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## American Informant

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## AMERICAN INFORMANT

*Ramzi Kassem*\*

Part of my childhood was spent in Baghdad, Iraq, during the rule of Saddam Hussein. At that time, the regime offered free and universal education and healthcare. Literacy rates in the country surpassed much of the Arabic-speaking world and, indeed, the Global South. As the celebrated Egyptian intellectual, Taha Hussein, famously put it: “Cairo writes; Beirut prints; and Baghdad reads.”<sup>1</sup> Booksellers were everywhere in Baghdad. Its people read voraciously and passionately debated literature, poetry, and a range of other subjects.

But what struck me, even as a child, was the absence of sustained talk about politics in bookshops, markets, and other public spaces. I knew that adults could not stay away from the topic of politics in more intimate, private settings, where a deeper level of trust usually reigned. Once you entered the public sphere, however, discretion about politics—and especially local politics—clearly became the better part of valor. Iraqi society had been so thoroughly infiltrated by elements of Hussein’s intelligence services that ordinary people knew to tread with extreme caution. After all, the person standing within earshot at a bustling Baghdad market, overhearing your conversation—or maybe even your direct interlocutor—could be an informant. And the stakes were high: incarceration, torture, or death. That was an early introduction to the *valency* of informants—their capacity to interact with the society that surrounds them and their distorting effect on it. The lesson has colored my subsequent work on

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\* Professor of Law, City University of New York (CUNY) School of Law. I would like to recognize first and foremost the very many clients, community organizers, and activists with whom my students and I have had the privilege of working and learning over years of clinical law practice for so generously bestowing their trust on us. I also wish to thank Noor Sheikh, CUNY School of Law Class of 2023, for her invaluable research support on this article, along with scores of alumni, too many to be named here, who have inspired, fueled, and carried out the arduous mission of the clinic. Finally, I have benefitted deeply from discussion and collaboration with Naz Ahmad, Tarek Z. Ismail, Diala Shamas, Princess Masilungan, and Mudassar H. Toppa, all former or current colleagues in law practice or on the law faculty.

1. *Taha Hussein*, MAREFA, [https://www.marefa.org/%D8%B7%D9%87\\_%D8%AD%D8%B3%D9%8A%D9%86](https://www.marefa.org/%D8%B7%D9%87_%D8%AD%D8%B3%D9%8A%D9%86) (on Taha Hussein generally); Osman Fekry, *Cairo Writes, Beirut Prints, and No One Reads*, AL-AHRAM (Mar. 11, 2019), <https://gate.ahram.org.eg/News/2320653.aspx> (attributing quote to Taha Hussein).

surveillance, including this reflection on the contemporary role of informants in the United States.

#### SCOPE OF THE PHENOMENON

Following the events of September 11, 2001, the Federal Bureau of Investigation officially pivoted from an ostensible law enforcement function towards intelligence gathering, in the name of national security.<sup>2</sup> Instead of focusing mostly on the retrospective investigation of already consummated acts, or organized conspiracies to commit specific crimes, the FBI shifted to a more prospective, supposedly preventative and preemptive posture, where one of the agency's principal declared aims became the disruption of potential terrorists.<sup>3</sup>

The FBI was not alone. Other agencies, both federal and local, were similarly repurposed. Among the more notable examples was the New York City Police Department (NYPD), the largest police force in the United States. Because New York City registered the largest number of casualties with the collapse of the Twin Towers, local authorities decided that they could no longer rely exclusively on federal law enforcement to protect the city from transnational threats.<sup>4</sup> David Cohen, a career Central Intelligence Agency officer, was brought in to helm the NYPD Intelligence Division.<sup>5</sup> He revamped the unit in the image of his former agency, developing and prioritizing its intelligence gathering capabilities.

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2. Robert S. Mueller, Director, Fed. Bureau of Investigation, Speech at Kansas State University Landon Lecture: The FBI Changing to Meet Today's Challenges (April 13, 2004) (transcript available on Federal Bureau of Investigation online archive), <https://archives.fbi.gov/archives/news/testimony/the-fbi-transformation-since-2001>; John Hudson, *FBI Drops Law Enforcement as 'Primary' Mission*, FOREIGN POLICY (Jan. 5, 2014), <https://foreignpolicy.com/2014/01/05/fbi-drops-law-enforcement-as-primary-mission/>.

3. In that period, counterterrorism went from a relatively minor unit to accounting for the "lion's share of the FBI's budget—\$3.3 billion, compared to \$2.6 billion for organized crime." Trevor Aaronson, *The Informants*, MOTHER JONES (Sept. 2011), <https://www.motherjones.com/politics/2011/07/fbi-terrorist-informants/>. In 2021, "intelligence" and "counterintelligence" were allotted \$5,797,453,000 of the FBI's budget, while "federal crimes" are allotted \$3,381,449,000. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., FY 2022 BUDGET REQUEST AT A GLANCE 4 (2021).

4. Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, ASSOCIATED PRESS (Sept. 6, 2011), <https://www.pulitzer.org/winners/matt-apuzzo-adam-goldman-eileen-sullivan-and-chris-hawley> (reporting that David Cohen, then-NYPD intelligence chief, and Ray Kelly, then-NYPD commissioner, shared the belief that NYPD could not rely on federal government to prevent further acts of political violence targeting New York City post-9/11).

5. *Id.* Today, that component is called the Intelligence Bureau, denoting increased stature within the police's organizational chart. *Intelligence*, N.Y.C. Police Dep't, THE OFF. WEBSITE OF N.Y.C., <https://www1.nyc.gov/site/nypd/bureaus/investigative/intelligence.page> (last visited Sept. 19, 2021).

The deployment of informants in U.S. Muslim communities and spaces has featured centrally in both agencies' programs and efforts.<sup>6</sup> Though secrecy is the name of the game, making updated figures hard to come by, there are an estimated 15,000 FBI informants deployed nationwide.<sup>7</sup> That is tenfold the number of informants when J. Edgar Hoover was still in charge of the agency, and more than double the number reached at the height of the so-called "war on drugs."<sup>8</sup> On average, the FBI disburses \$42 million per year on payments to its informants.<sup>9</sup> The NYPD also sent informants—known as "crawlers"—into mosques.<sup>10</sup>

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6. There exists, of course, a highly instructive literature on the harms caused by informants in other contexts. Law professor and former prosecutor Paul Butler has noted the devastating impact of the culture of informants in the criminal punishment system on communities of color and urges an end to the practice of becoming informants in exchange for money or reduction in sentencing. See, e.g., PAUL BUTLER, LET'S GET FREE: A HIP HOP THEORY OF JUSTICE 81-86 (2009). Professor Butler takes care to distinguish being an informant from being a witness or reporting crimes in one's community. See also ALEXANDRA NATAPOFF, SNITCHING, CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 121-28 (2009). The instant modest reflection is rooted in the author's clinical practice in its specific context.

7. Trevor Aaronson, *The Informants*, MOTHER JONES (Sept. 2011), <https://www.motherjones.com/politics/2011/07/fbi-terrorist-informants> (reporting that FBI has roster of 15,000 informants, many of whom are tasked with infiltrating U.S. Muslim communities). FBI agents have been reared to be suspicious of Muslims. See Janet Reitman, *I Helped Destroy People*, N.Y. TIMES MAG. (Sept. 1, 2021), <https://www.nytimes.com/2021/09/01/magazine/fbi-terrorism-terry-albury.html> (former FBI agent and whistleblower explaining that, in training, "it was made very clear from Day 1 that the enemy was not just a tiny group of disaffected Muslims" but that "Islam itself was the enemy"). Partly as a result, U.S. Muslims may be more spied upon by their own government than the people of the former East Germany were by the Stasi. See Arun Kundnani, Opinion, *Missing the Best Chance to Prevent Terror Bombing*, KUNDNANI (May 7, 2013), <https://www.kundnani.org/missing-the-best-chance-to-prevent-terror-bombing> (detailing that Stasi had one informant for every 66 citizens and that surveillance efforts in the United States may have already surpassed that ratio for Muslims). See also Conor Friedersdorf, *Does the FBI Use Stasi-Style Tactics Against Muslims?*, THE ATLANTIC (Apr. 24, 2014), <https://www.theatlantic.com/politics/archive/2014/04/a-lawsuit-alleges-that-the-fbi-uses-stasi-tactics-against-muslim-americans/361146> (comparing FBI retaliation against those who refuse to become informants to Stasi tactics).

