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## Doing More Good Than Harm: Alternatives to Incarceration for Young People Charged With Crimes of Terrorism

Nora Leslie Stephens

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**DOING MORE GOOD THAN HARM:  
ALTERNATIVES TO INCARCERATION FOR  
YOUNG PEOPLE CHARGED WITH CRIMES OF  
TERRORISM**

*Nora Leslie Stephens*\*

Introduction .....	198
I. Who Are Material Support Defendants and How Are They Sentenced? .....	202
A. The Material Support Crime .....	202
B. The Sentencing Guidelines and the Terrorism Enhancement.....	205
C. Numbers and Types of Terrorism-Connected Prosecutions.....	209
D. Monetary Costs of Imprisonment .....	211
E. The Current State of Diversion Programs in the Federal Court System Generally, and in the Eastern and Southern Districts of New York Specifically .....	211
II. Incapacitate or Rehabilitate: What Is in the Nation’s Best Interest? .....	215
A. What Best Ensures the Nation’s Safety? .....	215
i. Differing Theories on Deterrence and Incapacitation .....	216
ii. The Realities of Radicalization in Prison and the 20-Year Maximum Sentence .....	219
iii. The Role of Supervised Release .....	222
B. Young People’s Ability to Rehabilitate .....	225

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i. <i>United States v. Ceasar</i> : Why an EDNY Judge Disregarded Sentencing Recommendations for a Young Material Support Defendant.....	229
III. The Current State of Terrorism-Related Diversion Programs in the United States and Beyond .....	230
A. Minneapolis’s Diversion Program for a Young Person Charged with Material Support .....	230
i. The Minneapolis Diversion Program’s History .....	231
ii. Critical Aspects of the Minneapolis Program .....	232
B. What Can Be Learned from Other Countries That Successfully Utilize These Programs .....	235
C. Avoiding Pitfalls of Diversion Programs Generally and Countering Violent Extremism Programs Specifically ..	239
i. Pitfalls of Diversion Programs .....	239
ii. Pitfalls of Countering Violent Extremism Programs.....	240
IV. An SDNY-EDNY Diversion Program for Young People Charged with Material Support .....	241
A. Judges Who Have Expressed A Need for Material Support Diversion Programs .....	242
B. U.S. Attorney’s Office for the Eastern District of New York Created a Deradicalization Program.....	243
C. What an SDNY-EDNY Diversion Program Could Look Like.....	245
i. Re-Pluralization.....	246
ii. Choice .....	248
iii. The Role of Family and Community .....	248
iv. Opportunity to “Fail” Without Drastic Repercussions .....	250
Conclusion .....	252

## INTRODUCTION

At age 18, over pinball and pickup basketball games, Abdullahi Yusuf was first introduced to ISIS propaganda via YouTube videos.<sup>1</sup> ISIS served as a solution to the teen’s alienation.<sup>2</sup> Yusuf was drawn to the allure of

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1. See Brendan I. Koerner, *Can You Turn a Terrorist Back into a Citizen*, WIRE (Jan. 24, 2017) [hereinafter Koerner, *Can You Turn a Terrorist*], <https://www.wired.com/2017/01/can-you-turn-terrorist-back-into-citizen/> [https://perma.cc/QC7A-JFJ6].

2. See *id.*; see also Joanna Walters, *An Incredible Transformation: How Rehab, Not Prison, Worked for a US ISIS Convert*, GUARDIAN (Jan. 4, 2018),

extremist beliefs, that one organization could solve his problems.<sup>3</sup> A few months later, he left for the Minneapolis-Saint Paul International Airport to board a flight to Syria.<sup>4</sup> Yusuf was attempting to join ISIS.<sup>5</sup> Instead, he was arrested and charged with providing material support to a Foreign Terrorist Organization (FTO).<sup>6</sup>

But Yusuf was granted an opportunity most other material support defendants are not: participation in a rehabilitation program structured by his judge, the U.S. Attorney's office, and a world-renowned expert on deradicalization.<sup>7</sup> The expert, Daniel Koehler, believes that giving people an opportunity to change is core to living in "a democratic, pluralistic society."<sup>8</sup> Yusuf's successful completion of the program meant he would not spend the next decade or two behind bars.<sup>9</sup>

"Young people," defined as those under 25,<sup>10</sup> make up the majority of the U.S. population charged with the federal crime of providing material support to an FTO.<sup>11</sup> Material support statutes are the principal means of confronting

<https://www.theguardian.com/us-news/2018/jan/04/american-isis-abdullahi-yousuf-rehabilitation> [<https://perma.cc/PM8J-U7DT>].

3. See Koerner, *Can You Turn a Terrorist*, *supra* note 1; Rachel Martin, *Radicalization Recipe: Why Young People Are Drawn to ISIS*, NPR (June 5, 2016, 7:48 AM), <https://www.npr.org/2016/06/05/480820177/radicalization-recipe-why-young-people-are-drawn-to-isis> [<https://perma.cc/69YF-8NEN>].

4. See, e.g., Mukhtar M. Ibrahim, *ISIS Trial in Minnesota: What You Need to Know*, MPR NEWS (May 6, 2016), <https://www.mprnews.org/story/2016/05/06/isis-trial-minnesota-faq> [<https://perma.cc/R5V6-92LJ>]; Koerner, *Can You Turn a Terrorist*, *supra* note 1; Martin, *supra* note 3.

5. See Ibrahim, *supra* note 4; Koerner, *Can You Turn a Terrorist*, *supra* note 1.

6. See Ibrahim, *supra* note 4.

7. See Koerner, *Can You Turn a Terrorist*, *supra* note 1; see also Dina Temple-Raston, *He Was Caught Trying to Join ISIS. Now He's in Jihadi Rehab*, NPR (May 16, 2016, 4:55 PM) [hereinafter Temple-Raston, *He Was Caught*], <https://www.npr.org/sections/parallels/2016/05/16/478257287/he-was-caught-trying-to-join-isis-now-hes-in-jihadi-rehab> [<https://perma.cc/93QZ-6TE6>] (explaining the principles and strategies that Koehler uses to run the German Institute on Radicalization and De-Radicalization Studies).

8. See Martin, *supra* note 3.

9. See Walters, *supra* note 2.

10. See *infra* Section II.B.

11. See CTR. ON NAT'L. SEC. AT FORDHAM L., *THE AMERICAN EXCEPTION: TERRORISM PROSECUTIONS IN THE UNITED STATES — THE ISIS CASES* 3, 11–12, 28 (2017) [hereinafter AMERICAN EXCEPTION], <https://news.law.fordham.edu/wp-content/uploads/2017/09/TheAmericanException9-17.pdf> [<https://perma.cc/N5LW-Z9NX>]. "Eighty percent . . . were indicted on material support charges." CTR. ON NAT'L. SEC. AT FORDHAM L., *CASE BY CASE ISIS PROSECUTIONS IN THE UNITED STATES: MARCH 1, 2014 – JUNE 30, 2016*, at 2 (2016) [hereinafter CASE BY CASE ISIS PROSECUTIONS], <https://static1.squarespace.com/static/55dc76f7e4b013c872183fea/t/577c5b43197aea832bd486c0/1467767622315/ISIS+Report+-+Case+by+Case+-+July2016.pdf>

would-be terrorists, including those in the early stages of indoctrination<sup>12</sup> — the material support statutes are deliberately broad to facilitate arrests before any violence occurs.<sup>13</sup> Material support conduct includes actions such as donating funds, communicating online, and intending to move abroad to join an FTO.<sup>14</sup> Although most material support offenders can receive up to a statutory maximum sentence of 20 years, most receive a lesser sentence.<sup>15</sup>

When a defendant is offered and has completed a tailored alternative to incarceration program, judges are generally more likely to opt for a sentence below the maximum.<sup>16</sup> Such a program may also help the public feel safer once a material support defendant returns home. The only such diversion program specifically created for young persons charged with material support was in Minneapolis, Minnesota, through the District of Minnesota.<sup>17</sup> In 2016, the Minneapolis program aimed to rehabilitate a young person charged with material support to ISIS.<sup>18</sup> Yusuf, who was 18 at the time of his arrest, pursued a path of re-pluralization as opposed to a possible double-digit long prison sentence.<sup>19</sup> “Re-pluralization,” a term coined by German radicalization expert Daniel Koehler,<sup>20</sup> is “the careful reintroduction of problems and solutions into a radicalized person’s life, so that they can [choose to] no longer devote all their mental energy to stewing over [extremist thinking].”<sup>21</sup> “Through positive and supportive personal

[<https://perma.cc/WT5W-GKT2>]. For information on FTOs, see *infra* note 28 and accompanying text.

12. See Sameer Ahmed, *Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror*, 126 YALE L.J. 1520, 1539–40 (2017).

13. See *id.* at 1540.

14. 18 U.S.C. §§ 2339A–B.

15. See AMERICAN EXCEPTION, *supra* note 11, at 13; *Quick Facts: Offenses Involving National Defense*, U.S. SENT’G COMM’N (2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/National\\_Defense\\_FY17.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/National_Defense_FY17.pdf) [<https://perma.cc/939W-CGEG>]. In 2017, the average sentence for providing material support to an FTO was 157 months. See *id.*

16. See Roberto Cordeiro & Arthur Penny, *Alternatives to Incarceration in New York Eastern and Southern Districts*, HARV. KENNEDY SCH., MALCOLM WIENER CTR. FOR SOC. POL’Y (May 10, 2016), <https://www.hks.harvard.edu/centers/wiener/programs/criminaljustice/research-publications/young-adult-justice/developments-in-young-adult-justice/alternatives-to-incarceration-in-new-york-eastern-and-southern-districts> [<https://perma.cc/B8KN-82UH>]. For further information about various alternative to incarceration programs, see *infra* Section I.E.

17. See Kelly A. Berkell, *Off-Ramp Opportunities in Material Support Cases*, 8 HARV. J. NAT’L SEC. 1, 47–48 (2017).

18. See *id.*

19. See Koerner, *Can You Turn a Terrorist*, *supra* note 1.

20. See *id.*; Temple-Raston, *He Was Caught*, *supra* note 7 (explaining how Koehler runs the German Institute on Radicalization and De-Radicalization Studies).

21. Koerner, *Can You Turn a Terrorist*, *supra* note 1. For more information on re-pluralization, see *infra* Section IV.B.i.

relationships, mentoring, capacity building, [and] education,” Yusuf chose to understand that no one organization can solve his problems.<sup>22</sup> Re-pluralization education teaches that decisions need not be binary, that much of life is made out of the gray, not the stark black and white. That teenager is now 23 years old and leading a successful life in Minneapolis.<sup>23</sup> No matter where on the radicalization spectrum the defendant is, it is best for the broader community if the defendant has an opportunity to deradicalize.

Although Yusuf is the first and, so far, the only graduate of the 2016 Minneapolis program,<sup>24</sup> the program’s monumental goals warrant emulation. The Minneapolis program’s success should serve as inspiration for the Southern and Eastern Districts of New York, where nearly 20% of all ISIS-related cases are prosecuted.<sup>25</sup> This means that two of the nation’s 94 federal district courts hear nearly one out of every five ISIS-connected cases.<sup>26</sup> Thus, the Southern District of New York (SDNY) and the Eastern District of New York (EDNY), separated by a ten-minute subway ride, should consider implementing their own material support diversion program — either pre-trial or post-sentencing.

This Note argues that a tailored diversion program for young people charged with material support will combat excessively harsh sentences and do more to prevent terror than incapacitation prevents.<sup>27</sup> The enactment of

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22. Daniel Koehler, *Violent Radicalization Revisited: A Practice-Oriented Model*, INT’L RELS. & SEC. NETWORK (June 26, 2015), [https://www.files.ethz.ch/isn/192640/ISN\\_191575\\_en.pdf](https://www.files.ethz.ch/isn/192640/ISN_191575_en.pdf) [<https://perma.cc/VZ9N-7XSX>].

23. See Hollie McKay, *How Minneapolis’ Somali Community Became the Terrorist Recruitment Capital of the US*, FOX NEWS (Feb. 16, 2019), <https://www.foxnews.com/us/how-rep-ilhan-omars-minnesota-district-became-the-terrorist-recruitment-capital-of-the-us-officials-highly-concerned> [<https://perma.cc/XGV2-GUM2>] (explaining how “Yusuf’s ‘transformation’ has been nothing short of ‘successful’ and one that could be adapted to others going down a dangerous road to radicalization”).

24. See Berkell, *supra* note 17, at 47.

25. See *ISIS in America: The Cases*, PROGRAM ON EXTREMISM, GEO. WASH. [hereinafter *ISIS in America*], <https://extremism.gwu.edu/cases> [<https://perma.cc/HXT7-LS2D>] (last visited Sept. 22, 2020). Of the 209 ISIS-connected cases in the United States, 37 cases are in EDNY and SDNY. Therefore, 17.70% of ISIS-connected cases are prosecuted in EDNY or SDNY. This is the number for all ISIS-connected cases, not for solely material support cases. The Author reviewed all 209 cases to note which were prosecuted in EDNY and SDNY. AMERICAN EXCEPTION, *supra* note 11, at 3, 12, 28. Eighty percent were indicted on material support charges. CASE BY CASE ISIS PROSECUTIONS, *supra* note 11, at 2.

26. See AMERICAN EXCEPTION, *supra* note 11, at 3, 12, 28; *Court Role & Structure*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/court-role-and-structure> [<https://perma.cc/859P-TSBW>] (last visited Oct. 21, 2020).

27. Incapacitation refers to incarceration; people who are incarcerated are incapacitated from society. “Incapacitation reduces crime by literally preventing someone from committing crime [outside of prison,] through direct control during the incarceration experience . . . .” Shawn D. Bushway, *Incapacitation*, 4 REFORMING CRIM. JUST. 37, 37 (2017).

a diversion program for young material support defendants in SDNY and EDNY would be a first step towards rehabilitating individuals and preventing further radicalization. Part I explains the material support statutes and how the terrorism enhancement applies under federal sentencing guidelines. Part I also describes the number and types of prosecutions for terrorism-related charges, the various costs of long-term imprisonment, and the status of current diversion programs in the federal system and in SDNY and EDNY. Part II questions what is in the nation's best interest: long terms of incarceration rooted in specific deterrence or rehabilitation for vulnerable young people who might further radicalize in prison? Part II also explains how the attenuated material support statutes, coupled with the terrorism enhancement, impact young defendants and considers why young people should be sentenced differently than adults. Part III examines the outcomes of the District of Minnesota's terrorism diversion program and of other countries' terrorism diversion programs. Part III also explains some of the pitfalls of diversion programs in general and the specific concerns of relevant stakeholders most interested in seeing the program succeed. Part IV contends that for EDNY and SDNY to successfully rehabilitate people convicted of material support, it is most effective to provide these defendants with a structured program focused on re-pluralization, which includes family, community, choice, and the ability to make mistakes.

## **I. WHO ARE MATERIAL SUPPORT DEFENDANTS AND HOW ARE THEY SENTENCED?**

### **A. The Material Support Crime**

Material support is typically prosecuted under two federal criminal statutes: 18 U.S.C. § 2339A for providing material support to terrorists and 18 U.S.C. § 2339B for providing material support or resources to designated FTOs.<sup>28</sup>

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28. 18 U.S.C. §§ 2339A–B; *see also* Berkell, *supra* note 17, at 21 (explaining how “[t]wo related but less frequently employed statutes, 18 U.S.C. §§ 2339C and 2339D, prohibit fundraising for terrorism and receiving military-type training from a designated FTO, respectively. Finally, 18 U.S.C. § 2339 criminalizes the act of harboring or concealing a terrorist”) (citations omitted). Furthermore, an FTO is designated by the Secretary of State if she has determined that:

- (A) the organization is a foreign organization;
  - (B) the organization engages in terrorist activity (as defined in section 1182(a)(3)(B) of this title) or terrorism (as defined in section 2656f(d)(2) of Title 22), or retains the capability and intent to engage in terrorist activity or terrorism;
- and

The 1993 World Trade Center bombing was the impetus for the first material support statute.<sup>29</sup> It was amended in 1996 after the Oklahoma City bombings.<sup>30</sup> The September 11, 2001, World Trade Center attacks led to further amendments through the Patriot Act.<sup>31</sup> In the statutes' first six years, from 1994 to 2000, there were only six material support cases.<sup>32</sup> By contrast, 92 material support cases were brought in the three years following September 11.<sup>33</sup> After September 11, material support became the Justice Department's most frequent anti-terror charge.<sup>34</sup> Convictions under the material support statutes "require no proof that the defendant engaged in terrorism, aided or abetted terrorism, or conspired to commit terrorism."<sup>35</sup> Therefore, "what makes the law attractive to prosecutors — its sweeping ambit — is precisely what makes it so dangerous to civil liberties."<sup>36</sup>

18 U.S.C. § 2339A defines "material support" as:

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation . . . .<sup>37</sup>

Material support violation sentences range from time served to the 20-years maximum.<sup>38</sup>

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(C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.

8 U.S.C. § 1189.

29. See Nicole Hong, 'Material Support' Statute Is Front and Center in Antiterror Push, WALL ST. J. (May 27, 2015), <https://www.wsj.com/articles/material-support-statute-is-front-and-center-in-antiterror-push-1432719002> [<https://perma.cc/N9U5-GD82>].

30. *Id.*

31. *See id.*

32. *See id.*

33. *See id.*

34. See DAVID D. COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 165 (2006).

35. *Id.*

36. *Id.*

37. 18 U.S.C. § 2339A(b)(1).

38. See AMERICAN EXCEPTION, *supra* note 11, at 28. "Violations of Section 2339A are punishable by imprisonment for not more than 15 years; violations of Section 2339B by imprisonment for not more than 20 years." CHARLES DOYLE, CONG. RSCH. SERV., R41333, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. § 2339A AND § 2339B (2016).



A wide range of conduct constitutes material support. Everything from raising \$300 for Al Shabab<sup>39</sup> to boarding a plane with the intent to find and join ISIS abroad to helping prepare an attack on U.S. soil with those who will execute it.<sup>40</sup> The statutes were written with the intent of broad use, and the government has prosecuted individuals under this extensive scope. Professor Sameer Ahmed explains: “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.”<sup>41</sup> In the wake of the September 11 attacks, the then-Attorney General John Ashcroft instructed the Department of Justice to “prevent first, prosecute second.”<sup>42</sup> In 2006, then-Attorney General Alberto Gonzales held a press conference where he explained, “homegrown terrorists may prove to be as dangerous as groups like Al Qaeda. Our philosophy here is that we try to identify plots in the earliest stages possible, because we don’t know what we don’t know about a terrorism plot.”<sup>43</sup> Thus, the material support statutes’ utility is in their breadth, without which the government would not have as much power to cast the widest net possible.

