim.).

¹⁴⁷ See, e.g., *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 797–98 (1988) (“These [compelled speech] cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of ‘fact’: either form of compulsion burdens protected speech.”); see also *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1284 n.4 (10th Cir. 2004) (“[T]he First Amendment’s proscription of compelled speech does not turn on the ideological content of the message that the speaker is being forced to carry. The constitutional harm—and what the First Amendment prohibits—is being forced to speak rather than to remain silent.”); *Russo v. Cent. Sch. Dist. No. 1*, 469 F.2d 623, 634 (2d Cir. 1972) (noting that compelled speech and compelled silence were “constitutionally equivalent” and that “the right to remain silent in the face of an illegitimate demand for speech is as much part of First Amendment protections as the right to speak out in the face of an illegitimate demand for silence. . . . To compel a person to speak what is not in his mind offends the very principles of tolerance and understanding which for so long have been the foundation of our great land.”).

¹⁴⁸ It is unclear whether any lower courts have either, outside of the prison cases referenced above. See *Tanvir*, 128 F. Supp. 3d at 764–65 (The district court never reached the merits of the First Amendment arguments). The Second Circuit opinion in *Angola*, discussed above, may be the only such instance. See *supra* note 141 and accompanying text.

political utterances. These activities can be likened to coerced pledges of allegiance, which are prohibited by First Amendment jurisprudence.¹⁴⁹ Because of the religious overtones of informant recruitment and activities, they also raise Free Exercise and Establishment Clause concerns, as well as religious freedom concerns. Indeed, some individuals have argued that being an informant is prohibited by their Islamic faith.¹⁵⁰ They invoked both constitutional and statutory protection from being compelled to do so.¹⁵¹ In a first, the Second Circuit upheld the availability of a damages claim under the Religious Freedom Restoration Act¹⁵² for plaintiffs who could show that FBI agents infringed on their religious freedom when seeking to recruit them to inform on their communities.¹⁵³

A variant of a compelled speech claim is that the type of FBI recruitment described here often requires compulsory disclosure of religious or political affiliations by prospective informants to the FBI. For example, FBI agents ask individuals to name who attends their mosque, what their political or religious views on certain matters are, or what religious scholars they follow. These acts infringe on the right to freedom of and privacy in association.¹⁵⁴ This is particularly the case when a

¹⁴⁹ See *Russo*, 469 F.2d at 631 (“[T]here is no question but that the refusal to recite the pledge and salute the flag is a form of expression, and it matters not that the expression takes the form of silence.”). In *Wooley v. Maynard*, 430 U.S. 705 (1977), the plaintiffs brought a suit enjoining enforcement of a New Hampshire statute which required individuals to display the state motto “Live Free or Die” on their license plates. The Court agreed that that statute implicated the plaintiff’s free speech rights by compelling him to be “an instrument for fostering public adherence to an ideological point of view he finds unacceptable.” *Id.* at 715.

¹⁵⁰ Three plaintiffs in *Tanvir v. Lynch* argued that they did not want to become informants out of religious conviction, among other reasons. See First Amended Complaint, *supra* note 2 at ¶¶ 14, 122, 157. Others have made similar assertions about their faith, even though they have not presented this as a legal claim. See, e.g., Aaronson, *supra* note 80 (A religious leader, Mr. Farahi, refused to be an informant, saying that his motivation for not being an informant was because of the trust people had in him as a religious leader.). Mr. Ouassif similarly noted that this would go against his religious beliefs. Waldman, *supra* note 3. Claims that acting as an informant would violate religious beliefs have not been limited to Muslim individuals. See, e.g., Rebecca Spence, *Case of Informant Reverberates Through L.A.’s Orthodox Community*, FORWARD (Jan. 23, 2008), <https://forward.com/news/12542/case-of-informant-reverberates-through-la-s-orth-01183/> [<https://perma.cc/8VXU-YDWT>] (noting that it goes against traditional Jewish law to betray another Jew); see also *Koch*, 96 F. Supp. at 966 (inmate argues that being an informant goes against his Christian faith).

¹⁵¹ Three of the four plaintiffs in *Tanvir v. Lynch* argued that being compelled to act against their faith was a violation of their rights under the Religious Freedom and Reformation Act. See *Tanvir v. Tanzin*, 889 F.3d 72, 80 n.5 (2d Cir. 2018).

¹⁵² 42 U.S.C. §§ 2000bb–2000bb–4 (2012)

¹⁵³ *Tanzin*, 889 F.3d at 83.

¹⁵⁴ *Nat’l Ass’n for Advancement of Colored People v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (“Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”).

group espouses “dissident beliefs” and there is a risk that compelled disclosure of affiliation in such a group could expose those members to various forms of reprisal.¹⁵⁵ Certainly, being a member in a religious group or a targeted population does not necessarily make one a “dissident,” and most would probably not self-define as such. Under dominant government theories of radicalization,¹⁵⁶ however, which link certain markers of religiosity with the potential for terrorist activity, individuals may fear being subjected to official or private reprisal for being members of a particular group.

FBI informant recruitment practices also implicate associational rights. A corollary of the right to associate is the right not to associate. Many of these would-be informants are tasked with joining certain mosques, or engaging with members of their communities in ways that they would otherwise not have. Thus, they are also being compelled to associate, not simply to speak.¹⁵⁷

From a law enforcement perspective, it has been well-established that coerced information presents significant accuracy concerns.¹⁵⁸ These are the primary sources of concern that judges have when evaluating an informant.¹⁵⁹ Such concerns are just as valid in the intelligence context as the criminal context.¹⁶⁰ Policy arguments against coercion are, however, beyond the scope of this article.

¹⁵⁵ *Id.*

¹⁵⁶ See Akbar, *supra* note 36, at 869.

¹⁵⁷ See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000) (holding that state law requiring Boy Scouts to accept homosexual member was unconstitutional); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 234–35 (1977) (holding that, because a union’s requirement that individual members support union activities would entail the advancement of interests and ideas that members did not share, the employee’s right not to associate could be infringed by union laws); *Elrod v. Burns* 427 U.S. 347, 349 (1976) (involving freedom of a public employee not to be forced to associate with a political party as a condition of retaining employment).

¹⁵⁸ See MICHAEL D. LYMAN, PRACTICAL DRUG ENFORCEMENT: PROCEDURES AND ADMINISTRATION 132 (1989) (“[A]n informant’s motives could weigh heavily against the officer’s safety or the credibility of the investigation.”). The range and variations in incentives and motivations for informants have been closely scrutinized in sociological and law enforcement literature: One such effort is Greer, *supra* note 10, at 509–25. Another 1960 study by Malachi L. Harney and John C. Cross, based on American policing experience, suggest a number of motivations: Financial reward, “the Fear Motive,” “Revenge Motives,” “Perverse Motives,” “Egotistical Motives,” “Mercenary Motives,” “The Detective Complex,” “Selective Law Enforcement,” “Repentance or Desire to Reform”, “Appreciation or Gratitude Toward Police or Prosecutor”, and “Demented, Eccentric or Nuisance Type Individuals.” HARNEY & CROSS, *supra* note 61, at 41–48.

¹⁵⁹ See *infra* notes 205–208 and accompanying text.

