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# ABOVE CONTEMPT?: REGULATING GOVERNMENT OVERREACHING IN TERRORISM CASES

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Peter Margulies\*

The exigencies of law and terrorism cases tempt the government to overreach in attempting to control information. Prosecutors struggle with this temptation in each phase of a criminal proceeding, from investigation through trial, as they make crucial decisions about what information to disclose and highlight when dealing with courts, juries, and the public. Absent such exigencies, courts, defense counsel, the media, and internal oversight place constraints on the prosecutor's efforts to monopolize information. Extraordinary events such as the attacks of September 11, 2001, weaken these constraints.

In times of crisis, senior law enforcement and national security officials adopt a paradigm that this Article calls "informational overreaching." Informational overreaching entails the erosion of three vital obligations: 1) showing an impartial tribunal a particularized need for restraint of or intrusion on individuals;<sup>1</sup> 2) sharing with the defense exculpatory evidence;<sup>2</sup> and 3) shunning gratuitous public comments about defendants pending or during trial.<sup>3</sup> When senior officials discount these obligations,

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\* Professor of Law, Roger Williams University. I thank Kathleen Clark, Linda Fisher, Bruce Green, Sam Levine, Dan Richman, Shira Scheindlin, Ian Weinstein, Bill Swor, David Zlotnick, and participants at a Panel on Law, Terrorism, and Civil Liberties After September 11 at the 2003 Annual Meeting of the Law and Society Association and a Workshop of the New England Clinical Law Teachers for their comments on earlier drafts.

1. See *Illinois v. Gates*, 462 U.S. 213, 232-33 (1983) (articulating probable cause requirement under Fourth Amendment as based on "totality of the circumstances"); *Franks v. Delaware*, 438 U.S. 154, 164-65 (1978) (discussing requirements for accuracy in affidavits supporting warrant applications).

2. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

3. See *Sheppard v. Maxwell*, 384 U.S. 333, 350-52 (1966); see also Att'y Grievance Comm. v. Gansler, 835 A.2d 548, 575 (Md. Ct. App. 2003) (reprimanding prosecutor for improper extrajudicial comments); cf. Alberto Bernabe-Riefkohl, *Silence Is Golden: The New Illinois Rules on Attorney Extrajudicial Speech*, 33 LOY. U. CHI. L.J. 323 (2002) (analyzing Illinois rules on extrajudicial statements and offerings suggestions to clarify rules).

they threaten the structure of checks and balances within the criminal justice system.

Taken together, these three obligations protect equality and strengthen the rule of law. Requiring particularity ensures that the government cannot detain or restrain people based on forbidden criteria of status, identity, or political belief.<sup>4</sup> Requiring disclosure ensures fairness within the system of adjudication. The two acting together winnow out charges that target people based on invidious grounds. Requiring circumspection prevents the government from creating a climate of condemnation that prompts fact-finders to draw inferences based on stereotypes instead of evidence. By eroding these obligations, the government becomes a monolith, unchecked by the safeguards that the legal system relies upon to hold it accountable.

Cases after September 11 reflect this trend toward informational overreaching. In a well-known case, *United States v. Moussaoui*,<sup>5</sup> the Fourth Circuit reinstated a notice of death penalty<sup>6</sup> despite the government's refusal to grant the accused "twentieth hijacker" access to detainees who could offer evidence that he was not involved in the September 11 attacks.<sup>7</sup> In another case, *United States v. Koubriti*,<sup>8</sup> then Attorney General Ashcroft

4. Cf. Devon W. Carbado, (*E*)*Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 953-64 (2002) (detailing author's own experience with discriminatory law enforcement); Dorothy E. Roberts, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999) (analyzing problems with racial profiling in law enforcement).

5. 382 F.3d 453 (4th Cir. 2004) ("*Moussaoui IV*"), cert. denied, 73 U.S.L.W. 3556 (U.S. Mar. 21, 2005) (No. 04-8385). The government's case against Zacharias Moussaoui has been vigorously contested. The rulings discussed in this Article are the orders and appeals from *United States v. Moussaoui*, No. CR 01-455-A, 2003 WL 21263699 (E.D. Va. Mar. 10, 2003) ("*Moussaoui I*"), appeal dismissed by 333 F.3d 509 (4th Cir. 2003) ("*Moussaoui II*"), and *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. 2003) ("*Moussaoui III*"), aff'd in part, vacated in part, 382 F.3d 453 (4th Cir. 2004) ("*Moussaoui IV*"), cert. denied, 73 U.S.L.W. 3556 (U.S. Mar. 21, 2005) (No. 04-8385). In April 2005, Moussaoui pleaded guilty to all of the charges against him. See Neil Lewis, *Moussaoui Tells Court He's Guilty of a Terror Plot*, N.Y. TIMES, April 23, 2005, at A1. However, issues regarding access to exculpatory information are likely to figure heavily in the penalty phase of the proceedings.

6. *Moussaoui IV*, 382 F.3d at 459, 482.

7. *Id.* at 458. Line prosecutors litigating the case had little or no control over the government's decision to bar the defendant's access to al Qaeda leaders held in an undisclosed location. However, neither the disclosure of the information nor the prosecutors' lack of control over decisions made at a higher level lessens the prejudice that the defendant will encounter at trial because of the government's refusal. See *Moussaoui III*, 282 F. Supp. 2d at 487 (striking government's notice of intent to seek death penalty and precluding introduction of evidence relating to events of September 11 where government declined to make available to defendant a person in government custody who could have provided exculpatory testimony).

8. 305 F. Supp. 2d 723 (E.D. Mich. 2003) ("*Koubriti II*"). In *Koubriti II*, the district court issued a formal admonition to then Attorney General Ashcroft for violating a court order limiting extrajudicial comments. *Id.* at 764-65; cf. Richard A. Serrano, *Prosecutor in Terror Case Sues Justice Department*, L.A. TIMES, Feb. 18, 2004, at A14 (describing lawsuit by lead prosecutor in

claimed without factual support that the defendants had advance knowledge of the September 11 attacks<sup>9</sup> and vouched for the government's chief witness<sup>10</sup> despite a court order prohibiting extrajudicial remarks. A line prosecutor in the case also failed to turn over to the defense a letter that cast doubt on the chief witness's account.<sup>11</sup> Until recently, the defendants' only remedy was an admonition from the court to Ashcroft.<sup>12</sup>

In *United States v. Awadallah*,<sup>13</sup> the Second Circuit held that the government could still detain as a material witness a defendant whose initial arrest constituted an illegal seizure merely because the defendant had *failed to come forward* after the September 11 attacks.<sup>14</sup> Along with the government's efforts to detain alleged unlawful combatants indefinitely without evidentiary hearings,<sup>15</sup> withhold the names of immigration detainees,<sup>16</sup> and monitor attorney-client conversations,<sup>17</sup> these cases reveal a

*Koubriti* alleging that officials in Washington were more concerned with publicity than providing support for the prosecution).

9. *Koubriti II*, 305 F. Supp. 2d at 730.

10. *Id.* at 734-35.

11. John J. Goldman, *Judge Criticizes Prosecutors for Holding Evidence*, L.A. TIMES, Dec. 13, 2003, at A17.

12. *Koubriti II*, 305 F. Supp. 2d at 764-65. Ultimately, the government moved to vacate the convictions because it had not turned over exculpatory evidence to the defense, and the court granted the government's motion. See *Koubriti v. United States*, 336 F. Supp. 2d 676, 678 (E.D. Mich. 2004) ("*Koubriti IV*"); see also *infra* note 236.

13. 349 F.3d 42 (2d Cir. 2003) ("*Awadallah II*"), *cert. denied*, 125 S. Ct. 861 (2005).

14. *Id.* at 70-71.

15. See *Rasul v. Bush*, 124 S. Ct. 2686, 2696-98 (2004) (finding federal jurisdiction under habeas statute to hear petitions of alleged al Qaeda detainees at Guantanamo Bay Naval Base); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004) (holding that United States citizen detained as alleged enemy combatant was entitled to procedural protections of "receiv[ing] notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker"); cf. Ronald Dworkin, *What the Court Really Said*, N.Y. REV. OF BOOKS, Aug. 12, 2004, at 26, 28 (praising the Court's rejection of plenary executive branch authority while arguing that the "verdicts and reasoning" of the *Hamdi*, *Rasul*, and *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004), "will be understood as having much more power to constrain the government's treatment of its prisoners"); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime*, 5 THEORETICAL INQ. L. 1 (2004) (presenting analysis focusing on relationship among three branches), at <http://www.bepress.com/til/default/vol5/iss1/art1/>; Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383 (2004) [hereinafter Margulies, *Judging Terror*] (analyzing courts' role in reconciling exigency, equality, and integrity of legal system and arguing that courts should require due process protections such as a right to counsel for alleged unlawful combatants).

16. See *Center for Nat'l Sec. Studies v. United States Dep't of Justice*, 331 F.3d 918, 937 (D.C. Cir. 2003) (upholding government withholding of names), *cert. denied*, 540 U.S. 1104 (2004).

17. See Ellen S. Podgor & John Wesley Hall, *Government Surveillance of Attorney-Client*

pattern of excess and overreaching by the executive.

Under normal conditions, courts address such excess through a relational paradigm.<sup>18</sup> Courts treat prosecutors as fellow repeat-players in the criminal process, relying on reputational sanctions to ensure appropriate conduct and invoking formal sanctions infrequently. For example, courts faced with offending conduct such as a prosecutor's excessive public discussion of a pending case may address such behavior by criticizing the prosecutor in a written opinion.<sup>19</sup> This step is rare; rarer still are occasions where a court holds a prosecutor in contempt.<sup>20</sup>

Reflecting this relational perspective, legal doctrines for curbing informational overreaching offer law enforcement officials substantial leeway. For example, courts rarely find that inaccuracies in affidavits supporting warrant applications require exclusion of the evidence obtained.<sup>21</sup> Similarly, it seems courts will order a new trial in response to misconduct such as excessive public discussion or failure to disclose information to the defense only on a showing of clear and irremediable prejudice to the defendant.<sup>22</sup>

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*Communications: Invoked in the Name of Fighting Terrorism*, 17 GEO. J. LEGAL ETHICS 145 (2004); see also Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173 (2003) [hereinafter Margulies, *The Virtues and Vices of Solidarity*].

18. See generally Walter W. Powell, *The Capitalist Firm in the Twenty-First Century: Emerging Patterns in Western Enterprise*, in THE TWENTY-FIRST-CENTURY FIRM: CHANGING ECONOMIC ORGANIZATION IN INTERNATIONAL PERSPECTIVE 33, 59 (Paul DiMaggio ed., 2001) [hereinafter Powell, *The Capitalist Firm*] (outlining relational paradigm); Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483 (same); Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775 (2000) (same).

For discussions of relational and informal interactions in criminal law, see Roberta K. Flowers, *An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor*, 79 NEB. L. REV. 251 (2000) (discussing patterns of tacit and active collaboration between courts and prosecutors); Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381 (2002) [hereinafter Green & Zacharias, *Regulating Federal Prosecutors' Ethics*] (discussing advantages of formal and informal regulation of prosecutors by courts); Peter Margulies, *Battered Bargaining: Domestic Violence and Plea Negotiation in the Criminal Justice System*, 11 S. CAL. REV. L. & WOMEN'S STUD. 153, 178-80 (2001) [hereinafter Margulies, *Battered Bargaining*] (arguing for judicial and legislative checks on prosecutorial practice regarding sentencing of defendants such as some couriers or "mules" in drug transactions whose fear of domestic violence played role in offense); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 799-801 (2003) [hereinafter Richman, *Prosecutors and Their Agents*] (discussing interaction of local legal culture with national norms).

19. See Green & Zacharias, *Regulating Federal Prosecutors' Ethics*, *supra* note 18, at 404.

20. *Id.* Professors Green and Zacharias also note that "the presiding judge can refer the prosecutor to the state bar for discipline." *Id.* at 404-05.

21. See, e.g., *United States v. Canfield*, 212 F.3d 713, 720-21 (2d Cir. 2000).

22. See *Koubriti II*, 305 F. Supp. 2d at 763.

Generally, this architecture of sanctions maintains an equilibrium between the court and the prosecutor, although defense lawyers maintain that the edifice created leaves them out in the cold.<sup>23</sup> In times of heightened public anxiety, however, executive branch officials reject the tempering influence of the relational paradigm and its core value of comity between branches. Responding to broader political imperatives, senior officials re-frame law enforcement and national security discourse in the Manichaean terms of “us” versus “them.”<sup>24</sup> This signaling from senior levels transforms incentives for lower-level officials such as line prosecutors, overwhelming the capacity of the informal sanctions and quiescent case law relied on by the relational paradigm. As these constraints fade, informational overreaching threatens to become the new norm of law enforcement. Frightening chapters in American history, including the persecution of dissenters during World War I,<sup>25</sup> the Palmer Raids and subsequent deportation of “radicals” after the war,<sup>26</sup> and the conduct of cases such as the Rosenberg espionage trial after World War II,<sup>27</sup> illustrate the dangers of this monolithic turn.<sup>28</sup> The post-9/11 era echoes these troubling episodes.

Courts can slow informational overreaching through an institutional response—what one commentator decrying the toothlessness of case law in an earlier era envisioned as a “heightened sense of judicial activism.”<sup>29</sup>

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23. See Flowers, *supra* note 18, at 253; cf. Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2143-59 (2003) (arguing that federal Sentencing Guidelines create tacit alliance between prosecutors and courts that penalizes zealous advocacy by defense attorneys).

24. See Melvin Aron Eisenberg, *New Modes of Discourse in the Corporate Law Literature*, 52 GEO. WASH. L. REV. 582, 587 (1984) (criticizing Manichaean dualism in corporate law context).

25. See generally PAUL L. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* (1979).

26. See Betty Houchin Winfield, *“To Support and Defend the Constitution of the United States Against All Enemies, Foreign and Domestic”: Four Types of Attorneys General and Wartime Stress*, 69 MO. L. REV. 1095, 1106 (2004).

27. See generally Michael E. Parrish, *Revisited: The Rosenberg “Atom Spy” Case*, 68 UMKC L. REV. 601 (2000).

28. See, e.g., JAMES X. DEMPSEY & DAVID COLE, *TERRORISM & THE CONSTITUTION* 69-77 (1999) (discussing the Vietnam-era COINTELPRO project that engaged in surveillance and infiltration of anti-war organizations).

29. Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 654 (1972). This author’s own work on law and terrorism has focused on institutional concerns involving courts, agencies, the legal profession, and transnational violent networks. Margulies, *Judging Terror*, *supra* note 15 (discussing judicial role in times of crisis); Margulies, *The Virtues and Vices of Solidarity*, *supra* note 17 (noting importance of making transnational networks accountable, while preserving defense lawyer’s role as check on state power); Peter Margulies, *Uncertain Arrivals: Immigration, Terror, and Democracy After September 11*, 2002 UTAH L. REV. 481 [hereinafter Margulies, *Uncertain Arrivals*] (stressing

There is precedent for such a response in two strands of remedies that became salient in the 1960s. First, courts could curb prosecutorial excess in the same way that they approach derelictions of duty in state and local institutions such as schools, jails, and psychiatric hospitals, using equitable discretion and threats of contempt.<sup>30</sup> The courts would use these tools in the service of institutional reform. Second, courts could use their powers as the Supreme Court did in *Miranda v. Arizona*<sup>31</sup> and fashion prophylactic rules that deter informational overreaching.

An institutional approach would require substantial modifications in three complementary areas of criminal procedure. First, to preserve particularity as a basis for judicial authorization of restraint or intrusion against an individual, courts would have to read the requirement in *Franks* that warrant applications not be recklessly inaccurate<sup>32</sup> to apply more rigorously to material omissions. Second, courts should hold that a pattern of informational overreaching in a case gives rise to a presumption of prejudice sufficient to require a new trial. Third, in considering findings of contempt or other remedies for lawyer misconduct, courts should focus on organizational integrity, not individual intent. Stressing organizational integrity would promote greater *ex ante* concern by prosecutors with the prevention of informational overreaching.

Such an institutional approach admittedly cuts against the grain of recent Supreme Court precedent. The trend has been toward narrowing the courts' equitable authority over law enforcement. Concerns about separation of powers<sup>33</sup> and institutional competence<sup>34</sup> have given momentum to this jurisprudential drive. The consequences of an institutional approach—new trials or dismissals of charges against persons charged with activities related to terrorism—also seem radically

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need for both flexibility and limits on power of the political branches in dealing with exigency).

30. See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1029-33 (2004) (discussing use of judicial remedies to promote experimentation and innovation in mental health public institutions); cf. *Esteban v. Cook*, 77 F. Supp. 2d 1256, 1258-62 (S.D. Fla. 1999) (ruling that once a state agency decides to provide wheelchairs to people with mobility impairments caused by conditions such as multiple sclerosis, it had an obligation under the federal Medicaid statute to enhance their options for life and work by obtaining technologically up-to-date wheelchairs).

31. 384 U.S. 436 (1966).

32. 438 U.S. 154, 171-72 (1978).

33. See, e.g., *United States v. Williams*, 504 U.S. 36, 55 (1992) (limiting exercise of judicial supervisory power in cases involving alleged prosecutorial misconduct before grand jury).

34. See, e.g., John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423, 428 (1997) (criticizing decisions based on courts' supervisory powers that author, a federal judge and former federal prosecutor, regards as exceeding authority and intruding unwisely on prosecutorial decisions).



counterintuitive, if not downright perverse. These consequences would subject the public to a risk of catastrophic harm in order to deter misconduct by prosecutors and provide defendants, who in some cases may be factually guilty, with a windfall out of proportion to the actual prejudice that they have suffered.

Viewed in greater depth, however, an institutional approach addresses harms that would otherwise go unremedied. This is particularly true if one views the “institution” here as being the network of practices and discourse that motivates terrorism prosecutions generally. Abuses in one case have an effect on other cases, making abuses easier to tolerate, enhancing the climate of condemnation for all defendants, and weakening the mechanisms of accountability that hold law enforcement officials in check. Carried to their ultimate conclusion, the unchecked propagation of such images of alien terror<sup>35</sup> can have two disastrous consequences: first, a diminution in the fair trial rights and other civil liberties of groups identified as embodying a higher risk of terrorist activity; and second, as a backlash to the first, a popular disillusion not merely with prosecutorial excess, but also with the more careful and focused law enforcement necessary to address the genuine threats posed by violent networks such as al Qaeda. By addressing each of these concerns, an institutional response by courts serves liberty and security.

This Article proceeds in five parts. Part I discusses how important checks on informational overreaching by prosecutors are to the rule of law. Part II outlines courts’ application of the relational paradigm for dealing with informational overreaching. Part III outlines the cascade of informational overreaching triggered by senior law enforcement officials’ response to crises such as the September 11 attacks. Part IV sets out an institutional response by courts that would address governmental excess. Finally, Part V responds to two possible criticisms of the institutional approach: claims that it will intrude on the separation of powers and/or generate unintended consequences that adversely affect defendants.

## I. THE RULE OF LAW AND INFORMATIONAL OVERREACHING

The fragile system of accountability at the heart of our criminal justice system depends on sound prosecutorial practices regarding the distribution and disclosure of information. Prosecutors have a duty under the Model Rules of Professional Conduct to see that justice is done, rather than merely

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35. See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002) [hereinafter Cole, *Enemy Aliens*].

to engage in zealous advocacy for a particular position.<sup>36</sup> The content and scope of the duty to do justice with respect to information hinges on the audience with which the prosecutor interacts. As a general matter, the prosecutor serves justice best through candor with the court and the defendant and restraint in communications with the public. Finding the right balance of candor and restraint helps determine the fairness of the system for defendants and targets of investigations.

Three areas of information policy are crucial. The government should: 1) show a particularized need for coercion or restraint; 2) share with the defense exculpatory evidence; and 3) refrain from gratuitous public comments about defendants pending or during trial.

Few concerns are more carefully ingrained in our system than the requirement that the government aver with particularity why a court should order the restraint or coercion of an individual.<sup>37</sup> Without such a requirement, governments are free to visit their power on individuals and groups based on attributes of identity or status, such as ethnicity, national origin, religion, or political belief.<sup>38</sup> Dispensing with particularity makes the government's assertions of authority effectively unreviewable. If the government can detain an individual as an "enemy of the people," it is unclear what evidence the target can marshal to demonstrate the falsity of such an amorphous rubric. Even if the criminal law itself defines offenses with particularity, allowing detention prior to adjudication on a vague showing by the government undermines such substantive provisions.