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39. See CTR. ON L. & SEC., N.Y.U. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001 – SEPTEMBER 11, 2011, at 7, 20 (2011) [hereinafter TERRORIST TRIAL REPORT CARD], <http://www.lawandsecurity.org/wp-content/uploads/2011/09/TTRC-Ten-Year-Issue.pdf> [https://perma.cc/8MRU-8MR8]. “Al-Shabab, or ‘the Youth,’ is an Islamist insurgent group based in Somalia.” Al-Shabab has been designated as a foreign terrorist organization since 2008. “Al-Shabab’s leadership declared allegiance to al-Qaeda in 2012.” *Al-Shabab*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/backgrounder/al-shabab> [https://perma.cc/54AL-E7VZ] (last visited July 17, 2020).

40. See AMERICAN EXCEPTION, *supra* note 11, at 28. For example, “Jaelyn Young was sentenced to 12 years in prison for attempting to depart the U.S. and join ISIS in Syria. Although [Young] envisioned a nonviolent role for herself, she understood that ISIS was a . . . terrorist organization when she attempted to board a flight to leave the United States with the express goal of providing her services to ISIS.” Divergently, a jury convicted Abdul Malik Abdul Kareem “for violating the material support statute when he helped Elton Simpson and Nadir Soofi prepare for their attack in Garland, Texas, on behalf of ISIS.” *Id.* He was sentenced to 30 years in prison. See *Abdul Malik Abdul Kareem Update: US Judge Calls for Retrial of 1 Count in Texas Attack*, ABC15 (Dec. 27, 2019), <https://www.abc15.com/news/region-phoenix-metro/central-phoenix/abdul-malik-abdul-kareem-update-us-judge-calls-for-retrial-of-1-count-in-texas-attack#:~:text=PHOENIX%20%E2%80%94%20A%20U.S.%20judge%20refused,Judge%20Susan%20R> [https://perma.cc/3CQU-NZWU]. Kareem is currently appealing his case and may be awarded a new trial. See *id.*

41. Ahmed, *supra* note 12, at 1525.

42. *Id.* (quoting *Homeland Defense: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 9 (2001) (statement of John Ashcroft, Attorney General of the United States)).

43. Eric Umansky, *Department of Pre-Crime*, MOTHER JONES (Feb. 29, 2008), <https://www.motherjones.com/politics/2008/02/departments-pre-crime/> [https://perma.cc/3PH4-PBJA].

### B. The Sentencing Guidelines and the Terrorism Enhancement

Nearly all terrorism suspects are tried in Article III courts.<sup>44</sup> Article III judges have broad discretion in sentencing.<sup>45</sup> This is especially true after the 2005 *Booker v. United States* decision, in which the Supreme Court granted district courts broad discretion to impose sentences in an effort to create a sentencing scheme that complies with the Sixth Amendment.<sup>46</sup> Judges must consider the 18 U.S.C. § 3553(a) sentencing factors, including “the history and characteristics of the defendant,” “the kinds of sentences available,” and “the need for the sentence imposed to afford adequate deterrence to criminal conduct.”<sup>47</sup> The Federal Sentencing Guidelines determine the guidelines

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

45. See generally Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing*, 60 ALA. L. REV. 1 (2008).

46. See *Booker v. United States*, 543 U.S. 220, 245–46 (2005) (holding that the U.S. Sentencing Guidelines are advisory and allowing the Court to exercise its discretion in sentencing).

47. A court must impose a sentence sufficient, but not greater than necessary, after considering the following factors:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed
  - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for
  - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines— . . .
- (5) any pertinent policy statement
  - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 2); and
  - (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

range for a person charged with a federal crime.<sup>48</sup> Unless there is a mandatory minimum or maximum, an Article III judge can choose to sentence the defendant within, above, or below the guidelines.<sup>49</sup> Judges must consider the guidelines set out in a table, which has two parts: (1) the offense level and (2) prior criminal history category.<sup>50</sup> The seriousness of the alleged conduct, as well as other factors, determines the offense level.<sup>51</sup> Once the judge determines the offense level and criminal history category, the judge will look at the chart and find the applicable sentencing range, which is given in months.<sup>52</sup>

Certain felonies are grouped into sentencing enhancements, which add time to a defendant's base guidelines range.<sup>53</sup> Material support sentences are capped at 240 months (or life imprisonment, if the death of any person results).<sup>54</sup> But if a material support defendant is charged with an additional

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a). “A district court may not presume that a Guidelines sentence is reasonable; it must instead conduct its own independent review of the sentencing factors, aided by the arguments of the prosecution and defense.” *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc). The district court may depart from the Guidelines range when it “consider[s] all of the § 3553(a) factors to determine whether they support the sentence requested by a party.” *Gall v. United States*, 552 U.S. 38, 49–50 (2007).

48. *See generally* U.S. SENT’G GUIDELINES MANUAL (U.S. SENT’G COMM’N 2018) [hereinafter U.S. SENTENCING GUIDELINES].

49. *See id.* at ch. 5.

50. *See id.* at ch. 5, pt. A.

51. *See Federal Sentencing, FED. DEFS. N.Y.*, <https://federaldefendersny.org/information-for-client-and-families/federal-sentencing.html> [<https://perma.cc/r6n6-72z4>] (last visited June 9, 2020) (explaining how, “[f]or example, murder is at the top of the chart, at level 43. Theft of a small amount of money is closer to the bottom of the chart, at level 6”). “For example, the offense level will usually decrease with ‘acceptance of responsibility,’ which is most often demonstrated by pleading guilty. The criminal history category is calculated by giving ‘points’ to each prior conviction.” *Id.*; *see also* U.S. SENTENCING GUIDELINES, *supra* note 48, at ch. 4, pt. A.

A more serious prior conviction will receive more points. A less serious [one] will receive fewer points, or no points at all. Older convictions will not be counted if they happened more than fifteen years ago for the more serious convictions, or ten years ago for the less serious convictions.

*Federal Sentencing, supra* note 51.

52. *See* U.S. SENTENCING GUIDELINES, *supra* note 48, at ch. 5, pt. A.

53. *See id.* at ch. 3. Examples of other types of enhancements include hate crime motivation, serious human rights offense, and using a minor to commit a crime. *See id.*

54. *See* 18 U.S.C. §§ 2339A–B. Violating §§ 2339A or 2339B subjects someone to a maximum prison term of 15 or 20 years for each count respectively. *See also* AMERICAN EXCEPTION, *supra* note 11, at 28.

crime, the terrorism enhancement often leads to a sentence above 20 years; this enhancement is a major contributor to material support sentences above 20 years.<sup>55</sup> The terrorism enhancement requirement is satisfied if the offense is felonious conduct that (1) involved a crime of terrorism, or (2) was intended to promote a crime of terrorism.<sup>56</sup> The terrorism enhancement only refers to a “federal crime of terrorism” — it does not provide a specific list of criminal offenses.<sup>57</sup> The federal crime of terrorism “statute lists over fifty crimes and requires that a qualifying offense be ‘calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.’”<sup>58</sup>

Section 3A1.4 of the Guidelines inflates a defendant’s criminal history to a category VI, the harshest possible category, even when that defendant has no prior criminal record.<sup>59</sup> Section 3A1.4 has a dramatic impact on sentences by increasing both factors in the sentencing calculus: a defendant’s offense level and criminal history score.<sup>60</sup> This means the criminal history score can be completely artificial if a defendant has not committed any prior crimes.

Unsurprisingly, apart from Section 3A1.4, the other Guidelines provisions that automatically raise a defendant’s criminal history beyond the properly calculated criminal history score involve defendants with aggravated prior criminal convictions.<sup>61</sup> The Guidelines authorize a judge to sentence a defendant lower than the recommended Guidelines when “reliable information indicates that the defendant’s criminal history category

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55. See U.S. SENTENCING GUIDELINES, *supra* note 48, § 3A1.4 (stating acts of international or domestic felony terrorism are eligible for a terrorism enhancement); Ahmed, *supra* note 12, at 1528 (explaining “[o]f all the adjustments in the Guidelines, the Terrorism Enhancement is the most severe. 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”).

56. See U.S. SENTENCING GUIDELINES, *supra* note 48, § 3A1.4. One of the enumerated statutes is providing material support to a terrorist organization under 18 U.S.C. §§ 2339A and 2339B. See *id.* (application note 2).

57. See Brown, *supra* note 44, at 533.

58. *Id.* (quoting 18 U.S.C. § 2332b(g)(5)(A)).

59. See U.S. SENTENCING GUIDELINES, *supra* note 48, § 3A1.4(b).

60. See 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, 53 (2010).

61. See U.S. SENTENCING GUIDELINES, *supra* note 48, § 4B1.1(b) (automatic assignment to criminal history category VI for career offenders who have prior convictions for drug trafficking or crimes of violence); *id.* § 4B1.4(c)(2)–(3) (automatic assignment to criminal history category IV or VI for defendant sentenced under Armed Career Criminal Act due to prior conviction for violent felony or serious drug offense); *id.* § 4B1.5(a)(2) (automatic assignment to criminal history category V for certain sex crime defendants with prior sex offense convictions involving minors).

substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes."<sup>62</sup>

For example, in *United States v. Ceasar*,<sup>63</sup> Amera Ceasar was charged with material support to ISIS for serving as an online ISIS facilitator through Facebook and other social media platforms.<sup>64</sup> She was also charged with obstruction of justice after re-connecting with ISIS members online while released on bond.<sup>65</sup> Although her material support charge was capped at a 20-year sentence, the government chose to advocate for a 30- to 50-year sentence based on her obstruction of justice charge and the terrorism enhancement's boost.<sup>66</sup> Since the terrorism enhancement increases a defendant's criminal history to a category VI,<sup>67</sup> and she received multiple additions to her offense level, it was within the Sentencing Guidelines for Ceasar, who had no criminal history, to receive up to 50 years in prison.<sup>68</sup>

In another case where the defendant was convicted of both material support and obstruction of justice, Second Circuit Judge Guido Calabresi explained how the two charges, when intersected with the terrorism enhancement, create a warped effect:

It is ironical — more than ironical, potentially dangerous — that the government was able to take what is already a very serious crime — attempting to provide material support to a foreign terrorist organization — and, on the basis of some not overly strong facts, bring an obstruction charge that more than doubled the maximum sentence otherwise available. . . . And the additional term of 20 years of imprisonment seems incongruous. Obstruction of justice can, of course, in some circumstances, be a very serious crime. But we have to look at the context. And here, in this specific context, the record does not establish the seriousness of that crime. Indeed, it looks as though the court imposed the sentence it did based on the heinousness of Defendant's attempted terrorism and simply used the obstruction conviction as a means to go beyond the statutory maximum of that terrorism count.<sup>69</sup>

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62. *Id.* § 4A1.3(b)(1).

63. 388 F. Supp. 3d 194 (E.D.N.Y. 2019).

64. *See id.* at 200.

65. *See id.* at 203.

66. *See id.* at 223.

67. *See* McLoughlin Jr., *supra* note 60, at 54.

68. *See Ceasar*, 388 F. Supp. at 218, 223.

69. *United States v. Pugh*, 937 F.3d 108, 125 (2d Cir. 2019) (Calabresi, J., concurring). It is worth noting that on December 10, 2019, the Second Circuit, in *Pugh II*, held that there was an additional procedural error because of the district court's inadequate statement of reasons and remanded for resentencing. *See United States v. Pugh (Pugh II)*, 945 F.3d 9 (2d Cir. 2019). The Second Circuit emphasized that "the district court must impose a sentence that is sufficient, but not greater than necessary, to fulfill the purposes of sentencing." *Id.* at 28. And "if the court determines that a lower sentence will be just as effective as a higher sentence, it

The distorted effect illustrates how the terrorism enhancement can more than double a defendant's sentence when a second, non-maximum sentence charge is added — even though Congress intended a 20-year maximum sentence for non-violent material support offenders.<sup>70</sup> This means a defendant can receive a life sentence for a crime with a 20-year maximum. This warped, sentence-lengthening impact is an example of how the terrorism enhancement is used to aggrandize a sentence without considering further individualized factors, such as criminal history or specific deterrence.

### C. Numbers and Types of Terrorism-Connected Prosecutions

Between September 11, 2001, and February 2018, federal courts convicted over “660 individuals on terrorism-related charges.”<sup>71</sup> These convictions include both domestic acts of terror as well as criminal conduct tied to international terrorism.<sup>72</sup> Since the first ISIS arrests in March 2014, 37 out of 209 ISIS-connected charges were prosecuted in the Southern and Eastern Districts of New York.<sup>73</sup> Ten were prosecuted in SDNY, and 27 were prosecuted in EDNY.<sup>74</sup> This is nearly 18% of all ISIS charges in the United States.<sup>75</sup> In fact, “since the September 11th attacks, E.D.N.Y . . . has become an aggressive prosecutor of terrorism, securing more convictions than any other U.S. Attorney's office.”<sup>76</sup> Cases charged in EDNY and

must choose the lower sentence.” *Id.* (citation omitted). Judge Calabresi issued a similar opinion in his concurrence, warning of the extreme use of obstruction of justice charges. *See id.* at 28–30 (Calabresi, J., concurring); *see also* Darrell Fields, *Wednesday, December 11th 2019*, FED. DEFS. N.Y. BLOG (Dec. 11, 2019), <https://blog.federaldefendersny.org/the-second-circuit-issues-an-amended-opinion-in-united-states-v-pugh-no-17-1889-cr-f-3d-2019-wl-6708812-dec-10-2019-pugh-ii-a-material-support-to-terrorism-case-a/> [<https://perma.cc/HS2C-9S28>].

70. *See* DOYLE, *supra* note 38, at 1, 2.

71. *Myth v. Fact: Trying Terror Suspects in Federal Courts*, HUM. RTS. FIRST (Feb. 14, 2018), <https://www.humanrightsfirst.org/resource/myth-v-fact-trying-terror-suspects-federal-courts> [<https://perma.cc/862C-HTHT>] (comparing convictions in federal civilian courts to those in military commissions which “have convicted only eight [terrorism-related cases], three of which have been overturned completely and one partially”).

72. *See id.* (elaborating on how “[f]ederal court convictions include those resulting from investigations of terrorist acts and of criminal acts by those with an identified link to international terrorism. Federal courts have convicted many high-profile terrorists, including ‘Shoe Bomber’ Richard Reid [in 2002], Ramzi Yousef (1993 World Trade Center bombing), Faisal Shahzad (Times Square bomber [in 2010]), and Sulaiman Abu Ghaith (Osama bin Laden's son-in-law . . . in March 2014[)]”).

73. *See* *ISIS in America*, *supra* note 25.

74. *See id.*

75. *See id.*

76. William Finnegan, *Taking Down Terrorists in Court*, NEW YORKER (May 8, 2017), <https://www.newyorker.com/magazine/2017/05/15/taking-down-terrorists-in-court> [<https://perma.cc/D3L3-XUMU>].

SDNY “feature a diverse mix of [prosecutions], including foreign fighters, facilitators, domestic plotters, assailants, and hybrid cases combining foreign and domestic objectives.”<sup>77</sup>

Material support has become the most frequently charged terrorism offense since September 11, 2001.<sup>78</sup> According to New York University’s Center on Law and Security’s analysis of jihadist-inspired terrorism cases, the government alleged material support in 11.6% of cases in 2007; that measure rose to 69.4% by 2010.<sup>79</sup> There were 65 charges of § 2339B material support — over four times any other terrorism charge.<sup>80</sup> The second-most common charge was § 2339A material support with 14 charges,<sup>81</sup> and the third was 18 U.S.C. § 1001 charges of false statements with 11 charges.<sup>82</sup>

Approximately 77% of individuals charged in ISIS-related cases are U.S. citizens,<sup>83</sup> and nearly all defendants in ISIS-connected cases identify as Muslim.<sup>84</sup> “By contrast, 58% of all federal criminal defendants are U.S. citizens.”<sup>85</sup> Notably, 72% of defendants had no criminal history at all, and 89% of cases involved social media<sup>86</sup> — it is therefore not surprising that most people charged with ISIS-related cases are young.<sup>87</sup> In fact, 20 was “the most prevalent age” and a majority of defendants were aged 25 years or younger.<sup>88</sup>

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77. AMERICAN EXCEPTION, *supra* note 11, at 10.

78. See RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUM. RTS. FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 32 (2008), <https://www.humanrightsfirst.org/wp-content/uploads/pdf/080521-USLS-pursuit-justice.pdf> [<https://perma.cc/2ZJL-6AU5>].

79. TERRORIST TRIAL REPORT CARD, *supra* note 39, at 19.

80. See CASE BY CASE ISIS PROSECUTIONS, *supra* note 11, at 13.

81. See *id.*

82. See *id.*

83. *Id.* at 3.

84. See AMERICAN EXCEPTION, *supra* note 11, at 3.

85. *Id.*

86. CASE BY CASE ISIS PROSECUTIONS, *supra* note 11, at 26, 27.

87. See AMERICAN EXCEPTION, *supra* note 11, at 11 (“While the average age for all ISIS-related cases is 27.2, the most prevalent age is much lower, at 20. The median age is 25.5 years old. In the aggregate, the ISIS cases skew heavily toward the earlier stages of adulthood, with more than half the cases involving individuals who are 25 or younger at the time of arrest. Nevertheless, 47% of the individuals are older than 25, and the most destructive domestic attacks were perpetrated by assailants near 30 years of age. Only a third of individuals in ISIS cases in the United States are 30 years of age or older.”); *Social Media Fact Sheet*, PEW RSCH. CTR. (June 12, 2019), <https://www.pewresearch.org/internet/fact-sheet/social-media/> [<https://perma.cc/RNB3-9TW3>]. Ninety percent of people aged 18 to 29 use social media. *Id.*

88. See AMERICAN EXCEPTION, *supra* note 11, at 11.

### D. Monetary Costs of Imprisonment

The United States incarcerates more people than any other country in the world,<sup>89</sup> spending “more than \$80 billion each year to keep roughly 2.3 million people behind bars.”<sup>90</sup> The Federal Bureau of Prisons (BOP) currently incarcerates 184,000 individuals, and in Fiscal Year 2019, their budget exceeded \$7 billion.<sup>91</sup> In 2018, the average cost of a person detained in federal prison was \$36,299.25 (\$99.45 per day).<sup>92</sup> If a person is sent to solitary confinement, that annual rate can more than double to \$75,000 per year.<sup>93</sup>

Furthermore, the United States spends over \$100 billion on counterterrorism each year.<sup>94</sup> This \$100 billion is spent on military expenditures, investigations, local police force trainings, prosecutions, and diplomatic efforts.<sup>95</sup> The funding for anti-terrorism and prison is astronomical; diversion programs cost a fraction of either the counter-terror or BOP budgets and could appropriately come from either, or both, funding streams.

