

March 2016

Detect, Disrupt, and Detain: Local Law Enforcement's Critical Roles in Combating Homegrown Extremism and the Evolving Terrorist Threat

Mitch Silber
K2 Intelligence

Adam Frey
K2 Intelligence

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>

 Part of the [Law Enforcement and Corrections Commons](#), [Military, War, and Peace Commons](#), [National Security Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Mitch Silber and Adam Frey, *Detect, Disrupt, and Detain: Local Law Enforcement's Critical Roles in Combating Homegrown Extremism and the Evolving Terrorist Threat*, 41 Fordham Urb. L.J. 127 (2013).
Available at: <https://ir.lawnet.fordham.edu/ulj/vol41/iss1/7>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

DETECT, DISRUPT, AND DETAIN: LOCAL LAW ENFORCEMENT’S CRITICAL ROLES IN COMBATING HOMEGROWN EXTREMISM AND THE EVOLVING TERRORIST THREAT

*Mitch Silber & Adam Frey**

Introduction	128
I. The Al-Qaeda Threat to the Homeland 2013	130
A. Al-Qaeda Core	131
B. Affiliates and Allies	132
C. Al-Qaeda Inspired (or Homegrown).....	134
II. Radicalization and Detection	136
A. The Radicalization Process	136
B. Online Radicalization	140
III. Local Law Enforcement’s Role	144
A. Local Law Enforcement’s Comparative Advantages	145
1. Manpower	146
2. General Police Power/Knowledge of the Community.....	147
3. Greater Accountability to Local Concerns	150
B. The Legal Framework: The NYPD and <i>Handschu</i> . A Case Study.....	151
1. Background.....	151
2. Investigations Under Current <i>Handschu</i> Guidelines	154
a. Leads	155
b. Preliminary Inquiries.....	156
c. Full Investigations.....	156

* Mitch Silber was the Director of Intelligence Analysis at the NYPD from 2007 to 2012. He is also a visiting lecturer at Columbia University’s School for Public and International Affairs. He earned an M.A. in International Affairs from Columbia University and a B.A. from the University of Pennsylvania. Adam Frey was a Senior Intelligence Research Specialist with the NYPD from 2009 to 2013. He graduated Order of the Coif from the University of Virginia School of Law. Both currently work at K2 Intelligence.

d. Terrorism Enterprise Investigations.....	157
e. Investigative Techniques.....	158
3. Other Authorizations Under <i>Handschu</i>	158
IV. Prosecution.....	160
A. State Level Prosecutions	161
1. Ahmed Ferhani.....	161
2. Jose Pimentel	163
B. Federal Criminal Statutes	164
1. Background.....	164
2. Dissemination of Bomb Making Material/Information	167
3. Solicitation	169
4. Communicating Threats	171
Conclusion.....	174

*As this thing metastasizes, cops are it. We are going to win this at the local level.*¹

INTRODUCTION

Over the last dozen years, the great cities of the West—New York, London, Madrid, Amsterdam, Boston, Toronto, Sydney, and Los Angeles, among others—have been under the almost constant threat of al-Qaeda type² terrorism.³ There have been many plots against American cities.⁴ Some have been planned and directed from al-

1. William Finnegan, *The Terrorism Beat: How is the N.Y.P.D. Defending the City?*, NEW YORKER (July 25, 2005), http://www.newyorker.com/archive/2005/07/25/050725fa_fact2.

2. Almost twelve years after the September 11, 2001 attacks, the very definition of what Al-Qaeda as an organization is and what type of threat it represents have evolved to a point where clarification and definition are required before even beginning the discussion. For the benefit of this Article, a broad definition of “al-Qaeda,” referring to a loose global alliance of like-minded Sunni jihadist terrorist organizations that may share affinity, an alliance, operational coordination and/or personnel/weapons, and are intent on attacking Western interests both locally and abroad under the banner “al-Qaeda,” will serve as the definition of the group, rather than the more narrowly defined “al-Qaeda Core,” whose presence was generally limited to Afghanistan, Pakistan, and Yemen.

3. *See generally* MITCHELL D. SILBER, *THE AL QAEDA FACTOR: PLOTS AGAINST THE WEST* (2012).

4. James Jay Carafano et. al., *Fifty Terror Plots Foiled Since 9/11: The Homegrown Threat and the Long War on Terrorism*, HERITAGE FOUND. (Apr. 25, 2012), <http://www.heritage.org/research/reports/2012/04/fifty-terror-plots-foiled-since-9-11-the-homegrown-threat-and-the-long-war-on-terrorism>; *see also* Sebastian Rotella, *U.S. Sees Homegrown Muslim Extremism as Rising Threat*, L.A. TIMES, Dec. 7, 2009, <http://articles.latimes.com/2009/dec/07/nation/la-na-us-radicalization7->

Qaeda or its affiliates abroad, whereas others have been hatched by small cells of so-called homegrown terrorists and/or lone wolves inspired by al-Qaeda's ideology.⁵ And, while the vast majority of these plots have been thwarted, some have succeeded with deadly impact.⁶ As the recent al-Qaeda-inspired terrorist attack in Boston of April 2013 demonstrated, despite the death of Osama bin Laden, the al-Qaeda type threat to the U.S. homeland—and cities in particular—remains both real and deadly.⁷

Given that terrorist threats to urban environments are unlikely to abate any time soon, and that cities must seek to protect their citizens from terrorism, local police departments have to consider how best to counter this menace. At the same time, local police departments must balance the competing challenges that urban counterterrorism initiatives raise from security, law enforcement, intelligence and civil liberties perspectives. More broadly, local law enforcement has to understand the nature of the threat, which necessarily informs how it should be best thwarted.

This Article argues that the threat is three-fold: from al-Qaeda “Core”; al-Qaeda's regional affiliates and allies; and homegrown extremists. Moreover, as U.S. military and intelligence operations overseas continue to put pressure on the first two elements, the threat is likely to metastasize and become further decentralized.⁸ While the threat from al-Qaeda Core and its overseas affiliates and allies will remain, we have seen over the last five to seven years that these so-called “homegrown extremists”—who are radicalized here in the United States, often in urban centers and often over the Internet—present one of the most serious terrorism threats to the homeland.⁹

2009dec07 (noting, among others, disrupted plots that targeted New York City, Dallas, Detroit, and Raleigh, N.C.).

5. Carafano et. al., *supra* note 4.

6. *Id.*

7. John Eligon & Michael Cooper, *Blasts at Boston Marathon Kill 3 and Injure 100*, N.Y. TIMES, Apr. 16, 2013, http://www.nytimes.com/2013/04/16/us/explosions-reported-at-site-of-boston-marathon.html?pagewanted=all&_r=0. The injury toll was subsequently increased to at least 264. *See, e.g., Boston Marathon Terror Attack Fast Facts*, CNN U.S. (July 11, 2013, 12:06 PM), <http://www.cnn.com/2013/06/03/us/boston-marathon-terror-attack-fast-facts> (noting that the April 15, 2013 bombings killed three people and injured at least 264).

8. *See* SILBER, *supra* note 3, at 295; *see also* PHILIP MUDD, TAKE DOWN: INSIDE THE HUNT FOR AL QAEDA 79 (2009) (noting “the evolution of the threat, from a central organization to dispersed cells or individuals espousing an al-Qaeda-ist ideology”).

9. This Article does not take a position on the ongoing debate in the counterterrorism community about which of these three elements currently presents the primary threat to the United States. *See, e.g.,* Elaine Sciolino & Eric Schmitt, *A*

This Article will focus on the third leg of the stool: the threat of homegrown extremists. In particular, it addresses some of the problems this phenomenon presents, as well as the tools available to law enforcement and intelligence agencies to combat it in urban environments. Finally, it will focus in particular on the role of local law enforcement in combating this threat.

Part I of this Article begins by describing and defining the nature of the al-Qaeda threat in general, and that of homegrown extremism in particular. Part II then addresses the question of radicalization—the process by which homegrown extremists may be moved to violence. Given the often solitary nature of small cells of homegrown extremists and/or lone wolves, Part III then turns to the questions of how law enforcement and intelligence agencies can detect and disrupt groups of individuals who may be radicalizing. The Article emphasizes in particular the role of local law enforcement agencies and the comparative advantages such agencies may have in detecting and combating homegrown radicalization. The Article then turns to the New York City Police Department (NYPD) as a case study, reviewing the legal regime that governs the steps the NYPD can take to investigate, monitor, and/or disrupt potentially aspiring terrorists after their detection but prior to their mobilizing to action. Part IV of the Article then addresses some of the post-investigative tools available to the government at both the state and federal level to prosecute homegrown extremists *before* they have a chance to conduct a violent attack.

I. THE AL-QAEDA THREAT TO THE HOMELAND 2013

In discussing the nature of the al-Qaeda threat to the homeland, as well as how to counter it, there is a useful framework to disaggregate the component pieces into three categories with corollary geographic loci: (1) al-Qaeda Core (Afghanistan/Pakistan); (2) al-Qaeda Affiliates and Allies, such as al-Qaeda in the Arabian Peninsula

Not Very Private Feud Over Terrorism, N.Y. TIMES, June 8, 2008, <http://www.nytimes.com/2008/06/08/weekinreview/08sciolino.html?pagewanted=all> (describing the debate between Bruce Hoffman, who believes the primary threat comes from al-Qaeda, and Marc Sageman, who argues it comes from unaffiliated, radicalized individuals). See generally Bruce Hoffman & Marc Sageman, *Does Osama Still Call the Shots? Debating the Containment of Al Qaeda's Leadership*, FOREIGN AFFAIRS, May/June 2008, <http://www.foreignaffairs.com/articles/64460/marc-sageman-and-bruce-hoffman/does-osama-still-call-the-shots>. Rather, we maintain that the threat will continue to come from all three elements, and thus law enforcement and intelligence agencies must be prepared to counter the threat from all three, accordingly.

(Yemen), al Shabaab (Somalia), al-Qaeda of the Islamic Maghreb (Mali/Mauritania) and Boko Haram (Nigeria); and (3) the homegrown threat that emanates from within the United States. Each of these components will be discussed in turn.

A. Al-Qaeda Core

Al-Qaeda Core served as the central node of the group. Its leadership hierarchy included Osama bin Laden and Ayman al-Zawahiri, among others, and it had been based in Afghanistan leading up to the September 11, 2001 attacks.¹⁰ In a May 2013 speech about terrorism, President Obama noted, “Today, the core of al-Qaeda in Afghanistan and Pakistan is on the path to defeat. Their remaining operatives spend more time thinking about their own safety than plotting against us.”¹¹ Debate continues among terrorism experts regarding how much al-Qaeda Core has been degraded in the more than twelve years since 9/11 by bombing campaigns, drone strikes, Special Forces operations and other capture and arrest operations in coordination with Pakistani and Afghan authorities.¹² Yet, few dispute that al-Qaeda Core is substantially weaker than it has been in more than a decade, having lost senior leaders and its safe haven.¹³ Consequently, a weaker al-Qaeda Core is less likely to be

10. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT* 55 (2004).

11. Barack Obama, President of the United States, Remarks at the National Defense University (May 23, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

12. *See Country Reports on Terrorism 2012: Chapter 1: Strategic Assessment*, U.S. DEP’T STATE (May 30, 2013), <http://www.state.gov/j/ct/rls/crt/2012/209978.htm>.

The al-Qa’ida (AQ) core, under the direction of Ayman al-Zawahiri, has been significantly degraded as a result of ongoing worldwide efforts against the organization. Usama bin Laden’s death was the most important milestone in the fight against AQ, but there have been other successes—dozens of senior AQ leaders have been removed from the fight in the Afghanistan-Pakistan region. Ilyas Kashmiri, one of the most capable AQ operatives in South Asia, and Atiya Abdul Rahman, AQ’s second-in-command, were killed in Pakistan in 2011. AQ leaders Abu Yahya Al-Libi and Abu Zaid al-Kuwaiti were killed in 2012. As a result of these leadership losses, the AQ core’s ability to direct the activities and attacks of its affiliates has diminished, as its leaders focus increasingly on survival.

Id.

13. *Id.* But see Mary Habeck, *Evaluating the War with Al Qaeda, Part IV: How Well Are We Doing?* FOREIGN POLICY (Apr. 17, 2012, 1:09 PM), http://shadow.foreignpolicy.com/posts/2012/04/17/evaluating_the_war_with_al_qaeda_part_iv_how_well_are_we_doing (taking a slightly contrarian view, but defining al-Qaeda core much more broadly to essentially include the affiliates as “core”).

able to conduct complex operations directed against Western and American cities.

Thus, the likelihood that al-Qaeda Core might be able to direct trained operatives from its “core” in Afghanistan and Pakistan to attack an American city, as was done in the 2009 Najibullah Zazi plot against the New York City subway system,¹⁴ has been significantly reduced for now.¹⁵ As President Obama noted in May 2013, “They’ve not carried out a successful attack on our homeland since 9/11.”¹⁶ Nevertheless, should the security situation deteriorate in Afghanistan and Pakistan as the U.S. pulls back forces and reigns in its drone program, there is a possibility that al-Qaeda Core may have an opportunity to reconstitute itself to some degree and reconstitute some of its capabilities.¹⁷

B. Affiliates and Allies

During the same time period, the al-Qaeda movement has metastasized to ungoverned regions of the world that are difficult to reach and may have their own organic violent extremist groups with local agendas who are willing to formally ally or informally align themselves with al-Qaeda Core.¹⁸ This diffuse and decentralized element of al-Qaeda affiliates and allies has varying types of relationships with the core organization as well as each other. These relationships range from sharing operatives, to training, to just a loose

We will, however, draw quite a different conclusion if we look at how al Qaeda is faring in the rest of the world. On September 11, al Qaeda controlled perhaps a half-dozen camps in one safe-haven (Afghanistan) and had a few tentative alliances with other jihadist groups that had mostly local concerns. Today al Qaeda has multiple safe-havens (in northern Pakistan, Somalia, Yemen, the Sahel); controls branches in many countries that share al Qaeda’s global aspirations; holds territory through shadow governments that force local Muslims to follow al Qaeda’s version of sharia; and is waging open war on numerous battlefields (Afghanistan, Somalia, Yemen, Mali, etc.). Most tellingly, it is involved—sometimes weakly, at other times in strength—in every Muslim-majority country in the world.

Id.

14. See Press Release, Dep’t of Justice, Najibullah Zazi Indicted for Conspiracy (Sept. 24, 2009), <http://www.justice.gov/opa/pr/2009/September/09-ag-1017.html>.

15. See Obama, *supra* note 11.

16. *Id.*

17. Matthew Rosenberg & Julian E. Barnes, *Al Qaeda Makes Afghan Comeback*, WALL ST. J., Apr. 6, 2011, <http://online.wsj.com/article/SB10001424052748704355304576215762431072584.html>.