As an example of the importance of particularity, consider the law regarding material witnesses. Courts and legislatures have long accepted that the prosecution may hold persons as material witnesses to preserve the

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36. See MODEL RULES OF PROF'L CONDUCT R. 3.8 (2002) ("Special Responsibilities of a Prosecutor"); see also *Berger v. United States*, 295 U.S. 78, 88 (1935):

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

37. See *Groh v. Ramirez*, 540 U.S. 551, 557 (2004) ("The Fourth Amendment by its terms requires particularity . . ."); cf. *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) ("[T]he [particularity] requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.").

38. See, e.g., *City of Chicago v. Morales*, 527 U.S. 41 (1999) (striking down Chicago anti-loitering ordinance on the grounds that it was vague and allowed for arbitrary and discriminatory enforcement).

government's ability to call them at trial.<sup>39</sup> Judicial decisions have also interpreted statutes to permit the government to hold people as material witnesses before grand juries, reasoning that grand juries also qualify as "criminal proceedings" requiring the preservation of relevant and material evidence of the commission of a crime.<sup>40</sup> In the past, courts have carefully confined this authority by requiring a particularized showing that obtaining the witness's cooperation without a warrant is "impracticable."<sup>41</sup> Courts have even rejected evidence that might plausibly meet this standard, such as apparent attempts to avoid detection by the authorities, if the government cannot unequivocally demonstrate that an individual has declined to cooperate.<sup>42</sup> The particularity requirement makes it more difficult for prosecutors to detain an apparently law-abiding individual based on broad suspicions, in the hope that the detention itself will "shake loose" more concrete and incriminating information.

A comparable rationale of systemic integrity also undergirds the second example of constraints on prosecutors' informational overreaching: disclosure by prosecutors of evidence that exculpates the defendant. From an *ex post* perspective, the prosecutor must turn over exculpatory evidence to the defense to offer the defense a fair opportunity to use this evidence on the defendant's behalf.<sup>43</sup> A trial without such an opportunity increases the risk that the jury will base its verdict not on the evidence, but on inferences stemming from the defendant's membership in a disfavored group. Failure to turn over evidence that could have persuaded the jury of the defendant's innocence mandates a new trial.<sup>44</sup> From an *ex ante* perspective, moreover, the obligation to disclose also requires prosecutors to base their cases on reliable evidence, instead of merely trying to leverage the public's invidious suspicions.

The third area, rules limiting pre-trial publicity, similarly stems from concern about the influence of fear and preconceptions of the legal process. However, concerns here focus on a different audience: the members of the public comprising the jury pool. Because the audience changes in this fashion, the default rule changes as well. Instead of greater disclosure, the

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39. See *Bacon v. United States*, 449 F.2d 933, 936-41 (9th Cir. 1971).

40. See *id.*; *Awadallah II*, 349 F.3d 42, 61-64 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 861 (2005); *In re Material Witness Warrant*, 213 F. Supp. 2d 287, 300 (S.D.N.Y. 2002) (holding that federal material witness statute applied to grand jury proceedings).

41. *Bacon*, 449 F.2d at 943.

42. *Id.* at 944-45 (holding that government failed to demonstrate impracticability of securing witness's testimony, even when police apprehended witness in location that suggested she wished to hide from federal agents).

43. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

44. See *Giglio v. United States*, 405 U.S. 150, 153 (1972).

legal system expects that lawyers preparing a case for trial before a jury will minimize public comments about the case to preserve the integrity of adjudication.

Legal rules require lawyers to strive to ensure that juries can discharge their function by viewing the evidence in the case in conjunction with the safeguards, such as cross-examination and the rule against hearsay, that the trial process imposes. A juror, if not completely free from preconceptions, must at least be able to obtain some distance from those preconceptions for the whole notion of a trial to be meaningful, as opposed to merely a ratification of "conventional wisdom" about guilt or innocence in the community.<sup>45</sup>

Public comments by prosecutors are especially troublesome. Members of the public, the potential jury pool, and empanelled but not sequestered jurors will often see the federal prosecutor as "cloaked with the authority of the United States Government" and as "the community's representative,"<sup>46</sup> rather than as merely an attorney for a client. Remarks to the public can skew public debate, thereby frustrating public deliberation, corrupting the jury pool,<sup>47</sup> encouraging government overreaching, and intimidating supporters of the defendants.

To avoid such consequences, both professional codes and departmental regulations impose special obligations on prosecutors. The American Bar Association's Model Rules of Professional Conduct require that prosecutors "refrain from making extrajudicial comments that have a substantial

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45. Restraints on pretrial publicity must be tailored to honor First Amendment guarantees. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-49 (1991) (supporting limits on pretrial publicity and holding that Nevada rule was void for vagueness); cf. Erwin Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859 (1998) (arguing that virtually all limits on pretrial publicity fail under the First Amendment).

46. See *United States v. Modica*, 663 F.2d 1173, 1178 (2d Cir. 1981) (criticizing a prosecutor for improperly vouching for a witness during trial).

47. *United States v. Cutler*, 58 F.3d 825, 840 (2d Cir. 1995). Courts are proactive in high-profile cases in dealing with issues of pretrial publicity. For instance, a court may impose a "gag order" during the pendency and conduct of a trial to bar both the prosecution and defense from discussing the case in a manner likely to influence potential jurors. In *Cutler*, the court cited a well-known criminal defense attorney for contempt based on the finding that the attorney had violated a court order by repeatedly and publicly denouncing the government's witnesses as "liars" and making other comments before trial about evidence in the case, with the express purpose of "poison[ing] the well from which the jury would be selected." *Id.*; cf. *Gentile*, 501 U.S. at 1036-37 (plurality opinion) (stressing importance of limits on lawyer's use of pretrial publicity under the First Amendment); *United States v. Scarfo*, 263 F.3d 80, 95 (3d Cir. 2001) (striking down a gag order imposed on former criminal defense counsel); Judith L. Maute, "In Pursuit of Justice" in *High Profile Criminal Matters*, 70 FORDHAM L. REV. 1745, 1755-59 (2002) (discussing issues of pre-trial publicity); Marjorie P. Slaughter, *Lawyers and the Media: The Right to Speak Versus the Duty to Remain Silent*, 11 GEO. J. LEGAL ETHICS 89 (1997) (same).

likelihood of heightening public condemnation of the accused.”<sup>48</sup> Federal regulations echo these sentiments. Regulations bar disclosure of any “subjective observations” made by prosecutors.<sup>49</sup> They specifically discourage statements made at a time approaching or during trial.<sup>50</sup> Furthermore, they caution against public comments regarding witness credibility or evidence.<sup>51</sup> Finally, the regulations require the permission of the Attorney General or Deputy Attorney General to release information covered by the guidelines.<sup>52</sup>

In sum, both constitutional and ethical strictures mandate a balance of candor and restraint in prosecutors’ use of information. Unfortunately, prosecutors do not always manifest this sense of balance. Part II will outline the courts’ approach to curbing informational overreaching.

## II. MANAGING PROSECUTORIAL MISCONDUCT: THE RELATIONAL PARADIGM

A relational paradigm accounts for most judicial responses to prosecutorial misconduct regarding the disclosure or distribution of information. This approach relies principally on informal sanctions and disfavors legal remedies such as dismissal of charges or invocation of the contempt power. The relational approach has some virtue in addressing misconduct by line prosecutors, who have incentives to preserve their reputation with judges. Unfortunately, external pressures on prosecutors weaken these incentives, thereby undermining the core assumptions of the relational perspective.

To understand the development of the relational perspective, it is useful to think about the legal system as an institution consisting of interrelated ways of thinking, speaking, and doing.<sup>53</sup> Institutions spill over formal

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48. See MODEL RULES OF PROF’L CONDUCT R. 3.8(f) (2002); cf. Lonnie T. Brown, Jr., “*May It Please the Camera, . . . I Mean the Court*”—An Intrajudicial Solution to an Extrajudicial Problem, 39 GA. L. REV. 83 (2004) (arguing for more vigorous judicial oversight regarding extrajudicial remarks by prosecutors and defense attorneys).

49. 28 C.F.R. § 50.2(b)(3)(iv) (2004).

50. *Id.* § 50.2(b)(5).

51. *Id.* § 50.2(b)(6)(iv), (v).

52. *Id.* § 50.2(b)(9). In addition, the United States Attorneys’ Manual mandates fairness and accuracy in public comments made by federal prosecutors. See UNITED STATES ATTORNEYS’ MANUAL § 1-7.110 (2003). The Manual also recommends that answers to reporters’ questions should not go beyond the contents of the indictment. *Id.* § 1-7.520; see also *id.* § 1-7.401 (“Guidance for Press Conferences and Other Media Contacts”).

53. The discussion here borrows heavily from an earlier analysis in Peter Margulies, *The New Class Action Jurisprudence and Public Interest Law*, 25 N.Y.U. REV. L. & SOC. CHANGE 487, 497-98 (1999) [hereinafter Margulies, *Public Interest Law*] (discussing institutional dimension of

organizational structures, comprising "interpretive communities,"<sup>54</sup> with a common "set of material practices and symbolic constructions"<sup>55</sup> involving cognitive frameworks, rhetoric, and routines.

The history of relational agreements suggests that parties engaged in ongoing institutional relationships develop a common law for that relationship that governs their conduct with fewer transaction costs than those generated by legal intervention. In the commercial setting, for example, where scholars first outlined the relational model, a customer and her supplier develop a "mutual orientation . . . based on knowledge that the parties assume each has about the other and upon which they draw in communication and problem solving."<sup>56</sup> The parties' joint stake in the

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discourse and practice in public law litigation). Cf. Peter Margulies, *Public Interest Lawyering and the Pragmatist Dilemma*, in RENASCENT PRAGMATISM: STUDIES IN LAW AND SOCIAL SCIENCE 220, 225-30 (Alfonso Morales ed., 2003) (arguing that instrumental concerns often marginalize dialogue with affected parties in law reform efforts).

54. See Margulies, *Public Interest Law*, *supra* note 53, at 497; cf. BRIAN Z. TAMANAHA, REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW 148 (1997) [hereinafter TAMANAHA, REALISTIC SOCIO-LEGAL THEORY] (elaborating on Stanley Fish's notion of a legal interpretive community, consisting of "groups of people bound together by shared knowledge, language or terminology, and often a basic corpus of ideas, beliefs, and attitudes. One becomes a member of an interpretive community by undergoing indoctrination—by learning and internalizing the shared 'meaning system' of the interpretive community"); Brian Z. Tamanaha, *A Pragmatic Response to the Embarrassing Problems of Ideology Critique in Socio-Legal Studies*, in RENASCENT PRAGMATISM, *supra* note 53, at 60 ("truth . . . is the product of a community of inquirers operating within shared practices"). This view fits within a postmodern perspective that situates human agency in a nest of practices and cognitive paths. See MICHEL FOUCAULT, *Two Lectures*, in POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977, at 78, 96 (Colin Gordon ed., 1980) (urging study of how power "invests itself in institutions, becomes embodied in techniques, and equips itself with instruments"); cf. Steven L. Winter, *The "Power" Thing*, 82 VA. L. REV. 721 (1996) (interpreting Foucault).

55. See Roger Friedland & Robert R. Alford, *Bringing Society Back In: Symbols, Practices, and Institutional Contradictions*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 232, 248 (Walter W. Powell & Paul J. DiMaggio eds., 1991); cf. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 214 (1998) ("Every institutional role carries with it a remarkably complex set of behavioral expectations, expectations that exist in the minds of the institution's members."); Sue E. S. Crawford & Elinor Ostrom, *A Grammar of Institutions*, 89 AM. POL. SCI. REV. 582, 582 (1995) (describing institutions as "enduring regularities of human action in situations structured by rules, norms, and shared strategies, as well as by the physical world"); cf. TAMANAHA, REALISTIC SOCIO-LEGAL THEORY, *supra* note 54, at 149 (discussing the "internal attitude [that] is the (phenomenological) cognitive style or framework of thought which characterizes thinking while engaging in a given practice"); Richman, *Prosecutors and Their Agents*, *supra* note 18 (discussing institutional dimensions of interaction between prosecutors and agents in federal law enforcement).

56. Powell, *The Capitalist Firm*, *supra* note 18, at 59; Macneil, *supra* note 18 (discussing legal and empirical theory of relational contracting); Macaulay, *supra* note 18 (same); Robert Eli Rosen, *"We're All Consultants Now": How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services*, 44 ARIZ. L. REV. 637, 646

flourishing of the relationship makes “voice”—communication—a more efficient and appropriate initial response than “exit”—terminating the relationship or invoking the legal process—when one party feels that the other has departed from shared assumptions about appropriate conduct.<sup>57</sup> While one party might gain in the short-term from undermining these assumptions for a unilateral benefit, the “‘entangling strings’ of reputation, friendship, and interdependence”<sup>58</sup> constrain such strategic behavior. ○

This relational view also characterizes the interaction between federal district courts and federal prosecutors. Individual line prosecutors appear on an ongoing basis before federal district judges. They must act in a way that preserves their credibility and reputation if they hope to secure the district judge’s good will in a range of determinations such as detention hearings, evidentiary rulings, and sentencing.<sup>59</sup> Courts in turn come to rely on the candor and professionalism of individual line prosecutors. Moreover, judges at both the trial and appellate levels have frequently served as federal prosecutors earlier in their careers.<sup>60</sup> Reflecting the depth of these ongoing ties, courts evaluating cases of alleged prosecutorial misconduct acknowledge the efforts of the “relatively young attorneys, seeking valuable experience as a prelude to other professional endeavors”<sup>61</sup> who serve as federal prosecutors and “the high level of conduct that has traditionally characterized the office of the United States Attorney.”<sup>62</sup>

In keeping with this relational analysis, courts tend to view informal sanctions of prosecutors as being preferable to formal sanctions. Typically,

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(2002) (discussing Macneil in the area of team members); see also W. Bradley Wendel, *Informal Methods of Enhancing the Accountability of Lawyers*, 54 S.C. L. REV. 967, 972-73 (2003) (discussing credibility as a value that promotes responsibility among lawyers).

57. See Powell, *The Capitalist Firm*, *supra* note 18, at 59; ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 30-43 (1970) (discussing role of “voice” in preventing complacency within institutions). Market mechanisms and legal rules supply an implicit threat of retaliation if one party fails to meet the legitimate expectations of the other. If the supplier fails to come up with goods that are adequate, the customer can go elsewhere. The law provides default rules that govern when one party defects to realize a one-shot gain. However, most commercial relationships govern themselves satisfactorily through shared stakes and understandings about mutual interests.

58. Powell, *The Capitalist Firm*, *supra* note 18, at 59.

59. See Flowers, *supra* note 18, at 265-68; cf. Richman, *Prosecutors and Their Agents*, *supra* note 18, at 797 (discussing importance of reputation and credibility of institutional actors in federal law enforcement). Obviously, a judge’s view of a particular prosecutor’s trustworthiness and competence is not the sole factor on which a judge will rely in deciding a case. However, a prudent prosecutor will generally not underestimate its importance.

60. Flowers, *supra* note 18, at 268-69; Gleeson, *supra* note 34, at 423 n.\* (“The author[, a United States District Judge,] was formerly an Assistant United States Attorney and Chief of the Criminal Division in the Eastern District of New York.”).

61. *United States v. Modica*, 663 F.2d 1173, 1184 (2d Cir. 1981).

62. *Id.* at 1186.

these sanctions are reputational in nature, sending the message that the court can diminish the "professional capital" that line prosecutors seek to accumulate with courts, colleagues, the legal community, and the public.<sup>63</sup> In most cases of possible prosecutorial misconduct, courts appeal either expressly or implicitly to the tradition of in-house mentoring in United States Attorney's offices that imparts relational knowledge, through the "able attorneys who supervise federal prosecutors."<sup>64</sup> Trial courts favor indications of disapproval of line prosecutors that may never appear in the record, such as off the record admonishments or informing the prosecutor's superiors.<sup>65</sup> In cases of more serious misconduct, a judge may write an opinion criticizing the prosecutor's conduct.<sup>66</sup> When the conduct is still more problematic, the court may take the extreme step of mentioning the prosecutor by name.<sup>67</sup> More formal sanctions, such as findings of contempt, imposition of fines, or other remedies, are rare in cases involving prosecutors.<sup>68</sup> Legal remedies that would inure to the benefit of criminal defendants, such as the exclusion of evidence or the grant of a mistrial or a new trial, are also very difficult to obtain, often hinging on a showing of actual and direct prejudice.<sup>69</sup> Indeed, courts sometimes argue that such defendant-centered remedies are less effective than reputational sanctions in controlling prosecutorial misconduct, including the use of pre-trial publicity.<sup>70</sup>

A relational view of prosecutor-judicial interaction provides a valuable form of accountability to prosecutors. Interaction with judges helps prosecutors do justice, tempering zeal with compassion. For example, a regime granting judges significant discretion in sentencing would oblige prosecutors from the start of a criminal case to consider a judge's view of what is fair and equitable.<sup>71</sup> In this fashion, relationships between courts

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63. See Wendel, *supra* note 56 (discussing concept of "social capital" among lawyers).

64. *Modica*, 663 F.2d at 1186.

65. Green & Zacharias, *Regulating Federal Prosecutors' Ethics*, *supra* note 18, at 404.

66. *Id.*

67. See *United States v. Lopez*, 4 F.3d 1455 (9th Cir. 1993).

68. See Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 80-81 (1995) (noting that judge's contempt power is rarely used, and only when prosecutorial misconduct is egregious or intentional and in the courtroom); Alschuler, *supra* note 29, at 673-76.

69. See *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (holding that court must find prejudice against defendant in order to dismiss charges despite prosecutorial misconduct during grand jury proceedings).

70. See *Modica*, 663 F.2d at 1184.

71. See Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723, 727 (1999) (discussing prosecutor's need to "consciously consider the costs of the technique prospectively"); Ian Weinstein, *Regulating the*



and prosecutors humanize the exercise of prosecutorial discretion, leavening the mechanical application of the criminal law by allowing more room for factors such as a defendant's age, socio-economic background, family obligations, or relative guilt within a criminal enterprise, to shape charging decisions.<sup>72</sup>

Courts sometimes express concern that reputational sanctions are insufficient to deter prosecutorial misconduct. One court noted that a pattern of misconduct that persists despite the application of reputational sanctions undercuts the legitimacy of the relational model; invocations of the reciprocity at the core of the model begin to seem like "helpless piety,"<sup>73</sup> reflecting "purely ceremonial"<sup>74</sup> recitations instead of pragmatic remedies.

This reliance on relational governance encounters further strains when external pressures shift the balance of power between court and prosecutor.<sup>75</sup> In recent years, the most pervasive external pressure has been

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*Market for Snitches*, 47 BUFFALO L. REV. 563, 614 (1999) [hereinafter Weinstein, *Regulating the Market*] (stating that "decisions [are] driven by forces other than law enforcement concerns," such as sentencing decisions in districts where judges "readily mitigate sentences"); cf. Margulies, *Battered Bargaining*, *supra* note 18, at 170-71 (2001) (arguing for greater prosecutorial regard for survivors of domestic violence coerced into crime by their abusers). See generally Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121 (1998) (discussing standards for prosecutors).

72. Unfortunately, the absence of accountability for the exercise of prosecutorial discretion can also lead to abuses. See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 758 (1999) (discussing expansion of prosecutorial power resulting from an expanding scope of federal criminal law); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939 (1997) [hereinafter Richman, *Stipulating Away Prosecutorial Accountability*] (analyzing lack of accountability of federal prosecutors and risk of enforcement based on stereotypes); cf. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 31-38 (1998) (discussing interplay of prosecutorial discretion and race and arguing that prosecutors pay insufficient attention to perceived racial inequities); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 368-72 (2001) (same); Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811 (1998) (same, but focusing on capital cases).

73. *Modica*, 66 F.3d at 1183 (quoting *United States v. Benter*, 457 F.2d 1174, 1178 (2d Cir. 1972)).