### E. The Current State of Diversion Programs in the Federal Court System Generally, and in the Eastern and Southern Districts of New York Specifically

Diversion programs, alternative to incarceration programs, and off-ramp solutions generally refer to the same concept: providing a rehabilitation-focused program for people charged or convicted with a

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89. See *World Prison Populations*, BBC NEWS, <http://news.bbc.co.uk/2/shared/spl/hi/uk/06/prisons/html/nn2page1.stm> [https://perma.cc/GJ26-ZV9P] (last visited Aug. 20, 2020) (explaining how “[p]rison rates in the U.S. are the world’s highest, at 724 . . . per 100,000” people).

90. See Nicole Lewis & Beatrix Lockwood, *The Hidden Cost of Incarceration*, MARSHALL PROJECT (Dec. 17, 2019), <https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration> [https://perma.cc/7BTV-HJE3].

91. See FED. BUREAU OF PRISONS, U.S. DEP’T OF JUST., FY 2019 PERFORMANCE BUDGET CONGRESSIONAL SUBMISSION SALARIES AND EXPENSES 1 (2019), <https://www.justice.gov/jmd/page/file/1034421/download> [https://perma.cc/7AWS-J7CR].

92. See Teo Spengler, *How Much Do Prisons Cost Taxpayers?*, GO BANKING RATES (July 9, 2020), <https://www.gobankingrates.com/taxes/filing/wont-believe-much-prison-inmates-costing-year/> [https://perma.cc/CLG2-3V7M].

93. See *id.*

94. See Jeanne Sahadi, *The Cost of Fighting Terrorism*, CNN (Nov. 16, 2015, 6:29 PM), <https://money.cnn.com/2015/11/16/news/economy/cost-of-fighting-terrorism/index.html> [https://perma.cc/YJP3-D2X3].

95. See *id.*



criminal offense.<sup>96</sup> Diversion programs aim to improve public safety and curtail recidivism “by targeting the underlying problems that led to the criminal act.”<sup>97</sup> Generally, these programs, for both state and federal courts, aim to divert people to community-based solutions with the ultimate goals of reducing crime, limiting jail time, and eliminating the many collateral consequences of involvement with the criminal legal system.<sup>98</sup> Diversion programs can be mandated in lieu of prison time, or in addition to prison time with the sentence possibly shortened due to participation in the program.<sup>99</sup> They can occur pre-trial or as part of someone’s sentence.<sup>100</sup> Prosecutors’ offices typically operate diversion programs.<sup>101</sup>

However, the probation office and the judiciary run diversion programs in SDNY and EDNY. Grassroots organizations help operate some federal alternative to incarceration programs; these programs “developed . . . independently of both the Sentencing Commission and the Judicial Conference policy.”<sup>102</sup> Furthermore, the federal alternative to incarceration programs require intensive supervision, pre-trial services involvement, and the time of prosecutors, defense attorneys, and judges.<sup>103</sup> The ultimate financial question is whether these programs warrant the monetary cost given the savings attributable to reduced recidivism and improved lives. Probation officers, as well as at least one think tank, say these programs are cost-efficient.<sup>104</sup>

96. See Christine S. Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts*, 22 BERKELEY J. CRIM. L. 47, 49 (2017).

97. Micah W. Kubic & Taylor Pendergrass, *Diversion Programs Are Cheaper and More Effective Than Incarceration. Prosecutors Should Embrace Them*, ACLU (Dec. 6, 2017, 12:45 AM), <https://www.aclu.org/blog/smart-justice/diversion-programs-are-cheaper-and-more-effective-incarceration-prosecutors> [<https://perma.cc/L6R8-QBYQ>].

98. See *Diversion*, CTR. FOR CT. INNOVATION, <https://www.courtinnovation.org/areas-of-focus/diversion> [<https://perma.cc/3WLS-Z3EU>] (last visited Aug. 20, 2020).

99. See Scott-Hayward, *supra* note 96, at 109.

100. See *id.* at 53–54, 61.

101. See *id.* at 56.

102. Kevin T. Wolff et al., *A Viable Alternative? Alternatives to Incarceration Across Seven Federal Districts*, U.S. CTS., PRETRIAL SERVS. 8 (Apr. 15, 2019), [http://www.kevintwolff.net/uploads/2/0/1/8/20187445/000\\_uspt\\_ati\\_execsum\\_041519.pdf](http://www.kevintwolff.net/uploads/2/0/1/8/20187445/000_uspt_ati_execsum_041519.pdf) [<https://perma.cc/TBQ8-7DS2>].

103. See *id.* at 9.

104. See *id.* at 7–8, 9–10 (“An analysis of drug court cost-effectiveness conducted by the Urban Institute found that drug courts provided \$2.21 in benefits to the criminal justice system for every \$1 invested. When expanding the program to all at-risk arrestees, the average return on investment increased even more, resulting in a benefit of \$3.36 for every \$1 spent.”); see also Kubic & Pendergrass, *supra* note 97.

Typical considerations for program entry include factors such as offense conduct, history of substance use, mental health circumstances, and criminal history.<sup>105</sup> Professor Christine S. Scott-Hayward clarifies that “although the benefit of a reduced sentence is significant, it is qualitatively different from a dismissal of all charges, particularly for defendants with no prior criminal history.”<sup>106</sup>

EDNY offers two diversion programs: the Pretrial Opportunity Program (POP) and the Special Options Services Program (SOS).<sup>107</sup> POP is an alternative-to-incarceration, drug court program in the pre-sentence phase of a defendant’s case.<sup>108</sup> Programs offered pre-trial and pre-sentencing are particularly motivating for participants because they can potentially avoid or lessen jail time; sometimes participants can even “avoid a conviction altogether.”<sup>109</sup> The probation office and judiciary run these programs.

SOS is available to those “between the ages of 18 and 25 who are charged with non-violent crimes and who may benefit from the structure and direction of intensive supervision.”<sup>110</sup> EDNY Judge Jack B. Weinstein started SOS because he “believed that instead of pretrial detention, many youthful offenders might benefit more from intensive supervision and access to education, job training, and counseling.”<sup>111</sup> However, SOS is not

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105. *See* Scott-Hayward, *supra* note 96, at 56.

106. *Id.* at 58–59.

Criminal convictions carry severe direct consequences, including loss of liberty or restrictions on liberty, as well as an increasing number of fees and fines. There are also indirect consequences that diminish an individual’s rights and privileges. These include denial of public housing and assistance benefits, restrictions on employment, difficulty obtaining employment, restrictions on access to student financial aid, and civic exclusion, including ineligibility for jury service and felon disenfranchisement. The immigration consequences, particularly deportation, of a criminal conviction are also significant. Further, these consequences can also impact an individual’s ability to successfully complete their sentence of probation or to successfully reenter society after release from prison.

*Id.* at 58 (footnotes omitted).

107. *See* Cordeiro & Penny, *supra* note 16. Cordeiro and Penny are Chief Pre-trial Services Officers for the Eastern and Southern Districts of New York. *See id.*

108. *See id.*

109. U.S. PRETRIAL SERVS. AGENCY, E. DIST. OF N.Y., ALTERNATIVES TO INCARCERATION IN THE EASTERN DISTRICT OF NEW YORK: THE PRETRIAL OPPORTUNITIES PROGRAM AND THE SPECIAL OPTIONS SERVICES PROGRAM 8 (2015), [https://img.nyed.uscourts.gov/files/local\\_rules/ATI.EDNY\\_SecondReport.Aug2015.pdf](https://img.nyed.uscourts.gov/files/local_rules/ATI.EDNY_SecondReport.Aug2015.pdf) [<https://perma.cc/GG52-DF4D>].

110. *Id.* at 11–12.

111. *Id.* at 11.

available for anyone charged with a terrorism-related offense, even those deemed non-violent.

Furthermore, EDNY also offers a post-sentence drug court known as Supervision to Aid Re-entry (STAR).<sup>112</sup> STAR participants can begin the program as an alternative to incarceration at sentencing or as a condition of supervised release after their time of incarceration or assignment of probation.<sup>113</sup> Though some believe diversion programs are cost-inefficient, these programs are cost-saving because they reduce the amount of time a defendant is incarcerated, the amount of time on supervised release and, of course, recidivism rates.<sup>114</sup>

Since 2015, SDNY has run the Young Adult Opportunity Program (YAOP).<sup>115</sup> Like SOS, the YAOP helps young people charged with crimes gain access to counseling, job services, and substance use treatment.<sup>116</sup> The Program is intended to benefit non-violent, young adults (between 18 and 25 years old), but also considers adults over 25 years old on a case-by-case basis.<sup>117</sup> Successful YAOP participants can receive a reduction or deferral of their charges, a shortened sentence, or even the dismissal of their charges; the majority of program graduates have avoided a sentence of further incarceration.<sup>118</sup>

A report on alternatives to incarceration programs, compiled by federal pre-trial services officers across the United States, revealed that in seven federal districts, including EDNY and SDNY, these programs had successful short-term impacts.<sup>119</sup> The programs studied included SDNY's YAOP and EDNY's POP and SOS.<sup>120</sup> The results are encouraging — participants remained employed, abstained from illegal substance use, and were less likely to be re-arrested.<sup>121</sup> Rearrests were “significantly less likely” for program participants.<sup>122</sup> Strikingly, nearly half of program graduates' cases were dismissed.<sup>123</sup> Additionally, “successful completers are . . . significantly less likely to receive a prison term than their matched

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112. *See id.* at 48.

113. *See id.*

114. *See id.* at 7–8.

115. *See* Cordeiro & Penny, *supra* note 16, at 2–3.

116. *See id.* at 3.

117. *See Young Adult Opportunity Program*, U.S. DIST. CT. S. DIST. N.Y. (May 24, 2018), <https://www.nysd.uscourts.gov/programs/young-adult-opportunity-program> [<https://perma.cc/Q9AW-7ZSP>].

118. *See* Cordeiro & Penny, *supra* note 16, at 3.

119. *See* Wolff et al., *supra* note 102, at 3, 7.

120. *See id.* at 5–6.

121. *See id.* at 11.

122. *Id.* at 6.

123. *See id.* at 7.

counterparts” (23% compared to 81%), and “received an average prison sentence of 4.97 months[;] . . . their matched counterparts were sentenced to an average of 42 months (ranging from one day to 20 years).”<sup>124</sup>

The report concluded it is cost-effective to avoid or minimize custody at the pre-trial and post-conviction stages.<sup>125</sup> The federal pre-trial services officers declared: “[T]he human implications cannot be overstated.”<sup>126</sup> Experts know successful reentry is extremely difficult because, after long stints of incarceration, many people find themselves alienated from healthy support systems; these support systems are vital for the newly-released individual to live a law-abiding life.<sup>127</sup> Ultimately, diversion programs do more than just help individual defendants — diversion programs also unite families, create safer communities, and lessen incarceration rates.<sup>128</sup> However, material support defendants are not permitted to participate in any of SDNY’s or EDNY’s programs, thus leaving a worrisome gap for a vulnerable group of young adults.<sup>129</sup>

## **II. INCAPACITATE OR REHABILITATE: WHAT IS IN THE NATION’S BEST INTEREST?**

Part II questions what is in the nation’s best interest: long terms of incarceration rooted in specific deterrence, or rehabilitation for vulnerable, young people who might only be further radicalized in prison? Section II.A questions what keeps U.S. residents the safest: double-digit sentences with no rehabilitation and the possibility of further radicalization or options for rehabilitation and reintegration? Section II.B examines how young people, defined as those under age 25, are different from adults and reviews a case study of a young material support defendant to whom an EDNY judge gave a significantly reduced sentence.

### **A. What Best Ensures the Nation’s Safety?**

As stated in Part I, the material support statutes are intentionally broad to catch non-violent defendants before they may act violently or assist those who act violently. The offense conduct, the level of radicalization, and incarceration’s impact are significant factors when considering public safety.

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124. *Id.*

125. *See id.* at 11.

126. *Id.* at 10.

127. *See id.* at 11.

128. *See id.* at 10.

129. *See* Transcript of Bail Application at 33, *United States v. Augustine*, No. 18-CR-00393 (E.D.N.Y. Oct. 24, 2019) (explaining there is no alternative to incarceration program available for those charged with material support).

This Section explores what keeps us safest: retributive justice focused on specific deterrence in the form of long-term incapacitation or rehabilitation and transformative justice focused on giving young people the opportunity to change?

*i. Differing Theories on Deterrence and Incapacitation*

The material support statutes' architects focused on severe prison time as a deterrent.<sup>130</sup> The threat of legal punishment's impact is general deterrence on the public at large; it is meant to encourage other possible law-breakers to not act criminally.<sup>131</sup> The theory of general deterrence suggests that "imposing a penalty on one person will demonstrate to others the costs of committing a crime, thus discouraging criminal behavior" by others.<sup>132</sup> Specific deterrence "is the extent to which a sentence will 'persuade [the] defendant to resist further criminal behavior.'" <sup>133</sup> Those focused on rehabilitation and reintegration view the risk of release as necessary for the critical possibility that the individual is provided a better life<sup>134</sup> and, in the case of material support defendants, is not further radicalized in prison.<sup>135</sup>

Although the crime of material support is itself non-violent, it is viewed more harshly than other non-violent crimes given its connection to terrorism — one of society's most feared forms of violence.<sup>136</sup> This fear of terrorism is illustrated in the continued elongating of material support's statutory maximum. The sentencing maximum for material support has only been extended, never reduced — from ten years to 15, to now 20.<sup>137</sup> Some judges believe closer to the maximum of 15 or 20 years is necessary for general and specific deterrence in material support cases. For example, in 2010, Sabirhan Hasanoff, a U.S. citizen, was charged in SDNY with conspiracy to

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130. See DOYLE, *supra* note 38, at 2; Ahmed, *supra* note 12, at 1565 ("[J]ust 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.").

131. See Kelli D. Tomlinson, *An Examination of Deterrence Theory: Where Do We Stand?*, 80 FED. PROB. 33, 33 (2016).

132. Brian Jacobs, *The Role of Publicity in Sentencing*, FORBES (Oct. 23, 2017, 4:44 PM) (quoting U.S. District Judge Jack B. Weinstein), <https://www.forbes.com/sites/insider/2017/10/23/the-role-of-publicity-in-sentencing/#e76fb03e5c6b> [<https://perma.cc/YC52-FXWA>].

133. *Id.*

134. See Berkell, *supra* note 17, at 6–7, 45–46.

135. See *infra* Section II.A.ii.

136. See Hannah Ritchie et al., *Terrorism: Public Opinion on Terrorism*, OUR WORLD IN DATA (Nov. 2019), <https://ourworldindata.org/terrorism#public-opinion-on-terrorism> [<https://perma.cc/T4WV-BDAN>].

137. See DOYLE, *supra* note 38, at 2.

provide material support in the form of money.<sup>138</sup> In September 2013, Judge Kimba Wood sentenced Hasanoff to 18 years in prison.<sup>139</sup> Hasanoff's attorney "argued that there are two different kinds of terrorists: those who renounce what they have done and those who are just diehard and are going to be this way to the end."<sup>140</sup> In response, Judge Wood stated:

I am puzzled by one facet of this, which is if I were to conclude that Mr. Hasanoff has essentially turned over a new leaf, if he still believes his afterlife will be enhanced if he commits jihad, how can I believe that he can be individually deterred?<sup>141</sup>

Judge Wood believed the public's safest option was to incarcerate Hasanoff for almost the entire 20-year maximum. The judge's sentence was rooted in her disbelief that the defendant had, could, or would change his beliefs.<sup>142</sup> Others, including former Assistant U.S. Attorney Johanna Baltes, believe 15 years is not long enough for many material support defendants because they, like Baltes, "have not seen a defendant show[] remorse about what it is they've been charged with doing."<sup>143</sup> Former Eastern District of Virginia Judge Gerald Bruce Lee described: "These are not the typical cases. You are not going to have anybody with a prior criminal record generally. You are not going to have somebody come in and say, 'Well, I renounce my prior beliefs, and now I am prepared to go forward.'"<sup>144</sup> These experts view rehabilitation as impossible because they assume the defendant is not interested. But not all experts agree. For example, Director of the Center on National Security at Fordham Law School, Professor Karen Greenberg, "think[s] maybe we should consider that there are different levels of involvement in terrorism."<sup>145</sup> Professor Greenberg goes on to explain that the material support statutes' scope reduces the need for judges to make individualized "distinctions and comparisons that would otherwise be made in criminal sentencing contexts."<sup>146</sup>

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138. See Joanna Baltes et al., *Convicted Terrorists: Sentencing Considerations and Their Policy Implications*, 8 J. NAT'L SEC. L. & POL'Y 347, 358 (2015).

139. See *id.*

140. *Id.*

141. *Id.*

142. See *id.* However, Judge Wood recently had a change of heart about Hasanoff. On October 27, 2020 she granted him compassionate release. See Opinion & Order at 12, *United States v. Hasanoff*, No. 10-CR-162 (S.D.N.Y. Oct. 27, 2020). Judge Wood released Hasanoff 59 months early, in part so he could help care for his loved ones during the COVID-19 pandemic. See *id.* at 5–8, 11. Judge Wood stated clearly: "Hasanoff is not a danger to any person or the community." *Id.* at 12.

143. Baltes et al., *supra* note 138, at 366.

144. *Id.*

145. *Id.* at 369.

146. *Id.*

Furthermore, most material support defendants' "actions d[o] not lead to any identifiable harm or imminent risk of harm."<sup>147</sup> Judges would normally take this lack of harm into consideration during sentencing "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."<sup>148</sup> Because the terrorism enhancement applies to many material support defendants, the lack of harm from the offense conduct is often not even considered.<sup>149</sup> Under the Terrorism Enhancement, individuals convicted because of government sting operations are treated the same as those convicted for actions where the government had no role in setting them up.<sup>150</sup> Terrorism sentencing fails to consider that when an informant is involved, "a defendant's intent, knowledge, and capability of committing the crime is usually much lower."<sup>151</sup>

Not only does the enhancement cause a lack of individualized sentencing, but also the role of undercover government operatives leads to an inability to know the defendant's level of radicalization. As defense attorney Joshua Dratel stated, "it 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."<sup>152</sup> The unknown of a defendant's actions is important when considering the terms of the individual's sentence. Were they committed to an FTO or exploring a new ideology? Why were they drawn to the FTO originally? Understanding the defendant's personal story and reasons for interest in an FTO is important in determining a sentence under 18 U.S.C. § 3553(a).<sup>153</sup> This is especially true given that each defendant is entitled to an individualized sentence.<sup>154</sup>

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147. Ahmed, *supra* note 12, at 1530.

148. *Id.* (footnote omitted).

149. *See id.*

150. *See id.*

151. *Id.*

152. *Id.* at 1531 (alteration and emphasis in original) (quoting 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, 61 (2011)).

153. *See* U.S. SENTENCING GUIDELINES, *supra* note 48, at 458–60.

154. *See* United States v. Booker, 543 U.S. 220, 245–46 (2005).