8. Trevor Aaronson, *The FBI Informant Who Mounted A Sting Operation Against The FBI*, THE INTERCEPT (Apr. 15, 2015), <https://theintercept.com/2015/04/15/fbi-informant-stung-fbi> (reporting that during J. Edgar Hoover's administration, the COINTELPRO operation had 1,500 informants and the administration during the "war on drugs" had 6,000 informants).

9. OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., AUDIT OF THE FEDERAL BUREAU OF INVESTIGATION'S MANAGEMENT OF ITS CONFIDENTIAL HUMAN SOURCE VALIDATION PROCESSES 1 (2019) <https://oig.justice.gov/reports/2019/a20009.pdf>.

10. Adam Goldman & Matt Apuzzo, *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>. Whereas its "mosque crawlers" were informants, the NYPD also sent plainclothes police officers, known as "rakers," to inventory Muslim community spaces the police believed might be so-called "hot spots," in a sweeping search for

The role of informants is not limited to the brick-and-mortar world. Informants have also been tasked with infiltrating virtual spaces to collect information and report it to their handlers.<sup>11</sup> Perhaps even more significantly, law enforcement agencies routinely weaponize personal electronic devices, as well as the applications they host, to inform against their users. Law enforcement agencies accomplish this when they seize and mine those devices or serve various forms of process on “remote computing services” to obtain immense caches of user data.<sup>12</sup>

Finally, other practices can be assimilated to the use of informants. So-called knock-and-talks, where representatives of various law enforcement agencies appear, unannounced and uninvited, at a home, workplace, or place of worship or learning, in order to question someone, are functionally attempts to turn that person into a source of information—comparable in a sense to an informant.<sup>13</sup>

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what it imagined as smoldering embers that might ignite. ‘Mosque Crawlers,’ ‘Rakers’ Monitoring U.S. Muslims for NYPD (PBS News Hour radio broadcast Feb. 28, 2012) (transcript on file with PBS at <https://www.pbs.org/newshour/show/mosque-crawlers-rakers-monitoring-u-s-muslims-for-nypd>).

11. See Conor Friedersdorf, *supra* note 7 (relating experience of Jameel Algibbah who was approached by FBI to be an informant and asked to join online Islamic forums and “act like an extremist and report back to them”). Algibbah eventually sued the FBI agents responsible, among others, in a case that ultimately reached the U.S. Supreme Court. See *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020). Disclosure: with my law students and colleagues, I served as counsel for the plaintiffs throughout the litigation and I argued the case before the U.S. Supreme Court in 2020.

12. See, e.g., Second Amended Complaint at 1, *Janfeshan v. U.S. Customs and Border Prot.*, U.S. Dist. LEXIS 151058 (2017) (No. 16-CV-6915) (plaintiff challenged U.S. Customs and Border Protection’s search and seizure of smartphone device and data); see also *Janfeshan v. United States Customs & Border Prot.*, U.S. Dist. LEXIS 151058 (2017). Disclosure: with my law students and colleagues, I served as counsel for the plaintiff in this litigation. Beyond the border, federal agencies rely heavily on legal authorities such as 18 U.S.C. § 2703 to obtain user data and content, often without advance notice. It is important to note, however, that, on the digital front, state surveillance is not the sole menace, nor probably the principal one. For a brilliant analysis of the profit motive behind corporate collection of “behavioral surplus”—basically user behavior data—see Shoshana Zuboff, *The Age of Surveillance Capitalism* (Profile Books ed., 2019). See also Natasha Singer and Mike Isaac, *Facebook to Pay \$550 Million to Settle Facial Recognition Suit*, N.Y. TIMES (Jan. 29, 2020), <https://www.nytimes.com/2020/01/29/technology/facebook-privacy-lawsuit-earnings.html>; cf. Jonathan Stempel, *Google Faces \$5 Billion Lawsuit in U.S. for Tracking ‘Private’ Internet Use*, REUTERS (June 2, 2020), <https://www.reuters.com/article/us-alphabet-google-privacy-lawsuit/google-faces-5-billion-lawsuit-in-u-s-for-tracking-private-internet-use-idUSKBN23933H>.

13. Of course, in the parlance and perspective of law enforcement agents, a person who submits to such questioning would not be a covert “informant” but a “source,” recruited in the open. The FBI publicly refers to such encounters as “voluntary interviews.” *DOJ Orders, Incentivizes, ‘Voluntary’ Interviews of Aliens to Obtain Information on Terrorists; Foreign Students, Visa Processing Under State Dept. Scrutiny*, 78 INTERPRETER RELEASES 1816, 1817-19, Appendix I (2001); see also Federal Bureau of Investigation, *Domestic Investigations and Operations*

## WHAT INFORMANTS DO

Leading up to 9/11, informants typically acted as the eyes and ears of law enforcement within organized criminal syndicates. Like the agencies handling them, however, the approach informants took was reoriented. Instead of hewing to a more passive posture, informants adopted an increasingly active role in U.S. Muslim communities.<sup>14</sup>

For example, Shamiur Rahman, an informant who eventually outed himself on Facebook, was instructed by his NYPD handlers to “create and capture,” by instigating conversations with Muslim students and others about “jihad” and “terrorism.”<sup>15</sup> That strategy mirrors one followed by federal informants. The FBI tasked Craig Monteilh with infiltrating Southern California’s Muslim communities.<sup>16</sup> Posing as a convert, he repeatedly

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*Guide* §18.5.6.3 (2013), <https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29>.

However, scores of clients I have represented with my law students and colleagues have described the experience of armed law enforcement agents showing up in full view of neighbors, co-workers, classmates, or fellow worshippers as inherently coercive. See Ramzi Kassem & Diala Shamas, *Rebellious Lawyering in the Security State*, 23 N.Y.U. Clinical L. Rev. 671, 674 (2017). Internally, agents refer to the practice more befittingly as “confrontational interviews.” This American Life: *The Fix is In*, CHICAGO PUBLIC RADIO, at 5:57 (Sept. 15, 2000), <https://www.thisamericanlife.org/radio-archives/episode/168/the-fix-is-in.3>. See also Amna Akbar, Policing Radicalization, 3 U.C. IRVINE L. REV. 809, 859–861 (2013); Shirin Sinnar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, 77 BROOK. L. REV. 41, 50 (2011) (exploring coercive nature of law enforcement questioning campaigns within Muslim communities).

14. It bears emphasis that the FBI often turns to informants in the first instance because their deployment does not require probable cause, whereas sending in undercover FBI agents generally does. Informants can be used to obtain colorable probable cause that then permits the introduction of undercovers. In many post-9/11 so-called “terrorism stings,” undercovers come into play during the final act, culminating in arrest, followed by prosecution and then incarceration. Trevor Aaronson, *FBI Counterterrorism Informant Spent a Decade Committing Fraud*, THE INTERCEPT (Dec. 29, 2020), <https://theintercept.com/2020/12/29/fbi-counterterrorism-informant-wire-fraud-scam> (noting that probable cause requirement does not apply to informants, which incentivizes FBI agents to use informants).

15. Adam Goldman and Matt Apuzzo, *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> (detailing how 19-year-old Shamiur Rahman was pressured and paid by NYPD to create conversations about “jihad” or “terrorism” and capture responses).

16. Trevor Aaronson, *Spy in Disguise*, THE INTERCEPT (Sept. 12, 2021), <https://theintercept.com/2021/09/12/fbi-informant-surveillance-muslims-supreme-court-911> (reporting on Operation Flex, involving Craig Monteilh, who was approached by FBI counterterrorism agents to pose as Muslim convert and infiltrate mosques in Southern California despite FBI having no reason to believe crimes were underway).

attempted to initiate conversations about “jihad” with ordinary people, in order to report their reactions to his handlers.<sup>17</sup>

While neither Rahman’s nor Monteilh’s known efforts resulted in any prosecutions,<sup>18</sup> the same cannot be said for the work of many other informants. To date, of the nearly one thousand post-9/11 so-called terrorism cases prosecuted federally nationwide, a third proceeded from stings involving informants.<sup>19</sup> Even on cursory review, these cases raise serious concerns.