¹⁶⁰ See HEWITT, *supra* note 5, at 29 (noting that intelligence services, even those operating in non-democratic societies, view coerced informers as less effective as free informers); Ansari & Dato, *supra* note 24 (quoting anonymous FBI officials concerned that coercing intelligence informants through immigration pressures may result in bad intelligence); see also Stabile, *supra* note 16, at 240–41 (arguing that informants

IV. THE EXISTING RESTRAINTS ON INFORMANT RECRUITMENT

This Part describes the current administrative rules and legal doctrines governing the use of incentives or pressure to recruit informants. Existing rules do not adequately address the unique problems raised by the new intelligence informant—the “Muslim informant” practices described in Parts I and II. Where they fail, however, the courts have also presented limited avenues for relief.

A. *The Department of Justice Guidelines*

A review of the primary sources of guidance governing the FBI’s formal recruitment of informants yields three observations. First, they do not distinguish informants recruited for criminal investigation and prosecution from informants recruited for intelligence gathering. Second, they assume a highly formalized process for the recruitment of Confidential Human Sources that does not correspond with the observed reality of today’s intelligence gathering methods in Muslim communities. Third, they are relatively silent—and therefore permissive—on what FBI agents may or may not offer or use as leverage to secure the cooperation of potential informants.

Beyond perfunctory acknowledgement, the standards do not evince a serious concern for the civil liberties of a potential informant. These deficiencies are likely due to the origins of the guidelines, which were designed to respond to corruption, and other pitfalls of using informants from the ranks of high-ranking criminals.¹⁶¹ In particular, they arose out of a concern that excessive or unsupervised rewards result in poor information or intelligence.¹⁶² Further, the guidelines are reportedly violated or sidestepped by FBI agents with impunity, suggesting that the agencies fail to adequately assure that agents follow even the existing rules.¹⁶³

pressured through threats of deportation have more to lose, and therefore are more likely to provide unreliable information).

¹⁶¹ See generally OIG Compliance Report, *supra* note 8; Zimmerman, *supra* note 23, at 99–100. To be sure, concerns about informant mishandling still exist today. See, e.g., Dell Cameron & Patrick H. O’Neill, *FBI Authorized Informants to Break the Law 22,800 Times in 4 years*, DAILY DOT (Aug. 23, 2016, 4:49 PM), <http://www.dailydot.com/layer8/fbi-informants-otherwise-criminal-activity-report-foia/> [<https://perma.cc/6CS6-F2QJ>].

¹⁶² OIG Compliance Report, *supra* note 8, at 68.

¹⁶³ *Id.* at 93 (finding major compliance deficiencies in eighty-seven percent of reviewed informant files). The Guidelines have generally been criticized as ineffective. See Zimmerman, *supra* note 23, at 133–38; David A. Harris, *Law Enforcement and Intelligence Gathering in Muslim and Immigrant Communities After 9/11*, 34 N.Y.U.

1. The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources¹⁶⁴

The current Department of Justice Guidelines on Confidential Human Sources (CHS Guidelines) were promulgated in 2001 by Attorney General Janet Reno in response to high profile corruption scandals in the 1990s involving Mafia informants.¹⁶⁵ Earlier iterations of the guidelines were similarly triggered by a series of high-profile incidents of corruption, of criminal conduct by informants, and other mishandlings.¹⁶⁶ Likely because of these origins, the guidelines focus on reducing potential abuses by criminal informants or corruption by agents vis-à-vis informants. They impose documentation, reporting, and evaluation requirements on agents who want to use or recruit an informant.¹⁶⁷

Tellingly, there is very little in the CHS Guidelines regulating the methods agents may use to recruit potential informants. Despite extensive documentation requirements for “opening” and “validating” a new source, the guidelines say little

REV. L. & SOC. CHANGE 123, 164 (2010) (arguing that the FBI has abandoned the guidelines as a way to rein in how FBI agents use informants).

¹⁶⁴ U.S. DEP'T OF JUSTICE, OFFICE OF THE ATT'Y GEN., THE ATTORNEY GENERAL'S GUIDELINES REGARDING THE USE OF FBI CONFIDENTIAL HUMAN SOURCES (Dec. 13, 2006), <http://fas.org/irp/agency/doj/fbi/chs-guidelines.pdf> [<https://perma.cc/RP27-MEGV>] [hereinafter 2006 CHS Guidelines]; see also Dep't of Justice Guidelines Regarding the Use of Confidential Informants, DEP'T OF JUSTICE (Jan. 8, 2001), <https://www.justice.gov/ag/attorney-general-renos-confidential-informant-guidelines-january-8-2001#prohibition> [<https://perma.cc/Y9VP-ZKKM>]. The 2001 Guidelines were promulgated by Janet Reno and require each agency to develop its own specific guidelines in compliance. The 2006 CHS Guidelines are the most updated version of the FBI's application of the Reno Guidelines. In addition, the CHS Policy Guide expands and elaborates on the FBI DIOG. See *infra* note 182.

¹⁶⁵ OIG Compliance Report, *supra* note 8, at 8 (“As a result of a [two]-year review after high-profile problems in the FBI informant program came to light in the 1990s, Attorney General Reno issued revised Confidential Informant Guidelines.”). For the story behind the famous case of “Whitey” Bulger that drove the review, see DICK LEHR & GERARD O'NEILL, BLACK MASS: THE IRISH MOB, THE FBI, AND A DEVIL'S DEAL (2000).

¹⁶⁶ In 1976, Attorney General Edward Levi issued a memorandum called the Levi Informant Guidelines. The guidelines were “intended, in part, to diminish the perceived need for legislation to regulate and restrict the FBI's use of informants.” *United States v. Salemme*, 91 F. Supp. 2d 141, 190 (D. Mass. 1999). Revised guidelines were then issued every few years by subsequent attorneys general, generally in response to other high-profile investigations. For an account of the series of revisions under various administrations prior to the Reno Guidelines, see OIG Compliance Report *supra* note 8, at 36–55.

¹⁶⁷ For example, the Guidelines prohibit FBI agents from interfering in the investigation of an informant, and restrain the extent to which informants may be permitted to engage in otherwise illegal activity. See 2006 CHS Guidelines, *supra* note 164, at 26, 30–40. They also prohibit the exchange of gifts or other business transactions between DOJ personnel and informants and prohibit payments contingent on prosecution. *Id.* at 27–28. They require a heightened approval process prior to utilizing certain sensitive categories of informants, like someone who has a high rank in a criminal organization. *Id.* at 17–20.

about whether—and, if so, how—agents may incentivize their informants; the sparse terms on this subject suggest that agents are afforded wide discretion.

At the recruitment stage, the guidelines prohibit certain types of transactions—again largely appearing to be animated by concerns over corruption—but preserve broad discretion. For example, it is clear the FBI may not promise immunity from prosecution for any criminal activity unless explicitly authorized to do so by the guidelines.¹⁶⁸ The CHS Guidelines require a formal validation process for *every* Confidential Human Source.¹⁶⁹ This process requires noting what consideration an individual might be receiving from the government for his assistance, or any promises or benefits provided to the individual.¹⁷⁰

On their face, the Guidelines require agents to inform potential informants that they cannot make “promises or commitments . . . regarding [immigration] status . . . or the right of any person to enter or remain in the United States.”¹⁷¹ Such promises or commitments, in fact, may only be made by the United States Department of Homeland Security.¹⁷² The CHS Guidelines also require agents to notify potential informants that they may not follow through on promised rewards.¹⁷³ Finally, agents must instruct Confidential Human Source that their assistance or the information they provide is “entirely voluntary.”¹⁷⁴ These are the only provisions addressing the risk of coercion rather than corruption. Notably, the guidelines do not create an additional burden for an agent to ensure the voluntariness of an informant’s cooperation, nor do the guidelines establish any guidance on how to determine the voluntary nature of the transaction.

