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Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror

ABSTRACT. The United States' aggressive War on Terror policies since 9/11 have led to significant prison sentences for many young American Muslims, even when their charged criminal conduct cannot be tied to any act of violence in the United States or abroad. A primary reason provided for their severe punishment is that these individuals are uniquely dangerous, cannot be deterred or rehabilitated, and must be incapacitated to protect society from their ideologically violent goals. In the 1980s and 1990s, similar accusations were raised in the War on Drugs against young African-Americans, who were described as remorseless "super-predators" and received lengthy sentences in an effort to reduce drug and gang violence across the United States. Through a comparative analysis between federal sentencing policies in the Wars on Terror and Drugs, this Feature explains how these policies have disproportionately targeted particular minority communities and have led to sentences for young nonviolent offenders that undermine effective strategies to combat violence in the United States. In response to harms created by the War on Drugs, policymakers have instituted numerous reforms to reduce the length of drug-related sentences and focus on alternative means of addressing drug crimes and rehabilitating offenders. However, as this Feature explains, the lessons learned from counterproductive War on Drugs sentencing policies have not yet been translated to the War on Terror. This Feature advocates for a more effective and just counterterrorism strategy that would provide for greater nuance in sentencing terrorism offenders and focus on rehabilitation rather than on lengthy punitive incarceration.

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INTRODUCTION

Since 9/11, the U.S. government has undertaken an aggressive War on Terror to target violent extremist groups like Al Qaeda and ISIS that are based in Muslim-majority countries. In recent years, a handful of violent shootings and bombings by self-identified Muslims in Boston, San Bernardino, and Orlando—in addition to more deadly attacks in Europe, Africa, South Asia, and the Middle East—have exacerbated fears of terrorism and the need to combat it. For the most part, the United States has adopted a zero-tolerance, preventative counterterrorism strategy of arresting anyone who may support foreign terrorist groups and incapacitating them with lengthy terms of incarceration. Federal law enforcement has a variety of tools at its disposal to implement this policy, including “material support for terrorism” statutes to prosecute offenders and sentencing guidelines to put them away for decades in prison. These tactics have been used even when the offenders’ conduct cannot be tied to any act of violence in the United States or abroad. A primary justification given for these extraordinarily punitive measures is that those affiliated with terrorist activity—primarily young Muslim men—are uniquely dangerous: because they cannot be deterred or rehabilitated, they must instead be incapacitated to protect society from their ideologically violent goals.

Twenty to thirty years ago, similar accusations were levied against another group of individuals—young African American men—in the War on Drugs. Concerned about the rise of drug and gang violence in the 1980s and 1990s, government officials argued that remorseless inner-city “super-predators” must be incapacitated to stem the tide of death and destruction across the United States.¹ To address the problem, the government instituted a series of harsh penalties to significantly increase the criminal sentences for a wide range of drug-related conduct. However, the majority of individuals sentenced were not hardened violent criminals, but rather nonviolent low-level drug offenders.² Many now recognize that these War on Drugs policies have caused significant and disproportionate harm to African American communities, where one-third of African American men are expected to be incarcerated during their lifetime.³

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1. John J. Dilulio Jr., *The Coming of the Super-Predators*, WKLY. STANDARD (Nov. 27, 1995), <http://www.weeklystandard.com/the-coming-of-the-super-predators/article/8160> [<http://perma.cc/NX9W-BYHZ>].
 2. See *infra* Section I.B.
 3. Thomas P. Bonczar, *Special Report: Prevalence of Imprisonment in the U.S. Population, 1974-2001*, BUREAU JUST. STAT. 1 (Aug. 2003), <http://www.bjs.gov/content/pub/pdf/piuspo1.pdf> [<http://perma.cc/N7UA-3JDR>]; Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INSTITUTION (Sept. 30, 2014), <http://www.brookings.edu>

In recent years, changes in Supreme Court precedent, the United States Sentencing Guidelines, and charging policies have led to a reduction in the length of drug-related sentences, and policymakers have focused on alternative means of addressing drug crimes and rehabilitating offenders.

Similar to the War on Drugs, many of the individuals that have been sentenced in the War on Terror are not hardened remorseless terrorists. In fact, a number are young, disaffected American Muslims with little to no criminal history, whose anger over the killings of Muslims throughout the Middle East and the discrimination against Muslims in the United States has made them susceptible to the views of terrorist groups like ISIS.⁴ Furthermore, just like the War on Drugs, the government's sentencing policies—in particular the Sentencing Guidelines' Terrorism Enhancement—fail to take into account the differences between a violent terrorist who has killed dozens and an American Muslim teenager who tweets support for ISIS online. Despite these similarities, this Feature contends that the lessons learned from counterproductive War on Drugs sentencing laws have not yet been translated to the War on Terror. Instead, terrorism sentencing policies have caused harm to Muslim communities similar to that of African American communities in the War on Drugs. This is despite the fact that Muslims convicted of terrorism offenses make up only a few hundred of the millions of Muslims living in the United States.⁵ And, like the War on Drugs, the War on Terror policies have failed to serve the purposes of criminal sentencing or to contribute to an effective counterterrorism policy.

This Feature proceeds in four Parts. Part I provides a background of the sentencing policies of the Wars on Terror and Drugs that have led to long prison terms. It argues that these policies fail to take into account the seriousness of the offense and the characteristics of the individual defendant. Part II demonstrates how policymakers justified these laws by arguing that the "unique" nature of the individuals who commit certain drug and terrorism offenses makes them unable to be rehabilitated or deterred. This Part further argues that this premise has no support, and as a result, young Muslims and African Americans have received sentences for nonviolent conduct that far ex-

/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility [http://perma.cc/YHP8-J6U4].

4. See *infra* Section II.A.2.

5. *By the Numbers: U.S. Prosecutions of Jihadist Terror Crimes, 2001-2013*, CTR. ON NAT'L SECURITY FORDHAM L. [hereinafter *By the Numbers*], <http://static1.squarespace.com/static/55dc76f7e4b013c872183fea/t/56b88ef1356fb0ff251aa15a/1454935794120/JihadistFactSheet2001-13.pdf> [http://perma.cc/SB8Z-S72B]; *Muslim Americans: Middle Class and Mostly Mainstream*, PEW RES. CTR. 11 (May 22, 2007), <http://www.pewresearch.org/files/2007/05/muslim-americans.pdf> [http://perma.cc/9PH2-TX9D].

ceed the purposes of federal sentencing delineated by Congress. While acknowledging that the percentage of African Americans imprisoned under the War on Drugs policies has been much higher than that of Muslims imprisoned under the War on Terror policies, Part III explains how these lengthy sentences have negatively impacted African American and Muslim communities in similar ways, including increased discrimination, distrust of law enforcement, and the failure to effectively rehabilitate offenders. Part IV explains how recent reforms have been implemented to counter these harmful consequences of the War on Drugs, leading to lower sentences and a renewed focus on rehabilitating drug offenders. However, the lessons learned from the War on Drugs have not been applied to the more recent War on Terror. The government has failed to sufficiently address similar concerns in the War on Terror largely due to an oversized fear of foreign terrorists groups as well as the desire of government officials to be viewed as “tough” on terrorism without realizing the significant adverse consequences of their policies. Just as with the recent changes to drug sentencing policies, a more effective and just counterterrorism strategy would provide for greater nuance in sentencing terrorism offenders and focus on rehabilitation rather than only on lengthy punitive incarceration.

I. CRIMINAL SENTENCING IN THE WARS ON TERROR AND DRUGS

A. *War on Terror*

Soon after 9/11, the U.S. government launched the War on Terror to destroy Al Qaeda and other like-minded terrorist groups that threatened the United States and its allies.⁶ As part of the War on Terror, the government adopted a strategy of proactively preventing terrorist attacks before they take place and incapacitating any individual who supports terrorist organizations. Attorney General John Ashcroft instructed the Department of Justice to “prevent first, prosecute second.”⁷ To achieve this goal, the government expanded a series of laws and policies to allow law enforcement officials to arrest individuals well before they can commit or support violent acts and sentence them to lengthy terms of incarceration.⁸ These changes included broadening the Sen-

6. President George W. Bush, *Address to a Joint Session of Congress and the American People*, WHITE HOUSE (Sept. 20, 2001), <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html> [<http://perma.cc/D6WP-K8DQ>].

7. *Homeland Defense: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 9 (2001) (statement of John Ashcroft, Att’y Gen. of the United States).

8. George D. Brown, *Punishing Terrorists: Congress, the Sentencing Commission, the Guidelines, and the Courts*, 23 CORNELL J. L. & PUB. POL’Y 517, 547-48 (2014).

tencing Guidelines Terrorism Enhancement and federal terrorism statutes.⁹ As George Brown writes, “If prevention is at the heart of counter-terrorism, harsh sentences seem appropriate here as well.”¹⁰ The government does not want to “wait until there are victims of terrorist attacks to fully enforce the nation’s criminal laws against terrorism.”¹¹

1. *The Sentencing Guidelines Terrorism Enhancement*

The primary reason why individuals convicted of terrorism-related conduct have received extraordinarily long criminal sentences is due to section 3A1.4 of the United States Sentencing Guidelines, also known as the “Terrorism Enhancement.”¹² The Terrorism Enhancement significantly increases the sentencing range (known as the “Guidelines range”) that federal judges use when deciding the appropriate term of incarceration.

The Terrorism Enhancement is just one of many adjustments contained in the Guidelines created by the United States Sentencing Commission.¹³ The Guidelines establish various sentencing ranges based on a chart cross-referencing forty-three “offense levels” with six “criminal history” categories.¹⁴ For example, someone convicted of a serious crime with an offense level of forty-two and a lengthy criminal history (Category VI) would receive a Guidelines range of 360 months to life, while someone convicted of a lesser crime with an offense level of twelve and very little criminal history (Category I) would receive a Guidelines range of ten to sixteen months.¹⁵ The Guidelines also contain many adjustments based on the characteristics of the offense, the offender,

9. See, e.g., Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272.

10. Brown, *supra* note 8, at 547.

11. United States v. Abu Ali, 528 F.3d 210, 264 (4th Cir. 2008) (internal quotation marks omitted); see also Joshua L. Dratel, *The Literal Third Way in Approaching “Material Support for Terrorism”: Whatever Happened to 18 U.S.C. § 2339B(C) and the Civil Injunctive Option?*, 57 WAYNE L. REV. 11, 80 (2011) (“The government’s preemptive strategy has also resulted in the expansion of inchoate crimes such as attempt and conspiracy, as making arrests earlier along the time continuum further distances the defendant’s conduct from a completed substantive crime, or even an agreement to commit a specific offense.”).

12. U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (U.S. SENTENCING COMM’N 2015).

13. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, 1989-90 (codified as amended at 18 U.S.C. § 3553 (2012)).

14. U.S. SENTENCING GUIDELINES MANUAL 403-04 tbl. (U.S. SENTENCING COMM’N 2015).

15. *Id.*

or the victim.¹⁶ The adjustments can increase or decrease the offense level and/or the criminal history category. The Terrorism Enhancement is one such adjustment.

While federal judges were originally required to sentence defendants within the calculated Guidelines range, in 2005 the Supreme Court in *United States v. Booker* struck down the mandatory Guidelines regime as unconstitutional.¹⁷ Although the Guidelines are now only advisory, they continue to be the starting point to calculate the sentence for every federal offense, and courts, for the most part, attempt to sentence individuals within the range. For example, in 2015, 76.6% of defendants received a sentence either within the Guidelines range or below the range when the proposed sentence was sponsored by the prosecution.¹⁸ Moreover, if a court elects to impose a sentence outside the range, it must demonstrate why it is reasonable to do so.¹⁹ Therefore, the Guidelines, including the Terrorism Enhancement, still play an important role in determining the sentences of individuals convicted of terrorism offenses.

The Terrorism Enhancement was created pursuant to the Violent Crime Control and Law Enforcement Act of 1994, where Congress directed the Sentencing Commission “to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime.”²⁰ Although the Enhancement initially applied only to international terrorism, the Antiterrorism and Effective Death Penalty Act of 1996 expanded the Terrorism Enhancement to apply to domestic terrorism as well.²¹ After 9/11, the USA PATRIOT Act further expanded the Enhancement, making it applicable to a broad category of terrorism-related offenses, including: (1) crimes involving terrorism, but not falling within the statutory definition of “federal crime of terrorism”; (2) obstructing an investigation of a federal crime of terrorism; (3) harboring or concealing a terrorist; and (4) intending to influence the government’s conduct by intimidation or co-

16. *Id.* at 343-74.

17. *United States v. Booker*, 543 U.S. 220, 226-27, 267 (2005).

18. *National Comparison of Sentence Imposed and Position Relative to the Guideline Range, Fiscal Year 2015*, U.S. SENT’G COMMISSION tbl.N (2015), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/TableN.pdf> [<http://perma.cc/7T9V-V6GX>].

19. *United States v. Stewart*, 590 F.3d 93, 134-35 (2d Cir. 2009).

20. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120004, 108 Stat. 1796, 2022 (1994).

21. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 730, 110 Stat. 1214, 1303.

ercion, retaliate against government conduct, or influence a civilian population by intimidation or coercion.²² In addition to the commission of the actual crime, the Terrorism Enhancement also applies to inchoate offenses.²³ Therefore, while the Guidelines usually permit an offense level reduction for uncompleted crimes under section 2X1.1(b),²⁴ for terrorism offenses, defendants who conspire or attempt to commit a crime are treated exactly the same as those who actually commit the crime.

Although the Terrorism Enhancement has been expanded significantly to apply to a broad range of conduct, its effect on an individual's sentence has remained the same since its enactment. A defendant's offense level is increased by twelve levels, but cannot be lower than thirty-two.²⁵ His criminal history category is also increased to Category VI, the highest level.²⁶ The minimum Guidelines range under the Terrorism Enhancement is 210 to 262 months (17.5 to 21.8 years).²⁷ Of all the adjustments in the Guidelines, the Terrorism Enhancement is the most severe.²⁸ As an example, the Enhancement can lead to a sentence from thirty years to life for a crime that would otherwise result in a sentence of around five years.²⁹

2. *The Exceptionality of Terrorism Sentencing*

Post-*Booker*, federal courts are instructed to fashion a sentence based on a variety of statutory factors under 18 U.S.C. § 3553(a), including “the nature and circumstances of the offense and the history and characteristics of the defendant.”³⁰ However, unlike with other crimes, sentencing in the terrorism context—and the Terrorism Enhancement especially—fails to address these factors.

22. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272; U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 637 (U.S. SENTENCING COMM’N 2002); *id.* § 3A1.4 cmt. n.4.

23. *See, e.g.*, *United States v. Wright*, 747 F.3d 399, 407 (6th Cir. 2014).

24. U.S. SENTENCING GUIDELINES MANUAL § 2X1.1(b) (U.S. SENTENCING COMM’N 2015).

25. *Id.* § 3A1.4(a).

26. *Id.* § 3A1.4(b).

27. *Id.* 403-04 tbl.

28. *See Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions*, COLUM. L. SCH. HUM. RTS. INST. & HUM. RTS. WATCH 124 (July 21, 2014) [hereinafter *Illusion of Justice*], <http://www.hrw.org/report/2014/07/21/illusion-justice/human-rights-abuses-us-terrorism-prosecutions> [[29. *Id.* at 125.](http://perma.cc/56D]-YLRM].</p></div><div data-bbox=)

30. 18 U.S.C. § 3553(a)(1) (2012).

The Terrorism Enhancement treats all offenders the same, without taking into account their actual conduct or individual background, such as age and criminal history.³¹ Thus, the Enhancement undermines a basic principle of U.S. sentencing law and its underlying commitment to retributive justice: that punishment should be proportional to the crime.³²

Criminal conduct subject to the Enhancement varies significantly: from planning and participating in a violent attack that kills hundreds of people to making false statements to law enforcement officials. Yet the Terrorism Enhancement does not take into account this broad range of conduct, and the resulting Guidelines range is often inconsistent with the actual statutes that criminalize the underlying conduct in the first place. For example, the material support for terrorism statutes prohibit providing “material support”—such as money, training, expert advice, and assistance—to terrorists.³³ Unlike the Enhancement, these statutes recognize that different levels of support require different punishments. While 18 U.S.C. § 2339A permits a maximum sentence of fifteen years, if death is caused by the support provided, the maximum increases to life imprisonment.³⁴ Furthermore, under section 2339C, if financial support is provided with the intent to fund an act of terrorism, the maximum sentence is twenty years.³⁵ But if someone only conceals such financial support, the maximum is reduced to ten years.³⁶ Contrary to these varying levels of punishment, the *minimum* sentence under the Terrorism Enhancement is 17.5 years, regardless of the type of material support provided.³⁷ Therefore, while the material support statutes demonstrate that Congress indicated that sentences should be “proportional to the culpability of the conduct, to the injury that can be directly attributed to a defendant’s actions, and to the nature of the

31. See George D. Brown, *Notes on a Terrorism Trial—Preventive Prosecution, “Material Support” and the Role of the Judge After United States v. Mehanna*, 4 HARV. NAT’L SECURITY J. 1, 54 (2012) (“[The Terrorism Enhancement does not reflect] an important value of the criminal law: the gradation of offenses. We do not treat a purse-snatcher like a rapist. The Enhancement reflects a different view: a terrorist is a terrorist.”); James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 LAW & INEQ. 51, 100, 116 (2010).

32. See *Graham v. Florida*, 560 U.S. 48, 59–60, 71 (2010); Christina Parajon Skinner, *Punishing Crimes of Terror in Article III Courts*, 31 YALE L. & POL’Y REV. 309, 338–55 (2013).

33. 18 U.S.C. § 2339A (2012).

34. *Id.*

35. *Id.* § 2339C(d)(1).

36. *Id.* § 2339C(d)(2).

