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# A Visa to "Snitch": An Addendum to Cox and Posner

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## A VISA TO “SNITCH”: AN ADDENDUM TO COX AND POSNER

*Eleanor Marie Lawrence Brown\**

*Cox and Posner’s landmark contribution is the first article to have highlighted the challenges of information asymmetry in immigration screening. While Cox and Posner have undoubtedly made a significant contribution, there is a critical oversight in their framework: they do not discuss the importance of targeted ex post mechanisms of screening educational elites. This Article is an attempt to remedy Cox and Posner’s omission. Why is this oversight so problematic? In the post-9/11 world, U.S. immigration policy currently finds itself on the horns of a dilemma. While immigrant educational elites are critical to U.S. economic growth, terrorist networks have stepped up their recruiting among well-trained elites.*

*In visa application processes, screening out terrorism suspects is notoriously complicated, in part because terrorist networks are typically difficult for outsiders to penetrate. Yet, the same cannot be said of elite networks. Indeed, the term “global elite” is meant to reflect precisely the fact that a network of rich, well-educated persons from developing countries exists, and that members of this network are now bona fide members of the Western elite. Social network theory tells us that these elites are typically only a few degrees of separation apart. Yet while a primary goal of immigration law is screening, the United States currently finds itself in the absurd position of screening elite aliens utilizing what this Article terms “insufficiently networked” information.*

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*This screening typically occurs with little reference to the closely-knit elite networks whence these aliens originate, even as these networks are far better placed to access information about their members. A primary goal of immigration law should be to leverage these networks to supply the government with early warning signals when U.S. visa recipients display terrorist sympathies.*

*This Article seeks to mitigate the challenges of information gathering about such elites through an under-utilized and under-theorized sanction, namely, visa revocation. If not as a de jure matter, certainly as a de facto matter, elites typically have access to U.S. immigration privileges that are not easily available to their fellow nationals. Visas are status conveyers, and their loss may undermine business and educational opportunities dear to global elites. In a proposal referred to in shorthand as “a visa to snitch,” I impose a “duty to snitch” on elite visa recipients. Each time that a visa holder commits a terrorist act, the authorities would determine which persons in her network knew of her terrorist sympathies and failed to report them. These persons would face visa cancellation, or at a minimum, a reduced prospect of visa renewal, unless they were able to demonstrate that they had good reason not to know or not to report.*

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## INTRODUCTION

The legal scholarship has much to say about questions of immigrant "type," namely, which immigrants, among the millions who seek entry, should be admitted to the United States and in what numbers. Yet, while much has been written about these "first-order" questions,<sup>1</sup> the law review literature has little to say about how the Department of Homeland Security (DHS)<sup>2</sup> can ensure that the persons selected actually match its "type" preferences. The scholarship has been neglectful of "second-order" questions of institutional design.<sup>3</sup>

A refreshing exception to this general scholarly inattention is Cox and Posner's *The Second Order Structure of Immigration Law*.<sup>4</sup> They argue that the principal institutional design choice for any state is between ex ante screening, in which an alien is screened on the basis of pre-entry information and denied entry if she does not fit the state's first-order goals and an ex post system, in which an alien is screened on the basis of post-entry information and deported if she does not meet first-order policy.<sup>5</sup> Cox and Posner's analysis is enormously important: it provides a compelling explanatory framework for many puzzles in immigration law and policy, including the astronomical increase in federal immigration prosecutions.<sup>6</sup> They argue that this prosecutorial trend reflects an increasing institutional bias for ex post as opposed to ex ante screening.<sup>7</sup>

Why this ex post bias? A primary reason offered by Cox and Posner is information asymmetry.<sup>8</sup> Even as Congress dictates particular

1 The phrase "first-order," as applied to immigrant "type" scholarship, is Cox and Posner's. See Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 811 (2007). For a response, see Hiroshi Motomura, Comment, *Choosing Immigrants, Making Citizens*, 59 STAN. L. REV. 857-58 (2007).

2 In the aftermath of September 11, the federal government was reorganized to create the Department of Homeland Security (DHS). DHS now houses Immigration and Customs Enforcement (ICE), which bears primary responsibility for the federal immigration enforcement function. For a discussion of how DHS was organized to accommodate ICE, see STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY*, 12-24 (5th ed. 2009).

3 This scholarly neglect is also briefly discussed in a previous contribution by the author. See generally Eleanor Marie Lawrence Brown, *Outsourcing Immigration Compliance*, 77 FORDHAM L. REV. 2475 (2009).

4 Cox & Posner, *supra* note 1, at 811.

5 See *id.*

6 See *infra* notes 88-89 and accompanying text.

7 See Cox & Posner, *supra* note 1, at 813.

8 For a general summary of the challenges of information asymmetry, particularly in the context of contracting, see PATRICK BOLTON & MATHIAS DEWATRIPONT, *CONTRACT THEORY* 31-34 (2005). For a broader discussion of ex ante versus ex post

type preferences, the government is generally not well placed to collect and screen information about potential migrants. For example, a potential migrant will generally know much more about herself, and whether she will abide by U.S. immigration laws, than a consular visa officer.<sup>9</sup> Post-entry screening mitigates the challenges of information asymmetry since the United States is better able to access and screen information about aliens once they are already in the country.<sup>10</sup> Herein lies the primary explanation for the post-entry bias: given minimal access to reliable pre-entry information, DHS expends significant resources “double-checking” that only the right “types” have been admitted to the United States and ferreting out and deporting the “wrong” types, particularly among low-skilled aliens who are often unable to provide reliable pre-entry documentation.<sup>11</sup>

Post 9/11, there is evidence that the United States has also invested significant resources in ferreting out and deporting the “wrong types” even among members of the global elite,<sup>12</sup> namely, the group of persons who occupy the apex of their social order, attend the same coterie of Western universities, and work and reside within one degree of separation of their fellow elites in their countries of origin.<sup>13</sup> DHS appears to have been particularly focused on post-entry

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approaches to regulation, partly because of information asymmetry, see STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 277–81 (1987). Cox and Posner’s primary focus is on the mechanisms of screening immigrants (that is, persons who are admitted for long-term residence and possibly citizenship). For broader reflections on the applications of economic principles to immigration law including the admission of short-term guests, see Michael J. Trebilcock, *Immigration Policy*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 259 (Peter Newman ed., 1998). See also Michael J. Trebilcock, *The Law and Economics of Immigration Policy*, 5 *AM. L. & ECON. REV.* 271 (2003); Michael J. Trebilcock & Matthew Sudak, *The Political Economy of Emigration and Immigration*, 81 *N.Y.U. L. REV.* 234 (2006).

9 Consular officers are State Department employees stationed in embassies overseas. They are typically the “on the ground” screeners of visa applications. For a general discussion of their role, see LEGOMSKY & RODRIGUEZ, *supra* note 2.

10 See Cox & Posner, *supra* note 1, at 813.

11 *Id.*

12 The new emphasis on federal screening of elites is discussed in Philip Shenon, *Your Children Could be Terrorists*, *THE DAILY BEAST* (May 21, 2010, 5:47 AM), <http://www.thedailybeast.com/blogs-and-stories/2010-05-21/faisal-shahzad-case-spurs-feds-to-warn-pakistans-leaders-check-your-families-for-terrorism-ties/>. See also *infra* notes 63–67 and accompanying text.

13 See PIERRE BOURDIEU, *THE STATE NOBILITY* (1996) (using a classic sociological utilization of the term “elite”). See also JANINE R. WEDEL, *SHADOW ELITE* (2009), for a contemporary utilization of the term, which is generally used to refer to a small group of people who control a disproportionate amount of wealth, privilege, and access to decision making. A recent issue of *The Economist* also discusses the extraordinary influence of these elites, with a particular focus on elites in the developing world. See

screening of elites with scientific credentials such as engineers.<sup>14</sup> The information asymmetry rationale has less explanatory power with respect to elite migrants, since issues of information collection and verification are less acute.<sup>15</sup> In contrast to their low skilled counterparts, elites are well placed to provide tangible proxies that they will be productive and well behaved (such as professional certifications). Moreover, given modern advances in information technology, these proxies may be easily verified even halfway across the globe.