18. Mitchell D. Silber, *The Ever-Evolving Al-Qaeda Threat*, FOREIGN POL’Y MAG. (May 16, 2013), http://afpak.foreignpolicy.com/posts/2013/05/16/the_evolution_of_a_threat.

affiliation via nomenclature. These include groups such as al-Qaeda in the Arabian Peninsula in Yemen, al Shabaab in Somalia, al-Qaeda of the Islamic Maghreb in North Africa, Boko Haram in Nigeria, and jihadist groups in Pakistan like Lashkar-e-Taiba or Tehrik-e-Taliban.¹⁹

President Obama both identified this element of the threat and acknowledged their collective desire to attack the continental United States²⁰:

Instead, what we've seen is the emergence of various al-Qaeda affiliates. From Yemen to Iraq, from Somalia to North Africa, the threat today is more diffuse, with Al-Qaeda's affiliates in the Arabian Peninsula—AQAP—the most active in plotting against our homeland. And while none of AQAP's efforts approach the scale of 9/11, they have continued to plot acts of terror, like the attempt to blow up an airplane on Christmas Day in 2009.²¹

Many counterterrorism analysts share the President's view of the general threat from al-Qaeda affiliates, and agree that the Yemeni branch poses the greatest threat to the United States of all the groups.²²

While some of these groups' grievances are local, directing much of their efforts to the zones of conflict in which they are based, as these groups gain confidence and stature and seek to take a more significant role on the world stage, they may seek to attack the United States in its cities.²³ Indeed, this has already happened twice from two separate affiliates—first, the AQAP-directed plot to blow up an airliner headed for Detroit on Christmas Day 2009, and then the May 2010 New York City “Times Square Bomber,” whose mission was directed by Tehrik-e-Taliban.²⁴

19. *Id.*

20. *See* Obama, *supra* note 11.

21. *Id.*

22. Cory Bennett, *How Al-Qaida in Yemen Became the Biggest Terrorist Threat to the U.S.*, NAT'L J. (Dec. 14, 2012), <http://www.nationaljournal.com/political-landscape-podcast/how-al-qaida-in-yemen-became-the-biggest-terrorist-threat-to-the-u-s-20121214>.

23. Brian Michael Jenkins, *What Would Al Qaeda's PowerPoints Say?*, RAND BLOG (Aug. 23, 2013), <http://www.rand.org/blog/2013/08/what-would-al-qaedas-powerpoints-say.html>.

24. *See, e.g.*, Katherine Zimmerman, *Al-Qaeda and Its Affiliates in 2013*, AM. ENTERPRISE INST. CRITICAL THREATS (Apr. 25, 2013), <http://www.slideshare.net/CriticalThreats/al-qaeda-and-its-affiliates-in-2013> (identifying the December 2009 attempted attack as the first of three times that AQAP “has attempted to strike the U.S. homeland”); *Pakistani Taliban Behind Times Square Bomb Plot, Officials Say*, FOX NEWS (May 9, 2010), <http://www.foxnews.com/politics/2010/05/09/pakistani>

It may be difficult to predict or detect when others of these affiliates or allies decide to change their strategy from “the local to the global.” Based on recent history, however, which saw Western cities like Copenhagen and Sydney as well as New York and Detroit targeted by these groups, the threat that one of these groups might send operatives to American cities to carry out attacks in their group’s name should be considered quite real.²⁵

C. Al-Qaeda Inspired (or Homegrown)

The United States saw few, if any, homegrown, al-Qaeda-inspired plots in the immediate years after September 2001. However, the plot against Fort Dix, which was thwarted in April of 2007, heralded a wave of plots, arrests and even some successful attacks among al-Qaeda-inspired extremists in the United States, who had little if any operational links to al-Qaeda.²⁶ As noted in the May 2008 Senate Committee on Homeland Security and Governmental Affairs Report, *Violent Islamist Extremism, the Internet, and the Homegrown Terrorist Threat*, “These incidents and others form part of a growing trend that has raised concerns within the U.S. intelligence and law enforcement communities.”²⁷ The report quoted from then-Director of National Intelligence Mike McConnell’s testimony before the Senate Select Committee on Intelligence on February 5, 2008, stating that:

Over the next year, attacks by “homegrown” extremists inspired by militant Islamic ideology but without operational direction from al-Qa’ida will remain a threat to the United States or against U.S. interests overseas. The spread of radical Salafi Internet sites that provide religious justification for attacks, increasingly aggressive and violent anti- Western rhetoric and actions by local groups, and the growing number of radical, self- generating cells in Western countries that identify with violent Salafi objectives, all suggest

taliban-times-square-bomb-plot-holder-says/ (quoting then White House Counterterrorism Advisor John Brennan, who stated, “It looks as though [Shahzad] was operating on behalf of the Tehrik-e-Taliban Pakistan.”).

25. See STEPHEN TANKEL, LASHKAR-E-TAIBA: FROM 9/11 TO MUMBAI (2009), available at http://www.ps.au.dk/fileadmin/site_files/filer_statskundskab/subsites/cir/pdf-filer/Tankel_01.pdf; Sebastian Rotella, *Mumbai: The Plot Unfolds, Lashkar Strikes and Investigators Scramble*, PROPUBLICA (Nov. 14, 2010, 10:36 PM), <http://www.propublica.org/article/mumbai-attacks-david-coleman-headley-part-2>.

26. JOSEPH LIEBERMAN & SUSAN COLLINS, U.S. SENATE COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, *Violent Islamist Extremism, the Internet, and the Homegrown Terrorist Threat 2* (2008), available at http://www.hsgac.senate.gov/public/_files/IslamistReport.pdf.

27. *Id.* at 3.

growth of a radical and violent segment among the West's Muslim populations . . . The al-Qaida-propagated narrative of an “us versus them” struggle serves both as a platform and a potential catalyst for radicalization of Muslims alienated from the mainstream U.S. population.²⁸

Some of these plots included the JFK Airport Plot (June 2007), the Riverdale Synagogue Plot (May 2009), the Raleigh Jihad Group Plot (July 2009), the Smadi Dallas Skyscraper Plot (September 2009), the Finton, Springfield, Illinois Plot (September 2009), the Fort Hood Attack (November 2009), the Farouq Ahmed Washington Metro Plot (October 2010), and the Mohamed Osman Mohamud, Portland Christmas Tree Plot (November 2010).²⁹ While this wave crested by the end of 2010, since then there still have been some consequential plots and arrests, punctuated by the deadly Marathon Bombing in Boston on April 15, 2013, which killed four and wounded more than 250.³⁰

While these cases of al-Qaeda-inspired terrorism in the United States have involved American citizens or legal residents who have radicalized and then mobilized to violence in the West, some Americans have traveled (or sought to travel) abroad to train with or join al-Qaeda core or an affiliate.³¹ Others traveled abroad to a zone of conflict to fight, but were redirected back to the United States to carry out attacks, their terrorist masters recognizing that their U.S. passports made them more valuable at home.³²

28. *Id.* (quoting Director McConnell's Feb. 5, 2008 testimony before the Senate Select Committee on Intelligence).

29. *See* Carafano et al., *supra* note 4. President Obama noted this trend in his May 2013 speech when he said,

[F]inally, we face a real threat from radicalized individuals here in the United States. Deranged or alienated individuals—often U.S. citizens or legal residents—can do enormous damage, particularly when inspired by larger notions of violent jihad. And that pull towards extremism appears to have led to the shooting at Fort Hood and the bombing of the Boston Marathon.

Obama, *supra* note 11.

30. *See* Eligon & Cooper, *supra* note 7.

31. Faisal Shahzad, Mohamed Alessa, and Carlos Almonte are examples of Americans who traveled or sought to travel overseas and join terrorist groups, such as Tehrik-e-Taiban and Al Shabaab. *See generally* Complaint, United States v. Alessa & Almonte, No. 10-8109 (MCA) (D.N.J. June 4, 2010), *available at* http://media.nj.com/ledgerupdates_impact/other/unsealedcomplaint.pdf; Complaint, United States v. Shahzad, No. 10-MAG-928 (S.D.N.Y. May 4, 2010), *available at* <http://s3.amazonaws.com/nytdocs/docs/333/333.pdf>.

32. Najibullah Zazi, Adis Medunjanin, and Zarein Ahmedzay traveled overseas to fight American forces in Afghanistan but were redirected back to the United States by al-Qaeda. *See* SILBER, *supra* note 3, at 162.

Potential terrorists who travel abroad present opportunities for the federal government to detect them as they exit and reenter the United States, or when they are communicating with overseas terrorists. Homegrown terrorists who do not travel abroad do not present similar opportunities. Therefore, they present a unique challenge for federal and local U.S. law enforcement to detect, investigate and ultimately disrupt from their operational planning. This Article focuses on the challenges presented by the latter group, and specifically on the role of local law enforcement in countering those challenges.

II. RADICALIZATION AND DETECTION

A. The Radicalization Process

In the post-9/11 environment, the job of law enforcement and intelligence is to thwart and disrupt plots before they come to fruition.³³ It is no longer good enough to investigate the act after the fact.³⁴ Operatives sent by overseas groups to the United States provide certain signatures that law enforcement and intelligence may have a chance to detect as they enter the country—such as suspicious travel patterns or communications with an overseas group or via intelligence gathered abroad.³⁵ Federal intelligence agencies ranging from the National Security Agency, the Central Intelligence Agency, Customs and Borders Protection, and the Federal Bureau of Investigation are arrayed to detect these types of threats and have been successful in certain cases. However, if the operatives are in the United States and have either not traveled or were able to return undetected, it may prove more difficult for law enforcement and intelligence to detect them before they strike.

33. See, e.g., David Gomez, *How Robert Mueller Transformed the FBI into a Counterterrorism Agency*, VALLEY NEWS (June 9, 2013), <http://www.vnews.com/opinion/6780499-95/column-how-robert-mueller-transformed-the-fbi-into-a-counterterrorism-agency> (“At the direction of [President George W.] Bush, FBI Director Mueller ordered this focus on prevention—at the expense, if need be, of prosecution.”).

34. *Id.*

35. Dan Amira, *Did Controversial NSA Spy Programs Really Help Prevent an Attack on the Subway?*, N.Y. MAG. (June 10, 2013, 10:04 AM), <http://nymag.com/daily/intelligencer/2013/06/nsa-prism-zazi-subway-feinstein-rogers-phone.html> (discussing how NSA monitoring of a particular email address linked to al-Qaeda gave the U.S. government the insight to begin surveillance of Najibullah Zazi after he attempted to contact al-Qaeda from Colorado, triggering FBI surveillance of the subject and leading ultimately to his arrest).

This challenge begs two others with which the intelligence community has struggled since the 2004 attack in Madrid, which was conducted by long-time Spanish residents.³⁶ The first is determining whether there is some type of pattern that maps out how a nonviolent individual turns to violence; and the second, related challenge is determining whether individuals in the midst of turning to violence provide signatures or indicators that this process is unfolding. Consequently, governmental entities, law enforcement agencies, and intelligence agencies in the United States, the United Kingdom, Canada, and other Western democracies have attempted to identify behavioral patterns that are common to those who ultimately have turned to violence in past cases and use the detection of individuals who exhibit those behavioral patterns as indicators of persons who may be in the process of becoming terrorists, thus providing a means to detect them in advance of an attack.³⁷

The New York City Police Department sought to investigate these questions, and in 2007 published a landmark study, *Radicalization in the West: The Homegrown Threat*.³⁸ As Senior Advisor to the Rand Corporation, Brian Jenkins noted, “Although there have been informative analyses of the paths to violent jihad in individual countries, this is the most comprehensive review across national boundaries, including the terrorist conspiracies uncovered in the United States.”³⁹ The study analyzed the trajectories of radicalization to violence in eleven plots, spanning Europe, North America, and Australia.⁴⁰ One of its most important findings was the identification of a human behavior model for radicalization to violence where, “[t]he four stages of the radicalization process, each with its distinct set of indicators and signatures, are clearly evident in each of the nearly one dozen terrorist-related case studies reviewed in this report.”⁴¹ Moreover, “[i]n spite of the differences in both circumstances and environment in each of the cases, there is a remarkable consistency in the behaviors and trajectory of each of the

36. See SILBER, *supra* note 3, at 205.

37. For example, the Senate Committee on Homeland Security and Governmental Affairs held a series of hearings on “The Threat of Islamic Radicalism to the Homeland” from at least 2006 through February 2011.

38. See generally MITCHELL D. SILBER & ARVIN BHATT, N.Y. CITY POLICE DEP’T, *RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT* (2007), available at http://www.nypdshield.org/public/SiteFiles/documents/NYPD_Report-Radicalization_in_the_West.pdf.

39. *Id.* at 11.

40. See generally *id.*

41. *Id.* at 7.

plots across all the stages.”⁴² And, “[t]his consistency provides a tool for predictability.”⁴³ Similar to the NYPD, the FBI delineated four stages in a radicalization process, which are reflected in the chart reproduced in a FBI bulletin.⁴⁴

While this report was the first of its kind to be released in the public domain, a variety of think tanks, academics, and national security and intelligence agencies began their own studies of radicalization to violence, with terrorism as the endpoint and came to similar conclusions, albeit with slightly different models.⁴⁵ For example, the British think tank Demos published a study noting that:

Becoming a terrorist was not always a natural or linear progression from being a radical. Those who turned to violence often followed a path of radicalisation [sic] which was characterised [sic] by a culture of violence, in-group peer pressure, and an internal code of honour [sic] where violence can be a route to accruing status. Certain signs of radicalisation [sic] to violence are visible from this vantage point, for example: distribution of jihad videos, clashes with existing mosque authorities, debates between ‘do-ers’ and ‘talkers’, deep engagement in literature that explains how to determine a kafir and what is permissible once you know, and any criminal activity undertaken in this respect. These manifestations are potentially useful indicators for local police agencies, community

42. *Id.*

43. *Id.*

44. See FAIZA PATEL, BRENNAN CTR. FOR JUSTICE, RETHINKING RADICALIZATION 14–18 (2011). Beyond the scope of this Article, there is also a field of study on “counter radicalization”—the process by which at-risk individuals can be prevented or dissuaded from radicalizing in the first place or, failing that, the process by which radicalized individual can be brought back from the ledge. Like the question of which element of the threat is the greatest at the moment, there is significant debate about different counter-radicalization programs and their effectiveness vel non. See, e.g., BRIAN FISHMAN & ANDREW LEBOVICH, NEW AM. FUND., COUNTERING DOMESTIC RADICALIZATION: LESSONS FOR INTELLIGENCE COLLECTION AND COMMUNITY OUTREACH (2011), available at http://www.newamerica.net/sites/newamerica.net/files/policydocs/Fishman_Lebovich_Domestic_Radicalization.pdf. See generally PETER NEUMANN, BIPARTISAN POLICY CTR., PREVENTING VIOLENT RADICALIZATION IN AMERICA (2011), available at <http://bipartisanpolicy.org/sites/default/files/NSPG.pdf>; Anthony Richards, *The Problem with ‘Radicalization’: The Remit of ‘Prevent’ and the Need to Refocus on Terrorism in the UK*, 87 INT’L AFF. 143 (2011); Arun Kundnani & Faiza Patel, *Counter-Radicalization Lessons From the United Kingdom*, ROLL CALL (July 28, 2011, 10:56 AM), http://www.rollcall.com/news/counter_radicalization_lessons_from_the_united_kingdom-207779-1.html.