37. See *supra* text accompanying note 27.

organization's actions,"³⁸ the Terrorism Enhancement treats those who provide any type of material support to a terrorist as harshly as the terrorist who commits the violent act.³⁹

Others have recognized that the seriousness of terrorism offenses differs based on the underlying conduct. Christina Parajon Skinner, for example, divides offenders into "hard core" and "soft core" groups.⁴⁰ Hard-core defendants are those that have committed "terroristic acts or attempts, [when] there are no mitigating circumstances to consider."⁴¹ As an example, Skinner provides Zacarias Moussaoui, the "twentieth hijacker," who received a life sentence for his role in the 9/11 attacks and never demonstrated remorse for his actions.⁴² For these individuals, long sentences "are proportional to the threat they pose."⁴³ On the other hand, soft-core defendants include individuals "whose conduct has less directly threatened U.S. interests," such as those convicted of providing material support or in sting operations initiated by government informants.⁴⁴

One thing that many of these soft-core defendants have in common is that their actions did not lead to any identifiable harm or imminent risk of harm. In the regular sentencing context, the lack of actual harm usually reduces a defendant's sentence pursuant to 18 U.S.C. § 3553(a)(2)(A)'s instruction to consider "the seriousness of the offense" as well as section 2X1.1(b)(1)-(2) of the Guidelines, which provides for an offense-level reduction for uncompleted crimes.⁴⁵ However, for the Terrorism Enhancement, the fact that the defendant's conduct caused no harm does not matter. For this reason, the Enhancement treats individuals convicted after sting operations the same as those for whom the government played no role in assisting with their planned attack. Terrorism sentencing fails to take into account the fact that a defendant's intent, knowledge, and capability of committing the crime is usually much lower

38. McLoughlin, *supra* note 31, at 68; *see also id.* at 100 ("There are many meaningful distinctions between defendants convicted of crimes of terrorism, including the 'materiality' of their support, the intent with which they gave the support, the organization to which the support was given, the quality and quantum of the support, the duration of the support, the identifiable harm caused by the support, and any identifiable victim of the support. U.S.S.G. section 3A1.4 fails to account for these differences.").

39. *See, e.g., id.* at 58.

40. Skinner, *supra* note 32, at 349-57.

41. *Id.* at 349.

42. *Id.*

43. *Id.* at 350.

44. *Id.* at 351.

45. 18 U.S.C. § 3553(a)(2)(A) (2012); U.S. SENTENCING GUIDELINES MANUAL § 2X1.1(b)(1)-(2) (U.S. SENTENCING COMM'N 2015).

when an informant is involved. As Joshua Dratel states, “[I]t will always be unclear just what the defendant would have done – or *not* done – absent the solicitation, encouragement, and assistance of government operatives,” and the defendant “might not have presented a danger except in conjunction with a confidential informant.”⁴⁶ However, that defendant receives the same punitive sentencing enhancement as a hardened terrorist.

The Terrorism Enhancement also does not take into account the individual characteristics of each defendant. The young American Muslims analyzed in this Feature all have little to no criminal history, and but for the Terrorism Enhancement would have been placed in Category I instead of VI, which could have reduced their potential Guidelines sentence by fifteen years or more.⁴⁷ The Sentencing Commission has recognized that individuals with no criminal record have the lowest rate of recidivism. One study determined that 93.2% of first-time offenders did not recidivate.⁴⁸ In other situations for defendants with no criminal history, courts have given sentences below the advisory Guidelines range, recognizing that a lesser term of incarceration is still a substantial punishment and deterrent for someone who has never experienced prison before.⁴⁹ However, such considerations do not apply for most terrorism defendants.⁵⁰

46. Dratel, *supra* note 11, at 61.

47. For example, the Guidelines range for an individual with an offense level of thirty-six would be reduced from 324-405 months to 188-235 months. U.S. SENTENCING GUIDELINES MANUAL § 5A, sentencing tbl. (U.S. SENTENCING COMM’N 2015).

48. *Recidivism and the “First Offender,”* U.S. SENT’G COMMISSION 26 (May 2004), http://www.uscourts.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_First_Offender.pdf [<http://perma.cc/MLD8-RQU8>].

49. See, e.g., *United States v. Willis*, 479 F. Supp. 2d 927, 937 (E.D. Wis. 2007) (varying downwards because the “sentence provided a substantial punishment for someone like [Willis], who had never before been to jail and who engaged in no violence”); *United States v. McGee*, 479 F. Supp. 2d 910, 912 (E.D. Wis. 2007) (giving a below-Guidelines sentence because defendant “had never before been to prison” and “[g]enerally, a lesser period of imprisonment is required to deter a defendant not previously subject to lengthy incarceration than is necessary to deter a defendant who has already served serious time yet continues to re-offend” (quoting *United States v. Qualls*, 373 F. Supp. 2d 873, 877 (E.D. Wis. 2005))).

50. Some have argued that, despite the Terrorism Enhancement, federal judges can still take into account the circumstances of the offense and defendant in sentencing because, post-*Booker*, they have the discretion to vary or depart downward where the individual circumstances do not match those of a dangerous terrorist. Indeed, the Sentencing Guidelines themselves permit a downward departure “[i]f reliable information indicates that the defendant’s criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes” U.S. SENTENCING GUIDELINES MANUAL § 4A1.3(b)(1) (U.S. SENTENCING COMM’N 2015). In some terrorism cases, district courts have departed downward on that basis. For example, in *United States v. Aref*, the district court found that a departure to criminal

B. War on Drugs

Decades before the federal government established policies like the Terrorism Enhancement as part of the War on Terror, it created a series of laws to ensure that those convicted of drug crimes received lengthy jail time as part of the War on Drugs. And, just like the War on Terror, the War on Drugs' sentencing policies failed to take into account the nature of the offense and individual circumstances of the defendant. Instead, the policies required lengthy sentences for a broad range of conduct, including low-level drug offenses that were not tied to the violent gang activity that the policies were intended to address.

The beginning of the War on Drugs is often attributed to President Nixon, who in 1971 decried drug abuse as "public enemy number one" and later created the Office of Drug Abuse Law Enforcement, the precursor to the Drug Enforcement Administration.⁵¹ In the 1980s and 1990s, the crack-cocaine epidemic and inner-city gang violence led Congress to adopt harsh consequences for drug offenders.⁵² Congress passed the Anti-Drug Abuse Act in 1986, which created twenty-nine mandatory minimum sentences for drug offenses.⁵³ The law also created a one hundred-to-one sentencing disparity for crack versus powder cocaine, in which a person required only five grams of crack cocaine (as opposed to 500 grams of powder cocaine) to trigger a five-year mandatory minimum.⁵⁴ Additionally, to address what President Clinton characterized as the "[g]angs and drugs [that] have taken over our streets and undermined our schools,"⁵⁵ Congress enacted the Violent Crime Control and Law Enforcement

history Category I was warranted because the defendant "has provided for his family until his arrest through lawful employment in various capacities, and there is no indication that he has engaged in any other criminal activity." *United States v. Aref*, No. 04-CR-402, 2007 WL 804814, at *3 (N.D.N.Y. Mar. 14, 2007). The problem with this argument is that cases like *Aref* are the exception to the rule, and, as Wadie Said points out, appellate courts have consistently overturned sentences for terrorism defendants when judges vary downward too significantly from the Guidelines range created by the Terrorism Enhancement. Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO ST. L.J. 477, 525-27 (2014).

51. President Richard Nixon, *Statement on Establishing the Office for Drug Abuse Law Enforcement*, AM. PRESIDENCY PROJECT (Jan. 28, 1972), <http://www.presidency.ucsb.edu/ws/?pid=3552> [<http://perma.cc/R778-EHGB>].
52. Perry L. Moriearty & William Carson, *Cognitive Warfare and Young Black Males in America*, 15 J. GENDER RACE & JUST. 281, 290-91 (2012).
53. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.
54. *Id.* § 1302.
55. President William J. Clinton, *Remarks on Signing the Violent Crime Control and Law Enforcement Act of 1994*, AM. PRESIDENCY PROJECT (Sept. 13, 1994), <http://www.presidency.ucsb.edu/ws/?pid=49072> [<http://perma.cc/5MBP-K7PB>].

Act of 1994.⁵⁶ The Act created a federal “three strikes” provision establishing a mandatory life sentence for individuals convicted of a “serious violent felony” if they had two or more prior convictions, at least one of which was a “serious violent felony,” and the other of which was either a “serious violent felony” or a “serious drug offense.”⁵⁷

The Guidelines range for drug crimes increased significantly as well. For example, a first-time offender who was convicted of distributing 500 grams of methamphetamine would receive between ten to twelve years in prison, higher than for “forcible rape, killing a person in voluntary manslaughter, disclosing top secret information, and violent extortion of more than \$5 million involving serious bodily injury.”⁵⁸ The Sentencing Commission also created the Career Offender Guideline, which established a much higher Guidelines range for individuals convicted of a “controlled substance offense” or “crime of violence” with at least two prior felony convictions of either a “controlled substance offense” or “crime of violence.”⁵⁹

Similar to the War on Terror sentencing policies, many of these laws restricted a judge’s ability to consider the seriousness of the criminal conduct and circumstances of the individual defendant when formulating a sentence. Indeed, a primary reason Congress created high mandatory sentences in the War on Drugs was to take away the discretion that judges had previously used to assess the individual characteristics of each defendant, for fear that the judges were imposing lenient sentences that failed to sufficiently protect the public.⁶⁰ And, just like the terrorism context, drug sentencing policies not only applied to violent and hardened offenders, but also a broad range of nonviolent offenders. For example, the Career Offender Guideline defines “crime of violence” and “controlled substance offense” broadly, and like the Terrorism Enhancement, automatically increases a defendant’s criminal history category to VI, re-

56. Pub. L. No. 103-322, 108 Stat. 1796.

57. Memorandum from Jo Ann Harris, Assistant Att’y Gen., Criminal Div., U.S. Dep’t of Justice, to All U.S. Attorneys (Mar. 13, 1995), <http://www.justice.gov/usam/criminal-resource-manual-1032-sentencing-enhancement-three-strikes-law> [<http://perma.cc/23HC-Y5R8>].

58. *An Offer You Can’t Refuse: How US Federal Prosecutors Force Drug Defendants To Plead Guilty*, HUM. RTS. WATCH (Dec. 5, 2013) [hereinafter *An Offer You Can’t Refuse*], <http://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead> [<http://perma.cc/VL4A-VW8Q>].

59. U.S. SENTENCING GUIDELINES MANUAL §§ 4B1.1, 4B1.2 (U.S. SENTENCING COMM’N 2015).

60. James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331, 359-60 (2009); Aziz Z. Huq & Christopher Muller, *The War on Crime as Precursor to the War on Terror*, 36 INT’L J.L. CRIME & JUST. 215, 218-19 (2008).

ardless of his actual criminal history.⁶¹ Therefore, a typical defendant receiving a lengthy sentence pursuant to this Guideline has been a low-level, nonviolent drug offender whose previous convictions were for “crimes of violence” that did not involve any actual violent conduct and minor drug offenses.⁶²

II. JUSTIFYING LENGTHY SENTENCES IN THE WARS ON TERROR AND DRUGS

Although neither the terrorism nor the drug sentencing laws discussed above explicitly targeted one specific religious, ethnic, or racial group, both the Wars on Terror and Drugs have disproportionately affected particular segments of the American public: Muslims and African Americans, respectively. With the War on Terror, even though Muslims do not commit acts of terrorism in the United States at higher levels than other communities,⁶³ Muslims are disproportionately targeted by government counterterrorism policies.⁶⁴ The reason is obvious. The primary focus of the War on Terror has not been to eliminate all forms of terrorism, but rather to combat violent attacks from Al Qaeda—the perpetrators of the 9/11 attacks—and like-minded groups such as ISIS.⁶⁵ Similarly, with the War on Drugs, even though they were no more likely than whites to use or sell illegal drugs,⁶⁶ African Americans were far more likely to

61. U.S. SENTENCING GUIDELINES MANUAL §§ 4B1.1, 4B1.2 (U.S. SENTENCING COMM’N 2015).

62. Amy Baron-Evans et al., *Deconstructing the Career Offender Guideline*, 2 CHARLOTTE L. REV. 39, 85 (2010).

63. CHARLES KURZMAN, MUSLIM-AMERICAN TERRORISM IN 2014 2-3 (2015); *Non-Muslims Carried Out More than 90% of All Terrorist Attacks on U.S. Soil*, WASHINGTON’S BLOG (May 1, 2013), <http://www.washingtonsblog.com/2013/05/muslims-only-carried-out-2-5-percent-of-terrorist-attacks-on-u-s-soil-between-1970-and-2012.html> [<http://perma.cc/RQN4-LSLA>] (noting that only 2.5% of all terrorist attacks on U.S. soil between 1970 and 2012 were carried out by Muslims).

64. Aziz Z. Huq et al., *Why Does the Public Cooperate with Law Enforcement? The Influence of the Purposes and Targets of Policing*, 17 PSYCHOL. PUB. POL’Y & L. 419, 423 (2011) (“Post-9/11 changes to policing strategies have been primarily targeted towards Muslim, South Asian and Arab Americans.” (citations omitted)); *id.* (“Terrorism-related criminal investigations by the Federal Bureau of Investigation[] and local law enforcement focus disproportionately on mosques and Muslim civic organizations.” (citations omitted)).

65. *See National Strategy for Counterterrorism*, WHITE HOUSE 3 (2011), http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf [<http://perma.cc/6BA4-L343>] (“The preeminent security threat to the United States continues to be from al-Qa’ida and its affiliates and adherents.” (emphasis and footnote omitted)); *see also id.* at 10-17 (describing the areas of focus of U.S. counterterrorism strategy).

66. *See* Rothwell, *supra* note 3.

be arrested for drug crimes, and received much stiffer sentences.⁶⁷ This too was based on government objectives not to focus on all drug crimes, but rather primarily those that were tied to gang violence in predominantly African American communities.⁶⁸

Interestingly, when justifying the application of these stringent sentencing policies to young American Muslims and African Americans, policymakers and commentators have used notably similar reasons: these dangerous individuals are uniquely incapable of being rehabilitated and deterred in the short-term and must be incapacitated with lengthy terms of incarceration. And, in both cases, these justifications are unsupported. Instead, the punishment given to many American Muslims and African Americans has been much “greater than necessary” to achieve the purposes of federal sentencing.⁶⁹

A. *War on Terror*

1. *Justification for Terrorism Sentencing*

As explained above, unlike in other contexts, terrorism sentencing fails to sufficiently address how much harm the defendant has caused, and instead the Terrorism Enhancement creates lengthy sentences for a broad range of conduct.⁷⁰ Legislators and courts have justified adopting these long sentences based on their view that terrorism as an offense, and terrorists as individuals, are uniquely situated among all crimes and criminals, which supports fundamentally altering the sentencing process.

When Congress requested that the Sentencing Commission enact the Terrorism Enhancement in 1994, the Commission had initially expressed reservations because the proposed adjustment would not take into account the fact that “defendants who share a common terrorist objective may vary greatly in terms of the threat to persons and national security that they realistically

67. *Punishment and Prejudice: Racial Disparities in the War on Drugs*, HUM. RTS. WATCH (May 2000) [hereinafter *Punishment and Prejudice*], <http://www.hrw.org/legacy/reports/2000/usa/Rcedrg00-04.htm> [<http://perma.cc/JB4C-EUQP>].

68. See MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME AND PUNISHMENT IN AMERICA* (1995); Moriearty & Carson, *supra* note 52, at 290; *Punishment and Prejudice*, *supra* note 67.

69. *Contra* 18 U.S.C. § 3553(a) (2012) (“The court shall impose a sentence . . . not greater than necessary . . .”).

70. Said, *supra* note 50, at 527 (noting that “modern terrorism prosecution now relies largely on material support charges unconnected to any violence and inchoate criminal activity not likely to result in actual violence”).

pose.”⁷¹ In response, the Chair of the Attorney General’s Subcommittee on Sentencing Guidelines disregarded the Commission’s nuanced view of terrorism offenses and instead urged the Commission to enact the Enhancement “in order to combat this serious threat to public safety.”⁷² For this reason, as Second Circuit Judge Walker explains, the Terrorism Enhancement “reflects Congress’ [sic] and the Commission’s policy judgment that an act of terrorism represents a particularly grave threat because of the dangerousness of the crime and the difficulty of deterring and rehabilitating the criminal, and thus that terrorists and their supporters should be incapacitated for a longer period of time” than other criminals.⁷³ Courts have thus justified applying the Terrorism Enhancement by stating that “terrorists[,] [even those] with no prior criminal behavior[,] are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation.”⁷⁴ As Wadie Said notes, this belief “that terrorism is different, maybe even exceptional” is premised on “a type of visceral outrage at all conduct linked to terrorists that can taint the individualized and careful process that is supposed to go into a criminal sentencing” and “justifies a departure from the normal standards.”⁷⁵

The idea that those convicted of terrorism offenses cannot be rehabilitated or deterred stems from the belief that, unlike other criminal conduct, the primary motivation of terrorism is ideological. Indeed, when urging Congress to pass the USA PATRIOT Act—legislation that expanded both the Terrorism

71. U.S. SENTENCING COMM’N, ANALYSIS OF THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994: PART II, at 13 (1994).

72. *Hearing Before the U.S. Sentencing Comm’n Concerning Proposed Sentencing Guideline Amendments* 20 (Mar. 14, 1995) (statement of Jay P. McClosky, U.S. Attorney, District of Maine & Chairman, Subcommittee on Sentencing Guidelines, Att’y Gen.’s Advisory Comm. of U.S. Attorneys, & Robert S. Litt, Deputy Assistant Att’y Gen., Criminal Division); see also *United States v. Stewart*, 590 F.3d 93, 172 (2d Cir. 2009) (Walker, J., concurring in part and dissenting in part) (“Congress expressly mandated that the Sentencing Commission provide for a terrorism enhancement to ensure that crimes of terrorism were met with a punishment that reflects their extraordinary seriousness.”).