In *United States v. Cromitie*, widely known as the Newburgh Four case, a now notorious informant named Shahed Hussain offered his poor and unemployed targets a quarter of a million dollars to plot an attack with him.<sup>20</sup> The judge who sentenced the defendants commented that “[o]nly

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17. *This American Life, The Convert*, Ep. 755, CHICAGO PUBLIC RADIO, at 26:30 (Dec. 3, 2021), <https://www.thisamericanlife.org/755/the-convert> (FBI informant Craig Monteilh explaining that his handlers instructed him to record Muslim community members’ views on “jihad”). Monteilh’s activities—codenamed Operation Flex—are at the heart of a case that was heard by the U.S. Supreme Court in November 2021. See e.g., *Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015, 1026 (9th Cir. 2020); *Fed. Bureau of Investigation v. Fazaga*, 141 S. Ct. 2720 (2021) *cert. granted*.

18. Adam Goldman & Matt Apuzzo, *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> (reporting NYPD informant Shamiur Rahman’s statement that even his NYPD handlers did not believe his targets in student groups were “terrorists”); Adam Goldman & Matt Apuzzo, *NYPD: Muslim Spying Led to no Leads, Terror Cases*, ASSOCIATED PRESS (Aug. 21, 2012), <https://www.ap.org/ap-in-the-news/2012/nypd-muslim-spying-led-to-no-leads-terror-cases> (reporting sworn deposition testimony of senior NYPD official that six years of secret police spying on Muslim neighborhoods yielded no leads or terrorism investigations); *Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015, 1026 (9th Cir. 2020) (detailing how FBI informant Craig Monteilh was not sent after specific individuals suspected of crimes but instead was asked to keep track of entire Muslim communities); Br. for Respondents at 12, *Fed. Bureau of Investigation v. Fazaga*, 141 S. Ct. 2720 (2021) (No. 20-828), [http://www.supremecourt.gov/DocketPDF/20/20-828/193269/20210921155749522\\_20-828%20FBI%20v%20Fazaga%20Brief%20for%20the%20Respondents.pdf](http://www.supremecourt.gov/DocketPDF/20/20-828/193269/20210921155749522_20-828%20FBI%20v%20Fazaga%20Brief%20for%20the%20Respondents.pdf) (“Despite the scale of this dragnet surveillance program, Operation Flex yielded only a single criminal prosecution of any kind: an immigration fraud case dismissed on the Government’s motion.”).

19. Trevor Aaronson & Margot Williams, *Trial and Terror*, THE INTERCEPT (Sept. 11, 2021), <https://trial-and-terror.theintercept.com> (database reflecting that of the 975 international terrorism prosecutions since 9/11/2001, 299 cases involved informant-driven sting operations).

20. *United States v. Cromitie*, 781 F. Supp. 2d 211, 219 (S.D.N.Y. 2011), *aff’d*, 727 F.3d 194 (2d Cir. 2013). (defendants convicted for conspiracy to use weapons of mass destruction following investigation involving informant Shahed Hussain, who offered quarter of a million dollars to participate in his mission); see also HUMAN RIGHTS WATCH & THE HUMAN RIGHTS INSTITUTE AT COLUMBIA LAW SCHOOL, ILLUSION OF JUSTICE 55 (2014).

the government could have made a terrorist out of Mr. Cromitie, whose buffoonery is positively Shakespearean in scope.”<sup>21</sup>

Another FBI informant, Saeed Torres, complained to documentary filmmakers about his handlers: “They’re trying to make me force this dude into saying something to support terrorism. He’s not even a pseudo-terrorist . . . I said: ‘What y’all been doing for the last three years? Y’all seen nothing? If y’all seen nothing, then what you expect me to see?’”<sup>22</sup> His target, Khalifah Ali al-Akili, a recent convert who had previously served time on a drug felony, eventually realized he was being targeted and went public, prompting the FBI to arrest him on felon-in-possession of a firearm charges—not terrorism—based on photographs he had taken and posted of himself at a gun range.<sup>23</sup>

Even in relatively rare prosecutions under state terrorism laws, informants have featured centrally. An NYPD informant plied Jose Pimentel with marijuana to draw damning statements from him, and then followed up by pushing a ready-made plot involving pipe bombs, which Pimentel

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21. David K. Shipler, *Terrorist Plots, Hatched by the F.B.I.*, N.Y. TIMES (Apr. 28, 2012), <https://www.nytimes.com/2012/04/29/opinion/sunday/terrorist-plots-helped-along-by-the-fbi.html> (quoting Judge Colleen McMahon during sentencing).

22. (T)ERROR (Stories Seldom Seen LLC, Charlotte Street Films, and Independent Television Service 2015), <https://www.pbs.org/independentlens/documentaries/terror>; see also Mattathias Schwartz, *The Informant and the Filmmakers*, N.Y. TIMES MAGAZINE (Feb. 19, 2016), <https://www.nytimes.com/2016/02/21/magazine/the-informant-and-the-filmmakers.html> (detailing how FBI informant Saeed Torres turned on his handlers and began secretly working with documentary filmmakers, eventually proclaiming the innocence of one of his targets).

23. See Mattathias Schwartz, *The Informant and the Filmmakers*, N.Y. TIMES MAGAZINE (Feb. 19, 2016), <https://www.nytimes.com/2016/02/21/magazine/the-informant-and-the-filmmakers.html>; Trevor Aaronson, *The FBI Informant Who Mounted A Sting Operation Against The FBI*, THE INTERCEPT (Apr. 15, 2015), <https://theintercept.com/2015/04/15/fbi-informant-stung-fbi>

was unable to build himself, despite close instruction by the informant.<sup>24</sup> Pimentel was nonetheless sentenced to sixteen years.<sup>25</sup>

No longer mere eyes and ears, informants have become something more. They routinely drive “plots” they had proposed in the first place, providing funding and equipment, and also coaching and coaxing their often vulnerable, gullible targets, frequently over extended periods of time. Indeed, the targets of informant-driven stings have included “unstable” individuals such as Pimentel, who reportedly tried to circumcise himself, alongside many others with documented mental health concerns.<sup>26</sup>

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24. William Rashbaum & Joseph Goldstein, *Informer's Role in Terror Case Is Said to Have Deterred F.B.I.*, N.Y. TIMES (Nov. 21, 2011), <https://www.nytimes.com/2011/11/22/nyregion/for-jose-pimentel-bomb-plot-suspect-an-online-trail.html> (noting that many of Jose Pimentel's self-incriminating statements were uttered after he had smoked Marijuana with police informant and that following Pimentel's arrest, the FBI-led Joint Terrorism Task Force found that Pimentel may not have even had the resources or knowledge to produce the pipe bomb had the informant not assisted him); *see also Jose Pimental Pleads Guilty in NYC Pipe Bomb Terrorism Plot*, CBS N.Y. (Feb. 19, 2014), <https://newyork.cbslocal.com/2014/02/19/jose-pimentel-pleads-guilty-in-nyc-pipe-bomb-terrorism-plot> (Pimentel's lawyers suggested that he would not have progressed to making a pipe bomb, had he not been manipulated covertly by the NYPD); *see also* Press Release, Cyrus R. Vance, Manhattan Dist. Att'y, Jose Pimentel Pleads Guilty to State Terrorism Charge (Feb. 19, 2014), [https://www.investigativeproject.org/documents/case\\_docs/2311.pdf](https://www.investigativeproject.org/documents/case_docs/2311.pdf) (stating that Pimentel's conviction resulted from yearlong investigation by NYPD and Manhattan District Attorney's Office).

25. Shayna Jacobs, *'Lone Wolf' Terrorist Jose Pimentel Gets 16 Years in Prison*, N.Y. DAILY NEWS (Mar. 25, 2014), <https://www.nydailynews.com/news/crime/lone-wolf-terrorist-jose-pimentel-16-years-prison-article-1.1734472> (reporting that Jose Pimentel was sentenced to sixteen years in Manhattan Supreme Court).

