

Criminalizing the Armchair Terrorist: Entrapment and the Domestic Terrorism Prosecution

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Introduction

A variety of factors plague a defendant's rights in a domestic terrorism trial. This Note focuses on contemporary domestic terrorism prosecutions in which the defendants raise an entrapment defense. It suggests that federal courts apply a lower standard for prosecutors in proving predisposition by allowing nothing more than evidence of a defendant's religious or political beliefs, or general "impulse to lash out," to demonstrate predisposition. This Note further argues that this evidentiary laxity establishes a double standard in terrorism cases, and also manifests First Amendment problems. The crux of this Note is that federal courts should refine the entrapment doctrine within the terrorism-prosecution context. Rather than modify the doctrine—which arguably would result in convictions contrary to established precedent—federal courts should treat terrorism-related offenses like any other traditional crime. Further, the courts should exercise their inherent power to dismiss charges on due process grounds when the government's conduct in investigations is "outrageous" enough to violate fundamental notions of fairness under the Due Process Clause. By doing the above, federal courts would better preserve the constitutional rights of criminal defendants, as well as distinguish between legitimate and illegitimate threats of terrorism.

Part I provides a general overview of the entrapment doctrine. It describes the development of the judicially created doctrine, and the approaches taken by the Supreme Court to establish the predominant test that is now almost universally used—dubbed the "subjective" test—in which the court's main inquiry is the predisposition of the defendant to commit the offense for which he or she is charged. Part II argues that some recent cases suggest that federal courts have lowered the standard for the prosecution to establish predisposition

in terrorism cases, effectively resulting in a double standard for defendants charged with terrorism-related offenses. In addition, the courts implicate First Amendment concerns by allowing the prosecution to rely heavily on constitutionally protected material as evidence of the defendant's predisposition to commit the offense. Two contemporary terrorism cases, *United States v. Cromitie*¹ and *United States v. Siraj*,² outline these assertions. Part III proposes that federal courts should dismiss terrorism cases in which sting operations or acts of government inducement consist of "outrageous" government conduct, based on a finding that they violate the defendant's constitutional due process rights under the Fifth Amendment. This part surveys the development of the "due process defense" and asserts that particularly intrusive and expensive tactics exercised by the government to entrap unwary defendants in terrorism investigations warrant a finding of outrageousness.

I. The Entrapment Doctrine

Certain criminal offenses are difficult to detect by law enforcement by virtue of their being committed privately between consenting individuals.³ Such crimes tend to lack actual "victims," and thus law enforcement agencies implement the use of informants and provide "encouragement" for the commission of the actual offenses.⁴ In doing so, the government agent seeks to simulate a realistic environment in order to induce an individual to commit the crime, while simultaneously gathering evidence for prosecution.⁵ Such inducement may involve appeals to personal considerations, actual assistance in the planning of the crime, and the representation of benefits to be derived from the offense.⁶

These law enforcement tactics were traditionally most often used in "victimless" criminal activity, such as prostitution, counterfeiting, and narcotics manufacturing. However, with the government's

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1. *United States v. Cromitie*, 727 F.3d 194 (2d Cir. 2013).

2. *United States v. Siraj*, 468 F. Supp. 2d 408 (E.D.N.Y. 2007), *aff'd*, *United States v. Siraj*, 533 F.3d 99 (2d Cir. 2008).

3. 2 WAYNE R. LAFAYE, SUBST. CRIM. L. § 9.8 (2d ed. 2013).

4. *Id.*; see also Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125, 128 (2008).

5. LAFAYE, *supra* note 3.

6. *Id.*

increased focus on terrorism following the 9/11 attacks, law enforcement agencies have formulated a “proactive” or “preventive” orientation toward dealing with terrorism offenses.⁷ Undeniably, “[s]tate interests are particularly compelling in the terrorism context”; certainly more so than in traditional government sting operations, which typically involve drugs or financial crimes.⁸ This is a result of the gravity of terrorism offenses and their potential to create many victims, as well as impair national security generally. Indeed, such “preventive” tactics signal a shift in terrorism investigations and prosecutions, as, prior to 9/11, prosecutions generally focused on punishing individuals implicated in terrorist-related crimes that had already occurred.⁹

Perhaps even more so than the traditional crimes in which such government tactics were utilized, “terrorism-related offenses routinely involve individuals working together in close secrecy.”¹⁰ This has led law enforcement agencies to develop more creative tactics and increase the use of informants in investigating these types of offenses.¹¹ In addition, recent Federal Bureau of Investigations (“FBI”) guidelines permit the agency to surveil and investigate targets “without any particular factual predication.”¹² In this vein, the FBI formulated techniques that involve sending informants to mosques in an effort to uncover possible terrorist threats without articulable suspicion or probable cause.¹³

Given the existence of these types of law enforcement tactics, some may find it unsurprising that the entrapment defense developed in American jurisprudence. Furthermore, as terrorism sting operations and prosecutions became more common in federal courts following the 9/11 attacks, the defense has logically been extended to the context of domestic terrorism prosecutions as well. Commentators have noted that courts expected to see a “surge in terror-related entrapment cases” as a result of such law enforcement measures.¹⁴

7. *Id.*

8. Kent Roach, *Entrapment and Equality in Terrorism Prosecutions: A Comparative Examination of North American and European Approaches*, 80 MISS. L.J. 1455, 1456 (2011).

9. Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 430 (2007).

10. Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687, 688 (2010).

11. *Id.*

12. *Id.* at 708.

13. *Id.* at 710.

14. Stevenson, *supra* note 4, at 129.

The entrapment defense, if raised successfully, bars the conviction of a criminal defendant.¹⁵ The defendant must assert the defense to the jury and argue that “but for the government’s inducement, he or she would have never committed the offense.”¹⁶ Because it is a judicially created doctrine and not a constitutional one, no court is required to recognize the defense.¹⁷ Nevertheless, all federal and state courts currently do.¹⁸ Although there are two divergent approaches to the entrapment defense—dubbed the “objective” and “subjective” tests—the defense generally requires that the defendant was induced to commit the crime by the government, that the defendant would not have committed the crime but for the inducement, and that the government’s conduct was based on an effort to obtain evidence for prosecution.¹⁹ When a defendant raises an entrapment defense and puts the government inducement at issue, the prosecution must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime prior to being approached by the government.²⁰ Whether or not the government entrapped the defendant is generally a matter of fact for the jury, although the court may find the defendant was entrapped as a matter of law.²¹

The entrapment doctrine dates back to 1915, when the Ninth Circuit first evaluated a government scheme to induce the defendant to smuggle Chinese immigrants over the Mexican border in *Woo Wai v. United States*.²² There, the Ninth Circuit focused on the one and a half-year period the government spent attempting to influence the defendant to participate in the crime, until he “finally assented to enter into the scheme.”²³ However, it was not until 1932 that the Supreme Court upheld a defense of entrapment.²⁴ In *Sorrells v. United States*,²⁵ a government agent, posing as a World War I veteran, induced the defendant, a “fellow” veteran to obtain whiskey

15. LAFAVE, *supra* note 3.

16. Stevenson, *supra* note 4, at 137.

17. Joshua Dressler & Alan C. Michaels, *Criminal Procedure, Volume 1: Investigation*, 533 (6th ed. 2013).

18. *Id.*

19. *Id.*

20. *Id.* at 534.