73. *Stewart*, 590 F.3d at 172-73 (Walker, J., concurring in part and dissenting in part) (emphasis and quotations omitted).

74. *United States v. Jayyousi*, 657 F.3d 1085, 1117 (11th Cir. 2011); *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003); see also Said, *supra* note 50, at 481 (“At the heart of [terrorism sentencing case law] lies a message that terrorism is especially heinous, and those convicted of terrorist crimes are particularly dangerous to the point of being irredeemably incapable of deterrence.”).

75. Said, *supra* note 50, at 521, 525; see also Dratel, *supra* note 11, at 58 (noting that federal sentencing law fails to take into account that “not all terrorism cases are alike, not all terrorism defendants are alike, and the difference in treatment would reflect a difference in threat level presented by the defendant, as well as the individual’s capacity for rehabilitation”).

Enhancement and material support laws—Attorney General John Ashcroft described terrorists as “savage,” “freedom’s enemies, murderers of innocents in the name of a barbarous cause,” who are “undeterred by the threat of criminal sanctions” and “willing to sacrifice the lives of their members in order to take the lives of innocent citizens of free nations.”⁷⁶ And, at the USA PATRIOT Act’s signing ceremony, President George W. Bush added that the law “will help counter a threat like no other our nation has ever faced They recognize no barrier of morality; they have no conscience. The terrorists cannot be reasoned with.”⁷⁷ Pursuant to this argument, terrorists must be incapacitated and detained for extraordinarily long periods of time so they do not return to supporting their violent ideological goals.⁷⁸

2. Sentencing Young, Nonviolent American Muslims

Because federal terrorism sentencing laws do not adequately take into account the severity of the offense or the characteristics of the individual, the premise that those who commit terrorist crimes cannot be deterred or rehabilitated is then applied to the many young, nonviolent American Muslims convicted of terrorism-related offenses since 9/11. These individuals have little to no criminal history (particularly no crimes of violence), were convicted of terrorism offenses that caused no actual harm to others, and became subject to government scrutiny because they had expressed extreme views either consistent with or in support of foreign terrorist organizations like Al Qaeda and ISIS. In this category, I exclude individuals who have attempted to commit actual violent acts and failed to do so only because of happenstance or law enforcement intervention. However, I do include Muslims whose proposed attacks were doomed to fail from the beginning because they were instigated by government informants. In informant cases, it is unclear if the defendants ever would have attempted any violent acts but for the informants’ involvement.⁷⁹

Young, nonviolent American Muslims make up the majority of the approximately 400 individuals charged with crimes connected to Al Qaeda and related

76. *Expanding Terrorism, Investigation, Prosecution: Hearing Before the H. Comm. on the Judiciary*, 107th Cong. (2001) (statement of John Ashcroft, Att’y Gen. of the United States), 2001 WL 1132414.

77. *Bush Signs Anti-Terrorism Legislation*, WASH. POST (Oct. 25, 2001), http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushtext_102601.html [<http://perma.cc/U6LC-8EG4>].

78. See Skinner, *supra* note 32, at 349–50.

79. Dratel, *supra* note 11, at 61.

terrorist groups since 9/11.⁸⁰ Since the designation of ISIS as a terrorist organization in 2014, there has been an increased focus on arresting, detaining, and charging these individuals with terrorism crimes.⁸¹ Federal prosecutors have charged over 106 individuals in connection with ISIS and have convicted fifty.⁸² The majority arrested for ISIS-related activity have also been young, nonviolent American Muslims: their average age is twenty-six; ninety percent are U.S. citizens or permanent residents; seventy-three percent were not involved in plotting terrorist attacks in the United States; fifty-five percent were arrested after interacting with government informants; and most were charged

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80. While the exact figure of young, nonviolent American Muslims charged with crimes connected to terrorist groups remains unavailable, the available data demonstrates that they make up the majority of post-9/11 cases. For example, New America has identified 381 individuals since 9/11 who have been “charged with or died engaging in jihadist terrorism or related activities inside the United States, and Americans accused of such activity abroad.” Peter Bergen et al., *Terrorism in America After 9/11, Part I. Terrorism Cases: 2001-Today*, NEW AM. (Sept. 7, 2016) <http://www.newamerica.org/in-depth/terrorism-in-america/part-i-overview-terrorism-cases-2001-today> [<http://perma.cc/P8QE-U8L9>]; see also *By the Numbers*, *supra* note 5 (identifying 368 U.S. prosecutions from 2001 to 2013 of “terror activity associated with groups such as Al Qaeda and its affiliates or inspired by global jihadism”). Of those individuals, at least eighty-one percent were U.S. citizens or permanent residents, eighty-eight percent had never served time in prison, forty-eight percent were monitored by a government informant, and their average age was twenty-nine. Peter Bergen et al., *Terrorism in America After 9/11, Part II. Who Are the Terrorists?*, NEW AM. (Sept. 7, 2016), <http://www.newamerica.org/in-depth/terrorism-in-america/who-are-terrorists> [<http://perma.cc/EX5W-M9GL>]; Peter Bergen et al., *Terrorism in America After 9/11, Part III. Why Do They Engage In Terrorism?*, NEW AM. (Sept. 7, 2016), <http://www.newamerica.org/in-depth/terrorism-in-america/why-do-they-commit-terrorist-acts> [<http://perma.cc/2QMA-5AK2>]; Peter Bergen et al., *Terrorism in America After 9/11, Part IV. What Is the Threat to the United States Today?*, NEW AM. (Sept. 7, 2016) [hereinafter Bergen et al., *Terrorism in America After 9/11, Part IV*], <http://www.newamerica.org/in-depth/terrorism-in-america/what-threat-united-states-today> [<http://perma.cc/2CP5-KH72>]. Other data demonstrate that the majority of these terrorism offenses were not for committing violent acts, but rather nonviolent conduct, including providing material support, making false statements to law enforcement, and informant-based plots. See, e.g., *Illusion of Justice*, *supra* note 28, at 2, 21, 201-02; Lorenzo Vidino & Seamus Hughes, *ISIS in America: From Retweets to Raqqa*, GEO. WASH. PROGRAM ON EXTREMISM 7-8 (Dec. 2015), http://cchs.gwu.edu/sites/cchs.gwu.edu/files/downloads/ISIS%20in%20America%20-%20Full%20Report_o.pdf [<http://perma.cc/J88Y-DG7J>].
81. Janet Reitman, *The Children of ISIS*, ROLLING STONE (Mar. 25, 2015), <http://www.rollingstone.com/culture/features/teenage-jihad-inside-the-world-of-american-kids-seduced-by-isis-20150325> [<http://perma.cc/T23T-ZAG7>].
82. Adam Goldman et al., *The Islamic State’s Suspected Inroads into America*, WASH. POST (Nov. 15, 2016), <http://www.washingtonpost.com/graphics/national/isis-suspects> [<http://perma.cc/66TW-B7XK>].

with material support offenses, such as traveling, or attempting to travel, abroad to join ISIS.⁸³

These young American Muslims largely fit into the following three categories: those convicted of (1) material support offenses, (2) taking part in a plot assisted by government informants, and (3) making false statements to government officials. For each category, I present two case studies that provide concrete examples of how federal courts have given these individuals lengthy sentences despite their young age, lack of actual harm committed, negligible criminal history, expressions of remorse, and other mitigating factors. As the case studies show, for the most part, courts have applied the Terrorism Enhancement, leading to a significant Guidelines range and ultimate sentence.

a. Material Support Offenses

The material support statutes, 18 U.S.C. §§ 2339A and 2339B, have allowed the government to prosecute young American Muslims for a broad range of conduct. Section 2339A prohibits the provision of “material support or resources” while “knowing or intending that they are to be used in preparation for, or in carrying out,” enumerated terrorism crimes.⁸⁴ Section 2339B prohibits “knowingly provid[ing] material support or resources” to an organization that has been designated as a “foreign terrorist organization” by the Secretary of State.⁸⁵ Therefore, unlike section 2339A, where the provision of material support must be tied to an actual crime, section 2339B criminalizes *any* support given to a designated foreign terrorist organization, even if the support was intended for peaceful purposes. “Material support” includes any tangible or intangible property or service, such as training, expert advice, or assistance.⁸⁶

The material support statutes have allowed the government to convict young American Muslims for a variety of nonviolent conduct that is only tangentially related to terrorist activity, including translating and publishing extremist materials online as well as storing clothing for an alleged terrorist.⁸⁷ Once convicted, the Sentencing Guidelines—especially the Terrorism En-

⁸³. Vidino & Hughes, *supra* note 80, at 5-8; *see also* Goldman et al., *supra* note 82 (reporting an average age of twenty-seven).

⁸⁴. 18 U.S.C. § 2339A(a) (2012).

⁸⁵. *Id.* § 2339B(a)(1).

⁸⁶. Skinner, *supra* note 32, at 330 n.117; *Illusion of Justice*, *supra* note 28, at 60-61; *see also* Holder v. Humanitarian Law Project, 561 U.S. 1, 35 (2010) (finding that material support includes training on how to use humanitarian and international law to peacefully resolve disputes).

⁸⁷. *See, e.g.*, United States v. Mehanna, 735 F.3d 32, 41 (1st Cir. 2013); United States v. Hashmi, 621 F. Supp. 2d 76, 78-79 (S.D.N.Y. 2008).

hancement—leads these individuals to receive lengthy sentences. For example, a defendant convicted under section 2339B would be subject to a Guidelines range of thirty years to life. Although the statutory maximum is only twenty years for each count, prosecutors can charge individuals with multiple counts to reach the recommended Guidelines range.⁸⁸

The material support statutes are two of the more widely used tools in the War on Terror. One study found the largest share of convictions in terrorism cases since 9/11 was for material support offenses.⁸⁹ Below are two examples of young American Muslims who have received long sentences based on the material support statutes.

i. Shelton Bell

Shelton Bell was a high school dropout when he began viewing online videos from extremist Anwar al-Awlaki.⁹⁰ When Bell was eighteen, he and a friend traveled to the Middle East to join a terrorist organization.⁹¹ Their plans were foiled when they were detained by authorities in Jordan and returned to the United States.⁹² Bell pleaded guilty to conspiracy and attempt to provide material support to terrorists.⁹³

At sentencing, the judge applied the Terrorism Enhancement.⁹⁴ Although Bell's only prior criminal offenses were a trespass conviction and a violation of a temporary injunction barring contact with his mother's boyfriend, the Enhancement placed him in the highest criminal history category.⁹⁵ Bell's Guidelines range was life imprisonment. However, because the statutory maximum

88. U.S. SENTENCING GUIDELINES MANUAL §§ 5G1.1(a), 5G1.2(d) (U.S. SENTENCING COMM'N 2015); *United States v. Reifler*, 446 F.3d 65, 113 (2d Cir. 2006); *see also* McLoughlin, *supra* note 31, at 89 (“[A] defendant who is convicted of a single material support charge and a series of minor related or unrelated offenses can face a sentence dramatically greater than the statutory maximum. The greater sentence is . . . the result of the fact that the minor unrelated charges can add fuel to U.S.S.G. section 3A1.4.”).

89. *Illusion of Justice*, *supra* note 28, at 62-63.

90. *United States v. Bell*, 81 F. Supp. 3d 1301, 1306 (M.D. Fla. 2015); Derek Kinner & Tamara Lush, Associated Press, *Fla. Mosque Leaders Say Teen Talked of Jihad*, YAHOO! NEWS (July 19, 2013), <http://www.yahoo.com/news/fla-mosque-leaders-teen-talked-jihad-152931550.html> [<http://perma.cc/4J3J-YFJR>].

91. *Bell*, 81 F. Supp. 3d at 1306.

92. *Id.* at 1309.

93. *Id.* at 1305.

94. *Id.* at 1311-12.

95. *Id.* at 1315-16, 1318.

was fifteen years for each count, the maximum sentence that Bell could have received was thirty years.⁹⁶ Bell's attorney argued that he did not commit any terrorist acts, nor did he have the funds or connections to help terrorist organizations.⁹⁷ Bell added that "he made a grievous, immature mistake, and that he no longer subscribes to al-Awlaki's hate-filled agenda. He expresses remorse to his family, his friends, his fellow Muslims, and the Court, stating that his goal now is to be a productive citizen, raise a family, get an MBA, and even study terrorism and how to combat it."⁹⁸ The government rejected Bell's apology, arguing he was a terrorist who "poses a likelihood of recidivism, no meaningful chance of rehabilitation, and . . . a heightened risk of dangerousness."⁹⁹ Bell was sentenced to twenty years.¹⁰⁰

ii. *Ali Shukri Amin*

Ali Shukri Amin was a high school honor student who used Twitter to post thousands of messages in support of ISIS, including instructions on how to make anonymous donations to ISIS and on how to travel to Syria to join ISIS.¹⁰¹ Amin also helped his friend travel to Syria in January 2015.¹⁰² Amin was subsequently arrested by the FBI and pleaded guilty to conspiring to provide material support to ISIS.

At sentencing, the government argued that Amin should receive the statutory maximum of fifteen years based on the "harm that the defendant has caused to this community, the scope of his conduct, and the danger he will con-

96. *Id.* at 1316.

97. Larry Hannan, *Jacksonville Man Gets 20 Years in Prison on Terrorism Charges*, FLA. TIMES-UNION (Jan. 15, 2015, 5:46 AM), <http://jacksonville.com/news/crime/2015-01-14/story/jacksonville-man-gets-20-years-prison-terrorism-charges> [<http://perma.cc/BYR9-8P7Y>].

98. *Bell*, 81 F. Supp. 3d at 1304.

99. *Id.* at 1319.

100. *Id.* at 1325-26.

101. Yasmeen Abutaleb & Kristina Cooke, *Extremists Among Us: A Teen's Turn to Radicalism and the U.S. Safety Net that Failed To Stop It*, REUTERS (June 6, 2016, 2:20 P.M.), <http://www.reuters.com/investigates/special-report/usa-extremists-teen/> [<http://perma.cc/5HP3-PTRB>]; Press Release, U.S. Dep't of Justice, *Virginia Man Sentenced to More Than 11 Years for Providing Material Support to ISIL* (Aug. 28, 2015), <http://www.justice.gov/opa/pr/virginia-man-sentenced-more-11-years-providing-material-support-isil> [<http://perma.cc/DE8A-PGPE>].

102. Press Release, U.S. Dep't of Justice, *supra* note 101.

tinue to pose to society.”¹⁰³ Amin’s attorney requested six years, noting Amin’s young age and lack of criminal record. Amin apologized for his support for ISIS, stating that he “became lost and caught up in something that takes the greatest and most profound teachings of Islam and turns them into justifications for violence and death.”¹⁰⁴ Amin added that his online acquaintances “treated me with respect and occasionally reverence. For the first time I was not only being taken seriously about a very important and weighty topics [sic], but was actually being asked for guidance.”¹⁰⁵ Amin was sentenced to eleven years.¹⁰⁶

b. Informant Plots

Another major counterterrorism policy has been the use of government informants. Nearly fifty percent of federal terrorism convictions since 9/11 have been based on information obtained from informants.¹⁰⁷ Approximately thirty percent were sting operations in which an FBI informant “was directly involved in proposing, crafting, facilitating, and inducing a terrorist plot.”¹⁰⁸

The government’s aggressive use of sting operations has been criticized for targeting individuals who may never have taken part in terrorist activities but for the informants’ intervention.¹⁰⁹ The FBI has targeted young Muslims with

103. Paula Reid, *Teenage Terror Suspect Ali Shukri Amin Faces Sentencing*, CBS NEWS (Aug. 27, 2015, 6:41 PM), <http://www.cbsnews.com/news/teenage-terror-suspect-ali-shukri-amin-faces-sentencing> [<http://perma.cc/7XEW-Y86S>] (quoting federal prosecutors).

104. *Id.* (quoting Amin).

105. *Id.* (quoting Amin).

106. Press Release, U.S. Dep’t of Justice, *supra* note 101.

107. *Illusion of Justice*, *supra* note 28, at 2.

108. *Id.* at 2; see also Amna Akbar, *National Security’s Broken Windows*, 62 UCLA L. REV. 834, 855 (2015) (finding that “all but four of the last decade’s high-profile terrorism prosecutions resulted from FBI sting operations”); Trevor Aaronson, *The Informants*, MOTHER JONES (Sept. 2011), <http://www.motherjones.com/politics/2011/08/fbi-terrorist-informants> [<http://perma.cc/2C39-Y3BJ>] (finding that 158 out of 508 convictions involved a sting operation).