26. Rozina Ali, *The 'Herald Square Bomber' Who Wasn't*, N.Y. TIMES MAGAZINE (Apr. 15 2021), <https://www.nytimes.com/2021/04/15/magazine/fbi-international-terrorism-informants.html>. (reporting that Shahawar Matin Siraj was sentenced to 30 years in prison on charges of “terrorism” despite concerns of entrapment and findings by psychologist that his judgement and reasoning abilities were impaired); *see also* Yolanda C. Rondon, *Treatment of Domestic Terrorism Cases: Class and Mental Health in the Criminal System*, 26 AM. UNIV. J. OF GENDER, SOC. POL'Y & THE LAW, 743 (2018) (detailing how Ahmed Ferhani was arrested in NYPD sting operation despite suffering from amply documented PTSD and mental health issues which had resulted in his hospitalization more than 24 times since he was a teenager); HUMAN RIGHTS WATCH & THE HUMAN RIGHTS INSTITUTE AT COLUMBIA LAW SCHOOL, *ILLUSION OF JUSTICE* 27 (2014) (report detailing how the FBI targets vulnerable individuals with mental or intellectual disabilities); Ramzi Kassem, *Three Questions You Should Ask When You Hear About a 'Foiled Terrorist Plot'*, VICE (Mar. 10, 2015), <https://www.vice.com/en/article/nn9jjw/three-questions-you-should-ask-when-you-hear-about-a-foiled-terrorist-plot-310> (emphasizing importance of asking whether defendant struggles with mental health conditions when hearing about “foiled terrorist plots”).

Finally, the means employed to recruit and motivate informants—albeit not always unique to the post-9/11 counterterrorism context<sup>27</sup>—incentivize the delivery of results at all costs and cast considerable doubt onto the reliability informants’ work and their reports. Many informants work in exchange for leniency in separate criminal proceedings or for money. Shamiur Rahman was paid \$1,000 a month and police turned a blind eye to his marijuana arrests.<sup>28</sup> Shahed Hussain reportedly earned as much as \$100,000 per assignment and Craig Monteilh inflated his reimbursable expenses so as to be paid handsomely by the FBI while mitigating risk to his credibility if he ever testified.<sup>29</sup> The government also leverages immigration vulnerabilities to pressure people into working as informants.<sup>30</sup> Finally, in a practice bordering on extortion, where the government creates a threat and then charges a price for its removal, FBI agents have

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27. Diala Shamas, *A Nation of Informants: Reining In Post-9/11 Coercion of Intelligence Informants*, 83 BROOK. L. REV., 1175, 1188–1190 (2018) (exploring which FBI recruitment levers are relatively novel and critiquing the post-9/11 informant recruitment model).

28. Adam Goldman & Matt Apuzzo, *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>.

29. Trevor Aaronson, *The Informants*, MOTHER JONES (Sept. 2011), <https://www.motherjones.com/politics/2011/07/fbi-terrorist-informants> (noting that FBI informant Shahed Hussain was first spotted in connection with DMV scam, leading him to “work off those charges” and making as much as \$100,000 per assignment with the FBI); Trevor Aaronson, *Spy in Disguise*, THE INTERCEPT (Sept. 12, 2021), <https://theintercept.com/2021/09/12/fbi-informant-surveillance-muslims-supreme-court-911> (reporting that the FBI paid Craig Monteilh \$177,000 for work as informant in Southern California Muslim community). The FBI has also allowed people to profit from unrelated criminal enterprises while they continued to work as counterterrorism informants. Trevor Aaronson, *FBI Counterterrorism Informant Spent a Decade Committing Fraud*, THE INTERCEPT (Dec. 29, 2020), <https://theintercept.com/2020/12/29/fbi-counterterrorism-informant-wire-fraud-scam> (reporting that the FBI turned a blind eye to wire fraud schemes and extravagant life style of Mohammed Agbareia while he worked as informant).

30. Mazin Sidahmed, *How the FBI Coerced This Muslim Immigrant into Working as an Informant*, DOCUMENTED (Dec. 22, 2020), <https://documentedny.com/2020/12/22/how-the-fbi-coerced-this-muslim-immigrant-into-working-as-an-informant> (illustrating FBI use of “immigration dangle” with story of Muslim Ghanaian immigrant “Fatma” who was coerced to become an informant in order to remain in United States with her child); see also Arun Venugopal, *Pressured To Spy On NYC Mosques For Two Years, An Immigrant FBI Informant Seeks A Way Out*, GOTHAMIST (Aug. 22, 2019), <https://gothamist.com/news/pressured-to-spy-on-nyc-mosques-for-two-years-an-immigrant-fbi-informant-seeks-a-way-out> (relating story of Muslim Uzbek immigrant “Bilol” who also worked as FBI informant in exchange for letter staving off deportation). Disclosure: with my law students and colleagues, I acted as legal counsel for the individuals whose experiences were reported in these two articles and helped them extricate themselves from their roles as informants.

placed or kept people on the federal No Fly List in order to pressure them into working as informants.<sup>31</sup>

#### HISTORICAL CONTINUITY

There is nothing novel or recent about the construction by U.S. law enforcement agencies of suspect communities (or communities of interest), particularly when those groups are associated with movements for social or racial justice. The use of informants alongside a full panoply of other methods to infiltrate and spy on such groups is as old as the FBI itself. A century ago, the Bureau of Investigation, as it was then known, helmed by a young J. Edgar Hoover, set its sights on suspected Italian “anarchists” and Russian-born labor unionists, culminating in the infamous Palmer Raids.<sup>32</sup> That pattern of activity persisted through mid-century anti-communist McCarthyism<sup>33</sup> and the FBI’s subsequent focus on racial justice activists during the civil rights era.<sup>34</sup> The NYPD, too, dispatched informants, plainclothes officers, and undercover agents to report on various shades of political activism over the past century—the units carrying out that work bore colorful monikers such as the “Italian Squad,” or the “Red Squad.”<sup>35</sup>

At the federal level, the mid-1970s saw the formation of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, which peered into the intelligence excesses of U.S. government agencies both domestically and abroad. Known as the Church Committee (named after its chair), that body’s recommendations led to the creation of oversight, regulatory, and legislative structures, including the Senate Select Committee on Intelligence and the Foreign Intelligence Surveillance Act of 1978, constraining the activity of the FBI and other federal entities.<sup>36</sup> Similarly, organizing and litigation efforts in New York City,

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31. *Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020) (plaintiffs placed on federal No Fly List by FBI in retaliation for refusal to act as informants against Muslim communities).

32. See, e.g., *Palmer Raids*, FEDERAL BUREAU OF INVESTIGATION, <https://www.fbi.gov/history/famous-cases/palmer-raids> (last visited Oct. 16, 2021); Adam Hochschild, *When America Tried to Deport Its Radicals*, THE NEW YORKER (Nov. 4, 2019), <https://www.newyorker.com/magazine/2019/11/11/when-america-tried-to-deport-its-radicals>.

33. See, e.g., Charlotte Brooks, *Numbed with Fear: Chinese Americans and McCarthyism*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/mccarthy-numbed-with-fear-chinese-americans/>; FBI File on Joseph McCarthy, *microformed on Microfilm E 743.5 F355 1996* (Wilmington, Del.: Scholarly Resources, 1996), [https://library.truman.edu/microforms/fbi\\_file\\_joseph\\_mccarthy.asp](https://library.truman.edu/microforms/fbi_file_joseph_mccarthy.asp).

34. See *infra* note 43 and accompanying text.

35. Sam Roberts, *Keeping Tabs, Just in Case*, N.Y. TIMES (Apr. 4, 2014), <https://www.nytimes.com/2014/04/06/nyregion/keeping-tabs-just-in-case.html>.

36. *Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/investigations>

including notably the *Handschu v. Special Services Division* lawsuit,<sup>37</sup> resulted in a settlement, known as the *Handschu* Rules, reining in the NYPD's ability to spy on political activism.<sup>38</sup>

However, these developments in the late-1970s and 1980s, while certainly salutary from a rights-centering perspective, begin to appear as a hiatus or a parenthetical in the larger historical pattern of law enforcement activity when viewed against the backdrop of what came before and in light of what followed, in the post-9/11 era. Indeed, as noted above, the events of 9/11 ushered in a return to sweeping domestic surveillance for the FBI. Similarly, the NYPD pressed successfully for a significant judicial relaxation of the *Handschu* Rules, clearing the way for its resumption of its own brand of intelligence work targeting Muslims.<sup>39</sup> Though perhaps understandable, the temptation to describe the dramatic changes in post-9/11 law enforcement practices—including in the use of informants—as a paradigmatic shift is nonetheless misleading.<sup>40</sup> More restoration than revolution, what took place after 9/11 was a return to historical form for agencies like the FBI and the NYPD.<sup>41</sup> Viewed in broader context, therefore, the post-9/11 evolution featured far more historical continuity than rupture.