*ii. The Realities of Radicalization in Prison and the 20-Year Maximum Sentence*

Most defendants are released before the 20-year maximum for a material support charge.<sup>155</sup> And the vast majority of material support defendants are U.S. citizens.<sup>156</sup> Unless convicted of another crime, the U.S.-citizen defendant will be released to live in the United States. Thus, the remaining question is, what will happen to these individuals when they are released? This question is important for all defendants, of course. Society is best served when defendants leave prison ready to work, to contribute to their communities, and to serve as supportive family members. But this question is especially important when it comes to possibly radicalized individuals, no matter where they are on the radicalization spectrum (not at all radicalized, merely curious, more radicalized than not, or fully radicalized).

The material support prohibition's breadth in 18 U.S.C. §§ 2339A and 2339B means there are people prosecuted who may not be as much of a true believer of ISIS or another FTO, or as fully radicalized, as the label "terrorist" connotes. In *Holder v. Humanitarian Law Project*, the Supreme Court held "[t]he material-support statute is, on its face, a preventive measure — it criminalizes not terrorist attacks themselves, but aid that makes the attacks more likely to occur."<sup>157</sup> The preventive nature of the law combined with the 20-year maximum means there will be people, such as the person prosecuted for giving \$300 to al-Shabab,<sup>158</sup> who may not be fully radicalized but imprisoned. No matter where on the radicalization spectrum, this Note purports it is best for the broader community if the defendant has an opportunity to deradicalize.<sup>159</sup>

In fact, radicalization happens in prison.<sup>160</sup> An unintended consequence of prison sentences could be either further radicalization or the beginning of

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155. See CASE BY CASE ISIS PROSECUTIONS, *supra* note 11, at 21.

156. See *id.* at 3.

157. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 35 (2010).

158. See TERRORIST TRIAL REPORT CARD, *supra* note 39, at 20.

159. See generally Lorenzo Vidino & Seamus Hughes, *America's Terrorism Problem Doesn't End with Prison — It Might Just Begin There*, LAWFARE (June 17, 2018, 10:00 AM), <https://www.lawfareblog.com/americas-terrorism-problem-doesnt-end-prison-it-might-just-begin-there> [<https://perma.cc/FL4Q-ARKX>] (stating that "Elaine Duke, then-acting secretary at the Department of Homeland Security, . . . acknowledged before Congress that 'we need to work with the Department of Justice and its Bureau of Prisons . . . to make sure [convicted terrorists] do not return to violence once released'").

160. See *id.* See generally GREG HANNAH ET AL., RAND CORP., RADICALIZATION OR REHABILITATION: UNDERSTANDING THE CHALLENGE OF EXTREMIST AND RADICALIZED PRISONERS (2008), [https://www.rand.org/content/dam/rand/pubs/technical\\_reports/2008/RAND\\_TR571.pdf](https://www.rand.org/content/dam/rand/pubs/technical_reports/2008/RAND_TR571.pdf) [<https://perma.cc/E52R-LV7F>].



radicalization for someone who was never radicalized to begin with.<sup>161</sup> As socio-legal scholar Richard Abel explains, there are many terrorism defendants who, “[s]eeking a sense of meaning through identification with a larger group and cause, . . . were easily manipulated.”<sup>162</sup> If someone was never radicalized to begin with, incarceration will certainly not prevent further radicalization. Instead, incarceration may serve as the very impetus for radicalization.<sup>163</sup> A study by the International Centre for the Study of Radicalisation and Political Violence shows that of the ISIS supporters interviewed, over one in four<sup>164</sup> stated they were not radicalized before prison — that they became radicalized for the very first time in prison.<sup>165</sup>

Young people charged or convicted of material support are particularly susceptible to radicalization tactics in prison because, for most, it is their first time behind bars.<sup>166</sup> Extremist incarcerated recruiters understand that

161. See Vidino & Hughes, *supra* note 159 (explaining that various countries learned that incarcerating people convicted of terrorism does not solve the problem because “[i]n jail, terrorists network and proselytize, making the problem worse”). It is concerning “that the United States has not developed a comprehensive system to rehabilitate individuals convicted for terrorism while they are incarcerated.” *Id.*

162. RICHARD L. ABEL, LAW’S TRIALS: THE PERFORMANCE OF LEGAL INSTITUTIONS IN THE US “WAR ON TERROR” 72 (2018).

163. See UNITED NATIONS OFF. ON DRUGS & CRIME, HANDBOOK ON THE MANAGEMENT OF VIOLENT EXTREMIST PRISONERS AND THE PREVENTION OF RADICALIZATION TO VIOLENCE IN PRISONS 109 (2016) (“[P]rison radicalization to violence is an issue of considerable importance and recruitment attempts, successful or otherwise, do occur.”).

164. Of 79 people interviewed, at least 27% said they were first radicalized in prison. Oscar Schneider, *European Prisons Breeding Grounds for Jihadists*, BRUSSELS TIMES (Oct. 11, 2016), <https://www.brusselstimes.com/all-news/world-all-news/justice-world/39556/european-prisons-breeding-grounds-for-jihadists/> [<https://perma.cc/ZJ7A-ZLHJ>].

165. See Florence Gaub & Julia Lisiecka, *The Crime-Terrorism Nexus*, EUR. UNION INST. FOR SEC. STUD. (EUISS) 2 (2017), [https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief\\_10\\_Terrorism\\_and\\_crime.pdf](https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief_10_Terrorism_and_crime.pdf) [<https://perma.cc/N87T-P7DG>] (“[P]rison can act as an incubator for jihadists since it facilitates the creation of networks between petty criminals and jihadist ideologues, as well as the formation of likeminded cells. The poor conditions in some prisons, as well as the prospects of a difficult restart following release can foster an environment conducive to networking. The *Charlie Hebdo* attacker Cherif Kouachi met Amedy Coulibaly in Europe’s largest prison, Fleury-Mérogis, both were mentored there by Djamel Baghdal, an al-Qaeda recruiter.” After they were released from prison, they continued to meet and were involved in the jailbreak of another extremist person. Coulibaly stated that “prison is the best fucking school of crime. In the same walk, you can meet Corsicans, Basques, Muslims, robbers, small-time drug dealers, big traffickers, murderers . . . you learn from years of experience”).

166. See CASE BY CASE ISIS PROSECUTIONS, *supra* note 11, at 26. Additionally, the radicalization process does not happen linearly. See FAIZA PATEL, BRENNAN CTR. FOR JUST. AT N.Y.U., RETHINKING RADICALIZATION 10–11 (2011), <http://www.brennancenter.org/sites/default/files/legacy/RethinkingRadicalization.pdf> [<https://perma.cc/98G2-FJPR>] (“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

someone's first time in prison is usually "a period characterized by feeling lonely and frightened."<sup>167</sup> Those who are incarcerated often lose their sense of self and completely lose their autonomy.<sup>168</sup> These recruiters also "understand that . . . their ability to recruit young, first-time offenders into their" extremist group, and "feed them back . . . to a network outside the prison" allows recruiters to persuade these first-time offenders "to carry out terror acts on behalf of the group."<sup>169</sup> A report by the RAND Corporation further describes the process of radicalization in prison and why it is so common, stating that a "cognitive opening" to radicalization is formed because incarcerated individuals are more "susceptibl[e] to new and radicalizing ideas or beliefs."<sup>170</sup> There are striking similarities between what

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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.").

167. Anne Speckhard & Ardian Shajkovci, *Prison — Militant Jihadist Recruiting Grounds or Refuge for Rehabilitation?*, INT'L CTR. FOR STUDY VIOLENT EXTREMISM (Dec. 11, 2018), <https://www.icsve.org/prison-militant-jihadist-recruiting-grounds-or-refuge-for-rehabilitation/> [<https://perma.cc/YS7S-HX83>]. Loneliness occurs because, while incarcerated, people tend to be cut off from family and friends.

Separation from the regular day-to-day support that may be supplied by such relationships causes psychological stress at a time when the new prisoner is facing a traumatic set of conditions and going through a difficult adjustment. Social support and supportive relationships are known to be important for individuals' physical and emotional health and supportive relationships have been shown to protect individuals against offending in the future.

HANNAH ET AL., *supra* note 160, at 6 (citations and footnote omitted).

168. HANNAH ET AL., *supra* note 160, at 6 (explaining that an incarcerated person's understanding of self is threatened because they are "deprived of personal or sentimental possessions." For example, people "may use clothing and other personal items as symbols and reminders of their personal affiliations and ties to groups and identities" — removing "such items is part of the process of stripping away prisoners' autonomy and selfhood"). Furthermore, the prison environment completely removes an individual's "control of their daily routine, and replaces it with an array of imposed rules and regulations and bureaucratic controls." Also, "the imposition of harsh and arbitrary discipline and the removal of the prisoners' ability to make decisions for themselves poses a significant threat to their self-image and sense of self-efficacy, as it effectively reduces them to the status of helpless children." *Id.* at 7.

169. *See* Speckhard & Shajkovci, *supra* note 167.

170. HANNAH ET AL., *supra* note 160, at 50.

A number of young European Muslims perceive themselves to be rejected by Western society. Under such circumstances people tend to seek to re-establish or confirm their sense of personal and group identity. The prison context may sharpen or exacerbate such experiences of rejection and prejudice, and increase the urgent need to find way of coping with or overcoming these threats to self-identity.

*Id.* at 15 (citation omitted).

are believed to be the forces leading to the radicalization of young people and the psychological impact of imprisonment upon individuals; specifically

undergoing a crisis of the self, which challenges or even destroys one's self-conception, experiencing acute feelings of rejection by one's native or adopted society and seeking to cope by adopting a new sense of self-identify or a new belief, which may be delivered in adopting a new belief structure (religious or otherwise) and being assimilated into a new inclusive (and frequently protective) group identity.<sup>171</sup>

Given the psychological and physical dangers presented by prison, incarcerating young people can compound their vulnerabilities into radicalization.<sup>172</sup>

Furthermore, because most material support defendants will return home, continued or further radicalization in prison should be viewed as a broader public safety issue. The National Counterterrorism Center released a report stating that in 2016 there were 300 currently incarcerated people convicted of terrorism-related crimes, 90 of whom are due to be released before 2022.<sup>173</sup> Jessica Stern, a professor at Boston University specializing in extremism and the author of *Isis: The State of Terror*, explained: "At least some will probably reengage in terrorist activity . . . because they either remain radicalized or are susceptible to re-radicalization."<sup>174</sup> Thus, supervised release is particularly important for material support defendants.

### *iii. The Role of Supervised Release*

When someone is released from federal prison or jail, they are often placed on supervised release.<sup>175</sup> Supervised release is another way in which the court can give an individualized sentence and remedy to a defendant. Standard conditions of federal supervised release include reporting to a probation officer (PO), notifying a PO when leaving specific geographical areas, lawful employment, and notification of a change in residence.<sup>176</sup> Special conditions of supervision can include place restrictions, intermittent confinement, polygraph tests, computer and internet restrictions, and

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171. *Id.* at 50.

172. *See id.* at x.

173. *See* Walters, *supra* note 2.

174. *Id.* (alteration in original).

175. *See Overview of Probation and Supervised Release Conditions*, U.S. CTS., <https://www.uscourts.gov/services-forms/overview-probation-supervised-release-conditions> [<https://perma.cc/2GMU-9G7M>] (last visited Oct. 22, 2020); *Supervised Release*, FED. DEFS. N.Y., <https://federaldefendersny.org/information-for-client-and-families/supervised-release.html> [<https://perma.cc/VN33-T8V8>] (last visited Oct. 16, 2020).

176. *See Overview of Probation and Supervised Release Conditions*, *supra* note 175.

community service.<sup>177</sup> Judges use supervised release as a mechanism for reintegrating the defendant back into society and protecting the public; judges can also choose creative supervised release tactics.<sup>178</sup>

Although supervised release may seem, on its face, not punitive, significant liberty is stripped away from individuals. Unlike parole, supervised release is an “additional penalty.”<sup>179</sup> If a defendant is on supervised release for over ten years, which many material support defendants are,<sup>180</sup> that is a decade of drug screening, weekly calls to a PO, and limited internet access, as well as limitations on where a defendant can go, work, and visit. This results in criminalizing non-criminal actions. There are many collateral consequences of technical supervised release violations, including curfews that make it harder to find employment, limitations on often-needed licenses and other registrations, and failed drug tests — any of which can land the person back in federal custody.<sup>181</sup> Supervised release can include near-constant surveillance with “no clear process to register grievances or appeal decisions.”<sup>182</sup>

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177. *See id.*

178. *See United States v. Gementera*, 379 F.3d 596, 600 (9th Cir. 2004) (explaining that supervised release conditions are designed to protect the public and rehabilitate the defendant).

179. *See Jacob Schuman, Supervised Release Is Not Parole*, 53 LOY. L.A. L. REV. 587, 623 (2020). In the United States, there are 4.5 million people serving terms of criminal supervision, which includes probation, parole, and supervised release.

This “mass supervision” of convicted defendants is, as the District Attorney of Philadelphia Larry Krasner recently said, “a major driver of mass incarceration.”

Currently, almost 300,000 people are incarcerated for violating conditions of their supervision — one third of all prisoners in thirteen states, and more than half of all prisoners in Arkansas, Idaho, Missouri, and Wisconsin.

*Id.* at 589.

180. *See generally ISIS in America*, *supra* note 25. For example, Yusuf was sentenced to 20 years of supervised release. *See Twin Cities Man Who Tried to Join ISIS Is Released from Halfway House*, ASSOCIATED PRESS (Nov. 21, 2017, 6:44 PM), <https://www.twincities.com/2017/11/09/twin-cities-man-who-tried-to-join-isis-is-released-from-halfway-house/> [<https://perma.cc/6SYL-SENY>].

181. *See Schuman, supra* note 179, at 626. Schuman goes on to explain how “[w]hat was originally designed to assist re-integration into the community, instead is ‘facilitating reincarceration.’” *Id.* at 629 (footnote omitted).

182. Topeka K. Sam, *It’s Time to Overhaul America’s Broken Probation and Parole Systems*, OPEN SOC’Y FOUNDS. (July 13, 2017), <https://www.opensocietyfoundations.org/voices/it-s-time-overhaul-america-s-broken-probation-and-parole-systems> [<https://perma.cc/PX56-2PX8>]. Sam has personally experienced living under supervised release conditions. *See id.* In 2019, “the Supreme Court took a small step against mass supervision by striking down one provision of the supervised release statute as violating the defendant’s right to a jury trial” in *United States v. Haymond*, 139 S. Ct. 2369 (2019). Schuman, *supra* note 179, at 589–90 (footnotes omitted).

The intensity of supervised release should be reassessed given there has been very little recidivism of those convicted of crimes of terror since September 11. *The Terrorism Recidivism Study (TRS): Examining Recidivism Rates for Post-9/11 Offenders* illustrates that recidivism for terrorism-related offenders is extremely low.<sup>183</sup> In total, nine out of 561 offenders recidivated while incarcerated or upon release.<sup>184</sup> “Of the 247 offenders . . . released during the course of the study, four recidivated” by committing new crimes or violating supervised release terms.<sup>185</sup> None of these new crimes were connected to terrorism.<sup>186</sup> For example, one person was re-incarcerated for two years for “committ[ing] fraud by illegally buying food stamps.”<sup>187</sup> This indicates a recidivism rate of approximately 1.6% among released political extremists.<sup>188</sup> In comparison, the Bureau of Justice Statistics reported “that within the first year, 44% of the sample of [state prisoners] had been rearrested and, within three years, 68% had been re-arrested.”<sup>189</sup> These findings suggest that the heavy “surveillance of released political extremists . . . are unwarranted.”<sup>190</sup>

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183. See Omi Hodwitz, *The Terrorism Recidivism Study (TRS): Examining Recidivism Rates for Post-9/11 Offenders*, 13 PERSPS. ON TERRORISM 54, 54 (2019). The study examines recidivism rates of offenders convicted in the United States of terrorism-related offenses post-9/11.

184. *Id.* at 60. The study guaranteed that each of the cases or offenders were “validated by two or more credible sources.” *Id.* at 56. “This produced a set of 561 recidivism-eligible individuals convicted of terrorism-related offenses in the United States between September of 2001 and March of 2018.” *Id.*

185. *Id.* at 54, 60.

186. See *id.* at 60. The four recidivated by “violat[ing] plea agreement by using the internet,” “committ[ing] fraud by illegally buying food stamps,” “forgery and uttering,” and “parole violation due to drug possession.” *Id.*

187. *Id.*

188. *Id.* at 54 (explaining why “[t]hese findings suggest that restrictive policies designed to increase surveillance of released political extremists, such as the recently proposed TRACER Act and other registry-based measures, are unwarranted”). “In addition to the low rates of recidivism, it is also noteworthy that five of the recidivists reoffended while still incarcerated, dropping the total number of released recidivists to four. Those that reoffended in prison were charged with attempted murder and attempting to radicalize others.” *Id.* at 59.

189. *Id.* at 60.

190. *Id.* at 54. Hodwitz then goes on to explain that

political offenders were less likely to recidivate than apolitical offenders and, when they did recidivate, they did so in the years immediately following their release. In other words, although political and apolitical offenders are very similar in gender, age, and race, there are dramatic differences between these two groups when it comes [to] recidivism rates and, to a lesser extent, to the length of time between release and rearrest.

*Id.* at 61.

### B. Young People's Ability to Rehabilitate

Young people's brains are undeveloped and, therefore, more open to change.<sup>191</sup> Adolescent brain maturation extends from 11 to 25 years of age; adolescents have reduced culpability because they are naturally predisposed to impulsive decision-making and negative peer influence.<sup>192</sup> ISIS and other extremist groups prey on young people's immaturity when recruiting.<sup>193</sup> The Supreme Court recognizes three factors reducing adolescent criminal culpability: (1) a lack of maturity and an underdeveloped sense of responsibility often resulting in impetuous decision-making, (2) adolescents are more susceptible to negative influence through peer pressure, and (3) adolescents' characters are more transitory than those of adults.<sup>194</sup>

Both neuroscience and developmental psychology support the factors the Supreme Court outlined.<sup>195</sup> For example, in *Graham v. Florida*, the Supreme Court held that juvenile life sentences without parole for non-homicide offenses were unconstitutional.<sup>196</sup> The American Medical Association and the American Academy of Child and Adolescent Psychiatry filed an amicus brief stating that "[s]cientists have found that adolescents as a group, even at later stages of adolescence, are more likely than adults to engage in risky, impulsive, and sensation-seeking behavior."<sup>197</sup> Young people have less impulse control.<sup>198</sup> They are impressionable to negative influences, emotionally irrational, and overestimate short-term rewards.<sup>199</sup>

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191. See generally Allan Colver & Sarah Longwell, *New Understanding of Adolescent Brain Development: Relevance to Transitional Healthcare for Young People with Long Term Conditions*, 98 ARCHIVES DISEASE CHILDHOOD 902 (2013).

