

How the Terror Laws Make Terrorists: Pre-emptive Prosecution in the Homeland

David J. Staudt

When Attorney General Ashcroft announced, shortly after the September 11, 2001 attacks, that the FBI was shifting its anti-terror priorities from prosecution of terrorist actors to prevention of terrorist acts, it was a proclamation we had good cause to believe. Our traditionally retributive system of criminal justice had, by the turn of the century, already incorporated many practices that can only be justified upon an incapacitive or "preventive" theory of justice. That the Department of Justice should adopt a preventive posture in the face of kamikaze attacks that left behind no principal offenders to punish seemed prudent enough at the time. However, it is well known that the preventive theory of criminal justice generates more than its share of anomalies in practice, at least as judged by standards of fairness and accuracy, and the shift to preventive prosecution comes with significant social cost. In the anti-terrorist paradigm, in particular, our legislative race to neutralize any and all persons who aid, abet, conspire with, or think about becoming persons who might subvert our "national security" is leaving behind many collateral casualties. Whether or not collective utility regards this damage as acceptable is beside the point. It is certainly unjust.

My aim here is to show the extent to which our society has blessed new incapacitive measures in the domestic "War against Terrorism," even after their predictable harms to innocents have come to light; but also to show how the new terror laws will be harming categories of persons who have no organic relation to terrorism. In particular, I'd like to show how two predictions of wrongful persecution derided by the right as "hysterical"—the prosecution of political protestors as terrorists, and government monitoring of our reading habits—will reasonably occur under the current criminal code as amended by the USA PATRIOT Act and other recent enactments. Indeed, recent terror investigations show these predictions in the early stages of becoming reality.

More generally, we can see the USA PATRIOT Act and related anti-terrorist legislation as the latest in a series of "preventive" or "incapacitive" motives in

Western criminal justice systems, systems whose goals traditionally had been to punish wrongdoers proportionately to their moral desert for committing socially harmful acts. Consistent with what scholars find most troubling about the preventive theory of criminal justice in general, these newer, preventative measures have generated the majority of sanctions that libertarians and offenders' families find most repugnant. "Three strikes" sentencing laws, civil commitment of "sexually violent predators," the US Sentencing Guidelines' use of criminal history to enhance prison terms, strict-liability pornography laws, and a continually broadening set of "inchoate crimes" coupled with harsh mandatory minimums and the abolition of parole, have all been justified by legislators in recent decades as necessary incapacitive measures—and are among the main reasons why minor sex offenders and small possessors of narcotics now typically serve more jail time than rapists and some murderers. But whereas these sanctions are at least roughly confined to socially disreputable activities that citizens know to avoid—drug use, child pornography—we can predict that the new anti-terror laws will cast their net over a large set of traditionally acceptable, even privileged, social and political activities. The unjust anomaly generated by the pre-emptive prosecution of domestic terror conspirators, like the anomaly caused by pre-emptive war, will be that far too many innocents suffer.

Preventive Justice and Its Discontents

If many of the United States Government's tactics in the War against Terror are not simply explained by mean spirit or the President's drive for power, then they can only be justified by a preventive theory of criminal justice. That theory (also sometimes called the "restraint," "disablement," or "incapacitive" theory of punishment) lets society deprive persons of their liberty based upon their level of dangerousness to others, preventing those persons from causing future harms. The theory is usually treated in law schools in opposition with the retributive or "just desserts" theory of

punishment, which captures the traditional understanding that criminals are punished according to their level of moral culpability in causing injury to individuals or society's interests. The preventive theory's attraction is that it essentially eliminates the arbiter or legislator's need to determine perpetrators' moral culpability across broad categories of harmful acts—a determination that can often be grossly unjust in individual circumstances. Legal scholars agree that as a stand-alone, normative principle of criminal justice, however, preventive punishment wouldn't be tolerated for very long by the public. As Harvard Law Professor Paul R. Robinson has explained, psychology's tools for predicting dangerousness are still crude; our prison system is designed to punish, not reform; restraints would have logically to be limited to the minimally-restrictive; and any long prison sentence would have to be periodically revisited to determine a convict's ongoing dangerousness. The potential for government abuse or error would be very great, and the disparity of punishments meted out for the same unlawful acts (or for no unlawful acts, since the theory doesn't really require a crime to be committed before it imprisons a dangerous person) would likely strike the community as something other than "justice."

The preventive justification—and its unjustly punitive practices—were employed by federal law enforcement immediately following 9/11, when Attorney General John Ashcroft ordered, in his own words, "a preventive campaign of arrest and detention of law-breakers." Although many of the estimated 2,000 or

the Attorney General got away with it, deporting the immigration detainees, refusing to tell the House Committee on the Judiciary who the material witness detainees were, and benefiting from a decision in the Court of Appeals for the District of Columbia that withheld all details concerning the campaign under a law enforcement exception to the Freedom of Information Act.

In *Hamdi v. Rumsfeld*, the US Supreme Court also recently ratified preventive detention of the citizen-"enemy combatant," to the extent such is defined as "part of or supporting forces hostile to the United States or coalition partner in Afghanistan and who engaged in an armed conflict against the United States." The plurality of four justices rejected the argument of an unlikely dissenting combination of Justice Scalia and Justice Stevens that the US Criminal Code's treason statute, as well as a dozen other federal statutes criminalizing seditious acts, already give the Executive more than sufficient existing tools with which to neutralize or prosecute a Yassar Hamdi. Without endorsing the Government's argument, the plurality nonetheless had no difficulty accepting that detention of unlawful combatants was "an important incident of war" that was "solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war."