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/church-committee.htm; Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801–1885 (1978).

37. *Handschu v. Special Serv. Div.*, 288 F. Supp. 2d 411 (S.D.N.Y. 2003).

38. See, e.g., *Handschu v. Special Services Division (Challenging NYPD Surveillance Practices Targeting Political Groups)*, NEW YORK CIV. LIBERTIES UNION, <https://www.nyclu.org/en/cases/handschu-v-special-services-division-challenging-nypd-surveillance-practices-targeting> (detailing *Handschu v. Special Services Division* – a case that challenged NYPD surveillance practices targeting political groups); Paul G. Chevigny, Jethro M. Eisenstein & Martin R. Stolar, *An Historic Police Accountability Case Turns 50*, NEW YORK CIV. LIBERTIES UNION (May 18, 2021), <https://www.nyclu.org/en/news/historic-police-accountability-case-turns-50>.

39. See, e.g., Ramzi Kassem, *The Long Roots of the NYPD Spying Program*, THE NATION (June 14, 2012), <https://www.thenation.com/article/archive/long-roots-nypd-spying-program> (detailing NYPD Intelligence Division's post-9/11 bid to lift *Handschu* strictures and its sprawling Muslim surveillance program); Paul G. Chevigny, et al., *supra* note 38 (commenting that while U.S. federal district court approved modification of *Handschu* Rules but rejected their complete evisceration as NYPD proposed, NYPD still could claim that modified rules had become merely internal guidelines, advisory and not mandatory).

40. I have succumbed to this temptation in past work where I named this particular iteration of the larger historical trend as “9/11 warping” without situating the moment in its larger historical context as I attempt to do here. Ramzi Kassem, Professor of L., City Univ. of New York Sch. of L., Talk at Brown Univ. Ctr. for the Study of Race and Ethnicity in Am., “9/11 Warping and its Discontents: Our Security State, Racism, and Foreign Policy” (Feb. 12, 2016), <https://www.brown.edu/academics/race-ethnicity/events/ramzi-kassem-911-warping-and-its-discontents-our-security-state-racism-and-foreign-policy>.

41. Saeed Torres is the single informant who perhaps best captures this historical arc and embodies a vivid illustration of the point that the post-Church Committee period is most accurately viewed as an exception, not the rule. A former Black Panther and convert to

## TOWARDS A THEORY OF INFORMANCY

What is the true value of an informant? Does their value to law enforcement reside entirely or even chiefly in the “intelligence” that they provide? The post-9/11 informant’s outsized focus on targets with no prior involvement in acts of political violence, many of whom displaying evident signs of psychological, emotional, or financial vulnerability or even outright distress, suggests that any intelligence gathered is of questionable worth.<sup>42</sup> Further, the levers that law enforcement employs post-9/11 to pressure ordinary people into informancy—threats of criminal or immigration jeopardy, watchlisting, money—separately cast doubt on the reliability of reported information.<sup>43</sup> Informants in desperate straits are more likely to find ways to tell their handlers what they want to hear about targets who may pose no genuine threat.

The lion’s share of the value of informants to law enforcement and to the security state more broadly lies in two less obvious functions they perform, entirely aside from intelligence gathering: disruption and legitimization.

That law enforcement views disruption as a worthwhile objective is not news. The FBI’s notorious Counterintelligence Program, known as COINTELPRO, which targeted Black-led racial justice organizations and leftist groups in the 1960s and 70s, listed disruption as one of its goals in infiltrating those formations, including through the use of informants.<sup>44</sup> The modern-day Joint Terrorism Task Forces dotting the nation also consider disruption a central aim.<sup>45</sup>

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Islam, he worked as an informant for the FBI beginning in the 1990s and well into the post-9/11 period. See Schwartz, *supra* note 23.

42. See HUM.RTS. WATCH & THE HUM. RTS. INSTIT. AT COLUMBIA L. SCH., *supra* note 26; see also Kassem, *supra* note 26.

43. See Sidahmed, *supra* note 30; Venugopal, *supra* note 30.

44. WARD CHURCHILL & JIM VANDER WALL, AGENTS OF REPRESSION: THE FBI’S SECRET WARS AGAINST THE BLACK PANTHER PARTY AND THE AMERICAN INDIAN MOVEMENT, 58, 63–100 (South End Press, 2002) (describing COINTELPRO targeting of Black liberation movements and civil rights leaders); Letter from Dir. of FBI to FBI Field Off. (Aug. 25, 1967) (internal agency letter from FBI Director to FBI field offices dated Aug. 25, 1967 describing “new” “Counterintelligence Program” targeting “Black Nationalist – Hate Groups” under rubric of “Internal Security” and instructing agents to strive to “disrupt” any “targeted group”), [http://docs.noi.org/fbi\\_august\\_25\\_1967.pdf](http://docs.noi.org/fbi_august_25_1967.pdf), transcribed by Nation of Islam at [https://www.noi.org/fbi\\_08-25-1967](https://www.noi.org/fbi_08-25-1967).

45. See, e.g., JOINT COUNTERTERRORISM ASSESSMENT TEAM, THE NAT’L COUNTERTERRORISM CTR., COUNTERTERRORISM GUIDE, <https://www.dni.gov/nctc/jcat/index.html> (last visited Oct. 17, 2021); U.S. DEP’T OF JUST., FISCAL YEAR 2015 ANNUAL PERFORMANCE REPORT & FISCAL YEAR 2017 ANNUAL PERFORMANCE PLAN, §2 Performance Information by Strategic Goal/Objective, <https://www.justice.gov/doj/file/824716/download> (last visited Oct. 17, 2021).

But if the work of informants is covert in nature, if they are “*Confidential Human Sources*” in contemporary FBI parlance, and therefore undisclosed,<sup>46</sup> then whence their disruptive effect? Both by design and by accident, enough is known about informants, among the public at large and, importantly, in impacted Muslim and/or Black communities, to achieve force-multiplying and disruptive effects. Periodically, the security state tips its hand, revealing just enough. For example, publicly filed criminal complaints and U.S. Department of Justice press releases frequently refer to the role played by informants in netting the purportedly dangerous defendant.<sup>47</sup> In such disclosures, the informants may be anonymized, identified only by number with designations such as “CHS-1,” “CHS-2,” and so on, but their presence and activity are nonetheless made known. In the rare cases that proceed to trial or that call for their appearance at the pretrial stage, informants may even testify, again, often anonymously.

The solicitation of ordinary community members to inform, via questioning campaigns, is also visible and known. Whether or not a given community member submits to questioning, thereby becoming an informant of a sort (or a source, in the parlance), matters little. The attempt to question, by itself, communicates a message that resonates beyond the person. The FBI, for instance, may stage an unannounced visit in a manner deliberately calculated to be seen by neighbors, coworkers, or fellow worshippers. The person contacted may tell others that law enforcement came knocking. All of that does valuable work for the agencies. The point remains disruption, domination, and control.

This more publicly performative dimension recasts informant work as an exercise in deterrence and communication (or signaling), as much as, if not more than, an act of intelligence gathering.<sup>48</sup> All of this is aside from actually or strategically leaked information and extensive press coverage of the topic, which also put targeted communities on notice of the presence of informants in their midst.

The upshot is that Muslim and/or Black community members, leaders, activists, and organizers know that informants are around. They may

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46. FED. BUREAU OF INVESTIGATION, CONFIDENTIAL HUM. SOURCE POL’Y GUIDE (2015), <https://www.documentcloud.org/documents/3422065-CHS-FINAL-Redacted>.

47. See, e.g., Criminal Complaint, *U.S. v. Cornell*, No. 1:15-mj-00024, 2015 WL 13844929 (S.D. Ohio 2015), <https://www.justice.gov/file/317876/download>; Press Release, Fed Bureau of Investigation, Joint Terrorism Task Force Arrests Man in Lower Manhattan After He Attempted to Bomb New York Federal Reserve Bank (Oct. 17, 2012), <https://archives.fbi.gov/archives/newyork/press-releases/2012/joint-terrorism-task-force-arrests-man-in-lower-manhattan-after-he-attempted-to-bomb-new-york-federal-reserve-bank>.