21. *Id.*

22. *Woo Wai v. United States*, 233 F. 412, 414 (9th Cir. 1912).

23. *Id.* at 413–14.

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

25. *Id.*

(outlawed during Prohibition) for him, but only after asking him several times over the course of an hour.²⁶ The Supreme Court acknowledged that while the government may employ artifice and stratagem to apprehend individuals involved in criminal activity, “[a] different question is presented when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.”²⁷

Subsequent Supreme Court opinions have upheld and refined the *Sorrells* defense of entrapment.²⁸ In *United States v. Russell*, the Court explained that “the principal element in the defense of entrapment [is] the defendant’s predisposition to commit the crime.”²⁹ This focus on the defendant’s propensity to commit the crime for which he or she is being charged has been preserved within the approach to the entrapment defense and is now termed the “subjective test.”³⁰ Federal courts and the majority of state courts follow this test.³¹ On the flip side is the “objective test,” whereby the court, rather than focusing on the defendant’s predisposition to commit the alleged offense, focuses on the conduct of the government actors involved.³² In a similar vein, the Supreme Court has also noted that there exists some possibility to dismiss charges against a defendant on constitutional due process grounds where the conduct of the government is so “outrageous” that it violates the defendant’s due process rights.³³ Still, the Court has yet to dismiss a defendant’s charges on these grounds.

As noted above, in order for the government to annul the defendant’s entrapment claim, the government has the burden to prove that the defendant was predisposed to commit the crime.³⁴ Although the Supreme Court has, over the course of the past eighty years, upheld the entrapment doctrine and articulated this test, the Court has never explained *how* the government must prove a

26. *Id.* at 439–40.

27. *Id.* at 441–42.

28. *See* *Sherman v. United States*, 356 U.S. 369 (1958); *United States v. Russell*, 411 U.S. 423 (1973).

29. *Russell*, 411 U.S. at 433.

30. Said, *supra* note 10, at 693.

31. *Id.*

32. *Id.*

33. *See, e.g., Russell*, 411 U.S. at 432; *Hampton v. United States*, 425 U.S. 484, 489 (1976).

34. *Dressler & Michaels, supra* note 17, at 534.

defendant's predisposition.³⁵ Generally, the essential inquiry regarding predisposition is: what would the defendant have done had law enforcement agents not intervened?³⁶ Scholars have criticized this inquiry, for "only a saint would not commit a crime given the right inducement."³⁷

The Court's most recent discussion of the predisposition test within the entrapment context is *Jacobson v. United States*.³⁸ Here, the Court assessed a "56-year old veteran-turned-farmer[']s" entrapment claim following his conviction for ordering child pornography.³⁹ The defendant argued that he was induced to commit the crime as a result of the government's intricate, twenty-six-month-long investigation, which consisted of a series of inquiries and solicitations into his sexual inclinations.⁴⁰ For two and a half years, the government repeatedly made efforts, through "fictitious organizations and a bogus pen pal, to explore petitioner's willingness to break the . . . law by ordering sexually explicit photographs of children through the mail."⁴¹ The Court upheld the defendant's entrapment defense, a finding that was fueled largely by one critical factor: Even though Jacobson had previously ordered child pornography by mail (this was, after all, how he first came to the government's attention), at the time he had initially done so, the possession of child pornography was not yet illegal.⁴²

If the subjective test largely focuses on the actions of the defendant, and inquires into defendant's predisposition to commit the offense before the government approaches him or her, then it follows that such an inquiry could raise specific issues within the context of domestic terrorism trials.⁴³ Terrorism trials are typically accompanied with evidence exhibiting the defendant's political and ideological alignments.⁴⁴ This, in turn, ties in with the government's attempt to prove predisposition.⁴⁵ In an effort to assess and illuminate these

35. Said, *supra* note 10, at 696.

36. *Id.*

37. *Id.*

38. *Jacobson v. United States*, 503 U.S. 540 (1992).

39. *Id.* at 542.

40. *Id.* at 552–53.

41. *Id.* at 543.

42. *Id.* at 542–43.

43. Said, *supra* note 10, at 697.

44. *Id.*

45. *Id.*

issues, it is useful to review contemporary terrorism trials in which the defendants raised entrapment claims.

II. The Standard in Contemporary Terrorism Trials

A. *Cromitie* and the Double Standard

Federal courts have experienced an increase in domestic terrorism prosecutions following the 9/11 attacks.⁴⁶ Muslim and Arab men, unsurprisingly, are the typical defendants in these prosecutions.⁴⁷ Furthermore, the government commonly relies on invasive, widespread surveillance and secret informants to investigate these cases.⁴⁸ The government's conduct in some circumstances is aggressive enough to raise due process concerns and has in turn resulted in many defendants raising entrapment claims.⁴⁹ However, since the 9/11 attacks, not a single defendant charged with terrorism-related offenses has achieved an acquittal as the result of a successful entrapment defense.⁵⁰

One high-profile terrorism prosecution in which the defendant raised an entrapment defense is *United States v. Cromitie*.⁵¹ In *Cromitie*, four men were prosecuted and convicted in the Southern District of New York for plotting to blow up two Bronx synagogues.⁵² None of the defendants had prior convictions related to terrorism.⁵³ Further, the government failed to show that the defendants had any connection to a terrorist organization before a government informant approached James Cromitie.⁵⁴ Cromitie was a forty-two-year-old Muslim man and had a history of petty drug offenses, for which he had been repeatedly convicted.⁵⁵ He worked at a Walmart store,

46. Amy Waldman, *Prophetic Justice*, THE ATLANTIC (Oct. 2006), available at <http://www.theatlantic.com/magazine/archive/2006/10/prophetic-justice/5234/>.

47. *Id.*

48. Stevenson, *supra* note 4, at 126.

49. *See infra* Part III.

50. Said, *supra* note 10, at 696–97. *See generally* Kevin A. Smith, *Psychology, Factfinding, and Entrapment*, 103 MICH. L. REV. 759, 762 (2005) (explaining that although statistical data on the general success of entrapment claims is difficult to come by, anecdotally, it seems the defense is rarely successful).