Even as they are generally agnostic on U.S. institutional design choices, Cox and Posner emphasize the reduced explanatory power of the information asymmetry rationale in this context and appear troubled by the disproportionate focus on post-entry screening among educational elites.<sup>16</sup> What is the source of their discomfort? For elites in particular, the economic stakes of institutional design choices appear to be high. Why so? There is a real risk that highly talented but risk-averse persons may be deterred from migrating to the United States. The economic data is unambiguous: the U.S. economy needs educational elites.<sup>17</sup> Microsoft Founder Bill Gates has famously pointed out that Google, Oracle, and Intel were all founded by immigrant computer scientists.<sup>18</sup> Notably, the Blackberry smart phone was also

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*The Rich and The Rest: What to Do (and Not Do) About Inequality*, ECONOMIST, Jan. 22, 2011, at 13. In social science circles, the term "elite" has long been associated with Marx scholars. See generally TOM BOTTOMORE, *ÉLITES AND SOCIETY* (2d ed. 1993) (describing Marx's theory of social classes). However, the term has long had broader currency shorn of Marxist connotations, and there have been several landmark studies of economic, political, academic, and cultural elites, primarily in the "West," but also more broadly. See generally G. WILLIAM DORNHOFF, *WHO RULES AMERICA?* (1967); FLOYD HUNTER, *COMMUNITY POWER STRUCTURE* (1953); C. WRIGHT MILLS, *THE POWER ELITE* (1956); MICHAEL SCHWARTZ, *THE STRUCTURE OF POWER IN AMERICA* (1987); ROBERT D. PUTNAM, *A COMPARATIVE STUDY OF POLITICAL ELITES* (1976) (all containing detailed anthropological, sociological, or political science studies of how elites function).

14 Cox and Posner use the term "highly skilled." I will utilize this term interchangeably with "educational elites."

15 See Cox & Posner, *supra* note 1, at 825.

16 *Id.* Motomura also seems to share a similar concern. See Motomura, *supra* note 1, at 869 (noting that "lessons in *Second-Order Structure* about ex post screening are less convincing for noncitizens who are lawfully in the United States, and especially unconvincing for permanent residents").

17 See *infra* notes 92–94 and accompanying text.

18 Bill Gates's testimony is summarized in Miriam Jordan, *Skilled Worker Visa Applicants Expected to Soar*, WALL ST. J., Mar., 31 2008, at A2. See also *Competitiveness and Innovation on the Committee's 50th Anniversary with Bill Gates, Chairman of Microsoft: Hearing Before the H. Comm. on Sci. & Tech.*, 110th Cong. 138 (2008) (statement of William H. Gates, Chairman, Microsoft), available at <http://www.microsoft.com/presspass/exec/billg/speeches/2008/congress.msp>; Stuart Anderson, *40 Percent of Fortune 500*

invented by immigrants—in Canada rather than the United States.<sup>19</sup> Gates contends that the United States is falling behind in the competitive race for global talent due partly to an anachronistic immigration system.<sup>20</sup> Cox and Posner appear sensitive to these concerns and are disinclined to augment these challenges.<sup>21</sup> Thus, in the context of the highly skilled, they seem to express a preference for *ex ante* screening.<sup>22</sup>

Cox and Posner have undoubtedly made a significant contribution; they are the only scholars to have weighed the comparative advantages of *ex ante* versus *ex post* approaches. Yet, there is a critical oversight in their framework: they do not discuss the importance of targeted *ex post* mechanisms of screening the highly skilled. Why is this problematic? While elite immigrants are clearly critical for U.S. economic growth, terrorist networks have also stepped up their recruiting among such elites. Among the many aspirants to global notoriety as bombers, it is the elite and well educated that are most likely to be chosen by Al Qaeda's leadership.<sup>23</sup> Indeed, Al Qaeda's own leadership has been populated by such elites.<sup>24</sup> Among recent terror attempts, the most highly publicized was that of the Pakistani would-be Times Square bomber, Faisal Shahzad, who was previously a recipient of elite student and professional visas and was undoubtedly a member of the global elite.<sup>25</sup> Profiles of famous terrorism suspects

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*Companies Founded by Immigrants or Their Children*, FORBES (June 19, 2011, 11:04 AM), <http://www.forbes.com/sites/stuartanderson/2011/06/19/40-percent-of-fortune-500-companies-founded-by-immigrants-or-their-children/>.

19 The invention of the Blackberry smart phone in Canada is discussed in THOMAS FRIEDMAN, *THE WORLD IS FLAT* 249 (2007).

20 *See supra* note 18.

21 I should point out that Cox and Posner do not specifically mention Gates's testimony. However, they clearly share a similar concern. *See Cox & Posner, supra* note 1, at 813.

22 *Id.*

23 *See* Richard Bernstein, *Upper Crust is Often Drawn to Terrorism*, N.Y. TIMES (Dec. 31, 2009), <http://www.nytimes.com/2009/12/31/us/31iht-letter.html>.

24 *See id.* Several members of Al Qaeda's current leadership originate from such backgrounds. Most famously, Osama Bin Laden was the son of a monied and influential Saudi contractor. His former deputy, Ayman al-Zawahri, is a doctor from an affluent and prominent Egyptian family with several distinguished academics. *See id.*

25 At the time of the attack, Shahzad was a naturalized American citizen. However, prior to naturalization he had been the recipient of several visas, including an F1 student visa to study at an American university and a highly selective H1B visa for skilled foreign nationals. Times Topics, *Faisal Shahzad*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/people/s/faisal\\_shahzad/index.html?scp=1&sq=Shahzad%20&st=cse](http://topics.nytimes.com/top/reference/timestopics/people/s/faisal_shahzad/index.html?scp=1&sq=Shahzad%20&st=cse) (last updated Oct. 5, 2010). While Shahzad had recently

reveal this theme repeating itself.<sup>26</sup> Moreover there is another critical omission in Cox and Posner’s analysis: *ex ante* screening is complicated because elites have resources which allow them to obscure “red flags.” Additionally, some persons undergo extreme radicalization only *after* they receive their visas. For such subjects, *ex ante* screening would hardly suffice; *ex post* screening is critical.

Indeed, this was one of the justifications offered for the FBI’s large-scale questioning of students and scientists of Middle Eastern origin after 9/11. Although the FBI’s dragnet has generally withstood judicial review,<sup>27</sup> such action is arguably ineffective. There needs to be a narrow and targeted mechanism of double checking that elite aliens meet U.S. type preferences. This Article offers one such mechanism. Congress should leverage highly desirable visas to elicit valuable information about potential terrorists. To accomplish this goal, it should impose an explicit requirement on certain U.S. visa holders to inform on family and friends who may harbor fanatically dangerous hatred of America—or risk losing their highly coveted access to the United States. I will refer to this proposal in shorthand as “a visa to snitch.”

Notably, several of Shahzad’s family and friends, including his father—a retired high ranking Pakistani military officer—noticed his extreme radicalism.<sup>28</sup> And yet no one among Pakistani elites—pre-

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fallen on hard times, by virtue of his advantages of birth and Western education, he was undoubtedly a member of the global elite.

26 See Bernstein, *supra* note 23. Andrew Sullivan makes a similar point in his *Atlantic Monthly* blog. See Andrew Sullivan, *A Very Bourgeois Would-Be Bomber*, ATLANTIC MONTHLY: DAILY DISH (Dec. 26, 2009, 10:53 AM), [www.theatlantic.com/daily-dish/archive/2009/12/a-very-bourgeois-would-be-bomber/192537/](http://www.theatlantic.com/daily-dish/archive/2009/12/a-very-bourgeois-would-be-bomber/192537/).

27 A summary of the outcome of legal challenges to the FBI’s post-9/11 dragnet of student visa recipients of Middle Eastern origin and Muslims more generally is included in MUZAFFAR A. CHISHTI ET AL., MIGRATION POLICY INSTITUTE, AMERICA’S CHALLENGE 7–14 (2003). See also U.S. DEP’T OF JUSTICE, 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 (2003) (summarizing government response to the 9/11 attacks); U.S. DEP’T OF JUSTICE, SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES’ ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN NEW YORK (2003) (describing allegations of abuse in New York in response to post-9/11 investigations).

28 The question of what precisely constitutes Islamic fundamentalism is a controversial one. In “Western” public political discourse, the phrase has come to be used interchangeably with Islamicism and generally refers to the group of religious ideologies advocating a return to the “fundamentals” of Islam as embodied in the Quran (the holy book) and the Sunnah (the practices of the Prophet Muhammed). See generally GRAHAM E. FULLER, THE FUTURE OF POLITICAL ISLAM (2003) (examining political Islam, its evolution, and its role in the future); OLIVIER ROY, THE FAILURE OF POLITI-

sumably with U.S. visas and ready access to both Pakistani and U.S. law enforcement—appears to have snatched.<sup>29</sup> Consider the contrasting behavior of the father of the “Underwear Bomber,”<sup>30</sup> Umar Farouk Abdul Mutallab (“Abdulmutallab”),<sup>31</sup> a prosperous Nigerian engineering student and a repeated recipient of multi-entry, multi-year U.S. visitors’ visas.<sup>32</sup> As a well-known banker and philanthropist, Father Mutallab was undoubtedly a member of the global elite and was also a recipient of a multi-year, multi-entry U.S. visitors’ visa (henceforth “Mutallab”).<sup>33</sup> He repeatedly alerted the American authorities to his son’s trips to Yemen, an atypical destination for a member of Nigeria’s

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CAL ISLAM (1994) (claiming that the Islamic revolution, state and economy are myths). Central tenets include the obligation of Muslims to obey sharia (Islamic law); pan-Islamic political unity; and the removal of non-Muslim (particularly Western) political, cultural, and military influences from the Muslim world. Yet others indicate that Islamicism has been erroneously conflated with fundamentalism. They argue that it consists of a continuum of more fluid ideologies that emphasize Muslim identity, authenticity, the unity of Muslim peoples, and the general revitalization of Muslim community. See generally FRED HALLIDAY, *ISLAM & THE MYTH OF CONFRONTATION* (1996) (analyzing the contemporary Middle East in a variety of ways); *VOICES OF RESURGENT ISLAM* (John L. Esposito ed., 1983) (examining the Islamic resurgence).