This minimalist approach to interfering with the informant negotiation process is consistent with the general proposition that agents receive significant leeway in identifying and recruiting informants. When faced with overwhelming incentives to recruit informants,¹⁷⁵ this language falls more in the category of “best practices” rather than the imposition of a requirement.

¹⁶⁸ 2006 CHS Guidelines, *supra* note 164, at 8.

¹⁶⁹ *Id.* at 12.

¹⁷⁰ *Id.* at 13.

¹⁷¹ *Id.* at 16.

¹⁷² *Id.*

¹⁷³ *Id.* at 15 (In addition, “the FBI cannot guarantee any rewards, payments, or other compensation to the Confidential Human Source.”).

¹⁷⁴ *Id.* at 14.

¹⁷⁵ Aaronson, *supra* note 22 (discussing classified FBI documents recommending that the agency increase to a minimum of five percent the number of agents dedicated exclusively to informant recruitment).

The FBI CHS guidelines also do not create any enforceable rights.¹⁷⁶ The congressional committee that was involved in drafting an earlier version of DOJ Guidelines, intended to regulate informant abuses, refused to make the guidelines judicially enforceable by giving courts more power to void a conviction when the guidelines have been violated.¹⁷⁷ Thus, their enforcement relies solely on the FBI's annual performance review of special agents, when, supposedly, possible violations are to be considered.¹⁷⁸

The guidelines also do not distinguish between recruitment for intelligence and recruitment for crimes. Although some provisions distinguish investigations involving national security, they primarily serve to *reduce* oversight and create a separate process for review of those sources.¹⁷⁹ Yet notably, even with these relatively permissive standards and requirements, an Inspector General review cited widespread non-compliance with the CHS Guidelines, particularly the provisions relating to approval, monitoring, documentation, and notification requirements related to confidential informants.¹⁸⁰ In sum, nothing in the guidelines would effectively prevent an FBI agent from employing an immigration or watchlist lever to coerce someone to provide information to the government.¹⁸¹

¹⁷⁶ 2006 CHS Guidelines, *supra* note 164, at 11 (“Nothing in these Guidelines is intended to create or does create an enforceable legal right or private right of action by a Confidential Human Source or any other person.”).

¹⁷⁷ See S. REP. NO. 97-682, at 396 (1982), <https://www.ncjrs.gov/pdffiles1/Digitization/124269NCJRS.pdf> [<https://perma.cc/W4CM-JSVV>]. This committee was a response to the 1980 Abscam investigations that revealed severe governmental misconduct during undercover operations. See *id.* at 1–6.

¹⁷⁸ OIG Compliance Report, *supra* note 8, at 124 (“[C]ompliance with these Guidelines is considered in the annual performance appraisal of [the Law Enforcement Agency’s] agents.”); see also *United States v. Flemmi*, 225 F.3d 78, 91 (1st Cir. 2000) (holding that FBI agents lack authority to promise immunity to informants, and absent such authority, any promise made is unenforceable).

¹⁷⁹ See 2006 CHS Guidelines, *supra* note 164, at 20–22; see also *infra* Section IV.A.2.

¹⁸⁰ See OIG Compliance Report, *supra* note 8, at 7–8.

¹⁸¹ See generally 2006 CHS Guidelines, *supra* note 164. A separate document, the FBI's Confidential Human Source Policy Manual does have a section on immigration, but the heavily redacted public version makes it difficult to determine whether it provides any additional limits on the use of immigration status for recruitment. See FED. BUREAU OF INVESTIGATION, POL07–0004–DI, CONFIDENTIAL HUMAN SOURCE POLICY MANUAL 47–52 (2007), <https://www.aclu.org/files/fbimappingfoia/20111110/ACLURM003436.pdf> [<https://perma.cc/22JQ-XKRH>].

2. The FBI Domestic Investigations and Operations Guide¹⁸²

The FBI's Domestic Investigations and Operations Guide (the DIOG) is another possible source of regulation, but one that also falls short of protecting against the abuses discussed above. The DIOGs amount to a detailed manual governing every aspect of an investigation, and they apply to all FBI activity. The DIOGs elaborate and implement the Attorney General Guidelines, which are in turn the result of the FBI's response to the Senate Committee's investigation into abuses of intelligence activities during the fifties, sixties and seventies, commonly known as the "Church Committee."¹⁸³ Some portions of the DIOGs complement the CHS Guidelines by providing more specifics about the procedures for informant recruitment.

The DIOGs divide investigative activity into three levels, each requiring varying degrees of factual predication. An assessment is the lowest level investigation. It does not require factual predication or a factual indication of criminal wrongdoing. There are in turn six types of assessments, varying with respect to their goal and authorized investigative techniques. One of these, a "Type 5" assessment, is used when an agent determines whether an individual is suitable to become an informant. This assessment is performed according to the DIOG's guidance on identifying, evaluating, and recruiting a potential CHS. A closer look at these requirements confirms that agents may target someone for recruitment simply because she happens to attend a particular mosque or belong to a particular community. According to the DIOG, individuals with good CHS potential have "placement and access to information or intelligence related to criminal or national security threats or investigations."¹⁸⁴ They may be identified through "database searches, surveillance of specific locations, attendance at specific events."¹⁸⁵ When conducting a Type 5 assessment, agents may investigate a particular individual to determine whether she is suitable as a Confidential

¹⁸² FED. BUREAU OF INVESTIGATION, THE DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE (2013) [hereinafter FBI DIOG], [https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20\(DIOG\)](https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20(DIOG)) [<https://perma.cc/N2F7-VFD2>].

¹⁸³ The first Attorney General Guidelines were issued by Attorney General Edward Levi in 1976, entitled "Domestic Security Investigation Guidelines." See OIG Compliance Report *supra* note 8, at 36–37.

¹⁸⁴ FBI DIOG, *supra* note 182, § 5.6.3.4.1.1, at 5-21.

¹⁸⁵ *Id.* In addition, the DIOGs specify that selected characteristics "may not be based solely on race, ethnicity, national origin, religion or activities protected under the First Amendment or a combination of only such factors." *Id.* § 5.6.3.4, at 5-21.

Human Source; they may also conduct investigations without any specific individual in mind.

Once a potential CHS is identified and evaluated, agents then move to the recruitment phase. In recruiting a potential source, “information from [redacted] or other information/intelligence available . . . may be used.”¹⁸⁶ Presumably, agents may draw upon the same databases used in the identification phase. Agents may also deploy a panoply of investigative techniques, including subjecting potential informants to a polygraph investigation and obtaining information from other federal agencies. As with the CHS guidelines, here, the publicly available non-redacted versions of the DIOGs are silent on how agents may incentivize their CHS.¹⁸⁷

These Type 5 assessment provisions apply to those who are being formally explored as sources of information. They do not address the questioning that occurs on a daily basis in Muslim-American communities under the guise of “voluntary interviews” because such interviews are not formally considered to be forms of informant recruitment. These interviews are permitted at any level of investigation and require very little, if any, factual predication. As with formal CHS recruitment, the guidelines are virtually silent about what agents may or may not say to a member of the public to solicit their participation in an interview. The guidelines only specify that any information must be provided “voluntarily,” and that “FBI employees may not obtain a statement by force, threats, or improper promises.”¹⁸⁸ If, during such an interview, the interviewee indicates that she wishes to consult an attorney, the interviewer should only “assess whether continuing the interview would negatively affect the voluntariness of any further information provided.”¹⁸⁹ In order to determine whether a statement has been given voluntarily, courts evaluate a “totality of the circumstances.”¹⁹⁰ Beyond this, the guidelines do not provide any detail or training on what circumstances cross the line and may render an interview involuntary.