109. Paul Harris, *Fake Terror Plots, Paid Informants: The Tactics of FBI ‘Entrapment’ Questioned*, GUARDIAN (Nov. 16, 2011), <http://www.theguardian.com/world/2011/nov/16/fbi-entrapment-fake-terror-plots> [<http://perma.cc/U79P-D6SY>] (“Critics say the FBI is running a sting operation across America, targeting – to a large extent – the Muslim community by luring people into fake terror plots.”); Eric Schmitt, *U.S. Is Trying To Counter ISIS’ Efforts To Lure Alienated Young Muslims*, N.Y. TIMES (Oct. 4, 2014), <http://www.nytimes.com/2014/10/05/us/us-is-trying-to-counter-isiss-efforts-to-lure-alienated-young-muslims.html> [<http://perma.cc/HVP7-AC7U>] (reporting that Muslims at an Ohio mosque had “complained of . . . F.B.I. sting operations that wrongly targeted Muslim citizens as terrorists”).

extremist views, “who ha[ve] shown no signs of mastering basic life functions, let alone carrying out a serious terror attack, and ha[ve] no known involvement with actual terrorist groups.”¹¹⁰ Sometimes, the FBI designs the attack plan, and the informant convinces the target to carry it out.¹¹¹ Despite the informant’s large role in the crime, Muslims charged in these plots rarely avoid criminal liability by raising the entrapment defense, the primary way the American legal system regulates sting operations.¹¹² For an entrapment defense to succeed, two elements must be established: (1) the government “induced” the defendant to commit the crime, and (2) the defendant was not independently “predisposed” to commit the crime.¹¹³ The predisposition element leads to the introduction of character evidence,¹¹⁴ which in terrorism cases includes the defendant’s extremist views and is usually enough for an American jury to conclude that the defendant was predisposed to commit the crime.¹¹⁵

Below are two examples of American Muslims who received long sentences based on informant-led prosecutions.

i. James Cromitie

James Cromitie was an impoverished Muslim who expressed vitriolic anti-Semitic views when he met an FBI informant at his mosque. The informant constructed a plot in which Cromitie and three others would fire rocket-propelled grenades at Stewart Air Base and place bombs at a New York synagogue. After resisting the informant’s advances for months, Cromitie agreed to take part in the plot when the informant offered him \$250,000.¹¹⁶ Cromitie was arrested while planting phony explosive devices given to him by the informant. At trial, Cromitie was convicted of conspiracy and attempt to use weapons of mass destruction, and conspiracy and attempt to acquire and use anti-aircraft missiles, among other charges.¹¹⁷

110. Glenn Greenwald, *Why Does the FBI Have To Manufacture Its Own Plots If Terrorism and ISIS Are Such Grave Threats?*, INTERCEPT (Feb. 26, 2015), <http://theintercept.com/2015/02/26/fbi-manufacture-plots-terrorism-isis-grave-threats> [<http://perma.cc/7PFU-QXXT>].

111. *Id.*

112. Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125, 128 (2008).

113. See *Mathews v. United States*, 485 U.S. 58, 62-63 (1988).

114. See Stevenson, *supra* note 112, at 137.

115. *Illusion of Justice*, *supra* note 28, at 57-58.

116. *United States v. Cromitie*, 727 F.3d 194, 199-204 (2d Cir. 2013).

117. *Id.*

Despite Cromitie's conviction, the judge stated after trial that Cromitie "was incapable of committing an act of terrorism on his own," and that the FBI "created acts of terrorism out of his fantasies of bravado and bigotry, and then made those fantasies come true."¹¹⁸ The judge nevertheless sentenced Cromitie to twenty-five years. At sentencing, she explained that the Terrorism Enhancement applied, that Cromitie's Guidelines range was life imprisonment, and the anti-aircraft missile offenses carried a twenty-five-year mandatory minimum sentence.¹¹⁹

ii. *Rezwan Ferdaus*

Rezwan Ferdaus, age twenty-five, lived in Massachusetts when he met an FBI informant at his mosque.¹²⁰ The informant not only introduced Ferdaus to two FBI undercover agents pretending to be Al Qaeda terrorists, but also provided him with financial assistance for a plot to attack the Pentagon and U.S. Capitol building using remote-controlled drone planes containing explosives followed by a ground attack with automatic weapons.¹²¹ While the plot was unfolding, Ferdaus was suffering from mental and physical disabilities, including depression, seizures, weight loss, and loss of bladder control.¹²² The FBI agents also supplied Ferdaus with materials for the attack: grenades, machine guns, explosives, and a remote-controlled plane.¹²³

Ferdaus was subsequently arrested and charged with six counts, including "attempting to damage and destroy a federal building . . . by means of an explosive" and "attempting to provide material support to terrorists."¹²⁴ If he were found guilty at trial, Ferdaus's Guidelines range would have been life im-

118. Glenn Greenwald & Andrew Fishman, *Latest FBI Claim of Disrupted Terror Plot Deserves Much Scrutiny and Skepticism*, INTERCEPT (Jan. 16, 2015), <http://theintercept.com/2015/01/16/latest-fbi-boast-disrupting-terror-u-s-plot-deserves-scrutiny-skepticism> [http://perma.cc/FPW4-ZGDV].

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

120. *Illusion of Justice*, *supra* note 28, at 32-33; *Rezwan Ferdaus Held Over Pentagon and Capitol Bomb Plot*, BBC NEWS (Sept. 29, 2011) [hereinafter *Rezwan Ferdaus Held*], <http://www.bbc.com/news/world-us-canada-15101449> [http://perma.cc/UX6U-4CZE].

121. *Illusion of Justice*, *supra* note 28, at 32-33.

122. *Id.* at 33-34.

123. *Rezwan Ferdaus Held*, *supra* note 120.

124. Plea Agreement at 1, *United States v. Ferdaus*, 2011 WL 5909547 (D. Mass. Nov. 28, 2011) (No. 11-10331-RGS), 2012 WL 3151234.

prisonment, due in part to the application of the Terrorism Enhancement.¹²⁵ Instead, Ferdaus entered into a plea agreement and agreed to a seventeen-year sentence.¹²⁶

c. Making False Statements

The third way that young American Muslims have received lengthy sentences for nonviolent terrorism-related conduct is by making false statements to government officials. One common charge is violation of 18 U.S.C. § 1001, which states that “in any matter within the jurisdiction” of the federal government, it is prohibited to “knowingly and willfully” make “materially false . . . or fraudulent statement[s]” or conceal information.¹²⁷ While the maximum sentence for most section 1001 violations is five years for each count, the maximum increases to eight “if the offense involves international or domestic terrorism.”¹²⁸ However, because each false statement can be considered a separate “count,”¹²⁹ defendants in terrorism cases can be charged with multiple counts, and their sentences can exceed eight years.¹³⁰ Other related charges include 18 U.S.C. § 1623, for making false material declarations to a grand jury, and 18 U.S.C. § 1503, for obstructing justice on account of making false statements.¹³¹ In one analysis of hundreds of terrorism cases, the third highest share of convictions was for making false statements.¹³² In recent years, young American Muslims have been charged under section 1001 when statements made during FBI interviews were inconsistent with their social media activity.¹³³ Below are

^{125.} Plea Hearing at 13, *United States v. Ferdaus*, 2011 WL 5909547 (D. Mass. Nov. 28, 2011) (No. 11-10331-RGS).

^{126.} *Id.* at 15-17.

^{127.} 18 U.S.C. § 1001(a) (2012).

^{128.} *Id.*

^{129.} *U.S. Attorneys' Manual, Criminal Resource Manual Section 919: Multiplicity, Duplicity, Single Document Policy*, U.S. DEP'T JUST., <http://www.justice.gov/usam/criminal-resource-manual-919-multiplicity-duplicity-single-document-policy> [<http://perma.cc/CP7X-X5KY>] (“A defendant violates 18 U.S.C. § 1001 each time a false statement is made.”).

^{130.} *See, e.g.*, Trial Order at 2-3, *United States v. Hayat*, 2007 WL 1454280 (E.D. Cal. Sept. 25, 2007) (No. 2:05CR00240-01), 2007 WL 4915489.

^{131.} 18 U.S.C. § 1623 (2012); *id.* § 1503.

^{132.} *Illusion of Justice*, *supra* note 28, at 63 n.247, 202.

^{133.} For example, Hamza Ahmed was indicted for lying about his travel plans and telling the FBI “he knew someone who had traveled to Syria . . . only ‘vaguely’ from high school,” when he had tweeted “Lol my bro I love you” at the individual. Ryan J. Reilly, *FBI: When It Comes to @ISIS Terror, Retweets = Endorsements*, HUFFINGTON POST (Aug. 7, 2015), <http://www>

two examples of Muslims who have received long sentences for making false statements.

i. Sabri Benkahla

Sabri Benkahla, a twenty-seven-year-old college graduate, had been acquitted of charges of providing services to the Taliban during a trip to Afghanistan.¹³⁴ He subsequently was subpoenaed to testify before two grand juries regarding his activities in Afghanistan and was questioned by the FBI.¹³⁵ Finding Benkahla's answers untrustworthy, the government charged him with making false declarations to the grand juries, making false statements to the FBI, and obstructing justice. Benkahla was convicted on all those counts.¹³⁶

At sentencing, the parties disputed whether the Terrorism Enhancement should apply. Because Benkahla had no criminal history, without the Enhancement, his Guidelines range would have only been thirty-three to forty-one months. With the Enhancement, his range jumped to 210 to 262 months.¹³⁷ The judge held that the Enhancement applied because Benkahla's conduct concerned "federal crimes of terrorism" and had impeded the government's investigation into potential terrorist activity.¹³⁸ However, the judge also stated that "Sabri Benkahla is not a terrorist," that he "has not committed any other criminal acts," and that "his likelihood of doing so upon release is 'infinitesimal.'"¹³⁹ Therefore, the court varied downward and sentenced Benkahla to

.huffingtonpost.com/entry/twitter-terrorism-fbi_us_55b7e25de4bo224d8834466e [http://perma.cc/S2DW-YA3S]. Bilal Abood was arrested for telling the FBI that he had not pledged obedience to ISIS leader Abu Bakr al-Baghdadi even though he had done so on Twitter. *Id.* And, Arafat Nagi was arrested for making statements to the FBI "that were 'inconsistent with his statements [in support of ISIS] on the Twitter account that has been linked to him.'" *Id.* For a longer list of defendants charged with supporting ISIS, see Goldman et al., *supra* note 82.

134. See *United States v. Benkahla*, 530 F.3d 300, 304, 307 (4th Cir. 2008); Steven A. Book, *United States v. Benkahla: Illustrating The Need For Reform—The Fourth Circuit's Unprecedented Application of the United States Sentencing Guideline Terrorism Enhancement to an Obstruction of Justice Conviction*, 68 MD. L. REV. ENDNOTES 61, 62 (2009); *Benkahla v. Federal Bureau of Prisons*, et al., ACLU (June 2, 2010), <http://www.aclu.org/cases/benkahla-v-federal-bureau-prisons-et-al> [http://perma.cc/ZZD4-UT86].

135. 530 F.3d at 304.

136. *Id.* at 305.

137. *Id.*; *United States v. Benkahla*, 501 F. Supp. 2d 748, 759 (E.D. Va. 2007).

138. 530 F.3d at 305.

139. *Id.* at 306 (quoting *Benkahla*, 501 F. Supp. 2d at 759).

121 months, still four times longer than what he would have received but for the Terrorism Enhancement.¹⁴⁰

ii. Abdel Hameed Shehadeh

Abdel Hameed Shehadeh was a teenager when he became subject to government surveillance due to extremist websites that he ran.¹⁴¹ He attempted to travel to Pakistan and told U.S. officials that he was planning on visiting a religious school. However, the government believed Shehadeh wanted to join the Taliban.¹⁴² Shehadeh was convicted of three counts of making false statements to federal agents.¹⁴³

At sentencing, the judge ruled that the Terrorism Enhancement did not apply because Shehadeh's "deception and lies" did not "'promot[e]' the commission of" a federal terrorism offense.¹⁴⁴ Because of Shehadeh's lack of criminal history, his Guidelines range was only sixty-three to seventy-eight months.¹⁴⁵ However, the judge applied a significant upward variance and sentenced Shehadeh to 156 months.¹⁴⁶ The judge stated that "[w]hile Shehadeh displayed a significant level of immaturity and ineptness throughout the course of his criminal conduct, there is no question that his conduct was extremely serious and warrants a substantial period of incarceration."¹⁴⁷ Thus, even in cases where the Terrorism Enhancement is not applicable, defendants have still received very long sentences simply because their conduct could potentially relate to terrorist activity.

3. Terrorism Sentencing Is Based on an Unsupported Premise

Many of these lengthy sentences given to young Muslims could be justified if the basic premise of terrorism sentencing were correct: that all individuals

^{140.} *Id.*

^{141.} Mosi Secret, *Staten Island Man Is Convicted of Lying About Plans To Join Terrorists*, N.Y. TIMES (Mar. 25, 2013), <http://www.nytimes.com/2013/03/26/nyregion/staten-island-man-convicted-of-lying-about-plans-to-join-terrorists.html> [<http://perma.cc/5UMW-D7NP>].

^{142.} *Id.*

^{143.} *United States v. Shehadeh*, 586 F. App'x 47, 48 (2d Cir. 2014).

^{144.} *United States v. Shehadeh*, No. 1:10-CR-1020(ENV), 2013 WL 6049001, at *2 (E.D.N.Y. Nov. 14, 2013).

^{145.} *Id.* at *1.

^{146.} *Id.* at *4.

^{147.} *Id.*

who commit terrorism-related offenses are uniquely incapable of being deterred and rehabilitated such that a special rule is necessary. However, this premise is unsupported and leads to high sentences that are not connected to the characteristics of the offense or the individual defendant, the actual deterrent value, or the ability of the defendant to be rehabilitated.¹⁴⁸

*a. Ideology Is Not the Primary Motivation for Many Who Commit
Terrorism Offenses*

As explained above, one reason policymakers have provided for why individuals who commit terrorism offenses cannot be deterred or rehabilitated is that their criminal activity is ideologically motivated.¹⁴⁹ However, that assumption is unsupported. Despite years of analysis, social scientists and policy analysts have no clear answer as to what leads people to support and commit violent acts on behalf of terrorist groups like ISIS.¹⁵⁰ While most agree that there is no single profile of why one chooses to participate in terrorist activity,¹⁵¹ potential factors include political grievances, mental illness, economic stress, trauma, and a sense of belonging, adventure, and notoriety.¹⁵² What is clear is

148. Dratel, *supra* note 11, at 57.

149. See *supra* Section II.A.1.

150. See, e.g., QUINTAN WIKTOROWICZ, *RADICAL ISLAM RISING: MUSLIM EXTREMISM IN THE WEST* 11-17 (2005) (summarizing the different theories on why individuals become terrorists); Matt Apuzzo, *Who Will Become a Terrorist? Research Yields Few Clues*, N.Y. TIMES (Mar. 27, 2016), <http://www.nytimes.com/2016/03/28/world/europe/mystery-about-who-will-be-come-a-terrorist-defies-clear-answers.html> [<http://perma.cc/7QYF-56A8>] (“Despite millions of dollars of government-sponsored research, and a much-publicized White House pledge to find answers, there is still nothing close to a consensus on why someone becomes a terrorist.”).

151. Sahar F. Aziz, *Policing Terrorists in the Community*, 5 HARV. NAT’L SECURITY J. 147, 166 (2014) (recognizing the “general consensus that there is no profile or single path of ‘radicalization’ towards violence”); Apuzzo, *supra* note 150 (“[Y]oung American men and women who have been arrested over the past year for trying to help the Islamic State . . . are so diverse that they defy a single profile.”).

152. Apuzzo, *supra* note 150 (“Many studies seem to warn of the adolescent condition, singling out young, impatient men with a sense of adventure who are ‘struggling to achieve a sense of selfhood.’”); Liah Greenfeld, *To Combat Terrorism, Tackle Mental Illness*, N.Y. TIMES (July 15, 2016), <http://www.nytimes.com/roomfordebate/2016/07/15/can-we-just-live-with-terrorism/to-combat-terrorism-tackle-mental-illness> [<http://perma.cc/7NEZ-EJVV>] (“The great majority of ‘homegrown’ or ‘lone-wolf’ terror acts are committed by people with a known history of mental illness, most often depression, which counts social maladjustment and problematic sense of self among its core symptoms.”); Mehdi Hasan, *How Islamic Is Islamic State?*, NEW STATESMAN (Mar. 10, 2015), <http://www.newstatesman.com/world-affairs/2015/03/mehdi-hasan-how-islamic-islamic-state> [<http://perma.cc/DQ4T>]

that “ideology alone—even endorsement of terrorist activity—is such a poor predictor of actual terrorist activity that [it] is almost worthless.”¹⁵³ Indeed, a study by the United Kingdom’s MI5 intelligence agency based on in-depth case studies of hundreds of individuals associated with terrorist activity found that “[f]ar from being religious zealots, a large number of those involved in terrorism do not practise their faith regularly. Many lack religious literacy and could actually be regarded as religious novices.”¹⁵⁴ Another review of 500 cases and many other empirical studies have found that “a lack of religious literacy and education appears to be a common feature among those that are drawn to [terrorist] groups.”¹⁵⁵ Because “[t]he ideology . . . is a secondary concern,” even FBI analysts are taught to “use actions, not ideas, to determine whether someone might carry out an attack.”¹⁵⁶

b. Terrorism Sentencing Is Not Supported by Empirical Evidence

Neither the Sentencing Commission nor the courts applying the Terrorism Enhancement have provided any empirical evidence to support the presumption that terrorism defendants are uniquely dangerous. The legitimacy of the Guidelines is derived from the belief that they are based on reliable data and

-YWFV] (noting that individuals drawn to ISIS have a “sense of emotional and moral outrage” at the political situation in the Middle East and “are angry, or even bored, young men in search of a call to arms and a thrilling cause”); Faiza Patel, *Rethinking Radicalization*, BRENNAN CTR. FOR JUST. 10-11 (2011), <http://www.brennancenter.org/sites/default/files/legacy/RethinkingRadicalization.pdf> [<http://perma.cc/2S8V-AN8M>] (“Empirical research on radicalization conclusively shows that the path to terrorism is far from linear. While studies have identified various factors that may influence the process, including personal circumstances, perceptions of injustice (both local and international), exposure to ideology that promotes violence as “*jihad*,” and social bonds, it simply does not support the notion of a clear path from personal or political discontent to violence.”).

153. Jesse J. Norris, *Entrapment and Terrorism on the Left: An Analysis of Post-9/11 Cases*, 19 NEW CRIM. L. REV. 236, 269 n.206 (2016); see Jesse J. Norris, *Why the FBI and the Courts Are Wrong About Entrapment and Terrorism*, 84 MISS. L.J. 1257, 1285-90 (2015); Marc Sageman, *The Stagnation in Terrorism Research*, 26 TERRORISM & POL. VIOLENCE 565, 575 (2014).