29 Since then there have been media reports that several other well-heeled Pakistanis—including some with U.S. visas—are well known among Pakistani elites to harbor terrorist sympathies. Yet, this information is not being shared with U.S. intelligence. See Shenon, *supra* note 12.

30 The bomb-making materials were concealed in Abdulmutallab’s underwear, which accounts for the would-be bomber’s popular name. Anahad O’Connor & Eric Schmitt, *U.S. Says Plane Passenger Tried to Detonate Device: Popping Sound on a Trans-Atlantic Flight Was First Thought to be Fireworks*, N.Y. TIMES, Dec. 26, 2009, at A1; Kathleen Gray & Christina Hall, *Attempted Attack Raises Airport Security Concerns*, DET. FREE PRESS (Dec. 26, 2009), <http://www.freep.com/print/article/20091226/NEWS05/91226035/Attempted-attack-raises-airport-security-concerns>; James Sturcke, *Flight Terror Suspect Abdulmutallab Charged With Trying to Blow Up Jet*, GUARDIAN UK (Dec. 27, 2009), <http://www.guardian.co.uk/world/2009/dec/27/us-terror-flight-abdulmutallab-charged>.

31 In particular, at the time of the attempted terrorist attack, he had a multiple-entry, multiple-year visitor’s visa (also known as the B-2 visa). Duncan Gardham et al., *Detroit Terror Attack: Profile of Umar Farouk Abdul Mutallab*, DAILY TELEGRAPH (Dec. 28, 2009), <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/6896128/Detroit-terror-attack-profile-of-Umar-Farouk-Abdul-Mutallab.html> (referring to trips to both the United States and the European Union and implying that he received several visas from these jurisdictions to travel).

32 See Adam Nossiter, *Lonely Trek to Radicalism for Nigerian Terror Suspect*, N.Y. TIMES, Jan. 16, 2010, at A1.

33 *Id.*

jet-setting elite.<sup>34</sup> This was a rare red flag.<sup>35</sup> Parents generally do not turn in their children.<sup>36</sup>

Notably, Umarmutallab, was the *only one* to report his son<sup>37</sup>—though as appears to be the case with Shahzad, a much broader circle noticed young Mutallab's disturbing radicalism.<sup>38</sup> In one sense, this is unremarkable; many societies have a metaphorical equivalent of the biblical Judas Iscariot narrative,<sup>39</sup> signifying a deep aversion towards "snitches."<sup>40</sup> But against this prevailing wisdom—and despite the perceived damage snitching could do to his son, his family, his community, and his country—the interests of the elder Mutallab and the

34 This point has been made by several commentators including D.B. Grady at the *Atlantic Monthly*, in his blog. See D.B. Grady, *Why Heads Should Roll*, ATLANTIC MONTHLY (Jan. 8, 2010, 10:05 AM), <http://www.theatlantic.com/politics/archive/2010/01/why-heads-should-roll/33175/>.

35 Maureen Dowd, the *New York Times* op-ed writer was one such commentator. See Maureen Dowd, *Captain Obvious Learns the Limits of Cool*, N.Y. TIMES, Jan. 10, 2010, at WK11. The prominent blogger, D.B. Grady, cites several opinion leaders expressing this view. See Grady, *supra* note 34.

36 Dowd makes precisely this point. See Dowd, *supra* note 35. Dan Markel, Jennifer M. Collins, and Ethan J. Leib also discuss the difficulties inherent in the decision of whether to inform on a family member. See Dan Markel et al., *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1155–56.

37 See Dowd, *supra* note 35.

38 See *id.* Indeed, media reports were filled with stories from Nigerians of similar social station who knew Abdulmutallab and his family, discussing signs of his increasing radicalism, while simultaneously expressing shock that one of their own could have engaged in a terrorist attack. Mary M. Chapman, "Shocked" Nigerians in U.S. Express Fears of Guilt by Association After Arrest, N.Y. TIMES (Dec. 29, 2009), [http://www.nytimes.com/2009/12/30/us/30detroit.html?\\_r=1](http://www.nytimes.com/2009/12/30/us/30detroit.html?_r=1).

39 Judas Iscariot famously "snitched" on Jesus. *Matthew* 26:14–15. Natapoff notes the universality of the Judas narrative. Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 651 (2004).

40 This antipathy appears to be particularly strong towards cooperation with the U.S. government, given the deep ambivalence among many Muslim elites about U.S. foreign policy. Given the controversy attending U.S. policy towards "the Muslim world," recent polling data has captured a deep distrust among Muslim populations towards U.S. foreign policy. Although notably President Obama appears to be more popular in the Muslim world than President Bush, this distrust persisted even after President Obama assumed office in virtually all Muslim countries. See PEW GLOBAL ATTITUDES PROJECT, MOST MUSLIM PUBLICS NOT SO EASILY MOVED (2009), available at <http://pewglobal.org/reports/display.php?ReportID=264> (tracking attitudes toward the United States in Muslim countries). In this respect, Nigeria appears to be an outlier. Although approximately half of the population is Muslim, a majority of Nigerians expressed positive views of the United States even during the Bush administration, whose policies were often controversial. Since the advent of the Obama administration, a poll in 2009 revealed that nearly seventy-nine percent of Nigerians expressed positive attitudes towards the United States. See *id.* at 1.

United States converged. Father Mutallab, a paradigmatic member of the Nigerian Muslim elite, assumed the classic role of “snitch” and turned in his son. Hence the subject of this Article: How do we create incentives for elites to snitch on one another? By articulating a duty to snitch, the United States would essentially be codifying the behavior of the elder Mutallab.

What do I mean by a duty to snitch? This proposal is not concerned with criminal sanctions.<sup>41</sup> Rather, it is concerned with another under-utilized and under-theorized sanction, namely, visa revocation. Elites value their U.S. market access and the revocation of such access is a serious sanction. Under this proposal, each time that a visa holder commits a terrorist act, the authorities would determine which persons in her network knew of her tendencies and failed to report them. These persons would face visa cancellation, or at a minimum, a reduced prospect of visa renewal, unless they were able to demonstrate that they had good reason not to know or not to report.

This Article is deliberately provocative. Even in the absence of criminal sanctions, the imposition of a duty to “snitch” rightly causes discomfort. It has a bad odor about it, recalling an earlier Cold War era when aliens had their visas revoked for suspected Communist associations (as demonstrated by their refusal to snitch on suspected American communist associates) and raising uncomfortable First Amendment questions.<sup>42</sup> For this reason, even with technical fixes, the proposal may not only be unimplementable but also undesirable. It bears emphasis: the point of this Article is not to offer a feasible proposal, but instead to throw a metaphorical bomb and to raise uncomfortable “what if” questions.<sup>43</sup> In so doing, I hope to provoke the sort of response that might typically be elicited by a thought experiment and to cause readers to think more deeply about the power of association to expose valuable information.

Part I includes a more detailed discussion of Cox and Posner. In Part II, I focus on my primary subject, Abdulmutallab, assembling a rough reconstruction of what his visa file might have looked like. Why

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41 The United States could hardly impose criminal sanctions on a foreigner overseas for a failure to snitch. Indeed, given longstanding criminal law principles, it is doubtful the United States could impose such criminal sanctions on U.S. citizens in U.S. territory, absent affirmative collaboration in planning a terrorist attack.

42 This history is summarized in John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481, 1496 (1988). First Amendment challenges are likely to fail. See *infra* note 230.

43 For this reason, it is not within the scope of this Article to address many other practical issues that might arise in the administration of this proposal, including questions of standards of proof and so forth.

Abdulmutallab? Through background interviews with national security experts, I learned that Abdulmutallab is an ideal subject to explore the challenges of ex post screening since he was radicalized *after* his visa was approved. Moreover, it appears that the United States' information concerning Abdulmutallab was what this Article will term "insufficiently networked." In the future, this deficiency may be remedied through the simple threat of strategic revocation of the visas of elites, who may be the peers of would-be terrorists. Notably, the United States is already strategic in visa revocation when pressing foreign policy goals are at stake, as evidenced by its revocation of the visas of Honduran elites in the aftermath of a Honduran coup.<sup>44</sup> Additionally, this section also lays out two critical portions of the "duty to snitch," namely the information-screening and sanctioning components, drawing on the literature on collective sanctioning, and more broadly on network theory.