¹⁸⁶ *Id.* § 5.6.3.4.1.3, at 5-22.

¹⁸⁷ While the 2013 version is completely silent, the 2011 version only refers in passing to agents’ reimbursement for expenses incurred. FED. BUREAU OF INVESTIGATION, THE DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE (2011) <https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29/fbi-domestic-investigations-and-operations-guide-diog-2011-version> [<https://perma.cc/KT5F-3G8Y>] § 5.6.3.4.6, at 5-25

¹⁸⁸ FBI DIOG § 18.5.6.1, at 18-19.

¹⁸⁹ *Id.* § 18.5.6.3, at 18-19.

¹⁹⁰ *Id.* at 18-20.

As with the CHS guidelines, the DIOGs are internally created and enforced: a violation of the DIOGs does not give rise to an enforceable, individual cause of action. Therefore, if an FBI agent violates the DIOGs in his or her interactions with an individual, that alone does not enable the individual to sue the FBI or the agent.

3. The Confidential Human Source Policy Guide¹⁹¹

The 2015 Confidential Human Source Policy Guide (Guide) provides significantly more detail on the above-mentioned rules with regards to the identification, recruitment, management, and payment of confidential sources. This Guide makes it clear that anybody can be recruited to become an informant. It lays out in some detail how FBI agents may recruit undocumented individuals. First, it encourages agents to collect a “dossier” on an individual, which could include derogatory information about the potential informant that could be used to coerce an unwilling individual. According to the Guide, agents have several avenues that they may pursue to incentivize informants who do not have a legal status in the United States, and it dedicates an entire chapter to immigration-related incentives. These include the “Significant Public Benefit Parole Program,” Deferred Action Program, Advance Parole, S-Visa, or the option to even provide a permanent residency status to a limited number of Confidential Human Sources.¹⁹² Significantly, once the person is no longer of value to the FBI, the handling agent must work with immigration authorities to locate and remove them.¹⁹³

B. The Limits of Judicial Oversight and Remedies

1. Judicial Oversight Through the Criminal Process

There are few judicial restraints on the FBI’s ability to coerce individuals to become informants. To the limited extent

¹⁹¹ FED. BUREAU OF INVESTIGATION, (U)0836PG, CONFIDENTIAL HUMAN SOURCE POLICY GUIDE (Sept. 21, 2015), <https://archive.org/details/ConfidentialHumanSourcePolicyGuide> [<https://perma.cc/5KGU-327Q>]

¹⁹² *Id.* at 63–74.

¹⁹³ *Id.* at 63 (“If any illegal alien CHS is determined to be unreliable or no longer suitable for use by as a CHS, the CA must close him or her and notify the [REDACTED] in writing of the individual’s status and location. The [REDACTED] must notify ICE headquarters to terminate the CHS’s adjustment of status, as appropriate. The CA must also notify the local ICE office of the CHS’s status and location. If the CHS’s location is unknown, the CA must work with ICE to locate the individual.”).

such restraints are available, they are inherent to the criminal justice process and therefore inapplicable to the intelligence informant. Whatever limited judicial oversight over informant recruitment exists comes through courts' presiding over warrant requests, witnesses, trials, or plea deals.¹⁹⁴ This check on coercion is of minimal use if, as in the intelligence context, an informant's activities are not intended to yield criminal prosecutions. Accordingly, the FBI's activities vis-à-vis intelligence informants remain largely outside the purview of the judiciary.

Most judicial opportunities for oversight of the informant recruitment process involve criminal informants, and are, in any case, offered limited restraints. As a baseline, the exploitation of informants' vulnerabilities in the criminal process is widely tolerated.¹⁹⁵ The mere ability to decline to arrest an individual¹⁹⁶ gives agents significant power to wield in their quest for information from someone over whom they have probably cause to believe is involved in some wrongdoing. Prosecutors enjoy similar discretion, and their charging decisions are virtually unreviewable by courts,¹⁹⁷ subject only to constitutional constraints.¹⁹⁸ Courts have supported this discretionary authority—for example, by finding that consent by an informant is valid even if obtained under threat of prosecution, or with a

¹⁹⁴ FED. R. CRIM. P. 11(C)(3)–(5). The adequacy of the plea-bargaining process in ensuring voluntary and knowing pleas has been questioned. *See, e.g.*, Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POLY REV. 61 (2015).

¹⁹⁵ *See Alexander v. DeAngelo*, 329 F.3d 912, 917–18 (7th Cir. 2003). While the Seventh Circuit allowed the plaintiff's Section 1983 claim to go forward because of the level of deceit employed by prosecutors to obtain her consent to become an informer, it embraced the general practice of informant recruitment in exchange for leniency.

[W]e cannot think of any reason, especially any reason rooted in constitutional text or doctrine, for creating a categorical prohibition against the informant's incurring [costs such as] the usual risk of being beaten up or for that matter bumped off by a drug dealer . . . in the hope of obtaining lenient treatment from the government.

Id. at 918; *see also supra* notes 123–130.

¹⁹⁶ *See Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (no cause of action against police who failed to enforce a domestic violence restraining order); *see also* Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L. J. 543, 543 (1960).

¹⁹⁷ *See generally* Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996).

¹⁹⁸ A prosecutor's discretion is subject to constitutional constraints. *See United States v. Batchelder*, 442 U.S. 114, 125 (1979). Such constraints include charging decisions based on an impermissible basis. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (Equal Protection Clause prohibits decision to prosecute based on an unjustifiable standard such as race or religion); *Thigpen v. Roberts*, 468 U.S. 27, 30–31 (1984) (violations of due process give rise to a presumption of prosecutorial vindictiveness).

promise for immunity.¹⁹⁹ Similarly, a criminal defendant against whom there is probable cause may be prosecuted after refusing to cooperate, and does not have a civil remedy to address coercion through a malicious prosecution claim²⁰⁰ or a selective prosecution defense.²⁰¹

Thus, when negotiating with informants, prosecutors have near-complete latitude.²⁰² A charging decision based on willingness to become an informant is not only accepted, but built into sentencing guidelines and procedures. By legislative design, service as an informant plays a powerful role during sentencing in the federal system.²⁰³ The widespread acceptance of the use of some coercion against prospective criminal defendants means that courts generally do not scrutinize the informant-handler relationship.²⁰⁴

When courts do inquire into an informant's motives or the circumstances of the informant deal, the driving interest is in assessing the reliability of the evidence obtained, and also avoiding tainting of any evidence.²⁰⁵ Neither of these considerations is applicable in the intelligence context when a criminal prosecution or trial is not envisioned. For instance, when inquiring into

¹⁹⁹ *United States v. Dowdy*, 479 F.2d 213, 229 (4th Cir.) *cert. denied*, 414 U.S. 823 (1973) (rejecting argument that consent was not voluntary because it was extended under the threat of a potential indictment); *see also United States v. Horton*, 601 F.2d 319, 322 (7th Cir. 1979); *United States v. Silva*, 449 F.2d 145, 146 (1st Cir. 1971), *cert. denied* 405 U.S. 918 (1972); *Good v. United States*, 378 F.2d 934, 936 (9th Cir. 1967).