51. *Cromitie*, 727 F.3d 194.

52. *Id.* at 199.

53. *Id.* at 212.

54. *Id.*

55. *Id.* at 200.

“earning less than \$14,000 per year.”⁵⁶ The district court judge referred to Cromitie as “an impoverished man.”⁵⁷

The inducement to engage in a terrorist attack was extensive and aggressive, and was part of an elaborate sting operation. Shahed Hussain led the inducement.⁵⁸ Hussain was a government informant and Pakistani national who was granted asylum by the United States in the mid-1990s.⁵⁹ After receiving asylum, he was convicted of fraud and, to avoid deportation, began to work as a paid informant for the FBI.⁶⁰ Hussain befriended Cromitie and over a period of several months, planted the seeds of the government inducement. The inducement consisted of promises of large sums of money upon completion of the crime, luxury vehicles and all-expense-paid vacations to Puerto Rico for Cromitie and his family.⁶¹ Hussain provided the proposals for specific plans regarding the attack, as well as all the necessary materials.⁶² Still, Cromitie did not evince a quick and easy willingness to participate; during one of Hussain and Cromitie’s first encounters, Cromitie expressed his desire to “straighten himself out,” which was why he was “working hard . . . at Walmart.”⁶³ At another point early on in the investigation, Cromitie expressed dubiousness regarding what good, if any, violent attacks in the United States would bring to the Muslim cause.⁶⁴

Almost a year into the investigation, Cromitie and Hussain even lost touch for six weeks.⁶⁵ Cromitie agreed to meet again and subsequently carry out the plan only after Hussain offered him \$250,000 and additional encouragement for the completion of the crime.⁶⁶ Following this contact, the many pieces of the government’s puzzle swiftly came together, as agents created phony Improvised Explosive Devices (“IED”) and stinger missiles, and Hussain chauffeured Cromitie and the three co-defendants around New York where they surveilled targets, purchased handguns, and even trained

56. *Id.*

57. *Id.*

58. *Id.* at 199.

59. *Id.*

60. *Id.*

61. *Id.* at 211.

62. *Id.*

63. *United States v. Cromitie*, 781 F. Supp. 2d 211, 216 (S.D.N.Y. 2011).

64. *Id.* at 217.

65. *Cromitie*, 727 F.3d at 202.

66. *Id.* Cromitie contacted Hussain and shared his financial woes. In a recorded conversation, Hussain then said, “I told you, I can make you 250,000 dollars, but you don’t want it brother. What can I tell you?” *Id.* at 219.

the defendants in how to arm and plant the fake IED's and stinger missiles.⁶⁷ The government eventually arrested the four defendants while they were planting the fake IED's in a Bronx synagogue.⁶⁸ Even with the clearly questionable and outrageous government tactics used throughout the course of the investigation, the jury concluded that the government did not entrap the defendants and convicted them of various terrorism-related offenses. The Second Circuit upheld the verdict.⁶⁹

Because federal courts abide by the subjective test for entrapment, the outrageousness of the government's conduct plays a minor role in a finding of entrapment. Instead, once the District Court accepted Cromitie's entrapment defense, the government had to prove beyond a reasonable doubt that Cromitie was in fact predisposed to commit the offense before government agents approached him.⁷⁰ Although this Note's author finds the stringent subjective test an illogical one, for reasons not discussed here, the argument below analyzes what is troublesome regarding the subjective test *in this context*, rather than why it is generally troublesome, and less favorable than the objective test.⁷¹

Predisposition, the main inquiry of the subjective test, "focuses upon whether the defendant was an unwary innocent or, instead, an unwary criminal who readily availed himself of the opportunity to perpetrate the crime."⁷² In 1933, the Second Circuit set forth the three circumstances that establish predisposition within the Circuit: "an existing course of similar criminal conduct; the accused's already formed design to commit the crime or similar crimes, [or] his willingness to do so, as evinced by ready complaisance."⁷³ This prescribed paradigm created a problem for the Second Circuit in *Cromitie* because Cromitie had no criminal history that indicated any

67. Joshua L. Dratel, *The Literal Third Way in Approaching "Material Support for Terrorism": Whatever Happened to 18 C. § 2339B(C) and the Civil Injunction Option?*, 57 WAYNE L. REV. 11, 66 (2011).

68. *Id.*

69. *Cromitie*, 727 F.3d at 199.

70. *Id.* at 204.

71. See Ronald J. Allen, Melissa Luttrell & Anne Kreeger, *Clarifying Entrapment*, 89 J. CRIM. L. & CRIMINOLOGY 407, 413 (1999). Although the subjective test does require some form of government inducement, the sole focus on predisposition is meaningless, for as Professor Ronald Allen argues, "only a saint would not commit a crime given the right inducement." Sadie, *supra* note 10, at 696 (citing *id.*).

72. *Matthews v. United States*, 485 U.S. 58, 63 (1988).

73. *United States v. Becker*, 62 F.2d 1007, 1008 (2d Cir. 1933).

involvement in terrorism.⁷⁴ Further, Cromitie was not “willing” to commit the crime from the beginning; rather, he required several months of government inducement before agreeing.⁷⁵ Thus, ready complaisance was also absent.⁷⁶ The court’s only option then was to focus on Cromitie’s “already formed design” to commit the crime or similar crimes.

The focus on this “design” prong proved problematic in and of itself, as the Supreme Court had never defined the term within the context of entrapment.⁷⁷ The Second Circuit concluded that “design” must “take its meaning from the context of the type of criminal activity comprising the specific offenses a defendant has committed.”⁷⁸ The problem of laxity regarding evidence for predisposition manifested itself here, since Cromitie’s criminal history lacked any connection to terrorism. The court went on to state:

With respect to a category *as varied as terrorist activity*, the requisite design in the mind of a defendant *may be broader than the design for other narrower forms of criminal activity*. In view of the broad range of activities that can constitute terrorism, especially with respect to terrorist activities directed against the interests of the United States, the relevant prior design *need be only a rather generalized idea or intent to inflict harm on such interests*. A person with such an idea or intent can readily be found to be “ready and willing to commit the offence charged, whenever the opportunity offered.”⁷⁹

With this paragraph, the Second Circuit carved out a special realm of the entrapment doctrine for crimes specifically related to terrorism. By specifying that crimes of terrorism are more “varied” than other forms of criminal activity, the court established a lower standard for prosecutors when proving predisposition.⁸⁰ This allowed something as insignificant as a “generalized idea” to inflict harm on the United States’ interests to be sufficient for a finding of predisposition, and thus sufficient to overcome an entrapment

74. *Cromitie*, 727 F.3d at 212.