192. See *id.*

193. See UNITED NATIONS OFF. ON DRUGS & CRIME, HANDBOOK ON CHILDREN RECRUITED AND EXPLOITED BY TERRORIST AND VIOLENT EXTREMIST GROUPS: THE ROLE OF THE JUSTICE SYSTEM 13 (2017) [hereinafter HANDBOOK ON CHILDREN RECRUITED AND EXPLOITED], [https://www.unodc.org/documents/justice-and-prison-reform/Child-Victims/Handbook\\_on\\_Children\\_Recruited\\_and\\_Exploited\\_by\\_Terrorist\\_and\\_Violent\\_Extremist\\_Groups\\_the\\_Role\\_of\\_the\\_Justice\\_System.E.pdf](https://www.unodc.org/documents/justice-and-prison-reform/Child-Victims/Handbook_on_Children_Recruited_and_Exploited_by_Terrorist_and_Violent_Extremist_Groups_the_Role_of_the_Justice_System.E.pdf) [<https://perma.cc/YDJ5-RDED>].

194. See *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

195. See Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 811–19 (2003).

196. See *Graham v. Florida*, 560 U.S. 48, 82 (2010). Justice Kennedy's opinion explained that the Eighth Amendment's Cruel and Unusual Punishments Clause does not permit a juvenile offender to be sentenced to life in prison without parole for a non-homicidal crime. See *id.*

197. Stephen A. Newman, *Foreword: The Past, Present, and Future of Juvenile Justice Reform in New York State*, 56 N.Y. L. Sch. L. Rev. 1263, 1289 (2012).

198. See *id.*

199. See *id.* ("For example, brain imaging studies reveal that adolescents generally exhibit more neural activity than adults or children in areas of the brain that promote risky and reward-based behavior. These studies also demonstrate that the brain continues to mature, both structurally and functionally, throughout adolescence in regions of the brain responsible

The Court directly agreed with these medical experts that there are “fundamental differences between juvenile and adult minds.”<sup>200</sup> Developmental psychologists and the Court are on the same page that differences between adult and adolescent decision-making should translate into differences in sentencing.<sup>201</sup> The Court in *Miller v. Alabama* held that children are constitutionally different from adults for sentencing purposes, and that the Eighth Amendment’s prohibition against cruel and unusual punishment forbids the mandatory sentencing of life in prison without the possibility of parole for juvenile homicide offenders.<sup>202</sup> Although 18-year-olds are considered adults, “neuroscientists [and psychologists agree] that the brain’s prefrontal cortex — which is responsible for the ability to delay gratification, exercise emotional regulation, and resist pressure — continuously grows well into our mid-twenties.”<sup>203</sup> These developing “brains explain much of teenagers’ and adolescents’ impatience and rash decisions,” and therefore reduced culpability.<sup>204</sup> Brain development continues into a person’s twenties and early thirties.<sup>205</sup> In fact, some lawmakers have started to change criminal laws in accordance with this science. For example, California lawmakers amended a law focused on re-sentencing juvenile offenders to include those who were under 23 years old at the time the crime was committed.<sup>206</sup> Vermont allows some people up to age 22 to go through the family, not criminal, court system.<sup>207</sup> Additionally, in Europe, countries such as Germany and the Netherlands

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for controlling thoughts, actions, and emotions.”). Generally speaking, “the average adolescent cannot be expected to act with the same control or foresight as a mature adult.” *Id.*

200. *Id.* at 1290 (footnote omitted).

201. See Scott & Steinberg, *supra* note 195, at 839–40.

202. See *Miller v. Alabama*, 567 U.S. 460, 470–71 (2012).

203. HADAR AVIRAM, *YESTERDAY’S MONSTERS: THE MANSON FAMILY CASES AND THE ILLUSION OF PAROLE* 212 (2020).

204. *Id.*

205. See Dana Goldstein, *Should 25-Year-Olds Be Tried as Juveniles?*, *NEW REPUBLIC* (Oct. 27, 2016), <https://newrepublic.com/article/138133/25-year-olds-tried-juveniles> [<https://perma.cc/8ESN-S4MU>].

Social change is as important as biological change in understanding why some people in this age group are drawn to crime. Individuals who are “disconnected” — neither working nor in school — are more likely to get in trouble with the law. While fewer young women are disconnected today than in previous decades, the opposite is true for young men.

*Id.* (emphasis in original).

206. See AVIRAM, *supra* note 203, at 214.

207. See Goldstein, *supra* note 205.

classify all defendants up until their mid-twenties as juveniles; they are not tried in adult criminal court.<sup>208</sup>

Traditionally, responses to juvenile crime have focused more on rehabilitation than in the adult realm. Extremist organizations often recruit young people using methods “similar to those employed by sexual predators: gaining trust and establishing rapport, fulfilling emotional needs, and then isolating a victim from family and friends.”<sup>209</sup> Social media manipulation is rampant in connecting young people to extremist groups. Young people are recruited via social media through two primary strategies:<sup>210</sup> (1) “grooming, [which] is based on the perpetrator learning about the individual’s interests in order to tailor the approach and build up a relationship of trust,”<sup>211</sup> and (2) “targeted advertising,” where a group, “by tracking the online [behavior] of Internet users, . . . can identify those vulnerable to its propaganda and tailor the narrative to suit its target audience.”<sup>212</sup> Internet communities become an echo chamber filled with others holding similar opinions.<sup>213</sup> Young people often become radicalized through the internet because, as Bellevue/NYU Program for Survivors of Torture clinical psychologist Katherine Porterfield explains, “[t]hey sit in their room and they have a constant feed of language that enhances their sense of grievance and that the failures that they have are related to a larger mission.”<sup>214</sup> They become “alienated from the people who would help them seek alternate routes and it fuels their future actions.”<sup>215</sup>

ISIS maximizes its reach by sharing its message on Twitter, Facebook, and peer-to-peer messaging apps.<sup>216</sup> Social media content — including

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208. *See id.* Additionally, just because a young person is provided the opportunity to be charged as a juvenile and not an adult does not remove detention’s negative impact. *See id.* Research shows that even detention in a juvenile facility is “‘criminogenic,’ meaning it makes it more likely that a person will reoffend, compared to a juvenile who committed a similar crime, but was not incarcerated.” *Id.*

209. Berkell, *supra* note 17, at 42 (footnote omitted).

210. *See* HANDBOOK ON CHILDREN RECRUITED AND EXPLOITED, *supra* note 193, at 13.

211. *Id.*

212. *Id.* (footnote omitted).

213. *See* Ali Chunovic, #WSF18: *What Causes Extremism in the Brain?*, DANA FOUND. (June 7, 2018), <https://www.dana.org/article/wsf18-what-causes-extremism-in-the-brain/> [<https://perma.cc/T7BJ-NVN6>].

214. *Id.*

215. *Id.*

216. Brendan I. Koerner, *Why ISIS Is Winning the Social Media War*, WIRED (Apr. 2016) [hereinafter Koerner, *Why ISIS Is Winning*], <https://www.wired.com/2016/03/isis-winning-social-media-war-heres-beat/> [<https://perma.cc/DU8A-2WWX>] (explaining that ISIS “releases, on average, 38 new items per day — 20-minute videos, full-length documentaries, photo essays, audio clips, and pamphlets, in languages ranging from Russian to Bengali”). In the fall of 2014, ISIS supporters controlled 45,000 Twitter accounts. Since then, Twitter has been aggressively suspending accounts. *See* Humera Khan, *Why Countering Extremism Fails*, FOREIGN AFFS.



cartoons, computer games, and other interactive media<sup>217</sup> — is focused on persuading possible recruits of the organization’s strength and that it is open to all.<sup>218</sup> Joining an extremist group is portrayed as “offering status and prestige, smart uniforms and weapons.”<sup>219</sup> The experience is illustrated as an opportunity for power, especially to those without educational opportunities or employment.<sup>220</sup> ISIS recruitment also often focuses on “victimhood,” utilizing visuals that inspire “a desire to carry out revenge.”<sup>221</sup> In a material support case with nine young defendants, a judge found it difficult to consider long sentences because the defendants were “malleable youths who were ensnared by sly recruiting tactics: They were often lured into the group with invitations to pick-up basketball games, which were followed by late-night screenings of jihadist YouTube videos.”<sup>222</sup>

Law enforcement officials rely on community partnerships to help root out extremism, but this trust in law enforcement is broken when young people are aggressively prosecuted for non-violent crimes of terrorism.<sup>223</sup> For example, Sal Shafi notified the FBI that his 21-year-old son, Adam, was engaging with extremist communities online.<sup>224</sup> The worried father assisted the FBI with their investigation, but ultimately thought his son just needed counseling and community support.<sup>225</sup> The government charged Adam with attempting to provide material support to the al-Nusra Front; he faced a prison sentence of up to 20 years.<sup>226</sup> Adam awaited trial in solitary confinement.<sup>227</sup> Mr. Shafi now warns parents who face similar dilemmas to “not . . . even consider involving the authorities.”<sup>228</sup> The Shafi family’s

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(Feb. 18, 2015), <https://www.foreignaffairs.com/articles/united-states/2015-02-18/why-counterterrorism-fails> [https://perma.cc/989N-JY5V].

217. HANDBOOK ON CHILDREN RECRUITED AND EXPLOITED, *supra* note 193, at 12–13.

218. *See* Koerner, *Why ISIS Is Winning*, *supra* note 216.

219. HANDBOOK ON CHILDREN RECRUITED AND EXPLOITED, *supra* note 193, at 12.

220. *See id.*

221. *Id.*

222. Brendan I. Koerner, *A US Judge May Sentence Wannabe Terrorists to ‘Deradicalization,’* WIRED (Nov. 13, 2016) [hereinafter Koerner, *A US Judge May Sentence*], <https://www.wired.com/2016/11/u-s-judge-may-sentence-wannabe-terrorists-deradicalization/> [https://perma.cc/AW9W-MMU8].

223. *See* Berkell, *supra* note 17, at 42.

224. *See id.*

225. *See id.*

226. *See id.*

227. *See id.*

228. *Id.* Young people’s radicalization calls into question “the complex issues confronting law enforcement and communities when youth are suspected of supporting violent extremism.” *Id.* at 43. For example, a group of teenage girls, 15, 16, and 17 years old, were stopped in Germany on their way to join ISIS in Turkey. *See id.* Ultimately, they were not

situation represents how prosecution, not rehabilitation, is the government's most common immediate response and ultimate solution to young people engaging with extremist ideas.

*i. United States v. Caesar: Why an EDNY Judge Disregarded Sentencing Recommendations for a Young Material Support Defendant*

Some district court judges use a framework of lessened culpability for young defendants, even those charged with material support to ISIS. In *United States v. Caesar*, EDNY Judge Weinstein granted a 24-year-old defendant charged with material support to ISIS a four-year sentence — a dramatic downward departure from the 30 to 50 years the government recommended.<sup>229</sup> For at least 11 months, Caesar had actively sought to support and assist ISIS.<sup>230</sup> Caesar showed her support by encouraging people, via social media, to join and assist ISIS.<sup>231</sup> Caesar planned to travel to ISIS territory.<sup>232</sup>

Judge Weinstein considered many mitigating factors in her sentencing, including that her family repeatedly abused and neglected her.<sup>233</sup> She was forced to participate in ceremonial marriages with men many years older and was abused and neglected by multiple foster families.<sup>234</sup> Caesar's living situation was often unstable — at times she lived in homeless shelters.<sup>235</sup>

Judge Weinstein concluded that “[t]he ideal sentence, in the court's estimation following the hearing, would be Defendant's placement in a deradicalization or disengagement program with provision for intensive educational, emotional, and economic support to address her childhood trauma and its attendant results.”<sup>236</sup> Judge Weinstein's focus on treatment, as opposed to incarceration, speaks to the values society holds for young people — they are susceptible to negative influences, their brains are not fully developed, and they deserve opportunities deemed unfit for those who

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charged with any crimes — even the girls' school district claimed “they were victims of online predators, and not deeply motivated by a desire to fight with ISIS.” *Id.*

229. *See United States v. Caesar*, 388 F. Supp. 3d 194, 218, 223 (E.D.N.Y. 2019). For a judge's viewpoint that contrasts with Judge Weinstein's logic, see *supra* Section II.A.i. SDNY Judge Kimba Wood believed the public's safest option was to incarcerate Hasanoff for almost the entire 20-year maximum. She sentenced him to 18 years for conspiring to provide material support. *See id.* The judge's sentence was rooted in her disbelief that the defendant had, could, or would change his beliefs. *See Baltes et al., supra* note 138, at 358.

230. *See Caesar*, 388 F. Supp. 3d at 200.

231. *See id.* at 200–01.

232. *See id.* at 202.

233. *See id.* at 215, 220.

234. *See id.* at 197, 215, 220.

235. *See id.* at 197.

236. *Id.* at 220.

are older. There is less reason to incapacitate a young person because there is more reason to trust the young defendant can, and wants to, alter their life's path.

### III. THE CURRENT STATE OF TERRORISM-RELATED DIVERSION PROGRAMS IN THE UNITED STATES AND BEYOND

Part III examines the current state of terrorism-related diversion programs in the United States and around the world. Section III.A examines the only terrorism diversion program in the United States, located in the District of Minnesota. Section III.B explores what can be learned from other countries, focusing on Western Europe and Saudi Arabia, who use diversion programs to deradicalize. III.C explains the pitfalls of diversion programs generally and the pitfalls of countering violent extremism programs specifically.

#### A. Minneapolis's Diversion Program for a Young Person Charged with Material Support

The District of Minnesota created the only diversion program in the country for a young person charged with a terrorism-related offense.<sup>237</sup> Judge Michael J. Davis of the District of Minnesota approved the program in 2016.<sup>238</sup> The program aimed to rehabilitate the young defendants "to become successful, law-abiding citizens," to supervise and monitor defendants pre-trial and post-incarceration, and to provide the court with information useful for sentencing people charged with crimes of terrorism.<sup>239</sup> Judge Davis decided young people who acted as ISIS recruiters should be given the opportunity to improve their lives through a process of re-pluralization.<sup>240</sup> "Re-pluralization," coined by German radicalization expert Daniel Koehler,<sup>241</sup> is "the careful reintroduction of problems and solutions into a radicalized person's life so that they can no longer devote all their mental energy to stewing over their paranoia."<sup>242</sup> It is helping young

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237. See Dina Temple-Raston, *A Model for De-Radicalization in Minneapolis*, NPR (Feb. 19, 2015, 4:05 PM) [hereinafter Temple-Raston, *A Model for De-Radicalization*], <https://www.npr.org/2015/02/19/387554218/a-model-for-de-radicalization-in-minneapolis> [<https://perma.cc/QFU4-AV9V>] (explaining that the program developed for Yusuf is "America's first de-radicalization program, something to turn to when countering violent extremism efforts fall short").

238. See Berkell, *supra* note 17, at 47.

239. See *id.* at 48.

240. See Koerner, *Can You Turn a Terrorist*, *supra* note 1.

241. See *id.*; Temple-Raston, *He Was Caught*, *supra* note 7.

242. Koerner, *Can You Turn a Terrorist*, *supra* note 1; see also *infra* Section IV.B (explaining more about re-pluralization).

people understand that life and problem solving can be seen in complex shades of gray, as opposed to binary black and white.

*i. The Minneapolis Diversion Program's History*

Before the arrests of nine young Somali-American youths, there were already community conversations about how to prevent radicalization in Minneapolis's Somali community. This started when the Obama Administration, in 2011, released the first national strategy to prevent violent extremism domestically.<sup>243</sup> The strategy focused on community-based approaches, believing that knowledgeable and supported families, communities, and organizations are the best defense against violent extremism.<sup>244</sup> Three cities participated in the pilot program: Minneapolis-St. Paul, Boston, and Los Angeles.<sup>245</sup> A listening tour then took place in Minneapolis.<sup>246</sup> They discussed community-identified root causes of radicalization: “disaffected youth,” “a deepening disconnect between youth and religious leaders,” “internal identity crises,” “community isolation[,] and lack of opportunity — including high unemployment, lack of activities for youth, and few mentors.”<sup>247</sup>

Subsequently, in 2014 and 2015, nine Somali-American youths aged 18 to 22 were charged with conspiring to provide material support to ISIS.<sup>248</sup> Six of the teenagers pled guilty.<sup>249</sup> The three other teenagers went to trial in what was deemed “America’s largest ISIS recruitment trial.”<sup>250</sup> The six young men who pleaded guilty were sentenced to prison or rehabilitation.<sup>251</sup> Abdullahi Yusuf, who was 18 at the time of his offense, agreed to rehabilitation.<sup>252</sup>

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243. *See generally* EXEC. OFF. OF THE PRESIDENT OF THE U.S., STRATEGIC IMPLEMENTATION PLAN FOR EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES (2011), <https://obamawhitehouse.archives.gov/sites/default/files/sip-final.pdf> [<https://perma.cc/ES6M-F6Y6>].

244. *See id.*

245. *See Building Community Resilience Minneapolis-St. Paul Pilot Program A Community-Led Local Framework*, U.S. ATT’Y’S OFF. DIST. OF MINN. 2 (Feb. 2015), <https://www.justice.gov/usao-mn/file/642121/download> [<https://perma.cc/LWG4-A2JB>].

246. *See id.* at 4.

247. *Id.* (explaining how “[t]his framework was developed after months of listening to the community about its needs as well as reviewing available research and talking with experts”).

248. *See Ibrahim, supra* note 4.

249. *See id.*

250. Temple-Raston, *He Was Caught, supra* note 7. Yusuf “testified he was introduced to radical Islam by the three men now on trial, Guled Omar, 22, Abdirahman Daud, 22, and Mohamed Farah, 21.” *Id.*

251. *See id.*; Ibrahim, *supra* note 4.

252. *See Koerner, Can You Turn a Terrorist, supra* note 1.

*ii. Critical Aspects of the Minneapolis Program*

Judge Davis, along with the U.S. Attorney's Office for the District of Minnesota, created a pilot program — the District of Minnesota's Terrorism Disengagement and Deradicalization Program.<sup>253</sup> The program aimed to combat the fact that “[u]ntreated radicalized individuals [would] infect communities and continue to seek opportunities to harm others and martyr themselves.”<sup>254</sup> Yusuf began the program pre-sentencing after he pled guilty to material support charges and cooperated with the government.<sup>255</sup>

Yusuf, who was born in a Kenyan refugee camp, immigrated to Minneapolis with his family after they fled conflict in Somalia.<sup>256</sup> He attended high school in Minneapolis and was on the football team.<sup>257</sup> Yusuf became “part of a . . . pattern in which children of some immigrant families in North America and Europe feel alienated from society[;] a small but concerning few turn to jihad.”<sup>258</sup> At his co-conspirators' trial, Yusuf testified about the radicalization process:

[It] was frightening simple. It began with a meal at a Somali restaurant and a pickup game of basketball . . . [S]mart phones came out of their pockets and the young men began watching ISIS videos on a YouTube channel called “Enter the Truth.” They stayed up until 2 a.m . . . talking about the killing in Syria and watching ISIS videos.<sup>259</sup>

Yusuf further explained that “[t]he channel is saying that the West is corrupt and you can follow religion perfectly over there [in Syria] . . . [a]nd you don't have to conform to anyone else's traditions.”<sup>260</sup>

Judge Davis appointed Daniel Koehler, the founder of the German Institute for Radicalization and Deradicalization Studies and a fellow at George Washington University's Program on Extremism, to create the program.<sup>261</sup> Koehler explained that he

ha[s] already seen fierce criticism from the law-and-order people, saying these are terrorists and they don't deserve to be treated by any program, . . . [b]ut we need to have another option, because we can't kill or imprison our way out of why ISIS looks cool to these kids.<sup>262</sup>

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253. *See id.*

254. *Id.*

255. *See* Temple-Raston, *He Was Caught*, *supra* note 7.