²⁰⁰ In *Labensky v. Rozzi*, No. 98-7512, 1999 WL 146292, at *1 (2d Cir. Mar. 15, 1999), a plaintiff brought malicious prosecution, abuse of process, and retaliation claims after being arrested on valid drug charges by officers who were seeking her help in infiltrating a gang. When she vacillated, she was eventually indicted for the drug offenses. The Second Circuit found “refusal to cooperate with the government is not constitutionally protected conduct *in this context*.” (emphasis added). *Id.* at *2.

²⁰¹ *See United States v. Ross*, 719 F.2d 615, 620 (2d Cir. 1983) (“Where there is probable cause for believing a defendant has committed a crime, his prosecution is not constitutionally barred because the prosecutor’s selection of his, out of many other possible crimes to pursue, was precipitated by defendant’s failure to cooperate with law enforcement officials.”).

²⁰² *See, e.g., United States v. Singleton*, 165 F.3d 1297, 1298–99 (10th Cir. 1999) (federal statute prohibiting bribery does not apply to a prosecutor negotiating a plea agreement or recruiting an informant). In *Singleton*, the court described leniency for testimony as an “ingrained aspect of American legal culture.” *Id.* at 1302.

²⁰³ *See NATAPOFF, supra* note 12, at 50, 54. For example, The U.S. Federal Sentencing Guidelines allow the government to seek a sentence below the mandatory minimum by filing a motion “stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.” *Id.* at 52 (quoting U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. SENTENCING COMM’N 2008)). These provisions are used prolifically. There are similar provisions in the Federal Rules of Criminal Procedure, which permit courts to reduce sentences after they have been set as a reward for cooperation. FED. R. CRIM. P. 35.

²⁰⁴ *See Zimmerman, supra* note 23, at 129.

²⁰⁵ *See, e.g., Illinois v. Gates*, 462 U.S. 213, 230 (1983) (“[A]n informant’s ‘veracity,’ ‘reliability,’ and ‘basis of knowledge’ are all highly relevant in determining the value of his report.”).

whether an informant's tip can provide probable cause, courts are instructed to look at the veracity or reliability of an informant's information. Among the factors considered to establish reliability are the informant's motives, such as personal animus against a defendant,²⁰⁶ prior criminal record, or any quid-pro-quo by authorities.²⁰⁷ Relatedly, informants who are "citizens" or bystanders with no apparent motive to falsify are viewed by courts as inherently more reliable.²⁰⁸

2. Limited Civil Remedies

Beyond the protections inherent to the criminal process, constitutional violations should be remediable through affirmative civil litigation.²⁰⁹ However, civil suits against FBI agents based

²⁰⁶ *United States v. Stout*, 641 F. Supp. 1074, 1082 (N.D. Cal. 1986) (probable cause for the issuance of a warrant to search the defendant's residence was not established, in part because the officer-affiant had at least recklessly omitted the fact that the confidential informant was the husband of the woman whom the informant claimed was living with the defendant and involved with him in a major drug-distribution network).

²⁰⁷ *See, e.g., United States v. Huggins*, 299 F.3d 1039, 1046 (9th Cir. 2002) (rejecting defendants' contention that the failure to disclose in the application for a search warrant that the confidential informant was in custody and trying to secure a plea bargain was a material omission that justified suppression, noting that although the confidential informant was being prosecuted for a felony and was cooperating with the authorities in the hope of obtaining leniency, the informant's information was firsthand and corroborated by the police); *United States v. Gambino*, No. 88-1030, 1988 WL 132594, at *2 (9th Cir. Dec. 2, 1988); *United States v. Estrada*, 733 F.2d 683, 684, 686 (9th Cir. 1984) (finding that although the informant agreed to provide information in return for the officer's promise to write the sentencing judge in a state prosecution, the informant's information implicating the defendants was against penal interest, was detailed, and was partially corroborated by the police). *But see United States v. Medina-Reyes*, 877 F. Supp. 468, 475 (S.D. Iowa 1995) (No probable cause for the issuance of a warrant to search the defendants' residence, in part because the informant's unique cooperation agreement with the authorities provided that the informant would receive a specified lenient sentence only if the informant provided the authorities with a prosecutable case against two of the defendants within a specified period of time. Notwithstanding that the informant provided firsthand, corroborated information about the defendants' drug trafficking, the court concluded that probable cause was not established when the unique nature of the cooperation agreement was combined with the omission of significant facts from, and the inclusion of false information in, the affidavit).

²⁰⁸ In *Jaben v. United States*, the justices compared narcotics informants to civilian sources in a tax evasion case who were "much less likely to produce false or untrustworthy information." *Jaben v. United States*, 381 U.S. 214, 224 (1965). Courts regularly assume that a witness or bystander is more trustworthy than an informant recruited through the criminal process. *See, e.g., Panetta v. Crowley*, 460 F.3d 388, 395 (2d Cir. 2006) ("[I]nformation provided by 'an identified bystander with no apparent motive to falsify has a peculiar likelihood of accuracy.'" (quoting *Caldarola v. Calabrese*, 298 F.3d 156, 163 (2d Cir. 2002)). For some critiques of the citizen-informant doctrine, see Ariel C. Werner *What's in a Name? Challenging the Citizen-Informant Doctrine* 89 N.Y.U. L. REV. 2336, 2360-73 (2014).

²⁰⁹ *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987) ("When government officials abuse their offices, 'action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.'" (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)).

on constitutional violations—known as *Bivens*²¹⁰ actions and which are the judicially-created federal analog to a 42 U.S.C. § 1983 remedy—face several challenges. To bring a *Bivens* claim, a plaintiff has to show that there is no “alternative, existing process” for protecting the coerced individual’s interests, and, if the court finds the specifics of that case to be a new context for a *Bivens* action, that there are no “special factors” that “counsel[] hesitation” in providing a remedy.²¹¹ *Bivens* suits brought by plaintiffs making allegations of constitutional violations in the context of counterterrorism operations have generally encountered government opposition on the grounds that such a suit would implicate national security.²¹² Recent Supreme Court jurisprudence has further circumscribed the availability of *Bivens* remedies.²¹³ In the case of Mr. Tanvir and his co-plaintiffs who had religious objections to becoming informants, the Second Circuit recognized the availability of a damages action against the FBI agents under the Religious Freedom Restoration Act.²¹⁴ However, even if a court recognized the availability of a damages action against FBI agents, a plaintiff who successfully establishes a constitutional or statutory violation would still have to overcome the significant hurdle of qualified immunity afforded to FBI agents.²¹⁵

V. FALLING THROUGH THE CRACKS OF REFORM PROPOSALS

Criminal justice scholars have raised a number of constitutional and policy-based concerns regarding the coercive

²¹⁰ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 390–97 (1971) (holding that a civil remedy is available for injuries resulting from federal agents’ violation of the Fourth Amendment).

²¹¹ *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

²¹² See, e.g., *Arar v. Ashcroft*, 585 F.3d 559, 573 (2d Cir. 2009) (extraordinary rendition of terrorism suspect). In *Tanvir*, the defendants raised the *Bivens* “special factors” argument. See Memorandum of Law in Support of the Individual Agent Defendants’ Motion to Dismiss the First Amended Complaint at 18, *Tanvir v. Lynch*, 128 F. Supp. 3d 756 (S.D.N.Y. 2015), *rev’d in part sub nom. Tanvir v. Tanzin*, 889 F.3d 72 (2d Cir. 2018) (No. 1:13-CV-06951-RA), ECF No. 39. <https://ccrjustice.org/sites/default/files/assets/Tanvir%20%E2%80%93%20Motion%20to%20Dismiss%20Individual%20Capacity%20Defendants%E2%80%99%20Claims.pdf> [<https://perma.cc/7TN6-TEGJ>].