The preventive tool that is most widely used in the United States is prosecution for "inchoate" crimes, or what Robinson calls the modern penal system's "ability to punish the uncommitted crime." Under the federal criminal code, attempt or conspiracy to commit many crimes may be punished "up to the maximum punishment that would have applied had the offense been completed." Indeed, the Model Penal Code would punish all inchoate offenses as if they had been completed crimes. Robinson argues that this approach maximizes "societal control over dangerous people," since "the offender who fails to cause harm because police are able to interrupt him may be as dangerous as the offender who completes the offense." Currently, the charge of conspiracy is the favorite tool of federal prosecutors, who charge it in most criminal complaints or indictments involving more than one defendant. It appears to be charged in all international terror prosecutions.

Of course, there would appear to be no great injustice in severely punishing active members of a terror cell for conspiracy, especially where the plan were a suicide attack, and the conspirators had already begun physical actions or "overt acts" to attempt the crime. The successful suicide attack usually leaves the most morally culpable perpetrator beyond the reach of law, and it is a rare case in which the retributive principle—at least so far as the suicide bomber goes—entirely fails to match punishment to offense. Since the traditional common law defines conspiracy as an agreement between two

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more 9/11 detainees were, technically, lawbreakers, in that they were picked up for civil immigration law violations, it was not the criminal penalties for such infractions that kept most of them in jail for three months or longer. Others who were not visa violators, but who were "encountered during the course of the FBI's investigation into the attacks," i.e., present when the FBI picked up the violators, were arrested and then held on "material witness warrants" issued *ex post facto*. In the parlance of the law, these detainees were not being "punished" at all. Rather, they were Muslim immigrants or Muslim associates of Muslim immigrants, which in the FBI's mind was a sufficient index of dangerousness to hold them "until it was determined they were not involved in terrorist activity." Illegal as the whole detention campaign arguably was,

or more persons to commit a specific crime, who have intent to commit the crime, and who act in furtherance of the scheme, a suicide bombing case seems a clear mark of severe dangerousness, incarceration for conspiracy of which, as an incapacitive measure, is logically consistent and intuitively just.

Logical inconsistency and moral injustice enter when "terrorism" includes a broad range of activities, some hardly dangerous in their own right. The risk of inconsistency and injustice also increases to the extent that the proof elements of "conspiracy" are diluted or waived. The latter has already occurred in the federal system, due mostly to precedents crafted during the "War on Drugs." One public defenders' association has described contemporary federal conspiracy law as akin to "taking a trip to Lewis Carroll's Alice in Wonderland," critical of the many ways in which our justice system has enlarged the scope of the common law crime in order to ensure successful prosecutions. For example, the two federal conspiracy statutes for controlled substance offenses eliminate the need to prove any overt act to carry out a plan. Two people who agree to get drugs to sell have already broken federal law, whether or not they take any steps to get the drugs. Under the generic federal fraud statute, only one person of a conspiracy need commit an "act to effect the object of the conspiracy" in order for all members to be punished equally for conspiracy and for all other crimes which the actor foreseeably commits in the course of the overt act or offense. In the fed-

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eral defenders' opinion, there is "substantial danger that an individual lumped into a mass conspiracy may be found guilty based on evidence that is applicable solely to other defendants."

We know, for example, that as a result of judicial precedents in the War on Drugs, federal prisons contain many wives and girlfriends of distributors whose only involvement in the greater conspiracy was that they knew their husbands or boyfriends were selling drugs and that they did some trivial service for them such as depositing the proceeds. The US Sentencing Guidelines, tarring with a broad brush, has nonetheless given these women hard time commensurate with the total amount of drugs handled by "the conspiracy." (An additional anomaly is that since the women often know so little about the actual drug deals, they can't offer material assistance to prosecutors, and

wind up doing more time than some of the actual dealers.) Since the advent of the War on Drugs, in particular, conspiracy has come closer and closer to meaning little more than "association" with suspected wrongdoers.

The Department of Justice has deftly applied these modified conspiracy rules to the domestic War on Terror, creating similar anomalies. Civil rights attorney Lynne Stewart fell victim when, after allegedly passing a message from imprisoned client Abdul Rahman to the media, she found herself charged with conspiracy to commit the terrorist acts that the allegedly coded message facilitated. That she may not have known of the plot or any more of its accessories is not, in the government's view, a defense. Indeed, the trial judge who ruled against Zacarias Moussaoui's motion to dismiss his own terrorist conspiracy prosecution cited multiple-defendant drug prosecution precedents, noting that

[o]nce it is established that a conspiracy exists, the evidence need only establish a slight connection between the defendant and the conspiracy to support a conviction. One may be a member of a conspiracy without knowing its full scope, or all its members, and without taking part in the full range of its activities.

Seventy-five percent of the indictment against Moussaoui recites the events of 9/11 as the presumed "overt act" of his conspiracy, even though prosecutors concede that Moussaoui did not participate in planning or executing those attacks. The court agreed that once he joined al Qaeda, Moussaoui could be presumed to have agreed to "a conspiracy to attack the United States," and thus could be held responsible for all foreseeable offenses committed by al Qaeda members.