In Part III, I shift from the primary subject, Abdulmutallab to the "snitch," namely, the elder Mutallab. Although motives are notoriously difficult to ascertain, it is important to consider the elder Mutallab's potential motives—precisely because we hope to create incentives for similar behavior in others. I include an analysis of his potential decision-making matrix incorporating insights from the Nigerian blogosphere and other sources. In a departure from most accounts, I suggest nontraditional motives. A somewhat cynical game theory-inspired view would note that the elder Mutallab is a quintessential "repeat game" player with the United States. As a banker, he is necessarily dependent on U.S. market access to conduct his business; snitching may be viewed as a pre-emptive mechanism of protecting his financial interests. Yet another view of Mutallab's motives is nobler. Nigerian society famously puts great stock on honor as a value. Shame has been a prominent motif in the communal retelling of Abdulmutallab's narrative. Snitching may be conceived as a pre-emptive mechanism of mitigating an anticipated blow to familial, tribal, and national honor.

Notably, in this particular instance, communal norms appear to have already been working in the United States' favor. The United States may strategically deploy this prioritization of family honor as a mechanism for motivating persons to share important information. How does this insight apply in practice? Prominent Islamic American groups have highlighted prosecutorial overkill, such as dragnets of

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44 See *Official: U.S. Revokes Visas of Honduran President, 15 Others*, CNN (Sept. 12, 2009, 8:35 PM), <http://edition.cnn.com/2009/WORLD/americas/09/12/honduras.visas.revoked/>.

Muslim student visa recipients conducted after 9/11.<sup>45</sup> The key is to keep the community on the side of the authorities. If terrorism is viewed as antithetical to family honor, soft sanctions such as a threat of visa revocation may be more effective than heavy-handed approaches.

In Part IV, I discuss the metaphorical elephants in the room. Writing in the racially charged context of the civil rights movement, Malcolm X famously warned of the dangers of placing affirmative duties (i.e., to prevent harm) as opposed to negative duties (simply not to cause harm) on certain subsections of the society. Although Malcolm X was speaking specifically in reference to African American Muslims, his point was much broader, namely, that such actions may alienate precisely those portions of the population whose support the law enforcement authorities need.<sup>46</sup> There is also a concern regarding the McCarthyite penumbra associated with a duty to snitch. Moreover, the United States will need to guard against corruption of the process more generally, particularly given the dangers of elite capture. For example, elites may deliberately share inaccurate information to discredit competitors. Finally, I address the implications of all of the foregoing insights for U.S. immigration law and policy.

## I. SETTING UP THE THEORETICAL PROBLEM

### A. *Historical Context for Institutional Design Choices: Why Ex Post Screening Has Been Neglected*

Congress has charged the executive branch with screening for a dizzyingly large spectrum of alien “types,” from highly skilled com-

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45 This point has been made by several members of the umbrella advocacy group, the American Muslim Political Coordination Council, including the Muslim Public Affairs Council, the American Muslim Alliance, the American Muslim Council and the Council on American Islamic Relations. The Council on American Islamic relations, the largest Muslim lobby group has been particularly vocal in this regard. See COUNCIL ON AMERICAN-ISLAMIC RELATIONS, *THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES* (2002), available at <http://www.cair.com/CivilRights/CivilRightsReports/2002Report.aspx>; see also PEW RESEARCH CTR., *MUSLIM AMERICANS 35* (2007), available at <http://pewresearch.org/assets/pdf/muslim-americans.pdf>; Omar Sacirbey, *Muslims Look to Blacks for Civil Rights Guidance*, RELIGION NEWS SERVICE (May 15, 2006), [http://www.religionnews.com/index.php?/rnspremiumtext/muslims\\_look\\_to\\_blacks\\_for\\_civil\\_rights\\_guidance/](http://www.religionnews.com/index.php?/rnspremiumtext/muslims_look_to_blacks_for_civil_rights_guidance/) (documenting the concerns of Muslim lobby groups regarding prosecutorial heavy-handedness).

46 See generally *BY ANY MEANS NECESSARY* (George Breitman ed., 1970) (providing a variety of works by Malcolm X); MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* (with the assistance of Alex Haley) (1992); MANNING MARABLE, *ON MALCOLM X* (1992).

puter scientists,<sup>47</sup> to wealthy investors,<sup>48</sup> to aliens of “extraordinary ability,”<sup>49</sup> to low-skilled guest workers.<sup>50</sup> Screening millions of applicants for a wide range of specific types should typically require institutions that are finely tuned to such goals. However, a primary source of what one scholar has termed immigration “dysfunction” is that institutions are poorly designed for a primary function—namely, screening.<sup>51</sup> Cox and Posner’s exploration of the comparative advantages of *ex ante* versus *ex post* screening in institutional design has the potential to alleviate such dysfunction.<sup>52</sup>

This is not an obscure academic issue. The importance of Cox and Posner’s work can hardly be overstated: their institutional design focus has enormous consequence for real-life questions of how immigration law has historically been enforced.<sup>53</sup> Indeed, it is precisely because their work is so important that their failure to appreciate the importance of *ex post* screening in the context of the highly skilled is so troubling.

But in at least one sense, this oversight is also unsurprising. The federal government only began to restrict immigration in the late 19th century and even then, there were no provisions making immigrants deportable for post entry conduct.<sup>54</sup> These provisions were only introduced in 1917 and significantly expanded over the last century.<sup>55</sup> However, as a matter of practice, *ex post* screening was focused on the poor and low-skilled, as opposed to elites.<sup>56</sup>

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47 See 8 U.S.C. § 1101(a)(15)(H) (2006) (containing H(1)(B) provisions for the admission of the highly skilled).

48 See 8 U.S.C. § 1153(b)(5) (2006) (providing for visas to be issued to immigrants who invest at least one million dollars in a start-up business that generates full-time jobs for ten United States citizens or lawful residents; these are generally known as “E” Treaty Investor Visas).

49 See 8 U.S.C. § 1153(b)(1)(A)–(B) (providing for visas to be issued to immigrants of “extraordinary ability” or who are “outstanding” with a significant likelihood of making innovative contributions to the American economy); § 1153(b)(2) (providing for visas to be issued to immigrants with advanced academic training or who possess “exceptional ability”).

50 See 8 U.S.C. § 1101(a)(15)(H) (containing guest worker provisions).

51 An excellent discussion of how what he terms systemic “dysfunction” in the immigration system is augmented by the challenges of screening is contained in Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law* 23–28 (March 7, 2011) (unpublished manuscript) (on file with author).

52 See Cox & Posner, *supra* note 1, at 811.

53 A good summary of the implications of institutional design for “real life” decision making is contained in Cuéllar, *supra* note 51, at 29–38.

54 See GERALD NEUMAN, *STRANGERS TO THE CONSTITUTION* 22 (1996).

55 See *id.* at 22–23.

56 See ARISTIDE R. ZOLBERG, *A NATION BY DESIGN* 433–35 (2006).

To support this point, some broad historical context is in order. Zolberg's landmark historical study of migration contends that prior to the development of modern transportation, typically, very few persons left their countries of origin.<sup>57</sup> Even these migrants customarily had some pre-existing connection to the country of migration. Moreover, migrants generally met relatively little resistance at the port of entry.<sup>58</sup> Zolberg notes that great "powers" such as France and Great Britain liberally admitted migrants from their broader colonial empires.<sup>59</sup> The overall thrust of his historical analysis is clear: generally, the numbers of migrants were small, and admission policies were liberal. There was little need for a complicated system to determine which migrants merited admission. This was particularly true in the United States, which has been singularly welcoming to migrants.<sup>60</sup>

All this changed in the twentieth century. The World Bank has argued that a defining feature of the twentieth century was that people started to move at previously unparalleled levels.<sup>61</sup> With unprece-

57 *Id.* at 7.

58 *Id.* at 78–79. It bears emphasis that post-entry, migrants often found significant hostility in adjusting to their new homes. *Id.* at 298.

59 Even other empires that proved more resistant to long-term migration, such as the Germans, liberally admitted short-term migrants according to their economic dictates. The Germans typically denied migrants long-term membership. For a discussion of the historical German approach to migrants, see PATRICK WEIL, ALL OR NOTHING? WHAT THE UNITED STATES CAN LEARN FROM EUROPE AS IT CONTEMPLATES CIRCULAR MIGRATION AND LEGALIZATION FOR UNDOCUMENTED IMMIGRANTS 7, 12 (Immigration Paper Series, 2010), available at <http://database.gmfus.org/rs/ct.aspx?ct=24F76C1FD6E40AEDC1D180ACD22F921ADCBE5588F8A52DA2349D55444994EE21FC480CCED0D813CA335D773AA95658FE9FEA874847170E4EFF895E528EA32B9BC0599DFB0600D5A3404D276334C62FA51D8F2756E6638A3D1257F04>.

60 ZOLBERG, *supra* note 56, at 57. Professor Neuman's historical analysis of American immigration law suggests a different interpretation than Zolberg's of the development of the rules governing U.S. immigration. His work discusses the development of complicated immigration rules at the state level early in the U.S. Republic. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1841–57 (1993).