²¹³ See *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017); *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

²¹⁴ *Tanvir v. Tanzin*, 889 F.3d 72, 83 (2d Cir. 2018).

²¹⁵ See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (government officials performing discretionary functions are immune unless they violate “clearly established” rights and if “a reasonable person would have known” of that violation); see also *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (applying the qualified immunity analysis to FBI agents). The Supreme Court has suggested that qualified immunity sets a fairly high bar for plaintiffs, describing it as protecting “all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

aspects of the criminal informant-handler relationship, including at recruitment.²¹⁶ They have also articulated proposals to reduce the harms inherent to informant coercion practices.²¹⁷ Some have sought to prohibit the leveraging of criminal sanctions altogether.²¹⁸ None of these proposals, however, would adequately protect intelligence informants.

A. *Existing Reform Proposals*

Reform proposals to date have sought to elevate the protections that are embedded in the criminal justice system. They seek to capitalize on the prospect of cross-examination, the possibility of judicial oversight over warrants, the promise of competent access to counsel, and the self-regulation of agents fearful of tainting their case.²¹⁹ Procedural protections inherent to the criminal justice system are generally presumed to function as safeguards from various forms of law enforcement abuse. In the case of coercive informant recruitment, the rationale is that a defendant can choose to avail herself of an alternate, meaningful process if she chooses not to cooperate,

²¹⁶ See Zimmerman, *supra* note 23. See generally Susan S. Kuo, *Official Indiscretions: Considering Sex Bargains with Government Informants* 38 U.C. DAVIS L. REV. 1643 (2005) (questioning the soundness of an arrestee's "consent" when law enforcement coerces her into engaging in a sexual act in exchange for avoiding prosecution, arguing that special measures should be taken to ensure valid consent for informants undertaking sex acts); Daniel Moore, Comment, *Protecting Alien-Informants: The State-Created Danger Theory, Plenary Power Doctrine, and International Drug Cartels*, 80 TEMP. L. REV. 295, 319–23 (2007) (discussing the "state created danger" theory as a defense in deportation proceedings of aliens who acted as U.S. government informants); Rich, *supra* note 12 (invoking the Thirteenth Amendment and limitations on involuntary servitude to reform the practice of coercing informants in exchange for leniency in the criminal process). The problem of coerced informants has also received significant attention following publicized incidents of informants being harmed while they work. See, e.g., Sarah Stillman, *The Throwaways*, NEW YORKER (Sept. 3, 2012), <https://www.newyorker.com/magazine/2012/09/03/the-throwaways> [https://perma.cc/W6HM-KPQS].

²¹⁷ See NATAPOFF, *supra* note 12, at 140–41.

²¹⁸ See Rich, *supra* note 12, at 728. Professor Rich carves out three exceptions to his general proposed prohibition of informant recruitment of defendants or suspects: First, it may be permissible if the goal is to obtain information already in the informant's possession; second, officers may appeal to different motives, like pay or civic duty. *Id.* Otherwise, he argues that recruitment *after* conviction at trial or after a negotiated plea agreement would be permissible. *Id.* at 729.

²¹⁹ For a comparative perspective that highlights how the American system centralizes the transparency potential of the open courtroom and criminal trial as it relates to undercover operations relative to the German system which maintains secrecy of those operations throughout, see Jacqueline Ross, *The Place of Covert Surveillance in Democratic Societies: A Comparative Study of the United States and Germany*, 55 AM. J. COMP. L. 493, 506 (2007).

and so she has a real choice, even if her options are not ideal.²²⁰ From this perspective, abuses or mistakes can be caught or mitigated through robust judicial oversight or competent legal representation at every stage of the criminal process.

These protections are most prominently on exhibit in the five-star version of the criminal justice system. In her seminal book on criminal informants, Professor Alexandra Natapoff proposes that there is a “rich man’s version of the informant experience.”²²¹ This version—say in the mafia or white-collar crime context—is characterized by greater formality, regulation, and oversight.²²² An informant deal negotiated between defense counsel and the prosecutor affords some—although limited—protections to the recruit and, as the criminal justice system generally reflects political and social realities, those protections are more available to rich defendants.²²³ As a result, Natapoff has called for an expansion of these protections to “street criminals” being coerced through the criminal process—largely through extending some of the same protections accorded to the “rich informant” to the “poor informant.”²²⁴

A central pillar of these existing reform efforts involves increasing access to counsel for prospective criminal informants to negotiate the terms of possible cooperation. These proposals proceed on the theory that counsel would assist an individual with evaluating the risks and benefits of a prospective informant deal.²²⁵ In the criminal context, access to counsel would control agents’ ability to misrepresent the nature of the allegations, as well as the certainty of prosecution, and to help targets better assess their options ahead of reaching a cooperation agreement

²²⁰ Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 153 (1999) (noting that during the plea-bargaining process, “the defendant is free to proceed without the prosecutor’s concession”).

²²¹ NATAPOFF, *supra* note 12, at 140 (quoting MARX, *supra* note 129, at 8).

²²² *See id.*

²²³ *See generally* King, *supra* note 220 (discussing judicial tolerance—if not approval—of free trade in constitutional or statutory rights that occurs during the plea bargaining, sentencing agreements, and other stages in the criminal process). For a thorough analysis of the disparate treatment the criminal justice system provides according to race and class, see David Cole, *No Equal Justice* 1 CONN. PUB. INT. L.J. 19 (2001).

²²⁴ NATAPOFF, *supra* note 12, at 140–41.

²²⁵ Professor Natapoff proposes increased access to counsel, but recognizes this would severely limit the ability to recruit informants in the more routine dynamics between police and suspects in street and drug crime policing. NATAPOFF, *supra* note 12, at 183–84; *see also* Kuo, *supra* note 216, at 1679 (suggesting access to counsel and judicial oversight during plea bargaining or negotiation of informant deal involving a sex act is necessary).

or agreeing to become informants.²²⁶ Legislative reforms pushed by advocates have had a similar focus on access to counsel.²²⁷

These proposals are, however, tethered to the principle that existing criminal procedure provides a framework for minimizing harm. Yet this article has illustrated how a significant area of FBI activity exists outside of the criminal process altogether. For example, access to counsel in the immigration and watchlisting context provides only marginal benefits.²²⁸ Nor is judicial review through the criminal process a possibility, as intelligence informants are rarely tasked with obtaining the type of information intended to make it to judicial review. Thus, Muslim intelligence informants fall through the cracks of existing safety nets. Individuals like Mr. Tanvir and Mr. Ouassif remain unprotected even if the most protective reform proposals are implemented.²²⁹ Intelligence informant recruitment should be separately addressed, although that inquiry can be informed by the criminal informant context.

B. Towards an Intelligence Informant Paradigm

A federal judge who has closely monitored the evolution of law enforcement intelligence gathering practices over decades noted an evolution in the targets of surveillance—over time, various communities will find themselves in the crosshairs of law enforcement scrutiny.²³⁰ The rules and protections must evolve accordingly as the methods and targets evolve. Today, those targets have expanded to include Arab, Muslim and South

²²⁶ In the case of Rachel Hoffman, Ms. Hoffman was misled by officers into thinking she was facing criminal charges far more severe than she could possibly face. Thus, access to an attorney ahead of that agreement would likely have mitigated the coercion and led her to make to a more informed decision. See Stillman, *supra* note 216.