75. *Id.*

76. Twenty years after the *Becker* opinion, the Second Circuit changed the wording from “complaisance” to “compliance.” This rephrasing did not change the three ways in which the government may prove a defendant’s predisposition. *See id.* at 205.

77. *Id.* at 206.

78. *Id.* at 207.

79. *Id.* (emphasis added).

80. *Id.*

defense.⁸¹ In other words, the defendant need not have an already formed “design” to commit the specific offense for which he or she is prosecuted, but rather must only possess any state of mind that in any way inclines him or her to “inflict harm on the United States.”⁸²

This standard is particularly troublesome because there is essentially no limit to the kind of evidence the prosecution may present to show predisposition—no matter how attenuated, it may be offered against the defendant. This leaves little room for the fact finder to conclude anything other than the absence of entrapment, and convict the defendant. The standard suggests that even feeble evidence showing the defendant’s possession of literature authored by a known terrorist, or perhaps a Google search for “how to build a bomb,” would suffice to demonstrate predisposition.⁸³ Similar problems arose in *Cromitie*.

As mentioned above, post-*Jacobson*, the court’s inquiry into the defendant’s predisposition focuses on the defendant’s design *prior* to the government agent making contact. The *Cromitie* court looked at statements Cromitie made to the government informant during their initial introduction.⁸⁴ Though the statements were inflammatory, many of them simply constituted religious notions that the dissenting judge referred to as “boastful piety of a foolish man” and “banter in any faculty lounge.”⁸⁵ These statements included Cromitie’s remarks that he wanted “to die like a shahid, a martyr” and that he wanted to “do something to America.”⁸⁶ The *Cromitie* court found the defendant predisposed to commit the crime based on his “sense of

81. *Id.*

82. *Id.* at 207–08.

83. As of now, the author is unaware of an entrapment case in which the defendant was convicted purely on such evidence. However, defendants charged with terrorism-related offenses have nonetheless been convicted largely as a result of such evidence. *See, e.g., Aziz Z. Huq, The Signaling Function of Religious Speech in Domestic Counterterrorism*, 89 TEX. L. REV. 833 (2011) (discussing *United States v. Hayat*, 710 F.3d 875 (9th Cir. 2013)). In order to prove the defendant’s *mens rea* in providing material support for terrorism, the prosecution relied almost exclusively on a note found in the defendant’s wallet, which translated to “[I]ord, let us be at their throats, and we ask you to give us refuge from their evil.” *Id.* at 843. To demonstrate that this text was evidence of *mens rea*, the prosecutor proffered expert testimony that stated the note was a prayer “used by Muslim fanatics and extremists that consider themselves to be in a state of war with the rest of the world or their own government.” *Id.* The actual meaning behind the text was disputed all through appeal. *See id.*

84. *Cromitie*, 727 F.3d at 200.

85. *Id.* at 230 (Jacobs, J., dissenting).

86. *Id.* at 212.

grievance or . . . impulse to lash out.”⁸⁷ The dissent objected that such grievances and impulses are in most cases benign.⁸⁸

The sentencing opinion raises additional concerns on the issue of predisposition. There, the court refused to sentence Cromitie to life, as recommended by the Federal Sentencing Guidelines, on the basis that the government, not Cromitie, first introduced the idea of attacks.⁸⁹ The court further stated that “[t]he defendants were not engaged in any terrorist activity before they encountered the [informant]. In fact, they were not engaged in any sort of criminal activity at all.”⁹⁰

The *Cromitie* opinion is one example of a federal court giving in to current political tides and lowering the prosecution’s burden to establish predisposition in a terrorism-related entrapment case. This ultimately led to a conviction, which, if decided under the traditional entrapment paradigm, would not stand. Such a holding establishes an uneasy precedent as it creates laxity for the prosecution to establish predisposition. In *Cromitie*, the defendant never actually committed any prior similar offenses, evinced ready willingness to commit the offense or possessed even a “generalized idea . . . to inflict harm.”⁹¹ Yet, prosecutors established predisposition by showing the defendant’s mere alignment with a certain religious or political belief, or impulse to lash out. Such a standard runs contrary to established precedent because, as the dissent argued, a “generalized idea . . . to inflict harm” on the interests of the United States is not an “already formed design” to commit the crime; the “generalized idea of an act is not a disposition to do it.”⁹²

Federal courts should not reshape the entrapment doctrine in an attempt to force it into a mold that it clearly does not fit. By treating terrorism-related offenses within the entrapment context the same as any other traditional crime, the courts would preserve established precedents and, in turn, prevent the questionable convictions of defendants that would otherwise be acquitted under the traditional standard. In addition, the courts would escape the risk of providing

87. *Id.* at 229 (Jacobs, J., dissenting).

88. *Id.*

89. *United States v. Cromitie*, No. 09 Cr. 558(CM), 2011 U.S. Dist. WL 2693297, at *2 (S.D.N.Y. June 29, 2011).

90. *Id.* at *3.

91. *Cromitie*, 727 F.3d at 207.

92. *Id.* at 228 (Jacobs, J., dissenting) (“The majority opinion renders entrapment untenable as a defense. Unsurprisingly, the majority’s definition [of ‘already formed design’] is incompatible with precedent.”).

juries with a faulty foundation to convict defendants who, without the aid and inducement of the government, would pose no legitimate threat to the United States and its interests.

B. *Siraj* and the First Amendment Problem

Another high profile terrorism prosecution in which the defendant raised an entrapment defense is *Siraj*.⁹³ Shahawar Siraj was a twenty-four-year-old Pakistani immigrant.⁹⁴ He was convicted of several conspiracy counts relating to an alleged plot to blow up a subway station in New York City.⁹⁵ He was young, impressionable⁹⁶ and, again, had no prior convictions or connections relating to terrorist activity.⁹⁷ Osama Eldawoody, the chief government informant, was a fifty-one-year-old Egyptian immigrant.⁹⁸ During his tenure as a government informant, Eldawoody frequented New York City mosques and conducted surveillance on congregants.⁹⁹ Upon finding Siraj, the inducement began: Eldawoody initially suggested the proposed attack and the method to create a bomb.¹⁰⁰ Eldawoody further created a phony organization, dubbed “the Brotherhood,” which—he told Siraj—would supply the materials necessary to carry out the attack.¹⁰¹ Eldawoody was the main witness for the government at trial.¹⁰²

Siraj’s entrapment defense was, like Cromitie’s, based largely on his absence of predisposition to commit the crime for which he was being charged.¹⁰³ The evidence entered against Siraj was, in many ways, weak: Eldawoody lacked credibility because he was a government informant who frequented mosques in order to target individuals like Siraj.¹⁰⁴ Another government witness was Siraj’s co-conspirator, a nineteen-year-old schizophrenic, who agreed to cooperate with the government.¹⁰⁵ In an effort to bolster the assertion

93. *Siraj*, 468 F. Supp. 2d 408.