61 The World Bank has argued in a recent annual report that worldwide labor mobility trends will lead migration to remain at the center of contentious political debates worldwide. See WORLD BANK, GLOBAL ECONOMIC PROSPECTS at vii (2006), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2005/11/14/000112742\\_20051114174928/Rendered/PDF/343200GEP02006.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2005/11/14/000112742_20051114174928/Rendered/PDF/343200GEP02006.pdf). In the last three decades, the population of migrants in high income countries has doubled, registering an annual growth rate of three percent. See *id.* at 26–27. Migrants now constitute nearly three percent of the population worldwide, and eight percent of the population of industrialized countries. See *id.* See generally LANT PRITCHETT, LET THEIR PEOPLE COME 2 (2006) (“[T]he United States is in the throes of a deep and contentious debate about immigration policy.”).

dented levels of migration came domestic political resistance to new migrants in diverse countries. Social and economic pressures (from the Great Depression to nativist political parties and so forth) culminated in a similar outcome in different states<sup>62</sup>: more stringent rules across the board in an effort to stem the flow of new migrants.<sup>63</sup>

Yet even so, prior to the relatively recent development of the modern state, it was difficult for the state to locate, exclude, and deport undesirable migrants.<sup>64</sup> As a practical matter of limited state capacity, overwhelmingly, states focused on *ex ante* screening.<sup>65</sup> The United States was no different. If deportation was hardly a realistic policy option for a young country with a still poorly developed state, it was much better to determine whether a migrant was inadmissible *ex ante*.<sup>66</sup>

In the early twentieth century, this changed. Why the new focus on *ex post* screening? Among many possible factors, a structural change in the nature of migration appears to be the primary factor. For most of U.S. history, migrants were overwhelmingly documented entrants who came through seaports. The nature of migration changed with increasing numbers of undocumented migrants from Mexico and Central America crossing at land borders, which were much more difficult to police than sea ports.<sup>67</sup> In the face of this type of migration, an exclusive focus on *ex ante* exclusion became anachronistic.<sup>68</sup>

*Ex post* screening offered an alternative strategy. However, even after *ex post* screening measures developed, there was minimal *ex post* screening of the highly skilled until relatively recently, with a significant spike in *ex post* screening after 9/11.<sup>69</sup>

62 See WORLD BANK, *supra* note 61, at 26–27.

63 See *id.*

64 See ZOLBERG, *supra* note 56, at 69–70.

65 See *id.*

66 See *id.*

67 The landmark work in this regard has been conducted by Douglas Massey at the Office of Population Research at Princeton University, who has analyzed Mexican migratory patterns over the last century. See, e.g., DOUGLAS S. MASSEY ET AL., *BEYOND SMOKE AND MIRRORS* (2002) (discussing the series of legislative and bureaucratic changes that fundamentally altered the rules under which the Mexico-U.S. migration system operated); Douglas S. Massey, *Borderline Madness: America's Counterproductive Immigration Policy*, in *DEBATING IMMIGRATION* 129 (Carol M. Swain ed., 2007) (discussing inconsistencies in immigration reform since 1986).

68 See Cox & Posner, *supra* note 1, at 811.

69 This point is well made in a report by the Center for Strategic and International Studies. See generally CTR. FOR STRATEGIC AND INT'L STUDIES, *SECURITY CON-*

### B. *Ex Post Screening as the Dominant Strategy*

Ex post screening is no longer just an alternative strategy. It is now arguably *the* primary mechanism of immigration enforcement. The evidence is significant: immigration authorities currently expend more resources on ex post screening than on ex ante screening.<sup>70</sup> Consider, for example, the burgeoning federal law enforcement focus on “cimmigration,” that is, the prosecution and deportation of aliens who commit crime. Immigration cases now constitute *the majority of all* federal criminal prosecutions.<sup>71</sup> Additionally, the increased emphasis on post-entry screening is reflected in the fact that immigration law often treats post-entry criminal behavior (in the United States) much more harshly than equivalent pre-entry behavior criminal behavior (in a migrant’s country of origin).<sup>72</sup> Indeed, a conviction that is not a ground for excluding a first-time arriving alien may well constitute grounds for deportation of a long-time permanent resident.<sup>73</sup>

Cox and Posner’s singular contribution is to offer a “macro” bird’s eye view that provides critical context for this trend. In their view, a primary reason for this institutional bias for post-entry as opposed to pre-entry screening is information asymmetry. An alien must typically commit in her visa application to abide by the rules governing the visa in the event that she is eventually approved.<sup>74</sup> A potential migrant will generally know more about herself and whether

TROLS ON THE ACCESS OF FOREIGN SCIENTISTS AND ENGINEERS TO THE UNITED STATES (2005), available at [http://csis.org/files/media/csis/pubs/051005\\_whitepaper.pdf](http://csis.org/files/media/csis/pubs/051005_whitepaper.pdf).

70 See Cox & Posner, *supra* note 1, at 839–40.

71 Cox and Posner do not utilize the word “cimmigration,” which has gained greater currency since the publication of their article. However, they clearly reference the increasing utilization of federal enforcement resources to identify and deport aliens who have committed relatively minor crimes. See Cox & Posner, *supra* note 1, at 813. For an excellent summary of the data concerning the significant increase in federal immigration prosecutions, see David Allen Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, NEW CRIM. L. REV. (forthcoming 2012). This issue is also discussed in the following articles: Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 480 (2007); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003); Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006). For a recent addition to this literature, see Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010).

72 See Legomsky, *supra* note 71, at 480.

73 See *id.*

74 See, e.g., *Nonimmigrant Visa Application*, U.S. DEP’T OF STATE, <https://evisaforms.state.gov/ds156.asp> (last visited Nov. 22, 2011).

she will abide by the rules than a consular officer.<sup>75</sup> The disproportionate focus on post-entry screening reflects the fact that the United States is often better able to access reliable information about aliens once they are in the country.<sup>76</sup>

Questions of information asymmetry are most acute with respect to low-skilled aliens.<sup>77</sup> The typical low-skilled migrant lacks the traditional documentary mechanisms of credibly establishing that she is likely to be a law-abiding, productive contributor.<sup>78</sup> She is less likely than the typical high-skilled applicant to provide traditional and tangible evidence of traits that are proxies for desirable "type" (such as graduation certificates).<sup>79</sup> Moreover, the typical low-skilled migrant comes from a developing country with poorly-resourced and sometimes corrupt public institutions.<sup>80</sup> Thus, individual-level constraints are augmented by nationwide resource and governance constraints, which undermine a potential migrant's efforts to provide evidence (such as credible police reports)<sup>81</sup> from the authorities of her inclination to play by the rules. Thus, the resource challenges of the developing world augment the challenges of information collection. In summary, ex post screening mitigates these challenges.

### C. Cox and Posner's Oversight

Cox and Posner's analysis is generally positive as opposed to normative.<sup>82</sup> That is, they are generally concerned with illuminating which factors lead to immigration screening choices, as opposed to criticizing these choices. Thus, they are generally agnostic as to whether a state should typically pursue ex ante or ex post screening.<sup>83</sup> However, they come closest to critiquing the disproportionate focus on ex post screening when it comes to migrants with elite credentials. The information asymmetry rationale is less compelling for skilled migrants.<sup>84</sup>

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75 See Cox & Posner, *supra* note 1, at 811. I also discuss this issue in detail in a previous contribution. See Brown, *supra* note 3, at 2488.

76 See Cox & Posner, *supra* note 1, at 813.

77 See Brown, *supra* note 3, at 2488.

78 See *id.* at 2499.

79 See *id.*

80 The World Bank annual report details the relevant characteristics of this population that pose difficulties in screening. See WORLD BANK, *supra* note 61, at 57–58.

81 See *id.*

82 Cox & Posner, *supra* note 1, at 815.

83 *Id.*

84 *Id.* at 847.

In contrast to their low-skilled counterparts, the educational elite are well placed to provide tangible proxies that they have been law-abiding, productive community members in their country of origin, such as university diplomas, professional affiliations, and evidence of business ownership.<sup>85</sup> Indeed, this is precisely why other jurisdictions such as Canada and Australia have been able to develop “points” systems, which reward highly skilled migrants with expedited visa access.<sup>86</sup> Not only are highly skilled migrants able to provide documentary evidence of their academic, professional, and business credentials, but in the modern age of information technology, the DHS, working with the State Department, can easily verify an elite applicant’s credentials, even thousands of miles away in India or China.<sup>87</sup> Consequently, the United States, like its other developed-country counterparts has access to highly detailed, fine-grained information about the highly skilled, irrespective of where they live.<sup>88</sup> Accordingly, the United States has less justification for its *ex post* focus.

There is another reason that Cox and Posner are disturbed by the disproportionate *ex post* focus. Historically, U.S. migration has involved an implicit long-term contract, which has been termed “immigration as contract.”<sup>89</sup> If persons are well behaved, they are generally viewed as “Americans in waiting” and are eligible for long-term membership through naturalization.<sup>90</sup> An emphasis on *ex post* screening (with the corresponding “sanction” of deportation)<sup>91</sup>

85 *Id.* at 835.