45. JAMIE BARTLETT ET. AL., THE EDGE OF VIOLENCE: A RADICAL APPROACH TO EXTREMISM 6–12, 17–21, 24–34 (2010), available at http://www.demos.co.uk/files/Edge_of_Violence_-_web.pdf.

leaders and members, and public servants involved in working to prevent radicalisation [sic] to violence.⁴⁶

Essentially, despite common factors in these different radicalization processes, these are models of human behavior and are therefore not perfect—individuals do not always proceed in a linear manner from radical thoughts to violence and there are multiple pathways to violence, which make detection of potential terrorists that much more difficult. As terrorism researcher Dr. Marc Sageman has noted:

The vast majority of young people who brag and pretend that they are tough and dangerous just talk, talk . . . and do nothing. Small wonder that law-enforcement agencies complain that they are drowned by an ocean of false alarms, which threaten to overwhelm their resources.

The intelligence community has reached a consensus on how to distinguish the large number of wannabes from the small number of terrorists. Terrorists emerge in a two-step process. The first step is to join a political-protest community, which the intelligence community calls “radicalization.” The second is to turn to violence, or “mobilization.”⁴⁷

This observation suggests that even with caveats that the ratio of “noise to signal” is high, there are recognizable stages, behaviors, and processes by which an individual becomes a terrorist, thus providing a means by which the individual or group might be identified before they strike.⁴⁸

46. *Id.*

47. Marc Sageman, *The Stagnation of Research on Terrorism*, CHRON. HIGHER EDUC. (Apr. 30, 2013, 11:32 AM), <http://chronicle.com/blogs/conversation/2013/04/30/the-stagnation-of-research-on-terrorism>.

48. Sageman has been critical of FBI “sting methods” in preventing terrorism, noting that such stings have real-life implications. *Id.* Aggressive FBI field offices identify many young men based on nonspecific indicators, set them up in sting operations, and arrest them. *Id.* According to Bayesian probability models, the odds that these young men would ever have turned to violence are low. *Id.* But it is difficult to teach lawyers and juries Bayesian probability or insights from social psychology about how authoritative undercover officers can influence impressionable young men. *Id.* The result is that many young men are convicted, and the Department of Justice points to their convictions as justification for its sting operations and validation of its indicators. *Id.* However, one has to look at intent as well as capability; if an undercover or informant could convince them to do it, so could an actual al-Qaeda recruiter or operative. As Phil Mudd, former Deputy Director of the CIA’s Counterterrorist Center, has noted, “For all the criticism that some of the broken plots post-9/11 have been terrorist wannabes—low-level, unsophisticated amateurs who don’t merit the time and attention they are getting . . . they’re only amateur wannabes until they hatch a plot that results in mass

B. Online Radicalization

Radicalization to violence increasingly has an “online” component to it.⁴⁹ According to former FBI Director Mueller:

[We] face the challenges presented by a third group and that is self-radicalized, homegrown extremists in the United States. While not formally affiliated with a foreign terrorist group, they are inspired by those groups’ messages of violence, often through the Internet, and because they lack formal ties, they are often particularly difficult to detect.⁵⁰

The Internet can facilitate a variety of different aspects of the process of radicalization to violence. First, al-Qaeda’s Internet propaganda campaign, led by the group and its acolytes, facilitates the exposure of potential followers to jihadist ideology.⁵¹ Second, the Internet allows for socialization—it allows like-minded individuals who are interested in or support al-Qaeda’s message to interact through an anonymous medium.⁵² Next, it can be the vehicle through

murder. Then they’re the murderous plotters who were missed.” PHILIP MUDD, TAKE DOWN: INSIDE THE HUNT FOR AL QAEDA 77 (2013).

49. LIEBERMAN & COLLINS, *supra* note 26, at 12 (citing Marc Sageman, Principal, Sageman Consulting, LLC, Prepared Statement before the U.S. Senate Committee on Homeland Security and Government Affairs: Radicalization of Global Islamist Terrorists (June 27, 2007)).

50. *Id.* at 3–4 (citing Robert S. Mueller III, Director, Fed. Bureau of Investigation, Testimony Before the U.S. Senate Select Committee on Intelligence, Hearing on Annual Worldwide Threat Assessment (Feb. 5, 2008)); *see also* Robert S. Mueller III, Prepared Remarks Delivered at Chatham House, London, England: From 9/11 to 7/7: Global Terrorism Today and the Challenges of Tomorrow (Apr. 7, 2008), available at <https://www.hsdl.org/?view&did=485065> (“The bottom tier is made up of homegrown extremists. They are self-radicalizing, self-financing, and self-executing. They meet up on the Internet instead of in foreign training camps. They have no formal affiliation with al-Qaeda, but they are inspired by its message of violence. Examples of this tier include last year’s plot to blow up pipelines at JFK airport in New York and a 2005 plot to attack military recruiting centers and a synagogue in Los Angeles.”).

51. LIEBERMAN & COLLINS, *supra* note 26, at 8 (“The Internet hosts a vast electronic repository of texts and treatises by the zealots who have given shape to the supposed theological justifications for violent Islamist ideology and the strategies for advancing its cause. These zealots and their ideas, which have inspired attacks in the West and elsewhere, are considered by some to be the ‘center of gravity’ of the violent Islamist movement, more so perhaps than bin Laden or al-Zawahiri. According to testimony received by the Committee, websites that host this material ‘allow the Internet to function as a kind of virtual extremist *madrassa* enlisting and inspiring followers around the world.” (footnotes and internal quotation marks omitted)).

52. The Internet also plays an increasingly critical role in linking radicalized individuals with the global Islamist terrorist movement—what Dr. Marc Sageman calls “[m]obilization through networks.” Sageman, *supra* note 47. According to Dr. Sageman,

which individuals mobilize to action.⁵³ Finally, the Internet provides a reservoir of technological information that may further the operational capabilities of an individual or nascent terrorist cell, for which the potential end point is planning and executing a terrorist act.⁵⁴

In testimony before the Senate Homeland Security and Governmental Affairs Committee in 2007, then-NYPD Assistant Commissioner Larry Sanchez espoused a very similar view of the role of the Internet in radicalization:

I believe the Internet is usually the stepping-stone where people go to look first. If you look across these phases of radicalization, there is an identity phase where people are really looking for an answer. When you look for an answer, people nowadays, especially in Western societies, go to the Internet . . . Then the Internet plays another role. When you move to another state, which is one of looking for other like-minded people you can come out of the virtual world and meet real people, it has chat rooms. It talks about places. It talks about thing [sic] you could do together. It talks about events that you can go and join and become part of it. So now it gives you indicators for the real world where you can meet real people rather than living in this virtual world. And then as you progress down these stages, the Internet then becomes a research tool for maybe things you want to do. If you want to research information on bomb-making material, the Internet, again, becomes a resource for that. So it really covers the breadth of a radicalization process and becomes a useful tool in each of its phases.⁵⁵

Over the past two or three years, face-to-face radicalization is being replaced by online radicalization. It is the interactivity of the group that changes people's beliefs, and such interaction is found in Islamist extremist forums on the Internet. The same support and validation that young people used to derive from their offline peer groups are now found in these forums which promote the image of terrorist heroes, link them to the virtual social movement, give them guidance and instruct them in tactics. These forums, virtual market places for extremist ideas, have become the virtual "invisible hand" organizing terrorist activities worldwide. The true leader of this violent social movement is the collective discourse on a half dozen influential forums.

LIEBERMAN & COLLINS, *supra* note 26, at 12–13.

53. SILBER & BHATT, *supra* note 38, at 8–9.

54. *Id.*

55. LIEBERMAN & COLLINS, *supra* note 26, at 21 n.42 (citing Lawrence Sanchez, Assistant Comm'r, NYPD Intelligence Div., N.Y. City Police Dep't, Statement Before the Senate Committee on Homeland Security and Governmental Affairs, Hearing on the Role of Local Law Enforcement in Countering Violent Islamist Extremism (Oct. 30, 2007)).

While some individuals have been described as “self-radicalizing” to violence simply by surfing the web, the more common phenomenon is a hybrid between online radicalization and real world interactions.⁵⁶ The United Kingdom’s domestic security and intelligence service has noted in a report that became available to the *Guardian* newspaper in London that “it is important to recognize the role of online communities, People do not generally become radicalised [sic] simply through passive browsing of extremist websites, but many such sites create opportunities for the virtual social interaction that drives radicalisation [sic] in the virtual world.”⁵⁷ This notion is supported by Dr. Marc Sageman, who noted:

The Internet plays a critical role in the radicalization of young Muslims into terrorists. This is a new phenomenon. The pre-9/11 al-Qaeda terrorists were radicalized through face-to-face interaction. After Iraq, and especially in the past three years, this interactive process of radicalization takes place online, in the jihadi forums. This online radicalization is certainly replacing face to face radicalization. The key to understanding this process is to realize that it is based on interactivity between the members, which makes the participants in the forums change their mind. Some of the participants get so worked up that they declare themselves ready to be terrorists. In a way, recruitment is self-recruitment, which is why we cannot stop it by trying to identify and arrest “recruiters.” These self-recruited upstarts do not need any outsiders to try to join the terrorist social movement. Since this process takes place at home, often in the parental home, it facilitates the emergence of homegrown radicalization, worldwide.⁵⁸

Given the multifaceted role of the Internet in the radicalization process, law enforcement and intelligence have become more focused on seeking to monitor extremist chat rooms, websites that promote violent jihad, and other social media.⁵⁹

The goal is to detect individuals as they radicalize, form online conspiracies, and ultimately move to real world terrorist attacks.⁶⁰ A good example is the case of Younis Tsouli, a then-twenty-three-year-old of Moroccan descent residing in the United Kingdom. Tsouli had become a central player in the global violent Islamist online network

56. Alan Travis, *The Making of an Extremist*, GUARDIAN (London) (Aug. 20, 2008), <http://www.guardian.co.uk/uk/2008/aug/20/uksecurity.terrorism> (internal quotation marks omitted).

57. *Id.*

58. See Sageman, *supra* note 47.

59. From the authors’ personal experience in counterterrorism.

60. *Id.*

and had gained the trust of, and directly assisted, the head of al-Qaeda in Iraq in distributing videos of attacks in Iraq.⁶¹ British authorities' monitoring of his online activities ultimately led to the arrest of two Georgia Tech students in Atlanta whose radicalization progressed from their dorm rooms to online chat rooms, where they were then able to self-enlist in the global violent Islamist movement.⁶² The pair subsequently linked up with the "Toronto 18" plotters and conducted reconnaissance on targets in the Washington, D.C. area.⁶³ Another aspiring American homegrown terrorist whose online activities provided a window into his intentions was Jose Pimentel, who was arrested and charged with plotting to detonate bombs in and around New York City in November 2011.⁶⁴ He used instructions on how to build a bomb published by al-Qaeda's *Inspire Magazine*. After a two-and-a-half year investigation, Pimentel was caught while assembling three bombs.⁶⁵

Other plots and plotters have been disrupted by monitoring websites, chat rooms, and social media sites sympathetic to al-Qaeda by intelligence and security agencies, making site monitoring an important tool in the detection, investigation, and disruption of inchoate terrorist plots.⁶⁶ In fact, in the wake of the April 15 Boston bombings, some have suggested that the failure to monitor Tamerlan Tsarnaev's YouTube page was a potential indicator that was missed

61. *Id.*

62. See SILBER, *supra* note 3, at 255.

63. LIEBERMAN & COLLINS, *supra* note 26, at 13.

64. See discussion of the *Pimentel* and *Morton* cases *infra* Part IV; see also Mitchell D. Silber, *Al-Qaeda's Western Volunteer Corps*, INT'L J. ON CRIMINOLOGY, Fall 2013, at 96–97, available at http://www.ipsonet.org/images/Westphalia_Press/Criminology/8.%20Silber%20-%20Al%20Qaedas%20Western%20Volunteer%20Corps%20PDF.pdf.

65. *Id.* ("Pimentel seems to have self-radicalized via the Internet. He spent much of his time on the Internet and maintained a radical website on YouTube called TrueIslam1. The website contains a link to the bomb-making article in *Inspire* magazine. Pimentel was also a follower of the Islamist group, Revolution Muslim, which maintained an extremist website. Pimentel corresponded with Jesse Morton, the founder of the website, who was sentenced in June 2012 to 11.5 years in prison for using the Internet to solicit violence against individuals including the writers of the popular TV-satire *South Park*.").

66. See Complaint at 6, United States v. Nafis, No. 1:12-cr-00720-CBA (E.D.N.Y. Oct. 17, 2012), available at http://www.investigativeproject.org/documents/case_docs/2052.pdf (noting that during the period between July 6, 2012 and July 8, 2012, Nafis began to communicate—via Facebook, an internet social-media website—with the FBI's confidential human source about waging jihad).

by authorities.⁶⁷ “What remains unanswered is why Tsarnaev’s 2012 YouTube playlist did not ring alarm bells for the FBI. One clip shows young Muslim warriors parading with Kalashnikovs held about their heads, to booming martial music. The clues were all there.”⁶⁸

In recent years, the publication of *Inspire* magazine—an online magazine devoted to promoting al-Qaeda’s encouraging view on the benefits of violent jihad that is specifically targeted to a Western audience⁶⁹—has frequently been associated with individuals in the West who seek to turn to jihadist inspired violence.⁷⁰ The magazine, other than legitimatizing violence, has become a forum for aspiring jihadists and real terrorists to publish propaganda as well as to provide practical details on how to build explosive devices.⁷¹ Though it is probably too strong to suggest that the magazine causes terrorism, it has frequently been a source of information for individuals in the West who have gone on to become terrorists—most recently the Tsarnaev brothers in Boston.⁷²

III. LOCAL LAW ENFORCEMENT’S ROLE

Much of the section above has concerned the challenge of “identify[ing] [youths] who [are] susceptible to becoming radicalized.”⁷³ A second key challenge that follows, from the perspective of law enforcement and intelligence, is what can be done to detect and/or disrupt a radicalized individual before they mobilize to violence. This Part focuses on that second challenge, with a particular emphasis on local law enforcement.

67. Luke Harding & Vikram Dodd, *Tamerlan Tsarnaev’s YouTube Account Shows Jihadist Radicalisation in Pictures*, GUARDIAN (London) (Apr. 22, 2013), <http://www.theguardian.com/world/2013/apr/22/tamerlan-tsarnaev-youtube-jihadist-radicalisation>.

68. See *id.*; see also sam232690, *The Emergence of Prophecy: The Black Flags From Khorasan*, YOUTUBE (July 4, 2012), <http://www.youtube.com/watch?v=uJknGtKV34I>.

69. Ian Black, *Inspire Magazine: The Self-Help Manual for al-Qaida Terrorists*, GUARDIAN (London), May 24, 2013, <http://www.theguardian.com/world/shortcuts/2013/may/24/inspire-magazine-self-help-manual-al-qaida-terrorists>.