74. *Id.*

75. The equilibrium between prosecutor and judge is not an unmixed blessing. Defense lawyers, for example, have long harbored the suspicion that judges are too dependent on and solicitous of prosecutors. The very fact that a prosecutor appears often before a particular judge may encourage the judge to treat occasional misconduct leniently, at least if it appears to be isolated. Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239-40 (1940) (holding that prosecutor's statements to jury were harmless because they occurred in the course of a long trial); Alschuler, *supra* note 29, at 658-61 (criticizing application of harmless error rule as leading to undue leniency regarding prosecutorial misconduct). The defendant and defense counsel may feel frozen out of the judge-prosecutor relationship. To the extent that this is true, the relational

the trend toward more rigid sentencing, embodied in mandatory minimums and the United States Sentencing Guidelines. The direction of this trend has been called into question by the Supreme Court's opinion in *United States v. Booker*.<sup>76</sup> Today, the locus of discretion in a criminal case often is the point when a prosecutor decides whether to charge a prospective defendant or to place a matter before a grand jury.<sup>77</sup> Before *Booker*, courts had fewer opportunities to exercise discretion in sentencing. Instead of taking a range of equitable factors into account, judges often confined themselves to approving a motion made by a prosecutor for a downward departure in the defendant's sentence based on his substantial cooperation.<sup>78</sup> However, after the *Booker* decision, the Supreme may have returned sentencing discretion to the district judge.<sup>79</sup> The relational approach does

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approach may be not so much an ideal as a bare minimum that actually masks significant injustice to defendants. Inadequacies in the relational approach serve to emphasize the perils of external pressures that further enhance the leverage of prosecutors.

76. 125 S. Ct. 738 (2005) (holding that the Sentencing Guidelines are not mandatory, but rather advisory, such that a court must consider the guideline range but is not bound to follow it). *Booker's* effect on the judge-prosecutor relationship is still in question. On the one hand, the district court judge may rely even more on prosecutors to help sentence the defendant. On the other hand, a judge may decide to independently evaluate the sentencing factors and disregard the prosecutor's recommendation. This behavior will probably ultimately come down to the character of the individual judge. Ultimately, Congress is likely to enact legislation providing for mandatory minimum sentences for more federal sentences. This development will serve to exacerbate the situation noted in the text.

Over time, the Guidelines had developed fault lines in which individual line prosecutors, prompted by both their own misgivings over sentences that seem unduly harsh and by the public and private pronouncements to the same effect by judges, worked with courts to mitigate sentences. See Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 87-88 (2003) [hereinafter Weinstein, *Mandatory Minimums*] (arguing that courts and prosecutors have worked to humanize sentencing regarding non-drug offenses, but that mandatory minimum sentences have frustrated such efforts in the narcotics area); cf. Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 559-60 (2002) (arguing that even in drug sentencing prosecutors' and courts' perception of equities and sensitivity to local views has tempered practice). Prior to *Booker*, actions by both Congress and senior Justice Department officials, such as the restrictions on downward departures and the scrutiny of judges who authorize departures too often, represented efforts to stifle this return to a relational ethos.

77. See Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246 (1980). See generally Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

78. However, the extent of the departure is within the judge's discretion. See Weinstein, *Mandatory Minimums*, *supra* note 76, at 93.

79. See *Booker*, 125 S. Ct. 738. Nevertheless, some district court judges have turned down the Supreme Court's offer to exercise their discretion in sentencing defendants and instead have chosen to continue to follow the Guidelines. See *United States v. Wanning*, 354 F. Supp. 2d 1056, 1062 (D. Neb. 2005) (holding that "Guidelines must be given substantial weight even though they are now advisory"); *United States v. Wilson*, 350 F. Supp. 2d 910, 912 (D. Utah 2005) ("[I]n all

far less to promote prosecutorial accountability when external pressures such as the Sentencing Guidelines reduce judges to the status of ministerial functionaries presiding over guilty pleas.

When prosecutors have more power, the manner in which senior law enforcement officials articulate and implement priorities becomes crucial. Senior officials can mold the institutional power they wield to preserve the dialogue at the core of the relational approach. More ominously, senior officials can wield their power in ways that marginalize the courts. Concerns about national security and terrorism provide a convenient opening for officials seeking to exercise such sweeping authority. That is the focus of Part III.

### III. INFORMATIONAL OVERREACHING AS PARADIGM SHIFT

In times of crisis, senior law enforcement officials reject the relational paradigm in favor of a monolithic approach to information control. Plenary control over information, rather than collaboration with other institutional actors, becomes the strategy of choice for both alleviating immediate risks to public safety and reaping political rewards. As the institutional signals sent by senior officials work their way down through the bureaucracy, constraints on informational overreaching by prosecutors erode, threatening constitutional values.

Official reactions to cataclysmic events, such as September 11, reflect a process with some disconcerting parallels to the process that spawned the events themselves: the polarizing influence of “authenticity entrepreneurs”<sup>80</sup>

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future sentencing, the court will give heavy weight to the Guidelines in determining an appropriate sentence. . . . [T]he court will only depart from those Guidelines in unusual cases for clearly identified and persuasive reasons.”).

80. See Peter Margulies, *Making “Regime Change” Multilateral: The War On Terror And Transitions To Democracy*, 32 DENV. J. INT’L L. & POL’Y 389 (2004). The model of violent entrepreneurship developed by Charles Tilly, focusing largely on non-state actors, also has relevance for analysis of public officials with access to the violent instrumentalities of the state. See CHARLES TILLY, *THE POLITICS OF COLLECTIVE VIOLENCE* 34 (2003) (discussing role of “political entrepreneurs” who “promote violence . . . by activating boundaries, stories, and relations that have already accumulated histories of violence; by connecting already violent actors with previously nonviolent allies; by coordinating destructive campaigns; and by representing their constituencies through threats of violence”); cf. Timur Kuran, *Ethnic Norms and Their Transformation through Reputational Cascades*, 27 J. LEGAL STUD. 623 (1998) (discussing how small changes in perceptions and behavior prompted in part by signals from social and political leaders can snowball into massive political upheavals and ethnic strife); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999) (analyzing role of “availability entrepreneurs” in shaping public policy by leveraging stories and images that are cognitively salient).

This author does not argue here for any form of moral equivalence between United States officials and leaders of groups such as al Qaeda, who seek to kill massive numbers of innocents.

who seek to purge organizations and societies of the influence of "them." Often capitalizing on cognitively salient images of trauma and loss,<sup>81</sup> authenticity entrepreneurs market an essentialist account of a society's origin story and core beliefs, and exploit fear of persons, groups, and discourses perceived to be "outside" those boundaries. To facilitate their work, authenticity entrepreneurs build organizations that tend to be highly hierarchical, secretive, or homogeneous.<sup>82</sup> The form of these institutions in turn frames the perception of both identity and grievances in a far more polarized fashion,<sup>83</sup> suppressing nuance, detail, and dissent. In this monolithic organizational structure, leaders send an array of signals, both tacit and express, that shape behavior by lower-level organizational actors.<sup>84</sup> The violent transnational network that engineered the September 11 attacks evolved from such a process. This network both counted on and received an official reaction in the United States that furthered this polarizing trend.

The top-down dynamic of authenticity entrepreneurship was evident in the Ashcroft Justice Department.<sup>85</sup> Ashcroft rejected the nuances of the relational paradigm as a form of creeping corruption. He told narratives characterized by a Manichaeian purity in which American law enforcement and security officials occupy the moral high ground,<sup>86</sup> granting themselves

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*Cf.* Kanan Makiya & Hassan Mneimneh, *Manual for a 'Raid'*, N.Y. REV. OF BOOKS, Jan. 17, 2002, at 18 (discussing al Qaeda training manual for attacks on urban centers). It is not unreasonable, however, to hold United States officials to a higher standard that reflects concern for constitutional values. Moreover, while a state may use legally authorized force to address threats to national security, the principle of proportionality should guide such responses. *Cf.* Richard Falk, *Ends and Means: Defining a Just War*, THE NATION, Oct. 29, 2001, at 11, 12 (justifying American resort to force against the Taliban regime in Afghanistan by arguing that al Qaeda is a "transnational actor . . . [whose] relationship to the Taliban regime in Afghanistan [was] contingent, with al Qaeda being more the sponsor of the state rather than the other way around").

81. See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1039-40 (2003).

82. Authenticity entrepreneurs can be animated by a quest for power, a sense of mission, or sometimes by the force of their own fears. See TILLY, *supra* note 80.

83. *Cf.* Cass R. Sunstein, *Why They Hate Us: The Role of Social Dynamics*, 25 HARV. J. L. & PUB. POL'Y 429 (2002); Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307 (2003).

84. For a discussion of signaling within organizations, see Margulies, *The Virtues and Vices of Solidarity*, *supra* note 17, at 197-99 (discussing signaling as element of command structure within violent transnational networks); Erica Beecher-Monas, *Enron, Epistemology, and Accountability: Regulating in the Global Economy*, 37 IND. L. REV. 141, 170 (2003) (discussing signaling within corporate entities); ERIC POSNER, LAW AND SOCIAL NORMS 18-24 (2000) (discussing dynamics of signaling behavior).

85. We have yet to see whether the same shall be true of the Gonzales Justice Department.

86. See Jeffrey Rosen, *John Ashcroft's Permanent Campaign*, ATLANTIC MONTHLY, April 2004, at 68, 78 [hereinafter Rosen, *John Ashcroft's Permanent Campaign*] (former aide contends that Ashcroft views the fight against terrorism as a "civilizational clash" where "these people [are seen] as enemies of everything he believes in, as a sort of religiously based threat").

the license to dispense with procedural protections for persons deemed not to share those attributes. For Ashcroft, those who question the legitimacy of this license have cast in their lot with "them."<sup>87</sup>

In place of a relational paradigm, Ashcroft sought to implement a monolithic view of federal law enforcement. He insisted on secrecy, for example, in his refusal to make public information relating to the Justice Department's responses to the September 11 attacks, particularly the immigration crackdown that resulted in the detention and deportation of over a thousand undocumented aliens, most of whom turned out to have nothing to do with terrorism.<sup>88</sup> In recent prosecutions, such as a case involving the environmental activist group Greenpeace,<sup>89</sup> Ashcroft also seemed to pursue a policy that was increasingly intolerant of dissent.<sup>90</sup> Moves to limit plea bargaining and to require charging the most serious possible offense reflected this monolithic view;<sup>91</sup> so did efforts by Ashcroft to intimidate federal judges who sought to depart from the Sentencing Guidelines<sup>92</sup> and moves to overrule local United States Attorneys who declined to seek the death penalty.<sup>93</sup>

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87. As Ashcroft noted in testimony before Congress: "[T]o those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and resolve. They give ammunition to America's enemies, and pause to America's friends." *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. on the Judiciary*, 107th Cong. 313 (2002); cf. Jeffrey Toobin, *Ashcroft's Ascent*, THE NEW YORKER, April 15, 2002, at 50, 53 (describing Ashcroft's view of his role after September 11). Ashcroft cast this polarizing narrative in religious terms. *Id.* at 62 (noting that Ashcroft justified anti-terrorism efforts with a quote from the Old Testament that also carried what the author described as an "unmistakable message" regarding abortion: "I have set before you life and death, blessing and cursing: therefore choose life, that both thou and thy seed may live" (quoting *Deuteronomy* 30:19)).

88. See Center for Nat'l Sec. Studies v. United States Dep't of Justice, 331 F.3d 918, 920 (D.C. Cir. 2003) (upholding government's refusal to disclose information about detainees), *cert. denied*, 540 U.S. 1104 (2004).

89. See Adam Liptak, *Typical Greenpeace Protest Leads to an Unusual Prosecution*, N.Y. TIMES, Oct. 11, 2003, at A9 (discussing Justice Department's use of "an obscure 1872 law" to prosecute Greenpeace).

90. This same political focus was demonstrated by the dominance in Ashcroft's senior staff of political and ideological soulmates. See Toobin, *supra* note 87, at 53-54 (noting the presence of political operatives and absence of legal experts in Ashcroft's inner circle, as well as Ashcroft's disdain for career Justice Department employees); Rosen, *John Ashcroft's Permanent Campaign*, *supra* note 86, at 76-77 (same).

91. See Adam Liptak & Eric Lichtblau, *New Plea Bargain Limits Could Swamp Courts, Experts Say*, N.Y. TIMES, Sept. 24, 2003, at A23.

92. See Eric Lichtblau, *Justice Dept. to Monitor Judges for Sentences Shorter Than Guidelines Suggest*, N.Y. TIMES, Aug. 8, 2003, at A12; cf. David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211 (2004) (criticizing Justice Department policy).

93. See John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General*

Ashcroft's behavior was also a powerful signal to others in the Justice Department that the way to get ahead was to follow his lead, casting terrorist prosecutions as high-stakes contests of good and evil.<sup>94</sup> Bureaucracies tend to react to new challenges by "satisficing," that is, engaging in behavior that involves either the least effort or the lowest potential risk of embarrassment.<sup>95</sup> Publicity from the Attorney General signals that casting each prosecution in stark terms, regardless of the prejudicial impact of that approach, is a convenient path to organizational success.<sup>96</sup> The result is an accelerated climate of stereotyped notions of defendants, an impatience with procedural protections on the arrest and interrogation of suspects, and an eagerness to view a broad range of activities as worthy of prosecution.<sup>97</sup>

Signaling from senior Justice Department officials has been the catalyst for the weakening of three pillars of the rule of law regarding the control and distribution of information by prosecutors: 1) the requirement that the government show a particularized need for coercion or restraint; 2) the obligation to share with the defense exculpatory evidence; and, 3) the

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*Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697 (2003).

94. Comparable signaling behavior by the executive on the irrelevance of international law to detainees may have helped create the climate that gave rise to the torture of detainees at Abu Ghraib and elsewhere. See Anthony Lewis, *Making Torture Legal*, N.Y. REV. OF BOOKS, July 15, 2004, at 4, 4 (discussing development of Bush Administration's legal position).

95. See Robert Jerome Glennon & John E. Thorson, *Federal Environmental Restoration Initiatives: An Analysis of Agency Performance and the Capacity for Change*, 42 ARIZ. L. REV. 483, 492 (2000) (discussing "satisficing" in environmental bureaucracies and describing "satisficing" as "tunnel vision" that leads to "sub-optimal solution[s] that minimally satisf[y] the immediate concerns"); Sally S. Simpson & Nicole Leeper Piquero, *Low Self-Control, Organizational Theory, and Corporate Crime*, 36 LAW & SOC'Y REV. 509, 535 (2002) (discussing framing of incentives within bureaucratic organizations); MARY DOUGLAS, *RISK AND BLAME: ESSAYS IN CULTURAL THEORY* 187 (1992) (discussing socio-economic and psychological accounts of institutional change); Walter W. Powell & Paul J. DiMaggio, *Introduction to THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 1, 19 (Paul J. DiMaggio & Walter W. Powell eds., 1991) (noting that "habit must not be seen as a purely passive element in behavior, but rather as a means by which attention is directed to selected aspects of a situation, to the exclusion of competing aspects that might turn choice in another direction"); cf. Samuel Issacharoff, *Behavioral Decision Theory in the Court of Public Law*, 87 CORNELL L. REV. 671, 675 (2002) (noting that experts can engage in "groupthink" that may obscure some options and perspectives).

96. See Simpson & Piquero, *supra* note 95, at 535 (discussing importance of perceived norms within organization in generating either illegality or compliance with law); Diane Vaughan, *Rational Choice, Situated Action, and the Social Control of Organizations*, 32 LAW & SOC'Y REV. 23 (1998) (same).

97. See Eric Lichtblau, *1996 Statute Becomes the Justice Department's Antiterrorism Weapon of Choice*, N.Y. TIMES, April 6, 2003, at B15 (discussing Justice Department's prosecution of individuals who participated in al Qaeda training camp, but demonstrated no subsequent plans to engage in terrorist activity).

obligation to refrain from public comments about defendants pending or during trial that create a climate of condemnation. The following will discuss each development in turn, focusing first on the historical incidence of this dynamic, and then examining the evolution of these trends after September 11.

### A. *Particularity Lost*

Past crises have led to a wholesale retreat from the principle of particularity. During World War I, for example, the government prosecuted hundreds of individuals based on a vague statute that barred interference in the war effort.<sup>98</sup> Violations often entailed a generalized expression of political opposition to American involvement in the war that the First Amendment would clearly protect today.<sup>99</sup> During the "Red Scare" after World War I, Attorney General A. Mitchell Palmer, along with Palmer's assistant, J. Edgar Hoover, accelerated the trend toward persecution of dissidents, compiling lists of tens of thousands of radicals, deporting thousands, and setting a tone that strongly influenced American legal, social, and political life for the next half-century.<sup>100</sup> Similarly, prosecutions during the McCarthy Era revealed a conflation of unpopular speech with illegality that would be impermissible under present law.<sup>101</sup>

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98. See Geoffrey R. Stone, *The Origins of the "Bad Tendency" Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411 (discussing the Espionage Act).

99. See *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969); cf. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 151-70 (1994) (discussing Hand's path-breaking analysis in *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917)); Stone, *supra* note 98; William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 SUP. CT. REV. 375, 387:

These Espionage and Sedition Act trials during the first Red Scare anticipated later Cold War persecutions: the prosecution had no evidence that the defendants had actually committed any acts that might remotely be considered seditious (aside from their dissentient utterances), so it had to rely on party teachings. Professional informers provided their contribution. . . . All this was justified in the name of national security.

Other aspects of the dissenters' identity, such as immigration status, also fueled public animus. See MURPHY, *supra* note 25, at 106 (noting that under immigration law passed by Congress in 1918, "any alien who advocated anarchism, syndicalism, or violent revolution—or who belonged to an organization that advocated any of these things—could be deported").

100. See Wiecek, *supra* note 99, at 389-92.

101. In addition, outside of the criminal justice process, the government detained over a hundred thousand Japanese-Americans during World War II with no particularized suspicion that a given detainee had committed espionage or sabotage. See Thomas Y. Fujita-Rony, *Korematsu's Civil Rights Challenges: Plaintiffs' Personal Understandings of Constitutionally Guaranteed Freedoms, the Defense of Civil Liberties, and Historical Context*, 13 TEMP. POL. & CIV. RTS. L. REV. 51, 59 (2003). The Supreme Court upheld this blatant use of national origin and descent as a surrogate for particularized suspicion, although it also held that detention was illegal in the conceded *absence* of suspicion. See *Korematsu v. United States*, 323 U.S. 214, 223 (1944)

In the present crisis, the executive has sought to weaken or evade the particularity requirement. Immigrants and persons with Muslim, Middle Eastern, or South Asian backgrounds have been particular targets.<sup>102</sup> For example, in the two years following September 11, the Internal Revenue Service ("INS") detained over a thousand persons, most of them immigrants.<sup>103</sup> However, in virtually all of the cases, the government was unable or unwilling to demonstrate any link between these individuals and terrorism: a classic case of persons in the wrong place at the wrong time.<sup>104</sup> Ashcroft had also indicated that he was willing to detain people for "spitting on the sidewalk" and other generic offenses, on the modest chance that they, like the hapless illegal immigrants netted by the INS, had some connection to terrorism.<sup>105</sup> As part of this retreat from particularity, when the news media and advocacy groups sought further information about detainees the government advanced a so-called "mosaic" theory, arguing that the release of even mundane information *might* assist terrorist

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(upholding government order authorizing internment of Japanese-American citizens on grounds that there was a "real military danger"); *Ex parte Endo*, 323 U.S. 283, 294-95 (1944) (granting habeas petition for Japanese-American detainee who government acknowledged did not pose risk to national security); Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933 (2003); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists"*, 8 ASIAN L.J. 1, 11-26 (2001) (drawing parallels between Japanese-American internment and post-September 11 measures against Arabs and Muslims).

102. See Cole, *Enemy Aliens*, *supra* note 35 (critiquing detention of immigrants after attacks); Margulies, *Uncertain Arrivals*, *supra* note 29 (same); Letti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002) (describing the marginalization of particular communities after September 11); Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day after September 11*, SOCIAL TEXT, Fall 2002, at 101; Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 ANN. SURV. AM. L. 295 (2002) (same). For a political theory perspective, see BONNIE HONIG, *DEMOCRACY AND THE FOREIGNER* 34 (2001) (discussing "the politics of foreignness—the cultural symbolic organization of a social crisis into a resolution-producing confrontation between an 'us' and a 'them'").

103. See Margulies, *Uncertain Arrivals*, *supra* note 29, at 499.

104. See Center for Nat'l Sec. Studies v. United States Dept. of Justice, 215 F. Supp. 2d 94, 98 n.4 (D.D.C. 2002) (noting government concession that many aliens detained or deported after September 11 had been "'cleared of wrongdoing'" and that none had ties "to the terrorist attacks on the World Trade Center and the Pentagon"), *aff'd in part, rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003); cf. Stephen J. Ellmann, *Racial Profiling and Terrorism*, 46 N.Y.L. SCH. L. REV. 675, 725-26 (discussing lack of concrete information about terrorism yielded by government's immigration measures); Adam Liptak, *The Pursuit of Immigrants in America After Sept. 11*, N.Y. TIMES, June 8, 2003, § 4, at 14 (same) [hereinafter Liptak, *The Pursuit of Immigrants*].