48. See, e.g., Trevor Aaronson & Paul Abowd, *FBI Terrorism Stings: Two Decades of National Security Theater*, THE INTERCEPT (Sept. 11, 2021), [https://theintercept.com/2021/09/11/fbi-counterterrorism-stings-two-decades-of-national-security-theater/?mc\\_cid=6a017c370d&mc\\_eid=c938235815](https://theintercept.com/2021/09/11/fbi-counterterrorism-stings-two-decades-of-national-security-theater/?mc_cid=6a017c370d&mc_eid=c938235815).

not know the full scope of the problem—*how many* informants have been deployed around them—but they know enough to be alarmed and they have internalized the assumption of surveillance. In that informational asymmetry lies part of the value of informants to the government—law enforcement agents and other security state actors would describe the widespread assumption of surveillance as effective “deterrence,” with informants punching above their weight because the state’s real or imagined adversaries or targets believe that the threat to them is larger than it may be in reality. It is in that sense that the known use of informants carries a force-multiplying effect.

As a result, a pervasive sense of suspicion sets in, along with an impulse to remain on constant guard, taking care not to make statements or take actions that might be misunderstood or misrepresented by any informants present or by their handlers, who are the ultimate consumers of the information streams that informants generate. Imams might feel compelled to install expensive equipment in order to record their own sermons, as an insurance policy of sorts, or they might be reluctant to take private meetings with newcomers to their congregation.<sup>49</sup> Racial justice and anti-war activists may not wish to welcome strangers into their organizations, for fear of infiltration. College students, who are supposed to be exploring and experimenting with novel—even radical—ideas, experience the chilling effect and steer clear of political conversations for fear of what a possible informant might take out of context or misreport to security state handlers.<sup>50</sup>

While policymakers and security state apologists are wont to paint this facet of informant work as effective deterrence, the empirical evidence to back up that claim is scarce, to put it generously. All there is to show for it is the absence of an event: the public is asked to accept that, but for these mighty efforts by agents and their informants, dastardly plots would have come to fruition with devastating consequence.<sup>51</sup> The so-called foiled plots may have been detailed in splashy but questionable “terrorism sting”

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49. Complaint at 5, *Raza v. City of New York*, 998 F. Supp. 2d 70 (E.D.N.Y. 2013) (No. 13-CV-3448) Disclosure: with my law students and colleagues, I served as counsel for the plaintiffs in this litigation; Complaint, *Fazaga v. Fed. Bureau of Investigation*, 884 F. Supp. 2d. 1022 (C.D. Cal. 2011) (No. 8:11-cv-00301).

50. MUSLIM AM. CIV. LIBERTIES COAL., THE CREATING OF L. ENF’T ACCOUNTABILITY & RESP., & THE ASIAN AM. LEGAL DEFENSE AND EDUC. FUND, THE MUSLIM AM. CIV. LIBERTIES UNION ET AL., MAPPING MUSLIMS: NYPD SPYING AND ITS IMPACT ON AMERICAN MUSLIMS, <https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/immigration/clear/Mapping-Muslims.pdf> (describing signs put up by City University of New York student groups and reproducing one seen in Muslim Students Association office at Hunter College asking members to “please refrain from political conversations”).

51. See, e.g., Joint Terrorism Task Force Arrests Man in Lower Manhattan After He Attempted to Bomb New York Federal Reserve Bank, *supra* note 47.

prosecutions or they may have been left entirely to the public imagination. More visible, on the other hand, are the traces of the disruption caused by the deployment of informants as part of a larger architecture of surveillance—community building and movement work are stalled, the important civic and political work of organizing to challenge security state practices or foreign policy paralyzed or delayed.

Domination is one of the dividends of disruption. By sowing fear and distrust, and by hobbling the efforts of communities and movements to organize, the deployment of informants serves to assert state control over likely sites and constituencies of contestation to the state's claims and actions, domestically and overseas.

The disruptive function of informants harks back to the workings of Jeremy Bentham's Panopticon, at least as theorized by Michel Foucault. In a series of letters authored in 1787, English philosopher Jeremy Bentham expounded his vision of "a new principle of construction applicable to any sort of establishment, in which persons of any description are to be kept under inspection."<sup>52</sup> What he touted as "[a] new mode of obtaining power of mind over mind, in a quantity hitherto without example. . ."<sup>53</sup> was no more than a simple architectural idea. The proposed structure comprises a tower central to an annular building that is divided into cells, each cell extending the entire thickness of the edifice to allow inner and outer windows. The occupants of the cells are backlit and isolated from one another by walls or less imposing cleavages, depending on the purpose to which the structure is dedicated. The residents of the Panopticon are subject to scrutiny—both collectively and individually—by an unseen observer in the central tower.<sup>54</sup>

The essential elements of Bentham's plan are the centrality of the inspector's position combined with the asymmetrical gaze created by the structure, allowing the inspector to see without being seen.<sup>55</sup> Perpetual awareness by the inmates of the possibility of being observed at any moment turns uncertainty into a means of subordination.<sup>56</sup> The circular shape of the structure and the inspector's position therein reduce the costs and

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52. JEREMY BENTHAM, *THE PANOPTICON WRITINGS* 29 (Miran Božovič ed., 1995).

53. *Id.* at 31.

54. See Andreea Cutieru, *The Architecture of Surveillance*, ARCHDAILY (Apr. 18, 2020), <https://www.archdaily.com/937611/the-architecture-of-surveillance-the-panopticon-prison> (describing a Panopticon-inspired prison in France).

55. See Bentham, *supra* note 52 at 43 ("The essence of it consists, then, in the *centrality* of the Inspector's situation, combined with the well-known and most effectual contrivances for *seeing without being seen*.").

56. See DAVID LYON, *THE ELECTRONIC EYE: THE RISE OF SURVEILLANCE SOCIETY* 65 (1994) (University of Minnesota Press, 1994) ("Bentham's innovation, then, was not just to inspect, or even to ensure that the gaze is asymmetrical, but to use uncertainty as a means of subordination.").

difficulties of policing, such that a single inspector can realize the aforementioned risk of which the inmates are so keenly aware, merely by turning his gaze from one cell to the next. Indeed, in a passage that obliquely sets up the Panopticon as a secular parody of divine omniscience, Bentham describes the plan's advantages as resting primarily on "the *apparent omnipresence* of the inspector (if divines will allow me the expression), combined with the extreme facility of his *real presence*."<sup>57</sup> Isolation is another feature playing an important though variable role in this scheme. In a Panopticon used as a penitentiary, for example, isolating the inmates would forestall any attempt at subversion, escape, or other such conspiracy by removing all common spaces and preventing contacts among inmates.<sup>58</sup> Irrespective of the purpose to which the tool is applied, however, its success is guaranteed by making the inmates "not only *suspect*, but be *assured*, that whatever they do is known, even though that should not be the case."<sup>59</sup>

The Panopticon was the subject of little and mostly derisive attention until Michel Foucault resuscitated the concept in *Surveiller et punir*.<sup>60</sup> Foucault considered Bentham's Panopticon as a salient part of an important historical moment. In his view, the concept marked a transition from punishment of the body to discipline directed at the mind; it constituted a prototype for a new physics of power. Foucault's analysis succeeds in isolating and appreciating Bentham's contributions to disciplinary modes of control. By turning visibility into a trap for the inmate; by ensuring that, through the combined effects of isolation and the asymmetrical gaze, the occupant of the Panopticon becomes "the object of information, never the subject in communication," Bentham created a self-sustaining system of power borne by the very individuals it controls since they can never be free of the possibility of being watched and consequently internalize the surveillance mechanism, becoming their own inspectors.<sup>61</sup> More than a mere solution to a technical problem, Foucault saw the Panopticon as a

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57. Bentham, *supra* note 52, at 45. See Lyon, *supra* note 56, at 63 ("Bentham's Panopticon represented a secular parody of divine omniscience, and the observed was also, like God, invisible.").

58. See Bentham, *supra* note 52, at 48 (describing the advantages of isolating inmates in a penitentiary).

59. *Id.* at 94.

60. Foucault's account of the vitality of the concept clashes with that of most other scholars. According to Foucault, over the course of two centuries, the Panopticon so stimulated the imaginations of thinkers as to have led to the conception and even the construction of numerous variations along the main lines set down by Bentham. MICHEL FOUCAULT, *SURVEILLER ET PUNIR: NAISSANCE DE LA PRISON* 239 (1975). Foucault adduces no evidence in support of this proposition besides his citation to N.H. Julius. *Id.* at 252.