70. *Id.*

71. *Id.*

72. Richard Serrano, *Boston Bombing Indictment: Dzhokhar Tsarnaev Inspired by Al-Qaeda*, L.A. TIMES, June 27, 2013, <http://articles.latimes.com/2013/jun/27/nation/la-na-nn-boston-marathon-bombing-suspect-indictment-20130627>.

73. See Samuel J. Rascoff, *The Law of Homegrown (Counter)Terrorism*, 88 TEX. L. REV. 1715, 1719 n.14 (2010) (internal citation and quotation marks omitted).

A. Local Law Enforcement's Comparative Advantages

It is (perhaps too) often said that the September 11th attacks “changed everything,”⁷⁴ but to a great extent the maxim applies to the counterterrorism and intelligence role of local police departments.⁷⁵ As then-Attorney General John Ashcroft wrote in the opening paragraphs of a memorandum to all US Attorneys just two months after the attacks:

The September 11 attacks demonstrate that the war on terrorism must be fought and won at home as well as abroad. To meet this new threat and to prevent future attacks, law enforcement officials at all levels of government—federal, state, and local—must work together, sharing information and resources needed both to arrest and prosecute the individuals responsible and to detect and destroy terrorist cells before they can strike again.⁷⁶

Since the September 11 terrorist attacks, it has become clear that local police departments have a role to play in the counterterrorism fight. “Local police agencies offer tremendous resources in terms of personnel and the familiarity needed to prevent, investigate, and respond to terrorism.”⁷⁷ Indeed, local police departments “must be full partners in any effective strategy for preventing acts of terror:

74. See David Cole, *National Security State*, NATION (Dec. 17, 2001), <http://www.thenation.com/article/national-security-state>.

75. See Daniel Richman, *The Right Fight*, BOSTON REV. (Dec. 1, 2004), <https://bostonreview.net/forum/right-fight> (noting the claim that the September 11 attacks “changed everything . . . is quite apt when applied to the relations between the federal government and state and local governments in the area of law enforcement”); see also Rascoff, *supra* note 73, at 1715 (noting that “local police have once again emerged as a significant constituency in discussions of national security”); Matthew C. Waxman, *Police and National Security: American Local Law Enforcement and Counterterrorism After 9/11*, 3 J. NAT’L SEC. LAW & POL’Y 377, 377 (2009) (“Since the September 2001 terrorist attacks inside the United States, local police agencies have taken on greater national security roles and responsibilities.”).

76. Memorandum from John Ashcroft, Att’y Gen. of the United States, to All U.S. Attorneys, Cooperation with State and Local Officials in the Fight Against Terrorism (Nov. 13, 2001), available at <http://www.fas.org/irp/agency/doj/agdirective5.pdf>.

77. Waxman, *supra* note 75, at 378; see also JOHN J. NEU, TORRANCE POLICE DEPT., TESTIMONY BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON HOMELAND SECURITY, SUBCOMMITTEE ON INTELLIGENCE, INFORMATION SHARING, AND RISK ASSESSMENT (2007), available at <http://www.investigativeproject.org/documents/testimony/281.pdf> (“[S]ince the terrorist attacks of September 11, 2001, the role and responsibility of local law enforcement as first responders to terrorist activity have changed. Our mission demands that we make every effort possible to detect and prevent terrorist activity right here in our own communities.”).

without their participation, the federal government cannot possibly know what ‘dots’ to connect.”⁷⁸

Furthermore, although the emphasis on local police departments’ role in the counterterrorism fight seems recent, in actuality local police departments have a long history of performing the core counterterrorism functions such as “[i]ntelligence, investigation, deterrence, site protection, public education and emergency response.”⁷⁹ As a result, “local police were already well suited to perform these antiterrorism activities.”⁸⁰

In fact, local law enforcement actually holds certain comparative advantages over federal agencies in the counterterrorism fight. These advantages include the number of local law enforcement personnel compared to federal personnel, local agencies’ general police powers and knowledge of the communities in which they operate, ability to walk the beat, and their familiarity with their surroundings and what would be considered unusual or suspicious activity.⁸¹ Importantly, for the purposes of this Article, the crucial role of local police departments as well as these comparative advantages “is especially true in view of the ascendancy of homegrown terrorism.”⁸²

1. *Manpower*

Local law enforcement’s first comparative advantage is one of sheer size.⁸³ The FBI—the primary domestic agency charged with the counterterrorism mission—has only 13,785 special agents, plus an additional 22,000 support personnel.⁸⁴ Obviously not all of those

78. See generally Richman, *supra* note 75.

79. See Rascoff, *supra* note 73, at 1715 (describing a pre-World War II turf battle between the FBI and local police departments which “serves as a powerful reminder that local officials and agencies have historically participated in urgent matters of national security—especially in what we would today label ‘intelligence’” (citations omitted)); Waxman, *supra* note 75, at 385.

80. See Waxman, *supra* note 75, at 385.

81. See discussion *infra* Part III(a)(i)-(iii).

82. Rascoff, *supra* note 73, at 1716; see also GEORGE L. KELLING & WILLIAM J. BRATTON, POLICING TERRORISM 7 (2006), available at http://www.manhattan-institute.org/pdf/cb_43.pdf (“As the terrorist threat moves from large international terror groups to more loosely affiliated ‘lone wolves’ or ‘homegrown’ terrorists . . . the need to involve local police is becoming even more apparent.”).

83. See Waxman, *supra* note 75, at 386 (“[L]ocal police . . . agencies possess the numbers of personnel needed to sustain these functions over vast territory and for long periods of time.”).

84. See *Quick Facts: Our People and Leadership*, FED. BUREAU OF INVESTIGATION <http://www.fbi.gov/about-us/quick-facts> (last visited Nov. 11, 2013) (including “intelligence analysts, language specialists, scientists, information technology specialists, and other professionals” among the 22,117 support professionals).

agents and support personnel are assigned to counterterrorism concerns.

By contrast, according to the Bureau of Labor Statistics, there were nearly 800,000 police officers or detectives across the United States in 2010.⁸⁵ The NYPD alone has approximately 34,500 uniformed officers,⁸⁶ with 1000 of them assigned to counterterrorism duties.⁸⁷ Also, as two prominent commentators have noted, “Based on numbers alone, local law enforcement personnel are much more likely than feds to cross paths with terrorists.”⁸⁸ This is particularly true in the context of homegrown terrorists who operate without the overseas connections that would typically put them on the FBI’s radar.⁸⁹ One prominent proponent of the decentralized threat theory has referred to this as a “bottom-up” perspective, which focuses “precisely on how terrorists act on the ground.”⁹⁰ Viewed this way, and with respect to the homegrown threat, “[l]ocal agencies ‘see’ the local factors of terrorism more clearly than national agencies that view the world through the prism of global trends.”⁹¹

2. *General Police Power/Knowledge of the Community*

Local law enforcement’s second comparative advantage comes from its general role in maintaining order and public safety in

85. See *Police and Detectives*, BUREAU LAB. STAT. (Mar. 29, 2012), <http://www.bls.gov/ooh/protective-service/police-and-detectives.htm> (listing 794,300 as the number of people holding jobs of that title in 2010).

86. See *Frequently Asked Questions: Police Administration*, NYPD, http://www.nyc.gov/html/nypd/html/faq/faq_police.shtml#1 (last visited Oct. 9, 2013).

87. See *NYPD Increasing Security at Prominent Locations Following Boston Marathon Blasts*, CBS N.Y. (Apr. 15, 2013, 11:50 PM), <http://newyork.cbslocal.com/2013/04/15/nypd-increasing-security-following-boston-marathon-blasts/> (quoting New York City Mayor Michael Bloomberg, “We have 1,000 members of the NYPD assigned to counterterrorism duties . . .”).

88. KELLING & BRATTON, *supra* note 82, at 2; see also David Thacher, *The Local Role in Homeland Security*, 39 LAW & SOC’Y REV. 635, 636 (2005) (describing the emphasis on local law enforcement’s number advantage as “opportunistic in the sense that it treats the massive institutional capacity of local policing as a resource that can be mobilized for any end that policy makers desire”). *But see* Rascoff, *supra* note 73, at 1721–22 (criticizing generic “clichés about the sheer number of sub-federal police departments and officers across the country and their ability to serve as ‘eyes and ears’ of the nation” without distinguishing between intelligence collection and analysis on the one hand and criminal investigations on the other).

89. See Rascoff, *supra* note 73, at 1722 (“In view of the emergence of homegrown terrorism and the mounting official preoccupation with counter-radicalization, local police are well positioned—arguably better so than their federal counterparts—to engage in genuine intelligence work.”).

90. MARC SAGEMAN, *LEADERLESS JIHAD*, 23–24 (2008).

91. Rascoff, *supra* note 73, at 1726.

addition to investigating specific crimes.⁹² In this respect, local law enforcement agencies have a broader mandate than the FBI.⁹³ This broader mandate, embodied by the police officer who “walks a beat,” can then translate into greater knowledge of the community in which the officer operates.⁹⁴ In a paper, two-time and, as of January 2014, current NYPD Commissioner Bill Bratton and his co-author have described it thus: “Local police officers have an everyday presence in the communities that they are sworn to protect. They ‘walk the beat,’ communicate regularly with local residents and business owners, and are more likely to notice even subtle changes in the neighborhoods that they patrol.”⁹⁵ As a result, “local police are positioned naturally to collect and process information about communities and activities within them.”⁹⁶ In many respects, this positioning provides support for the trend toward community policing, which “call[s] for a wide and deep engagement within the community. These responses to crime, disorder, and other community problems [such as terrorism] require fostering both proactive and reactive relationships with local social service agencies, civic leaders, and community organizations, *as well as developing deep awareness of community environments.*”⁹⁷ A concomitant benefit of the wider mandate—epitomized by the officer who walks the beat and “knows the community”—is that it puts the local officer in a better position to detect unusual or suspicious behavior.⁹⁸

92. See Daniel Richman, *The Right Fight, Enlisted by the Feds, Can Police Find Sleeper Cells and Protect Civil Rights, Too?*, BOSTON REV. (Dec. 1, 2004), <https://bostonreview.net/forum/right-fight>.

93. See Waxman, *supra* note 75, at 386 (referring to local police’s “wider mandate” of “maintaining order, patrolling, and providing services” in addition to “preventing and investigating crime”); see also NEU, *supra* note 77 (“Our personnel are on the streets of our community everyday interacting, observing, and maintaining the public safety.”).

94. See Rascoff, *supra* note 73, at 1730 (“[T]he NYPD’s officers are mainly on patrol—generalist cops who walk a beat and develop complex understandings of, and working relationships with, the community.”(citations omitted)).

95. KELLING & BRATTON, *supra* note 82, at 1–2.

96. See Rascoff, *supra* note 73, at 1734 (“[T]he local police are in significant respects well positioned to tap into their relationships with the local community to useful effect. These relationships are a natural fit for local departments that have been practicing a form of community policing for over a generation.”); Waxman, *supra* note 75, at 386.

97. Waxman, *supra* note 75, at 386 (emphasis added) (citations omitted).

98. See KELLING & BRATTON, *supra* note 82, at 2 (“The presence of police in our communities sensitizes them to anomalies and yields counterterrorist data valuable to other agencies.”); see also Waxman, *supra* note 75, at 401 (“Local familiarity provides a baseline for detecting suspicious activities, and local police may have networks of

The mandate may also build greater trust with the citizens among whom the local officer on patrol interacts. For example, over the last several decades, the city of Dearborn, Michigan has established an extensive community relations approach to the local Arab community.⁹⁹ One local officer explained that “as a result, community residents ‘feel comfortable telling me about a problem instead of some guy they never saw before that just showed up on a radio call.’”¹⁰⁰ Just as importantly, “Arab community leaders . . . echoed this sentiment.”¹⁰¹ This level of trust “is important because the friends and family of suspected extremists often are the best resources for law enforcement officials.”¹⁰²

Thus, one result of this “more balanced ‘portfolio’” of responsibilities with the local community may be a built-up well of capital, support, and trust based on positive interactions with the police.¹⁰³ Beyond the general good that these positive interactions provide in and of themselves, they may also place police officers in a better position to ask for and receive information when necessary.¹⁰⁴ Former director of the Central Intelligence Agency James Woolsey put it this way:

Only an effective local police establishment that has the confidence of citizens is going to be likely to hear from, say, a local merchant in a part of town containing a number of new immigrants that a group of young men from abroad have recently moved into a nearby apartment and are acting suspiciously.¹⁰⁵

cooperative relationships with community members who supply them with information.”(citations omitted)).

99. See Thacher, *supra* note 88, at 648–53.

100. *Id.* at 649.

101. *Id.*

102. RICKE “OZZIE” NELSON & BEN BODURIAN, CTR. FOR STRATEGIC & INT’L STUDIES, *A GROWING TERRORIST THREAT? ASSESSING ‘HOMEGROWN’ EXTREMISM IN THE UNITED STATES*, at vi (2010).

103. See Richman, *supra* note 92 (“The police officer who seeks information from a local Arab-American community leader has probably met and assisted that leader before—protecting his property, ironing out some administrative complexity, or ensuring his safe worship.”).

104. See KELLING & BRATTON, *supra* note 82, at 2 (“Local police officers . . . are in a better position to know responsible leaders in the Islamic and Arabic communities and can reach out to them for information or for help in developing informants.”).

105. *Id.* at 2.

3. Greater Accountability to Local Concerns

Finally, some scholars assert that local police departments may be more accountable to the local community and local community preferences.¹⁰⁶ Some of the reasons underlying this greater accountability include local elections, public opinion, civil society, media pressure, and community relations that have been developed and influence the direction of policing.¹⁰⁷ Much of this is due to the increased prevalence of the community policing model, which takes into account the views and priorities of the local community to a great extent.¹⁰⁸ As a result of the growth of this model,

the last two decades have seen enormous and accelerating changes in the readiness of urban police forces to solicit and address the concerns of the people they serve. And solicitude for the concerns of ethnic or racial minority groups . . . has increasingly become a non-negotiable part of a police chief's job description.¹⁰⁹

An extension of this theory further holds that local communities may actually work as a check on federal policies or priorities that they view as too aggressive.¹¹⁰ One prominent post-9/11 example of this type of local check on federal behavior is the Dearborn Police Department's qualified (and limited) participation in post-9/11 interviews conducted by the FBI.¹¹¹ Another is the Portland Police Department's and other localities' refusal to embed local officers on the regional Joint Terrorism Task Force based on the voting of the city council.¹¹²

106. See Rascoff, *supra* note 73, at 1737 (“[A] body of scholarship [that] identifies the presence of a wide range of accountability mechanisms that cause local counterterrorism officials to be more responsive to civil liberties.”).

107. See *id.* at 1736–40 (discussing the informal mechanisms and incentive structures which may make local law enforcement more susceptible, and thus accountable, to the opinions of the local community); see also Waxman, *supra* note 75, at 392 (noting that local police departments are subject to local budgetary concerns, electoral concerns, and draw and train their forces mainly from and in the community being served).