256. *See* Walters, *supra* note 2.

257. *See* Temple-Raston, *A Model for De-Radicalization*, *supra* note 237.

258. Walters, *supra* note 2.

259. Temple-Raston, *He Was Caught*, *supra* note 7.

260. *Id.*

261. *See* Walters, *supra* note 2.

262. Koerner, *A US Judge May Sentence*, *supra* note 222.

Koehler further described that “[t]he US, unfortunately, is about 20 or 25 years behind European countries in building these kinds of networks and programs. Intervention to counter violent extremism is really missing.”<sup>263</sup> Koehler thinks the program is not only useful to deradicalize individuals, but also to cultivate trust with the communities that are most at risk for radicalization.<sup>264</sup> Koehler’s theory of change for these young people is through re-pluralization — learning to see life and problem-solving in the gray, not stark black and white. Successful re-pluralization, “los[ing] the fervor that once made them eager to [harm others],” requires substantial resources, including an “intervention coordinator” and multiple mentors who work with the client for years.<sup>265</sup>

Yusuf’s process of re-pluralization entailed incremental stages of freedom,<sup>266</sup> family and individual therapy, and lengthy reading lists.<sup>267</sup> Heartland Democracy, a small Minneapolis-based nonprofit, was hired to help facilitate the program for Yusuf because of its work with Somali youth in Minneapolis.<sup>268</sup> Heartland Democracy’s executive director, Mary McKinley, took an existing program entitled “Empowering You” and customized it for Yusuf, “[t]he idea [being] to make disaffected young people and their parents feel more connected, to each other and to their communities.”<sup>269</sup> McKinley stated that the “program works with young people to connect with themselves, their community and their world. We believe that when young people make bad choices — some extremely bad choices — there’s still an opportunity to turn your life around.”<sup>270</sup>

McKinley worked in conjunction with Ahmed Amin, a local Somali-American high school social studies teacher.<sup>271</sup> Amin served as Yusuf’s primary counselor and described his empathy for Yusuf:

I understand the difficulties of identity that lead people to join organizations like ISIS . . . . It is hard trying to live in two worlds. From 9 to 5 these kids have to live one way when they are at school, they are socialized to be

263. Walters, *supra* note 2; *see also infra* Section III.A.i.

264. *See* Koerner, *A US Judge May Sentence*, *supra* note 222.

265. Koerner, *Can You Turn a Terrorist*, *supra* note 1.

266. *See* Temple-Raston, *A Model for De-Radicalization*, *supra* note 237 (explaining that the program developed for Yusuf is “America’s first de-radicalization program, something to turn to when countering violent extremism efforts fall short”).

267. *See* Temple-Raston, *He Was Caught*, *supra* note 7.

268. *See id.*

269. Temple-Raston, *A Model for De-Radicalization*, *supra* note 237.

270. Paul McEnroe, *Minneapolis Nonprofit Tests Program to Pull Teens from Terror’s Grasp*, STAR TRIBUNE (Apr. 29, 2015), <http://www.startribune.com/mps-nonprofit-tries-to-pull-teens-from-terror-s-grasp/301325811/> [https://perma.cc/S3B7-8ARK].

271. *See* Temple-Raston, *He Was Caught*, *supra* note 7.

American. And then they go home, learn to be religious and are trying to cope with that. It is harder than you'd think.<sup>272</sup>

During his year at a federal halfway house, Yusuf read philosophy, biography, and literature; he wrote essays and poetry, reflecting on his life, his choices, and his future; and he was encouraged to debate with mentors and Muslim community leaders.<sup>273</sup> Amin introduced Yusuf to many different texts so that he “could really challenge how he thinks and sees the world.”<sup>274</sup> Yusuf also read and discussed the works of Sherman Alexie, Martin Luther King Jr., Malcolm X, and Michel Foucault, with the aim of “work[ing] through barriers, both mental and societal.”<sup>275</sup>

Of the nine Somali teenagers who were originally charged with conspiring to provide material support to ISIS in 2016, only Yusuf was deemed trustworthy enough for a time-served sentence and therefore immediate release after two years of incarceration and one year in the re-pluralization program.<sup>276</sup> At Yusuf's sentencing, Judge Davis declared, “I just don't see how prison will help this boy”<sup>277</sup> — Yusuf was ultimately sentenced to 20 years of supervised release.<sup>278</sup> At Yusuf's sentencing, his PO testified that “while in the halfway house, Yusuf earned his high school diploma, underwent counseling and participated in community service. Yusuf even became a role model for other residents.”<sup>279</sup> One of Yusuf's lawyers explained, “[h]is transformation has been incredible. He went from being a surly, closed-down kid to this really open, warm, intelligent, thoughtful, introspective young man, who recognizes why he'd been attracted to Isis and why there are so many other options for him.”<sup>280</sup> Yusuf's success pre-sentencing was one step toward gaining additional freedoms. Upon his release, Judge Davis ordered supervised release conditions that included

272. *Id.* (quoting Amin Ahmed, Yusuf's counselor). Amin further explained: “You know, these are really young kids . . . and in my heart I really believe that they fell for something. They need a chance to correct, to undo, what they did.” *Id.*

273. *See* Walters, *supra* note 2.

274. Temple-Raston, *He Was Caught*, *supra* note 7.

275. Walters, *supra* note 2; *see also* Temple-Raston, *He Was Caught*, *supra* note 7.

276. *See* Walters, *supra* note 2.

277. Dina Temple-Raston, *He Wanted Jihad. He Got Foucault.*, N.Y. MAG. (Nov. 27, 2017) (quoting Judge Michael J. Davis), <https://nymag.com/intelligencer/2017/11/abdullahi-yusuf-isis-syria.html> [<https://perma.cc/ZV4D-PQ24>].

278. *See* Walters, *supra* note 2.

279. Stephen Montemayor, *First of Minnesota's ISIS Defendants Wins Release from Federal Halfway House*, STAR TRIBUNE (Nov. 9, 2017, 11:17 PM), <http://www.startribune.com/yusuf-wins-release-from-halfway-house-in-isis-case/456407163/> [<https://perma.cc/3CJD-HVEV>].

280. Walters, *supra* note 2.

approval of all education and employment plans.<sup>281</sup> Additionally, Yusuf's internet use was monitored, he was tracked via GPS, and he was not permitted to access extremist materials or use social media.<sup>282</sup> Yusuf will live under supervised release for 20 years unless Judge Davis decides to reduce his term.<sup>283</sup>

### **B. What Can Be Learned from Other Countries That Successfully Utilize These Programs**

For decades, other nations have regularly utilized deradicalization and disengagement programs with the goal to deradicalize those facing crimes of terrorism, both pre-trial and after conviction.<sup>284</sup> Previously, European rehabilitation programs were directed at violent right-wing extremists, such as neo-Nazis and nationalist extremists.<sup>285</sup> Recently, European programming turned its focus to Jihadist-inspired extremists. Non-governmental organizations (NGOs), governments, or both oversee more than 40 terrorism-related diversion programs throughout the world.<sup>286</sup> A crucial difference between those charged with terrorism-related crimes in the United States versus elsewhere is that terrorism sentences are generally shorter in other countries.<sup>287</sup> Rehabilitation is needed quickly because defendants will be released in a matter of months, as opposed to possible decades in the United States.<sup>288</sup>

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281. See Montemayor, *supra* note 279.

282. See *id.*; see also *Twin Cities Man Who Tried to Join ISIS Is Released from Halfway House*, *supra* note 180 (“While at the halfway house, Yusuf received counseling, mentoring and an award for being a role model to other residents. As condition of his release, Yusuf is barred from social media and accessing content with extremist views.”).

283. See Montemayor, *supra* note 279. After one year on supervised release, a judge has the option to reduce the amount of time, and/or the conditions. See 18 U.S.C. § 3583(e)(1); see also *supra* Section II.A.iii.

284. See *United States v. Ceasar*, 388 F. Supp. 3d 194, 220–21 (E.D.N.Y. 2019) (citing UNITED NATIONS OFF. ON DRUGS & CRIME, *supra* note 163, at 122–23 (“The [Danish] Back on Track . . . programme was designed to help prisoners who have been charged or convicted of terrorism-related offences, or who have been assessed as vulnerable to radicalization.”)); Berkell, *supra* note 17, at 28–32 (describing the deradicalization program used by Saudi Arabia).

285. See Berkell, *supra* note 17, at 28 (explaining “[p]rominent examples include disengagement initiatives known as Exit programs in Norway, Sweden, and Germany”).

286. See *id.* at 26.

287. See Sebastian Rotella, *Europe's Revolving-Door Prisons Compound Growing Terror Threat*, PROPUBLICA (June 23, 2015, 5:44 AM), <https://www.propublica.org/article/europes-revolving-door-prisons-compound-growing-terror-threat> [https://perma.cc/K99Y-NL9W] (explaining terrorism sentences are short in Europe compared to the United States).

288. See *id.*; Ahmed, *supra* note 12, at 1523.



Nations other than the United States “have experienced more immediate and extensive threats from young people joining extremist groups”; these countries have utilized a holistic approach by implementing alternative to incarceration programs centered on mental health, economic opportunities, and family and religious counseling.<sup>289</sup> Countries such as Germany, Northern Ireland, Egypt, Jordan, Yemen, the United Kingdom, and Malaysia have implemented diversion programs for potentially radicalized individuals.<sup>290</sup> This diverse group of nations’ programs utilize rehabilitative opportunities that can lead to lessened jail time.<sup>291</sup>

Many European countries have designed and used intensive disengagement and deradicalization programs to assist people charged and convicted of terrorism-related offenses. These programs have many successes. One such success occurred in a Danish town where over 300 young people completed a deradicalization rehabilitation program — the town went “from thirty [young people joining ISIS] in 2013 to only one the following year.”<sup>292</sup> Additionally, Germany’s Federal Office for Migration and Refugees partners with NGOs, such as HAYAT,<sup>293</sup> “to counter violent Islamist extremism using a counseling approach.”<sup>294</sup> Germany offers a national hotline for radicalization counseling.<sup>295</sup> The hotline accepts anyone’s calls and directs them to HAYAT.<sup>296</sup> HAYAT received international acclaim for its individualized counseling for people “on a path toward Jihadist-inspired violent extremism.”<sup>297</sup>

Furthermore, the NGO Reprieve created a “Life After Guantánamo” program to help re-settle people who were detained at Guantánamo Bay and released to countries that were not their home countries.<sup>298</sup> The program

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289. See Ahmed, *supra* note 12, at 1552.

290. See *id.*

291. See *id.* at 1552–53.

292. *Id.* at 1553.

293. Hayat is Turkish and Arabic for “Life.” See HAYAT-DEUTSCHLAND, <https://hayat-deutschland.de/english/> [<https://perma.cc/63EA-754M>]. “HAYAT . . . is the first German counseling program for persons involved in radical Salafist groups or on the path of a violent Jihadist radicalization, including those travelling to Syria and other combat zones. Further, HAYAT is available to the relatives of a radicalized person as well.” *Id.*

294. Berkell, *supra* note 17, at 28 (“Many other programs warrant consideration, such as the UK’s Channel initiative, the Danish model in Aarhus, and in North America, the newly created Centre for the Prevention of Radicalization Leading to Violence in Montreal, Canada. Although the U.S. lacks comprehensive programs domestically, the American military pursued deradicalization strategies through Task Force 134 for detainee operations in Iraq under the leadership of Major General Douglas Stone.”).

295. See *id.* at 33.

296. See *id.*

297. *Id.*

298. See *Life After Guantánamo*, REPRIEVE U.S. (May 20, 2016), <https://reprieve.org/2016/05/20/life-after-guantanamo/> [<https://perma.cc/33ES-28KE>].

aims to help former Guantánamo detainees receive services, support, and counseling, including assistance with integration, family reunification, housing, education, and employment.<sup>299</sup> Reprieve arranged holistic services “to 38 struggling ex-prisoners in 18 countries.”<sup>300</sup> The U.S. government had tortured all of the program participants.<sup>301</sup> Thus, the holistic nature of the program was vital to their rehabilitation.<sup>302</sup> Without the Life After Guantánamo program, these participants would likely “be abandoned, stigmatized and lack access to services necessary to overcome a range of psychological and physical illnesses.”<sup>303</sup>

Not all deradicalization programs are successful. For example, in May 2016, French Prime Minister Manuel Valls publicized “that France [would] open a dozen de-radicalization centers.”<sup>304</sup> This program closed after five months.<sup>305</sup> In the French program, participants “worked with teachers, psychologists, and imams in a rural chateau in the Loire Valley to discuss religion and jihadi ideologies.”<sup>306</sup> However, halal food was not provided for the participants, and “they studied French history, philosophy, and literature, wore uniforms, and sang the national anthem.”<sup>307</sup> Even the program’s Imam was not allowed to keep a halal diet.<sup>308</sup> New America researchers Elena Sourin and Spandana Singh explain that the French deradicalization program failed for two reasons. First, “although the center wanted to address the root causes of radicalization and had psychologists on staff,” the program over-emphasized “ideology by trying to replace extremism with a secular ‘counter-truth.’”<sup>309</sup> Second, “the program promoted Western nationalist identities over Islamic ones, an especially fraught move in France, given the country’s long-standing tensions around *laïcité*, the legal principle that promotes secularism in theory but, to many critics, seems more focused on limiting Muslims’ ability to observe Islam.”<sup>310</sup> These mistakes made deradicalization unlikely. Ultimately the researchers suggested that a more

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299. *See id.*

300. *Id.*

301. *See id.*

302. *Id.*

303. *Id.*

304. Berkell, *supra* note 17, at 28.

305. *See* Elena Souris & Spandana Singh, *Want to Deradicalize Terrorists? Treat Them Like Everyone Else*, FOREIGN POL’Y (Nov. 23, 2018, 7:00 AM), <https://foreignpolicy.com/2018/11/23/want-to-deradicalize-terrorists-treat-them-like-everyone-else-counterterrorism-deradicalization-france-sri-lanka-pontourny-cve/> [<https://perma.cc/KW5J-ZSN9>].

306. *Id.*

307. *Id.*

308. *See id.*

309. *Id.*

310. *Id.*

holistic and therapeutic-focused program, where community organizations directly work with participants, would more effectively help individuals rehabilitate, as well as protect, their legal rights.<sup>311</sup>

Additionally, Saudi Arabia has extensive deradicalization programs and has touted very low recidivism rates,<sup>312</sup> with success rates of up to 87%.<sup>313</sup> The Saudi program includes in-prison counseling and religious re-education, in which 5,000 people participated.<sup>314</sup> The program features several key components: the “presumption of benevolence,” a halfway house-type structure where mental health professionals and imams provide services, and the practice of “respected Islamic scholars correct[ing] what they consider warped interpretations of Islam.”<sup>315</sup>

However, there have been significant failures within the program.<sup>316</sup> Such failures include that “310 to 390 graduates have ‘relapsed’ into extremism.”<sup>317</sup> In addition, the Saudi program includes aspects that would not work in the United States, such as finding male defendants a wife and buying them a car.<sup>318</sup> Furthermore, the religious aspects of the “program would not be culturally viable in the United States or legally [viable] under the First Amendment.”<sup>319</sup> Thus, the Saudi program likely is not replicable in the United States due to religious and cultural differences, and because the program is used for defendants convicted of all levels of terrorism — violent and non-violent, significant and minor.

Overall, deradicalization programs’ “existence is evidence of a commitment to dealing with the problem of radicalization by focusing on rehabilitation.”<sup>320</sup> A defendant can be sentenced to participate in such a diversion program<sup>321</sup> and a sentence could be lessened or eliminated, should the participant successfully complete the program.

311. *See id.*

312. *See* Walters, *supra* note 2.

313. Associated Press, *Saudi Arabia Sends Convicted Terrorists to a Cushy Rehab Center*, N.Y. POST (June 24, 2015), <https://nypost.com/2015/06/24/saudi-arabia-sends-convicted-terrorists-to-a-cushy-rehab-center/> [<https://perma.cc/P6BB-K3QZ>].

314. *See* Berkell, *supra* note 17, at 30.

315. *Id.*

316. *See* Walters, *supra* note 2.

317. Berkell, *supra* note 17, at 31 (citations omitted).

318. *See* Andreas Casptack, *Deradicalization Programs in Saudi Arabia: A Case Study*, MIDDLE E. INST. (June 10, 2015), <https://www.mei.edu/publications/deradicalization-programs-saudi-arabia-case-study> [<https://perma.cc/QEF3-FFNK>].

319. Berkell, *supra* note 17, at 31.

320. *United States v. Caesar*, 388 F. Supp. 3d 194, 221 (E.D.N.Y. 2019).

321. *See id.* (citing Liesbeth van der Heide & Bart Schuurman, *Reintegrating Terrorists in the Netherlands: Evaluating the Dutch Approach*, 17 J. DERADICALIZATION 196, 204–07).

### C. Avoiding Pitfalls of Diversion Programs Generally and Countering Violent Extremism Programs Specifically

#### *i. Pitfalls of Diversion Programs*

Diversion programs are far from perfect. As criminologist Darryl Davies stated in 1976, “[d]iversion is part of what I call the ‘Bartholomew Effect in Penology’; that is, in our eagerness to devise alternatives to imprisonment, we may merely replace one method with another; creating more problems in the process.”<sup>322</sup> There are significant liberty interests at stake for a defendant and an individual could easily consent to a diversion or alternative to incarceration program without being fully aware of his loss of rights.<sup>323</sup> Thus, a person charged with a crime may choose to participate in a program without realizing he could have been acquitted of the charge in a criminal court.<sup>324</sup>

These diversion program problems continue today. The Vera Institute of Justice cautions, “[b]ecause these courts hold the promise of addressing problems faced by many people who come into contact with the criminal justice system, experts counsel that courts should partner with and follow the guidance of those who are trained in clinically appropriate methods, to avoid ordering inadequate or misapplied treatment.”<sup>325</sup> Defendants should be aware of each component of a diversion program and should not be forced to participate without knowing the extensive pros and cons of their selection.<sup>326</sup> Diversion should not serve as the government forcing change on an individual — the individual should be interested in changing themselves and should not lose all autonomy in their say of how best to do so.