154. Alan Travis, *MI5 Report Challenges Views on Terrorism in Britain*, GUARDIAN (Aug. 20, 2008), <http://www.theguardian.com/uk/2008/aug/20/uksecurity.terrorism1> [<http://perma.cc/B35E-EDAE>].

155. Patel, *supra* note 152, at 10 & n.63.

156. Peter Bergen, *Why Do Terrorists Commit Terrorism?*, N.Y. TIMES (June 14, 2016), <http://www.nytimes.com/2016/06/15/opinion/why-do-terrorists-commit-terrorism.html> [<http://perma.cc/V8W4-VNL3>].

principles.¹⁵⁷ However, when the Terrorism Enhancement was promulgated, no statistically sound evidence was used to substantiate that all terrorism defendants were so different as to necessitate such a large increase in the Guidelines range.¹⁵⁸ Similarly, courts of appeals upholding the idea that terrorism defendants “are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation” have also not cited any evidence to support that opinion.¹⁵⁹

Moreover, while the Commission has recognized that first-time offenders rarely recidivate, it has provided no evidence that those convicted of terrorism offenses are an exception to this rule and recidivate at higher rates.¹⁶⁰ While “the question of recidivism after terrorism-related detention is empirically fraught,”¹⁶¹ the very limited available data suggests that individuals convicted of terrorism offenses do *not* recidivate at higher rates than those convicted of other crimes. Of the more than 300 prisoners who have completed their terrorism sentences since 2001, “Justice Department officials and outside experts could identify only a handful of cases in which released inmates had been rearrested, a rate of relapse far below that for most federal inmates”¹⁶²

c. Individuals Who Commit Terrorism Offenses Can Be Deterred

Contrary to the assumption that all those convicted of terrorism offenses cannot be deterred and the only adequate deterrence is full incapacitation, terrorism experts and government officials have recognized that terrorists and their supporters cannot be considered as a monolith, and many can be de-

157. McLoughlin, *supra* note 31, at 112 (“The Supreme Court and the Sentencing Commission have opined that the deference to be given to the Sentencing Guidelines derives principally from the fact that the Guidelines were developed based on the experience of thousands of cases over a period of years.”).

158. *Id.* at 112-15.

159. *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003); *see, e.g., United States v. Jayyousi*, 657 F.3d 1085, 1117 (11th Cir. 2011); Said, *supra* note 50, at 481, 525, 527.

160. McLoughlin, *supra* note 31, at 114-15.

161. Aziz Z. Huq, *The Political Path of Detention Policy*, 48 AM. CRIM. L. REV. 1531, 1531 n.2 (2011).

162. Scott Shane, *Beyond Guantánamo, a Web of Prisons for Terrorism Inmates*, N.Y. TIMES (Dec. 10, 2011), <http://www.nytimes.com/2011/12/11/us/beyond-guantanamo-bay-a-web-of-federal-prisons.html> [<http://perma.cc/XG52-SF2S>]; *see also id.* (“[I]t appears extraordinarily rare for the federal prison inmates with past terrorist ties to plot violence after their release. The government keeps a close eye on them: prison intelligence officers report regularly to the Justice Department on visitors, letters and phone calls of inmates linked to terrorism. Before the prisoners are freed, F.B.I. agents typically interview them, and probation officers track them for years.”).

tered.¹⁶³ Skinner, for example, notes that outside “a relatively small group of decision-makers,” most “terrorist operatives participate as agents, not as initiators.”¹⁶⁴ These agents can be deterred by cutting their “ideological ties to a larger terrorist network.”¹⁶⁵ Matthew Kroenig and Barry Pavel add that because “[m]any terrorist leaders, financiers, supporters, radical clerics, and other members of terrorist networks value their lives and possessions,” “[s]imple threats of imprisonment and death against these actors can deter terrorist activity.”¹⁶⁶ They provide examples of radical clerics in the United Kingdom being deterred from preaching incendiary sermons by threats of imprisonment, donors in Saudi Arabia being deterred from financing terrorism due to increased scrutiny, and the Moro Islamic Liberation Front in the Philippines being deterred from cooperating with Al Qaeda by the threat of U.S. retaliation.¹⁶⁷

Similarly, Samuel J. Rascoff notes that “[t]errorist foot soldiers behave differently than operational commanders, financiers, and propagandists,” with “[s]ome groups [being] more readily deterrable than others.”¹⁶⁸ Yet, he adds that this recognition of deterrence “has been largely lost on lawyers, judges, and legal academics, resulting in significant gaps between the practice of national security in this area and the legal architecture ostensibly designed to undergird and oversee it.”¹⁶⁹ One aspect of this legal architecture is the Terrorism Enhancement, which fails to acknowledge that “adequate deterrence” may

163. See, e.g., Samuel J. Rascoff, *Counterterrorism and New Deterrence*, 89 N.Y.U. L. REV. 830, 832 (2014) (“Deterrence began to make a small but palpable comeback in the discourse of some security officials and commentators, partly because the effectiveness of alternative approaches, like preemption, had begun to be called into question.” (citations omitted)); *National Strategy for Counterterrorism*, *supra* note 65, at 6, 8 (“The successful prosecution of terrorists will . . . deter terrorist activity . . . [Target hardening] can deter [terrorists] from attacking particular targets or persuade them that their efforts are unlikely to succeed.”).

164. Skinner, *supra* note 32, at 344 (quoting Mark Weisburd, *Al-Qaeda and the Law of War*, 11 LEWIS & CLARK L. REV. 1063, 1069 (2007)).

165. *Id.*

166. Matthew Kroenig & Barry Pavel, *How To Deter Terrorism*, 35 WASH. Q. 25-26 (2012).

167. *Id.* at 26-27; see also ANDREAS WENGER & ALEX WILNER, DETERRING TERRORISM: THEORY AND PRACTICE 205-300 (2012) (providing several empirical studies of the deterrence of terrorism in practice).

168. Rascoff, *supra* note 163, at 838 (internal quotation marks omitted); see also Elbridge A. Colby, *Expanded Deterrence: Broadening the Threat of Retaliation*, 149 POL’Y REV. 43, 52 (2008) (“[T]he vast majority of terrorists, even those contemplating catastrophic attacks against us, have some kind of rationale in mind, a strategy, a rational calculus that we can affect . . . Broadening our deterrent threat will let us seize more levers on these groups’ behavior.”).

169. Rascoff, *supra* note 163, at 830.

differ based on the circumstances surrounding a defendant's conduct and should be taken into account in sentencing.

d. Individuals Who Commit Terrorism Offenses Can Be Rehabilitated

Finally, the assumption that terrorism offenders cannot be rehabilitated is also unsupported. While the United States has largely taken a punitive approach toward terrorism convicts,¹⁷⁰ other countries that have experienced more immediate and extensive threats from young people joining extremist groups have implemented rehabilitation programs focusing on mental health, educational, family, economic, and religious counseling and social services. In places like Germany and Northern Ireland, such programs were initially created to address violence coming from domestic groups, like neo-Nazis, right-wing extremists, and ultranationalists.¹⁷¹ With the rise of Middle East-based terrorist organizations, countries throughout the world have established similar programs, including Saudi Arabia, Algeria, Egypt, Jordan, Yemen, Singapore, Indonesia, Malaysia, the United Kingdom, and Denmark.¹⁷² Some of these programs are alternatives to incarceration, while others provide rehabilitative

170. Matt Apuzzo, *Only Hard Choices for Parents Whose Children Flirt with Terror*, N.Y. TIMES (Apr. 9, 2016), <http://www.nytimes.com/2016/04/10/us/parents-face-limited-options-to-keep-children-from-terrorism.html> [<http://perma.cc/UD95-G439>].

171. Dratel, *supra* note 11, at 41 (discussing a Northern Ireland program that “spawned dozens of public and privately sponsored programs designed to maintain peace, ensure security, address grievances and perceived inequalities, promote healing, and build trust between the police and the community”); Dina Temple-Raston, *Methods for Reforming Neo-Nazis Help Fight the Radicalization of Muslims*, NPR (May 10, 2016, 4:24 AM), <http://www.npr.org/sections/parallels/2016/05/10/477043520/methods-for-reforming-neo-nazis-help-fight-the-radicalization-of-muslims> [<http://perma.cc/5JXH-2FMZ>] (discussing a program called “Exit-Deutschland,” “which targeted neo-Nazis and right-wing extremists, groups that German authorities have been working to de-radicalize and fold back into German society for years”).

172. See, e.g., Dratel, *supra* note 11, at 41-44; Audie Cornish, *German Program Helps Families De-Radicalize Members Prone to Extremism*, NPR (Mar. 13, 2015, 5:29 PM), <http://www.npr.org/2015/03/13/392845800/german-program-helps-families-de-radicalize-members-prone-to-extremism> [<http://perma.cc/Q2FR-5SFY>]; Hanna Rosin, *How a Danish Town Helped Young Muslims Turn Away from ISIS*, NPR (July 15, 2016, 3:05 AM), <http://www.npr.org/sections/health-shots/2016/07/15/485900076/how-a-danish-town-helped-young-muslims-turn-away-from-isis> [<http://perma.cc/RA5B-GTDY>]; Temple-Raston, *supra* note 171; *Risk Reduction for Countering Violent Extremism: Explorative Review by the International Resource Center for Countering Violent Extremism*, QATAR INT’L ACAD. FOR SECURITY STUD. 10 (Nov. 2010) [hereinafter QIASS Report], <http://qiass.org/wp-content/uploads/2016/05/QIASS-Risk-Reduction-for-CVE-final-101414.pdf> [<http://perma.cc/G67F-YJGP>].

services in conjunction with criminal proceedings, and participation can lead to shorter sentences.¹⁷³ Many of these programs have been successful in rehabilitating terrorism offenders and helping them adjust back into society.¹⁷⁴ For example, in one Danish town, about 330 individuals—including eighteen who had returned from Syria—have participated in a rehabilitation program, leading to a significant decrease in the number of young Muslims joining ISIS, from thirty in 2013 to only one the following year.¹⁷⁵ Moreover, in the Saudi Arabian program, about 1,400 individuals have renounced their past terrorist activities, and Saudi authorities claim a “success rate” of between eighty to ninety percent.¹⁷⁶

Many individuals have also rejected their past support for terrorist groups without even participating in rehabilitation programs. With regard to ISIS, hundreds of young Muslims who traveled to Syria and Iraq to join the terrorist organization have now returned to their home countries, denounced the group, and expressed regret for travelling in the first place.¹⁷⁷ Many of these individuals are facing lengthy terms of incarceration in their home countries, but an approach focused on rehabilitation may be a more effective counterterrorism strategy. Peter Neumann argues that governments should encourage more defectors to publicly counter ISIS’s recruiting tactics and to “remove legal disincentives” in the form of imprisonment that deter individuals from speaking out.¹⁷⁸

173. See, e.g., Dratel, *supra* note 11, at 37-48; QIASS Report, *supra* note 172, at 6; see also Temple-Raston, *supra* note 171 (noting that participation in the German Hayat program “can actually have a very positive effect on sentencing later on”).

174. Dratel, *supra* note 11, at 14.

175. Tim Mansel, *How I Was De-Radicalised*, BBC NEWS (July 2, 2015), <http://www.bbc.com/news/magazine-33344898> [<http://perma.cc/8VRP-TK3S>]; Rosin, *supra* note 172.

176. Christopher Boucek, *Saudi Arabia’s “Soft” Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare*, 97 CARNEGIE PAPERS 1, 21-22 (Sept. 2008), http://carnegieendowment.org/files/cp97_boucek_saudi_final.pdf [<http://perma.cc/83XD-7MW4>].

177. Kimiko De Freytas-Tamura, *ISIS Defectors Reveal Disillusionment*, N.Y. TIMES (Sept. 20, 2015), <http://www.nytimes.com/2015/09/21/world/europe/isis-defectors-reveal-disillusionment.html> [<http://perma.cc/K2R9-PEKM>]; Peter R. Neumann, *Victims, Perpetrators, Assets: The Narratives of Islamic State Defectors*, INT’L CTR. FOR STUDY RADICALISATION & POL. VIOLENCE (2015), <http://icsr.info/wp-content/uploads/2015/09/ICSR-Report-Victims-Perpetrators-Assets-The-Narratives-of-Islamic-State-Defectors.pdf> [<http://perma.cc/83PZ-GNZP>].

178. De Freytas-Tamura, *supra* note 177 (internal quotation marks omitted).

B. War on Drugs

The failure to recognize that many young Muslims who commit terrorism offenses can be deterred and rehabilitated echoes a similarly held belief by policymakers and commentators years earlier in the War on Drugs – that young African Americans convicted of gang-related drug offenses presented a distinctive threat to American society that called for lengthy punishment. Perhaps the term that best personified the perceived threat was “super-predator.” Coined by Princeton Political Science Professor John Dilulio, super-predators were predominantly “black inner-city males,” allegedly “hardened, remorseless juveniles” with “absolutely no respect for human life.”¹⁷⁹ Dilulio added:

They are perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons They fear neither the stigma of arrest nor the pain of imprisonment So for as long as their youthful energies hold out, they will do what comes “naturally”: murder, rape, rob, assault, burglarize, deal deadly drugs, and get high.¹⁸⁰

The fear of super-predators was expressed by politicians across the political spectrum. For example, Dilulio co-authored a book with John Walters and William Bennett, head of the Office of Drug Policy under President George H. W. Bush, entitled *Body Count: Moral Poverty . . . and How To Win America's War Against Crime and Drugs*, where they spoke of the need to incapacitate “juvenile ‘super-predators’ – radically impulsive, brutally remorseless youngsters, including ever more pre-teenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs, and create communal disorders.”¹⁸¹ Similarly, when discussing support for her husband’s War on Drugs agenda, then-First Lady Hillary Clinton spoke of addressing the need to punish young men who “are often connected to big drug cartels.”¹⁸² She stated, “[T]hey are not just gangs of kids anymore. They are often the kinds of kids that are called

179. John J. Dilulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD (Nov. 27, 1995), <http://www.weeklystandard.com/the-coming-of-the-super-predators/article/8160> [<http://perma.cc/3FBP-W29U>].

180. *Id.*

181. WILLIAM BENNETT ET AL., *BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST POVERTY AND DRUGS* 27 (1996).

182. Kevin Drum, *A Very Brief History of Super-Predators*, MOTHER JONES (Mar. 3, 2016, 1:04 PM), <http://www.motherjones.com/kevin-drum/2016/03/very-brief-history-super-predators> [<http://perma.cc/XN5P-HJCJ>].

‘super-predators’—no conscience, no empathy. We can talk about why they ended up that way, but first we have to bring them to heel.”¹⁸³

These views were shared by the federal legislators who drafted the very bills that led to disproportionately high sentences for African Americans in the War on Drugs. For example, to justify the 100-to-1 crack cocaine disparity, Senator Lawton Chiles warned of people who “will go out and steal, rob, lie, cheat, take money from any savings, take refrigerators out of their houses, anything they can get their hands on to maintain that habit,” which has caused an increase in “the crimes of burglary, robbery, assault, purse snatching, [and] mugging.”¹⁸⁴ Dilulio himself had a direct influence on federal legislation, when he testified in front of the Senate Judiciary Committee about the harm from young African Americans “surrounded by deviant, delinquent, and criminal adults in chaotic, dysfunctional, fatherless, Godless, and jobless settings where drug abuse and child abuse are twins, and self-respecting young men literally aspire to get away with murder.”¹⁸⁵

Because of the assumed threat posed by these young African American men, the focus on addressing the problem was not rehabilitation, but rather lengthy punishment. And harsh sentencing laws were believed to be necessary to protect Americans. Furthermore, as with the War on Terror, because the threat was premised on a violent cultural ideology ingrained in the offender, the individual circumstances of each defendant or his crime of conviction did not matter. As Joseph Margulies argues, “A belief that terrorism always reflects the act of an inherently malevolent disposition, for which no further explanation is possible or necessary, swims in the same stream as a similar view of . . . juvenile super-predators.”¹⁸⁶ From this point of view, “[T]he criminal has been reimagined from one of us—a person for whom society bears some responsibility and who must therefore be reformed and rehabilitated—to one of them—a monster who must be separated from us and whose behavior must be monitored and controlled.”¹⁸⁷

183. *Id.*

184. 132 CONG. REC. 31,329-30 (Oct. 15, 1986) (statement of Sen. Chiles).

185. *The Changing Nature of Youth Violence: Hearing Before the Subcomm. on Youth Violence of the S. Comm. on the Judiciary*, 104th Cong. 1, 24 (1996) (statement of John J. Dilulio, Jr.).

186. Joseph Margulies, *Deviance, Risk, and Law: Reflections on the Demand for the Preventive Detention of Suspected Terrorists*, 101 J. CRIM. L. & CRIMINOLOGY 729, 732 (2011).

187. *Id.* at 744.

However, just like in the terrorism context, fears of young, African American super-predators unable to rehabilitate were inaccurate and overblown.¹⁸⁸ The increase in violent crime that led to the super-predator myth has dropped significantly in the past twenty years.¹⁸⁹ Even Dilulio himself has admitted that his views on super-predators were incorrect and has apologized for his role in establishing severe penalties that disproportionately harm young African Americans.¹⁹⁰ Many now have also recognized that the majority of individuals being sentenced in the War on Drugs were not violent, hardened criminals, but rather were capable of rehabilitation and reintegration into society.¹⁹¹

III. THE NEGATIVE EFFECTS OF LENGTHY INCARCERATION ON AFRICAN AMERICAN AND AMERICAN MUSLIM COMMUNITIES

The faulty premise underlying sentencing policies in the Wars on Drugs and Terror has not only led to significant prison sentences for many young African Americans and American Muslims. It has also caused harm to African American and American Muslim communities more broadly in similar ways. These negative effects include (1) increasing discrimination by reinforcing stereotypes of African Americans and Muslims as inherently dangerous, (2) furthering distrust of law enforcement among African Americans and Muslims, which undermines government objectives by making these communities less likely to cooperate in criminal investigations, and (3) failing to effectively rehabilitate drug and terrorism offenders and reintegrate them into society.