108. See generally Richman, *supra* note 92.

109. *Id.*

110. See Rascoff, *supra* note 73, at 1736 (“A small but significant body of scholarship has coalesced around [this] view . . .” (citing Susan N. Herman, *Collapsing Spheres: Joint Terrorism Task Forces, Federalism, and the War on Terror*, 41 WILLAMETTE L. REV. 941, 942 (2005); Susan N. Herman, *Introduction to Our New Federalism? National Authority and Local Autonomy in the War on Terror*, 69 BROOK. L. REV. 1201, 1212–13 (2004); Tom Lininger, *Federalism and Antiterrorism Investigations*, 17 STAN. L. & POL’Y REV. 391, 393 (2006))).

111. See *id.* See generally Thacher, *supra* note 88, at 636 (describing the process around which this policy developed).

112. See Rascoff, *supra* note 73, at 1736.

Nevertheless, the benefits of this particular advantage should not be oversold, particularly in the realm of counterterrorism investigations, which “pulls on local policing that strain these systems and patterns of political accountability.”¹¹³ In these cases, despite the normal decentralized hierarchy of policing that typically holds true, local law enforcement may have to defer to national priorities.¹¹⁴

Moreover, these informal checks may be less effective in reining in the less publicized tactics that local police departments may seek to implement to combat the terrorism threat, particularly that posed by homegrown extremists. Thus, while there may be “powerful incentives for police officers to negotiate a middle road when it comes to the more intrusive and potentially objectionable aspects of counterterrorism” tactics, “it is hard to know whether this logic dictates local restraint in the more elusive (and less overt) aspects of intelligence collection that, at least in theory, are likely to remain unknown to community members.”¹¹⁵ Despite the limitations of this last advantage, however, we have seen from the discussion above that “[l]ocal law enforcement is, in fact, uniquely positioned to identify terrorist activity right here in [local] communities.”¹¹⁶

B. The Legal Framework: The NYPD and *Handschr*. A Case Study

1. Background

Having reviewed the general advantages that local law enforcement has in combating the homegrown terrorist threat, this Part turns to how the NYPD operates in this environment as a specific example.

It is important to note at the outset that New York City is a bit of an exception on these issues for several reasons. On the one hand, the NYPD has more resources and manpower than almost any other

113. Waxman, *supra* note 75, at 391.

114. *See id.* at 392 (“The police should not be responsive in an unlimited sense to either the entire community or minority interests in the community. In many situations it is essential that the police act independent of local community interests, responding instead to state or federal laws that preempt local legislation and override local preferences.”).

115. *See* Rascoff, *supra* note 73, at 1738–1739.

116. *See* NEU, *supra* note 77; *see also* Rascoff, *supra* note 73, at 1730 (“Local counterterrorism intelligence has been uniquely well-positioned to see the emergence of the [homegrown terrorism] threat on a micro level.”).

local law enforcement agency.¹¹⁷ On the other hand, the framework under which the NYPD operates in this area is actually *more* restrictive than most other local jurisdictions because the NYPD's investigations into political activity are governed by a federal consent decree.¹¹⁸

The decree, which has become known as the “*Handschu* Guidelines,”¹¹⁹ was agreed to initially in 1985 as a compromise settlement to protracted litigation that began in 1971, when individuals affiliated with several political action groups sued the City and the NYPD for alleged violations of their civil rights.¹²⁰ Among the key features, the Guidelines established the parameters by which the NYPD could conduct investigations into political activity. More specifically, the initial version of the Guidelines required that the police have specific information of criminal activity before initiating an investigation, established an “Authority” to oversee those investigations, and created a mechanism for New Yorkers who believed they were aggrieved to seek redress.¹²¹

117. See BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEP'TS, 2007, at 34 (2010), available at <http://www.bjs.gov/content/pub/pdf/lpd07.pdf>.

118. See *Alliance to End Repression v. City of Chicago*, 237 F.3d 799, 802 (7th Cir. 2001) (stating that due to the consent decree, Chicago police “labor . . . under severe handicaps that other American police are free from,” and that even *after* modification, the consent “decree will leave the Chicago police under considerably greater constraints than the police forces of other cities.”); see also Paul Chevigny, *Politics and Law in the Control of Local Surveillance*, 69 CORNELL L. REV. 735 (1994) (discussing consent decrees imposed on other cities, including Chicago and Memphis, for violations of civil rights that occurred in the 1960s and 1970s); Raymond Kelly, Police Comm’r, N.Y.C. Police Dep’t, Remarks to Fordham Law School Alumni, (Mar. 3, 2012), http://www.nyc.gov/html/nypd/html/pr/pr_2012_03_03_remarks_to_fordham_law_school_alumni.shtml (noting that other police departments are not limited by the rules in the *Handschu* Guidelines, “which restrict police powers granted under the constitution”). Several other jurisdictions have been subject to consent decrees with respect to investigations into political activity, stemming from civil rights violations and litigation that occurred in the 1970s and 1980s. Jerrold L. Steigman, *Reversing Reform: The Handschu Settlement in Post-September 11 New York City*, 11 J.L. & POL’Y 745, 746 (2003).

119. See *e.g.*, *Handschu v. Special Servs. Div.* (*Handschu 2003*), 288 F. Supp. 2d 411, 420–31 (S.D.N.Y. 2003) (detailing the modified and superseding guidelines as “Appendix A”); *Handschu v. Special Servs. Div.* (*Handschu 1985*), 605 F. Supp. 1384, 1420–24 (S.D.N.Y. 1985) (detailing the original provisions of the consent decree as “Appendix A”).

120. See *Handschu 2003*, 288 F. Supp. 2d 411 at 420–31 (detailing the modified and superseding guidelines as “Appendix A”); *Handschu 1985*, 605 F. Supp. at 1420–24 (detailing the original provisions of the consent decree as “Appendix A”); Steigman, *supra* note 118, at 746.

121. See *Handschu 1985*, 605 F. Supp. at 1420–24; Steigman, *supra* note 118, at 758–61 (summarizing the settlement).

In 2002, the NYPD petitioned for the Guidelines to be modified¹²² to enable the Department to combat the terrorist threat by allowing the investigative threshold to shift from retroactive (“specific information”) to anticipatory and preventive investigations.¹²³ As articulated in the “Preamble” to what would be adopted as the modified Guidelines:

Subsequent to the terrorist attacks on the City of New York on September 11, 2001 which resulted in the loss of thousands of lives and the total destruction of the World Trade Center complex, it became apparent that the City faces unprecedented threats to its continued safety and security. In the view of federal, state, and local law enforcement agencies, the prevention of future attacks requires the development of intelligence and the investigation of potential terrorist activity *before an* unlawful act occurs.¹²⁴

The Southern District of New York—in fact, the same judge who issued the initial decision in 1985—agreed with the NYPD and allowed modification of the Guidelines.¹²⁵ Under the new guidelines, the basis for initiating an investigation shifted from a reactive (or retrospective) approach to an anticipatory one.¹²⁶ While the initial Guidelines required *specific information* of criminal activity before commencing an investigation,¹²⁷ the revised Guidelines state, “In its effort to anticipate or prevent unlawful activity, including terrorist acts, the NYPD must, at times, initiate investigations *in advance of unlawful conduct*.”¹²⁸

The need to adopt this shift from a more reactive approach to an anticipatory one was aptly articulated by Judge Posner, in an opinion

122. See Steigman, *supra* note 118, at 746; Kelly, *supra* note 118.

123. See, e.g., *Handschu 2003*, 288 F. Supp. 2d at 420–31; *Handschu 1985*, 605 F. Supp. at 1420–24.

124. *Handschu 2003*, 288 F. Supp. 2d at 420 (emphasis added).

125. See *Handschu v. Special Servs. Div.*, 273 F. Supp. 2d 327 (S.D.N.Y. 2003) (granting the NYPD’s motion to modify the Handschu Guidelines), *superseded in part by Handschu 2003*, 288 F. Supp. 2d 411 (issuing the Second Revised Order and Judgment.)

126. Compare *Handschu 1985*, 605 F. Supp. at 1390 (quoting Section IV(C) of the Guidelines requiring “specific information” to commence an investigation), *with Handschu 2003*, 288 F. Supp. 2d at 421 (authorizing investigations “in advance of unlawful conduct”).

127. See *Handschu 1985*, 605 F. Supp. at 1390 (“When specific information has been received by the Police Department that a person or group engaged in political activity is engaged in, about to engage in, or has threatened to engage in conduct which constitutes a crime the PSS is authorized to commence an investigation of such person or group.” (quoting Section IV(C) of the Guidelines)).

128. *Handschu 2003*, 288 F. Supp. 2d at 421 (emphasis added).

that similarly allowed modification of the City of Chicago's consent decree in early 2001.¹²⁹ In that decision, Judge Posner wrote:

The City [of Chicago] wants flexibility to meet new threats to the safety of Chicago's citizens Today the concern, prudent and not paranoid, is with ideologically motivated terrorism. The City . . . wants to be able to keep tabs on incipient terrorist groups. New groups of political extremists, believers in and advocates of violence, form daily around the world. If one forms in or migrates to Chicago, the decree renders the police helpless to do anything to protect the public against the day when the group decides to commit a terrorist act. Until the group goes beyond the advocacy of violence and begins preparatory actions that might create reasonable suspicion of imminent criminal activity, the hands of the police are tied. And if the police have been forbidden to investigate until then, if the investigation cannot begin until the group is well on its way toward the commission of terrorist acts, the investigation may come too late to prevent the acts or to identify the perpetrators. If police get wind that a group of people have begun meeting and discussing the desirability of committing acts of violence in pursuit of an ideological agenda, a due regard for the public safety counsels allowing the police department to monitor the statements of the group's members, to build a file, perhaps to plant an undercover agent.¹³⁰

2. *Investigations Under Current Handschu Guidelines*

It is important to point out that the Guidelines apply only to investigations involving political activity.¹³¹ At the same time, as former Commissioner Kelly noted, the NYPD "imposed on oursel[ves] the strictest interpretation of political activity We go above and beyond by treating every terrorism investigation as subject to *Handschu*."¹³² As described above, the guiding principle of the modified *Handschu* Guidelines is that the NYPD must have the ability to investigate potential terrorist activity *in advance of* specific information of that activity, while at the same time ensuring "that investigations involving political activity conform to the guarantees of the Constitution, that care be exercised in the conduct of those investigations so as to protect constitutional rights, and that matters

129. See *Alliance to End Repression v. City of Chicago*, 237 F.3d 799 (7th Cir. 2001).

130. *Id.* at 802 (emphasis added).

131. See *Handschu 2003*, 288 F. Supp. 2d at 421–22.

132. See Kelly, *supra* note 118 ("One could easily argue that when we investigate terrorism, we are dealing with criminal, not political, activity.").

investigated be confined to those supported by a legitimate law enforcement purpose.”¹³³

To accomplish these goals, the Guidelines set out “three levels of investigative activity . . . intended to provide the NYPD with the necessary flexibility to act well in advance of the commission of planned terrorist acts or other unlawful activity.”¹³⁴ The four levels of investigation, described further below, are: (1) Checking Leads, (2) Preliminary Inquiries, (3) Investigation, and (4) Terrorism Enterprise Investigation.¹³⁵ All investigations except for leads must be submitted in writing, with the requisite level of information, and approved by the Deputy Commissioner of Intelligence.¹³⁶

a. Leads

Checking leads is the “lowest level” of investigation.¹³⁷ According to the Guidelines, this type of investigation “should be undertaken whenever information is received of such a nature that some follow-up as to the possibility of unlawful activity is warranted.”¹³⁸ This is, essentially, fundamental police work. One example of leads are tips, such as calls in response to the “If You See Something, Say Something!” campaign¹³⁹ or calls from concerned friends and family. Leads can also be based on information passed on to uniformed officers who are “walking the beat” or otherwise present and available to New York residents. The Guidelines dictate that leads investigations “should be conducted with an eye toward promptly determining whether” one of the next levels of investigation is warranted.¹⁴⁰

133. *Handschu 2003*, 288 F. Supp. 2d at 421.

134. *Id.* at 422.

135. *Id.* at 422–28 (detailing the levels of investigation).

136. *See id.* at 423–24, 427–28.

137. *Id.* at 422.

138. *Id.*

139. *See Safeguard New York*, N.Y. ST. DIV. HOMELAND SECURITY & EMERGENCY SERVICES, http://www.dhse.ny.gov/oct/safeguardny/documents/safeguard_fire-ems.pdf (last visited Nov. 17, 2013).

140. JOHN ASHCROFT, DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATION, *available at* <https://www.cdt.org/security/usapatriot/020530generalcrimes2.pdf>.

b. Preliminary Inquiries

A Preliminary Inquiry, as the name suggests, is an intermediary step between checking leads and a Full Investigation.¹⁴¹ The threshold standard for initiating a preliminary inquiry is an “allegation or information indicating the *possibility* of unlawful activity” that should be investigated beyond just the checking of leads.¹⁴² This level of investigation is intended to “allow[] the NYPD to respond in a measured way to ambiguous or incomplete information, with as little intrusion as the needs of the situation permit.”¹⁴³

Preliminary Inquiries are initially authorized for a six-month period and may be extended for three-month intervals as long as the need is justified and submitted in writing for approval.¹⁴⁴ Most standard investigative techniques are authorized under the Preliminary Inquiry, including examination of NYPD records and files, other government records and public records; interviews of complainants and/or the subject(s); surveillance which does not require a warrant; and use of undercover or confidential informants.¹⁴⁵

c. Full Investigations

The next and highest level of investigation is the Full Investigation.¹⁴⁶ The standard for a Full Investigation is “facts or circumstances” that “reasonably indicate” criminal activity.¹⁴⁷ While a Full Investigation requires “an objective, factual” predicate, the reasonable indication standard is explicitly described as “*substantially* lower than probable cause.”¹⁴⁸ Moreover, the reasonable indication “standard . . . is satisfied where there is not yet a current substantive or preparatory unlawful act, but facts or circumstances reasonably indicate that such unlawful conduct will occur in the future.”¹⁴⁹ The police department may employ “[a]ny lawful investigative

141. *Handschu 2003*, 288 F. Supp. 2d at 422 (noting that preliminary inquiries are appropriate for “cases where the NYPD receives information or an allegation not warranting an investigation . . . but whose responsible handling requires some further scrutiny beyond the prompt and extremely limited checking out of initial leads”).

142. *Id.* (emphasis added).

143. *Id.*

144. *Id.* at 423.

145. *Id.* (finding that the exceptions which are *not* allowed are mail openings and “eavesdropping and video surveillance”).

146. *See id.* at 424.

147. *Id.*

148. *Id.* (emphasis added).