The USA PATRIOT Act

In early law review critiques of the PATRIOT Act, scholars feared that new definitions of terrorism would be applied to monitor and stifle legitimate public protest. In particular, they were concerned about the scope of the following newly-added definition of "domestic terrorism":

the term "domestic terrorism" means activities that

- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or any State; and
- (B) appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily within the jurisdiction of the United States.

The troubling aspects of the definition are that almost all demonstrations aim to influence the policy of the government, that “intimidation” is a subjective state, and that tempers can easily get out of hand during protests. One Congressman, reading the text after its passage (we know no legislator read it beforehand) worried that Congress “may be handing a future administration tools to investigate pro-life or pro-gun rights organizations. . . . It is an unfortunate reality that almost every political movement today, from gun rights to environmentalism, has a violent fringe.” Many commentators worried the definition would sweep up any domestic political group that had ever been accused of intimidation or property damage, “such as Act Up, [PETA], Operation Rescue, or the Vieques demonstrators.” To these we can add picket lines and labor rallies, and urban riots.

The PATRIOT Act’s insertion of “domestic terrorism” in the definitions of the federal criminal code chapter on Terrorism is not altogether clear. The Act did not add a new crime called “domestic terrorism,” and the term is never used again in the chapter. In addition to the crime of “acts of terrorism transcending

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national boundaries,” there already existed a “Federal crime of terrorism” (defined as any offense “calculated to influence or effect the conduct of government by intimidation or coercion”) that violated any one of approximately thirty other federal statutes involving violence or destruction of property.

The new definition may have been included for reasons other than to define a new crime, though. We know in hindsight that the PATRIOT Act was a Department of Justice compiled “wish list” amending over thirty federal statutes to give law enforcement either greater powers (to obtain business records or get Foreign Intelligence Surveillance Act (FISA) warrants, for instance); to remove limitations from existing authorities (such as the geographical scope of warrants and notification deadlines); or to codify or overrule specific judicial rulings (these concern the FBI’s ability to use evidence obtained by spying agencies to prosecute criminals—the so-called “wall” on which the Department of Justice blames the 9/11 attacks). Without making “domestic terrorism” a new crime, the PATRIOT Act nonetheless modifies obscure chapters of the criminal code, including one section that grants authority to the Attorney General to reward and pro-

tect the identity of any person who “furnishes information leading to the prevention [or] frustration . . . of an act of terrorism against a United States person or property”—which now includes “domestic terrorism.”

The new definition may also be a placeholder. The PATRIOT Act amended FISA to allow agents surveillance warrants when “a significant purpose” of the surveillance is to obtain foreign intelligence information. Subsequently, the Domestic Security Enhancement Act of 2003 (“PATRIOT II”) sought to amend the language of both FISA and the criminal (or “Title III”) wiretap statutes to allow both FISA and normal investigative surveillance to be used on purely “domestic terrorist” groups. The new definition appears to have been part of a Department of Justice legislative strategy eventually to allow surveillance and subpoena of “domestic terror” groups with no connection to foreign powers.

There is plenty of evidence that political dissent is now targeted for surveillance, and that the government is looking to prosecute. In a March 2002 memorandum to the FBI, “What Do I Have to Do to Get a FISA Warrant?,” the Attorney General and his department took the position that information submitted to the FISA court in support of surveillance applications “need not be constitutionally reliable.” He also interprets “clandestine intelligence gathering activities,” one of several statutory predicates for FISA surveillance, to include attempts to collect “trade secrets, economic developments, political information, and even personal information.” Political action, when “disguised propaganda” and “harassment,” is also, in the Attorney General’s opinion, clandestine intelligence gathering activity. At the same time, Attorney General Ashcroft issued new guidelines on investigations, requiring the FBI to “proactively draw on available sources of information to identify terrorist threats and activities . . . with an eye toward early intervention and prevention of acts of terrorism before they occur.” Overturning a Vietnam-era reform, he once again “authorized [the FBI] to visit any place and attend any event that is open to the public, on the same terms and conditions as the public” without opening an actual investigation. Peaceful protest demonstrations were specifically addressed in the guidelines under the heading “Terrorism Enterprise Investigations.” In May of 2003, Congress again helped bridge the “foreign agent”/domestic free-speaker divide, amending FISA to allow unaffiliated “lone wolf” actors to be considered “agents of a foreign power” for surveillance purposes. Because an “agent of a foreign power” need no longer be cooperating with anyone, much less a foreign power, US citizens became subject to FISA without any necessary foreign nexus.

In perhaps the clearest indication that the Executive finds a rough equivalence to exist between protest and

terror, FBI Intelligence Bulletin No. 89 ("Tactics Used During Protests and Demonstration"), issued 10 days before large Washington and San Francisco anti-Iraq occupation protests, alerted law enforcement to report "possible indicators of protest activity" and other "potentially illegal acts" to "the nearest FBI Joint Terrorism Task Force." Describing protest organizing activities in the same dire terms one would expect the government to use to alert of al Qaeda activity, the bulletin issued such warnings as that protestors may use the Internet "to recruit, raise funds, and coordinate their activities"; that "activists may also use intimidation techniques such as videotaping . . . to hinder the arrest of other protestors." "[E]ven more peaceful techniques," warned the bulletin "can create a climate of disorder . . . and possibly intimidate people from attending the events being protested."

The reiteration of "intimidation" to describe protestors' effects on event attendees and the police parallels the language of the definitions of "domestic terrorism" and the "federal crime of terrorism," as well as language typically used in indictments of alleged foreign terrorists. By creating "a climate of disorder," no matter how peacefully, protestors are intimidating civilians and possibly even government officials; by attempting to protect themselves from police brutality, they are intimidating the police. Numerous ACLU reports published since May 2002 claim that local police are responding commensurately.