²²⁷ FLA STAT. ANN. § 914.28(3)(c), also known as “Rachel’s law,” requires that “a person who is requested to serve as a confidential informant [be given] the opportunity to consult with legal counsel.” FLA. STAT. ANN. § 914.28(3)(c). A New York Bill to amend the state criminal procedure law in relation to the regulation of the use of informants proposed a similar access to counsel provision. See 2007 New York Assembly Bill No. 1124, New York Two Hundred Thirtieth Legislative Session

²²⁸ See *supra* notes 94–97 and accompanying text regarding mandamus and minimal avenues for relief for CARRP holds. See *supra* Section II.C. for the limited role an attorney can play given the existing listing and de-listing process for the No-Fly List.

²²⁹ Some consideration has been given to individuals recruited outside the criminal process and through the S-1 visa, sometimes called the “snitch visa.” See Stabile, *supra* note 16, at 268.

²³⁰ Judge Haight’s opinion in *Handschu v. Police Dep’t of the City of New York* was addressing the evolution of the NYPD’s surveillance program over the several decades that he has presided over a class action law suit challenging police surveillance of political activities. “[I]t is an historical fact that as the decades passed, one group or another came to be targeted by police.” The members of the class in that case are all individuals and organizations residing in or operating in New York City. *Handschu v. Police Dep’t of the City of New York*, 219 F. Supp. 3d 388, 404 (S.D.N.Y. 2016).

Asian communities, and the methods have evolved to include non-criminal ones. Yet judicial and regulatory oversight has fallen behind—despite the significant liberties at stake.

This gap in regulation exists because the current recruitment practices are unprecedented in scale: widespread recruitment of non-criminal informants for intelligence purposes in the United States is arguably a new, post-September 11 development. Even the most prominent historical precedents of widespread infiltration of and informant recruitment among political groups in the United States reveal that those informants tended to be recruited through the criminal process.²³¹ And this is not unique to the United States: authoritarian regimes that relied heavily on recruiting a large number of informants still often did so after arrest and confession.²³²

In targeting Muslim informants outside of the criminal process, FBI agents have been able to take advantage of this gap in regulation and oversight. They have capitalized on their increasingly discretionary investigative tools with a near total absence of review of their informant recruitment practices. The situation described in this article results in a perverse incentive structure for the agent: as long as investigations do not yield a prosecution, FBI agents can insulate their informant-recruitment practices from judicial scrutiny. And as long as they do not formally recruit informants, FBI agents can evade even internal oversight by their supervisors and in their annual reviews per the FBI's administrative guidelines.

VI. SOME PROPOSALS

Strengthened procedural protections in the context of the CARRP program or the No-Fly List will reduce the discretion afforded to individual FBI agents—a necessary step to prevent their abuse. Improvement of these protections has been the primary goal of litigation efforts challenging the No-Fly List.²³³ The CARRP program has similarly been challenged in federal

²³¹ In his study of twenty-one cases involving informants involved in infiltrating social movements in the 1970s, Gary Marx observed that a large percentage were either formerly, or simultaneously informants for “traditional” criminal matters. He noted that this was prominent in the black movement, because “some groups such as the Panthers and Black Muslims sought to recruit from those with lower class and criminal backgrounds. Legal protest and illegal drugs were part of the same youth culture.” See Gary T. Marx, *Thoughts on a Neglected Category of Social Movement Participant: The Agent Provocateur and the Informant*, 80 AM. J. OF SOC. 402, 411 (1974).

²³² See Greer, *supra* note 10, at 516.

²³³ See, e.g., *Latif v. Holder*, 28 F. Supp. 3d 1134, 1161 (D. Or. 2014) (describing existing procedures as “wholly ineffective” and requiring the development of new, constitutionally adequate procedures).

court, although those cases have generally been resolved before reaching the merits.²³⁴ However, such improvements do not address the core problem raised by the growing practice of coercing informants. Indeed, it is likely that these tools will remain at FBI agents' disposal in some capacity, as the use of databases proliferates as a central component of counterterrorism efforts, as immigration enforcement remains a national law enforcement priority, and as agents continue to be incentivized to gather informants. Thus, the regulatory framework should be amended to strengthen prohibitions on the coercion of individuals to provide information to law enforcement. As discussed in Part III, the governing guidelines and regulatory schemes do not include robust anti-coercion principles, are unenforceable, and are unlikely to meaningfully alter agents' behavior. This is especially true in light of countervailing pressures to recruit informants. Revisions along the following principles would strengthen the protections available to individuals like Mr. Ouassif and Mr. Tanvir, and everyone else who might be deemed—at one point or another—to belong to a social, political or religious network or group that finds itself in the crosshairs of law enforcement attention.

A. *Guaranteeing Consent*

The DIOGs and the CHS guidelines should be strengthened to emphasize the voluntariness requirement. This can be achieved in a number of ways. For example, the guidelines can be amended to include a step at the outset of the interaction requiring FBI agents to execute the equivalent of a *Miranda* warning—a law-enforcement delivery of notice of rights—to any member of the public that they seek to recruit as an informant, or from whom they wish to obtain information. That warning should inform the potential informant that providing information to the government is voluntary, and that no negative consequences can follow from refusal. If applicable, the agents should also explicitly say that the outcome of pending immigration-related applications do not turn on cooperation.

In addition, when an agent obtains information from a member of the public, he or she should be required to note the

²³⁴ See, e.g., Complaint for Declaratory and Injunctive Relief at 4, *Muhanna v. USCIS*, No. 2:14-CV-05995, 2014 WL 3747595 (C.D. Cal. July 31, 2014), ECF No. 1 (filed but withdrawn without prejudice after the government acted on Plaintiffs' applications). A similar outcome appears to have unfolded in *Alwan v. USCIS*. See Complaint for Declaratory and Injunctive Relief Petitions for Naturalization, *Alwan v. USCIS*, No. 4:16-CV-00692 (dismissed E.D. Mo. Aug. 24, 2017), ECF No. 1.

circumstances under which the agent has obtained consent, with enough detail that would enable a reviewer to meaningfully assess the voluntariness of the encounter. Such a notation should be included in the formal summary of the interview. Through adding such a requirement, the agency would communicate to FBI agents that it is institutionally committed to ensuring that purportedly voluntary informants are in fact volunteers. Moreover, the mere prospect of having to detail the circumstances may act as a deterrent for abuse.²³⁵

It is worth acknowledging that the voluntariness of consent in an inherently coercive situation has long been questioned by scholars and police reform advocates.²³⁶ Proposals to require “consent forms” to ensure that officers have obtained appropriate consent ahead of a search have also had mixed results.²³⁷ Indeed, the instruction of rights does not automatically result in meaningful consent and it would likely present similar caution in this context, where the interaction between agents and members of the public—particularly vulnerable immigrants—is inherently coercive.

Finally, it would be important to add these proposed requirements to all types of assessments, and not just the “Type 5” assessment. This would prevent agents from circumventing the protections by further de-formalizing their engagement with potential intelligence informants. Such clarity in motivation is also a best practice, as it will also allow one reviewing an informant’s intelligence to assess accuracy.²³⁸

B. *Enforcement & Oversight*

Improving the prohibitions on coercing individuals is meaningless if there is no structure to ensure that the rules are

²³⁵ Research in the context of the use of force has shown that police departments that have reporting requirements can reduce police killings significantly. *See, e.g.*, Jay T. Jennings & Meghan E. Rubado, *Want to Reduce Fatal Police Shootings? This Policy Makes a Big Difference*, WASH. POST (Mar. 14, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/14/want-to-reduce-fatal-police-shootings-this-policy-makes-a-big-difference/?utm_term=.b696c46423f2 [<https://perma.cc/KLAF-WAU7>].