61. See *id.* at 234–35 for a discussion of that contribution.

blueprint for an entire societal type.<sup>62</sup> That Bentham presented his project as a self-contained institution should not blind us to the fact that it is really a scalable model, “the diagram of a mechanism of power reduced to its ideal form,”<sup>63</sup> argued Foucault.

The possible presence of informants installs the targets of surveillance in a panoptic dynamic. They become the inmates of Bentham’s and Foucault’s prison, subject to both the asymmetrical gaze—being seen without seeing in return—and to a sense of uncertainty about whether and when they are being watched. The third core panoptic element, isolation, is not structural in the literal sense in our context, not in the way that inmates are separated from one another by physical walls in a panoptic penitentiary. But isolation flows from the possible presence of informants in a community or in movement spaces, sowing discord and distrust, thereby separating community members and activists from one another.

At this juncture in the analysis, it bears emphasis that the *color* of surveillance is central. The effect achieved through the deployment of informants in post-9/11 America is not truly *panoptical* in that informants neither target nor affect everyone equally.<sup>64</sup> Muslim and/or Black communities and organizing spaces bear the brunt of infiltration by informants, along with many other forms of surveillance.

Informants, therefore, project the security state’s claim to ubiquity. Some observant Muslim clients on the receiving end have noted how that claim appears to usurp divine attributes of omnipresence, omniscience, and omnipotence. Indeed, the presumed presence of close yet elusive informants is reminiscent of the Qur’ānic verse describing God as “closer to [man] than his jugular vein.”<sup>65</sup> Far less fanciful, however, are the concrete ramifications of recruiting and deploying informants in observant Muslim communities and houses of worship in the face of a clear Qur’ānic prohibition on spying.<sup>66</sup> My students, colleagues, and I have represented clients who

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62. See *id.* at 252 (“En apparence, ce n’est que la solution d’un problème technique; mais à travers elle, tout un type de société se dessine.”).

63. *Id.* at 239.

64. See Didier Bigo, *Globalized (In)Security: The Field and the Ban-Opticon*, 1 *TERROR, INSECURITY AND LIBERTY* 10 (Didier Bigo & Anastasia Tsoukala ed 2008); Didier Bigo, *Security, Exception, Ban, and Surveillance*, 1 *THEORIZING SURVEILLANCE* 46 (David Lyon ed 2006); Ibrahim Bechroui, *Approche géopolitique des stratégies de lutte anti-terroriste du New York Police Department 279–282* (unpublished July 5, 2021) (Ph.D. dissertation, University of Paris).

65. Qur’ān 50:16 (“

declined to work as FBI informants in violation of the tenets of their Islamic faith and were placed or kept on the No Fly List as a result, in a bid by government agents to pressure them to reconsider.<sup>67</sup>

Aside from disruption, an insufficiently examined function of informants is the legitimizing role that they play in the larger so-called “war on terror.” One is reminded of the “native informants” whose enabling role was dissected in postcolonial studies.<sup>68</sup> “Native informants” told European colonizers what they already believed, confirming pre-existing views and justifying with a veneer of local color whatever form or combination of occupation, exploitation, extraction, or war was being waged under the false pretenses of spreading civilization. Similarly, an important role of the post-9/11 informant in America is to affirm the regnant narrative positing the immediacy and urgency of an existential, Muslim-identified security threat on a global scale. However that is done, whether by in-court testimony or in government-issued accounts, informants legitimize not only discrete prosecutions but also and far more importantly a larger narrative, a veritable framework, along with structures of control and domination, both domestically and overseas.

#### THE PATH OF RESISTANCE

This is where most law review articles would offer prescriptions for policy or legal reform. Existing strictures governing the use of informants by various law enforcement agencies certainly leave much to be desired.<sup>69</sup>

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[O you who have attained faith, avoid making too many assumptions—indeed, some assumptions are sinful. And do not spy on one another nor backbite one another. Would any of you like to eat the flesh of his dead brother? You would detest it. So be mindful of Allah; indeed, Allah is Granting and Accepting of repentance, Bestowing of mercy].

67. *Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020).

68. See GAYATRI SPIVAK, *A CRITIQUE OF POSTCOLONIAL REASON* (1999) (tracking the figure of the “native informant” through various disciplines—philosophy, history, literature); Edward Said, *The Academy of Lagado*, *LONDON REVIEW OF BOOKS* (2003) (analyzing Fouad Ajami as an influential “native informant” given his role as an Arab “expert” known for fervent anti-Arab views and right-wing Zionist sympathies).

69. The most relevant FBI policy documents are the Attorney General’s Guidelines for Domestic FBI Operations, the Domestic Investigations and Operations Guide, and the Confidential Human Source Policy. THE ATT’Y GEN., U.S. DEP’T OF JUST., THE ATTORNEY GENERAL’S GUIDELINES FOR DOMESTIC FBI OPERATIONS (2008), <https://www.justice.gov/archive/opa/docs/guidelines.pdf>; FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE (2016), <https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29%202016%20Version/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29%202016%20Version%20Part%2001%20of%2002/view>; FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE

But the ultimate ambition of this essay, having attempted to situate the problem and then unpack its implications, would be to lend immediate support to communities and movements grappling with informants in their midst, so that those constituencies are then better placed to pursue a radical transformation of the systems that most affect them. Put differently, we must first defeat informant networks and their handlers on our terrain before waging the largely political and cultural struggle to defeat them on theirs in more lasting fashion, by dismantling the very apparatus that sustains them.

My law students, colleagues, and I have worked with clients, communities, and movements to face this challenge in two principal ways: through mutual political education coupled with a studied, holistic, and homegrown practice of informant extraction. Our platform for this work has been the Creating Law Enforcement Accountability & Responsibility project and clinic (CLEAR), which I launched in 2009 with my students at the City University of New York (CUNY) School of Law. The aim was and is to support those who are targeted by law enforcement under the guise of security or counterterrorism.<sup>70</sup>

At the behest of partner communities and movements, CLEAR has developed and employed a comprehensive curriculum focused on the problem of informants, refined to integrate and disseminate best practices learned across spaces and over time. The rights awareness and legal security workshops on the subject of informants that CLEAR teams facilitate in community and movement spaces, along with the literature that CLEAR has generated over the years, all aim to build power, not demoralize and

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(2013), <https://www.documentcloud.org/documents/3416775-DIOG-Redactions-Marked-Redacted>; FED. BUREAU OF INVESTIGATION, CONFIDENTIAL HUM. SOURCE POL'Y GUIDE (2015), <https://www.documentcloud.org/documents/3422065-CHS-FINAL-Redacted>. The NYPD Intelligence Bureau's surveillance of First Amendment activity is now governed by the current version of the *Handschu* Rules, which were strengthened as part of a settlement resulting from a challenge to the constitutionality of the NYPD's Muslim surveillance program in *Raza v. City of New York*, coupled with motion practice in the longstanding *Handschu* case. See REVISED *HANDSCHU* GUIDELINES (2017), [https://static1.squarespace.com/static/59134566e58c623970f2cd48/t/5c4fcd9b032be4383f4a4eff/1548733852344/Raza\\_+jt+stip\\_+exh+A\\_+revised+Handschu+guidelines\\_+2017.03.19.pdf](https://static1.squarespace.com/static/59134566e58c623970f2cd48/t/5c4fcd9b032be4383f4a4eff/1548733852344/Raza_+jt+stip_+exh+A_+revised+Handschu+guidelines_+2017.03.19.pdf); <https://www.nydailynews.com/new-york/judge-greenlights-settlement-nypd-muslim-surveillance-suit-article-1.3004545>. Permissive doctrine, exemplified by *Laird v. Tatum*, 408 U.S. 1 (1972), has proven to be of enduring utility to surveillance enterprises, be they deployed by state, federal (including military as in *Laird*), or municipal authorities. All of these authorities call for deep critique, but while that could well be the subject of other writing, it is not the object of this essay. For a set of regulatory proposals, see, e.g., Diala Shamas, *A Nation of Informants: Reining In Post-9/11 Coercion of Intelligence Informants*, 83 BROOK. L. REV. 1175 (2018).