Going after Only the "Bad Guys"?

"Everything they're jumping up and down about is completely untrue," Justice Department spokesman Jorge Martinez said in May of 2003, responding to a nationwide rash of municipal resolutions condemning the PATRIOT Act. "We're not going after the average American. We're only going after the bad guys. If you're not a terrorist you have nothing to fear." During his 2003 "Protecting Life and Liberty" speech tour to law enforcement bodies, Attorney General Ashcroft also derided as "hysteria" American Library Association concerns over the PATRIOT Act amendments to FISA that gave the FBI power to demand library records under a secret FISA warrant or National Security Letter (NSL) issued by the Attorney General. "The Department of Justice has neither the staffing, the time nor the inclination to monitor the reading habits of Americans," said Ashcroft. "No offense to the [ALA], but we just don't care."

But the "we're only after the bad guys" argument—offered numerous times by the Bush Administration over the past three years whenever confronted with a domestic civil liberties concern—is a contradiction in terms. Every first-year law student knows (and every high school civics student should know) that in a con-

stitutional system of checks and balances, "good" and "bad" is what a jury determines a defendant is at the end of a trial preceded by criminal due process, instead of the start of an investigation. Allowing law enforcement to use a separate investigative procedure on perceived "bad guys" is, in effect, to allow law enforcement to determine the guilt of the suspects.

The risk to the majority of protestors and demonstration planners (those who don't throw stones or even know those who do) is that by the application of current conspiracy doctrine, they could be charged with aiding, abetting, or conspiring to commit acts of terrorism so long as one person in the demonstration commits or attempts a state or federal crime of violence. Addressing this risk, law enforcement officials repeat many variations of the "only the bad guys" assurance. Those "bad guys" whom joint task forces and federal prosecutors have targeted for special treatment lately are less than bomb-throwing anarchists, however. In March 2004, Bill Moyers reported incidents in which local police assigned to anti-terrorist teams or joint federal-state task forces infiltrated anti-war protest groups in Colorado, California, and Washington, DC. In the Colorado case, the undercover sheriff had unsuccessfully attempted to persuade the members to rush the police line into Buckley Air Force base, an action that might have been a federal felony. Under federal conspiracy law, it would not have mattered that the prime instigator would have been a law enforcement officer.

At Drake University this year, The National Lawyers Guild, the Catholic Peace Ministry, and college students held an anti-war demonstration at the Camp Dodge, Iowa, National Guard base. One college student may

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—Jorge Martinez, Justice Department Spokesman

have tried to scale the base fence. Apparently acting on tips from two local deputies who had attended planning sessions undercover, and who took names, federal district prosecutors convened a grand jury "to determine whether there were any violations of federal law, or prior agreements to violate federal law, regarding unlawful entry onto military property." School officials, including the University president, were served with subpoenas demanding them to turn over the all information they had on the Lawyer's Guild and its membership, including meeting minutes. At least one subpoena was served by a member of the local FBI Joint Terror Task Force. The Grand Jury appeared to have been convened to determine whether there had

David Staudt
The Gifts and Thefts

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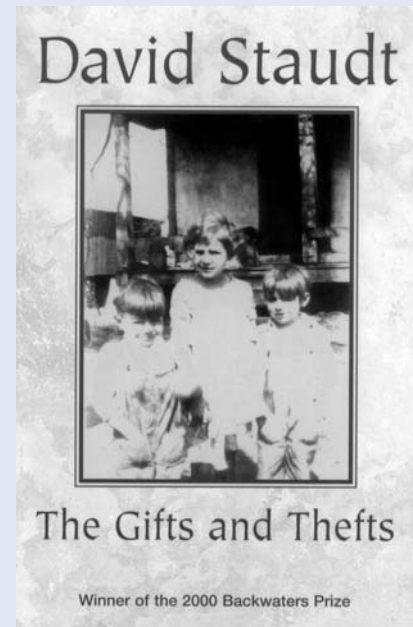
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Judge's Statement

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been a conspiracy to "attempt to injure . . . national-defense premises," a crime that can qualify as an offense of the "Federal crime of terrorism," punishable by a sentence of up to ten years.) Just recently, the FBI admitted it had infiltrated, and was monitoring the Internet sites of, groups planning to protest at the Republican national convention, even though the assistant director of the Bureau's counterterrorism division acknowledged it had no evidence to move against any member.

The harm to a free society caused by these threats of prosecution goes beyond disproportionate punishment in individual cases and the chilling effect those threats will have on persons thinking of demonstrating. Changes in criminal punishments don't always reflect pre-existing community norms. As Professor Robinson notes, "a criminal law with moral authority can influence conduct by helping to shape community norms." Robinson cites increased penalties relating to

drunk driving and domestic abuse that "painted such conduct as more morally condemnable than previously thought." To these we can add the observation that, since the "War on Drugs" began, upper middle-class professionals generally no longer have marijuana at their parties. I believe this is due not only to fear of mandatory minimum penalties, but also that the penalties themselves are a legislatively imposed judgment that recreational use no longer is socially acceptable. Nowadays we tend to think of recreational users as a different social class of people who recklessly disregard the law. If the government sanction of public dissent rises to the level libertarians think it can, we may begin to view dissenters as similarly lawless. Public dissent may decrease not only because of the chilling effect of random prosecutions, but also because dissent will be no longer respectable. Dissent is already, in too many people's minds, "unpatriotic."