94. Said, *supra* note 10, at 715.

95. *Id.*

96. *Id.* at 716 (discussing how the prosecution’s chief witness testified to this notion).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. Said, *supra* note 10, at 717.

104. *Id.* at 716.

105. *Id.* at 717.

that Siraj did in fact possess predisposition, the government entered into evidence a variety of constitutionally protected materials, including books and videos that the defendant possessed that praised so-called violent jihad and testimony regarding the defendant's approval of Osama Bin Laden.¹⁰⁶ Siraj raised the First Amendment concerns during the trial and the court responded:

Defendant also argues that allowing the undercover officer's testimony raises "considerable First Amendment concerns" by criminalizing legitimate political discourse. However, even if the undercover officer testified to statements made by defendant that may be described as reflecting defendant's political views, those statements were properly admitted as discussed above. That defendant's statements contain political expression does not insulate defendant from their use at trial where the statements also rebut his testimony and prove predisposition.¹⁰⁷

So what exactly is the issue with admitting such evidence against a defendant in an effort to prove predisposition? After all, the *Jacobson* court did state that relevant evidence of what a defendant does or says prior to government contact is admissible.¹⁰⁸ First and foremost, it should be noted that the court's response to Siraj's First Amendment concern is rather bare in its reasoning. It does not address the prejudicial effect of the evidence, nor more importantly, does it touch on the actual First Amendment concern: the notion that heavy reliance on such evidence could have an effect of criminalizing political expression or speech. The court shrugs off the argument and simply restates what it already asserted: that the evidence proves predisposition.¹⁰⁹ Nonetheless, such admissions of evidence certainly do possess an eerie tint of criminalizing religious and political beliefs.¹¹⁰ By admitting such evidence against a defendant to prove his predisposition for an act of terrorism, absent additional stronger

106. *Id.*

107. *Siraj*, 468 F. Supp. 2d at 420.

108. *Jacobson*, 503 U.S. at 549 n.2.

109. See Wadie E. Said, *The Message and Means of the Modern Terrorism Prosecution*, 21 *TRANSNAT'L L. & CONTEMP. PROBS.* 175, 191-92 (2012) (noting the court's reasoning as a "because I said so" mentality).

110. Waldman, *supra* note 46.

evidence, the court makes the mere possession of such material (and the inferred belief in the ideology it promulgates) a proof of the propensity to commit violent terrorist acts.¹¹¹

This suggests that any defendant who possesses some religious or political belief deemed contrary to the United States interests—regardless of how benign the belief is or how peaceful the individual—is effectively precluded from raising a successful entrapment defense. This is precisely what happened in *Siraj*: The court and the jury construed the defendant’s religious and political beliefs as evidence of his predisposition to commit acts of violence.¹¹² Without strong, direct evidence, the government then leaned on other “proxies”—or used them to bolster other weaker evidence—including religious speech and political ideology, in an effort to show a predisposition to commit violent acts.¹¹³ This is further problematic because it facilitates a notion that Muslims, who espouse anti-United States opinions and possess jihadist literature and other provocative materials, are “criminals just waiting for an opportunity to transform rhetoric into action.”¹¹⁴ It also implicates the notion that a Muslim defendant prosecuted for terrorism has substantially fewer rights than a non-Muslim in the same position.

This Note does not assert that the government should be barred from entering such evidence against a defendant in a terrorism trial simply because it expounds the defendant’s political or religious beliefs. Rather, this Note questions whether such heavy reliance on this type of “proxy” evidence is constitutional. Beyond the effect of practically placing criminal sanctions on certain political and religious beliefs, a heavy reliance on such evidence also implicates First Amendment protections of freedom of religion and expressive association.¹¹⁵

This concern was previously raised by scholars within the context of government surveillance of individuals because of their political

111. Said, *supra* note 10, at 717.

112. *Id.* at 717–18.

113. Huq, *supra* note 84, at 836.

114. Dratel, *supra* note 68, at 73.

115. See Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance, and the Privacy of Groups*, 46 ARIZ. L. REV. 621 (2004). “[T]here is a risk that increased security measures will unduly focus on individuals and groups unlikely to be involved in terrorism. Those likely to be targeted by law enforcement, such as Muslims attending mosques or political dissidents protesting war in Iraq, can face repercussions considerably more serious than waiting in line to pass through a metal detector.” *Id.* at 622. It should be noted that in the entrapment context, these First Amendment implications only truly arise if the defendant’s thoughts and beliefs are followed by some kind of action.

associations.¹¹⁶ However, in the context of inducement-based law enforcement practices that revolve around terrorist plots, rather than merely being investigated or surveilled, defendants risk losing their liberty for their associations and beliefs. Allowing the prosecution to heavily rely on evidence pertaining to the defendant's objectionable political or religious beliefs, in absence of strong, direct evidence of predisposition, could certainly chill entire communities' freedoms of expression and association.¹¹⁷ The right of association is unequivocally infringed when organizations "must abandon or alter activities protected by the First Amendment."¹¹⁸ In *Siraj*, the government agents frequented mosques, specifically targeting individuals who possessed such beliefs.¹¹⁹ The government informant happened to come across Siraj, a young and impressionable Muslim, who had no prior connections to terrorism. Following the rejection of Siraj's entrapment defense, it seems that his viewpoints prior to the government inducement are essentially what led to his conviction since the government lacked credible or strong evidence of his actual predisposition to commit the substantive offense. Thus, it follows that this type of targeting by the government could chill the exercise of First Amendment rights in certain communities.

The government employs invasive and inducement-based techniques by targeting a very specific group of people: young, religious, and unsophisticated Muslim men. Undeniably, some of these individuals are engaged in lawful activities—including religious and political expression—even though their viewpoints may run contrary to those of the government.¹²⁰ The upshot is that terrorism prosecutions, where the government heavily relies on constitutionally protected material to prove the defendant's predisposition, inevitably chills the exercise of political and religious expression and association by this group. If the government can use this type of evidence to secure a conviction, despite a defendant's entrapment claim, it follows that people within this targeted group would fear expressing their viewpoints and refrain from associations with others who possess their viewpoints. This runs contrary to the primary goal of the First

116. See, e.g., *id.*; Roach, *supra* note 8; Michael R. Blood, *FBI Director Defends Use of Informants in Mosques*, MSNBC.COM (June 8, 2009, 9:48 PM), <http://www.nbcnews.com/id/31177049/>.