A. War on Drugs

The harsh sentencing laws in the War on Drugs have had profound, negative consequences for African American communities throughout the United States. For example, the prison level for African Americans convicted of drug-related offenses in 2000 was twenty-six times that in 1983.¹⁹² In some communities, three-fourths of African American men have served prison time, and

188. See, e.g., Meredith Lamberti, *Children Are Different: Why Iowa Should Adopt a Categorical Ban on Life Without Parole Sentences for Juvenile Homicide Offenders*, 63 *DRAKE L. REV.* 311, 331-32 (2015).

189. *Id.* at 332.

190. *Id.*

191. *Punishment and Prejudice*, *supra* note 67.

192. JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* 28 (2005).

more African Americans are in prison or under correctional supervision than were enslaved in 1850.¹⁹³ This mass incarceration has led to the discrimination and stigmatization of young African American men, significant distrust of law enforcement in African American communities, and the failure to effectively rehabilitate offenders during and after their sentences.

First, the myth of the “super-predator” and high incarceration rates have caused discrimination against African American men from a public who view them as exceptionally dangerous.¹⁹⁴ Not only have African Americans been disproportionately targeted by the police, they have also faced discrimination in a variety of areas, including employment, housing, and access to public services.¹⁹⁵ This mistreatment is due in part to stereotypes of young African Americans as drug offenders and criminals based on the media hysteria created in the aftermath of the crack-cocaine epidemic and inner-city gang violence that led to the creation of harsh criminal penalties in the War on Drugs.¹⁹⁶

Second, the severe penalties and disproportionate targeting of African Americans have also created significant distrust of law enforcement in African American communities. The sentences are viewed by many African Americans as illegitimate uses of government power that have directly harmed their family members and friends.¹⁹⁷ As a consequence, African Americans have higher levels of distrust of law enforcement when compared to whites and are less likely to cooperate in investigations.¹⁹⁸

193. Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 9 (2011).

194. Huq & Muller, *supra* note 60, at 4.

195. See, e.g., Jillian Berman, *The Job Market Discriminates Against Black College Grads*, HUFFINGTON POST (May 20, 2014), http://www.huffingtonpost.com/2014/05/20/black-college-graduates_n_5358983.html [<http://perma.cc/H7P7-A8XU>]; Shaila Dewan, *Discrimination in Housing Against Nonwhites Persists Quietly, U.S. Study Finds*, N.Y. TIMES (June 11, 2013), <http://www.nytimes.com/2013/06/12/business/economy/discrimination-in-housing-against-nonwhites-persists-quietly-us-study-finds.html> [<http://perma.cc/8DGV-HEW7>]; Corrado Giulietti et al., *Racial Discrimination in Local Public Services: A Field Experiment in the US* (Inst. for the Study of Labor, Discussion Paper No. 9290, 2015), <http://ftp.iza.org/dp9290.pdf> [<http://perma.cc/7DKY-EEGC>].

196. See, e.g., *Race And Punishment: Racial Perceptions Of Crime And Support For Punitive Policies*, SENT'G PROJECT 3-4 (2014) [hereinafter *Race and Punishment*], <http://www.sentencingproject.org/wp-content/uploads/2015/11/Race-and-Punishment.pdf> [<http://perma.cc/9L8S-M756>].

197. Tom R. Tyler et al., *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC'Y REV. 365, 369-70 (2010); *Race and Punishment*, *supra* note 196, at 33-35.

198. Frank Newport, *Gallup Review: Black and White Attitudes Toward Police*, GALLUP (Aug. 20, 2014), <http://www.gallup.com/poll/175088/gallup-review-black-white-attitudes-toward-police.aspx> [<http://perma.cc/XX6B-J2GB>]; *Reducing Racial Disparity in the Criminal Justice*

Third, the focus of drug sentencing laws on punishment trumped any desire to help rehabilitate offenders. Due to the belief that young African American convicts were uniquely dangerous and not worthy of rehabilitation, efforts to support drug treatment and alternatives to incarceration were rejected. For example, during debate over the 1994 crime bill, policymakers rejected efforts by members of the Congressional Black Caucus that would have increased funding for drug treatment by two billion dollars and early intervention programs by three billion dollars.¹⁹⁹ Instead, the law that was eventually passed made it harder for offenders to rehabilitate by removing their ability to receive Pell Grants for higher education while incarcerated.²⁰⁰

B. War on Terror

1. Differences Between Communities Affected by the Wars on Drugs and Terror

Before comparing the harms faced by African American communities in the War on Drugs and those faced by American Muslims in the War on Terror, I must first acknowledge important demographic differences between the two groups. The population of Muslims in the United States is much smaller than the population of African Americans, and the percentage of Muslims convicted of terrorism-related crimes is also much smaller than the percentage of African Americans convicted of drug-related crimes. While the Muslim American population has been estimated to be at most six to seven million,²⁰¹ forty-two million identify as African American.²⁰² Furthermore, as explained above, drug-sentencing policies have had a widespread impact on African Americans.²⁰³ The

System: A Manual for Practitioners and Policymakers, SENT'G PROJECT (Sept. 1, 2008), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Reducing-Racial-Disparity-in-the-Criminal-Justice-System-A-Manual-for-Practitioners-and-Policymakers.pdf> [<http://perma.cc/EXK2-J7QK>].

199. Elizabeth Hinton et al., *Did Blacks Really Endorse the 1994 Crime Bill?*, N.Y. TIMES (Apr. 13, 2016), <http://www.nytimes.com/2016/04/13/opinion/did-blacks-really-endorse-the-1994-crime-bill.html> [<http://perma.cc/AC68-BR9A>].

200. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20411, 108 Stat. 1796, 1828 (codified as amended at 20 U.S.C. § 1040a(b)(6) (2012)).

201. *Muslim Americans: Middle Class and Mostly Mainstream*, PEW RES. CTR. 11 (May 22, 2007), <http://www.pewresearch.org/files/2007/05/muslim-americans.pdf> [<http://perma.cc/9PH2-TX9D>].

202. Sonya Rastogi et al., *The Black Population: 2010*, U.S. CENSUS BUREAU 3 (Sept. 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf> [<http://perma.cc/5822-S223>].

203. See *supra* Section III.A.

same cannot be said for terrorism sentencing policies' effect on Muslims, as only a few hundred have been charged with terrorism offenses, and the vast majority reject the violent extremist ideology of foreign terrorist organizations.²⁰⁴

For the most part, these differences do not affect the arguments made in this Feature. They have no effect on how young African American and Muslim men have been viewed as uniquely dangerous in the Wars on Drugs and Terror, respectively, leading to harsh sentencing policies in both contexts. They do, however, demonstrate why the consequences of the War on Drugs in the United States has affected a much larger segment of the American population than those of the War on Terror. This helps explain why African American communities have been more successful in advocating for community policing reforms than their Muslim counterparts have been in changing federal counterterrorism policies.²⁰⁵ Since terrorism offenders make up a much smaller percentage of American Muslims, one might also expect that they would not be stereotyped in the same way as African Americans. However, because Muslims are also a much smaller percentage of the U.S. population, many Americans do not personally know any Muslims, which, as demonstrated below, leads to high levels of discrimination toward Muslims and association of Muslims with violence.²⁰⁶

2. *Negative Consequences of the War on Terror*

Despite the demographic differences between Muslim and African American communities, American Muslims have faced consequences in the aftermath of the government's War on Terror policies similar to those suffered by African Americans due to the War on Drugs, including discrimination and stigmatization of Muslims, distrust of law enforcement in Muslim communities, and the failure to effectively rehabilitate offenders.

204. CHARLES KURZMAN, *THE MISSING MARTYRS: WHY THERE ARE SO FEW MUSLIM TERRORISTS* 11 (2011); Tyler et al., *supra* note 197, at 366 ("Recent studies suggest that [American Muslims] generally express strong allegiance to America and very little support for terrorism or terrorists."); *By the Numbers*, *supra* note 5.

205. See Aziz, *supra* note 151, at 210-11.

206. See, e.g., Mona Chalabi, *Americans Are More Likely To Like Muslims If They Know One*, FIVE THIRTY EIGHT (Feb. 13, 2015, 5:18 PM), <http://fivethirtyeight.com/datalab/americans-are-more-likely-to-like-muslims-if-they-know-one/> [<http://perma.cc/2QXD-A4BM>]; Pew Forum on Religion & Pub. Life, *Muslims Widely Seen as Facing Discrimination*, PEW RES. CTR. 11 (2009), <http://www.pewforum.org/files/2009/09/survey0909.pdf> [<http://perma.cc/A3GK-AZ2E>]; Matt Sledge, *Muslim Americans Widely Seen as Victims of Discrimination*, HUFFINGTON POST (Feb. 23, 2015, 5:34 PM), http://www.huffingtonpost.com/2015/02/23/muslim-americans-discrimination_n_6738642.html [<http://perma.cc/C6AC-T53H>].

a. *Discrimination and Stigmatization*

As mentioned above, Muslims are disproportionately prosecuted in the War on Terror. In some instances this is because the policies are specifically designed to target Muslims (similar to how War on Drugs policies like the 100-to-1 crack cocaine disparity targeted African Americans). For example, the material support ban in 18 U.S.C. § 2339B only prohibits providing material support to a “foreign terrorist organization” designated by the Secretary of State.²⁰⁷ Providing similar support to a domestic terrorist organization is not criminalized.²⁰⁸ Since many Muslims accused of violating section 2339B provide support to foreign groups such as ISIS, they are convicted of conduct that would not be illegal if it were provided to domestic extremist groups, like the Ku Klux Klan. For entirely domestic terrorist crimes, an individual’s material support must be in furtherance of a specified terrorism offense to be illegal.²⁰⁹

Even outside the material support context, “[t]errorism-like crimes committed by Arab or Muslim Americans get treated as terrorism, but similar crimes by non-Arabs/non-Muslims . . . are generally not viewed as terrorism.”²¹⁰ For example, Tung Yin analyzed multiple attempted bombings and mass shootings in the United States and found that those committed by Muslims were more likely to be characterized as “terrorism” than those committed by non-Muslims.²¹¹ Similarly, unlike Muslims, when Christians commit crimes because “God supposedly told them to do so,” they are not considered terrorists, but instead their religious zeal is often treated as a mitigating factor, such as diminished capacity or insanity.²¹² Due to the Terrorism Enhancement, how a crime is categorized can have a significant impact on sentencing, and there-

207. 18 U.S.C. § 2339B(a)(1) (2012) (emphasis added).

208. See Said, *supra* note 50, at 506.

209. 18 U.S.C. § 2339A; see also Said, *supra* note 50, at 506 (“[M]aterially supporting [foreign terrorist organizations] can result in very high sentences for what would otherwise be innocuous and constitutionally protected activity. In contrast, in cases involving purely domestic terrorist crimes with no international bent, the available decisions of the federal circuit courts involve some form of violent activity or conspiracy to commit violence, without exception.”).

210. Tung Yin, *Were Timothy McVeigh and the Unabomber the Only White Terrorists?: Race, Religion, and the Perception of Terrorism*, 4 ALA. C.R. & C.L.L. REV. 33, 35 (2013).

211. *Id.* at 43-53.

212. *Id.* at 72 & n.244 (citing *State v. Roque*, 141 P.3d 368, 389 (Ariz. 2006); *People v. Coddington*, 2 P.3d 1081 (Cal. 2000); *People v. Serravo*, 823 P.2d 128, 131 (Colo. 1992)).

fore Muslims can receive higher sentences for similar conduct committed by non-Muslims.²¹³

Similarly, despite the increase in right-wing extremist and militia groups,²¹⁴ government counter-radicalization programs designed to stop individuals from embracing violent extremism—such as the Obama Administration’s “Countering Violent Extremism” program²¹⁵—have focused almost entirely on terrorism committed by Muslims.²¹⁶ And, although social scientists agree that there is no one path that radicalizes an individual to become violent, these programs often “scrutiniz[e] Muslims who are highly religious, hold unsavory or critical political views of American domestic or foreign policy, and/or are first- or second-generation Muslim immigrants deemed unassimilated into the dominant Anglo-Judeo-Christian-American culture.”²¹⁷ This radicalization discourse “creates false and stigmatizing equivalences . . . between Islam, Muslims, and terrorism.”²¹⁸

By reinforcing the belief that Muslims are uniquely prone to terrorism, government policies have led to private acts of discrimination against Muslims

213. See *supra* Part I; see also Michal Buchhandler-Raphael, *What’s Terrorism Got To Do With It? The Perils of Prosecutorial Misuse of Terrorism Offenses*, 39 FLA. ST. U. L. REV. 807, 843-44 (2012) (noting “sentencing disparities among similarly situated defendants and lack of uniformity and consistency in charging decisions” and providing an example of “Muhammad, who was a Muslim, was prosecuted under the terrorism statute, [while] McCoy was prosecuted under ‘ordinary’ murder charges”); Yin, *supra* note 210, at 67 (noting that being labeled a “terrorist” results in a significant sentencing increase).

214. See Kurt Eichenwald, *Right-Wing Extremists Are a Bigger Threat to America than ISIS*, NEWSWEEK (Feb. 4, 2016, 6:02 AM), <http://www.newsweek.com/2016/02/12/right-wing-extremists-militants-bigger-threat-america-isis-jihadists-422743.html> [<http://perma.cc/Y3S4-2WFE>]. A 2015 Georgetown study of 119 lone wolf attackers found that “the majority are white men with criminal records” and “more than half were found to subscribe to white supremacist or extremist far-right ideologies.” Engy Abdelkader, *Mental Illness: A Key Factor in ‘Terror,’* HUFFINGTON POST (Aug. 15, 2016), http://www.huffingtonpost.com/entry/mental-illness-a-key-factor-in-terror_us_57a49406e4b0ccbo23721dcf [<http://perma.cc/BG5N-DEXY>]. The study added that terrorism from self-identifying Muslims “poses no greater threat to the public than other forms of domestic radicalization.” *Id.*

215. See *Empowering Local Partners To Prevent Violent Extremism in the United States*, WHITE HOUSE (Aug., 2011) [hereinafter *Empowering Local Partners*], http://www.whitehouse.gov/sites/default/files/empowering_local_partners.pdf [<http://perma.cc/U8R8-32L4>]; Dina Temple-Raston, *White House Unveils Counter-Extremism Plan*, NPR (Aug. 3, 2011, 1:24 PM), <http://www.npr.org/2011/08/04/138955790/white-house-unveils-counter-extremism-plan> [<http://perma.cc/BY6M-B9VT>].

216. Aziz, *supra* note 151, at 164-65, 182-83.

217. *Id.* at 167.

218. Akbar, *supra* note 108, at 895.

as well.²¹⁹ As Sahar Aziz writes, “As the public interprets the government’s actions as part of reasonable national security policies, private actors feel justified in discriminating against Muslims in employment, housing, education, and public accommodations.”²²⁰ This has led to a broad range of discriminatory acts, including “vandalizing mosques with anti-Muslim graffiti and dead pigs, burning down children’s play centers,” and “pressur[ing] local governments to bar mosque constructions and expansions on grounds that they are terrorist breeding centers.”²²¹ Recent studies have found that nearly two-thirds of Muslims experienced discrimination in the past year.²²² There were 174 reported incidents of anti-Muslim violence and vandalism in 2015,²²³ and anti-Muslim hate crimes are five times more common today than before 9/11.²²⁴

b. Distrust of Law Enforcement

As American Muslims feel unjustly targeted by government practices due to their religious beliefs, their distrust of law enforcement has increased as well.²²⁵ This distrust is caused by “[t]he dominant model of counterterrorism policing [that] has emphasized coercion and surveillance over the elicitation of cooperation through trust-building.”²²⁶ When communities doubt the fairness and le-

219. Aziz, *supra* note 151, at 154, 186; Huq et al., *supra* note 64, at 423.

220. Aziz, *supra* note 151, at 186.

221. *Id.* at 186-87; see also Aziz Z. Huq, *Private Religious Discrimination, National Security, and the First Amendment*, 5 HARV. L. & POL’Y REV. 347, 349 (2011) (“[R]ecent data on Muslim America suggests that ambient public animus is on the rise, and furthermore increasingly taking the form of legal enactments.”).

222. Rashed Mian, *Study Highlights Election-Year Islamophobia’s Negative Impact on Muslims*, LONG ISLAND PRESS (Sept. 8, 2016), <http://www.longislandpress.com/2016/09/08/study-highlights-election-year-islamophobias-negative-impact-on-muslims/> [<http://perma.cc/PBN8-3BA9>].

223. Engy Abdelkader, *Special Report: When Islamophobia Turns Violent: The 2016 Presidential Elections*, BRIDGE INITIATIVE 1 (2016), <http://bridge.georgetown.edu/wp-content/uploads/2016/05/When-Islamophobia-Turns-Violent.pdf> [<http://perma.cc/KM3J-RTLG>].

224. Christopher Ingraham, *Anti-Muslim Hate Crimes Are Still Five Times More Common Today than Before 9/11*, WASH. POST (Feb. 11, 2015), <http://www.washingtonpost.com/news/wonk/wp/2015/02/11/anti-muslim-hate-crimes-are-still-five-times-more-common-today-than-before-911/> [<http://perma.cc/9T2F-YRQS>].