105. See Adam Liptak, *Under Ashcroft, Judicial Power Flows Back to Washington*, N.Y. TIMES, Feb. 16, 2003, § 4, at 5 (discussing prosecutors' broad mandate from Ashcroft, who attributes the "sidewalk" reference to Robert Kennedy in his pursuit of organized crime). *But see id.* (quoting officials who served under Kennedy in the Justice Department as arguing that Kennedy did not seek the broad power that Ashcroft has claimed).



groups.<sup>106</sup> The government expressly declined to specify how and why such information might be of assistance to terrorists or to engage in a case-by-case showing of the need for non-disclosure because such a showing would itself aid terrorists.<sup>107</sup>

In the law of criminal procedure, the most troubling retreat from particularity has occurred in case called *United States v. Awadallah*.<sup>108</sup> In *Awadallah*, the government discovered Awadallah's phone number in the trunk of a car left at Dulles Airport in Virginia by one of the September 11 hijackers.<sup>109</sup> The government did not contest on appeal that the federal agents illegally seized Awadallah both times they spoke with him.<sup>110</sup> Considering whether any means less restrictive than detention was "impracticable" for securing Awadallah's testimony before a grand jury, the Second Circuit was not disturbed that the government's affidavit supporting its application for an arrest warrant failed to disclose a number of facts.<sup>111</sup>

106. *Center for Nat'l Sec. Studies*, 331 F.3d at 924, 928-929 (upholding government's refusal to disclose information); cf. *id.* at 940 (Tatel, J., dissenting) (criticizing "government's vague, poorly explained allegations" and asserting that majority, "by filling in the gaps in the government's case with its own assumptions about facts absent from the record," has "converted deference into acquiescence"); Margulies, *Judging Terror*, *supra* note 15, at 400-01 (criticizing majority's holding as example of dangers of undue deference to executive).

107. *Center for Nat'l Sec. Studies*, 331 F.3d at 928-929.

108. 349 F.3d 42 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 861 (2005).

109. *Id.* at 45. Agents seized Awadallah, a Jordanian national, in the period immediately after September 11, and questioned him for six hours at the FBI's office. *Id.* at 46. After this questioning, the FBI sought a warrant to hold Awadallah as a material witness. *Id.* at 47. The affidavit attested to Awadallah's acquaintance with two of the hijackers, his interest in Osama bin Laden, and his ownership of a "box-cutter," but left other relevant information and contained no further information linking Awadallah to the September 11 conspiracy. *Id.* By the end of his detention as a material witness, Awadallah "had bruises on his upper arms," and an agent's report indicated other injuries involving his shoulder, ankles, hand, and face. *Id.* at 48.

Before the grand jury, Awadallah testified that he did not know the name of one of the hijackers and that writing in a booklet obtained from his English professor was not his. *Awadallah II*, 349 F.3d at 48. In a second appearance before the grand jury, Awadallah acknowledged that the writing was his, and that he recalled the name of the hijacker. *Id.* The government indicted him for making false statements to the grand jury. *Id.* Awadallah moved to dismiss the indictment and suppress the statements to the grand jury, as well as other evidence obtained from his home and cars. *Id.* The district court denied the defendant's motion but dismissed the indictment and suppressed the evidence after a hearing and briefing on two issues raised *sua sponte* by the court. *Id.* at 48-49.

110. *Id.* at 68-69; see also *United States v. Awadallah*, 202 F. Supp. 2d 82, 101-05 (S.D.N.Y. 2002) ("*Awadallah I*") (holding that government's initial contact with Awadallah constituted a seizure in violation of the Fourth Amendment), *rev'd*, 349 F.3d 42 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 861 (2005).

111. See *Awadallah II*, 349 F.3d at 70; see also *id.* at 76 (Straub, J., concurring in the judgment on separate grounds) (arguing that once the illegally seized evidence was removed from the affidavit, there was no "probable cause to believe that it may have 'become impracticable' to secure Awadallah's presence before the grand jury by subpoena").

For example, the affidavit did not disclose that Awadallah had not seen one of the hijackers for over a year, had moved eighteen months earlier from the address associated with the phone number found in the trunk of the hijacker's car, and had used a "box-cutter" found by agents in his car to install a new carpet in his apartment.<sup>112</sup> Nor did the affidavit disclose that Awadallah had been "cooperative" after his concededly illegal seizure by the FBI, and that he had three brothers in San Francisco, including one who was an American citizen.<sup>113</sup> Discounting the impact of these omissions by the government, the Second Circuit cited the fact that Awadallah had failed to come forward voluntarily after the attacks to disclose his acquaintance with two of the hijackers.<sup>114</sup>

The Second Circuit's holding that Awadallah's mere failure to come forward was a sufficient factual predicate for his detention as a material witness sets a distressingly low threshold of particularity. Although the law may require that persons approached by law enforcement not affirmatively misrepresent facts, mandating that people come forward is a departure from well-established Anglo-American legal norms. Our basic liberties include the freedom not to speak or act; thus, there is no generalized duty to rescue others or volunteer to assist the government.<sup>115</sup> Without such norms, the government could detain or prosecute persons who failed to come forward with information about any offense.<sup>116</sup> The amorphous nature of the failure to come forward would invite governmental reliance on invidious criteria, such as race, ethnicity, or political belief, in selecting targets.

In *Awadallah*, the government's disregard of such concerns raised the specter of informational overreaching. The government offered no evidence that Awadallah failed to come forward because of an urge to mislead law enforcement or flee the jurisdiction. Indeed, Awadallah's failure to come forward may have stemmed from his desire to avoid the marathon interrogation by the government that ensued after his seizure—an interrogation which in conjunction with his subsequent detention produced

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112. *Id.* at 47.

113. *Id.*

114. *Awadallah II*, 349 F.3d at 70.

115. *Cf.* RESTATEMENT (SECOND) OF TORTS § 291 cmts. f, g (1965) (noting the lack of a duty to rescue under the common law); *cf.* Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula,"* 4 THEORETICAL INQ. L. 145, 237-38 (2003) (discussing roots of rejection of general duty to rescue in conception of freedom).

116. *See* JEFFREY ROSEN, *THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE* 106-11 (2004) [hereinafter ROSEN, *THE NAKED CROWD*] (discussing perils in government attempts to use technology to monitor population for terrorist threats); *cf.* Linda E. Fisher, *Guilt By Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621 (2004) (outlining dangers of government surveillance of political and religious groups after September 11).

virtually no information of use regarding the hijackers. Given Awadallah's lack of useful information, the court's mention of "the terrorist attacks known to everyone else on the planet, and the implicit threat of future attacks,"<sup>117</sup> seems at best a *non sequitur*, and at worst an invocation of fear as a substitute for analysis.

Viewed in retrospect, the government's detention of Awadallah for almost three weeks as a material witness seems designed more to produce some "hook" for prosecuting him further, despite the absence of any information linking him to the planning or execution of the September 11 attacks. Nor does the court adequately analyze why the government failed to include facts demonstrating that Awadallah was not likely to flee because of community and family ties, or why Awadallah's responses to questioning by the government prior to his detention did not constitute "cooperation" within the meaning of the material witness statute.

To illustrate the currency of these concerns about the erosion of particularity, consider the recent case of Brandon Mayfield, a lawyer in Portland whom the FBI arrested in May 2004 as a material witness in connection with the Madrid train bombing.<sup>118</sup> The FBI secured a warrant for Mayfield's arrest apparently without disclosing that Spanish authorities had grave doubts about the fingerprint match between Mayfield and a print found at the scene of the bombing.<sup>119</sup> Central to the FBI's affidavit were allegations that Mayfield had represented an individual in a *child custody* case who was subsequently charged in a terrorism investigation, had called the head of a local Islamic organization, and had visited a mosque.<sup>120</sup> Based on this ill-fitting mosaic, the government held Mayfield for seventeen days until it was forced to acknowledge that the fingerprints did not match.<sup>121</sup>

Failures of disclosure by government in such cases encourage the detention of persons whose only offenses are displaying indicia of religious commitment or fleeting, innocent, or privileged association with wrongdoers. In an ongoing crisis, it is understandable that government may desire such authority. However, courts should not rush to indulge executive branch appetites that undermine the integrity of procedural safeguards.<sup>122</sup>

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117. *Awadallah II*, 349 F.3d at 70.

118. See Sarah Kershaw & Eric Lichtblau, *Spain Had Doubts Before U.S. Held Lawyer in Blast*, N.Y. TIMES, May 26, 2004, at A1.

119. *Id.*

120. *Id.*

121. *Id.*

122. This is the gravamen of the recent Supreme Court decisions. See *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (finding federal jurisdiction regarding petitions of alleged al Qaeda detainees at Guantanamo Bay Naval Base); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (requiring procedural protections for alleged enemy combatants).

### B. *Suppression of Exculpatory Evidence*

The *Koubriti* case illustrates how extrajudicial comments by prosecutors interact with other forms of informational overreaching, such as the failure to disclose exculpatory evidence. Moreover, such failures feed back into our first species of informational overreaching—the erosion of particularity. Withholding exculpatory evidence in terrorism cases weakens the particularity requirement by allowing the government to exploit inappropriate inferences based on widely held views that a defendant with a particular ethnic or religious background is more likely to have committed the acts charged.<sup>123</sup> Without the distraction of facts that might counter such inferences, prosecutors seeking conviction need only contend with the dutiful but bland instructions offered by the trial judge.<sup>124</sup> Here, too, history offers troubling precedents.

In the World War I prosecutions, for example, the government systematically failed to reveal evidence that the dissidents charged had no knowledge of any treasonable plots against the government.<sup>125</sup> In the Rosenberg case, the government concealed evidence that would have at least partially exculpated Ethel Rosenberg, revealing her as at best a tacit ally in the espionage conspiracy charged, not an active or even fully knowing participant.<sup>126</sup>

More recent cases also reveal the troubling synthesis of hyperbolic public comments with back-stage withholding of information. Consider the case of Edwin Wilson, a CIA operative convicted of trafficking in arms on behalf of Libya.<sup>127</sup> Prosecutors were able to frame the debate by a publicity campaign that framed Wilson as a rogue agent.<sup>128</sup> A recent court decision, however, demonstrates that Wilson may have had government authorization for many of his allegedly criminal activities, and the government may have willfully deceived the court by saying otherwise.<sup>129</sup> Another notable example is New York's infamous "Central Park Jogger" case, in which the prosecution, determined to respond to the public outcry about a brutal rape,

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123. See Ahmad, *supra* note 102, at 104; Akram & Johnson, *supra* note 102, at 301.

124. Cf. Alschuler, *supra* note 29, at 652-53 (expressing skepticism about curative power of instructions by trial judges).

125. See MURPHY, *supra* note 25, at 107.

126. See Parrish, *supra* note 27, at 602. Consider also the government's failure to acknowledge in all but a handful of cases involving the internment of Japanese-Americans that the government possessed no information whatsoever indicating the participation of the detainees in sabotage or espionage. See Gudridge, *supra* note 101, at 1940.

127. *United States v. Wilson*, 289 F. Supp. 2d 801, 803 (S.D. Tex. 2003).

128. *Id.*

129. *Id.* at 807-08.

ignored pervasive and material inconsistencies in the alleged "confessions" of the defendants.<sup>130</sup> The defendants' status as young African-Americans accused of "wilding" in Central Park made them handy scapegoats for the crime, contributing to the rush to judgment.<sup>131</sup>

In the post-9/11 era, the government failed to disclose significant evidence about its chief witness in the *Koubriti* case.<sup>132</sup> After the trial, the prosecutor in the case provided the defense with a letter, received before the trial, from a federal prisoner stating that the government's main witness admitted that he had fabricated his story about the defendants.<sup>133</sup> The government defended its failure to disclose the letter previously, arguing that it was not material.<sup>134</sup> The court ordered a new trial for the document fraud charges.<sup>135</sup>

The government's failure to make exculpatory evidence available after September 11 has also played a prominent role in the case of accused "twentieth hijacker," Zacarias Moussaoui.<sup>136</sup> In *Moussaoui*, the Fourth Circuit overruled the district court's ruling and held that the government's failure to produce detainees with exculpatory information for a video deposition would not unduly prejudice the defendant.<sup>137</sup> The Fourth Circuit's decision forces the defendant in a capital case to rely on the impersonal and possibly unreliable summaries of the reports of the detainee's interrogation prepared by government officials.<sup>138</sup>

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130. *New York v. Wise*, 752 N.Y.S.2d 837, 845-46 (Sup. Ct. 2002) (also noting discovery of new DNA evidence demonstrating that another individual had committed the crime in question).

131. See N.R. Kleinfeld, *A Crime Revisited: Voices; City Reminded of Fears It Believed It Left Behind*, N.Y. TIMES, Dec. 6, 2002, at B5.

132. *United States v. Koubriti*, 297 F. Supp. 2d 955, 958 (E.D. Mich. 2004) ("*Koubriti I*").

133. *Id.* at 959-60.

134. *Id.* at 960. The government has asserted that other allegations in the letter, including the claim that the Bush family is in league with international drug traffickers, would have substantially eroded the credibility of the letter's author before a jury. See Norman Sinclair, *Fed Missteps Jeopardized Terror Case*, DETROIT NEWS, March 28, 2004, at A1. While this is a plausible assertion viewed in isolation, it begs the question of why the government did not allow the defense to make its own decision about the probative force of the evidence.

135. *Koubriti IV*, 336 F. Supp. 2d 676, 682 (E.D. Mich. 2004).

136. *Moussaoui IV*, 382 F.3d 453, 460 (4th Cir. 2004), *cert. denied*, 73 U.S.L.W. 3556 (U.S. Mar. 21, 2005) (No. 04-8385).

137. *Id.* at 478. For the district court's considered opinion, see *Moussaoui III*, 282 F. Supp. 2d 480, 487 (E.D. Va. 2003) (striking government's notice of intent to seek death penalty, dismissing several charges, and precluding prosecution's introduction of evidence relating to events of September 11 in case of alleged "twentieth hijacker"), *aff'd in part, vacated in part*, 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 73 U.S.L.W. 3556 (U.S. Mar. 21, 2005) (No. 04-8385); cf. Margulies, *Judging Terror*, *supra* note 15, at 436 (praising district court's ruling in *Moussaoui*, while arguing that it does not go far enough in eradicating prejudice to defendant because testimony barred by the government could also have been exculpatory on remaining counts).

138. The district court found that the summaries were unreliable. *Moussaoui IV*, 382 F.3d at

Because it concerns the only domestic case involving a defendant with alleged ties to the September 11 attacks, the problems with the Fourth Circuit's decision in *Moussaoui* are worth examining in depth. Although the decision acknowledges that the government cannot bar access to evidence with complete impunity,<sup>139</sup> the analysis and remedies offered by the Fourth Circuit severely discount the prejudice to the defendant, defer excessively to the blanket national security arguments of the executive, and distort the balancing test provided by analogy to the Classified Information Procedures Act ("CIPA").<sup>140</sup>

First, reliance on the summaries prepared by the government as a substitute for the video deposition ordered by the district court precludes the defendant's lawyers from developing further exculpatory information that the give and take of a deposition would reveal.<sup>141</sup> A deposition of the detainee, presumably Ramzi bin al-Shibh, an alleged al Qaeda ringleader captured in Pakistan, might point the defendant to other witnesses or documentary evidence. The government may have failed to uncover such evidence in the course of its interrogation, may have unduly discounted its importance to the defense, or may simply have determined that it would not be in the government's interest to volunteer additional information. A deposition of the detainee would guard against any of these risks.

Second, the format of the summaries, however the court and the parties edit them through the uncertain process outlined by the Fourth Circuit, may well substantially reduce the impact of the exculpatory evidence contained therein on the finder of fact, sow jury confusion, and even produce heightened prejudice to the defense. The summaries, akin to stipulations entered into by both parties, lack the enlivening interchange featured in actual testimony. The dramatic, narrative elements of testimony make it memorable for juries, who may find the mechanical recitation of

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478 (discussing district court's rulings in the case, some of which are unavailable through Lexis, apparently because of the national security information contained therein). The Fourth Circuit found that the summaries were reliable, but again, in part presumably for national security reasons, its analysis of this issue in the published decision is conclusory at best. *Id.*

Subsequent to the Fourth Circuit's decision in *Moussaoui*, it issued an order requiring the government to explain "arguably inconsistent" information in the government's filings that suggested that prosecutors may have had some contact with personnel interrogating the alleged al Qaeda detainees. Jerry Markon, *Court Questions Al Qaeda Contact; Moussaoui Case Could Stall Again*, WASH. POST, May 15, 2004, at A3. The ambiguity surrounding the nature of the prosecutors' involvement in the interrogation brings home the artificiality of the Fourth Circuit's distinction between the prosecutors and the U.S. agencies with custody of the detainees.

139. *Moussaoui IV*, 382 F.3d at 476.

140. See 18 U.S.C. app. 3, § 6.

141. The use of summaries of classified documents is a device provided for under CIPA. See *infra* notes 151-54 and accompanying text (discussing flaws in the Fourth Circuit's use of CIPA).

stipulations soporific. As the Supreme Court noted in *Old Chief v. United States*,<sup>142</sup> while discussing the advantages of testimony over stipulations,<sup>143</sup> “A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it.”<sup>144</sup> Furthermore, a jury, accustomed by popular culture and the routine of the trial to seeing evidence from particular individuals in the form of testimony, may be confused by the disruption of their expectations.<sup>145</sup> Reacting as people typically do, they may well direct blame for their confusion at the party introducing the evidence<sup>146</sup>—here, the defendant. Lacking access to exculpatory evidence in a compelling form, and blaming the defendant for confounding their expectations, a jury may find it easier to convict.

Furthermore, the government’s argument that making this witness available would disrupt his interrogation should not outweigh the prejudice to Moussaoui.<sup>147</sup> Rather than accepting the government’s blanket justification for denying a defendant access to detainees, the court could have engaged in a more textured analysis. Under this analysis, a court could acknowledge that the government has a legitimate interest in interrogating al Qaeda detainees about future operations. Over time, however, that justification grows less compelling, as detainees either reveal information or demonstrate definitive resiliency in declining to do so.<sup>148</sup> Here, bin al-Shibh had been in custody for approximately eighteen months

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142. 519 U.S. 172 (1997).

143. Cf. Richman, *Stipulating Away Prosecutorial Accountability*, *supra* note 72.

144. *Old Chief*, 519 U.S. at 189; cf. ROSEN, *supra* note 116, at 75 (noting that people often make “affective judgments” based on “images, metaphors, and narratives”); Matthew Rabin, *Psychology and Economics*, 36 J. ECON. LIT. 11, 30-31 (1998) (discussing importance of salience in human inference); Kuran & Sunstein, *supra* note 80, 706-07 (analyzing how cognitively salient factors play a disproportionate role in public policy).

145. *Old Chief*, 519 U.S. at 188-89.

146. *Id.*

147. See *Moussaoui IV*, 382 F.3d at 470.

148. See *Sell v. United States*, 539 U.S. 166, 186 (2003) (holding that government’s interest in restoring criminal defendants to competence through the administration of psychotropic medication declines when the time taken to restore competence will exceed the maximum sentence the defendant could serve for the offense charged); *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001) (holding that government cannot detain aliens already subject to final deportation order for more than six months without reasonable prospect of securing cooperation of alien’s country of origin or other country in effecting alien’s deportation); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (holding that state must dismiss criminal charges against defendants who have no reasonable prospect for attaining competence to stand trial); cf. Brief of Amicus Curiae, Center for Nat’l Security Studies at 8 n.1, *Moussaoui IV*, 382 F.3d 453 (4th Cir. 2004) (No. 03-4792):

The government’s national security interest in this case rests upon showing that a deposition of the detainees would be likely to cause them to refuse to disclose information important to national security that they would otherwise disclose. Such a showing might be difficult in this case, where the detainees have been in captivity for several months and have already reportedly disclosed important information.

and had already been talking to the government.<sup>149</sup> It is doubtful that brief and carefully circumscribed contact with officers of the court will necessarily imperil his transmission of future information.<sup>150</sup>

Finally, the Fourth Circuit presses its analogy to CIPA too far. As the district court noted, CIPA provides a balancing test that can be very helpful in analyzing the novel issues raised in *Moussaoui*, allowing the court to weigh the defendant's interest in an effective defense against the government's interest in avoiding disclosure of information that could endanger sources and methods of intelligence collection.<sup>151</sup> However, CIPA's lack of direct application to the case is not fortuitous, but instead is bound up with the merits of the dispute. CIPA only addresses disclosure of information to the *public*.<sup>152</sup> The pre-trial deposition at issue in *Moussaoui* does not on its face involve public disclosure since all parties to the deposition, including the experienced federal public defenders representing Moussaoui, have affirmed their obligation to refrain from such disclosure pending trial. Under CIPA, the government's interest does not crystallize until trial when the parties and the court can apply the balancing test to

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149. David Johnson & Don Van Natta Jr., *Threats and Responses: The Interrogations; Account of Plot Sets Off Debate Over Credibility*, N.Y. TIMES, June 17, 2004, at A1.