117. See Fisher, *supra* note 116, at 624 ("Targets of political surveillance typically report being chilled in the exercise of their rights to engage in free speech and the free exercise of religion").

118. *Id.* at 637.

119. See Waldman, *supra* note 46.

120. See Fisher, *supra* note 116, at 622.

Amendment: guaranteeing a “marketplace of ideas,” where truth and honest debate emerge from a multiplicity of voices.¹²¹

Cases like *Siraj* set murky precedent that suggest that even in an exceptionally weak terrorism case, where the prosecution has very little to rely on in terms of establishing a defendant’s predisposition, evidence of the defendant’s political or religious beliefs alone could pass muster and trump an entrapment claim. This reliance is problematic because such beliefs, standing alone, are not directly linked to a factual predisposition to commit violent acts. It thus creates a foundation for a jury to convict a defendant even though entrapment exists as a matter of law. Furthermore, First Amendment issues arise because this type of reliance potentially chills religious and associative freedoms.

III. “Outrageous Government Conduct” and the “Due Process Defense”

The government expends vast resources to investigate terrorism cases.¹²² Everything from informant salaries, to delegating agents, to cultivating imaginary plots shows that substantial resources are spent to apprehend would-be terrorists working at the direction of a government informant.¹²³ Prosecuting these cases is expensive too: Terrorism cases are complex and sometimes require years to litigate—for example, in *Cromitie*’s trial, the government informant’s testimony lasted thirteen days¹²⁴ and the jury deliberated for eight.¹²⁵ The risk of entrapment increased following the government’s reliance on these tactics and the use of confidential informants.¹²⁶ Also, these types of investigations raise issues regarding the proportionality of the punishments: It is not always clear what crime, if any, the defendant would have committed had it not been for the encouragement and assistance of a government informant.¹²⁷ This problem is evident in *Cromitie* and *Siraj*, where poor and unsophisticated defendants, with no prior connection to terrorist

121. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

122. See Waldman, *supra* note 46.

123. *Id.*

124. Tom Hays, *4 Men are Convicted in NY Synagogue-Bombing Plot*, ASSOCIATED PRESS (Oct. 18, 2010, 2:14 PM), <http://abclocal.go.com/wabc/story?section=news/local&id=7731175>.

125. *Cromitie*, 727 F.3d at 204.

126. Dratel, *supra* note 68, at 60.

127. *Id.* at 61.

activity, were encouraged and assisted by the government to plot terrorist attacks.

In a 1985 article, Judge Richard Posner explores the economic viability of undercover tactics that induce defendants to commit crimes, for which the defendants are subsequently prosecuted.¹²⁸ Posner argues that such police tactics are perfectly lawful, and generally make economic sense, for it is likely that the person who the police induced to commit the crime will commit those same crimes in the future.¹²⁹ Thus, it is “cheaper” to catch the individual “in an arranged crime than in his ordinary criminal activities.”¹³⁰ The problem, Posner argues, is when the police, rather than just simulating the defendant’s “normal criminal opportunities,” induce the defendant to commit a crime that he or she would never commit in his “ordinary opportunity.”¹³¹ Posner further states:

The police offer a poor man who has no criminal record one thousand dollars to steal a bicycle; he does so, and is arrested. The resources used to apprehend and convict the man of bicycle theft are socially wasted, because they do not prevent any crimes. Had it not been for the police offer, he would not have stolen a bicycle Nothing is achieved by the police conduct except deflating scarce resources from genuine crime prevention.¹³²

It begs the question: What crimes, if any, would the defendants in *Cromitie* and *Siraj* have committed if the government never approached them in the first place? Had it not been for his initial meeting with the government informant, Cromitie would likely never have been arrested for terrorist activity.¹³³ It is unquestionable that the government’s conduct in the investigation played a significant role

128. Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

129. *Id.* at 1220.

130. *Id.*

131. *Id.*

132. *Id.*

133. James Cromitie routinely displayed his unsophisticated demeanor and lack of experience throughout the entire inducement process. This included routinely forgetting “code words,” an inability to make the fake bombs “operational,” and forgetting to set the timer on one of the fake bombs. Francesca Laguardia, *Terrorists, Informants, and Buffoons: The Case for Downward Departure as a Response to Entrapment*, 17 LEWIS & CLARK L. REV. 172, 195 (2013).

in getting Cromitie to agree to commit the acts for which he was subsequently convicted. But just how outrageous need the government's conduct be to warrant a dismissal of charges against an unwary induced defendant? Precedent tells us that there is perhaps a threshold for outrageous government conduct that when reached, may result in the dismissal of charges under the Due Process Clause of the Fifth Amendment.

The first Supreme Court case to entertain this idea was *United States v. Russell*.¹³⁴ In *Russell*, the defendant was convicted on narcotics charges and raised an entrapment defense on the grounds that the undercover agents provided him with an ingredient necessary for the manufacture of methamphetamine, and that this particular ingredient was difficult to obtain, making it essential for the commission of the crime.¹³⁵ The Court found that because the defendant was an "active participant in an illegal drug manufacturing enterprise which began before the government had [made contact with him]," his entrapment defense was unwarranted.¹³⁶ In other words, the defendant was predisposed to commit the offense before being approached by the government and thus failed to meet a vital element of the defense.

The Court also assessed the defendant's second theory of defense: that the case warranted dismissal on due process grounds as a result of the government's "outrageous" conduct.¹³⁷ The Court found that the conduct of the agents was not sufficiently outrageous to justify dismissal on due process grounds, but left open the possibility of such a defense.¹³⁸ The Court said: "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, the instant case is distinctly not of that breed."¹³⁹

134. *Russell*, 411 U.S. 423.

135. *Id.* at 424–26.

136. *Id.* at 436.

137. *Id.* at 428, 431.

138. *Id.* at 432.

139. *Id.* (internal citation omitted). The Court explained that the agent contributed a legal ingredient that may have been difficult, though not impossible to obtain. This conduct, the Court said, falls "short of violating . . . fundamental fairness, shocking to the universal sense of justice, mandated by the Due Process Clause of the Fifth Amendment." *Id.*

Three years later, the Court revisited the due process defense in *Hampton v. United States*.¹⁴⁰ There, the defendant—convicted of heroin distribution—raised an entrapment defense, asserting that the heroin he sold to an undercover agent was supplied to him by another undercover agent.¹⁴¹ The Court, finding that the defendant had been predisposed to commit the offense, affirmed the conviction, but wrote three separate opinions.¹⁴² The plurality opinion, written by Justice Rehnquist, and joined by Chief Justice Burger and Justice White, argued that predisposition should completely bar not only the entrapment defense, but also the due process defense.¹⁴³ Justice Powell's concurrence asserted the converse and stated that even if predisposition was present, the defendant should not be precluded from raising the due process defense.¹⁴⁴ The dissent argued that the entrapment doctrine should be modified to focus not on the defendant's predisposition, but rather the government's conduct.¹⁴⁵

The above cases illustrate that a due process defense is available for a defendant whose commission of a crime was fueled by "outrageous government conduct" that is "shocking to the universal sense of justice" mandated by the Due Process Clause of the Fifth Amendment.¹⁴⁶ As noted above, the Court has yet to establish what constitutes conduct sufficient to warrant dismissal of charges on due process grounds. However, by applying the facts of these cases, along with federal circuit opinions, a hazy template exists providing some insight.