Bless the Librarians

After Congress passed the PATRIOT Act without a single member having read it, as the Executive was refusing to talk about the hundreds it had thrown in jail without charges, as the media waved the flag and people lowered their voices in restaurants whenever they talked about the government, librarians loudly rallied to preserve the First Amendment. After section 215 of the PATRIOT Act authorized assistant special agents in charge of FBI field offices to seek a FISA warrant requiring any entity to produce "any tangible things . . . for an investigation to protect against international terrorism or clandestine foreign intelligence activities," the 64,000-member strong American Library Association denounced the provision. Under previous laws, explained Department of Justice spokesman Mark Corallo, federal investigators had had difficulty getting the library records of people who had not committed crimes. "But terrorists have been exploiting that," he told the *Washington Post*. Still, he assured us, "We're only going after the bad guys." By the time PATRIOT I passed, the FBI had already seized computers from a Delray, Florida library on suspicion that some 9/11 hijackers had used them to communicate; the agency also had subpoenaed information on the use of library terminals from the Paterson, New Jersey Public Library. After the bill's passage, the Santa Cruz public libraries began shredding reference requests and computer use records daily; other Bay Area libraries erased caches on hard drives. The Patten Free Library in Bath, Maine, began leaving "no trace" of book borrowing or computer sign-up sheets. The Berkeley Public Library, which was contacted by the Air Force immediately after September 11 with a complaint that someone on a library computer had tried to hack into Travis Air Force Base's files, instructed employees to say, when served with a subpoena, that they "were not in a position to act on it." Instructed the laminated card each employee received, "Do not attempt to give them the information they are looking for."

During his speech tour in September 2003, John Ashcroft derided all this as hysteria, but at the same time refused to disclose how many times section 215 had actually been used to inspect public library records. The ALA subsequently reported that unnamed Department of Justice witnesses had claimed that agents had obtained library information in 50 occasions since 9/11. Independently, the University of Illinois surveyed 1,020 libraries across the country and reported that 85 had been asked by law enforcement officials about patrons in connection with 9/11. A Department of Justice spokesman responded that most of these contacts, if not all, had been part of normal criminal investigations.

Absent specific state or local law prohibiting such, librarians had always had the ability to turn over

patron records. Even with such laws, law enforcement could always get the records with a wiretap order or search warrant, assuming they could convince a trial judge or magistrate that they had probable cause that the fruits of such warrants would turn up evidence that a specific target had committed a specific crime. The question is why the FBI needed to have easier access to records of people who are *not* thought to have committed crimes, and to enforce the silence of librarians from whom that information is obtained.

Swapping Recipes

"If you enjoy swapping recipes from your 'Joy of Jihad' cookbook," stated John Ashcroft in September 2003, "you *might* be a target of the Patriot Act." This is actually a fairly accurate statement of the law. Prior to PATRIOT, the mere swapping of such "recipes" (presumably Ashcroft means bomb-building instructions, but he could also mean information concerning how to avoid the INS, or how to get money to family overseas), the communication would essentially not be accessible to the intelligence and law enforcement unless one were a foreign national or were suspected of having committed an actual crime. Having successfully made the case for preventive surveillance power, federal agencies may now intercept or retrieve such communications so long as the need for those communications is linked to an investigation into clandestine intelligence gathering.

It's always possible that a Task Force in distinct situations might need to know all the patrons who checked out the anti-Semitic *Turner Diaries* or manuals on explosives. As the short history of terror prosecutions post-9/11 shows us, however, it is more likely that investigators want to dig up everything they can get on individuals targeted for preventive surveillance, including what they read and watch and the Web sites they visit. In a preventive system, anything may be a sign of dangerousness. Even in a retributive justice system, anything is fair game as evidence for motive. Many post-9/11 prosecutions involve the charge of "providing material support to terrorists," and "material support to foreign terrorist organizations." "Material support" is defined, among many things, as "currency . . . lodging, training, expert advice or assistance . . . communications equipment . . . personnel, transportation, and other physical assets." A favorite early target of prosecutors have been young Arab or Muslim men who attended training camps overseas. In these cases, reading material, videos, and e-mails often form the core of the evidence proving the defendants' intent to fight.

In *United States v. Masoud Khan*, for example, the inquiry focused on why Muslim college students in northern Virginia played organized paintball every

weekend. In early 2000, with the war in Chechnya a current topic in the Muslim community, two of the young defendants apparently discussed playing paintball as “a way of doing jihad.” Although the court recognized that “Jihad literally means a struggle, which may range from exercising self-discipline, such as controlling one’s appetite, to violent combat,” the court construed every subsequent mention of jihad in the evidence as “violent combat.” The defendants may or may not have had an actual intention of someday fighting for the rebels against Russia.

On what basis did the court then conclude that the paintball exercises were “not just an opportunity for outdoor exercise [and] fellowship . . . but also as preparation for real combat”? For one, what the defen-

dants read. “The players shared videotapes of war and their paintball Website, which was password protected, was used to disseminate information about jihad.” Second, the court noted that after one of the students had been questioned by FBI agents on campus about the paintball games, the games became “more secretive.” New players were told not to tell people about the games, and to avoid talking to the police. After 9/11, the students were among others in the Muslim community who met to discuss “how Muslims could protect themselves.” Of course, all of this is protected First Amendment activity, and with no more indications of dangerousness than typify activities of “muscular Christians,” who read and discuss end-time novels, play paintball at church retreats,

US Anti-Terror Initiatives

1972 In *United States v. United States District Court*, the US Supreme Court holds that the President’s surveillance of domestic terror suspects without a warrant is unconstitutional.