225. See, e.g., JEFFREY L. THOMAS, *SCAPEGOATING ISLAM: INTOLERANCE, SECURITY, AND THE AMERICAN MUSLIM* 161 (2015); Sahar Aziz, *Racial Profiling by Law Enforcement Is Poisoning Muslim Americans’ Trust*, GUARDIAN (Feb. 21, 2012), <http://www.theguardian.com/commentisfree/cifamerica/2012/feb/21/racial-profiling-law-enforcement-muslim-americans> [<http://perma.cc/WZP5-PEP7>].

226. Huq et al., *supra* note 64, at 423.

gitimacy of police tactics (as African Americans did with War on Drugs policies), they are less likely to cooperate with law enforcement. American Muslims are no exception.²²⁷ For example, one study found “a robust correlation between perceptions of procedural justice and both perceived legitimacy and willingness to cooperate among Muslim American communities in the context of antiterrorism policing.”²²⁸ Other research has demonstrated that private discrimination of Muslims also makes them less likely to cooperate with law enforcement based on “[p]erceptions that officials share and act on that animus.”²²⁹

Muslims’ unwillingness to cooperate with law enforcement can have serious negative ramifications for U.S. counterterrorism policy. When based on actual threats and not overbroad practices that stereotype an entire faith, law enforcement cooperation with American Muslims has already played a vital role in preventing terrorist activity.²³⁰ Twenty-six percent of Muslims convicted of terrorism offenses have been implicated by a tip from family and community members.²³¹ As the FBI has recognized, “[U]pholding and enhancing the community’s trust [allows] law enforcement [to] counter the spread of . . . extremist ideology.”²³² Muslims’ distrust may also undermine counter-

227. See Dratel, *supra* note 11, at 52 (“Currently, Muslim communities believe they are targeted unfairly by law enforcement with respect to terrorism investigations and stings, leading to a ‘circling the wagons’ mentality. That sentiment provides a disincentive to cooperate with authorities on a routine basis.”); Tyler et al., *supra* note 197, at 367 (“Judgments about procedural justice have been found to influence the perceived legitimacy of law enforcement and thus to affect willingness to comply and to cooperate.”).

As a Human Rights Watch report explained, “counterterrorism efforts, including surveillance and the use of informants, cause such significant harm to community-law enforcement trust that they may understandably deter communities from accepting any government support. Mosque and community leaders may also be reluctant to engage with youth and other members they identify as at risk of committing a crime, out of fear that they will be tainted by association and come under government scrutiny themselves.” *Illusion of Justice*, *supra* note 28, at 176.

228. Tyler et al., *supra* note 197, at 368; see also Dratel, *supra* note 11, at 60 (noting “the perception in the community that Muslims are being unfairly targeted in counterterrorism investigations . . . informs community reaction to counterterrorism enforcement”).

229. Huq, *supra* note 221, at 357.

230. For example, family members have approached government agencies about potential attacks, mosques officials have dissuaded those turning to terrorism, and others have flagged imminent risks to law enforcement. *Id.* at 358.

231. Bergen et al., *Terrorism in America After 9/11, Part IV*, *supra* note 80.

232. Huq, *supra* note 221, at 358 (quoting Carol Dyer et al., *Countering Violent Islamic Extremism: A Community Responsibility*, 76 FBI/L. ENFORCEMENT BULL. 3, 8 (2007)). More broadly, law enforcement “has sought to build relationships with American Muslim community leaders

terrorism policy because it can make them more likely to believe the narrative of foreign terrorist organizations “that the West is somehow at war with a religion that includes over a billion adherents.”²³³ As President Obama recognized, “That’s not smart national security.”²³⁴

The belief that Muslims are being targeted based on their religious and political views instead of actual criminal conduct has also hindered the ability of Muslims to address extremism within their own communities. For example, counterterrorism policies have created a chilling effect among young American Muslims who have deeply critical views of American foreign policy or espouse deviant religious beliefs.²³⁵ Instead of engaging with mainstream Muslim institutions to address their concerns, these individuals are more likely to interact amongst themselves in secret and become more susceptible to the views of terrorists abroad.²³⁶ As American Muslim cleric Yasir Qadhi stated, “Like it or not, when kids find out that their peers are getting 15 years for what looks a lot like a thought crime, it makes them more secretive because it reinforces the idea that the government is out to get them.”²³⁷

The lengthy sentences that young American Muslims have received for terrorism-related offenses have, in particular, decreased incentives for Muslim families to cooperate with counterterrorism officials.²³⁸ For example, in the case

and groups, believing they are critical sources of information to prevent terrorist attacks . . . [and] to build American Muslim communities’ sense of cohesion and trust in law enforcement.” *Illusion of Justice*, *supra* note 28, at 7.

233. *Remarks by the President at Eid Reception*, WHITE HOUSE (July 21, 2016), <http://www.whitehouse.gov/the-press-office/2016/07/21/remarks-president-eid-reception> [http://perma.cc/QGZ5-ZQT5].

234. *Id.*; see also Dratel, *supra* note 11, at 57 (“[P]roportionality in counterterrorism enforcement is essential in order to imbue the justice system with integrity, consistency, fairness, and logic, and to achieve success in making communities safer.”).

235. See Akbar, *supra* note 108, at 904 (explaining that counterterrorism strategy “creat[es] a climate of fear and chill[s] constitutionally protected activity” (quoting *Joint Statement Regarding Upcoming Summit on Countering Violent Extremism*, COUNCIL ON AM.-ISLAMIC REL. (Feb. 17, 2015), <http://www.cair.com/images/pdf/CAIR-CVE-summit-statement.pdf> [http://perma.cc/BL28-CZU5])); *Illusion of Justice*, *supra* note 28, at 57, 167.

236. Reitman, *supra* note 81 (“We want these kids to bring their grievances out in the open. But in the absence of genuine dialogue that could be tempered with some elderly wisdom, young men and women, frustrated at what they perceive as the increasing injustices of our foreign policy, gravitate to clerics with more black-and-white views on Islam and the West.” (quoting American Muslim cleric and professor Yasir Qadhi)).

237. *Id.*

238. See, e.g., Scott Shane, *From Minneapolis to ISIS: An American’s Path to Jihad*, N.Y. TIMES (Mar. 21, 2015), <http://www.nytimes.com/2015/03/22/world/middleeast/from-minneapolis-to-isis-an-americans-path-to-jihad.html> [http://perma.cc/8RBF-DT9P] (“Parents and

of Ali Shukri Amin, who received an eleven-year sentence for tweeting pro-ISIS material and helping his friend travel to Syria, law enforcement was tipped off to Amin's Twitter activity by his own family.²³⁹ After Amin's sentencing, his attorney and a local Muslim leader both indicated that parents may be less likely to involve law enforcement when their children are recruited by ISIS online.²⁴⁰ The Muslim leader added, "[Amin's parents] were looking for a mentor to come in and help this child navigate away from this drastic path [he was] taking. They were not looking for their child to be taken away for 11 years."²⁴¹ Another case is Adam Shafi, a twenty-two-year-old who considered joining ISIS but was stopped by law enforcement before boarding a flight to Turkey.²⁴² Shafi had been turned in by his own father, who had been communicating with the FBI over his attorney's objections.²⁴³ Shafi was charged with attempting to support ISIS and could face up to twenty years in prison.²⁴⁴ Shafi's father believes he made a mistake by contacting the FBI, and his message for other parents now is: "Don't even think about going to the government."²⁴⁵

c. Failure To Effectively Rehabilitate Offenders

Finally, just as with offenders in the War on Drugs, the government's focus when convicting young American Muslims in the War on Terror has not been to promote their rehabilitation, but instead to incapacitate them with lengthy punitive sentences. Based on fears that, even in prison, terrorists may cause harm by communicating with those on the outside, government officials have placed individuals in harsh conditions, including solitary confinement, and have imposed significant restrictions on their communications.²⁴⁶ Such policies

friends concerned about a young person drawn to the Islamic State are more likely to call the police, advocates say, if they believe there is an alternative to a long prison sentence.”).

239. Matt Zapotosky, *Northern Virginia Teen Sentenced to 11 Years for Aiding Islamic State*, WASH. POST (Aug. 28, 2015), http://www.washingtonpost.com/local/crime/a-sophisticated-terrorist-supporter-or-a-troubled-teen/2015/08/27/9138cb6e-4c1e-11e5-bfb9-9736do4fc8e4_story.html [http://perma.cc/R768-LFF7].

240. Julie Carey, *Virginia Teen Sentenced to More Than 11 Years for Helping ISIS*, NBC WASH. (Aug. 28, 2015), <http://www.nbcwashington.com/news/local/Teen-to-Be-Sentenced-for-Helping-ISIS-323193661.html> [http://perma.cc/D3LT-6BRQ].

241. *Id.*

242. Apuzzo, *supra* note 170.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Illusion of Justice*, *supra* note 28, at 112-21, 133-51.

include Communication Management Units (CMUs), which severely restrict prisoners' communications (telephone, mail, visitation) and monitor their activities twenty-four hours a day.²⁴⁷ Often, the application of these measures fails to distinguish between hardened terrorists and individuals, like the ones discussed in this Feature, whose convictions are not tied to any act of violence or viable threat. For example, Sabri Benkahla, who received a ten-year sentence for making false statements to a grand jury and the FBI, was sent to a CMU, denied contact visits with family, and only allowed one fifteen-minute call per week. This is despite the fact that the sentencing judge unequivocally stated that he "is not a terrorist" and "[h]is likelihood of ever committing another crime is infinitesimal."²⁴⁸

Furthermore, not only do lengthy sentences hinder rehabilitation, but they can also promote recidivism, especially in the terrorism context. For example, one study analyzing prisoners generally suggests that "[e]nduring years of separation from family and community . . . [creates] [a]nger, frustration, and a burning sense of injustice, . . . [which] significantly reduce the likelihood that prisoners are able to pursue a viable, relatively conventional life after release."²⁴⁹ Others have argued that significant time in prison can "harden[] terrorist defendants against America, and contribut[e] to the development or entrenchment of terrorist networks" because of the well-documented "correlation between prison and extremism."²⁵⁰ In particular, there is evidence "to suggest that conditions of confinement can push toward extremism those terrorist defendants that might have previously lacked very radical beliefs."²⁵¹ Therefore, harsh conditions like CMUs can be counterproductive, increasing the likelihood that

247. *Id.* at 131, 138-41.

248. *Id.* at 128-29, 153-54.

249. James Austin et al., *Unlocking America: Why and How To Reduce America's Prison Population*, JFA INST. 10 (2007), <http://www.jfa-associates.com/publications/srs/UnlockingAmerica.pdf> [<http://perma.cc/2FSZ-RTNP>]; see also Dratel, *supra* note 11, at 59 ("[T]o the extent a particular inmate's criminality was the product of mental or emotional instability, the separation from other stimuli will only drive them to further emotional and ideological isolation.").

250. Skinner, *supra* note 32, at 371; see also QIASS Report, *supra* note 172, at 11 ("A substantial number of persons with alleged connections to violent extremist organizations have been incarcerated over the past decade, and some are now being released back to the community. A proportion of them have more extreme views and commitments to violence than when they began their detention.").

251. Skinner, *supra* note 32, at 372. Skinner gives the example of Al Qaeda leader Ayman al-Zawahiri, who after being subject to mistreatment in an Egyptian prison was transformed from a relative moderate into a violent extremist. *Id.* at 372-73.

individuals will be dangerous when they eventually get out of prison.²⁵² This is a particular concern in American prisons, where programs focused on rehabilitating individuals convicted of terrorism offenses have not been instituted.²⁵³

IV. ADDRESSING THE NEGATIVE EFFECTS OF LENGTHY INCARCERATION

While American Muslim and African American communities have suffered similar harms due to the government's sentencing policies in the Wars on Terror and Drugs, the present-day responses to counter those harms have been very different. In response to the negative effects of lengthy incarceration caused by the War on Drugs, government officials have recognized that a more nuanced approach consisting of shorter sentences for nonviolent offenders and a greater focus on rehabilitation is a more beneficial way of tackling America's drug problem. Yet, despite the various reforms that have been instituted in the War on Drugs, the lessons learned from the War on Drugs have not yet been applied to help reverse the negative effects caused by the War on Terror's harsh sentencing policies.

A. *War on Drugs*

Over the past decade, increasing criticism has mounted against punitive drug sentencing policies and the harm they have caused African American communities. Policymakers have also raised concerns about the high financial costs associated with lengthy incarceration.²⁵⁴ As a result, a series of reforms have taken place to lower sentences for drug-related crimes and focus on rehabilitating drug offenders.

The judicial reform with perhaps the greatest impact on drug sentencing policy was the Supreme Court's 2005 *Booker* decision making the Sentencing Guidelines advisory.²⁵⁵ After *Booker*, courts have increasingly varied downward

252. Dratel, *supra* note 11, at 58 (noting the problems with CMUs because they will allow “[t]he more radical and violent [prisoners to] transform the less so, not vice versa” (emphasis omitted)); Skinner, *supra* note 32, at 373 (noting that “[t]he current sentencing practice of imposing lengthy sentences, across the board to all softcore terrorist defendants, exacerbates th[e] risk [of recidivism]”).

253. See *infra* Part IV.

254. See, e.g., *Senators Announce Bipartisan Sentencing Reform and Corrections Act*, U.S. SENATE COMM. ON JUDICIARY (Oct. 1, 2015), <http://www.judiciary.senate.gov/meetings/senators-announce-bipartisan-sentencing-reform-and-corrections-act> [<http://perma.cc/4Y2V-B2Y6>].

255. *United States v. Booker*, 543 U.S. 220, 233, 245 (2005).

in drug cases when the Guidelines range produces sentences “that are greater than necessary to achieve the purposes of sentencing under 18 U.S.C. § 3553.”²⁵⁶ Important changes were also made to the Guidelines themselves. For example, the Fair Sentencing Act of 2010 reduced the 100-to-1 sentencing disparity for crack versus powder cocaine to 18-to-1 and eliminated the five-year mandatory minimum for simple possession of crack cocaine.²⁵⁷ And, the Sentencing Commission retroactively reduced the offense levels for drug trafficking offenses by two, leading to the release of thousands of federal inmates.²⁵⁸ The Justice Department has followed suit. As part of his “Smart on Crime” initiative, Attorney General Eric Holder issued policy memoranda instructing federal prosecutors to avoid charging mandatory minimums for nonviolent drug offenders.²⁵⁹ In a similar vein, President Obama has granted clemency to hundreds of federal inmates serving long prison terms for nonviolent drug offenses.²⁶⁰

At the same time, increased attention has been given to the treatment and rehabilitation of drug offenders in lieu of lengthy punitive incarceration. For

256. McLoughlin, *supra* note 31, at 116.

257. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified in scattered sections of 21 U.S.C. and 28 U.S.C. (2012)).

258. See *Amendments to the Sentencing Guidelines*, U.S. SENT’G COMMISSION (2014), http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140430_RF_Amendments.pdf [<http://perma.cc/2CV3-49DQ>]; Sari Horwitz, *Justice Department Set To Free 6,000 Prisoners, Largest One-time Release*, WASH. POST (Oct. 6, 2015), http://www.washingtonpost.com/world/national-security/justice-department-about-to-free-6000-prisoners-largest-one-time-release/2015/10/06/961f4c9a-6ba2-11e5-aa5b-f78a98956699_story.html [<http://perma.cc/D3PQ-LLBY>].

259. Memorandum on Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases from Eric H. Holder, Jr., Att’y Gen., to the U.S. Att’y and Assistant Att’y Gen. for the Criminal Div. 2 (Aug. 12, 2013), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf> [<http://perma.cc/AL3V-NT2E>]; Memorandum on Retroactive Application of Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases from Eric H. Holder, Jr., Att’y Gen., to the U.S. Attorneys and Assistant Att’y Gen. for the Criminal Div. 1 (Aug. 29, 2013), <http://www.justice.gov/sites/default/files/ag/legacy/2014/04/11/ag-memo-to-usas-and-aag-crm-retroactivity-of-drug-policy.pdf> [<http://perma.cc/58QS-CCPR>].

260. Sari Horwitz, *Obama Commutes the Sentences of 102 More Federal Drug Offenders*, WASH. POST (Oct. 6, 2016), http://www.washingtonpost.com/world/national-security/obama-commutes-the-sentences-of-102-more-federal-drug-offenders/2016/10/06/e66578d6-8bff-11e6-bf8a-3d26847eed4_story.html [<http://perma.cc/53RD-SPQP>]; see also Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 812, 824-38 (2017) (discussing President Obama’s efforts at reforming sentencing practices caused by the War on Drugs).

example, in 2009, New York sent more drug offenders to treatment instead of prison.²⁶¹ Studies demonstrate that those receiving treatment have been less likely to recidivate than those who were incarcerated.²⁶² There has also been an increased focus on treatment for offenders in prison. The National Institute on Drug Abuse has stated that “[t]reatment offers the best alternative for interrupting the drug use/criminal justice cycle for offenders with drug problems Untreated substance using offenders are more likely to relapse into drug use and criminal behavior, jeopardizing public health and safety and taxing criminal justice system resources.”²⁶³

B. War on Terror

Although the United States has adopted a variety of reforms to counter the negative effects of the War on Drugs on African American communities, the lessons learned from adopting these changes have not yet been translated into the War on Terror context. A major reason for this difference is that while Americans across the political spectrum now recognize that young African American drug offenders were unjustly characterized as irredeemable “super-predators,”²⁶⁴ fears of young American Muslims as unrepentant violent terrorists continue to dominate public discourse. If anything, with the rise of ISIS and violent acts committed by Muslims in San Bernardino and Orlando—as well as throughout Europe, the Middle East, and other parts of the world—those fears are more pronounced today. As a result, politicians, and even judges,²⁶⁵ are pressured to look “tough” on terrorism, and it is doubtful they would institute reforms that reduce prison sentences for Muslims convicted of terrorism offenses.²⁶⁶

261. Erin Durkin, *Higher Percentage of New York Drug Offenders Being Sent to Treatment Rather than Prison: Study*, N.Y. DAILY NEWS (Jan. 20, 2015), <http://www.nydailynews.com/new-york/nyc-crime/higher-percent-drug-offenders-treatment-prison-article-1.2084707> [<http://perma.cc/H9QK-ZS4K>].