150. The government has also asserted the disruption of interrogation argument in *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42, 50 (S.D.N.Y. 2003), *aff'd in part, rev'd in part*, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 124 S. Ct. 2711 (2004), a case involving the detention of an alleged unlawful combatant currently in Pentagon custody. In *Padilla*, the district court observed that the government's uncontested control over a detainee might harden attitudes, while an outside actor such as an attorney who has contact with the detainee might actually facilitate cooperation, as attorneys do routinely in criminal cases. *Id.* at 52 (noting that providing counsel to Padilla might, as with many criminal defendants facing trial, promote a realistic perspective, leading the defendant to "seek to better his lot by cooperating"). The government has acknowledged that other detainees providing evidence against Padilla have offered much "misinformation" to interrogators. See Steve Fainaru, *Padilla's Al Qaeda Ties Confirmed, Prosecutors Say*, WASH. POST, Aug. 28, 2002, at A4 (quoting government as acknowledging that "some of the sources who provided information on Padilla may be trying to mislead the government"). However, the government has argued against allowing Padilla a day in court to contest those allegations, and has declined to provide Padilla's lawyer with any examples of the misinformation supplied by Padilla's accusers. See *id.* For a discussion of the difficult issues posed by detention of alleged unlawful combatants, see Margulies, *Judging Terror*, *supra* note 15, at 417-18 (arguing for procedural safeguards for detention); cf. Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 44-46 (2003) (discussing challenge to criminal justice system posed by individuals like Moussaoui, whose intractable beliefs and acknowledged commitment to violent means for realizing those beliefs may make them "undeterrable").

151. *Moussaoui I*, No. CR. 01-455-A, 2003 WL 21263699, at \*3 (E.D. Va. Mar. 10, 2003), *appeal dismissed* by 333 F.3d 509 (4th Cir. 2003).

152. See *Moussaoui II*, 333 F.3d 509, 514-15 (4th Cir. 2003) (holding that CIPA did not directly apply to Moussaoui's case and dismissing the government's interlocutory appeal from the preliminary order of the district court).



determine the content and format of the evidence presented.<sup>153</sup> Before trial, court orders and affirmations by the lawyers involved in the case can deal adequately with the risk of disclosure to the public.

The Fourth Circuit failed to acknowledge that the lower risk of public disclosure in the pre-trial stage in *Moussaoui* makes the government's interest in avoiding a video deposition less compelling than the interest that CIPA was designed to protect. The prejudice to the defendant, however, remains constant since the defendant is deprived of the opportunity to use the deposition to develop other evidence that might be admissible at trial. Taking the possibility of prejudice seriously, the Fourth Circuit should have upheld the district court's more robust remedy: dismissal of a number of the charges against Moussaoui, suppression of the government's evidence purporting to link Moussaoui to the September 11 attacks, and striking of the government's notice of intent to seek the death penalty.<sup>154</sup>

### C. *Suppression of Exculpatory Evidence*

The government has also sought to control information to a different audience—the public and prospective jurors—through extrajudicial comments regarding terrorism prosecutions. Prejudicial public comments by prosecutors are a staple of government reactions to crisis. When the public and media identify one group as the source of the crisis, such comments can drive perceptions about all defendants from that group, thereby making the government's job easier at trial and further eroding safeguards such as the reasonable doubt standard. Extrajudicial comments by the Attorney General can also discourage internal criticism and the disclosure of information to the defense inconsistent with the theme sounded in public. Ashcroft had resorted to this tactic, in keeping with precedent from past crises. These precedents are not encouraging.<sup>155</sup> In World War I, for example, the Wilson Administration mounted a sophisticated propaganda campaign led by George Creel, a public relations executive, to discredit dissenters such as Eugene V. Debs and inflame

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153. *United States v. Rezaq*, 134 F.3d 1121, 1143 (D.C. Cir. 1998) (discussing CIPA process for providing substitutions for documents at trial and upholding use of substitutions where “[n]o information was omitted from the substitutions that might have been helpful to [the] defense, and the discoverable documents had no unclassified features that might have been disclosed to [the defendant]”).

154. *Moussaoui III*, 282 F. Supp. 2d 480, 487 (E.D. Va. 2003), *aff'd in part, vacated in part*, 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 73 U.S.L.W. 3556 (U.S. Mar. 21, 2005) (No. 04-8385).

155. See DEMPSEY & COLE, *supra* note 28 (discussing the history of government abuse of civil liberties during crises).

public opinion against them.<sup>156</sup> Attorney General Thomas W. Gregory, Palmer's predecessor, joined in this effort, warning dissenters, "May God have mercy on them, for they need expect none from an outraged people and an avenging government."<sup>157</sup> Gregory described the "male pacifist [a]s a 'physical, or moral degenerate'"<sup>158</sup> and vigorously endorsed a state bar association resolution that condemned as "unpatriotic and unprofessional" a lawyer's representation of an objector to the draft.<sup>159</sup> Line prosecutors and juries needed little urging to "get with the program,"<sup>160</sup> drawing inferences on culpability of the accused for sedition and espionage based on the mere fact of their dissent from the war effort.

The record in the McCarthy era after World War II is hardly better. In the Rosenberg "atom-spy" trial, Attorney General J. Howard McGrath and FBI Director J. Edgar Hoover issued a press release that set the stage for massive and often inaccurate reporting about the case in the media.<sup>161</sup> The lead prosecutor in the case, Irving Saypol, assisted by the politically connected Roy Cohn, who subsequently became chief counsel to Sen. Joseph McCarthy's committee,<sup>162</sup> capitalized on his agenda-setting ability by holding informal press conferences after the conclusion of the day's events in the courtroom.<sup>163</sup> The prosecution's efforts to inflame both the public and the jury through inappropriate publicity continued throughout the trial.<sup>164</sup> While the Second Circuit criticized Saypol for engaging in

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156. See Stone, *supra* note 98, at 413-14.

157. *Id.* at 413. Attorney General Gregory, in contrast with Ashcroft, subsequently became more reflective about the authority he had claimed. See *id.* at 442 & n.123. However, his initial pronouncements, coupled with those of other Administration figures as well as officials at the state level and leaders of organizations, set in motion a cascade of law enforcement activity against dissidents. *Id.*

158. See MURPHY, *supra* note 25, at 192.

159. *Id.*

160. *Id.* at 191 (noting that "United States Attorneys [were] eager to prosecute vigorously under [restrictive wartime] legislation and anxious to secure convictions from juries").

161. See Attossa M. Alavi, Comment, *The Government Against Two: Ethel and Julius Rosenberg's Trial*, 53 CASE W. RES. L. REV. 1057, 1068 (2003).

162. *Id.* at 1060 & n.13.

163. *Id.* at 1067.

164. See *id.* at 1068. In his most egregious act of overreaching, during the trial Saypol announced the perjury indictment of an alleged associate of the Rosenbergs, William Perl. *Id.* Saypol explained to the media, in accounts that the jury, which was not sequestered, most probably read, that Perl was to have testified in the Rosenberg trial to corroborate a government witness. *Id.* at 1068-69. The implication, which the Second Circuit Court of Appeals later described as part of a "reprehensible" course of conduct on Saypol's part, was that other confederates of the Rosenbergs had "gotten to" Perl, causing him to lie to the grand jury investigating the case. See *United States v. Rosenberg*, 200 F.2d 666, 670 (2d Cir. 1952). This kind of discussion of potential witnesses, augmented by the prosecution's gambit of placing distinguished scientists such as Robert Oppenheimer, developer of the atom bomb, on the witness

excessive public comments,<sup>165</sup> the anti-Communist hysteria of the period made such reputational sanctions largely irrelevant.

Public comments by Ashcroft in the two years after September 11 converged with a general ratcheting up of prosecutors' public description of terrorism cases. Every indictment involves not merely alleged wrongdoing, but a new terrorist "cell" set to perpetrate the next September 11. When qualifications of this rhetoric occur, they occur most often after announcement of an indictment, and indeed after defendants have gone to trial or taken a plea. At sentencing, prosecutors suddenly discover that yesterday's vast terrorist conspiracy is actually a more modest bundle of conduct, much of which would not even have been illegal prior to 1996.

To consider the current dangers of public comments by prosecutors, consider *United States v. Koubriti*, a Detroit case in which the government charged the defendants with "material support" of terrorist activity.<sup>166</sup> The defendants were initially arrested in the weeks after September 11 because they occupied an apartment once rented by an individual whom the government was seeking in connection with ties to al Qaeda.<sup>167</sup> The defendants were allegedly in possession of a substantial number of fraudulent immigration documents not solely for their own use, as well as a diagram of a United States military base in Turkey.<sup>168</sup>

The government's main witness tying these disparate pieces together was a gentleman named Yousef Hmimmsa.<sup>169</sup> Hmimmsa was in many ways the prototype of an individual apprehended by the government in the course of clearly illegal behavior—here, the fabrication and sale of fraudulent government documents—who had powerful incentives to offer the government something, anything, that might shift blame from him to others.<sup>170</sup> Hmimmsa alleged that the defendants in *Koubriti* had knowingly assisted "various terrorism-related activities."<sup>171</sup>

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list to buttress the scientific basis for the government's case, was part of a strategy for influencing both the public and the jury. See Alavi, *supra* note 129, at 1069-70. The defense, perhaps persuaded by Saypol's avowals that he had not sought to influence the jury, did not ask for a mistrial. *Id.* at 1069.

165. *Rosenberg*, 200 F.2d at 670 ("Such . . . tactics cannot be too severely condemned.").

166. *Koubriti II*, 305 F. Supp. 2d 723, 731 (E.D. Mich. 2003).

167. *Id.* at 727-28.

168. *Id.*

169. *Id.* at 734.

170. For more on the dynamics of informers and false testimony, see Weinstein, *Regulating the Market in Snitches*, *supra* note 71, at 599-600; Margulies, *Battered Bargaining*, *supra* note 18, at 167 n.48.

171. *Koubriti II*, 305 F. Supp. 2d at 734. At trial, the jury convicted two of the defendants of document fraud and terrorism-related offenses, one was convicted of document fraud, and one was acquitted. *Id.* at 736.

The *Koubriti* case revealed a pattern of public comments by senior officials that both violated a court order and entailed a substantial risk of prejudice to the defense. The judge in the case entered a gag order shortly after the arraignment, concerned about the prejudicial nature of publicity after September 11.<sup>172</sup> In the weeks after September 11, Ashcroft asserted without any support that the defendants had advance knowledge of the September 11 attacks.<sup>173</sup> Conferences with the judge followed, after which a senior government official stated that "no further such incidents would occur during the case."<sup>174</sup> The government then retracted these assertions,<sup>175</sup> although the retraction received less press coverage than the initial statements by Ashcroft. However, the day before the prosecutors filed a revised indictment a television network reported on the forthcoming indictment, which circumstances suggested was a leak from a law enforcement official.<sup>176</sup> The court again insisted that the government obey its gag order but did not sanction anyone.<sup>177</sup>

After the trial itself commenced, Ashcroft commented directly on the evidence, praising Hmimmsa as providing testimony of "substantial value" to prosecutors.<sup>178</sup> Ashcroft made his comments after a particularly damaging cross-examination of Hmimmsa by defense counsel.<sup>179</sup> Ashcroft also described the defendants as being part of a terrorist "cell," without using the usual qualifier "alleged."<sup>180</sup>

Ashcroft's comments in the *Koubriti* case demonstrate the connection between inappropriate publicity and the erosion of particularity. The prosecution had to persuade the jury to draw damaging inferences against the defendants on the basis of activity that was either innocuous, such as the possession of a videotape of tourist attractions,<sup>181</sup> or explainable without reference to terrorism,<sup>182</sup> such as the possession of fraudulent immigration documents. The Arab and Muslim background of the defendants provided an unspoken, albeit invidious, link between the innocuous or otherwise

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172. *Id.* at 725.

173. *Id.* at 729-30. One defense lawyer violated the ban by publicly criticizing the government's witness, Hmimmsa, as a "snitch." He subsequently left the case. *Id.* at 732 & n.8.

174. *Id.* at 730.

175. *Koubriti II*, 305 F. Supp. 2d at 730.

176. *Id.* at 731-32.

177. *Id.* at 733.

178. *Id.* at 735.

179. *See id.* at 734-35.

180. *Id.* at 735.

181. *See* Liptak, *supra* note 104.

182. *Koubriti II*, 305 F. Supp. 2d at 727-28.

explainable behavior and the government's charges.<sup>183</sup> Publicly describing the defendants as members of a terrorist "cell" made it easier to make that link, while camouflaging its malevolent origin.<sup>184</sup> Bolstering the credibility of the government's flawed chief witness also gave members of the public and the jury, who might have been wary of drawing forbidden inferences, something more neutral on which to hang their hats.

*Koubriti* also demonstrates the inadequacies of the relational approach in times of crisis. After the judge indicated that he was considering the appointment of an independent counsel to investigate whether Ashcroft should be charged with criminal contempt, Ashcroft sent the judge a written apology.<sup>185</sup> Ashcroft described his public comments about the government's witness in guarded, lawyerly terms, acknowledging that the "statements, however brief and passing, . . . *could have been considered* . . . to be a breach of . . . the Court's Order."<sup>186</sup> He further described his remarks as "inadvertent" comments resulting from ill-informed drafting on the part of his staff.<sup>187</sup>

Applying the relational approach, the court admonished Ashcroft for violating the court's order, but decided against further fact-finding regarding possible contempt charges.<sup>188</sup> However, the court failed to address the interaction between Ashcroft's public vouching for the government's witness, and the prosecution's failure to hand over documents challenging that witness's account. The court also failed to recognize that the form and content of Ashcroft's apology raised far more questions than answers. For example, his blaming of his staff for failing to draft his remarks properly represents a striking abdication of accountability.<sup>189</sup> Whatever his staff's role, surely a U.S. Attorney General should acknowledge personal responsibility for public remarks, awareness of outstanding court orders, and knowledge of professional rules and departmental regulations that limit extrajudicial comments. Delegating responsibility for such matters to staff signals difficulties within the institution that transcend the remedial capabilities of the relational paradigm.

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183. See Liptak, *supra* note 104.

184. *Koubriti II*, 305 F. Supp. 2d at 735.

185. *Id.* at 737.

186. *Id.* (emphasis added).

187. *Id.* at 737-38.

188. *Id.* at 753.

189. *Id.* at 738.

#### D. Summary

In times of crisis, informational overreaching by the government takes three interlocking forms. First, the government seeks to avoid the requirement that it show a particularized need for coercion or restraint. Second, government seeks to limit its obligation to share with the defense exculpatory evidence. Third, while minimizing access to information by the defendants, the courts, and the public, government officials make public statements that create a prejudicial atmosphere pending or during trial. These moves create a dynamic of monolithic prosecution that threatens fairness and accountability.

#### IV. AN INSTITUTIONAL RESPONSE TO INFORMATIONAL OVERREACHING

Once informational overreaching gains momentum, it is very difficult to stop.<sup>190</sup> Narratives of exigency are notoriously difficult to question or rebut.<sup>191</sup> Courts that wish to deter informational overreaching in a period of crisis must act as counterweights to prosecutorial power. The requisite authority, while embedded in judicial tradition, involves an institutional turn more far-reaching than the reassuring informality of the relational approach.

The institutional approach would draw on the public law tradition of federal remedies, under which federal courts undertook reform of state and local institutions such as jails and psychiatric hospitals.<sup>192</sup> It would braid this remedial strand together with the remedial element of constitutional criminal procedure, under which the courts have for decades fashioned rules for compliance with the Due Process Clause and with the Fourth, Fifth, and Sixth Amendments by prosecutors and law enforcement officials.<sup>193</sup> Each remedial tradition is both fluid—capable of adapting to shifting demands—and focused—capable of providing concrete guidance to multiple

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190. See Kuran & Sunstein, *supra* note 80, at 713 (discussing force of policy “cascades” that develop from interaction of entrepreneurship and public fears).

191. See ROSEN, *supra* note 116, at 75 (discussing belief perseverance in psychology of fear); Gross, *supra* note 81, at 1038-42 (same); Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 77 (2002) (same).

192. See FEELEY & RUBIN, *supra* note 55, at 13; Sabel & Simon, *supra* note 30, at 1016-17; cf. Margulies, *Judging Terror*, *supra* note 15, at 402 (discussing institutional approach based on remedies jurisprudence for dealing with issues such as detention of alleged “unlawful combatants”). But see ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 113-17 (2003) (critiquing public law remedies as unduly disrupting the political branches); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 29-30 (2003) (discussing dangers of overstepping judicial role in supervision of mass tort litigation).

193. See *Miranda v. Arizona*, 384 U.S. 436, 439 (1966).

constituencies. To appreciate the flexibility of equitable remedies, consider *Hecht Co. v. Bowles*,<sup>194</sup> in which the Supreme Court noted that:

The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs . . . .<sup>195</sup>

Yet, while equitable jurisdiction is fluid, it can also be concrete when necessary. In certain situations, courts dealing with the "polycentric" pull of different constituencies have, after extensive fact-finding, determined that broad standards give institutions too much room to frustrate needed reforms.<sup>196</sup> In such cases, courts have issued detailed orders ordering changes in institutions such as public employers, schools, and prisons.<sup>197</sup>

The remedial authority of federal courts in the domain of criminal procedure has followed a similar path.<sup>198</sup> Prior to the plenary incorporation of Bill of Rights guarantees, federal courts reviewing the fairness of criminal convictions in state courts applied the Due Process Clause in a fashion that was fluid, "duly mindful of reconciling the needs both of continuity and of change in a progressive society."<sup>199</sup> Reflecting this fluid approach, the Court excluded evidence obtained by means that "shock[ ] the conscience."<sup>200</sup> By the same token, when such open-textured tests provide insufficient guidance, the Court has not hesitated to require more concrete steps as a prophylactic measure. The Court's decision in *Miranda v. Arizona*, for example, which required specific warnings to defendants in custody regarding their right to remain silent and consult with counsel, implemented a concrete regime.<sup>201</sup> This was in response to the apparent tendency of law enforcement officials to cut corners in adhering to the more

194. 321 U.S. 321 (1944).

195. *Id.* at 329-30; see also SANDLER & SCHOENBROD, *supra* note 192, at 194-95 (praising exercise of equitable discretion in *Hecht*); cf. *TVA v. Hill*, 437 U.S. 153, 193-94 (1978) (holding that Endangered Species Act abrogated equitable jurisdiction, requiring issuance of injunction against construction of dam to save the endangered snail darter fish).

196. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

197. See FEELEY & RUBIN, *supra* note 55, at 13; Sabel & Simon, *supra* note 30, at 1029-33 (discussing interaction between fluidity and specificity in judicial decrees addressing institutional problems in mental health system).