In addition, federal courts have not completely shied away from accepting the due process defense. For example, in *United States v. Twigg*,¹⁴⁷ the Third Circuit dismissed charges on due process grounds against one defendant convicted for methamphetamine manufacturing.¹⁴⁸ The court found that the government agents' conduct was so overreaching, that it barred prosecution.¹⁴⁹ In *Twigg*, the government agents greatly assisted the defendant in setting up the methamphetamine operation by acquiring "the necessary equipment,

140. *Hampton*, 425 U.S. 484.

141. *Id.* at 487.

142. *Id.* at 484.

143. *Id.* at 490.

144. *Id.* at 495 (Powell, J., concurring).

145. *Id.* at 497–98 (Brennan, J., dissenting).

146. *Russell*, 411 U.S. at 432.

147. *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978).

148. *Id.*

149. *Id.* at 382.

raw materials and a production site.”¹⁵⁰ Moreover, it was the government that initially hatched the plan.¹⁵¹

The Third Circuit said that the defendant was predisposed to commit the offense, evidenced by his “apparent willingness to participate in the manufacturing venture.”¹⁵² Thus, the dismissal was not the result of a successful entrapment claim.¹⁵³ Relying on the Supreme Court’s opinions in *Russell* and *Hampton*, the Third Circuit found that even if a defendant’s predisposition barred an entrapment defense, the theory of fundamental fairness precluded conviction, where police conduct is “outrageous.”¹⁵⁴ In an attempt to solidify what constituted such conduct, the Third Circuit looked to prior cases¹⁵⁵ in which charges were dismissed on due process grounds. Based on the principles outlined by those cases, the court concluded that barring the prosecution of the defendant was warranted because the governmental involvement in the criminal activities had reached “a demonstrable level of outrageousness.”¹⁵⁶

Twigg, decided almost forty years ago, has received a substantial amount of negative treatment from various courts, including the *Cromitie* court.¹⁵⁷ However, the courts in most of these cases did not doubt the validity of the due process defense theory—rather they distinguished their facts from *Twigg*.¹⁵⁸ Nonetheless, the possibility, as outlined by the Supreme Court in *Russell*, still stands: if a defendant commits a crime as a result of government inducements that entail outrageous conduct, then the defendant could have his or her charges dismissed based on a finding that the government conduct violated

150. *Id.* at 375.

151. *Id.*

152. *Id.* at 376.

153. *Id.*

154. *Id.* at 378–79.

155. *Id.* at 379.

156. *Id.* at 380.

157. *See, e.g., Cromitie*, 727 F.3d at 225. *Cromitie*, 781 F. Supp. 2d at 225 (“[*Twigg*] has never been followed . . . and conduct equally reprehensible has been repeatedly found not to violate a defendant’s Fourteenth Amendment rights in other courts.”). *See also* United States v. Dyke, 718 F.3d 1282 (10th Cir. 2013); United States v. Myers, 527 F. Supp. 1206 (E.D.N.Y. 1981). *But see*, United States v. Solorio, 37 F.3d 454, 460 (9th Cir. 1994); United States v. Solario, No. 94-50443, 1995 U.S. App. LEXIS 10364, at *3 (9th Cir. 1995) (initially reversing the defendant’s drug conviction on an outrageous conduct theory because the amount the government paid the informant was dependent on the defendant’s eventual conviction and the quantity of drugs involved, but later withdrawing its opinion on a theory that the defendant lacked standing to assert the claim).

158. *See, e.g., U.S. v. Christie*, 624 F.3d 558, 573 (3d Cir. 2010); United States v. Westmoreland, 712 F.3d 1066, 1072 (7th Cir. 2013); United States v. Romano, 706 F.2d 370, 373 (2d Cir. 1983).

fundamental notions of justice guaranteed by the Due Process Clause.¹⁵⁹

As noted above, there is no clear standard for what constitutes outrageous government conduct. Still, the Supreme Court and other federal cases provide a rough roadmap. For example, in *Russell*, the Court found that the government's conduct, which consisted of providing the defendant with a difficult to obtain chemical to manufacture drugs for which he was convicted, stopped "far short of violating . . . fundamental fairness, shocking to the universal sense of justice, mandated by the Due Process Clause of the Fifth Amendment."¹⁶⁰ The Court further justified its finding on practical grounds noting that the manufacture of drug is a "continuing . . . business enterprise" that requires that law enforcement rely on infiltration tactics since they are left with few other practical ways to apprehend individuals involved in such crimes.¹⁶¹ One essential factor that swayed the Court away from finding outrageous conduct was that the defendant was an "active participant in . . . [the] enterprise . . . before the government agent appeared on the scene."¹⁶² In *Twigg*, on the other hand, the Third Circuit found that the government conduct violated basic principles of due process, largely based on the following factors: the government supplied the defendant with essential ingredients for methamphetamine manufacturing; the expense of the chemical; and the significant assistance provided by the government in the narcotics manufacturing.¹⁶³

Using these cases as a backdrop to assess the facts of *Cromitie* and *Siraj* (and further to consider future entrapment cases in the terrorism context), it is possible to extrapolate certain facts which, in their aggregate, could potentially meet the threshold for outrageous government conduct. The defendants in *Cromitie* and *Siraj* did not participate in terrorist-related criminal activity prior to the inducements.¹⁶⁴ This is unlike *Russell*, *Hampton*, and *Twigg*, where the defendants were active participants in their respective criminal enterprises before government agents approached them. Furthermore, in *Hampton* and *Russell*, the defendants themselves conceived the crime, whereas in *Cromitie* and *Siraj*, it was the government agents that initially planned the crimes. In *Cromitie*, the

159. *Russell*, 411 U.S. at 432.

160. *Id.* (citing *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960)).

161. *Russell*, 411 U.S. at 432.

162. *Id.* at 436.

163. *Twigg*, 588 F.2d at 376.