149. *Id.*

technique . . . in a full investigation,” (subject to certain limitations in the Guidelines).¹⁵⁰ Full Investigations may be authorized for one year and renewed for the same amount of time.¹⁵¹

d. Terrorism Enterprise Investigations

A Terrorism Enterprise Investigation (TEI) is a specific type of Full Investigation.¹⁵² While the standard for initiating a TEI is the same as for a Full Investigation—i.e., a reasonable indication of criminal activity¹⁵³—TEIs are focused on groups that are or may be engaged in terrorism.¹⁵⁴ Specifically,

a terrorism enterprise investigation may be initiated when facts or circumstances reasonably indicate that two or more persons are engaged in an enterprise for the purpose of (i) furthering political or social goals wholly or in part through activities that involve force, violence or other unlawful acts; (ii) engaging in terrorism as defined in N.Y. Penal Law § 490.05, or (iii) committing any offense described in N.Y. Penal Law §§ 490.10, 490.15, 490.20, 490.25, 490.30, or 490.35, or other related statutes currently in effect or subsequently enacted.¹⁵⁵

This group-based focus of the TEI leads to several key differences from a typical Full Investigation, including: a focus on the nature, history, and goals of the group and the threat it presents; continuation of the investigation even after one or more of the group members have been prosecuted for a crime; and lengthy investigations lasting several years.¹⁵⁶ In short, TEIs are “broader and less discriminate than usual, involving the interrelation of various sources and types of information.”¹⁵⁷ Some of the factors that may be considered to determine whether a group or organization “is pursuing terrorist activities or objectives”¹⁵⁸ that rise to the level of the threshold standard include: (1) engaging in, threatening, or advocating violence, (2) “apparent ability or intent to carry out violence” or other covered activities, and (3) statements or actions by the group which “suggest potential unlawful acts” that fall under the definition of the

150. *Id.*

151. *See id.*

152. *See id.* at 424–25 (“A terrorism enterprise investigation is a full investigation but differs from a general investigation . . . in several important respects.”).

153. *Id.* at 422.

154. *See id.* at 425 (describing “two or more persons . . . engaged in an enterprise”).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 426.

standard.¹⁵⁹ Just as a TEI's threshold standard mirrors a Full Investigation, so does its authorization and renewal procedures. To wit, a TEI may be authorized for a year and renewed for the same amount of time.¹⁶⁰

e. Investigative Techniques

To conduct the above outlined investigations, "the NYPD may use any lawful investigative technique" allowed by the Guidelines.¹⁶¹ Which technique(s) to actually employ is left to the judgment of the officer(s) running the investigation, based on a number of factors and considerations, including:

- (i) the objectives of the investigation and available investigative resources;
- (ii) the intrusiveness of a technique, considering such factors as the effect on the privacy of individuals and potential damage to reputation;
- (iii) the seriousness of the unlawful act; and
- (iv) the strength of the information indicating its existence or future commission of the unlawful act.¹⁶²

Moreover, the NYPD should try to use the least intrusive technique that would still be effective; however, the Department should not avoid a technique if it is warranted under the circumstances.¹⁶³

The Guidelines specifically authorize the use of undercover officers and/or confidential informants as an approved investigative technique, "when such operations are the most effective means of obtaining information, taking into account all of the circumstances of the investigation, including the need for the information and the seriousness of the threat."¹⁶⁴

3. Other Authorizations Under Handschu

Apart from the rules governing investigations, *Handschu* imparts several other authorizations that are instrumental in the police department's ability to "*proactively* draw on available sources of

159. *Id.*

160. *Id.* at 427.

161. *Id.*

162. *Id.* at 428.

163. *Id.*

164. *Id.*

information to identify terrorist threats and activities.”¹⁶⁵ It is crucial to bear in mind that the authorized activities discussed below do not have to be part of the investigative procedures described above and “include both activities that are . . . useful for law enforcement purposes in both terrorism and non-terrorism contexts.”¹⁶⁶ There are five key authorized activities, each of which are discussed in turn.

First, the NYPD may “operate and participate in identification, tracking, and information systems for the purpose of identifying and locating potential terrorists and supporters of terrorist activity, assessing and responding to terrorist risks and threats, or otherwise detecting, prosecuting, or preventing terrorist activities.”¹⁶⁷ The information in these systems may come from “any source permitted by law,” such as information gleaned in the course of current or past investigations; information provided by other government entities (including foreign intelligence), publicly available information, and information voluntarily provided to the police.¹⁶⁸

Second, “[f]or the purpose of detecting or preventing terrorist activities, the NYPD is authorized to visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally.”¹⁶⁹ This means that NYPD officers may go anywhere that anybody else can go, with or without a lead, preliminary inquiry, full investigation, or TEI as a predicate.¹⁷⁰ This authorization is key to understanding the operation of the Demographics Unit, which was a small unit of plainclothes officers—*not* undercover¹⁷¹—who visited only public places “to determine how

165. *Id.* at 429 (“This Part accordingly identifies a number of authorized activities which further this end, and which can be carried out even in the absence of a checking of leads, preliminary inquiry, or full investigation as described in these guidelines.”).

166. *Id.*

167. *Id.* at 429–30.

168. *Id.* at 430.

169. *Id.*

170. *Id.* at 429–30 (placing the authority to visit public places and events within “[t]his Part [of the Guidelines, which] identifies a number of authorized activities which . . . can be carried out even in the absence of a checking of leads, preliminary inquiry, or full investigation as described in these guidelines”).

171. See Mitchell D. Silber, *Who Will Defend the Defenders?*, COMMENTARY MAG. (June 1, 2012), <http://www.commentarymagazine.com/article/who-will-defend-the-defenders/> (noting that with only sixteen plainclothes officers at its largest, the Demographics did not—indeed, could not—engage in “blanket . . . surveillance” of these communities). *Contra* Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, ASSOCIATED PRESS, Aug. 23, 2011, <http://www.ap.org/Content/AP-in-the-News/2011/With-CIA-help-NYPD-moves-covertly-in-Muslim-areas>.

individuals seeking to do harm might communicate or conceal themselves. Where might they go to find resources or evade the law? Establishing this kind of geographically-based knowledge saves precious time in stopping fast-moving plots.”¹⁷² Indeed, as discussed earlier, this ability to “understand the relationships within the community” has often been considered one of local law enforcement’s comparative advantages.¹⁷³ As one commentator has written,

Because local police, unlike the FBI, have a broader law and order and public service mandate, their routine activities tend to penetrate more widely and deeply into community groups, including civic and religious organizations. Indeed, this is one of the features that make local police potentially valuable from a counterterrorism perspective.¹⁷⁴

Third, the police department can “carry out general topical research” as if they were members of the public.¹⁷⁵ This research may include “conducting online searches and accessing online sites and forums.”¹⁷⁶ The fourth authorization applies the same standard to online activity in general.¹⁷⁷ Specifically, NYPD officers are authorized under the *Handschu* Guidelines to search extremist Internet sites and/or forums to “develop[] intelligence information to detect or prevent terrorism or other unlawful activity.”¹⁷⁸

Finally, “[t]he NYPD is authorized to prepare general reports and assessments concerning terrorism or other unlawful activities for purposes of strategic or operational planning or in support of other legitimate law enforcement activities.”¹⁷⁹

IV. PROSECUTION

After detect, disrupt, and detain, the final step in the process is to prosecute. Although terrorism prosecutions remain largely the

172. Kelly, *supra* note 118.

173. Waxman, *supra* note 75, at 399.

174. *Id.* (emphasis added). Therefore, it is somewhat ironic that recent criticism of the NYPD’s counterterrorism strategies has focused so much on its Demographics program, which was designed to do that very thing. See Chris Hawley et. al., *Highlights of AP’s Pulitzer Prize-Winning Probe into NYPD Intelligence Operations*, ASSOCIATED PRESS, <http://www.ap.org/media-center/nypd/investigation> (last visited Oct. 9, 2013).

175. *Handschu 2003*, 288 F. Supp. 2d 411, 430 (S.D.N.Y. 2003).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

province of federal prosecutors,¹⁸⁰ a number of states passed their own terrorism criminal statutes in the wake of 9/11, and there are at least two recent examples of New York City invoking New York's terrorism criminal statute.¹⁸¹ Moreover, cases that are prosecuted at the federal level may be initiated based on information detected at the local level.¹⁸² Finally, there appears to be a recent, and perhaps growing, trend of using certain long-standing criminal statutes of general application to combat Internet radicalization, which, as discussed above in Part II(b), remains a significant source of extremism. These statutes also seem particularly well-suited to prosecuting so-called lone wolves or homegrown extremists for whom the absence of established terrorist ties may make it more difficult to prosecute using the more traditional anti-terrorism statutes discussed below in Part IV.B.1.¹⁸³

A. State Level Prosecutions

1. *Ahmed Ferhani*

Ahmed Ferhani is a New York City resident who was arrested by the NYPD on May 11, 2011 in New York City after trying to purchase three semi-automatic guns, ammunition, and a grenade in a sting operation.¹⁸⁴ The NYPD's months-long investigation, which included

180. Waxman, *supra* note 75, at 384 (“Most criminal prosecutions for crimes directly related to terrorism are investigated and prosecuted at the federal level. Federal investigative and prosecutorial capabilities are vast and sophisticated, while federal prosecutorial antiterrorism statutes and the high profile of such crimes push the prosecution of terrorism crimes at the federal rather than state and local levels.” (internal citations omitted)).

181. *See e.g.*, *People v. Ferhani*, No. 2461/11, 2012 WL 6554892 (N.Y. Sup. Ct. 2012); Complaint, *People v. Pimentel* (N.Y. Crim. Ct. Nov. 20, 2011) [hereinafter *Pimentel Complaint*], available at http://www.nyc.gov/html/om/pdf/2011/jose_pimentel_complaint.pdf.

182. *See* discussion *infra* Part IV.B.4 on the Jesse Morton prosecution, which began with a NYPD investigation into Morton's organization.

183. *See* Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 436–46, 493 (2007) (discussing the declining utility of FTO-support prosecutions to “unaffiliated” terrorists, and noting that 18 U.S.C. § 2339A may apply even more broadly than inchoate conspiracy charges, “but by shifting the point of potential prosecutorial intervention further back along the continuum between thought and deed, the statute entails a variety of offsetting costs”).

184. Press Release, Cyrus R. Vance, Jr., N.Y. Cnty. Dist. Attorney, First Terrorist Convicted on State Terror Charges Sentenced to Decade in Prison for 2011 Plot to Attack Manhattan Synagogues (Mar. 15, 2013), available at <http://manhattanda.org/press-release/first-terrorist-convicted-state-terror-charges-sentenced-decade-prison-2011-plot-attac>.

the use of an undercover officer who became close to Ferhani, revealed Ferhani's intention to blow up a Synagogue and kill Jews because of the violent ideology he espoused.¹⁸⁵ Ferhani was charged with a number of crimes, including two under New York State's terrorism statute—the first state-level prosecution ever brought under the statute.¹⁸⁶ Rather than being a self-standing offense, the statute operates as an “add-on” or enhancement to an underlying offense. It reads:

A person is guilty of a crime of terrorism when, with intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping, he or she commits a specified offense.¹⁸⁷

The statute was satisfied in this case, the prosecution argued, because Ferhani and Mamdouh intended to coerce New York's Jewish population and perhaps even influence U.S. foreign policy toward Muslims through the bombing.¹⁸⁸ As Manhattan District Attorney Cyrus Vance, who brought the groundbreaking charges, put it, “They did it for jihad, something they referred simply to as the cause, which meant the violence and armed fight against Israel, Jews and other non-Muslims and the West.”¹⁸⁹

Another historic first for the statute occurred nearly two years later, when Ferhani pled guilty to four counts in the indictment, including two of the “crimes of terrorism” charges.¹⁹⁰ Vance characterized the sentencing and use of the state terrorism law with the following:

Today's sentencing marks an important first for local law enforcement officials in New York State. This defendant was convicted and sentenced under anti-terrorism laws that enabled local police and prosecutors to protect our communities from

185. See Complaint, *People v. Ferhani* (N.Y. Crim. Ct. May 12, 2011), available at http://www.investigativeproject.org/documents/case_docs/1591.pdf.

186. William K. Rashbaum & Al Baker, *Suspects in Terror Case Wanted to Kill Jews, Officials Say*, N.Y. TIMES, May 12, 2011, <http://www.nytimes.com/2011/05/13/nyregion/two-men-arrested-in-new-york-terror-case-police-say.html?pagewanted=all>) (“[Ferhani and Mamdouh] were charged in a criminal complaint under a state terrorism statute passed after the Sept. 11 attacks that Mr. Vance said had not been used before in New York City in a terrorism case.”).

187. N.Y. PENAL LAW § 490.25 (McKinney 2008).

188. See Press Release, *supra* note 184 (noting that “Ferhani conspired to bomb synagogues in Manhattan to send a message of violence to non-Muslims, including Americans, Christians, and Jews.”).

189. Rashbaum & Baker, *supra* note 186.

190. See Press Release, *supra* note 184.

terrorist threats. Violent plots like Ahmed Ferhani's endanger all New Yorkers. Fortunately, *as a result of the collaboration between state prosecutors and local police*, we prevented him from carrying out his violent plan against our City.¹⁹¹

Perhaps for the first time in a terrorism prosecution, the U.S. Attorney and the FBI were not mentioned in that equation.¹⁹²

2. *Jose Pimentel*

While it took nearly a decade for the first charges to be brought under New York's terrorism statute, the second was not far behind. On November 19, 2011, the NYPD arrested Jose Pimentel as he was in the process of finalizing construction of three bombs.¹⁹³ Three of the five counts charged against Pimentel included the state terrorism enhancement: criminal possession of a weapon as a crime of terrorism, conspiracy as a crime of terrorism, and soliciting or providing support for an act of terrorism.¹⁹⁴

The NYPD's investigation of Pimentel was approximately a year long and involved many of the techniques available under *Handschu*.¹⁹⁵ In particular, the NYPD used a confidential informant to get close to Pimentel and also closely monitored Pimentel's Internet presence.¹⁹⁶ Both the interpersonal interactions and the websites evinced a violent, jihadist mindset. For example, the investigative detective on the case stated that he "reviewed internet postings from the defendant, both on a website maintained by him and on blogs, in which the defendant described his support of the terrorist organization Al-Qaeda and his belief in violent jihad."¹⁹⁷

Pimentel's "True Islam" website included a link to *Inspire* magazine's article entitled *How to Make a Bomb in the Kitchen of*

191. *Id.* (emphasis added).

192. *See* Rashbaum & Baker, *supra* note 186 ("The case was presented in State Supreme Court, with no involvement from the F.B.I. or the United States attorney's office, typically crucial in such investigations and prosecutions.").

193. Pimentel Complaint *supra* note 181, at 5; Richard Esposito & Mark Schone, *Alleged 'Lone Wolf' Arrested in New York on Terror Charges*, ABC NEWS (Nov. 20, 2011), <http://abcnews.go.com/Blotter/alleged-lone-wolf-jose-pimentel-arrested-york-terror/story?id=14994845>.

194. *See* Pimentel Complaint, *supra* note 181, at 1.

195. *See id.* at 3 (noting that the investigation lasted approximately twelve months and involved monitoring the defendant's internet activity and use of a confidential informant).