86 See Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148, 171–79 (2006).

87 See *id.* at 169 n.74.

88 See *id.*

89 The phrase “immigration as contract” has been heavily utilized by Motomura. See, e.g., HIROSHI MOTOMURA, *AMERICANS IN WAITING* (2006); see also Adam B. Cox & Eric A. Posner, *The Rights of Migrants: An Optimal Contract Framework*, 84 N.Y.U. L. REV. 1403, 1407 (2009) (applying a similar metaphor of a “contract” between the state and the migrant); Cox & Posner, *supra* note 1, at 818.

90 The term “Americans in waiting,” which gained currency in recent immigrants’ rights protests is originally Motomura’s. See MOTOMURA, *supra* note 89.

91 One might question the basis on which deportation might reasonably be construed as a sanction. If an alien does not abide by the terms of her visa, and the host country deports her, why is this not simply an enforcement of a contractual obligation that the alien agreed to (as a condition of her visa) in the first place? Indeed, there is a longstanding debate in the immigration law literature as to whether deportation should in fact be viewed as a punishment. See *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (holding that an “order of deportation is not a punishment for crime”); cf. Legomsky, *supra* note 71, at 514 (arguing that theories of deportation overlap so substantially with those of criminal punishment that deportation should at least sometimes be regarded as a form of punishment).

implies that the United States may later revoke this implicit contract. Herein lies the dilemma: risk-averse, but talented high-skilled persons who are ideal migrants may decline to migrate to the United States. More bluntly put, why should a computer programmer invest in migration to (and assimilation into) the United States, when she may later be found to be an inappropriate "type" and subject to deportation? Why not go instead to Canada?

There is significant evidence that skilled migrants contribute disproportionately to U.S. economic growth.<sup>92</sup> Additionally, their children are also likely to be highly productive. For example, *New York Times* columnist Thomas Friedman discusses the children of skilled immigrants who dominate the United States Physics team and Intel Science competitions, and ultimately go on to work and form high tech companies.<sup>93</sup> While a broad array of lobby groups agree that successful global recruitment of the highly skilled is essential to long-term U.S. economic growth, an institutional framework not well suited to such recruitment continues to undermine efforts to recruit highly skilled immigrants.<sup>94</sup>

Cox and Posner appear sensitive to these concerns; they are conscious of and disinclined to contribute further to this poor institutional framework.<sup>95</sup> Thus, they express a preference for ex ante screening in the context of the highly skilled.<sup>96</sup> In their words, "the main advantage of the ex ante system is that it reduces the risk faced

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92 A brief summary of this literature is included in Shachar, *supra* note 86, at 149–50. For a good introduction to the global competition for skilled persons see MICHAEL E. PORTER, ON COMPETITION at xi–xxxi (2008). See also B. LINDSAY LOWELL ET AL., INST. FOR THE STUDY OF INT'L MIGRATION, GEORGETOWN UNIVERSITY, FOREIGN STUDENTS COMING TO AMERICA (2007); VIVEK WADHWAN ET AL., DUKE UNIVERSITY, SCHOOL OF INFORMATION, U.C. BERKELEY, AMERICA'S NEW IMMIGRANT ENTREPRENEURS 5 (2007); Gnanaraj Chellaraj et al., *The Contribution of International Graduate Students to U.S. Innovation*, 16 REV. INT'L ECON. 444, 458–59 (2008); William Kerr, *Ethnic Scientific Communities and International Technology Diffusion*, 90 REV. ECON. & STAT. 518, 536 (2008); William R. Kerr & William F. Lincoln, *The Supply Side of Innovation: H-1B Visa Reforms and U.S. Ethnic Invention*, 28 J. LAB. ECON. 474, 504–05 (2010); AnnaLee Saxenian, *Silicon Valley's New Immigrant High-Growth Entrepreneurs*, 16 ECON. DEV. Q. 20, 29–30 (2002); Paula E. Stephan & Sharon G. Levin, *Exceptional Contributions to US Science by the Foreign-Born and Foreign-Educated*, 20 POPULATION RES. & POL. REV. 59, 74–76 (2001); Madeline Zavodny, *The H-1B Program and its Effects on Information Technology Workers*, FED. RES. BANK ATLANTA ECON. REV. 1, 8–10 (2003); Sari Pekkala Kerr & William R. Kerr, *Economic Impacts of Immigration: A Survey* (Harvard Business School, Working Paper, No. 09-013, 2011) (on file with author).

93 See FRIEDMAN, *supra* note 19, at 270.

94 This point is made by Cuéllar. See Cuéllar, *supra* note 51, at 10–11.

95 Cox & Posner, *supra* note 1, at 813.

96 *Id.* at 835.

by potential immigrants that they will be deported, so that risk-averse noncitizens are more likely to enter and invest in the country than they are under the ex post system.”<sup>97</sup>

This Article points out a critical oversight in Cox and Posner’s framework: they do not discuss the importance of targeted ex post mechanisms of screening the highly skilled. Why is this problematic? U.S. immigration policy currently finds itself on the horns of a dilemma. While the highly skilled are clearly critical to U.S. economic growth, terrorist networks have stepped up their recruiting among the highly skilled. Moreover, the highly skilled are also most likely to gain access to the United States. They are also singularly well prepared to execute terrorist attacks.

The bottom line: While Cox and Posner are correct in stating that ex ante screening may be more appropriate for elites, ex post screening is still critical. What is needed is a targeted mechanism of ex post screening that meets U.S. security concerns, while not undermining efforts to recruit the best and the brightest. In the next section, I consider how this goal might be accomplished through the lens of Abdulmutallab and other highly skilled terrorist subjects.

## II. ABDULMUTALLAB

### A. *A Note on Methodology*

A word on methodology is in order. In this section, my primary subject is Abdulmutallab, the Nigerian “Underwear” bomber, and elite engineering graduate who received a multiple-year, multiple-entry visitor’s visa. As a Nigerian national, Abdulmutallab would have been required to submit his visa application at a U.S. consulate in Nigeria.<sup>98</sup> The question becomes: What was available to the U.S. consulate in Nigeria on both an ex ante and ex post basis? I consider how the consular authorities might have “filled in the blanks.”

Typically, visa files are not available for public view. Moreover, for obvious reasons, subsequent law enforcement interviews with terror suspects are classified. Thus, I am only able to create a rough re-enactment of what a subject’s visa file might have contained. In an effort to find an ideal subject, I created a narrow list of potential subjects, including only elites who had either carried out or attempted to carry out a terrorist attack. In order to further narrow down this list, I

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97 *Id.* at 813.

98 This requirement is stipulated by the U.S. Department of State Visa Rules. *See Nonimmigrant Visas*, UNITED STATES DIPLOMATIC MISSION TO NIGERIA, [http://nigeria.usembassy.gov/non-immigrant\\_visas.html](http://nigeria.usembassy.gov/non-immigrant_visas.html) (last visited Nov. 22, 2011).

interviewed persons with national security expertise. While Abdulmutallab was not a long-term migrant,<sup>99</sup> repeatedly, he was recommended by such experts as a subject choice.

This recommendation primarily arises from the fact that Abdulmutallab was the subject of extensive reporting, by not only the Western press, but also the Nigerian press. It appears that Nigerian journalists were able to access on-the-ground sources, which were more difficult for foreign correspondents to find. Why is this relevant? Notably, it was the Nigerian (as opposed to the U.S.) press, which first reported that Abdulmutallab's father had visited the U.S. consulate repeatedly to raise concerns about his son.<sup>100</sup> Nigerian journalists have been essential to Western media outlets (and indeed to this Article). In comparison to other countries from which elite terror suspects have originated, such as Saudi Arabia, Pakistan and Egypt, Nigeria is more highly ranked on indices of press freedom. This perhaps enabled more rigorous on-the-ground reporting, particularly in the subject's tightly-knit Muslim community.<sup>101</sup> This has typically not occurred in other terror suspects' home countries.

Moreover my research was also aided considerably by extensive reporting by European news outlets. What accounts for their interest? Although Abdulmutallab attempted to detonate a bomb on a U.S. bound flight, he could just have made a similar attempt in the European Union (E.U.) given his easy access to several E.U. countries. Indeed, Abdulmutallab boarded the U.S. bound flight in the Netherlands. Moreover, he had previously received multiple E.U. (Schengen) visas, which authorized admission to many E.U. member states.<sup>102</sup> Abdulmutallab had also previously received a U.K. student

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99 It bears emphasis: Abdulmutallab was not admitted as a long-term immigrant. Cox and Posner's primary focus is on mechanisms of screening immigrants (that is, persons who are admitted for long-term residence and possibly citizenship). However, they point out that their analytical framework is also applicable to the challenges of admitting temporary guests such as Abdulmutallab. Cox & Posner, *supra* note 1, at 818.