1978 Congress passes the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801–1811, establishing a secret *ex parte* court to issue warrants for the federal surveillance of foreign powers. Federal courts gradually allow evidence obtained in such surveillance to be used in domestic criminal prosecutions of citizens so long as the purpose of the surveillance was primarily for intelligence-gathering purposes.

1994 18 U.S.C. § 2339A makes it a crime to provide “material support” to a terrorist.

1996 In response to the Oklahoma City bombing, the President signs the Antiterrorism and Effective Death Penalty Act, severely limiting habeas corpus challenges and adding the new crime of “providing material support or resources to designated foreign terrorist organizations (FTOs),” 18 U.S.C. § 2339B. The classification of an organization as an FTO is left to the Secretary of State’s secret determination.

September 11, 2001 Al Qaeda terrorists attack the United States.

October 26, 2001 Congress Passes the USA PATRIOT Act. Amending over 30 federal statutes, PATRIOT now authorizes FISA warrants when “a significant” purpose of surveillance is intelligence gathering on agents of foreign powers. (The Attorney General immediately interprets the phrase to mean that any FISA surveillance can be used to gather evidence for domestic criminal prosecutions as long as “a purpose” of the warrant is to gather foreign intelligence, and is upheld by the US Fourth Circuit Court of Appeals.) The Act also enlarges the term “material support” in 18 U.S.C. §§ 2339A and §2239B to include provid-

ing “expert advice or assistance” and “monetary instruments” to terrorists and FTOs, and adds a new definition of “domestic terrorism.” To date, only the 9th Circuit Court of Appeals has struck the phrase “expert advice or assistance” as unconstitutionally vague. Section 215 of the Act allows FISA warrants to access library records.

January 10, 2003 The Department of Justice circulates a draft of the “Domestic Security Enhancement Act of 2003” (PATRIOT II), to Speaker of the House Dennis Hastert and Vice President Cheney, after denying its existence to senators for months. Several times larger and even more sweeping than PATRIOT I, PATRIOT II authorizes FISA warrants to allow surveillance and search of “domestic terrorists,” gives the Attorney General authority to expatriate US citizens who provide “material support” to terrorists, and gives federal agents administrative subpoena authority. After the Center for Public Integrity breaks news of PATRIOT II a few weeks later, congressional and public outcry grows and the bill is never formally introduced.

May 2003 The Attorney General gives FBI agents permission to attend anti-war meetings and mosques without opening an investigation in order to look for potential terrorist suspects.

October 15, 2003 The FBI publishes an Intelligence Bulletin directing law enforcement agencies to report “possible indicators of protest activity” to FBI Joint Terrorist Task Force.

2004 The Administrative Office of United States Courts’ annual Wiretap report shows that for the first time, the number of secret FISA wiretaps (1,777) exceeded all federal and state criminal wiretaps combined for the previous year. The number of FISA wiretaps had been growing steadily since 1979, when a mere 207 FISA warrants were issued.

and support the expulsion of Palestinians from Israel. Viewed through the “bad guy” lens, however, Muslims playing paintball evidences a terrorist conspiracy. For their expert witness, the prosecution called a white Marine Corps trainer who testified that paintball, for many Marines, was “a stepping stone to further military training.”

In the now-infamous “Lackawanna Six” prosecution, six young Buffalo, New York, Muslims visited Taliban training camps in Afghanistan prior to 9/11, leaving early after learning what Osama bin Laden and his supporters were actually espousing. Though none of those actually charged would subsequently be found to have harbored any terrorist plans or any weapon more dangerous than one hand gun, and cooperated in answering questions from FBI field agents about the camp openly, their daily lives were scrutinized extensively by the CIA and FBI for many months under FISA warrant, with practically every e-mail communication parsed by the agencies and briefed to the President daily. Though the FBI repeatedly stated there was no case worth prosecuting, CIA agents convinced the President that e-mails referring to an imminent “marriage feast” meant a terrorist attack, and finally arrested the six—one in bed with his new wife on their wedding night. The six were charged with providing “personnel” (i.e., themselves) to al Qaeda by having attended the camp. Dismissing a vagueness challenge to the charged offense, the trial judge adopted Fourth Circuit precedent and held that “one can be found to have ‘provided material support and resources to a foreign terrorist organization’ by . . . allowing one’s self to be indoctrinated and trained as a ‘resource’ in that organization’s activities.” As proof of the indoctrination and belief, prosecutors and the court cited the following items: a movie about the destruction of the *USS Cole* for which al Qaeda claimed responsibility; “conversations about Palestine and Kashmir”; documents the defendants admitted they saw in Pakistan containing “anti-American sentiments”; an audio cassette tape in Arabic entitled “A Call to Jihad” (the defendants disputed this translation); another tape containing “pro-Palestinian, anti-Israeli propaganda”; another entitled “Future of the Islamic Nation”; and another containing recitations of passages from the Koran. That the defendants had not made a cleaner, more public disavowal of the sentiments expressed in these materials was proof of their “conspiracy of silence” as a terrorist sleeper cell. Against the advice of at least one of their defense counsel, the defendants pleaded guilty. Said Attorney Patrick J. Brown, “we had to worry about the defendants being whisked out of the court room and declared enemy combatants if the case started going well for us.”