196. *See id.*

197. *Id.*

your Mom.¹⁹⁸ As discussed previously, *Inspire* is Awlaki's and al-Qaeda in the Arabian Peninsula's online magazine, which is meant to encourage Muslims in the West to take action without any training or coordination from al-Qaeda.¹⁹⁹ The magazine lived up to its name in Pimentel's case, as the investigation revealed that he methodically followed the instructions in the article to make his bombs.²⁰⁰ Pimentel's potential targets for the bombs, based on conversations that he had with the informant, may have included government and police buildings, banks, and U.S. servicemen who had served in Iraq and/or Afghanistan.²⁰¹

In many ways, the Pimentel investigation epitomizes the problems facing law enforcement and the opportunity for local involvement: a homegrown loner who appears to have been largely radicalized online but has access to "virtual training" and inspiration. Based on a tip from another local law enforcement agency,²⁰² the NYPD was able to detect, disrupt, and detain him before he could act on his violent intentions.

B. Federal Criminal Statutes

1. Background

Just as law enforcement's approach to terrorism-related cases switched to a more proactive approach post 9/11, so too did federal prosecutors.²⁰³ As then-Deputy Attorney General Paul McNulty said in a 2006 speech:

198. *Id.* According to the Complaint, Pimentel also provided a flash drive containing copy of the article directly to the NYPD informant, along with two bomb-making manuals.

199. See Complaint ¶ 48, *United States v. Morton*, No. 1:12cr35 (E.D. Va. 2011) [hereinafter *Morton Complaint*] (noting that "[t]he stated purpose of *Inspire* was to inspire English-speaking Muslims to support al-Qaeda and engage in jihad."); Black, *supra* note 69, at 2.

200. Pimentel Complaint, *supra* note 181, at 4–5.

201. See *id.* at 3–4.

202. See Esposito & Schone, *supra* note 193 ("Pimentel first came to the attention of authorities in May 2009, when he was living in Schenectady, N.Y. He returned to New York City in January 2010. Authorities say they have been tailing him for more than a year.").

203. See Chesney, *supra* note 183, at 427 (outlining "the emergence of a preference for early prosecutorial intervention in terrorism investigations within the United States"); Kelly Moore, *The Role of Federal Criminal Prosecutions in the War on Terrorism*, 11 LEWIS & CLARK L. REV. 837, 838–839 ("In the immediate aftermath of September 11, 2001, the government made a dramatic shift in its approach to terrorism prosecutions." (citations omitted)).

The extent of September 11th's impact on the Department of Justice cannot be overstated. The magnitude of that day's tragedy transformed our counterterrorism strategy. On every level, we committed to a new strategy of prevention. The 9/11 attacks shifted the law enforcement paradigm from one of predominantly reaction to one of proactive prevention. We resolved not to wait for an attack or an imminent threat of an attack to investigate or prosecute

In the wake of September 11, this aggressive, proactive, and preventative course is the only acceptable response from a department of government charged with enforcing our laws and protecting the American people. Awaiting an attack is not an option. That is why the Department of Justice is doing everything in its power to identify risks to our Nation's security at the earliest stage possible and to respond with forward-leaning—preventative—prosecutions.²⁰⁴

Two of the more frequently used statutes to prosecute terrorism are the two material support statutes, 18 U.S.C. § 2339B (“Providing material support or resources to designated foreign terrorist organizations”) and 18 U.S.C. § 2339A (“Providing material support to terrorists”). The first, 18 U.S.C. § 2339B, makes it illegal to provide material support to a designated foreign terrorist organization (FTO).²⁰⁵ The second, 18 U.S.C. § 2339A, criminalizes the provision of material support to terrorists.²⁰⁶ Both statutes criminalize a broad range of underlying conduct, making them useful for accomplishing the Department's stated goal of preventive prosecution.²⁰⁷ However, they increasingly have limitations, particularly as applied to self-radicalized terrorists who lack a connection to a designated terrorist organization.²⁰⁸ The growth of the Internet-based threat, where someone can learn how to conduct an attack and also receive moral support without ever connecting with a designated FTO,²⁰⁹ only heightens this limitation. Especially because, as one FBI official put it, “Individuals . . . who encourage

204. Paul McNulty, U.S. Deputy Att'y Gen., Remarks at the American Enterprise Institute, (May 24, 2006), *available at* http://www.justice.gov/archive/dag/speeches/2006/dag_speech_060524.html.

205. *See* 18 U.S.C. § 2339B (2012).

206. *See id.* § 2339A.

207. *See* Chesney, *supra* note 183, at 436 (discussing § 2339B), 493 (noting the features of the statute that “make[] § 2339A a very attractive and useful charge from the point of view of prevention”).

208. *See id.* at 445.

209. *See* discussion of online radicalization *supra* Part II(b).

violence and create fear over the Internet are a danger to our society and to the freedoms we enjoy as citizens.”²¹⁰

After the September 11 attacks, the Justice Department has also sought to use “every available federal criminal statute . . . to detect, prevent, disrupt, and deter terrorism.”²¹¹

The remainder of this paper will focus on what appears to be an emerging trend of using three such statutes that may be particularly useful in combating the increasing threat posed by homegrown extremists who engage in terrorist activity over the Internet.²¹² Those statutes are: (1) Dissemination of Bomb-Making Material or Information;²¹³ (2) Communicating Threats;²¹⁴ and (3) Soliciting

210. Press Release, U.S. Attorney’s Office for the E. Dist. of Va., Leader of Revolution Muslim Pleads Guilty to Using Internet to Solicit Murder and Encourage Violent Extremism (Feb. 9, 2012), *available at* <http://www.justice.gov/usao/vae/news/2012/02/20120209mortonnr.html> (quoting Assistant FBI Director in Charge of the Washington Field Office James W. McJunkin).

211. *See* Moore, *supra* note 203, at 839.

212. As with any statute that criminalizes conduct taking the form of speech, the attempt to combat the increasing threat of radicalization online inevitably raises free speech concerns. A full explication of those issues is beyond the scope of this Article. However, “there is little dispute that Congress may enact laws that regulate and even prohibit speech under some circumstances.” CHARLES DOYLE, BOMB-MAKING ONLINE: AN ABRIDGED SKETCH OF FEDERAL CRIMINAL LAW 4 (2003), *available at* <http://www.fas.org/sgp/crs/misc/RS21616.pdf>. In particular, “[i]f the speech in question is an integral part of a transaction involving conduct the government otherwise is empowered to prohibit, such ‘speech acts’ typically may be proscribed without much, if any, concern about the First Amendment, since it is merely incidental that such ‘conduct’ takes the form of speech.” U.S. DEP’T OF JUSTICE, REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION, THE EXTENT TO WHICH ITS DISSEMINATION IS CONTROLLED BY FEDERAL LAW, AND THE EXTENT TO WHICH SUCH DISSEMINATION MAY BE SUBJECT TO REGULATION CONSISTENT WITH THE FIRST AMENDMENT TO THE CONSTITUTION 35 (1997), *available at* <http://cryptome.org/abi.htm>. As the Second Circuit stated in affirming Omar Abdel Rahman’s conviction on multiple counts of solicitation,

Freedom of speech and of religion do not extend so far as to bar prosecution of one who uses a public speech or a religious ministry to commit crimes. Numerous crimes under the federal criminal code are, or can be, committed by speech alone . . . Notwithstanding that political speech and religious exercise are among the activities most jealously guarded by the First Amendment, one is not immunized from prosecution for such speech-based offenses merely because one commits them through the medium of political speech or religious preaching. Of course, courts must be vigilant to insure that prosecutions are not improperly based on the mere expression of unpopular ideas. But if the evidence shows that the speeches crossed the line into criminal solicitation, procurement of criminal activity, or conspiracy to violate the laws, the prosecution is permissible.

United States v. Rahman, 189 F.3d 88, 117 (2d Cir. 1999) (citing *United States v. Spock*, 416 F.2d 165, 169–71 (1st Cir. 1969)).

213. *See* 18 U.S.C. § 842(p) (2012).

Others to Threaten Violence.²¹⁵ Robust prosecution of Internet-based radicalization using these statutes will go a long way toward implementing the pledge of one FBI official that “[u]sing broad-based communication channels to threaten, harm and intimidate and the incite others to do the same will not be tolerated.”²¹⁶

2. *Dissemination of Bomb Making Material/Information*

Perhaps one of the most powerful tools available to federal prosecutors in this context is 18 U.S.C. § 842(p),²¹⁷ which criminalizes the teaching, demonstrating or dissemination of information related to manufacturing explosives, destructive devices, and weapons of mass destruction *if* the information is distributed while either knowing or intending that “the information be used for, or in furtherance of, an activity that constitutes a Federal crime of violence.”²¹⁸ The statute was enacted in response to the 1995 Oklahoma City bombing, after which instructions for making similar bombs had been quickly posted on the Internet following the attack.²¹⁹

Importantly, in *United States v. Sherman Austin*—the first case brought under this statute—the distribution element of the statute appears to have been satisfied merely by *linking* on the Internet to an explosives manual.²²⁰ The statute also carries a maximum prison sentence of twenty years,²²¹ meaning that potential terrorists may be taken off the street for quite a long time. However, the statute does not appear to have been frequently used since its enactment in 1999.

214. *See id.* § 875(c).

215. *See id.* § 373.

216. Press Release, Dep’t of Justice, Virginia Man Pleads Guilty to Providing Material Support to a Foreign Terrorist Organization and Encouraging Violent Jihadists to Kill U.S. Citizens (Oct. 20, 2010), *available at* <http://www.justice.gov/opa/pr/2010/October/10-nsd-1174.html> (citing statement of Acting Assistant Director in Charge of the FBI Washington Field Office John G. Perren).

217. *See Senator Feinstein Urges Department of Justice to Aggressively Enforce Bombmaking Statute*, PROJECT VOTE SMART (Sept. 3, 2003), *available at* <http://votesmart.org/public-statement/20372/#.UlbIhSSE41o> (referring to the statute, which Sen. Feinstein co-sponsored, as “an important anti-terrorism tool”).

218. 18 U.S.C. § 842(p)(2) (2012).

219. DOYLE, *supra* note 212, at 2.

220. *See* Judgment and Probation/Commitment Order, *United States v. Austin*, No. 2:02-cr-00884 (C.D. Cal Aug. 14, 2003); *Senator Feinstein Urges Department of Justice to Aggressively Enforce Bombmaking Statute*, *supra* note 217 (noting that Sherman Austin, the first person prosecuted under the statute, was “an anarchist who put links to bombmaking information on his website”).

221. 18 U.S.C. § 844 (2012).

As Senator Feinstein, one of its original co-sponsors, lamented when Austin was sentenced in 2003, “the Department of Justice needs to do a better job making prosecutors aware of” the statute, which “has been little used.”²²²

The Department’s view and awareness of the statute may be changing, however. In July 2011, Emerson Begolly, a homegrown extremist from Pennsylvania, was indicted on two counts, including a violation of 842(p)(2)(A).²²³ According to the indictment, in December 2010, “Begolly . . . posted *links* to . . . a 101-page document that contains information on how to set up a laboratory, conduct basic chemistry, and manufacture explosives.”²²⁴ The document was supposedly written by a top al-Qaeda chemical weapons expert and was posted on a known jihadist web forum²²⁵—in other words, where the audience would be receptive to his message. Moreover, the Indictment notes that shortly after Begolly posted the links to the website, he posted a follow-up message that urged others to take caution—both security precautions in downloading and physical caution when following the instructions—so that he did not have to read about a “Suspected Islamist killed while mixing chemicals for bombmaking.”²²⁶

Similar to the charges brought against Sherman Austin for disseminating bomb-making information via links to bomb-making manuals on his website, the Begolly indictment also seems to indicate that merely linking to an explosives manual or other bomb-making information online amounts to “dissemination” under the statute. That means that under those circumstances charges could be brought under 842(p) *as long as* there also is sufficient evidence to prove the “intent” prong of the statute. This, in turn, suggests that it may be possible to prosecute Internet extremists like Jose Pimentel, who post or link to issues of *Inspire* containing the “How to Make a Bomb in the Kitchen of your Mom” or similar articles if the requisite intent can be proved. The full weight of the legal theory was not tested in

222. *Senator Feinstein Urges Department of Justice to Aggressively Enforce Bombmaking Statute*, *supra*, note 217 (referring to the statute, which Sen. Feinstein co-sponsored, as “an important anti-terrorism tool”).

223. *See* Indictment at 1, United States v. Begolly, 1:11-cr-326 (E.D. Va. 2011) [hereinafter Begolly Indictment].

224. *Id.* at 5.

225. *Id.*

226. *Id.* at 5–6.

the *Begolly* case, however, as the 842(p) charge ultimately was not included as part of his guilty plea.²²⁷

3. *Solicitation*

One of the charges to which Begolly did plead guilty was “soliciting others to engage in acts of terrorism . . . ”²²⁸ which was a violation of 18 U.S.C. § 373(a).²²⁹ Under that statute, it is a crime to “solicit[], command[], induce[], or otherwise endeavor[] to persuade” another person to commit a felony with the intent that that person actually commit the felony.²³⁰ This crime often includes solicitation and/or persuasion in the form of speech.²³¹ Although the “prototypical solicitation case” usually involves some type of inducement or threat as well as directing the solicitation at a particular person, as discussed *infra*, those are not hard and fast requirements.²³²

The solicitation charge against Begolly centered on several Internet postings he made on a jihadist Internet forum encouraging others to attack targets within the United States and, importantly, specified both the type of targets and also the tactics to be used.²³³ In one example, Begolly posted about how easy it is in the United States to buy a gun “even if this person IS on the ‘terror watch’ list” and encouraged others to “take advantage of this and MOVE . . . MOVE . . . MOVE!!!”²³⁴ He then followed that advice with the following: “A successful lone-wolf attack, when even kills 1 or 2 or 3 of the kuffar is BETTER THAN and [sic] UNSUCCESSFUL massive attack which also results in your own

227. See Press Release, Dep’t of Justice, Pennsylvania Man Pleads Guilty to Terrorist Solicitation and Firearms Offense (Aug. 9, 2011), <http://www.justice.gov/opa/pr/2011/August/11-nsd-1028.html> (noting the solicitation charge and firearms charge but not dissemination of bombmaking).

228. *Id.*

229. 18 U.S.C. § 373 (2012).

230. *Id.*

231. U.S. DEP’T OF JUSTICE, *supra* note 212, at 11 (citing *United States v. McNeill*, 887 F.2d 448, 450–52 (3d Cir. 1989)); see also *United States v. Rahman*, 189 F.3d 88, 117 (2d Cir. 1999).

232. The cases discussed in this Part address terrorism-related solicitation via the Internet. However, the history of using this statute to prosecute terrorism-related solicitation—even absent a specific target of the solicitation—goes back at least a decade. For example, in 2002, Ahmed Abdel Sattar—a cohort of the Blind Sheikh Omar Abdel Rahman—was successfully charged with Solicitation of Crimes of Violence for his role in helping to distribute a *fatwa* calling for Muslims to kill Jews “wherever they are.” See Indictment at 16, *United States v. Satter*, No. 02-cr-395 (S.D.N.Y. Apr. 2010).