100 See, e.g., Dora Akunyulim, *Mutallab is a Stranger*, NEXT, [http://234next.com/csp/cms/sites/Next/News/5503108-147/Mutallab\\_is\\_a\\_stranger,\\_Dora\\_Akunyili.csp](http://234next.com/csp/cms/sites/Next/News/5503108-147/Mutallab_is_a_stranger,_Dora_Akunyili.csp) (last visited Nov. 22, 2011) (consolidating a variety of Nigerian newspaper outlets which reported that Father Mutallab had visited the U.S. consulate repeatedly to voice his concerns).

101 See *Press Freedom Index 2009*, REPORTERS WITHOUT BORDERS, [http://en.rsf.org/spip.php?page=classement&id\\_rubrique=1001](http://en.rsf.org/spip.php?page=classement&id_rubrique=1001) (last visited Nov. 22, 2011). While Nigeria is still in the bottom half, it is clearly more highly ranked than all the other countries mentioned. See *id.*

102 The Netherlands is a signatory to the Schengen Agreement, a treaty (signed near the town of Schengen in Luxembourg), between five of the ten member states of

visa. It appears that only one state—the United Kingdom—rejected his application for visa renewal (presumably on the basis of *ex post* screening, since he had previously received a visa). Thus, in several different jurisdictions, journalists were seeking to determine why their own immigration authorities had failed to successfully screen him.<sup>103</sup> This accounts for the availability of detailed news accounts that allowed me to assemble a rough reconstruction of information that might have been missing from his visa file.

### B. *Abdulmutallab's Visa Application*

A consideration of Abdulmutallab's network is enlightening. He went to one of Africa's most exclusive private schools, the British School of Togo, to which very few Africans gain admission, and which even fewer can afford to attend.<sup>104</sup> He studied there for the prestigious International Baccalaureate examination.<sup>105</sup> While he was denied admission to Stanford University, he did sufficiently well in his high school examinations to attend University College London's highly selective engineering program.<sup>106</sup> While there, he achieved an honors engineering degree.<sup>107</sup> In London, he lived in a family apartment in one of the city's chicest districts.<sup>108</sup> He was surrounded by relatives and friends who were part of a tightly knit group of rich Nigerian expatriates in London.<sup>109</sup>

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the European Economic Community. The Treaty created the Schengen Area through the complete abolition of border controls between Schengen states, common rules on visas, and police and judicial cooperation. Thus, in order to gain admissions to the Netherlands, Abdulmutallab needed a Schengen visa. See *Schengen: Europe Without Internal Borders*, EUROPEAN COMMISSION, [http://ec.europa.eu/home-affairs/policies/borders/borders\\_schengen\\_en.htm](http://ec.europa.eu/home-affairs/policies/borders/borders_schengen_en.htm) (last visited Nov. 22, 2011).

103 Additionally, his family's extensive ties to the United Kingdom enabled particularly detailed reporting by the British press. In contrast to the family and friends of other would-be bombers, Abdulmutallab's network of family and friends appear to have been more cooperative with the press.

104 See Gardham et al., *supra* note 31.

105 Peter Walker et al., *Rich and Privileged—The Gilded Life of the Would-Be Plane Bomber*, GUARDIAN UK (Dec. 27, 2009, 2:17 PM), <http://www.guardian.co.uk/uk/2009/dec/27/gilded-life-of-plane-bomber>.

106 See *id.*

107 See *id.*

108 See *id.* But see Xan Rice, *Bombing Suspect Was Pious Pupil Who Shunned High Life of the Rich*, GUARDIAN UK (Dec. 31, 2009, 5:50 PM), <http://www.guardian.co.uk/world/2009/dec/31/bombing-suspect-abdulmutallab-nigeria-home> (noting that his affluence appeared to have caused him some discomfort).

109 See Gardham et al., *supra* note 31.

Abdulmutallab had a multiple-entry, multiple-year visitor's visa, also known as the B-2 visa.<sup>110</sup> Although this visa category is *in principle* available to any Nigerian national who is not a visa overstay or security risk, *in practice* the documentary requirements are so stringent that only a tiny minority of elite Nigerians are typically eligible.<sup>111</sup> In the Nigerian context, Abdulmutallab achieved what a former Ambassador has termed an exclusive badge of honor—namely a U.S. visa.<sup>112</sup>

In the aftermath of Abdulmutallab's attempted bombing, DHS was accused of having missed important clues while screening.<sup>113</sup> The

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110 A B-2 visa is granted to a foreigner seeking to enter the United States for tourism purposes. See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 214, 66 Stat. 165, 189–90 (1952) (codified as amended at 8 U.S.C. §§ 101, 214 (a) (1996)). The Nigerian Information Minister noted that he “sneaked into” Nigeria, implying that the Nigeria security forces were on alert and would have detained him if he had stopped in Nigeria. See *supra* note 99 and accompanying text.

111 While approximately sixty-six percent of Nigerian applicants for non-immigrant visas are approved, against a background in which most Nigerians express positive views of the United States and a desire to travel to the United States, very few Nigerians actually apply for visas suggesting that either the airplane and visa application fees are prohibitive or the documentation requirements are widely perceived to be difficult. See PEW GLOBAL ATTITUDE PROJECT, *supra* note 40. The percentage of Nigerians with non-immigrant visas is miniscule. For a summary of the figures, see U.S. DEP'T OF STATE, ADJUSTED REFUSAL RATE, <http://travel.state.gov/pdf/FY10.pdf>. In 2010, 64,279 Nigerians received non-immigrant visas. See U.S. DEP'T OF STATE, FY 2010 NON IMMIGRANT VISAS ISSUED, available at <http://www.travel.state.gov/pdf/FY10NIVDetailTable.pdf>. This is a tiny percentage of the general population. Approximately 0.03% of Nigerians applied for non-immigrant visas and 0.02% were approved. To provide some context as to what a miniscule percentage of the Nigerian population has non-immigrant visas, consider the similar rates for Jamaica, another developing country. Although Jamaica is a much smaller country with 1.7% of Nigeria's population, a much higher percentage of Jamaicans have non-immigrant visas. For example, in 2010 approximately 43,171 Jamaicans received non-immigrant visas. See U.S. DEP'T OF STATE, FY 2010 NON IMMIGRANT VISAS ISSUED, *supra*. Since Jamaica only has a population of 2.7 million people, 1.6% of Jamaicans were recipients of non-immigrant visas in 2008. See David Seminara, *No Coyote Needed: U.S. Visas Still an Easy Ticket in Developing Countries*, BACKGROUND (2008), <http://www.cis.org/articles/2008/back208.pdf>.

112 This view was expressed by the Former U.S. Ambassador to Nigeria, John Campbell: “Nigerian elites relish the opportunity to travel to the U.S. and to own property there.” *Examining the U.S.-Nigeria Relationship in a Time of Transition: Hearing Before the Subcomm. on African Affairs of the S. Comm. on Foreign Relations*, 111th Cong. 27 (2010) (statement of Hon. John Campbell, Ralph Bunche Senior Fellow for Africa Policy Studies, Council on Foreign Relations).

113 See Eric Lipton et al., *Review of Jet Bomb Plot Show More Missed Clues*, N.Y. TIMES, Jan. 18, 2010, at A1, A14; Eric Lipton & Scott Shane, *More Questions on Why Suspect Was Not Stopped*, N.Y. TIMES, Dec. 28, 2009, at A1, A3; Sheryl Gay Stolberg, *Counterterrorism Chief Faces Rough Week as Hearings Begin*, N.Y. TIMES, Jan. 17, 2010, at A18, available at <http://www.nytimes.com/2010/01/17/us/politics/17leiter.html>.

United States presumably had many mechanisms of verifying Abdulmutallab's bona fides. His ties to formal institutions were well documented, his family was prominent, and he was well known at his schools.<sup>114</sup> He appears to have had a detailed paper trail.

The centrality of contesting claims regarding the ease of screening the young Mutallab obscures an important point—in this particular context, screening raises peculiar concerns. Since even applicants for temporary tourist visas are presumed under the Immigration and Nationality Act (“INA”) to have immigrant intent, the burden is on the average applicant to prove that she is coming to the United States temporarily and does not intend to abandon her country of origin.<sup>115</sup> As such, the typical visa recipient must successfully demonstrate significant ties to her country of origin and financial assets to support herself while visiting the United States.<sup>116</sup>

As evidence of home-country ties, Abdulmutallab's visa application would typically have noted his extensive family in Nigeria. As evidence of his ability to support himself while in the United States, it would undoubtedly have noted his family's significant asset base, including major shareholdings in several companies and valuable real estate in the European Union and the United States. Further evidence of nonimmigrant intent would be his history of travel without visa overstays. Moreover, his previous studies at an elite boarding

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114 See Stolberg, *supra* note 113.