198. See *Rochin v. California*, 342 U.S. 165, 172 (1952).

199. *Id.*

200. *Id.*

201. *Miranda*, 384 U.S. at 444-45; cf. *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (re-affirming *Miranda*'s viability as constitutional precedent).

amorphous "totality of the circumstances" test then applied to the assessment of voluntariness in defendant's confessions.<sup>202</sup>

The balance between flexibility and formality, in both the equitable and criminal procedure realms, often hinged expressly or impliedly on the likelihood that the government would overreach against particular subordinated groups. The equitable public law remedies cases often involved litigation where plaintiffs were people of color, such as the plaintiffs in the school desegregation, or child welfare cases,<sup>203</sup> or people of limited means, such as the residents of public psychiatric facilities, prisons, and jails.<sup>204</sup> Further, in the criminal procedure context, the Supreme Court has noted the special vulnerability to abusive law enforcement practices of people of color.<sup>205</sup>

An institutional perspective is necessary because the remedies typical of the relational approach cannot cope effectively with the external pressures and signaling by senior officials typical of the monolithic turn. While judges can effectively use reputation sanctions with prosecutors, such informal measures are far less effective in dealing with the behavior of senior officials, whose reputations hinge on the responses of an audience that extends well beyond the dimensions of the courtroom. The Attorney General, for example, is a political appointee with a far wider constituency than a prosecutor; the Attorney General's decisions deal more with shaping and satisfying the demands of national political constituencies. When the Attorney General can appeal to these constituencies for validation, mere unfavorable words from a court will not be a significant deterrent.<sup>206</sup>

An institutional approach is also crucial because of the interlocking character of the three brands of informational overreaching by prosecutors in terrorism cases. An institutional approach, rather than considering prosecutors as isolated legal actors and analyzing prosecutorial misconduct within discrete doctrinal pigeonholes, would recognize the links between the erosion of particularity, the failure to disclose exculpatory information to the defense, and excessive extrajudicial comments about pending cases. Each component of informational overreaching reinforces the others,

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202. See *Miranda*, 384 U.S. at 457.

203. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); cf. NINA BERNSTEIN, *THE LOST CHILDREN OF WILDER: THE EPIC STRUGGLE TO CHANGE FOSTER CARE* 59-60 (2001) (discussing racial disparities in foster care).

204. FEELEY & RUBIN, *supra* note 55, at 13.

205. *Miranda*, 384 U.S. at 457 (noting police abuse of Latinos and African-Americans); cf. *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (discussing concerns about police targeting of people of color as rationale for development of "void for vagueness" doctrine).

206. See *supra* notes 80-87 and accompanying text (discussing role of "authenticity entrepreneurs").



making prosecutors less accountable and impairing the integrity of the justice system. The courts should interpret their remedial power to promote accountability and integrity.<sup>207</sup> To that end, the institutional approach would construe misrepresentation, prejudice, and bad faith in structural terms, and tailor remedies accordingly. Only an institutional perspective can re-frame the discourse and *ex ante* incentives of prosecutors in times of crisis.

#### A. *Preserving Particularity*

One of the first casualties of a national security crisis is the principle that the government must provide courts with a particularized basis for searches, seizures, or detentions. In a crisis, requiring particularity as a predicate for governmental intrusion or coercion may seem quaint or even perverse. For a democracy, however, viewing particularity as an exercise in nostalgia threatens abiding values that exigency should not extinguish. Courts serve those values by preserving some meaningful threshold of particularity as a safeguard against the evils of monolithic prosecution.

Finding the right balance of particularity and exigency is crucial.<sup>208</sup> Traditional standards of reasonableness have always contemplated some trade-off between the probability and gravity of harm. A showing that serious harm is possible in the near or foreseeable future will heighten requirements of due care for private actors charged with preventing harm, or grant government greater flexibility in law enforcement.<sup>209</sup> For example,

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207. See *Rasul v. Bush*, 124 S. Ct. 2686, 2699 (2004) (holding that federal jurisdiction under habeas statute extended to consideration of cases of detainees at Guantanamo Bay Naval Base).

208. See Margulies, *Judging Terror*, *supra* note 15; Cole, *Enemy Aliens*, *supra* note 35, at 955.

209. Judge Learned Hand indicated that under the law of torts reasonableness might require a heightened standard of care when lack of due care could cause an injury of sufficient gravity, despite a lower probability that the injury would in fact occur. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); cf. *Kiareldeen v. Ashcroft*, 273 F.3d 542, 556 (3d Cir. 2001) (observing that the government, when making a decision to apprehend an individual suspected of plotting terrorist activity—in that case a pre-September 11 plan to bomb the World Trade Center—was entitled to consider not only the probability that an individual had engaged in such activity, but also the extent of the destruction that could have resulted); see also ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 187-96 (2002) (discussing constitutional concern with false positives, while arguing that the challenge of terrorism complicates issue); Laurence H. Tribe, *Trial By Fury: Why Congress Must Curb Bush's Military Courts*, *THE NEW REPUBLIC*, Dec. 10, 2001, at 18, 20 (arguing that public interest requires some revision of balance between false positives and false negatives when persons who turn out to be false negatives “slaughter innocent civilians, and may well have access to chemical, biological, or nuclear weapons”). But see Ronald Dworkin, *The Threat to Patriotism*, *N.Y. REV. OF BOOKS*, Feb. 28, 2002, at 44, 44 (cautioning against lowering standards of proof in terrorism cases brought in courts, military tribunals, or other venues); Wright, *supra* note 115 (critiquing Hand formula).

courts have suggested that a more modest showing of probable cause than the usual might govern law enforcement officers' search to discover a ticking bomb<sup>210</sup> and that the failure to give *Miranda* warnings would not compel the suppression of a defendant's statements made under interrogation in a situation posing an imminent danger to the officers' safety.<sup>211</sup> Similarly, one could argue that government investigators in the period immediately proceeding September 11 were unduly reticent in seeking a warrant for the laptop of the frustrated flight school enrollee Zacarias Moussaoui, given the available evidence that al Qaeda was considering using airplanes as bombs.<sup>212</sup>

Fine-tuning the balance between particularity and exigency should not lead to the demise of the particularity requirement. It appears that in cases since September 11, courts have sometimes contorted logic to dispense with particularity. Courts need to be especially wary that they are not distorting doctrine to accomplish a particular result, such as ensuring the admissibility of evidence that should be excluded. This result-oriented jurisprudence has made troubling inroads since September 11. The *Awadallah* court's citing of the defendant's failure to come forward as the principal basis for his detention is the most recent example.<sup>213</sup> Another example is the failure of the Third Circuit in *Kiareldeen v. Ashcroft* to hold the Justice Department

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Similarly, in the law of remedies, "irreparable harm" that cannot be redressed by a subsequent monetary award justifies the issuance of an injunction, a form of relief considered extraordinary because of its assertion of control over the future conduct of an individual or entity. See *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) ("[I]t has long been held that an injunction is to be used sparingly, and only in a clear and plain case." (internal quotations omitted)); DAN D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 2.1, at 27, § 2.5, at 57 (1973); cf. DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 5-6 (1991) (arguing that irreparable harm is no longer significant factor in awarding of equitable relief); Douglas Lichtman, *Uncertainty and the Standard for Preliminary Relief*, 70 U. CHI. L. REV. 197, 205-10 (2003) (arguing that standard fails to address impact of uncertainty about the future on court's ability to assess irreparable harm).

210. See *Florida v. J.L.*, 529 U.S. 266, 273-74 (2000) (suppressing a search based on an anonymous informant's description of an individual's appearance in routine criminal case but suggesting that information about bomb might present different set of considerations).

211. See *New York v. Quarles*, 467 U.S. 649, 655-57 (1984).

212. See Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 970-71 (2003) (arguing that magnitude of possible harm in *Moussaoui* would have permitted probable cause finding, despite a lesser showing of probability). The nature of the threat posed by admitted al Qaeda operatives such as Moussaoui might also justify detention, although not the virtually unreviewable confinement favored by the Bush Administration. Cf. Slobogin, *supra* note 150, at 46 (arguing that commitment of active members of al Qaeda to "ending innocent lives in disregard of international legal principles and any threat to their own life distinguishes them from the 'detractable' common criminal," and thereby justifies preventive detention cabined by appropriate procedural safeguards); Margulies, *Judging Terror*, *supra* note 15, at 417-25 (same).

213. *Awadallah II*, 349 F.3d 42, 70 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 861 (2005).

accountable for its delay in providing an immigration detainee with specific notice of the charges against him.<sup>214</sup>

One way to cope with the erosion of particularity is to employ a more robust interpretation of *Franks v. Delaware* to omissions from affidavits supporting arrest warrants.<sup>215</sup> The premise of *Franks* is that officials issuing warrants should act on the basis of materially accurate information. Although courts cannot expect law enforcement personnel, particularly in exigent circumstances, to catalog exhaustively all information known to them, it is reasonable to expect that they will include material information, even if it casts some doubt on probable cause.<sup>216</sup> An omission can otherwise prevent the officer determining the sufficiency of the affidavit from doing her job, making law enforcement officials arbiters of probable cause not subject to review. This potential for lack of effective review is a core danger of informational overreaching.

As the district court noted in *Awadallah*, the affidavit supporting the warrant for Awadallah's arrest as a material witness omitted several facts relevant to the issue of both the materiality of his potential testimony and

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214. 273 F.3d 542, 555-56 (3d Cir. 2001). In *Kiareldeen*, after the Justice Department belatedly provided the detainee with specific notice of the charges against him, the detainee was able to demonstrate that immigration authorities had relied on a witness—an unfriendly ex-spouse—who had a demonstrable bias against the immigrant and a track record of unsupported allegations. Furthermore, the latest allegations were also materially inaccurate. See *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 416-17 (D.N.J. 1999) (noting that the immigrant's ex-wife had made repeated allegations of domestic violence against him, but had failed to substantiate any of these accusations), *rev'd on other grounds sub nom.* *Kiareldeen v. Ashcroft*, 273 F.3d 542, 557 (3d Cir. 2001) (denying immigrant's motion for attorney's fees and holding that the government's provision of a specific public summary of the secret evidence to the immigrant, however belated, rendered its position "substantially justified"); see also *Najjar v. Reno*, 97 F. Supp. 2d 1329, 1358-59 (S.D. Fla. 2000) (granting writ of habeas corpus because Immigration and Naturalization Service summarized the secret evidence against the immigrant in general and conclusory fashion, asserting without elaboration that the immigrant was involved with a terrorist organization), *vacated as moot sub nom.* *Najjar v. Ashcroft*, 273 F. 3d 1330 (11th Cir. 2001); *Najjar v. Ashcroft*, 257 F.3d 1262, 1270 (11th Cir. 2001) (declining to rule on secret evidence issue but affirming denial of asylum to petitioner on other grounds); cf. *Haddam*, 2000 WL 1901995 (Board of Immigration Appeals Dec. 1, 2000) (unpublished decision) (considering secret evidence, but granting claimant's request for asylum); *Knauff v. Shaughnessy*, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting) (arguing that secret evidence "is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected"); Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIG. L.J. 51 (1999); David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 68-76 (arguing that due process bars use of secret information in removal proceedings against lawful permanent residents); Margulies, *Uncertain Arrivals*, *supra* note 29, at 503 n.119 (discussing issues of secret evidence).

215. 438 U.S. 154, 164-72 (1978) (discussing requirements for affidavits setting out probable cause for issuance of warrants).

216. See *United States v. Garza*, 980 F.2d 546, 551 (9th Cir. 1992).

the impracticability of securing it by less restrictive means.<sup>217</sup> These facts, viewed in their entirety, suggest Awadallah had no recent contact with the hijackers, knew little about the hijackers' plans, had substantial incentives to stay in the country, and had responded to questioning. Disclosure of this information would have had a number of salutary consequences. It would have given the judicial officer considering the issuance of the warrant sufficient information to weigh all concerns appropriately. Additionally it would have balanced out the stereotypes of immigrants the affidavit exploited by merely noting that Awadallah had family in Jordan. Disclosure of these facts would also have placed in context Awadallah's failure to come forward after September 11, making clear that the evidence suggested no operational connection between Awadallah and the attacks. The Second Circuit should have held that such omissions rose to the level of misrepresentation.

Holding that the law enforcement officials in *Awadallah* violated the *Franks* standard would have affirmed the importance of particularity. Since the trial court had found that the twenty days of Awadallah's confinement created a sense of disorientation that caused his misstatements of fact to the grand jury, the *Franks* analysis outlined above would also have required excluding those statements and dismissing the underlying perjury charge.<sup>218</sup> This result would have deprived the government of the incentive to detain individuals such as Awadallah on amorphous grounds, such as the failure to come forward, in the hope that aggressive interrogation will "press the witness unduly, . . . browbeat him if he be timid or reluctant, . . . push him

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217. See *Awadallah I*, 202 F. Supp. 2d 55, 78 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 861 (2005). Less restrictive means would have included service of a subpoena to appear before the grand jury voluntarily.

Current law also requires proof that the omissions of the official submitting the affidavit were intentional or reckless. *Awadallah II*, 349 F.3d at 66-68 (citing *United States v. Canfield*, 212 F.3d 713, 717-18 (2d Cir. 2000)). The Second Circuit held that the defendant had failed to meet this standard, observing, *inter alia*, that the presence in the affidavit of a form disclaimer indicating that the affidavit did not include some facts known to law enforcement demonstrated the absence of the requisite intent. *Id.* Relying on the presence of a form disclaimer to negate intent exacerbates the problem of lack of sufficient information to review that plagues the Second Circuit's narrow interpretation of *Franks*.

218. The district court reached this conclusion. *Awadallah I*, 202 F. Supp. 2d at 82. The analysis of material omissions should incorporate consideration of the exigency of the situation. Suppose, for example, that the defendant in *Awadallah* had engaged in conduct closer to the conduct of Zacarias Moussaoui, whose enrollment in flight school suggested ongoing operational ties to al Qaeda. If the government had included such facts in its affidavit supporting probable cause, any omission in the affidavit would have been immaterial, unless the fact omitted clearly and conclusively demonstrated the witness's lack of both knowledge and dangerousness (such as the government's possession of a written confirmation from a reputable air carrier attesting to its sponsorship of the witness's aviation training). *Cf. Lerner, supra* note 212, at 970-71 (discussing *Moussaoui* case).

into a corner, and . . . entrap [the witness] into fatal contradictions.”<sup>219</sup> Employing an institutional perspective would thus have arrayed the courts firmly against the second coming of “the third degree”<sup>220</sup> signaled by informational overreaching.

### B. *Re-framing Prejudice*

As courts affirm the importance of particularity, they should also re-frame their approach to prejudice. Prejudice has long been the touchstone of inquiries about the scope of judicial power to dismiss charges or order a new trial.<sup>221</sup> Focusing on prejudice *seems* to confer a sense of proportion on such remedies, precluding the possibility that inadvertent or isolated acts of misconduct by prosecutors will frustrate society’s interest in holding persons accused of crime accountable.<sup>222</sup> However, the narrowness of the courts’ inquiry into prejudice fails to address unfairness suffered by defendants or to deter prosecutorial misconduct. Responding to these problems, courts should adopt a presumption of prejudice in cases reflecting a pattern of prosecutors’ noncompliance with established norms.

To consider the issue of unfairness to defendants the traditional test fails to uncover, consider the example of pretrial publicity. Traditional methods for discovering prejudice, such as questioning jurors, are not

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219. *Miranda*, 384 U.S. at 443 (quoting *Brown v. Walker*, 161 U.S. 591, 596-97 (1896)). The concurring opinion in *Awadallah II* suggested an alternate basis for declining to dismiss the perjury charge: holding that Awadallah’s statements to the grand jury constituted a separate offense unrelated to his detention. *Awadallah II*, 349 F.3d at 79-83 (Straub, J., concurring in the judgment on separate grounds). The concurrence supported this argument by noting that Awadallah had access to a lawyer on several occasions prior to his grand jury appearance. *Id.* at 82. It seems artificial, however, to find that access to a lawyer neutralized the impact of Awadallah’s concededly illegal initial seizure and interview, as well as his subsequent detention as a material witness. The Second Circuit did not question this, leaving undisturbed the district court’s finding that Awadallah’s twenty-day detention materially caused his inaccurate statements before the grand jury. *Id.* at 70-71 n.24.

220. *Miranda*, 384 U.S. at 442-43 (citing *Brown*, 161 U.S. at 596-97) (discussing abuses in custodial interrogation).

221. The harmless error rule, codified at Fed. R. Crim. P. 52(a), which requires that an error materially affect the defendant’s prospects at trial, applies to most errors considered on appeal. See *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-55 (1988) (discussing harmless error rule); *Arizona v. Fulminante*, 499 U.S. 279, 306-312 (1991) (applying harmless error rule to admission of coerced confessions). But see *Vasquez v. Hillery*, 474 U.S. 254, 260-64 (1986) (holding that racial discrimination in grand jury selection is fundamental error that gives rise to presumption of prejudice); but cf. Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1 (2002) (arguing that harmless error doctrine discourages innovation in the law).

222. See, e.g., *Kotteakos v. United States*, 328 U.S. 750, 760 (1946) (justifying harmless error rule by noting concern with granting “fairly convicted” defendants “the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record”).

necessarily reliable. Jurors may well be reluctant to acknowledge that they have read newspapers or encountered media reports. The nature of the questioning, which will tend to be leading (e.g., "Did you see news reports yesterday about . . . ?"), suggests a negative answer. This signaling by the questioner, however subtle and unintentional, creates a significant risk of "false negatives"—persons who respond, "No," to the question, as the questioner seems to desire, but who have in fact seen the problematic media accounts. While judges may seek to refine the sophistication of their inquiries, the problem remains. Similarly, defense counsel may have a real incentive to ferret out prejudice among jurors, but face a troublesome dilemma in deciding how vigorously to pursue this information. If defense lawyers are too probing, they end up promoting the result they fear: enhanced juror knowledge about the problematic disclosures, and enhanced prejudice.<sup>223</sup>

A further asymmetry is that publicity in a given case creates what economists call "negative externalities," i.e., adverse consequences experienced by third parties, often based on invidious grounds.<sup>224</sup> In terrorism cases, for example, extrajudicial remarks have an adverse impact not merely on the defendant, but on other terrorism defendants who share particular attributes, such as ethnicity or religion. Traditional mechanisms such as voir dire, which rely on both the candor and self-awareness of prospective jurors,<sup>225</sup> cannot erase these negative externalities. As a result, comments by prosecutors create a cascade of condemnation,<sup>226</sup> as in the World War I or McCarthy Era situations, that prejudices defendants as a group.<sup>227</sup>

The minimal impact of the narrow inquiry into prejudice also creates a dangerous asymmetry in prosecutors' institutional incentives. In times of crisis, institutional pressures gravitate even more strongly than usual toward prosecutors "pushing the envelope" to gain a litigation advantage. Prosecutors, who are satisfying bureaucratic players seeking to avoid the

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223. Cf. Alschuler, *supra* note 29, at 656-58.

224. See Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 337 (1987).

225. Cf. *id.* at 321-23 (discussing racial prejudice as unconscious, rather than intentional, phenomenon); Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 535-45 (2003) (discussing manifestations of unconscious racism in the workplace).

226. See Kuran & Sunstein, *supra* note 80 (discussing dynamics of cascades that drive public policy toward extremes).

227. See generally MURPHY, *supra* note 25 (discussing persecution of dissidents during World War I); Stone, *supra* note 98 (same); Wiecek, *supra* note 99 (discussing climate of condemnation affecting persons identified as Communists through the 1960s).

greatest embarrassment, will often find themselves pulled away from the requirement to do justice in high-profile cases, where promoting justice will yield little institutional benefit for them, and cutting corners creates only a small risk of some amorphous sanction such as professional discipline in the dim future.<sup>228</sup> In contrast, where the institutional signaling from superiors condones or encourages cutting corners, prosecutors will heavily discount future problems and focus on present rewards.<sup>229</sup> Success at a trial is a present goal, with immediate ramifications in terms of the prosecutor's standing with her superiors and peers, and her level of approval from the public.<sup>230</sup> Informational overreaching that serves this goal, such as extrajudicial statements praising the government's case or failure to disclose possibly exculpatory evidence, may seem imperative. Furthermore, the narrowness of the present inquiry into prejudice encourages prosecutors to "game the system," by signaling that courts will not view most transgressions as serious.

Given this combination of a heightened risk of false negatives and asymmetrical incentives for prosecutors, courts should adopt a conclusive presumption of prejudice regarding a pattern of informational overreaching. The concerns animating this change dovetail with the concerns that drive cases, such as the discriminatory selection of grand jurors, where such a presumption currently applies.<sup>231</sup> In the current cases where a presumption holds, the Court has found a serious risk that the practice in question will compromise the integrity of the justice system or permit the exclusion of a particular group.<sup>232</sup> Taken together, the practices comprising informational

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228. Cf. Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 WM. & MARY L. REV. 2209, 2236-60 (2003) (discussing political and institutional factors that tend to broaden the scope of criminal liability under federal statutes); Richman, *Prosecutors and Their Agents*, *supra* note 18 (discussing institutional incentives of prosecutors and other law enforcement officials); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (discussing convergence of interests between legislators and prosecutors that broadens scope of criminal law).

229. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, in BEHAVIOR LAW AND ECONOMICS 13, 45-46 (Cass R. Sunstein ed., 2000) (discussing individuals' tendency to heavily discount future costs); cf. David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q. J. ECON. 443 (1997) (analyzing how individuals use "commitment mechanisms" such as insurance policies or savings plans to remedy tendency to unduly discount the future); Ted O'Donoghue & Matthew Rabin, *Doing It Now or Later*, 89 AM. ECON. REV. 103 (1999) (analyzing "present-biased preferences").

230. See Alschuler, *supra* note 29, at 668 ("If the courts would begin to exhibit a working commitment to the ideals of prosecutorial dignity and impartiality, the present volume of misconduct . . . could be reduced—simply because prosecutors do care about retrials and lost convictions.").

231. See *Vasquez v. Hillery*, 474 U.S. 254, 260-64 (1986).

232. *Id.*

overreaching raise similar risks, permitting the government to skew the outcome of adjudication and "poison the well" of public opinion against groups the government deems to be unsafe.<sup>233</sup> A presumption of prejudice would address the heightened risk of false negatives and asymmetry in prosecutors' incentives, encouraging prosecutors to disclose more to the defense and the court and say less to the press.

A presumption of prejudice would dictate that when a pattern of informational overreaching by the prosecution has arisen, courts would dismiss charges precipitated by the pattern, or order a new trial in response to abuses that occurred in the initial trial. Court would view examples of informational overreaching in combination. For example, instead of undertaking a compartmentalized analysis of the prejudice caused by failures to disclose and excessive extrajudicial comments, the court would view such incidents *in combination* as reflecting an institutional trend toward overreaching. Such an institutional perspective would place a priority on shaping the *ex ante* incentives of prosecutors to deter future transgressions.<sup>234</sup> Based on such an institutional analysis, a court would view the informational overreaching in *United States v. Koubriti*,<sup>235</sup> including the multiple incidents of inappropriate pretrial publicity on the part of Ashcroft and the withholding of the letter calling into question the veracity of the government's chief witness, as warranting a new trial.<sup>236</sup>

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233. On the costs of such targeting in law enforcement investigations, see Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1423-30 (2002) (discussing dignitary harm caused by racial profiling); Stephen J. Ellmann, *Racial Profiling and Terrorism*, 46 N.Y.L. SCH. L. REV. 675, 724-26 (2002-2003) (same); see also Leonard M. Baynes, *Racial Profiling, September 11th, and the Media: A Critical Race Theory Analysis*, 2 VA. SPORTS & ENT. L.J. 1 (2002) (discussing racially oriented images in media portrayals of post-September 11 figures).

234. Such a presumption would also entail modifying or overruling a series of precedents. See, e.g., *United States v. Williams*, 504 U.S. 36, 52-55 (1992) (judicial supervisory power does not extend to dismissing case because of alleged prosecutorial misconduct before grand jury when alleged misconduct does not constitute violation of constitutional guarantees); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (harmless error rules applies to grand jury proceedings); cf. Kamin, *supra* note 221 (arguing against utility of harmless error rule); Nicki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 45-50 (2004).

235. 305 F. Supp. 2d 723, 742-757 (E.D. Mich. 2003) (determining that Ashcroft violated court's order, but declining to initiate further proceedings to determine whether he was guilty of contempt).

236. The *Koubriti* defendants' filed a motion for new trial and acquittal after the jury convicted them. See Serrano, *supra* note 8. Following the motion, a series of events led to a great deal of publicity:

[T]he Justice Department's decision to replace the Assistant United States Attorneys who prosecuted this case with new counsel; the institution of a civil lawsuit against the Attorney General and other Justice Department officials by one of the former AUSAs, Richard Convertino, challenging his removal from the case; the new prosecutor's



A presumption of prejudice in cases involving a pattern of informational overreaching would have a useful *ex ante* effect, encouraging the prosecutor to deliberate more extensively. Such a shift to an *ex ante* institutional perspective would entail costs. If prosecutors failed to internalize the *ex ante* guidance they received, defendants whose factual guilt was not open to question might go free. The benefit of such an institutional approach, however, is that sending a clear message minimizes the chances that society will incur those costs.

The Supreme Court invoked this calculus in *Miranda* when it abandoned the atomistic inquiry about the voluntariness of confession in favor of a clear prophylactic standard.<sup>237</sup> The Court acknowledged that there might be cases where a confession obtained in violation of *Miranda* was voluntary, given the totality of the circumstances.<sup>238</sup> However, the Court viewed excluding a confession in such a case as salutary, in light of the Court's overriding objective of outlawing use of the "third degree" in custodial interrogations.<sup>239</sup> The Court recognized that an *ex ante* institutional remedy would offer much-needed clarity to both defendants and law enforcement. Indeed, as the Court recognized in re-affirming *Miranda* recently, the clarity of an *ex ante* perspective aids law enforcement in the discharge of its obligations by promoting certainty and predictability.<sup>240</sup> A presumption of prejudice in cases involving a pattern of informational overreaching would accomplish the same goal.

Courts responding to governmental excesses must also decline the

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discovery of potential *Brady/Giglio* materials in the case file that had not been turned over to Defendants or the Court either prior to or during the course of trial; the Court's conducting of an evidentiary hearing regarding the failure of the Government to disclose this *Brady/Giglio* material during pretrial discovery or during the course of the seven-week trial; the Court's consequent order directing the Government to conduct a full-scale review of the entire case in order to discern whether any other potential *Brady/Giglio* materials were not turned over to the defense or the Court; and the Attorney General's appointment of a Special Attorney to lead this review.

United States v. Koubriti, 307 F. Supp. 2d 891, 893 (E.D. Mich. 2004) ("*Koubriti III*"). In response, the court ordered that while the motion for new trial and acquittal were pending, no person with knowledge of the case could disclose confidential information not in the public record. *Id.* at 902.

Eventually, the government "confess[ed] error" and filed a separate motion to dismiss because of its *Brady/Giglio* violations. *Koubriti IV*, 336 F. Supp. 2d 676, 678 (E.D. Mich. 2004). The district court granted the motion to dismiss the terrorism related charges in Count I. It also granted the defendants' motion for a new trial, which the government acquiesced to, as to the document fraud charges in Count II. *Id.* at 678, 682; *see also id.* at 679 (describing government's actions in seeking to dismiss one count and acquiescing in a new trial for another as "legally and ethically correct" and "in the highest and best tradition of Department of Justice attorneys").

237. *See Miranda v. Arizona*, 384 U.S. 436, 447-48 (1966).

238. *Id.* at 457.

239. *Id.* at 447.

240. *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

temptation to discount prejudice where it is clearly present. Critics have persistently charged that the harmless error rule encourages such discounting.<sup>241</sup> Law and terrorism cases compound the problem.

The judicial discounting of manifest prejudice is clearly on view in *United States v. Moussaoui*. The Fourth Circuit overruled the considered judgment of the district court that the government's failure to produce a detainee with exculpatory information for a video deposition would prejudice the defendant.<sup>242</sup> Purporting to apply by analogy the balancing test required by CIPA, the appellate court's decision trivializes the importance to the defendant of using the deposition to develop other exculpatory evidence. Harm is caused by forcing the defendant at trial to use summaries prepared by the government, instead of more dramatic deposition testimony. While minimizing the defendant's concerns, the Fourth Circuit inflates the government's interest in barring pre-trial, non-public access to the detainee—an interest outside CIPA's scope. A legal standard permitting the dismissal of charges even without a demonstration of prejudice to the defendant could encourage courts to act more strongly when government obstruction threatened to compromise fairness at trial.

In sum, reframing prejudice would offer a welcome antidote to government overreaching. It would enhance *ex ante* incentives for prosecutors to comply with legal standards. It would also act as a welcome corrective to the judicial tendency to discount prejudice through application of the harmless error rule. Finally, focusing judicial scrutiny on the subtler forms of disadvantage suffered by terrorism defendants would heighten sensitivity to the cases such as *Moussaoui* in which palpable prejudice goes unremedied.

### C. *Requiring Organizational Integrity Instead of Subjective Good Faith*

As a third and final step, an institutional approach would replace the bad faith standard for violations of court orders by prosecutors with a standard that focuses on structural safeguards. Courts considering sanctions for violations of court orders have often insisted on a "smoking gun" that demonstrates malicious intent.<sup>243</sup> However, this subjective test asks the

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241. See Alschuler, *supra* note 29; Kamin, *supra* note 221.

242. 365 F.3d 292, 314, *amended on reh'g by* 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 73 U.S.L.W. 3556 (U.S. Mar. 21, 2005) (No. 04-8385).

243. See *In re Smothers*, 322 F.3d 438, 441-42 (6th Cir. 2003) (vacating finding of contempt after noting that basis for finding—legal aid attorney's lateness for hearing—could have been accidental, inadvertent, or negligent); *United States v. Cutler*, 58 F.3d 825, 828 (2d Cir. 1995) (citing defense attorney for contempt after repeated violations of court order limiting extrajudicial comments).

wrong questions of large institutions such as the Justice Department, where officials can invoke the scale of the organization to minimize their own role.<sup>244</sup> Focusing on the adequacy of structural controls against informational overreaching would re-frame the analysis to promote greater accountability.

In other settings where organizations dominate, courts have promoted accountability through institutional measures. For example, the Supreme Court has indicated that corporations can defend themselves against claims that they knowingly tolerated sexual harassment of their employees by establishing procedures for dealing with sexual harassment complaints.<sup>245</sup> In the class action context, where plaintiffs' attorneys may have conflicts of interests because of the divergent situations of class members, courts have required the establishment of sub-classes to more effectively represent those disparate interests.<sup>246</sup> In the area of funding of terrorist groups, federal statutes, regulations, and guidelines encourage charities to perform due diligence inquiries before contributing.<sup>247</sup> Each of these structural measures

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244. Cf. Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1 (1991) (advocating entity-based approach to disciplinary issues involving participants in law firms); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 775 (2001) (suggesting appropriateness of Schneyer's approach for addressing patterns of misconduct within prosecutor's offices); see also Green & Zacharias, *Regulating Federal Prosecutors' Ethics*, *supra* note 18 (discussing federal courts as sources of professional discipline for prosecutors). But see Alschuler, *supra* note 29, at 670-73 (viewing professional discipline imposed by traditional authorities, such as state bar association grievance committees, as ineffective tool for regulation of prosecutors); Julie Rose O'Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal*, 16 GEO. J. LEGAL ETHICS 14 (2002) (expressing doubts about fairness and efficacy of Schneyer's model). See generally Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345 (2003) (discussing history, utility, and fairness of collective sanctions in legal culture).

245. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-08 (1998) (discussing importance of a corporate sexual harassment policy as a defense to sexual harassment claims).

246. *Amchem Products, Inc. v. Windsor* 521 U.S. 591, 625-28 (1997); cf. Margulies, *Public Interest Law*, *supra* note 53, at 526-30.

247. See U.S. DEP'T OF THE TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES 6-7, available at <http://www.treasury.gov/press/releases/docs/tocc.pdf> (last visited Apr. 29, 2005) (created for purpose of promoting compliance with Antiterrorism and Effective Death Penalty Act ("AEDPA"), 18 U.S.C. 2339A(b) (2000), describing prophylactic steps recommended for domestic charities regarding foreign recipients of aid, including searching the internet and other public sources of information, requiring detailed reports from recipients, requiring list of organizations which recipient assists or with which recipient does business, and when possible conducting audits of major recipients); cf. Margulies, *Uncertain Arrivals*, *supra* note 29 (arguing that careful regulation of terrorist financing can promote organizational accountability, while cautioning against potential for government overreaching); Margulies, *The Virtues and Vices of Solidarity*, *supra* note 17 (same); Cole, *Enemy Aliens*, *supra* note 35, at 1000-1001 (expressing doubt about constitutionality of statute barring "material support" of terrorist organizations); see also *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1027-28 (7th Cir. 2002) (upholding

creates incentives for greater organizational vigilance and penalties for abdication of responsibility.

In addressing issues of prosecutorial misconduct, federal courts already have inherent and supervisory power to deter informational overreaching, even in the absence of willfulness or bad faith.<sup>248</sup> The touchstone for exercise of the court's inherent power is necessity.<sup>249</sup> On the occasions when a lack of adequate alternative remedies make the exercise of inherent authority similar to the enforcement of the court's orders and to the maintenance of the integrity of judicial proceedings, necessity can authorize exercise of this authority without a "smoking gun" that indicates the presence of bad faith.<sup>250</sup>

In the *Koubriti* case, the court could have found that Ashcroft's failure to implement workable procedures for preventing unwarranted public

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constitutionality of prohibition on material support); *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137-38 (9th Cir. 2000) (upholding statute, while holding that certain terms were vague as applied), *cert. denied sub nom.* *Humanitarian Law Project v. Ashcroft*, 532 U.S. 904 (2001); *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185, 1200-1201 (C.D. Cal. 2004) (holding vague as applied bar on "expert advice or assistance" to designated terrorist organizations in USA PATRIOT Act); Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilty By Association Critique* 101 MICH. L. REV. 1408, 1433-51 (2003) (reviewing DAVID COLE & JAMES X. DEMPSEY, *TERRORISM & THE CONSTITUTION* (2d ed. 2002) and DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003) [hereinafter COLE, *DOUBLE STANDARDS*]) (arguing that certain statutory terms, such as "personnel," cut too close to criminalizing mere membership in organization and are therefore void for vagueness). Scholars have made similar arguments about the effect of liability rules on corporate responsibility. See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001) (arguing that multinational corporations should be held accountable for human rights violations resulting from enterprises over which they have control).

248. See, e.g., *United States v. Hammad*, 858 F.2d 834, 839-840 (2d Cir. 1988) (holding prospectively that court could exercise supervisory power to suppress evidence yielded by sham grand jury subpoena to represented target of investigation); *United States v. Ming He*, 94 F.3d 782, 789-90 (2d Cir. 1996) (holding based on court's supervisory authority that absent express waiver, prosecutor could not "debrief" cooperating witness without counsel being present); cf. Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984) (arguing for clarification of judicial authority and linkage of supervisory power to violation of specific constitutional and statutory provisions); Etienne, *supra* note 23, at 2147-51 (discussing contours of supervisory and inherent power of courts); Green & Zacharias, *Regulating Federal Prosecutors' Ethics*, *supra* note 18, at 407-08. (same). But see Gleeson, *supra* note 34 (criticizing *Hammad* and *Ming He* as excessive and largely ineffective exercises of judicial power).

249. See *Eash v. Riggins Trucking*, 757 F.2d 557, 563 (3d Cir. 1985) (noting that courts can interpret "necessity" broadly to include power that is "highly useful in the pursuit of a just result"); cf. Green & Zacharias, *Regulating Federal Prosecutors' Ethics*, *supra* note 18, at 403-05 (discussing judicial remedies for prosecutorial misconduct under court's inherent authority).

250. See *Republic of the Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 74 n.11 (3d Cir. 1995) (asserting that express finding of bad faith was not a prerequisite for imposition of sanctions under court's inherent power).

remarks required some form of structural relief. At the very least, Ashcroft failed to exercise appropriate supervisory responsibility over Justice Department personnel, even after committing himself through his delegates, to exercise such supervision.<sup>251</sup> Even without a finding of bad faith, the court could have held that the failure to implement sound procedures constituted sufficient evidence that Ashcroft did not view the court's order with sufficient seriousness,<sup>252</sup> and did not place a high priority on compliance.<sup>253</sup>

Potential structural safeguards for the Justice Department could include measures that would deter future informational overreaching.<sup>254</sup> The court could invoke its supervisory and inherent power to require the Attorney General to produce a report detailing the procedural history of the apparent violations, and suggesting methods in which officials could better implement Justice Department guidelines and ethical mandates in the future.<sup>255</sup> Alternatively, the court could appoint a Special Master to make recommendations to the court on this score.<sup>256</sup> Prophylactic procedures could include a requirement that the line prosecutor in a terrorism matter consult in writing with a supervisor and with a representative of the Attorney General regarding disclosure of any material that could affect the credibility of a government witness. Regarding gratuitous pretrial publicity, the court could order that the Attorney General and subordinate Justice

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251. *Koubriti II*, 305 F. Supp. 2d 723, 733-40 (E.D. Mich. 2003).

252. This finding would have effectively distinguished *Koubriti II* from an earlier case where a federal appeals court had vacated a contempt finding against the then Attorney General. See *In re Attorney General*, 596 F.2d 58, 67 (2d Cir. 1979) (vacating district court's contempt finding on grounds that Attorney General had asserted colorable legal claim of privilege regarding court's earlier order, and that court had failed to consider less intrusive means of ensuring adequate discovery for plaintiffs).

253. This inference is even more compelling based on Ashcroft's very prominent efforts in other contexts to exert heightened control over decision-making within federal prosecutors' offices. See *supra* notes 88-97 and accompanying text (discussing Ashcroft's efforts to discourage plea bargaining, increase requests for the death penalty, and report judges who had made downward departures from the Sentencing Guidelines).

254. For other proposals with a structural slant on prosecutorial conduct and discretion, see John Q. Barrett, *The Leak and the Craft: A Hard Line Proposal to Stop Unaccountable Disclosures of Law Enforcement Information*, 68 FORDHAM L. REV. 613, 633-36 (1999); cf. Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893 (2000) (suggesting guidelines to inform exercise of discretion in cases involving federal prosecution of parents using interstate travel to evade child support obligations).

255. See *In re Material Witness Warrant*, 214 F. Supp. 2d 356, 363 (S.D.N.Y. 2002).

256. See *Ex parte Peterson*, 253 U.S. 300, 312 (1920), cited in *Eash v. Riggins Trucking*, 757 F.2d 557, 563 (3d Cir. 1985) (noting that the court has inherent power to appoint an individual who can assist the court "in the performance of specific judicial duties").

Department personnel pre-clear or file public statements with the court,<sup>257</sup> or with relevant departmental offices, such as the Professional Responsibility Advisory Office, or the Office of the Inspector General.<sup>258</sup>

The court could also take a less deferential stance toward the executive branch when construing willfulness and bad faith. When a senior official with tremendous resources at his disposal, such as the Attorney General, has clear notice of a court order and nonetheless violates that order on two occasions, a finding of willfulness seems appropriate. Ashcroft's mere avowals in *Koubriti* that his remarks were "inadvertent" should not be sufficient to defeat this inference.<sup>259</sup> Nor did Ashcroft demonstrate the kind of clear insight into the problems of prosecutorial publicity that the court had a right to expect when he phrased his discussion of his remarks in conditional terms, describing how his "statements, however brief and passing, . . . *could have been considered* . . . to be a breach . . . of the Court's Order."<sup>260</sup> A court's refusal even to engage in further fact-finding in this situation seems to place the Attorney General above the reach of the contempt power, able to compromise the integrity of the judicial process with impunity. Courts owe it to constitutional values to dismantle such a would-be monolith.<sup>261</sup>

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257. See Brown, *supra* note 48.

258. Some structural remedies for informational overreaching might require a modification of the temporal and spatial limitations on judicial supervision of law enforcement. Usually, for example, a court's authority to order ongoing affirmative relief on the part of the prosecution terminates at the conclusion of the trial. In addition, in criminal cases a judge is usually limited to ordering relief in proceedings before him or her. In extraordinary cases, however, judges imposing affirmative relief on the prosecution have ordered that relief after trial, in order to prevent future misconduct. See *In re Material Witness Warrant*, 214 F. Supp. 2d at 363 (in order to "make known the truth and deter future misconduct," court, after government moved to dismiss charges against terrorism suspect, ordered federal prosecutor to submit report on improper questioning of defendant); cf. *Willy v. Coastal Corp.*, 503 U.S. 131, 138-39 (1992) (subsequent finding of lack of subject matter jurisdiction does not deprive court of power to impose sanctions under rule 11 of the Federal Rules of Civil Procedure); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 409-09 (1990) (court can impose rule 11 sanctions even after a party's voluntary dismissal of an action); see also *United States v. Mechanik*, 475 U.S. 66, 69 (1986) (noting that the district court, in a case in which government had violated rule 6(d) of the Federal Rules of Criminal Procedure by presenting the simultaneous testimony of two government agents, "undertook to ensure future compliance with the one-witness rule by directing the Government to keep the court advised concerning compliance with Rule 6(d) in future criminal cases"). In addition, the special risk of a generalized climate of condemnation in terrorism cases, spurred by nationwide publicity, the common religious or ethnic background of the defendants, and the public's perception of an overarching national security threat may justify relief with a broader geographic scope.

259. *Koubriti II*, 305 F. Supp. 2d 723, 737 (E.D. Mich. 2003).