Furthermore, another pitfall of any alternative to incarceration program is fear of the “Willie Horton effect” — that program success is thwarted by individual failures. Willie Horton was an incarcerated person who was

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(2018)) (describing the Dutch Terrorism, Extremism, and Radicalization team, which was designed to “(a) improve efforts made to reintegrate terrorist prisoners while still in detention, (b) provide better aftercare upon their release, and (c) create a central and coordinated approach for dealing with this offender class in the future”).

322. Darryl T. Davies, *The Pitfalls of Diversion: Criticism of a Modern Development in an Era on Penal Reform*, 14 OSGOODE HALL L.J. 759, 762 (1976).

323. *See id.* at 764.

324. *See id.*

325. *What Is Diversion?*, VERA INST. JUSTICE (June 21, 2016), <https://www.vera.org/the-human-toll-of-jail/judging-without-jail/what-is-diversion> [<https://perma.cc/25N2-JTRS>].

326. *See generally* Davies, *supra* note 322.

granted permission to participate in a weekend-leave program.<sup>327</sup> On one such weekend, Horton “brutally raped a woman and assaulted her boyfriend.”<sup>328</sup> Professor John Pfaff explained that “Horton was an outlier [because] more than 99% of those allowed to go home on leaves returned without incident.”<sup>329</sup> In 1988, during his successful run for president, George Bush Senior utilized Horton’s case in an infamous attack ad that some claimed won Bush the presidency.<sup>330</sup> Pfaff stated that “[a]lthough the impact of the ad on the outcome of the election has been overstated, politicians quickly learned its lesson. No matter how successful an ‘early release’ prison program is, one single failure can impose huge political costs.”<sup>331</sup> Potential individual failures, along with many programs’ shortcomings, illustrate how diversion programs are imperfect.

*ii. Pitfalls of Countering Violent Extremism Programs*

Countering violent extremism (CVE) is “a catchall term for terrorism prevention strategies that critics say [can] stigmatize Muslims and yield few or no measurable results.”<sup>332</sup> In 2011, the Obama Administration released a strategic implementation plan with the overarching goal of “preventing violent extremists and their supporters from inspiring, radicalizing, financing, or recruiting individuals or groups in the United States to commit acts of violence.”<sup>333</sup> CVE refers to four stages: prevention, intervention, rehabilitation, and reintegration.<sup>334</sup> Diversion is included in the latter two categories, given that these categories take place after arrest.

Additionally, community policing, sometimes a CVE aspect, comes with its own pitfalls. In *Policing Terrorists in the Community*, Sahar Aziz explained critiques of community policing in counterterrorism, including that individuals are divided into categories of “Good Muslims” or “Bad Muslims” depending on their willingness to cooperate with the federal government, and that Muslim community leaders are selected “to gather and

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327. See John Pfaff, *The Never-Ending ‘Willie Horton Effect’ Is Keeping Prisons Too Full for America’s Good*, L.A. TIMES (May 14, 2017, 4:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-pfaff-why-prison-reform-isnt-working-20170514-story.html> [<https://perma.cc/6TUQ-G6M2>].

328. *Id.*

329. *Id.*

330. *See id.*

331. *Id.*

332. Hannah Allam, *‘We Were Blindsided’: Families of Extremists Form Group to Fight Hate*, NPR (Dec. 12, 2019, 12:10 PM), <https://www.npr.org/2019/12/12/787295283/we-were-blindsided-families-of-extremists-form-group-to-fight-hate> [<https://perma.cc/7A3G-7SDV>].

333. EXEC. OFF. OF THE PRESIDENT OF THE U.S., *supra* note 243, at 1–2.

334. *See* Berkell, *supra* note 17, at 5–7.

share seemingly innocuous information about their communities” that ultimately may be used by law enforcement.<sup>335</sup>

Thus, some worry that CVE programs are used as a front for domestic intelligence gathering.<sup>336</sup> A group of human rights, civil liberties, and community-based organizations wrote to Deputy National Security Advisor Lisa Monaco expressing their concerns about the CVE programs.<sup>337</sup> They described the possible impact of the targeting of Muslim-American communities and communities presumed to be Muslim, and broadly addressed “religious exercise; freedom of expression; government preference for or interference in religion; stigmatization of American Muslims; and ongoing abusive surveillance and monitoring practices.”<sup>338</sup> The groups recommended not to involve U.S. Attorneys’ Offices and the FBI in CVE programs given their lead involvement in investigations and prosecutions.<sup>339</sup>

#### IV. AN SDNY-EDNY DIVERSION PROGRAM FOR YOUNG PEOPLE CHARGED WITH MATERIAL SUPPORT

Part IV explains the feasibility of a joint SDNY-EDNY diversion program for young people charged with material support. Section IV.A highlights EDNY judges who have requested such a program be developed. Section IV.B explains how the U.S. Attorney’s Office for the Eastern District of New York created its own deradicalization program merely a few years ago. Section IV.C lays out the major considerations for an SDNY-EDNY diversion program tailored for young people charged with material support.

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335. Sahar F. Aziz, *Policing Terrorists in the Community*, 5 HARV. NAT’L SEC. J. 147, 147–48 (2014).

336. See *CAIR-MN: Civil Rights Groups Concerned About Minneapolis CVE Pilot Program*, CISION (Jan. 23, 2015, 10:27 AM), <https://www.prnewswire.com/news-releases/cair-mn-civil-rights-groups-concerned-about-minneapolis-cve-pilot-program-300024869.html> [<https://perma.cc/2LLR-N3U7>].

337. See Letter from American Civil Liberties Union et al., to Lisa O. Monaco, Assistant to the President for Homeland Sec. & Deputy Nat’l Sec. Advisor, Off. of the Homeland Sec. Advisor (Dec. 18, 2014), [https://www.aclu.org/sites/default/files/assets/141218\\_cve\\_coalition\\_letter\\_2.pdf](https://www.aclu.org/sites/default/files/assets/141218_cve_coalition_letter_2.pdf) [<https://perma.cc/M4LL-UPER>].

338. *Id.*

339. See *id.* at 3–4 (“Justice Department Civil Rights Division Investigation & Assessment: The Civil Rights Division of the Justice Department should investigate and assess the impact of DOJ and FBI community outreach and CVE programs on religious exercise and freedom of expression in minority communities, including American Muslim communities . . . . Justice Department Guidance on Race: Our concerns outlined above are heightened by recent changes to the Guidance Regarding the Use of Race by Federal Law Enforcement Agencies. The changes to do not close loopholes that have long permitted the use of profiling in the national security context. In fact, the Guidance explicitly permits practices we have long identified as abusive, discriminatory and stigmatizing.”).

### A. Judges Who Have Expressed A Need for Material Support Diversion Programs

At least two EDNY judges have expressed the need for a diversion program created specifically for young people charged with material support. As discussed above in Section II.B.i, Judge Weinstein stated the importance of material support diversion programs in *United States v. Ceasar*.<sup>340</sup> Judge Weinstein explicitly stated that a program should be created for defendants like Ceasar:

In Europe, countries such as Denmark and the Netherlands have designed and used intensive disengagement and deradicalization programs to assist prisoners charged and convicted of terrorism-related offenses. The United States has no such program. The Bureau of Prisons should seriously consider designing an appropriate program to deal with American terrorists like this one. Without access to treatment while incarcerated or on supervised release, Defendant will likely remain an unrehabilitated supporter of ISIL and a continuing danger to the United States.<sup>341</sup>

Judge Weinstein made clear that diversion programs serve not only to help the individual and reduce their incarceration time, but also to directly combat radicalization. This is especially true given that material support defendants are rarely, if ever, incapacitated for life.<sup>342</sup>

EDNY Magistrate Judge Robert M. Levy presented similar thoughts in *United States v. Augustine*.<sup>343</sup> Bernard Augustine was charged with attempting to provide material support to ISIS.<sup>344</sup> Family turmoil roused Augustine to leave his parents' home.<sup>345</sup> At 18 years old, he flew to Tunisia,<sup>346</sup> where he was arrested and sentenced to two years in a Tunisian prison.<sup>347</sup> After serving his sentence, the FBI collected him from Tunisia and charged him with material support in the United States.<sup>348</sup> Judge Levy expressed the need for a diversion program during Augustine's bond hearing:

There is no alternative to incarceration program for people who were young who went to, you know, to join ISIS, at least not in this district. If there

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340. 388 F. Supp. 3d 194 (E.D.N.Y. 2019); *see also supra* Section II.B.i.

341. *Ceasar*, 388 F. Supp. 3d at 196.

342. *See* AMERICAN EXCEPTION, *supra* note 11, at 34; CASE BY CASE ISIS PROSECUTIONS, *supra* note 11, at 21.

343. *United States v. Augustine*, No. 18-CR-00393 (E.D.N.Y. filed July 30, 2018).

344. *See* Transcript of Bail Application at 5–6, *United States v. Augustine*, No. 18-CR-00393 (E.D.N.Y. Oct. 24, 2019).

345. *See id.* at 3–4.

346. *See id.* at 4.

347. *See id.* at 5, 23–24.

348. *See id.* at 5–6. When he completed his sentence, Augustine was sent to Tunisian immigration custody because he is a U.S. citizen. *See id.*

were, that would be something that would be, I think, useful in a situation like this. But we don't have that. And the safeguards that would come with that we don't have.<sup>349</sup>

Here, Judge Levy exemplified a nearly identical point as Judge Weinstein: an alternative to incarceration program is necessary to rehabilitate and reintegrate defendants and also a more humane option than incarceration. But no such program exists. Given these judges' desires to see a diversion program enacted, their interest and influence should be considered in helping to ensure an effective program.

### **B. U.S. Attorney's Office for the Eastern District of New York Created a Deradicalization Program**

In 2018 and before, U.S. Attorney's Office for the Eastern District of New York created the Disruption and Early Engagement Program (DEEP).<sup>350</sup> DEEP was devised as "a strategic public/private partnership aimed at reducing the threat of terrorism by building a pool of subject matter experts across disciplines."<sup>351</sup> A diverse range of players were involved, including Assistant U.S. Attorneys, the Federal Defenders of New York, mental health professionals, the Probation Department, Pretrial Services, and other individuals focused on curtailing violent extremism.<sup>352</sup>

The program's main advocate, former EDNY National Security & Cybercrime Section Chief Seth DuCharme, touted DEEP during the 2018 ISIS prosecution of John Doe.<sup>353</sup> Although DEEP never became an official diversion program within the EDNY court, at least one EDNY defendant

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349. *Id.* at 33.

350. BRIAN A. JACKSON ET AL., HOMELAND SEC. OPERATIONAL ANALYSIS CTR., PRACTICAL TERRORISM PREVENTION 45 n.28 (2019), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR2600/RR2647/RAND\\_RR2647.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR2600/RR2647/RAND_RR2647.pdf) [<https://perma.cc/J95B-DKUT>] (explaining how "[t]here appears to be little current activity in the United States that is focused on diversion in lieu of prosecution for any terrorism-related offenses, in contrast to some other types of crimes (according to multiple interviews with government representatives at the federal and local levels, 2018). The one possible exception is the Disruption and Early Engagement Program (DEEP) run by the U.S. Attorney's Office in the Eastern District of New York").

351. Defendant's Sentencing Memorandum at 51, *United States v. Ceasar*, 388 F. Supp. 3d 194 (E.D.N.Y. 2019) (No. 17-CR-00048).

352. *See id.* (explaining that if the client, Ms. Ceasar, were to have the opportunity to participate in DEEP, she "looks forward to participating in this collaborative network, and discussing her experiences in the hopes that public safety professional and partners could learn from her personal path in this case").

353. *See Seth Ducharme*, STS. ATT'Y (July 21, 2020), <https://www.statesattorney.org/case/seth-d-ducharme/#:~:text=Seth%20DuCharme%20joined%20the%20United,States%20Attorney's%20Office%20in%202015> [<https://perma.cc/EX4B-KN35>]. *See generally* *United States v. Doe*, 323 F. Supp. 3d 368 (E.D.N.Y. 2018).



participated in DEEP through a collaboration with the U.S. Attorney's Office and defense counsel. In one case, John Doe, a U.S. citizen, then 25-years-old, joined ISIS in Syria; for five months, "he served ISIS in an administrative role."<sup>354</sup> Doe was "present in at least one battle, he received military training, he carried firearms, and he was introduced to explosive belts used to blow up civilians."<sup>355</sup> Doe cooperated with the government and, through DEEP, he participated in terrorism prevention education and helped prevent a juvenile from continuing on the path toward jihadism.<sup>356</sup> The government's own expert witness at Doe's sentencing hearing, Deputy Director of George Washington University's Program on Extremism Seamus Hughes, recommended requiring further counseling and mentoring support for Doe post-sentence; Hughes also proposed offering "an 'individualized approach,' creating a 'cocoon' around the defendant comprised of community groups, law enforcement, religious leaders, and others."<sup>357</sup> Part of the government's interest in DEEP was its fear that Doe could be "re-radicalized in prison."<sup>358</sup> For this reason, the government's expert "concluded that supervised release, rather than incarceration, would increase [the] defendant's chances to be rehabilitated."<sup>359</sup>

Notably, the Department of Homeland Security's (DHS) Fiscal Year 2021 budget request includes, "[i]n addition to traditional prosecution options, [Department of Justice] is expanding implementation of its [DEEP] model, which assesses the degree of threat posed by particular subjects and develops options to mitigate the threat and divert or disrupt mobilization to violence."<sup>360</sup> In July 2020, DuCharme was named the new Acting U.S. Attorney for the Eastern District of New York.<sup>361</sup> Political will is a necessity for the implementation of any diversion program, let alone one for people charged with crimes of terrorism. Given DuCharme's previous interest in DEEP and DHS's possible financial commitment, there may now be the political will from Acting U.S. Attorney DuCharme as the new EDNY head.

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354. *Doe*, 323 F. Supp. 3d at 370.

355. *Id.* at 370.

356. *See id.* at 375.

357. *Id.* at 381.

358. *See id.* at 382.

359. *Id.*

360. U.S. DEP'T OF HOMELAND SEC., FY 2021 BUDGET REQUEST (2020), [https://www.dhs.gov/sites/default/files/publications/20\\_0210\\_dhs-tvtp-omb-fact-sheet.pdf](https://www.dhs.gov/sites/default/files/publications/20_0210_dhs-tvtp-omb-fact-sheet.pdf) [<https://perma.cc/8H24-TJM7>].

361. *See* Press Release, U.S. Att'y's Off. for the E. Dist. of N.Y., Attorney General William P. Barr Announces the Appointment of Seth D. DuCharme as Acting United States Attorney for the Eastern District of New York (July 10, 2020), <https://www.justice.gov/usao-edny/pr/attorney-general-william-p-barr-announces-appointment-ent-seth-d-ducharme-acting-united> [<https://perma.cc/B6GE-PZPS>].

### C. What an SDNY-EDNY Diversion Program Could Look Like

Keeping the pitfalls discussed in Section A.ii in mind, it is important to consider the many positive aspects of a material support diversion program. Given the government's appetite for charging young people with material support, along with "the preemptive nature of the prohibitions," an alternative to incarceration program for young people charged with material support is imperative.<sup>362</sup>

EDNY and SDNY are uniquely situated to offer an alternative to incarceration program for young people charged or convicted of material support. Nearly one-fifth of all ISIS-related charges are brought in SDNY or EDNY.<sup>363</sup> Logistically, the two districts already offer three alternative to incarceration programs for young defendants.<sup>364</sup> These programs are offered as both an alternative to incarceration and as a re-entry tool to limit recidivism.<sup>365</sup> EDNY in particular is uniquely positioned to host diversion programs given its previous implementation of DEEP and its history as one of the first federal districts to offer alternative to incarceration options in as early as 2000.<sup>366</sup> In the case of material support-connected programs, EDNY could further lead. Because EDNY and SDNY pre-trial officers are already actively involved with managing diversion programs, these officers are prepared, and even eager, to contribute to reducing the federal prison population, especially for young defendants.<sup>367</sup> As discussed in Section III.C.ii, a coalition of human rights, civil liberties, and Muslim-American community-based organizations recommend that U.S. Attorneys' Offices and the FBI not be connected with CVE programs given their lead involvement in investigations and prosecutions.<sup>368</sup> Community organizations, probation officers, and judges are better situated to oversee these programs given they are certainly more neutral than the U.S. Attorney's Office.

This Note, drawing on these themes, other nations' deradicalization efforts, and the Minnesota program's success, expands upon those ideas to

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362. Berkell, *supra* note 17, at 22 (citing Seamus Hughes, *Domestic Counterterrorism: Material Support or Bust*, LAWFARE (Aug. 30, 2015, 10:03 AM), <https://www.lawfareblog.com/domestic-counterterrorism-material-support-or-bust> [<https://perma.cc/CY82-ACV2>]).

363. *See ISIS in America*, *supra* note 25.

364. *See generally* Wolff et al., *supra* note 102.

365. *See id.* at 6, 9–11.

366. *See* U.S. PRETRIAL SERVS. AGENCY, E. DIST. OF N.Y., *supra* note 109, at 7; U.S. SENT'G COMM'N, FEDERAL ALTERNATIVE-TO-INCARCERATION COURT PROGRAMS 31 (2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928\\_alternatives.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928_alternatives.pdf) [<https://perma.cc/WTK6-TUA8>].

367. *See* Wolff et al., *supra* note 102, at 11.

368. *See supra* Section III.C.ii.

explain how re-pluralization, choice, the role of family and community, and the ability to make some mistakes are also key matters to consider when devising a diversion program for people charged with material support. Below are general pillars for a material support alternative to incarceration program that considers the pitfalls of diversion programs generally and CVE programs specifically.

*i. Re-Pluralization*

Re-pluralization is the careful reintroduction of problems and solutions into a radicalized person's life, so that they actively choose to stop their dichotomous, overly suspicious thinking.<sup>369</sup> Re-pluralization “encourages reflection about whether a certain course of action is absolutely necessary, providing room for further intervention.”<sup>370</sup> In other words, radicalization is *de-pluralization* — “only recogniz[ing] problems, solutions and future scenarios associated with a specific ideology and not perceive[ing] alternative frames and interpretations of core political values.”<sup>371</sup> Coiner Daniel Koehler further explains that if one's *de-pluralization* is “based on devaluing other humans,” the radicalization process then leads to “use of violence as the only perceived feasible option to solve that psychological tension.”<sup>372</sup> Thus, *re-pluralization* is centered on learning problem-solving skills that, as Koehler explains, “relieves the tension between the ideological urgency to act and the lack of alternative solutions.”<sup>373</sup> Understanding that life is not binary is an important first step; the second step is then channeling energy into activities that fit with a participant's new mindset. Koehler traveled to Minneapolis to train probation officers who would work with Yusuf in the *re-pluralization-focused* program.<sup>374</sup> Koehler trained officers with lessons designed to assist with counseling people experiencing extremist thinking.<sup>375</sup> For example, in one exercise, Koehler showed a hypothetical teen's Facebook history, which indicated the hypothetical young person was “in the midst of being radicalized by the Islamic State.”<sup>376</sup> The social media history included a range of topics — everything from

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369. See Koerner, *Can You Turn a Terrorist*, *supra* note 1.