262. Nat’l Inst. of Justice, *Program Profile: Drug Treatment Alternative to Prison (DTAP)*, U.S. DEP’T JUST. (May 25, 2011), <http://www.crimesolutions.gov/ProgramDetails.aspx?ID=89> [<http://perma.cc/74WH-Q94W>].

263. Nat’l Inst. on Drug Abuse, *Drug Addiction Treatment in the Criminal Justice System*, NAT’L INST. HEALTH (Apr. 2014), <http://www.drugabuse.gov/related-topics/criminal-justice/drug-addiction-treatment-in-criminal-justice-system> [<http://perma.cc/ELK5-CXD5>].

264. Lamberti, *supra* note 188, at 332; *Punishment and Prejudice*, *supra* note 67.

265. Rascoff, *supra* note 163, at 873 n.204 (“Unlike counterpart institutions overseas, American courts have been notoriously reluctant to superintend counterterrorism policy.”).

266. See, e.g., Aziz, *supra* note 151, at 203 (“[I]mplementation of current ‘hard on terror’ strategies has led to promotions, public recognition, and more votes for law enforcement officers,

However, just as policymakers have recognized the benefits of strengthening efforts to rehabilitate offenders in the drug enforcement context, they should also establish a counterterrorism policy that would work with defendants to address the underlying causes for their criminal conduct and focus on rehabilitation instead of lengthy punitive incapacitation.²⁶⁷ Such a policy would help build greater trust of law enforcement in Muslim communities and ensure terrorism offenders receive the treatment they need to successfully integrate back into society when their sentences are completed.

This is especially true for the young American Muslims discussed in this Feature. As explained above, many other countries have implemented rehabilitation programs to work with young Muslims who have committed terrorism offenses.²⁶⁸ Because individuals sympathize with and join terrorist groups for a variety of different reasons, successful programs “are very individualized in order to address the grievances that drove someone to extremist groups in the first place.”²⁶⁹ Such grievances include the killing and subjugation of Muslims by Western and Middle Eastern governments, feelings of racial and religious discrimination in their home countries, as well as personal issues, such as problems with family, school, mental health, and employment.²⁷⁰ Furthermore, “risk reduction” strategies have proven to be more effective than “de-radicalization” ones.²⁷¹ Instead of attempting to change individuals’ political and religious beliefs—which is very difficult to do—these programs focus on

notwithstanding the significant adverse consequences to Muslim communities’ rights.”); Buchhandler-Raphael, *supra* note 213, at 846 (noting that state legislatures are “largely motivated by a political incentive to appear ‘tough on terrorism’ by expanding the scope of anti-terrorism statutes and allowing for them to cover broader factual contexts . . . in order to satisfy the American people’s demand that aggressive steps be taken to reduce the catastrophic risks of terrorism and ensure their safety”).

267. See Skinner, *supra* note 32, at 345 (“[I]nclusion of some rehabilitative considerations would focus the sentencing courts on the long-term objectives of this war, which include diminishing the root causes of terrorism.”).

268. See *supra* Section II.B.3.

269. Temple-Raston, *supra* note 171; see also QIASS Report, *supra* note 172, at 7 (“In countering violent extremism, one size does not fit all (or even most).”).

270. See, e.g., Reitman, *supra* note 81 (“These kids identify as Muslims. And what they see are young Muslims in the tens of thousands being killed in Syria by barrel bombs—and the Western press doesn’t report this. We report on the killers. They see the victims.”); Rosin, *supra* note 172 (“Organizations like ISIS take advantage of people who, because of racism or religious or political discrimination, have been pushed to the margins of society.”); Temple-Raston, *supra* note 171 (“Studies have shown that by strengthening family ties, parents and siblings end up providing the support young people were missing and subsequently sought and found in extremist groups.”).

271. See Dratel, *supra* note 11, at 39-40.

modifying their behavior so that they are less likely to commit acts of violence or provide support to militant groups.²⁷²

Despite these efforts around the globe,²⁷³ in the United States, young Muslims who have committed terrorism offenses, for the most part, have no alternative to lengthy incarceration with little to no rehabilitative component.²⁷⁴ Although many of the defendants discussed in this Feature expressed remorse for their actions, prosecutors routinely dismissed their statements as self-serving pleas to obtain reduced sentences, and instead repeated the mantra “that terrorists cannot be deterred or rehabilitated.”²⁷⁵ Recently, however, the U.S. government has begun recognizing that rehabilitation should play a role in combating support for terrorism among young American Muslims.²⁷⁶ The

272. *See id.*

273. Interestingly, for suspected militants detained in Iraq, the United States military has created a rehabilitative alternative to detention called Task Force 134. *See id.* at 48.

274. A former National Counterterrorism Center official noted that it is “an abject failure . . . that there is no system in place that doesn’t result in spending 20 years in jail.” Apuzzo, *supra* note 170.

275. *United States v. Bell*, 81 F. Supp. 3d 1301, 1319 (M.D. Fla. 2015).

276. Some academics have expressed concerns about the government playing a role in rehabilitating Muslims who have supported foreign terrorist organizations. Sahar Aziz, for example, criticizes strategies of having Muslim community leaders collaborate with the FBI to intervene to “prevent terrorist recruitment of young men who suffer from mental health illnesses, personal crises, or other sources of emotional vulnerability.” Aziz, *supra* note 151, at 213. She worries that such initiatives “could prove devastating to Muslim communities’ collective liberty interests,” because they promote intra-community spying and censorship and falsely assume “that domestic terrorists who are Muslim are integrated into Muslim-American communities.” *Id.* at 213-14. While Aziz raises important concerns regarding individuals who have not yet been charged with terrorism-related crimes, this Feature focuses solely on those Muslims who have already been convicted and are awaiting sentencing. To assist in rehabilitating these individuals, coordination between government officials and Muslim community groups would not raise the same concerns.

Similarly, Samuel J. Rascoff argues that government-sponsored rehabilitation programs could be counterproductive and violate the Establishment Clause to the extent they promote “‘Official Islam’: a government-sponsored account of ‘mainstream Islam’ offered by the state in place of radical doctrinal alternatives.” Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 124, 130 (2012). However, to the extent rehabilitation efforts focus on “risk reduction” and not altering individuals’ political and religious beliefs, the Establishment Clause likely will not be implicated. And, to the extent religion does play a role, community religious groups would be providing counseling, not government officials. Even Rascoff acknowledges that if “grassroots non-governmental organizations play a more decisive role in counter-radicalization efforts,” his arguments “are diminished.” *Id.* at 180. Notably, religion has played a role in rehabilitating offenders in other contexts, including the use of prison chaplains and religious-based programs like Alcoholics Anonymous. *See, e.g., Jones v. Smid*, No. 4-89-CV-20859, 1993 WL

Obama Administration's Countering Violent Extremism program²⁷⁷ and the House of Representatives' Homeland Security Committee have endorsed such efforts.²⁷⁸ The FBI has even worked with community leaders, mental health experts, and religious figures to intervene with minors and mentally ill individuals.²⁷⁹ The most significant efforts have occurred in Minneapolis.²⁸⁰ In the case of Abdullahi Yusuf, who pleaded guilty to conspiring to provide material support for attempting to fly to Syria to join ISIS when he was eighteen, the district judge agreed to a presentence rehabilitation program, allowing Yusuf to stay at a halfway house and receive counseling and services from a local non-profit.²⁸¹ The judge also has appointed an expert to determine whether other defendants could benefit from similar services.²⁸²

Yet, despite these efforts, the United States still has no rehabilitation programs in federal prisons for those serving sentences for terrorism crimes.²⁸³

719562 (S.D. Iowa Apr. 29, 1993) (holding that the inmate's participation in a treatment program modeled on precepts of Alcoholics Anonymous did not interfere with the inmate's practice of his religion or establish religion). Certain federal districts even use religious organizations to help offenders reintegrate into society. *See, e.g., Project H.O.P.E. Re-Entry Initiative*, U.S. DEP'T JUST., <http://www.justice.gov/usao-sdal/programs/ex-offender-re-entry-initiative> [<http://perma.cc/XV7U-LPD7>] (discussing the Southern District of Alabama's Project H.O.P.E. program, which requests the assistance of "service provider[s], business[es], employer[s], non-profit entit[ies], [and] religious organization[s]" to "address the needs of re-entering ex-offenders in order to make their transition back into mai[ns]tream society a success" (emphasis added)).

277. *Empowering Local Partners*, *supra* note 215.

278. *Final Report of the Task Force on Combating Terrorist and Foreign Fighter Travel*, HOUSE HOMELAND SEC. COMM. 34-35 (Sept. 2015) [hereinafter *Task Force on Combating Terrorist and Foreign Fighter Travel*], <http://homeland.house.gov/wp-content/uploads/2015/09/TaskForceFinalReport.pdf> [<http://perma.cc/656H-TWT7>].

279. Apuzzo, *supra* note 170; *see also Illusion of Justice*, *supra* note 28, at 175 ("In the US, there are at least a handful of cases where the government adopted a 'soft intervention' approach and referred individuals to local community partners.").

280. *See* Shane, *supra* note 238.

281. *Id.*; Dina Temple-Raston, *He Was Caught Trying To Join ISIS, Now He's in Jihadi Rehab*, WBUR (May 16, 2016), <http://www.wbur.org/npr/478257287/he-was-caught-trying-to-join-isis-now-hes-in-jihadi-rehab> [<http://perma.cc/8Q95-43D4>].

282. Temple-Raston, *supra* note 281.

283. *United States v. Bell*, 81 F. Supp. 3d 1301, 1318 (M.D. Fla. 2015) ("David Schiavone with the Federal Bureau of Prisons confirmed in his testimony that the BOP currently has no programs for de-radicalizing prisoners convicted of crimes of terrorism." (citation omitted)); *id.* at 1325 ("[I]n the years to come, one would expect more comprehensive methods for rehabilitating would-be terrorists will be developed."); *see also* Dratel, *supra* note 11, at 59 (noting "the invariably long sentences in 'material support' cases, and the lack of any legitimate rehabilitative programs for inmates in such facilities").

Recognizing this shortcoming, some judges have noted that lengthy terms of supervised release can be used to both monitor individuals after they have been released from prison and provide them with resources to help integrate them back into society.²⁸⁴ In the aftermath of the War on Drugs, treatment programs have been established by federal courts for drug offenders serving terms of supervised release to help them “establish[] a sober, employed, law abiding life in an effort to promote public safety, . . . and to promote rehabilitation.”²⁸⁵ Similar rehabilitation programs should be created for young nonviolent terrorism offenders while on supervised release. By keeping track of their whereabouts and providing them rehabilitative resources, such programs would reduce the need to sentence these individuals to long terms of incarceration. Overall, just as with the recent changes to War on Drugs policies, in order to have a more effective and just counterterrorism strategy, policymakers should not only establish rehabilitation programs for terrorism offenders during and after their criminal sentences, but also reform sentencing policies like the Terrorism Enhancement to allow for sentences that properly take into consideration the individual circumstances of each defendant.

CONCLUSION

Similar to the War on Drugs, the War on Terror has led to the imposition of lengthy criminal sentences for young nonviolent offenders. These policies disproportionately target a particular minority community, resulting in sentences that are contrary to the purposes delineated by Congress in 18 U.S.C. § 3553(a) and that undermine effective government policies to combat harm in the United States. In the War on Drugs, recent changes in judicial precedent, the Sentencing Guidelines, and charging policies have led to a reduction in the length of sentences, and policymakers have focused on alternative means of addressing drug-related crimes and rehabilitating offenders. For the most part, similar reforms have not been made in the War on Terror.

In recent years, advocates and academics have argued that changes in terrorism sentencing laws are necessary to establish more effective and just poli-

284. See, e.g., *Bell*, 81 F. Supp. 3d at 1325 (“The Court also has the tool of an extended period of supervised release to closely monitor Bell’s activity even after he is released from prison.”); Dratel, *supra* note 11, at 94 (noting that rehabilitation programs can be created “for convicted defendants as part of their probation or supervised release”).

285. *Court Assisted Recovery Effort*, U.S. DISTRICT CT. FOR DISTRICT MASS., <http://www.mad.uscourts.gov/outreach/recovery.htm> [<http://perma.cc/TH6C-UEAV>]; see *Types of Drug Courts*, NAT’L ASS’N DRUG CT. PROFESSIONALS, <http://www.nadcp.org/learn/what-are-drug-courts/models> [<http://perma.cc/PDT5-Y6DV>].

cies. Said recommends “that some combination of Congress, the U.S. Sentencing Commission, and the federal courts establish standards to help courts better decide when a heightened punishment might be warranted, free from unsupported assumptions about the nature of terrorism or a particular defendant.”²⁸⁶ Skinner calls for “a new sentencing framework” based on “reasonableness (proportionality and necessity), and mitigating (and aggravating) circumstances.”²⁸⁷ The new framework would “provide courts with legal tools to distinguish between gradations of terrorist conduct” and “consider[] a defendant’s ‘substantial steps’ toward the terrorism offense and the motives for his conduct.”²⁸⁸ Human Rights Watch asks the Sentencing Commission to “[c]onduct a study assessing whether the current system of sentence enhancements for terrorism is furthering appropriate criminal justice goals and is well-tailored to best meet those goals” and narrow the Terrorism Enhancement “to apply only to federal crimes of terrorism, as defined in 18 U.S.C. § 2332b(g).”²⁸⁹ Dratel argues that prosecutors and judges should use 18 U.S.C. § 2339B(c), which authorizes the use of civil injunctive authority in material support cases, to order nonviolent terrorism offenders to participate in rehabilitation programs in lieu of criminal incarceration.²⁹⁰

These potential reforms would be important steps in addressing many of the problems analyzed in this Feature. However, it is unlikely that any will be implemented by government officials, at least in the short-term. Americans today view terrorism much differently than “ordinary” violent crimes or drug crimes.²⁹¹ The “super-predator” — a remorseless young African American man

286. Said, *supra* note 50, at 481-82.

287. Skinner, *supra* note 32, at 345.

288. *Id.* at 349, 357.

289. *Illusion of Justice*, *supra* note 28, at 185.

290. Dratel, *supra* note 11, at 93 (noting that, pursuant to their discretionary equitable authority, “courts can be innovative and affirmative in imposing customized conditions such as . . . counseling and other programming (including vocational if appropriate), religious instruction, some form of supervision and reporting, restricted internet access, associational and travel limitations, financial monitoring, and even home detention and/or electronic monitoring” (footnote omitted)).

291. See Buchhandler-Raphael, *supra* note 213, at 848 (“[S]ince the September 11 attacks, fear and anxiety have dominated the public’s perception of actors who are labeled ‘terrorists,’ and therefore using the ‘terrorism’ rhetoric critically influences public perceptions of crime and punishment.”); *id.* (noting that with the War on Terror “powerful emotions, particularly hatred and fear, often prevail over rational legal doctrines, resulting in significant deviations in criminal law and procedure” (internal quotation marks omitted)); Huq et al., *supra* note 64, at 423 (noting that “people may respond differently to counterterrorism policing than to crime-control because they view terrorism as imposing a graver risk of harm to individuals

bent on creating havoc through gang and drug violence—has been replaced by the “terrorist”—a remorseless young Muslim man bent on killing as many Americans as possible. Until the discourse shifts to a more nuanced and realistic framing of the range of individuals convicted of terrorism crimes—as well as the actual threat faced by the United States—changes to the current sentencing framework are unlikely. Given that Donald Trump, who has advocated banning all Muslims from entering the United States, was elected President, the country appears to be moving in the opposite direction.

Despite Trump’s alarming rhetoric, certain incremental changes can and should be implemented to lower sentences and increase rehabilitation efforts for young, nonviolent Muslims convicted of terrorism offenses. Using their discretion under *Booker*, more trial judges should issue lower sentences in terrorism cases to reflect more accurately the circumstances of the offense and characteristics of the individual defendant. Although courts of appeals have overturned terrorism sentences that deviate too significantly from the Guidelines, judges are more insulated from public fears regarding terrorism than the political branches of government, and are more able to sanction nuanced sentencing procedures. Moreover, members of all branches of the federal government have recognized the importance of creating rehabilitation programs to address the needs and underlying causes of those convicted of terrorism offenses. Such programs should be formed in the near future,²⁹² and to be successful, they should focus on individualized treatment, positive relations with local community groups, and risk reduction.

In 2009, Attorney General Eric Holder stated:

Getting smart on crime requires talking openly about which policies have worked and which have not. And we have to do so without worrying about being labeled as too soft or too hard on crime. Getting smart on crime means moving beyond useless labels and catch-phrases, and instead relying on science and data to shape policy.²⁹³

Although Holder was addressing the continuing need to reform sentencing laws due to over-incarceration caused by the War on Drugs, his words are as relevant to the over-incarceration of young, nonviolent American Muslims

than the more diffuse consequences of ordinary crime” and “may have different normative assessments of crime and terrorism”).

292. See *Empowering Local Partners*, *supra* note 215; *Task Force on Combatting Terrorist and Foreign Fighter Travel*, *supra* note 278.

293. Eric Holder, Jr., Att’y Gen., *Address at the 2009 ABA Convention*, U.S. DEP’T JUST. (Aug. 3, 2009), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-2009-aba-convention> [<http://perma.cc/NEC5-J83K>].

caused by the War on Terror. If the government truly wants to get smart on addressing the threat from foreign terrorist organizations like ISIS, it should establish fair and effective sentencing policies that focus on rehabilitation as much as incapacitation and punishment.