Conclusion

The foregoing should give credibility to the librarians’ concerns. Given any particular prosecution theory, one’s reading and viewing material is potentially relevant to one’s intentions, motives, and beliefs—and therefore one’s danger to society. After the next domestic terror attack, whenever it comes, PATRIOT II’s wish list is sure to return. Among the new powers will be the ability of FBI field offices to issue their own “administrative” subpoenas for the information.

“Historically, terrorists have used libraries to plan and carry out activities that threaten our national security. . . . [W]e should not allow them to become safe havens for their terrorist or clandestine activities” warns the Department of Justice on its “Preserving Life and Liberty” Web page. Maybe the librarians should worry for themselves as well as their patrons. Some communities contain large immigrant Arab populations with identifiable Muslim organizations. In these communities, librarians who take special measures to erase caches or shred sign-up lists might be thought one day to foresee the consequences of their actions on police or intelligence efforts—especially if they institute such measures in the aftermath of a terrorist attack. That their stated intention would be to protect the privacy of all patrons would, I suspect, not impress a zealous prosecutor, especially one willing to make a point *in terrorem*. One needn’t have attended the cabal at its birth in order to aid it or conceal it; one needn’t even approve of it, or even actually aid it in fact, in order to incur culpability. In a pre-emptive war, non-combatants such as these could surely fall.

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Sources: John Ashcroft announced his preventive campaign in testimony before the US Senate Committee on the Judiciary, in *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism* (December 6, 2001), http://www.judiciary.senate.gov/print_testimony. An overview of the competing descriptive theories of punishment may be found at Wayne R. LaFave, 1 *Substantive Criminal Law* § 1.5 (second edition, West 2004), available on Westlaw at 1 SUBCRL § 1.5. See Paul H. Robinson, “Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice,” *Harvard Law Review*, vol. 114 (2001), for a discussion of the preventive elements in American criminal justice, and their conflict with this system’s essentially retributive goals and methods. On the 9/11 detainees, see US D.O.J., Office of Public Affairs, “Statement of Barbara Comstock, Director of Public Affairs, Regarding the IG’s Report on 9/11 Detainees” (June 2, 2003), http://www.usdoj.gov/opa/pr/2003/June/03_opa_324.htm; see also USD.O.J., Office of the Inspector General, “Report to Congress on the Implementation of Section 1001 of the USA PATRIOT ACT” (July 17, 2003), http://www.usdoj.gov/opa/pr/2003/July/03_oig_324.htm.

www.justice.gov/oig/special/03-07/index.htm; see generally other critical OIG reports at <http://www.justice.gov/oig>. The federal district court in *US v. Awadallah*, 202 F.Supp.2d 55, *rev'd*, 349 F.3d 42 (2nd Cir. 2002), thought DOJ's use of the material witness warrant statute, 18 U.S.C. § 3144, was illegal. See DOJ's answers to questions on the material witness detainees posed by the House Committee on the Judiciary in US D.O. J. Office of Legislative Affairs, Letter to Hon. F. James Sensenbrenner (May 13, 2003) (answers to questions 26 and 27), at <http://www.house.gov/judiciary/patriotlet051303.pdf>. The estimate as to the number of detainees is from David Cole, "The Course of Least Resistance: Repeating History in the War on Terrorism." *Lost Liberties: Ashcroft and the Assault on Personal Freedom*. Ed. Cynthia Brown. (NY: The New Press, 2003). The decision in *Center for National Security Studies v. Department of Justice*, 331 F.3d 918 (D. C. Cir. 2003), *cert. denied*, 124 S.Ct. 1041, 157 L.Ed.2d 888 (2004), effectively sealed all further information concerning the detainees. In *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004), the Supreme Court took up the Administration's arguments on the internment of citizen "enemy combatants." Observations on the federal crime of conspiracy are largely from Federal Defenders of San Diego, Inc., *Defending a Federal Criminal Case*. (San Diego: DFCC 2001), 12-544 to 12-546 (further citations omitted). The Lynne Stewart case is *US v. Sattar*, 272 F.Supp.2d 348 (S.D.N.Y. 2003); her superceding indictment of November 19, 2003, No. 02-Cr.-395, is available from the US Southern District of New York with PACER access at <https://ecf.nysd.uscourts.gov/cgi-bin/login.pl>. It is also available from this article's author. Details of the original indictment of Zacarias Moussaoui, may be found in the district court's opinion at *US v. Moussaoui*, 282 F.Supp.2d 480 (E.D.Va. 2003). The passages of the USA PATRIOT Act, Pub. L. 107-56 (107th Cong.), 115 Stat. 271 et seq., discussed in this article are Section 215 (amending FISA, 50 U.S.C. § 1861 et seq.), Section 802 ("Definition of Domestic Terrorism") (amending 18 U.S.C. § 2331), Section 805 (amending 18 U.S.C. § 2339A), and section 808 (amending 18 U.S.C. § 2332b). A good analysis of PATRIOT in plain language is Charles Doyle, "Terrorism: Section by Section Analysis of the USA PATRIOT Act." (Congressional Research Service, December 10, 2001), available at <http://www.cdt.org/security/usapatriot/011210crs.pdf>. The FISA definition of "agent of a foreign power" was again amended by S.113 (108th Cong. 1st) (May 9, 2003), text at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:s.0113> and <http://homeland.cq.com/hs/display.do?dockey=/usr/local/cqonline/docs/html/billtext/108>. "PATRIOT II" was the Domestic Security Enhancement Act of 2003, section-by-section analyses and complete text of which may be found at the Center for Public Integrity, <http://www.cpi.org>. After the confidential text of the bill was leaked to the CPI, and criticized in Congress and the media, it was tabled, though the ACLU reports that it is being passed in piecemeal legislation. In this article, I discuss sections 121, 122, and 128 of the draft bill. Early fears about PATRIOT quoted are from Sharon Rackow, "How the USA PATRIOT Act Will Permit Government Infringement upon the Privacy of Americans in the Name of 'Intelligence' Investigations," *University of Pennsylvania Law Review*, vol. 150 (May 2002); and John W. Whitehead and Steven H. Aden, "Forfeiting 'Enduring Freedom' for 'Homeland Security': A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives," *American Law Review*, vol. 51 (August 2002). The Supreme Court in *United States v. United States District Court*, 407 U.S. 297 (1972) once held that the executive wiretaps of citizens for national security purposes violated the Fourth Amendment as unreasonable searches. The decision led to the passage of FISA. The Attorney General's *Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations*, (May 30, 2002) are avail-