370. Koehler, *supra* note 22.

371. *Id.*

372. Sara Brzuszkiewicz, *An Interview with Daniel Koehler*, *German Institute on Radicalization and De-radicalization Studies*, EUR. EYE ON RADICALIZATION (Jan. 2, 2019), <https://eeradicalization.com/an-interview-with-daniel-koehler-german-institute-on-radicalization-and-de-radicalization-studies/> [<https://perma.cc/E4GB-BUKY>].

373. Koehler, *supra* note 22.

374. See Koerner, *Can You Turn a Terrorist*, *supra* note 1.

375. See *id.*

376. *Id.*

“anguished posts about his fictional father’s disapproval of his new lifestyle” to “comments on videos about the jihadis.”<sup>377</sup> The officers were supposed to notice that several of the posts featured images related to photography — for example, one photograph, captioned “Jihad Is Beautiful,” presented a group of Islamic State soldiers looking at the screen of a digital camera.<sup>378</sup> Koehler’s point was to illustrate the teen had once dreamed of becoming a photojournalist and that his re-pluralization should therefore include this passion for photography.<sup>379</sup>

Participants in re-pluralization education learn to understand why they were driven to extremist views and develop appropriate problem-solving skills. For example, a program participant could learn through analysis of the push-pull factors. Daisy Khan is the Executive Director of the Women’s Islamic Initiative in Spirituality and Equality and the editor of *WiseUp: Knowledge Ends Extremism*, a book representing “a community-led effort to address the issue of the rise of extremism, wherever it might be, but, also, to prevent the rise of Islamophobia in this country.”<sup>380</sup> Khan refers to push-pull factors as those that draw someone toward an FTO (the push: kindness from ISIS online community members) and those that draw someone away from western society (the pull: having one’s hijab pulled off while walking to school).<sup>381</sup> Khan is clear that many people drawn to ISIS are not motivated by the extremist ideology, but actually social isolation, trauma, and yearning for a life purpose.<sup>382</sup> Extremist groups’ effective manipulation allows disaffected young people to feel connected to a broader community and purpose.<sup>383</sup> Part of re-pluralization is first understanding the various push-pull factors in one’s life and then choosing to change behavior accordingly. The participant will begin to re-pluralize when he more fully understands the root cause of his interest in extremist ideologies and then recognizes that the singular organization cannot solve his problems. By

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377. *Id.*

378. *See id.*

379. *See id.*

380. *United States v. Ceasar*, 388 F. Supp. 3d 194, 212 (E.D.N.Y. 2019). Khan’s book *WiseUp* also compiled common misconceptions about American Muslims, including that, “according to Gallup, American Muslims are more likely than any other religious community to reject violence against civilians.” Habib Todd Boerger, *Book Review*, SPIRITUALITY & PRAC. 1 (reviewing DAISY KHAN, *WISEUP: KNOWLEDGE ENDS EXTREMISM* (2017)), <https://www.Spirituality&Practice.Com/Book-Reviews/View/28866/Wiseup> [<https://perma.cc/M7NL-R2YD>] (last visited Aug. 11, 2020). The book also “explores the emergence of violent extremism and its consequences, clarifying that more than 80 percent of victims are Muslim and that the majority of such incidents occur in majority-Muslim countries.” *Id.*

381. *See Ceasar*, 388 F. Supp. 3d at 212–13.

382. *See id.* at 212.

383. *See supra* Section II.B.

understanding the root cause of problems, individuals can then begin to see life in nuanced shades of gray, actively choosing to abandon their de-pluralized, binary thoughts and actions.

*ii. Choice*

Many of diversion programs' pitfalls stem from a lack of choice and therefore a lack of autonomy.<sup>384</sup> For example, although the Minneapolis program provided Yusuf the choice, and ultimately the opportunity, to participate, Judge Davis did not permit other defendants to participate after a one-time set date.<sup>385</sup> If a person is to change, they must be ready to take an active role in their life. Choice about education, programs, activities, or employment is a key aspect in allowing participants to begin to exercise autonomy over their own lives. For example, the Minneapolis program gave Yusuf options from which he could choose.<sup>386</sup> Some small: which books to read and review with his mentor.<sup>387</sup> And some more significant: whether to cease association with other suspects, who were friends.<sup>388</sup> By actively making choices for oneself, the program participant takes action steps to re-pluralize.

Choice is further discussed below as related to the role of family and community.

*iii. The Role of Family and Community*

Koehler believes that to be successful in re-pluralization, one must have stable and supportive relationships throughout rehabilitation.<sup>389</sup> This entails including community-based organizations, as opposed to merely probation officers, in the rehabilitation process. Koehler further explained that family therapy, if available, is key to ideological rehabilitation.<sup>390</sup> Koehler recommends groups not connected with the government, including Families for Life, which was founded by Nicola Benyahia after her son joined ISIS and died fighting on their behalf.<sup>391</sup> These groups are more likely to positively impact people charged with material support because their staff and volunteers can speak with personal knowledge about the program participants' experiences. This personal knowledge, that a probation officer

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384. *See supra* Section III.C.i.

385. *See* Walters, *supra* note 2.

386. *See supra* Section III.A.ii.

387. *See supra* Section III.A.ii.

388. *See* Koerner, *Can You Turn a Terrorist*, *supra* note 1; McEnroe, *supra* note 270.

389. *See* Martin, *supra* note 3.

390. *See* Walters, *supra* note 2.

391. *See id.*

would likely not have, helps to create stronger bonds, which are needed for personal emotional growth.

Another element of choice is the inclusion of one's family, or other support sources, in the rehabilitation process. Family, or other community support, is crucial in ensuring that changes made while in the program continue after the individual returns home. One example is the group Parents for Peace.<sup>392</sup> The group originally started as a support group for family, friends, and individuals who are former extremists or the relative of a former extremist.<sup>393</sup> Parents for Peace aims "to reframe extremism as a public health emergency" and "to put human faces to a problem typically addressed as a national security issue."<sup>394</sup> Members include the wife of a former Klansman, a man who identifies as a former neo-Nazi, and the aunt of a young man who died in Somalia while attempting to join ISIS.<sup>395</sup> The group's most well-known member is self-described "former Islamic jihadist" Tania Joya, whose ex-husband is Yahya al-Bahrumi, former highest-ranking American ISIS Commander.<sup>396</sup> The key aspects of Parents for Peace include "a no-judgment zone," allowing members from all different radicalized backgrounds<sup>397</sup> to participate with the goal "to set aside partisan differences and present a unified front against extremism."<sup>398</sup> This no-judgement zone allows for an individual to participate in the community, even while still wavering on deciding to deradicalize or not.<sup>399</sup> Mixed-ideology groups allow participants to focus on life decisions and root causes, as opposed to shared ideology. The no-judgment zone allows different extremist group members to realize the commonalities of said groups — preying on vulnerable youth, manipulation via social media, intense sense of community, and the requirement of extreme thought to participate in severe

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392. See *generally About Us*, PARENTS FOR PEACE, <https://www.parents4peace.org> [<https://perma.cc/KQ3Q-S4K6>] (last visited Aug. 8, 2020).

393. See Allam, *supra* note 332.

394. *Id.*

395. See *id.*

396. See Cyril Julien, *Ex-Jihadist Tania Joya Now Fights to 'Reprogram' Extremists*, YAHOO! NEWS (July 19, 2019), <https://news.yahoo.com/ex-jihadist-tania-joya-now-fights-reprogram-extremists-030911737.html> [<https://perma.cc/B449-MMDD>].

397. See Allam, *supra* note 332 (explaining how "[a]t the summit, a Somali Muslim with henna patterns on her hands sat next to an ex-skinhead with tattoos across his knuckles. They have political and religious differences; sometimes they squabble like family members").

398. *Id.* (including the Executive Director declaring "[w]e know that we vote differently from one another . . . I love all of you members that are conservative and that are liberal and independent or you don't care. We are on the same page").

399. See *id.*

actions.<sup>400</sup> As one Parents for Peace member explained, “[l]eaving was like kicking an addiction. ‘When you’re coming off of hate and extremism, it’s the same process . . . . You’ve got to have a support group. You’ve got to have a network.’”<sup>401</sup> In order for participants to share common ground about the ways various extremist ideologies are similarly unhealthy, the SDNY-EDNY program should include members of different ideological backgrounds. Otherwise, participants may be too enmeshed in their own thinking and ideology. Groups like Parents for Peace should be considered for contracts.

Another crucial aspect is the want to change — even if the desire to change comes from a loved one and not from the individual extremist-thinker himself.<sup>402</sup> Inspiration from family members or other loved ones is critical for change to actually occur.<sup>403</sup> Because not all material support defendants are charged in jurisdictions they call home or where they have community, the opportunity to participate in a program based in another jurisdiction is also key.

*iv. Opportunity to “Fail” Without Drastic Repercussions*

Young people will make mistakes. And as one Parents for Peace member shared, “[l]eaving was like kicking an addiction.”<sup>404</sup> In a similar vein, Koehler explained that because extremist radicalization promises that believers “will immediately start to change society and live out their ideals, . . . newly minted extremists often experience feelings of euphoria, much like addicts who’ve just discovered the drug that will be their doom.”<sup>405</sup> As clinical psychologist Katherine Porterfield explained at Ceasar’s sentencing

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400. *See id.* This approach is especially key given DOJ just started prosecuting members of MS-13 with material support. *See generally* Press Release, U.S. Att’y’s Off. for the E. Dist. of Va., MS-13 Leader in El Salvador Charged with RICO & Terrorism Offenses (July 15, 2020),

<https://www.justice.gov/usao-edva/pr/Ms-13-Leader-El-Salvador-Charged-Rico-&-Terrorism-Offenses> [<https://perma.cc/X2C2-BQ5M>]. There are many shared characteristics of individuals who make up the general recruitment base and membership ranks of ISIS and MS-13, including ideological similarities and why certain aspects of ideology appeal to those groups. *See generally* Robert Alvarez, *On Gangsters & ISIS Militants: Contemporary Manifestations of Marginalization & Anomie*, HUMAN. ACTION (Oct. 2016), [https://www.Humanityinaction.Org/Knowledge\\_Detail/On-Gangsters-&-Isis-Militants-Contemporary-Manifestations-Of-Marginalization-&-Anomie/](https://www.Humanityinaction.Org/Knowledge_Detail/On-Gangsters-&-Isis-Militants-Contemporary-Manifestations-Of-Marginalization-&-Anomie/) [<https://perma.cc/K2UT-8NEZ>].

401. Allam, *supra* note 332 (quoting Chris Buckley, a former Ku Klux Klan member).

402. *See id.*

403. *See id.* (explaining “[h]e is here because his wife, Melissa, decided in 2016 that she was tired of the toxic world of the KKK. She could no longer watch her 4-year-old son do the ‘white power’ salute to be like his dad. ‘I went into Google and I typed in: “How do you get your spouse or loved one out of a hate group?””).

404. Allam, *supra* note 332.

405. Koerner, *Can You Turn a Terrorist*, *supra* note 1.

hearing, just as alcoholics or those addicted to drugs can relapse, individuals struggling with extremist beliefs can also relapse.<sup>406</sup> Relapses occur because the trajectory of progress rarely goes in “a straight line.”<sup>407</sup> Porterfield explained that although relapses often lead to negative collateral consequences, sometimes relapses produce positive impacts for those in therapy;<sup>408</sup> a relapse gives a therapist and client the “meat” to work together to analyze the choices that led to the relapse.<sup>409</sup> Whether a person relapses by using drugs after staying sober, returning to an abusive partner, or re-connecting with members of an FTO, there is room for growth, and deeper understanding of one’s root problems, post-relapse.<sup>410</sup> A relapse for a material support defendant does not necessarily mean a violent act. For example, in Yusuf’s early days living in a halfway house after his arrest, he “relapsed” by hoarding a box cutter under his bed — a clear violation of halfway-house protocols.<sup>411</sup> Additionally, while out on bond, Cesar re-connected with the online ISIS community.<sup>412</sup> Both situations involved young people, Cesar, then 23, and Yusuf, then 19, committing serious violations of their supervised release requirements.<sup>413</sup> Either situation could have warranted a judge deciding that the person was not worthy of further chances, but in both cases, the judges deemed each defendant still worthy of a second, or even third, chance.<sup>414</sup> Program officials should expect that, similar to a relapse, some mistakes will happen and that each participant should receive the opportunity for an individualized hearing to determine their ongoing suitability for the program.

These four categories — re-pluralization, choice, family and community, and the opportunity to fail without drastic repercussions — are some of the necessary considerations for creating an SDNY-EDNY alternative to incarceration program for young people charged with material support. Alternatives to incarceration are needed not only because young people deserve the opportunity to grow but also because it is in the nation’s best

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406. *See* United States v. Cesar, 388 F. Supp. 3d 194, 215 (E.D.N.Y. 2019).

407. *Id.*

408. *See id.* at 216.

409. *See id.*

410. *See id.* at 215–16.

411. *See* Katie Zavadski, *Group with No Jihadi Experience Rehabs ISIS Recruit*, DAILY BEAST (Apr. 14, 2017, 9:50 AM), <https://www.thedailybeast.com/group-with-no-jihadi-experience-rehabs-isis-recruit> [<https://perma.cc/PB3S-7RPF>] (explaining “the halfway house’s inspection of Yusuf’s room turned up a box cutter, which got him kicked out of the home — but not out of rehab”).

412. *See Cesar*, 388 F. Supp. 3d at 203.

413. *See id.*; Zavadski, *supra* note 411.

414. *See Cesar*, 388 F. Supp. 3d at 220; Zavadski, *supra* note 411. Cesar could have received up to 50 years in prison. *See Cesar*, 388 F. Supp. 3d at 223. Yusuf could have received up to 15 years. *See Koerner, Can You Turn a Terrorist, supra* note 1.



national security interest. First-time radicalization, as well as deepening radicalization, can occur in prison.<sup>415</sup> Other nations have more robust deradicalization programs because they recognize prison time greatly impacts their national security.<sup>416</sup> Additionally, monetary costs are comparable for imprisonment or diversion programs.<sup>417</sup> And the science is clear — human brains develop up until the mid to late twenties.<sup>418</sup> Young people's brains are undeveloped and, therefore, more open to change; young people have reduced culpability because they are naturally predisposed to impulsive decision making and negative peer influence.<sup>419</sup> Furthermore, when material support defendants are not incarcerated, they are still heavily surveilled on supervised release.<sup>420</sup> The intensity of supervised release is mitigated by the fact there has been very little recidivism of those convicted of crimes of terror since September 11.<sup>421</sup> It is best for the broader community if the defendant has an opportunity to deradicalize.

There is the possibility of a Willie Horton effect. If the Willie Horton effect occurred for rape and assault,<sup>422</sup> it would occur if terrorist activity originated from someone who completed a diversion program. It is important to consider that almost all people convicted of material support will eventually be released, whether that is after incapacitation, a diversion program, or some combination of both. Unfortunately, further terror activity can never be permanently ruled out. This Note proposes it is more ethical and effective to strive, and possibly fail, to rehabilitate the young material support defendant as opposed to allowing them to possibly further radicalize in prison.<sup>423</sup>

### CONCLUSION

The material support statutes have great breadth. And with great breadth should come extremely individualized decisions so that no one person is incapacitated for longer than necessary. Given the extensive literature and common understanding that young people deserve different opportunities from our criminal legal system, there should be more rehabilitation and reintegration opportunities for young people charged with material support.

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415. *See supra* Section II.A.ii.

416. *See supra* Section III.A.i.

417. *See supra* Section I.D.

418. *See supra* Section II.B.

419. *See supra* Section II.B.

420. *See supra* Section II.A.iii.

421. *See* Hodwitz, *supra* note 183, at 54.

422. *See* Pfaff, *supra* note 327.

423. This is even more true given that material support defendants' actions rarely lead to any identifiable harm or imminent risk of harm. *See* Ahmed, *supra* note 12, at 1530.

Furthermore, it is in the nation's public safety interests to focus on rehabilitation given the majority of material support defendants are young Americans who will return home after incarceration. Rehabilitation is a necessity given the alarming data about radicalization in prison. No matter where on the radicalization spectrum, it is best for the broader community if the defendant has an opportunity to deradicalize.

One of the first steps in combatting radicalization should be providing smarter, more effective opportunities to re-pluralize those who are, or could be, radicalized. EDNY and SDNY should expand upon the work of the District of Minnesota and create their own diversion program for young people charged with material support. With a robust pre-trial services team knowledgeable about alternatives to incarceration programming and nearly one-fifth of all ISIS-related cases charged in EDNY and SDNY, these two districts could serve as the nation's leader in brave, necessary, and compassionate rehabilitation. A tailored diversion program for young people charged with material support will combat excessively harsh sentences and do more to prevent terror than incapacitation.

There is no question that ISIS's power is dwindling.<sup>424</sup> Many say the caliphate is dead.<sup>425</sup> But, alternatives to incarceration for those charged with material support remain important. Extremist groups are not going anywhere. In fact, the Trump Administration recently declared MS-13 an FTO, and would like to declare Antifa one, thereby expanding FTOs to include unorthodox, previously-unthinkable organizations.<sup>426</sup> With DOJ's latest decision to charge alleged MS-13 members with material support and President Trump's promise to "designate [A]ntifa a terrorist organization,"<sup>427</sup> the need for material support diversion programs endures.

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424. See generally Haroro J. Ingram & Asaad Almohammad, *Caliph Dead, Caliphate Destroyed, New Era Begins: Legacy, Leadership, & the Global Jihad*, GEO. WASH. PROGRAM EXTREMISM,

[https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/Ingram%20%26%20almohamed%20poe%20blog%20post%202-\\_0.pdf](https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/Ingram%20%26%20almohamed%20poe%20blog%20post%202-_0.pdf) [https://perma.cc/J66J-746S].

425. See generally *id.*

426. See Allam, *supra* note 332; see also Ken Klippenstein, *Homeland Security Is Quietly Tying Antifa to Foreign Powers*, NATION (Aug. 3, 2020), <https://www.thenation.com/article/society/dhs-antifa-syria> [https://perma.cc/NWD8-SDWR].

427. Klippenstein, *supra* note 426 (explaining how a former senior DHS intelligence officer said "[t]hey targeted Americans like they're Al Qaeda." The officer, who served for years in the DHS's Office of Intelligence & Analysis (I&A), "compared the operations to the illegal surveillance of activists during the civil rights era. They essentially were violating people's rights like this was the '60s . . . the type of shit the Church and Pike committee[s] had to address." He further explained that "[d]esignating someone as foreign-sponsored can make a huge legal and practical difference in the government's ability to pursue them").