²³⁶ *See, e.g.*, Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 211–12 (2002).

²³⁷ *See* Nancy Leong & Kira Suyeishi, *Consent Forms and Consent Formalism*, 2013 WIS. L. REV. 751, 751, 782 (2013).

²³⁸ *See* DENNIS G. FITZGERALD, *INFORMANTS, COOPERATING WITNESSES, AND UNDERCOVER INVESTIGATIONS: A PRACTICAL GUIDE TO LAW, POLICY, AND PROCEDURE* 24 (2d ed. 2015) (“[C]larity in terms used to identify the various types of cooperators is essential. . . . lack of precision will also allow those case officers who, for various reasons including motives of impropriety, do not wish to register a person as an informant, a way out of the registration process by claiming that the person did not come within the definition.”).

followed, or if violations are not addressed in a meaningful way. Oversight of FBI agents' recruitment activities can be accomplished in several ways. Scholars have noted the powerful potential of Inspector General offices in protecting individual liberties, particularly in the national security setting where judicial review is often limited.²³⁹ The Department of Justice's Office of the Inspector General (OIG) has already conducted extensive investigations into the FBI's confidential human source practices, noting significant compliance deficiencies.²⁴⁰ Among the office's detailed recommendations have been the implementation of compliance plans, technical support, training and adjustment to personnel and performance plans, to name a few.²⁴¹ These recommendations were all primarily geared towards addressing the main problems at issue at the time—confidential informants who were participating in criminal activity.²⁴² An OIG review of informant recruitment practices with an eye towards overseeing the abuse of authority for informant recruitment purposes might similarly yield strong recommendations and deterrent effect.

Congressional oversight might also be considered. During 1983 and 1984, Congress considered the Undercover Operations Act, which would have required the Attorney General to promulgate Guidelines for undercover operations and subject them to congressional supervision. This act would have created a cause of action for a violation of any civil rights resulting from an undercover operation. The bill was never brought to a vote.²⁴³ If it could be passed, legislation giving a right of action to someone who was threatened, blackmailed, or otherwise coerced into providing information to the federal government would serve a significant deterrent effect.

²³⁹ Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1027–28 (2013).

²⁴⁰ See OIG Compliance Report, *supra* note 8, at 93–94.

²⁴¹ *Id.* at 133–34.

²⁴² See *supra* notes 164–166.

²⁴³ See *Undercover Operations Act: Hearing on S. 804 Before the Subcomm. on Crim. L. of the S. Comm. on the Judiciary*, 98th Cong. 8 (1984) <https://babel.hathitrust.org/cgi/pt?id=pur1.32754075297253;view=1up;seq=14> [<https://perma.cc/8Q6C-FPWX>]; see also *Undercover Operations Act*, S. 804, 98th Cong. § 3803 (1984) (proposed bill concerned with the rights of those who are being targeted by undercover operations, rather than the rights of those being coerced to become informants themselves).

C. *Segregating the Intelligence Informant Recruitment Functions*

The FBI functions as a federal police force as well as a domestic spy agency.²⁴⁴ This dual role is fairly unique: a comparative look at European states that have had longer histories with totalitarian regimes sheds some light on alternative approaches. In the United States, there is no institutional, regulatory or legal distinction between the recruitment of informants in the intelligence and the criminal contexts. Elsewhere, in societies that have had a longer history of dealing with repressive regimes, regulations have evolved to distinguish undercover police operations used for intelligence gathering from undercover operations aimed at gathering evidence.²⁴⁵

The FBI's procedures for informant recruitment should similarly be revised to differentiate between informants who are being recruited for intelligence gathering and those recruited for criminal investigations, applying heightened protections to the recruitment of intelligence sources.²⁴⁶ The current CHS guidelines create a special review procedure for recruitment of certain types of human sources.²⁴⁷ There are other special procedures outlined for different types of informants, including probationers, parolees, or prisoners.²⁴⁸ Ironically, a sensitive source involved in a national security investigation is exempt

²⁴⁴ Robert S. Mueller III, *The FBI's New Mission: Preventing Terrorist Attacks While Protecting Civil Liberties*, 39 STAN. J. INT'L L. 117, 120–22 (2003).

²⁴⁵ See, e.g., Ross, *supra* note 219, at 521–29 (comparing the German rules on undercover policing to American ones, noting that the German system has a much more deliberate distinction between intelligence gathering and evidence gathering, “preventative” and “repressive” functions of police work, and generally imposes higher constraints on undercover operations, likely in reaction to the memories of intensive surveillance under the German Democratic Republic); see also *id.* at 503 n.22–24 (describing a core distinction in German legal doctrine and of separation between police and intelligence agencies, a principle that solidified in response to the Gestapo experience).

²⁴⁶ There are precedents for such a differentiation: for example, different warrant requirements currently exist for a wiretap for criminal investigation and a wiretap for foreign intelligence gathering—with looser requirements for a foreign intelligence investigation. The Foreign Intelligence Surveillance Act (FISA) was enacted after congressional inquiries revealing widespread monitoring of political activities. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95–511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801–1863 (2012)). It required a warrant process for intelligence gathering purposes—civil liberties advocates were, at the time, proponents of creating this procedure because the alternative was no regulation. See Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306, 1309 (2004) (describing the origins of the FISA statute as a compromise between civil liberties advocates and supporters of surveillance, and the differences in procedural rules as applied to foreign versus domestic surveillance).

²⁴⁷ These “sensitive” sources include “Senior Leadership” source, a “Privileged or Media” source, a “High-Level Government or Union” source, or a source that has been registered for more than five consecutive years. 2006 CHS Guidelines, *supra* note 164, at 17–18.

²⁴⁸ *Id.* at 23–24.

from these special oversight procedures, and has separate, even less transparent ones.²⁴⁹ An opposite approach would be more appropriate, given the problem of coerced intelligence informants: recruitment of informants in the intelligence context should be viewed as *more* sensitive than the recruitment of other types of informants, and subjected to special review procedures.

CONCLUSION

This article has highlighted a significant area of counterterrorism policing: the push to turn entire communities into sources of information for the government. In repurposing a growing range of non-criminal levers to support their efforts to turn informants, FBI agents are engaging in a practice that is evocative of a totalitarian state and infringes on fundamental freedoms. Yet, because these levers fall outside the criminal process, existing legal and institutional protections do not prevent abuses. This article has ended with some specific recommendations that would begin to mitigate the individual, communal, and broader societal harms that result from the targeting of individuals for their associational identity and coercing them to become informants. However, “[b]ecause informant use and its problems are rooted in so many different social institutions, they cannot be fixed solely by changing legal rules.”²⁵⁰ The entrenchment of widespread, quotidian intelligence gathering from law abiding citizens requires further exposure and interrogation by scholars and policymakers alike.

²⁴⁹ *Id.* at 20 (“No Confidential Human Source who is providing information for use in international terrorism investigations, national security investigations, or other activities under NSIG shall be referred to the HSRC for review. Instead, the FBI shall provide notice to the National Security Division within 60 days of FBI Headquarters’ approval of the continued use of any such Confidential Human Source who is subject to enhanced review provisions of the FBI’s Confidential Human Source Validation Standards Manual.”).

²⁵⁰ NATAPOFF, *supra* note 12, at 175.