233. See *Begolly* Indictment, *supra* note 223 at 2–5.

234. *Id.* at 5.

arrest”²³⁵ Thus Begolly was successfully charged with solicitation even though there was no positive or negative inducement included in his solicitation and he was not directing the solicitation to anyone in particular.²³⁶ Indeed, the fact that he was addressing a wide audience on a known extremist forum rather than one specific individual may have actually increased the seriousness of the threat.²³⁷

Nor is Begolly the only terrorism defendant who was successfully charged in this manner. Another prominent example is Zachary Chesser, another extremist convert who operated his own blog that was “dedicated to those who give their blood for Islam”²³⁸ and “primarily devoted to spreading knowledge regarding Jihad and the Mujahideen.”²³⁹ Chesser was arrested by the FBI on July 21, 2010 and ultimately charged with solicitation of others to violence, attempting to provide material support to a foreign terrorist organization, and communication of threats.²⁴⁰

The core of the solicitation charge against Chesser focused on a group of five Internet posts to his own blog as well as several other jihadist forums between January and June 2010.²⁴¹ Three of these postings involved potential ways to attack the U.S. aviation industry.²⁴² Specifically, Chesser posted a link on his blog to a U.S. Transportation and Security Administration manual detailing certain screening procedures.²⁴³ He then posted on two extremist forums a link to more than 200 “books on Jihad, Islam and Warfare,” including one that had “information on the construction of anti-aircraft missiles and tactics, techniques and weapons for targeting aircraft, including jet airplanes and helicopters.”²⁴⁴

The second group of postings involved “desensitizing” law enforcement to the dangers of explosive packages by encouraging people to plant suspicious packages that were in reality harmless.²⁴⁵

235. *Id.*

236. There is no mention in the Begolly Indictment of an inducement to act or a request that any particular person on the forum be the individual to act. *See generally id.*

237. *See e.g.*, Complaint at 11–12, United States v. Chesser, No. 1:10-CR-395 (E.D. Va. 2010) [hereinafter Chesser Complaint] (noting that Chesser’s audience was a factor in determining whether his actions constituted a threat).

238. *Id.* at 2–3.

239. *Id.*

240. *See generally id.*

241. *See* Chesser Complaint, *supra* note 237, at 13–15.

242. *Id.*

243. *Id.* at 13–14.

244. *Id.* at 13–15.

245. *Id.*

This is essentially a “boy who cried wolf” scenario, in which law enforcement would become complacent and thus susceptible to a real explosives package.²⁴⁶ As the Complaint describes the post, Chesser explained that “after law enforcement had become sufficiently ‘desensitized’ to the possible danger of such packages, they would be vulnerable to a real explosive . . . boom! No more kuffar.”²⁴⁷ According to the Criminal Information filed in the case, “[t]he term ‘kuffar,’ meaning unbeliever, or disbeliever, refers to an individual who is not a Muslim.”²⁴⁸

It is interesting to note that while Chesser’s posts had a high degree of specificity in terms of the targets and tactics he was soliciting, there was no inducement (positive or negative) and the solicitation was not directed at any person in particular.²⁴⁹ Instead, as with Begolly, the fact that it was addressed to a wider audience on extremist websites known to be supportive of Jihad seemed to enhance rather than diminish the threat.²⁵⁰

4. *Communicating Threats*

Chesser also was charged with and pleaded guilty to a count of Communicating Threats, 18 U.S.C. § 875(c), which criminalizes the use of interstate or foreign commerce to communicate a threat to kidnap or injure another person.²⁵¹ In order to show a violation of this statute, the government must prove three things: “(1) a transmission in interstate [or foreign] commerce; (2) a communication containing a threat; and (3) [that] the threat [was one] to injure [or kidnap] the person of another.”²⁵² To survive First Amendment

246. See Press Release, *supra* note 216 (“Chesser explained . . . that once law enforcement was desensitized, a real explosive could be used.”).

247. Chesser Complaint, *supra* note 237, at 15.

248. *Id.* at 1.

249. As was the case with the Begolly Complaint, there is no mention in the Chesser Complaint of any inducement, or that his exhortations to act were directed at any particular person. See *generally id.*

250. Although this was explicitly a factor in the communicating threats charge, it seems possible that it also played a role in measuring the significance of the solicitation charge as well. See *id.* at 11–12.

251. See 18 U.S.C. § 875(c) (2012) (“Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.”).

252. *United States v. Baker*, 890 F. Supp. 1375, 1380 (E.D. Mich. 1995) (citations omitted), *aff’d*, *United States v. Baker*, 104 F.3d 1492 (6th Cir. 1997); see also *1072, Special Considerations in Proving a Threat*, U.S. DEP’T JUSTICE, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01072.htm (last visited Nov. 11,

scrutiny, the threat communicated must be a “true threat,”²⁵³ meaning “unequivocal, unconditional and specific expressions of intention immediately to commit an act of unlawful violence to a particular individual or group of individuals.”²⁵⁴ In addition, the threat should be viewed objectively and in context, rather than subjectively.²⁵⁵ Nor does it matter whether the person making the threat intended to carry it out.²⁵⁶

In Chesser’s case, the charges stemmed from statements that he posted on the Revolution Muslim website²⁵⁷ and other known Islamic extremist forums in response to an episode of the television show *South Park*, which Chesser believed insulted and defamed the Prophet Mohamed.²⁵⁸ The key statements underpinning the threat, according to the Complaint, included: (1) stating that the creators of the show will end up like Theo Van Gogh, the Dutch filmmaker murdered in 2004 by a Muslim extremist for making a film critical of Islam, as well as posting a picture of his murder; (2) posting sermons and statements by Osama bin Laden and Anwar al-Awlaki justifying and calling for the murder of anyone who defames Muhammad; (3) posting a home and business address for the show’s creators and suggesting that readers “pay them a visit;” and (4) obtaining and then posting the contact information for several individuals who joined a Facebook group established in solidarity with the show’s creators with the comment, “Just a place to start.”²⁵⁹ According to the Government, the threatening nature of the comments above was amplified specifically because he posted the comments on websites that had wide audiences and could be considered predisposed to respond to his exhortations with violence.²⁶⁰ Chesser understood this

2013) (outlining relevant elements and issues associated with proving violations of the statute).

253. See *Baker*, 890 F. Supp. at 1381 (E.D. Mich. 1995) (quoting *Watts v. United States*, 394 U.S. 705, 707 (1969)), *aff’d*, *United States v. Baker*, 104 F.3d 1492 (6th Cir. 1997).

254. Affidavit of Paula R. Menges ¶ 26, *United States v. Morton*, No. 1:11mj386 (E.D. Va. May 13, 2011) [hereinafter *Menges Affidavit*]; see also *Baker*, 890 F. Supp. 1375, 1382 (defining true threat as “unequivocal, unconditional and specific expressions of intention immediately to inflict injury” (citation omitted)).

255. See *Menges Affidavit*, *supra* note 254, ¶ 28; *Baker*, 890 F. Supp. at 1380.

256. See *id.* ¶ 28.

257. See Chesser Complaint, *supra* note 237, at 8.

258. See *id.* (“Chesser’s assert[ed] that the South Park episode went beyond showing [Muhammad] . . . it outright insulted him . . .” (internal quotation marks omitted)).

259. See *id.* at 7–11.

260. See *id.* at 11–12 (“[T]he postings on the internet by Chesser objectively constituted messages to an audience that likely included individuals around the world

as well, saying at one point “that posting the statement on the Ansar Al Jihad Network would ‘scare the kuffar.’”²⁶¹

Chesser made the above statement to Jesse Morton, a New York City-based Muslim convert who founded the extremist group “Revolution Muslim.”²⁶² Morton himself was charged with and “pled guilty . . . to using his position as a leader of Revolution Muslim Organization’s internet sites to conspire to solicit murder, make threatening communications and use the internet to place others in fear.”²⁶³

According to the prosecuting attorney, “Jesse Morton operated Revolution Muslim to radicalize those who saw and heard his materials online and to incite them to engage in violence against those they believed to be enemies of Islam.”²⁶⁴ As described in greater detail in the Statement of Facts in the complaint:

Morton and his associates in the Revolution Muslim organization . . . used the organization’s websites to encourage Muslims to support Usama bin Laden, Anwar Al-Awlaki, al-Qaida, the Taliban, and other Muslims engaged in or espousing jihad. They encouraged Muslims to prepare for and engage in jihad against those they believed to be enemies of Islam.²⁶⁵

One of the counts was based on Morton’s role, in cooperation with Chesser, in communicating the threats in the *South Park* affair.²⁶⁶ Among other things, Morton worked closely with Chesser to write and edit multiple drafts of the so-called “Clarifying Statement,” which

who: (A) were inclined to engage in violent jihad against what they believed to be the enemies of Islam; (B) understood the messages to constitute requests to attack [the *South Park* creators and members of the Facebook Group]; and (C) could potentially be willing and capable to attack [those individuals] in response to those messages.”).

261. Morton Complaint, *supra* note 199, ¶ 40.

262. According to the Statement of Facts accompanying Morton’s guilty plea, he “admitted that the Revolution Muslim websites contained the writings of and/or contributed to the radicalization of” at least nine people, including Colleen R. LaRose (a.k.a. Jihad Jane) and Samir Khan, the former New York City resident who is largely credited with creating and publishing *Inspire* before he was killed in a drone strike in Yemen alongside AQAP leader Anwar Al-Awlaki. See Press Release, *supra* note 210; see also Aaron Y. Zelin, *American Jihadist: The Death of Samir Khan in Yemen Marks the End of a Key Figure in the Internet Jihad*, FOREIGN POL’Y (Sept. 30, 2011), http://www.foreignpolicy.com/articles/2011/09/30/samir_khan_dead_inspire_magazine.

263. See Press Release, *supra* note 210.

264. See *id.*

265. Morton Complaint, *supra* note 199, ¶ 3.

266. See *id.* ¶¶ 29–44. The other counts not discussed herein relate to threats to Jewish organizations made in posts to Revolution Muslim by its other co-founder and which Morton approved of as administrator of the website. See *id.* ¶¶ 18–28.

ultimately reiterated their belief that insulting the Prophet Muhammad was sufficient justification for murder, quoting Osama Bin Laden to support their argument.²⁶⁷

Morton also was charged for his role in communicating the threats to the creator of the “Everybody Draw Muhammad Day” Facebook group.²⁶⁸ Specifically, about a month after the Facebook page was created, Morton posted to Revolution Muslim an audio file of one of his speeches in which he stated that Islamic law justifies killing anyone who insults the Prophet Muhammad and calling on people listening to “fight the disbelievers near you.”²⁶⁹ Morton also posted a link on Revolution Muslim to the first issue of *Inspire* which, in addition to containing the “Make a Bomb in the Kitchen of your Mom” article, also included an article in which Awlaki explicitly calls for the “assassination” of the artist who started “Everybody Draw Muhammad Day.”²⁷⁰ When the website to which he had linked subsequently removed *Inspire*, Morton, “in his capacity as administrator of the website,” allowed someone in the comment section to post active links to the magazine—thereby relinking to Awlaki’s comments.²⁷¹

CONCLUSION

Recent terrorist plots provide clear reminders that al-Qaeda, its affiliates, and others fueled by its ideology continue to pose a danger to the United States, its interests, and its cities.²⁷² For example, in early August 2013, the United States closed twenty-two embassies throughout the Middle East and North Africa due to a credible threat to U.S. interests emanating from AQAP. Moreover, Ayman Zawahiri, Osama bin Laden’s successor as the “emir” of al-Qaeda, purportedly directed the threat.²⁷³ Meanwhile, the April 15, 2013

267. *Id.* ¶¶ 36–39.

268. *Id.* ¶¶ 45–54.

269. *Id.* ¶ 47 (internal quotation marks omitted).

270. *Id.* ¶ 52.

271. *Id.* ¶ 54.

272. See Barack Obama, President of the United States, Remarks at Camp Pendleton (Aug. 7, 2013), www.whitehouse.gov/the-press-office/2013/08/07/remarks-president-camp-pendleton-ca (“[E]ven as we decimated the al-Qaeda leadership that attacked us on 9/11, al-Qaeda affiliates and like-minded extremists still threaten our homeland, still threaten our diplomatic facilities, still threaten our businesses abroad.”).

273. See Tom Cohen, *Response to Terror Threat Scrutinized: Did U.S. Go Too Far?*, CNN (Aug. 8, 2013, 6:51pm), <http://www.cnn.com/2013/08/08/politics/terror-threat> (“A recently intercepted message from al-Zawahiri to al-Wuhayshi telling AQAP to ‘do something’ set off the embassy closings . . .”).

Boston Marathon bombing was a deadly example²⁷⁴ that the threat to U.S. cities from homegrown extremists persists as well, often fueled by the availability of information and Jihadist propaganda on the Internet.²⁷⁵

Although counterterrorism is often thought of as the responsibility of the federal government, it is clear that local law enforcement can—and already does—play an important role. This is especially true in countering the threat of homegrown extremism, where local law enforcement agencies may in fact have certain advantages over their federal counterparts. The arrest and prosecution of Jesse Morton encapsulates local law enforcement’s various roles and potential advantages in each stage of the process of detecting, disrupting, and detaining homegrown extremists discussed in this Article. Morton’s and Revolution Muslim’s activities were first detected and investigated by the NYPD Intelligence Division.²⁷⁶ The Morton investigation, which used many of the techniques available to the NYPD under the revised *Handschu* Guidelines, led to the NYPD and FBI cooperating in the investigation and, ultimately, in Morton’s arrest by the federal authorities and the dismantling of the Revolution Muslim website (and much of its organization).²⁷⁷ Clearly demonstrating Morton and Revolution Muslim’s ability to use the Internet to influence others, Morton’s plea agreement lists nine homegrown radicals with ties to the Revolution Muslim website.²⁷⁸ Moreover, at least four of the nine individuals listed as radicalized by or associated in some way with Revolution Muslim were subjects of NYPD investigations that led to their arrests either at the local or federal level.²⁷⁹ Finally, Morton was charged under a relatively new trend of using certain long-standing criminal statutes to effectively

274. See *Boston Marathon Terror Attack Fast Facts*, *supra* note 7 (noting that the Apr. 15, 2013 bombings killed three people and injured at least 264).

275. See Press Release, *supra* note 210 (“Jesse Morton operated Revolution Muslim to radicalize those who saw and heard his materials online and to incite them to engage in violence against those they believed to be enemies of Islam. We may never know all of those who were inspired to engage in terrorism because of Revolution Muslim, but the string of recent terrorism cases with ties to Morton’s organization demonstrates the threat it posed to our national security.”).

276. *Id.* (referring to the role of the NYPD Intelligence Division in monitoring Morton’s activities).

277. *Id.*

278. *Id.*

279. *Id.* (specifically, Abdel Hameed Shehadeh, Jose Pimental, Mohamed Hamoud Alessa, and Carlos Eduardo Almonte).

combat the increasing role that the Internet plays in recruiting and radicalizing homegrown terrorists.²⁸⁰

As Federal and local officials continue to craft counterterrorism policy into the second decade after the September 11 terror attacks, they should bear in mind the roles and advantages that local law enforcement can bring to the counterterrorism fight.

280. See discussion *supra* Part IV.B.4.