70. For more on CLEAR's work, visit [www.cunyclear.org](http://www.cunyclear.org) (last visited Oct. 21, 2021).

discourage.<sup>71</sup> The goal is to raise awareness of concrete realities and propose effective strategies of resistance, while remaining constantly careful not to promote paranoia and deter organizing impulses, thereby performing the security state's disruptive work in its stead.<sup>72</sup>

Informants are often told by their handlers that they have no way out—they must do law enforcement's bidding, and do it secretly, or else. Often, as discussed above, they are impressed into informancy by the threat of incarceration, deportation, or watchlisting. Informants also fear that they would be ostracized if members of their community discovered their secret, and that they have nowhere to turn. CLEAR works with community members and activists to counter that messaging. We encourage informants to come out of the shadows and offer them legal and community support, provided they are willing to exit their destructive role with agencies like the FBI.

In that way, we strive to dissolve a web of informants that thrives on secrecy, shame, isolation, and fear with openness, honesty, and holistic support. We offer people who come forward and commit to quit working as informants the legal support they need to resolve any underlying criminal, immigration, or watchlisting issues that their law enforcement handlers may be using to pressure them into service. When the time is right, we intercede on the informants' behalf with their handlers to inform law enforcement that they no longer wish to work as informants. We coordinate various demonstrations of support from community representatives and organizers so that the informants no longer feel isolated. Finally, we meet secrecy with transparency and publicity, working with trustworthy reporters to tell the informants' stories, which serves to protect them from law enforcement retaliation while making it less likely they would be of renewed value as informants in the future.

For example, CLEAR's informant extraction work has featured community members and activists turning up to support an informant's decision to pull out of a relationship with law enforcement, communicated in person to their handlers in a public space such as a park or on a city sidewalk, in the presence of their legal team from CLEAR, along with members of the press.<sup>73</sup> Following that act—which is often experienced by the

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71. See CLEAR, "What You Should Know About Informants," <https://static1.squarespace.com/static/59134566e58c623970f2cd48/t/5c526c204d7a9c391e44c8cc/1548905505636/ENGLISH+WHAT+TO+KNOW+ABOUT+INFORMANTS.pdf> (available in multiple languages).

72. For more, see Ramzi Kassem & Diala Shamas, *Rebellious Lawyering in the Security State*, 23 N.Y.U. CLIN. L. REV. 671, 702–704 (2017) (discussing rights awareness and legal security workshops facilitated by CLEAR).

73. See Mazin Sidahmed, *How the FBI Coerced This Muslim Immigrant into Working as an Informant*, DOCUMENTED (Dec. 22, 2020), <https://documentedny.com/2020/12/22/how-the-fbi-coerced-this-muslim-immigrant-into-working-as-an-informant> (reporting how Fatma,

former informants as both terrifying and liberating—CLEAR has engaged in restorative justice work, facilitating and moderating meetings between the former informants and their erstwhile targets.<sup>74</sup> While such conversations can be difficult, they also create room for reconciliation and healing.

#### CODA

An accurate analysis of the role, value, and valency of informants, along with a mastery of strategies of resistance, remain as vital today as they were ever before in communities and movements that find themselves in the crosshairs of the sprawling security apparatus that is among the signature legacies of the post-9/11 period.<sup>75</sup> An entire generation of FBI agents and other law enforcement officers have been reared on questionable practices of informant recruitment, deployment, and use.<sup>76</sup> These agents and officers know little else—they are far less familiar and comfortable with conventional criminal investigative work. The old saying about a person with only a hammer seeing nails everywhere comes to mind. And because the bloated security apparatus developed over the past two decades remains intact today, it must seek additional demographics to paint as a threat and to target in order to justify its own expensive existence.

In addition to a continued focus on both Black and non-Black Muslims, there has already (and unsurprisingly) been a resurgence of the FBI's historical obsession with Black-led racial justice movements. In the wake of the murder of George Floyd by police in 2020, with an unprecedented

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a Ghanaian Muslim immigrant coerced into working as an informant, flanked by a team of CLEAR attorneys and law students, alongside a reporter, informed her FBI agent handlers in a public park that she would no longer be working with them); Arun Venugopal, *Pressured to Spy on NYC Mosques for Two Years, An Immigrant FBI Informant Seeks A Way Out*, GOTHAMIST (Aug. 22, 2019), <https://gothamist.com/news/pressured-to-spy-on-nyc-mosques-for-two-years-an-immigrant-fbi-informant-seeks-a-way-out> (describing how FBI informant Bilol, an Uzbek Muslim, flanked a team of CLEAR attorneys and activists, informed FBI agents on a city sidewalk that he would no longer be working with them).

74. Venugopal, *supra* note 73 (describing former informant Bilol's outreach to leaders in Muslim communities he was tasked to spy on in order to repair the damage he caused by working for the FBI).

75. Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST (July 19, 2020), <https://www.washingtonpost.com/investigations/top-secret-america/2010/07/19/hidden-world-growing-beyond-control-2> (reporting how secrecy throughout sprawling U.S. security and intelligence apparatus has made it nearly impossible to determine whether it fulfills its stated purpose).

76. See Janet Reitman, *I Helped Destroy People*, N.Y. TIMES MAG. (Sept. 1, 2021), <https://www.nytimes.com/2021/09/01/magazine/fbi-terrorism-terry-albury.html> (“Tremendous pressure was put on agents to bolster their squad's numbers on open or active investigations and informants, which boosted the office's statistics, resulting in more funding for agents, analysts, surveillance teams and other aspects of the J.T.T.F., which in turn would open more investigations.”).

wave of protests against police violence sweeping the nation, then-Attorney General Bill Barr saw fit to activate the national network of 56 regional Joint Terrorism Task Forces (JTTFs) against the movement in defense of Black lives.<sup>77</sup> The silver lining to that development is that it naturally highlights a commonality of both predicament and, importantly, purpose that should bind affected groups. The present historical moment organically offers an opportunity to draw inspiration and teachings from the centuries of struggle and organizing by Black people in the United States, combined with the invaluable lessons gleaned by Black and non-Black Muslims post-9/11. Together, not only can these groups, with their allies, mount resistance to informants and the larger system they represent, but they can also contribute to reimagining their society and the world beyond without the harmful trappings of that system.

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77. WILLIAM P. BARR, ATT'Y GEN., U.S. DEP'T OF JUST., STATEMENT ON RIOTS AND DOMESTIC TERRORISM (May 31, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barrs-statement-riots-and-domestic-terrorism> (reporting Attorney General's announcement in response to Black Lives Matter protests that national network of 56 regional FBI Joint Terrorism Task Forces (JTTFs) will be used to identify "criminal organizers and instigators"); THE MOVEMENT FOR BLACK LIVES & CLEAR, STRUGGLE FOR POWER 8-9 (2021), <https://m4bl.org/wp-content/uploads/2021/08/Struggle-For-Power-The-Ongoing-Persecution-of-Black-Movement-by-the-U.S.-Government.pdf>.

## THE BAN AND ITS ENDURING BANDWIDTH

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*This Essay is a contribution to the Michigan Journal of Race & Law's special issue marking the 20<sup>th</sup> anniversary of September 11, 2001 and the ensuing War on Terror. It reflects on Executive Order 13769, widely known as the "Muslim Ban," years after it was signed into law, as an extra-legal catalyst of state-sponsored and private Islamophobia that unfolded outside of the United States.*

### INTRODUCTION

Hours after newly inaugurated President Trump signed Executive Order 13769 into law, airports across the United States were instantly transformed into holding cells.<sup>1</sup> Muslim visa holders from seven Muslim-majority countries were denied entry into the United States.<sup>2</sup> In addition to these immigrants, those applying for status as lawful permanent residents were also barred entry in the immediate wake of the Ban.<sup>3</sup>

The swift enforcement of the Ban sowed chaos, and instant legal challenge. On the other side of the airport checkpoints, protesters stormed the terminals in defense of the Muslim travelers-turned-captives, challenging a ban that would become the Trump Administration's hallmark policy. Virtually overnight, the American people were awakened to

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1. See Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017). Revoked by Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

2. Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) The first version of the Ban listed Libya, Iran, Iraq, Somalia, Sudan, Syria, and Yemen as the restricted states.

3. Amrit Cheng, *The Muslim Ban: What Just Happened?* AMERICAN CIVIL LIBERTIES UNION (Dec. 6, 2017), <https://www.aclu.org/blog/immigrants-rights/muslim-ban-what-just-happened>.