able at www.usdoj.gov/olp/generalcrimes2.pdf. US D.O.J., "What do I have to do to get a FISA?" (September 2002) is available at http://www.aclu.org/patriot_fioa/foia3.html. FBI, *Intelligence Bulletin* No. 89 (October 15, 2003), may be found at <http://la.indymedia.org/print.php?id=95652>. The ACLU has been decrying abuse by local police ever since. DOJ Spokesman Martinez's "bad guys only" argument is reported in Elsa Wenzel, "Who's Afraid of the Patriot Act?" *Medill News Service* (May 27, 2003), <http://pcworld.shopping.yahoo.com/yahoo/article/0,aid,110880,00.asp>. Ashcroft's remarks on the public hysteria are from US D. O. J., Office of the Attorney General, "Remarks of Attorney General John Ashcroft, 'Protecting Life and Liberty,' Memphis, Tennessee, Sept. 18, 2003," available at <http://www.usdoj.gov/ag/speeches/2003/091803memphisremarks.htm>. Infiltration of anti-war groups was reported during *NOW with Bill Moyers*, PBS, March 5, 2004, transcript available at http://www.pbs.org/now/printable/transcript310_full_print.html. See also Monica Davey, "An Antiwar Forum in Iowa Brings Federal Subpoenas," *New York Times*, Feb. 10, 2004, <http://www.nytimes.com/2004/02/10/national/10PROT.html>. The FBI program of monitoring, infiltration, and interviewing anti-Republican groups prior to the RNC convention is reported at "Ashcroft defends interviews with protestors," *San Francisco Chronicle* (Aug. 21, 2004), available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2004/08/21>. Gary Bald is the assistant director of the FBI referred to as acknowledging that the Bureau had no evidence of the "Federal crime of terrorism." In calendar year 2003, the number of secret FISA wiretaps granted outnumbered all other wiretaps ordered by federal and state criminal courts combined (1,777 to 1,442). See Administrative Office of United States Courts, "2003 Wiretap Report," <http://www.uscourts.gov/wiretap03/contents.html>; and Eric Lichtblau, "Search Warrant Requests Increased in 2003," *New York Times* (May 3, 2004). Information on the librarians' protest is from Rene Sanchez, "Librarians Make Some Noise Over Patriot Act," *The Washington Post* (April 10, 2003), A20, available at <http://www.washingtonpost.com/ac2/wp-dyn/A1481-2003Apr9>; "Libraries Rally Against USA Patriot Act," *FOXNews.com* (May 7, 2003), http://www.foxnews.com/printer-friendly_story/0,3566,861667,00.html; Dana Hull, "Patriot Act causes libraries to review records," *San Jose Mercury News* (Oct. 20, 2002), available at <http://www.bayarea.com/mld/bayarea/news/4327549.htm?template=content>; and Jim McGee, "Librarians, Ashcroft Trade Accusations in Search Debate," *Congressional Quarterly Homeland Security* (Oct. 9, 2003), available at <http://homeland.cq.com/hs/display.do?dockey=/usr/local/cqonline/docs.html/hsnews/108> or from this article's author. The district court's opinion in *US v. Masoud Khan*, is at 309 F.Supp.2d 789 (E.D.Va. 2004). The "Lackawanna Six" show-prosecution is revealed in all its absurdity in Mathew Purdy and Lowell Bergman, "Unclear Danger: Inside the Lackawanna Terror Case," *New York Times* (Oct. 12, 2003), <http://www.nytimes.com/2003/10/12/nyregion/12LACK.html>. Remarks from defense attorneys are reported in Alex Gourevitch, "Immaterial and Unsupportable," *The American Prospect*, vol. 14, no. 8 (Sept. 1, 2003), available at <http://www.prospect.org/print-friendly/print/V14/8/gourevitch-a.html>. The court's opinion in *US v. Goba* is at 220 F.Supp.2d 182 (W.D.N.Y. 2002). John Ashcroft's parting shots to librarians are reported in *The Washington Post*, Editorial, (September 21, 2003), B06, available at <http://www.washingtonpost.com/wp-dyn/articles/A37575-2003Sep19/html>; and US D.O.J., "Dispelling the Myths," http://www.lifeandliberty.gov/subs/u_myths.htm.