260. *Id.* (emphasis added).

261. An institutional approach by courts would complement in-house sources of accountability already in place within the Justice Department that have addressed law enforcement excesses after September 11. For example, the Office of the Inspector General filed a report that severely

For this reason, the court in *Koubriti* should have considered at least requiring Ashcroft to personally appear in federal district court in Detroit to show cause why the court should not hold him in contempt. The judge could have engaged in further fact-finding on such an occasion, asking Ashcroft if he was familiar with the Rules of Professional Conduct, federal regulations, and Department of Justice guidelines. Such questioning would have provided a better opportunity for the court to gauge the level of willfulness exhibited by Ashcroft. Instead, the judge was restricted to an optimistic reading of the lawyerly phrases in Ashcroft's guarded letter of apology. Indeed, to the extent that a lawyer or lawyers on Ashcroft's staff drafted the letter, the court's acceptance of the apology made in the letter exacerbated the troubling tendency of Ashcroft to assert virtually plenary control over the Justice Department when that served his agenda, but to shift responsibility to subordinates when confronted.<sup>262</sup> An institutional approach by courts would stop this bureaucratic two-step, sending a clear message that responsibility starts at the top.

A similar approach to institutional integrity might have more

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criticized the government's detention of over a thousand aliens in the months after the attacks. U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, *THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS* (April 2003), available at <http://www.usdoj.gov/oig/special/0306/full.pdf>. This report received extensive coverage in the press and helped spur congressional hearings into the detentions. *Lessons Learned—The Inspector General's Report on the 9/11 Detainees: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. (2004); cf. William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J. L. & PUB. POL'Y 665, 677-78 (2002) (discussing role of media coverage in promoting government accountability). Part of the problem with the detentions was the slowness of the Justice Department, particularly the INS, which insisted on receiving clearances from the FBI indicating that a given detainee had no links with terrorism. U.S. DEP'T OF JUSTICE, *supra*, at 37. The Justice Department has undertaken reform of its procedures to clear immigrant detainees in a more timely fashion and release them when appropriate. See Eric Lichtblau, *US Will Tighten Rules on Holding Terror Suspects*, N.Y. TIMES, June 13, 2003, at A1.

Another source of accountability has been the efforts of civil liberties and human rights lawyers who have pressured the Justice Department and other government agencies to reform their practices in the war on terror. See COLE, *DOUBLE STANDARDS*, *supra* note 247, at 159-79 (discussing author's efforts to litigate against government overreaching, inter alia, in the use of "secret evidence" against immigration detainees); Podgor & Hall, *supra* note 17, 154-60 (noting efforts of National Association of Criminal Defense Lawyers to ease restrictions on defense lawyers in terrorism cases); Catherine Powell, *The Role of Transnational Norm Entrepreneurs in the U.S. "War on Terrorism"*, 5 THEORETICAL INQ. L. 47 (2004) (discussing role of international human rights organizations), at <http://www.bepress.com/til/default/vol5/iss1/art2/>.

262. Ashcroft has even sought to deflect blame to lower-ranking officials from previous Administrations. See Eric Lichtblau, *White House Criticizes Justice Dept. Over Papers*, N.Y. TIMES, April 30, 2004, at A24 (reporting on reaction to Ashcroft's release, in testimony before September 11 Commission, of classified memos by Jamie Gorelick, Commission member and Deputy Attorney General in Clinton Administration).

effectively dealt with the government's blanket justification in *Moussaoui* that any access to a detainee would disrupt interrogation. A court could view a party's assumption of an inflexible legal position as reflecting a failure to accept the accountability at the heart of the separation of powers. The fact that the government openly asserts its position does nothing to reduce its intransigency. Indeed, the government's blanket refusal to share information in terrorism prosecutions reveals the accelerating influence of habits of highhandedness and secrecy that threaten constitutional values.

The same analysis should prevail regarding the *Moussaoui* prosecutors' effort to assert that they have no control over the actions of the government.<sup>263</sup> The party listed for that case, in addition to the defendant, is the "United States of America." If prosecutors wish to represent that party, with all the credibility and legitimacy that such representation yields,<sup>264</sup> they should also accept responsibility for decisions made elsewhere in the executive branch that affect their case. A defendant cannot escape the impact of the government's decisions regarding access to exculpatory information. Prosecutors should, similarly, be held to account.

## V. RESPONDING TO CRITIQUES

### A. *Separation of Powers*

Critics of the institutional approach may argue that increased judicial activism with respect to prosecutorial and other governmental practices will violate the separation of powers. The government needs flexibility to respond to transnational terrorist networks, which have demonstrated a capacity to inflict catastrophic losses on U.S. civilians. Additional scrutiny or the possibility of contempt citations may chill government efforts in an area where the most risky course can be doing nothing.<sup>265</sup> In addition, undue judicial intrusion into the functioning of the executive branch will involve the courts in matters in which they have little expertise and distort the mechanisms for accountability to the electorate and oversight by the legislature.

Courts must display a prudent appreciation of the limits of their expertise and authority when taking actions that affect other branches. The Supreme Court's decision in *United States v. Williams* stands for the

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263. See *supra* note 7.

264. See *United States v. Modica*, 663 F.2d 1173, 1178 (2d Cir. 1981).

265. See Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605 (2003).



proposition that courts cannot micro-manage processes like grand jury investigations that should have a substantial degree of independence in a constitutional system.<sup>266</sup> On the other hand, courts have always behaved as though they had authority to maintain the integrity of the legal system, particularly when the conduct of lawyers before a tribunal threatened to undermine that crucial value.<sup>267</sup>

Informational overreaching by the executive branch threatens the integrity of the legal process. The threat is most apparent in the “enemy combatant” cases such as *Padilla v. Bush* and *Hamdi v. Rumsfeld*, in which the executive has endeavored to set up an entire regime of confinement without either legislative authorization or judicial review.<sup>268</sup> The danger posed by informational overreaching is more subtle, but no less real: the prospect of terrorism prosecutions becoming a kind of independent fiefdom within the criminal justice system, in which the executive largely makes its own rules. The most pressing separation of powers concern should be the fear that the executive branch’s overreaching will render the courts irrelevant.

Admittedly, the most controversial aspect of the recommendations contained here—the ability to dismiss charges based on a pattern of misconduct even absent proof of prejudice to the defendant—challenges the cautionary note on excessive judicial authority struck in *Williams*.<sup>269</sup> However, under the institutional approach, courts would only impose this kind of extreme sanction on a graduated basis and only once the government had shown by its repeated misconduct that other methods were ineffective. Ultimately, the justification for the institutional approach to remedies is the importance of sending a clear message to the government that overreaching threatens the integrity of the entire system. A commitment by the government to meet this challenge need not conflict

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266. 504 U.S. 36, 48-50 (1992); cf. Beale, *supra* note 248 (urging limits on federal courts’ supervisory authority); Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303, 1314-36 (2003) [hereinafter Zacharias & Green, *Federal Court Authority*] (discussing possible readings of *Williams*). But see Kuçkes, *supra* note 236 (arguing that the notion of grand jury independence is a fiction masking prosecutorial authority).

267. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) (relying on inherent authority to sanction an attorney who had engaged in litigation misconduct such as the filing of frivolous pleadings and delay); cf. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-67 (1980) (discussing inherent authority to sanction lawyers); Zacharias & Green, *Federal Court Authority*, *supra* note 266, at 1337-51 (discussing case law on federal courts’ inherent authority).

268. *Padilla v. Bush*, 233 F. Supp. 2d. 564, 588-95 (S.D.N.Y. 2002); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2626 (2004).

269. 504 U.S. at 49-50 (discussing the limitations on a court’s supervisory power of grand juries).

with vigilance regarding the dangers presented by terrorist networks.

To demonstrate that there is not necessarily a conflict between an enhanced judicial role and legitimate prerogatives of the executive, consider the argument made by the district court in *Koubriti* that further contempt proceedings might chill an Attorney General's performance of his constitutionally mandated duty to inform the public.<sup>270</sup> This argument fails to acknowledge that the Attorney General has ample alternatives to making specific public comments on cases pending or in trial. The Attorney General can offer a more general description, explaining his circumspection with reference to the court's order. He can also refer interested members of the public to other available sources of information.<sup>271</sup> While the Attorney General may wish to impart his own "spin" on the proceedings, the best prosecutors know that the most appropriate place to present both evidence and argument is the courtroom.<sup>272</sup> This allocation of roles leaves the Attorney General free to address overarching policy issues. Courts can play an appropriate role in encouraging such productive delegation.

### B. *Unintended Consequences of the Institutional Approach*

A second objection to an enhanced judicial role is that such activism will prompt unintended consequences.<sup>273</sup> These consequences could be harmful to future defendants. Unintended consequences could also injure efficiency or accuracy in the legal system as a whole. While this critique

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270. See *Koubriti II*, 305 F. Supp. 2d 723, 748-50 (E.D. Mich. 2003).

271. The Justice Department can refer publicly to documents already filed in the case. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1052-53 (1991) (plurality opinion). Such documents and other material are available on websites such as [www.findlaw.com](http://www.findlaw.com), subscription databases such as Lexis, and a range of newspapers, magazines, and cable and broadcast outlets.

In law and terrorism cases, the public record may contain gaps caused by redactions made for national security purposes. See *United States v. Moussaoui*, 365 F.3d 292, 297, *amended on reh'g* by 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 73 U.S.L.W. 3556 (U.S. Mar. 21, 2005) (No. 04-8385). Since the government typically has requested such redactions, it cannot argue that these gaps necessitate further public explanatory comments by senior government officials. Indeed, arguing for untrammelled public expression by government officials seems like an odd posture for an Administration whose signature is secrecy. See COLE, *DOUBLE STANDARDS*, *supra* note 247, at 26-30 (discussing government's post-September 11 closure of immigration hearings for "special interest" detainees, most of whom turned out to have no relationship to terrorism); Margulies, *Uncertain Arrivals*, *supra* note 29 (same).

272. See *Brown*, *supra* note 48, at 112-17; *cf.* *United States v. Modica*, 663 F.2d 1173, 1184 (2d Cir. 1981) (discussing training of federal prosecutors).

273. Professor Stuntz has offered the most cogent analysis of the unintended consequences of innovation in the law of criminal procedure. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) [hereinafter Stuntz, *The Uneasy Relationship*]; *cf.* William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002) (discussing possible effect of September 11 attacks on criminal procedure generally).

suggests that courts should tailor the contours of the institutional approach to minimize unintended consequences, it does not invalidate the case for such an approach in the appropriate context.

Consider, for example, the argument that the institutional approach will lengthen trials, as defense counsel make seriatim motions for dismissal based on perceived patterns of prosecutorial misconduct.<sup>274</sup> While this is a legitimate concern, it is also possible that the setting of a prophylactic rule will encourage the cultivation of the best practices by prosecutors to head off such dilatory tactics. In the best prosecutors' offices, the default rules already discourage public comments on pending cases and encourage disclosure.<sup>275</sup> Under an institutional approach, judges who observe these best practices in action will see little need to intervene.<sup>276</sup>

An institutional approach might also spur congressional changes in substantive criminal law, which will operate to the net disadvantage of defendants. In other areas of the criminal law, skeptical analysis of the "criminal procedure revolution" embodied by *Miranda* suggests that legislatures have broadened the substantive definitions of crimes to make charges easier to prove.<sup>277</sup> These substantive changes do an "end-run" around the criminal procedure doctrines that limit law enforcement's evidence-gathering practices.

This argument has limited application to the overreaching at issue here. The argument is most compelling in the Fourth and Fifth Amendment contexts, in which criminal procedure constrains methods of investigation.<sup>278</sup> However, only the first kind of informational overreaching studied in this Article—insufficiency in applications for warrants—deals with investigative techniques.<sup>279</sup> Moreover, many terrorism prosecutions are already brought under broad provisions, such as provisions barring

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274. Professor Stuntz makes this argument in the context of non-terrorism prosecutions. See Stuntz, *The Uneasy Relationship*, *supra* note 273, at 13-16.

275. Cf. Richman, *Prosecutors and Their Agents*, *supra* note 18, at 816-18.

276. One could also argue that if in a case such as *Moussaoui* the courts force more access than the executive desires, in the next case the government will have an incentive not to disclose any exculpatory information. Courts can reduce the risks of such a response by carefully tailoring access, as the trial court did in *Moussaoui*, to address legitimate security concerns. See *Moussaoui III*, 282 F. Supp. 2d 480, 482-87 (E.D. Va. 2003) (allowing video deposition, while denying defendant's motion to require live testimony at trial of alleged al Qaeda higher-ups detained by the government), *aff'd in part, vacated in part*, 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 73 U.S.L.W. 3556 (U.S. Mar. 21, 2005) (No. 04-8385). Beyond this, courts should not make law based on the fear that rejecting the government's legal arguments will cause the government to violate clear constitutional obligations.

277. See Stuntz, *The Uneasy Relationship*, *supra* note 273, at 56-59.

278. See *id.* at 17, 56-59.

279. See *infra* Part IV.A.

"material support" of designated terrorist organizations or conspiracy to commit terrorism or sedition.<sup>280</sup> Congress would encounter substantial constitutional barriers to further broadening of these statutes.<sup>281</sup> When courts act to counter manifest prejudice, as the more robust approach of this Article recommends in the *Moussaoui* case, any reaction by Congress that limited defendants' access to exculpatory evidence beyond the limits currently imposed by CIPA would also confront significant Sixth Amendment obstacles.<sup>282</sup> These barriers may encourage both Congress and the executive to respond in a constructive way to an institutional approach by enhancing effective internal organizational controls that reduce informational overreaching.<sup>283</sup>

## VI. CONCLUSION

Even in ordinary times, prosecutors and law enforcement personnel benefit from the opportunity to manage the disclosure, distribution, and interpretation of information. At the very beginning of an investigation, prosecutors can select the facts that support issuance of an arrest or search

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280. See AEDPA, 18 U.S.C. § 2339A(b) (2000) (defining material support), *as amended by* Intelligence Reform and Terrorism Protection Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, 3762.

281. See *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137 (9th Cir. 2000) (finding that certain terms of statute were vague as applied), *cert. denied sub nom.* *Humanitarian Law Project v. Ashcroft*, 532 U.S. 904 (2001); *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185, 1200-1201 (C.D. Cal. 2004) (holding vague as applied bar on "expert advice or assistance" to designated terrorist organizations in the USA PATRIOT Act).

282. See *Roviaro v. United States*, 353 U.S. 53, 64-65 (1957) (requiring government to disclose identity of informant). Congress can exert control over the content of the Federal Rules of Criminal Procedure, ensuring the survival of the harmless error rule. Congress could also limit, but most likely not eliminate, the courts' contempt power. See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987) ("The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches."); cf. *Zacharias & Green*, *supra* note 266, at 1311-13 (discussing non-delegated sources of judicial authority). Avoiding these counter-moves from Congress hinges on the courts' ability to use equitable authority wisely, focusing on egregious cases of overreaching.

283. Probing the assumptions of a legal regime, and suggesting alternatives, can be useful even when alternatives will not be immediately adopted. Professor Stuntz built on his analysis of unintended consequences of the criminal procedure revolution by urging substantially more funding for defense counsel and a greater willingness by courts to review the proportionality of sentences mandated by legislatures for particular crimes. See Stuntz, *The Uneasy Relationship*, *supra* note 273, at 65-68. There are compelling arguments for both of these reforms, even if their prospects for immediate adoption are uncertain. See *Lockyer v. Andrade*, 538 U.S. 63, 72-77 (2003) (rejecting proportionality challenge to California "three strikes" law). Over time, questioning assumptions and providing alternatives can provoke change at the margins, or even change paradigms.

warrant. Later, when prosecutors draft an indictment, they can fashion a narrative that moves their agenda, and casts the defendant in a narrative of their choosing. Faced with the obligation to disclose to the defense information that may contradict or undermine that chosen narrative, prosecutors *know* what evidence they have, while the defense and the court are to a large extent dependent on the prosecutor's good will, professionalism, and commitment to doing justice.

In ordinary times, courts rely on a relational paradigm to reduce the likelihood that prosecutors will abuse their power over information. Courts invoke a shared stake with prosecutors in the integrity of judicial proceedings. Prosecutors who flout this mutual dependence, for example through inappropriate and excessive extrajudicial comments about a pending case, receive informal sanctions such as mention in published opinions, signaling the prosecutors' imperiled status in the relationship. For prosecutors, who are often young lawyers building reputations, such informal sanctions act as a valuable source of discipline and accountability. In this sense, the relational paradigm supplements the relatively mild case law on excesses relating to information, which often hinges on a finding of actual prejudice to the defendant or bad faith on the part of the prosecutor.

In high profile and national security cases, prosecutors face extraordinary pressures to control the flow of information to courts, defendants, and the public. Senior officials embrace a political agenda that has little room for the nuances implicit in the prosecutor's duty to do justice. The response of the prosecutors to this new set of institutional imperatives results is the erosion of: 1) the requirement that the government show a particularized need for coercion or restraint; 2) the obligation to share exculpatory evidence with the defense, including access to witnesses as in *Moussaoui*; and 3) the obligation to refrain from gratuitous public comments about defendants pending or during trial. This Article refers to this erosion of three core safeguards as informational overreaching.

The relational paradigm provides scant protection from informational overreaching. Senior officials do not view judges as a key constituency, particularly in times of crisis. The judgment and discretion of prosecutors, which is traditionally tempered in ordinary times by interaction with judges, is more responsive to pervasive signaling from superiors to keep information guarded and seize every opportunity to shape the public debate. In times of crisis, therefore, the relational paradigm resembles what its critics have always viewed as a posture of "helpless piety," rather than effective regulation.

To respond to the failure of the relational paradigm in times of crisis, courts should adopt an institutional approach to curbing informational

overreaching. Under the institutional paradigm, courts become a counterweight to the excess of prosecutors. Abandoning the cozy sanctions of the relational approach, the institutional paradigm seeks wholesale reform of prosecutorial practices, much as courts have reformed state institutions, such as prisons, psychiatric hospitals, and school systems. The institutional approach also draws authority and inspiration from the *ex ante* approach to deterring law enforcement misconduct that the Supreme Court modeled in *Miranda v. Arizona*.

An institutional approach has three core components. First, to affirm particularity, courts should require greater comprehensiveness in affidavits supporting the issuance of warrants. Building on *Franks v. Delaware*, the courts should require specificity, rejecting amorphous government justifications based on an individual's failure to come forward or immigration status. Second, courts should adopt a presumption of prejudice in cases involving a pattern of governmental misconduct. A presumption reduces both the risk of residual prejudice, which is not reached by existing mechanisms such as questioning of jurors, and the asymmetries in prosecutors' incentives that encourage overreaching in times of crisis. A presumption of prejudice would also encourage courts to react robustly to the policies of the executive that create manifest prejudice, as in the withholding of access to witnesses in the *Moussaoui* case. Finally, the institutional approach stresses organizational integrity over mere subjective good faith, in order to encourage the development of systems of accountability within law enforcement.

The institutional approach must contend with two significant critiques. The first critique, centered on separation of powers concerns, argues that an activist approach by courts will intrude excessively on prerogatives of the executive branch. Responding to this concern, courts should tailor their approach to impose the minimum authority needed to ensure disclosure and fairness on the part of the government. Certain governmental practices, such as profligate discussion of the details of pending cases, may be chilled as a result. However, greater discipline on the part of the executive in such areas may be a constructive addition to legitimate anti-terrorism efforts.

The second critique argues that the institutional approach may have unintended consequences, including legislative attempts to broaden anti-terrorism legislation to circumvent new strictures in the law of criminal procedure. Here, again, a carefully tailored approach by courts will minimize adverse reactions. Moreover, the Constitution itself supplies substantial protection against further broadening of anti-terrorist legislation, which is already at the outer boundary of permissibility under the First Amendment. Executive attempts to bar access to information are on an

even more precarious legal footing because of the Sixth Amendment's fair trial guarantees. Courts have the authority to intervene; the only question is whether they have the will to do so.

An institutional approach would jettison the comfortable pieties of the relational paradigm and reverse long-standing trends in criminal procedure, such as the rise of the harmless error doctrine. To avoid this challenging path, it is tempting to view current government excesses as merely a momentary aberration. However, when systemic flaws in law enforcement jeopardize the effective and fair prosecution of terrorist cases, such quiescence is a luxury the law cannot afford. An institutional response recognizes the scope of the problem, and commits courts to protection of core constitutional values endangered by informational overreaching.