164. *See supra* Part II.

agent supplied almost all of the necessary materials for the offense and played an integral role in the plot. This is distinguishable from *Russell*, where the agents supplied only one ingredient that the defendants could have obtained without government assistance.

Further, it is unlikely that the unsophisticated defendants in *Cromitie* and *Siraj* could have obtained the materials provided to them by the government.¹⁶⁵ In *Twigg*, the government provided the defendants with a location to manufacture the drugs, whereas the government agents in *Cromitie* not only provided the necessary materials and specific stratagems for the plot, but also offered the defendants large sums of money, luxury vehicles and all-expense-paid vacations for their families.¹⁶⁶ Thus, the government conduct in *Hampton* and *Russell* is modest as compared to the conduct in *Cromitie* and *Siraj*. The same can be said for the government conduct in *Twigg*, which still stands as good law. It follows then that government conduct exemplified in *Cromitie* and *Siraj* should bar prosecution of defendants on due process grounds.

Turning back to Judge Posner's argument regarding economic pragmatism,¹⁶⁷ it is questionable whether such extensive and heavily funded inducement practices exercised by the government in would-be-terrorist cases serve any substantial long-term benefit. This is because, as Judge Posner asserts, the agents are simulating an environment that the defendant would not otherwise find himself in.¹⁶⁸ Indeed, defendants that are impressionable, whether as a result of their age, poverty, or something else, would likely never find the means to facilitate the type of terrorist acts the government imagines for them. Certainly there exists a possibility that an actual sophisticated terrorist, like one that Hussain claimed to be, could approach such an individual and coax him or her into engaging in a terrorist plot, but that delves too far into a conjectural world.¹⁶⁹ The plot to blow up the synagogue in *Cromitie* and the conspiracy to bomb the subway station in *Siraj* were the poor man's stolen bicycle in Posner's hypothetical; it is simply too contentious a claim that the

165. *Id.*

166. *Cromitie*, 727 F.3d at 211.

167. Posner, *supra* note 129.

168. *Id.* at 1220.

169. The issue with this line of thought is that it only exists in the abstract. Just because the defendant *could have been* approached by an actual terrorist and induced to commit a crime should not rectify the government's conduct. Every individual can be considered "inducement-bait," and that theory alone should not justify an ordinary individual's conviction. As noted above, "only a saint would not commit a crime given the right inducement." Sadie, *supra* note 10, at 696 (discussing Allen, *supra* note 72, at 413).

defendant would have committed a terrorist-related crime but for the government's inducement. Thus, government resources used to apprehend defendants in such circumstances are "socially wasted . . . because they do not prevent any crimes."¹⁷⁰

Following Judge Posner's logic, the question is whether such inducements are actually preventing real terrorist attacks from occurring, or whether they are simply draining scarce resources from a government that could otherwise be preventing actual crime. By finding that the government conduct in cases like that of James Cromitie and Shahawar Siraj is sufficiently outrageous to constitute a dismissal of the charges on due process grounds, the courts would not only be protecting the due process rights of criminal defendants, but also making important distinctions between legitimate and illegitimate threats of terrorism. A defendant who actually possesses the will and design to commit a terrorist attack would certainly not require such extensive and extraordinary inducement, for, like the defendants in *Hampton* and *Russell*, he or she would already be an active participant in such an enterprise, or could obtain the necessary materials without the direction of the agents.

Conclusion

Recent domestic terrorism cases suggest that some federal courts are modifying the entrapment doctrine, effectively lowering the standard for the prosecution to demonstrate a defendant's predisposition. By permitting increased laxity for the prosecution to offer such evidence, the courts are establishing an uneasy precedent: Prosecutors are allowed to admit evidence against that would not pass muster in a traditional criminal prosecution in which an entrapment defense is raised. By doing so, the federal courts have established a double standard for criminal defendants charged with terrorism-related offenses. This evidentiary laxity has also led to a First Amendment problem, particularly because the typical defendant in a contemporary terrorism case is Muslim and possesses inflammatory or radical beliefs. This evidentiary laxity has the effect of putting a defendant's religious and political beliefs on trial. Further, it has the potential to chill religious and political expression and association.

By treating the entrapment doctrine in terrorism cases as the same as any other traditional crime involving government inducement, federal courts would preserve entrapment doctrine precedent, as well as the First Amendment rights of individuals who

170. Posner, *supra* note 129, at 1220.

are prosecuted for terrorism. By disfavoring reliance on evidence regarding the defendant's religious and political beliefs, the courts would minimize the risk of providing the jury with a foundation to convict, when there should be a finding of entrapment as a matter of law. In addition, the courts would protect defendants from having their political and religious beliefs criminalized, effectively safeguarding First Amendment protections.

On the other hand, even if a court concludes that a defendant induced by the government to plot a phony terrorist attack possessed the predisposition to commit the offense, there are circumstances in which the defendant should have his or her charges dismissed on due process grounds. The government expends vast resources to investigate individuals and induce them to commit acts of terrorism.¹⁷¹ The Supreme Court has never heard a case in which it dismissed a defendant's charges pursuant to this theory. However, prior cases in which the defense was discussed, along with the holdings of other federal courts, provide a backdrop for assessing when a defendant should have the defense available. When law enforcement agents seek out young, unsophisticated individuals and exploit their impressionability and religious beliefs in an attempt to coax them to commit highly intricate acts of terrorism by promising, amongst other things, large sums of money, and provide all the necessary materials and plans for the fake attack, the federal courts should dismiss the charges on due process grounds.

Despite the Supreme Court never having established exactly what "outrageous conduct" sufficient to warrant dismissal on due process grounds is, the government conduct in the cases where the Court does discuss the defense is modest when compared to the example cases of *Cromitie* and *Siraj*. Aside from upholding the notion of fundamental fairness guaranteed by the Constitution, such findings would also bear positive policy implications by deterring the government from expending large resources on investigating and entrapping individuals who, realistically speaking, likely pose no serious threat to the United States' interests in the first place.

As a closing thought, the author hopes to convey that the balance between the preservation of national security (facilitated by inducement-based law enforcement techniques and followed by terrorism-related prosecutions) and constitutional rights need not be a binary paradigm. Society bore witness to this faulty notion, for example, when the Supreme Court held in *Korematsu v. United*

171. See Waldman, *supra* note 46.

*States*¹⁷² that the constitutional rights of a specific class of citizens could be suspended, justified by the government's claim that such measures were warranted under national security concerns.¹⁷³ The significance is simple: political winds break hard and the past should always serve as a reminder for courts to be independent, neutral, and uninfluenced by the overwrought claims of the government, even in times of political and social tension.

172. *Korematsu v. United States*, 323 U.S. 214 (1944).

173. *Id.*