115 See Immigration & Nationality Act of 1952, Pub L. No. 82-414, 66 Stat. 165, 189 (1952) (codified as amended at 8 U.S.C. §§ 101, 214 (a) (1996)) (“The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe . . . to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 248, such alien will depart from the United States. . . . (b) Every alien [other than a nonimmigrant described in subparagraph (L) or (V) of section 101(a)(15), and other than a nonimmigrant described in any provision of section 101(a)(15)(H)(i) except subclause (b1) of such section] shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status . . .”).

116 See also *Visitor Visa—Business and Pleasure*, U.S. DEP'T OF STATE, [http://travel.state.gov/visa/temp/types/types\\_1262.html](http://travel.state.gov/visa/temp/types/types_1262.html) (last visited Nov. 22, 2011) (“The presumption in the law is that every visitor visa applicant is an intending immigrant. Therefore, applicants for visitor visas must overcome this presumption by demonstrating that: The purpose of their trip is to enter the U.S. for business, pleasure, or medical treatment; That they plan to remain for a specific, limited period; Evidence of funds to cover expenses in the United States; Evidence of compelling social and economic ties abroad; and That they have a residence outside the U.S. as well as other binding ties that will insure their return abroad at the end of the visit.”).

school and at an elite engineering program would also be relevant since it would typically be difficult for well-educated persons to work as undocumented aliens in the United States.

Indeed, on the basis of a typical *ex ante* screen, Abdulmutallab would not have looked substantially different than any other well-educated and wealthy Nigerian. As one interview subject pointed out, without the benefit of hindsight bias,<sup>117</sup> Abdulmutallab's profile is not substantially different than that of Adebayo Ogunlesi, another well-educated Nigerian national who first came to the United States as a young man. He subsequently went on to graduate from Harvard Business School, become an editor of the Harvard Law Review, a Supreme Court clerk and Vice-Chairman of Credit Suisse.<sup>118</sup> Indeed, Ogunlesi is precisely the sort of elite that Cox and Posner are worried about deterring. Moreover, Abdulmutallab's profile is not discernibly different from many other well-educated Nigerians. How could a visa officer be reasonably expected to differentiate Abdulmutallab from this pool?

Moreover, Abdulmutallab reminds us that the profiles of elite visa recipients may change in critical ways *after* they first receive their visas. What the consular officer could not have anticipated is Abdulmutallab's time at a religious training institute in Yemen run by an American imam, whose role in training terrorists is apparently so significant that his assassination has been authorized by President Obama.<sup>119</sup> A consular officer would also not have anticipated his leadership role of a student Islamic society that was well known for inviting radical speakers to his London university campus.<sup>120</sup>

Although elites are typically in a much better position than non-elite visa applicants to submit detailed paper trails, screening on an *ex ante* basis is complicated by the fact that their resources allow them to obscure "red flags," such as travel to countries on terrorist watch lists. For example, Abdulmutallab's passport bore no Yemeni entry stamp

117 See *infra* text accompanying note 170.

118 This point was made to me in an interview with the Nigerian American journalist and Daily Beast contributor, Dayo Olopade who herself wrote about Abdulmutallab. See Samuel Gregory, *Adebayo Ogunlesi*, TIME, Dec. 2, 2002, at 56, available at <http://www.time.com/time/2002/globalinfluentials/gbiogunlesi.html> (discussing the elite credentials of Adebayo Ogunlesi).

119 See Nossiter, *supra* note 32; see also Scott Shane, *U.S. Approves Targeted Killing of Radical Muslim Cleric Tied to Domestic Terror Suspects*, N.Y. TIMES, April 7, 2010, at A12, available at <http://nytimes.com/2010/04/07/world/middleeast/07yemen.html> (discussing the influence of a Yemeni American cleric on several would-be bombers).

120 Venetia Thompson, *My Classmate, The Plane Bomber*, DAILY BEAST (Dec. 30, 2009, 5:51 PM), <http://www.thedailybeast.com/blogs-and-stories/2009-12-30/my-classmate-the-undie-bomber.html>.

although he traveled there repeatedly, presumably because he had the resources to bribe Yemeni immigration officials.<sup>121</sup> He is likely to have omitted this information from any application for U.S. visa renewal. Indeed, this was also true of the would-be Times Square bomber, Shahzad. He was able to obscure another clear “red flag,” namely, his repeated trips to an al Qaeda stronghold in Pakistan.<sup>122</sup>

The bottom line: These facts reinforce the critical nature of Cox and Posner’s omission. Aliens, like all people, are not static personalities. Both Abdulmutallab and Shahzad’s profiles changed such that they no longer matched the U.S. visa “types;” they underwent extreme radicalization only *after* they received their first U.S. visas. Thus, they would probably not have been excluded through *ex ante* screening.

Arguably it is precisely because of this challenge that in the aftermath of 9/11, the United States panicked and “overreached,” in its *ex post* screening of elites.<sup>123</sup> In addition to plentiful stories of Muslim elites whose visa applications were delayed or denied, there emerged myriad narratives of revocations of the visas of elites *subsequent* to their acceptance of positions in the United States.<sup>124</sup> Indeed, U.S. universities asserted that they were losing recruits, because scholars were unwilling to subject themselves to the stigma of potential visa revocation, a problem that they also experienced during the McCarthy era.<sup>125</sup> Such criticism of the post 9/11 dragnet<sup>126</sup> reinforces the point

121 See Lipton & Shane, *supra* note 113.

122 See *Faisal Shahzad Kept Low Profile in U.S.*, CBS NEWS (May, 4, 2010, 7:23 PM), available at [www.cbsnews.com/stories/2010/05/04/national/main6459360.shtml](http://www.cbsnews.com/stories/2010/05/04/national/main6459360.shtml).

123 For the best summary of this data, see B. LINDSAY LOWELL ET. AL., *supra* note 92. See also CTR. FOR STRATEGIC AND INT’L STUDIES, *supra* note 69.

124 While there were several cases, the most prominent case was that of Tariq Ramadan, the Swiss-Egyptian scholar who accepted an endowed Chair at Notre Dame prior to the revocation of his visa. A good summary of the exclusion of several Muslim elites including Ramadan is included in George Packer, *Comment: Keep Out*, THE NEW YORKER 59, 59 (Oct. 16, 2006) (discussing the visa revocation of several prominent Muslims including Ramadan whose visa was revoked on the basis of his \$770 in donations between 1998 and 2002 to a pro-Palestinian French charity that was added to the federal government’s list of designated terrorist organizations in 2003, on suspicion that the charity channeled money to Hamas).

125 See JANINE KEIL, INST. FOR THE STUDY OF DIPLOMACY, GEORGETOWN UNIVERSITY, VOICES OF HOPE, VOICES OF FRUSTRATION (2006), available at [http://www12.georgetown.edu/sfs/isd/ISD\\_Visa\\_Report.pdf](http://www12.georgetown.edu/sfs/isd/ISD_Visa_Report.pdf); BRIGITTE SUTER & MICHAEL JANDL, INTERNATIONAL CTR. FOR MIGRATION POLICY DEV., COMPARATIVE STUDY ON POLICIES TOWARD FOREIGN GRADUATES (2006); *Statement and Recommendations on Visa Problems Harming America’s Scientific, Economic, and Security Interests*, NATIONAL ACADEMIES 1 (May 12, 2004), available at [www.aas.org/news/releases/2004/0512vvisa.pdf](http://www.aas.org/news/releases/2004/0512vvisa.pdf); see also Robert Sedgwick, *Education Professionals Caution about Potential Fallout from Sept. 11*, 15 WORLD

that screening must be narrow and targeted.<sup>127</sup> Mohammed Atta is one engineer of Middle Eastern origin. Another is Pierre Omidyar, the Founder of eBay. It is unclear that such dragnets distinguish between the Attas and the Omidyars of this world. With these sorts of screening techniques, could the next immigrant Nobel Laureate would end up elsewhere?

What is needed is a targeted mechanism of ex post screening that meets U.S. security concerns, while not undermining efforts to recruit the best and the brightest. The question then becomes, how could the authorities have accessed the relevant information? This is the subject of the next section.

### C. *The Situation Then and Now*

In the months following 9/11, detailed hearings laid bare the historical difficulty that the United States had in penetrating terrorist networks.<sup>128</sup> Much was made of the failures of human intelligence.<sup>129</sup> Most disturbing was the fact that many of the 9/11 hijackers appeared to be operating in the clear light of day. These young engineers were widely recognized in their universities, their mosques, and more broadly in their communities. Although they were typically described as middle-class Saudis, there was little doubt that they were educational elites. They had graduated from elite Saudi universities with highly technical engineering degrees. Many people had reason to

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EDUC. NEWS & REVIEWS, (Jan./Feb. 2002), *available at* <http://www.wes.org/ewenr/02jan/feature.htm>.

126 In the aftermath of 9/11, the then competent immigration authority, the Immigration and Naturalization Service provided information to the FBI which allowed them to detain university students of Middle Eastern origin for additional inspection in what was widely viewed as a "dragnet." See LOWELL ET AL., *supra* note 92, at 20–24.

127 Indeed, one paper contends that domestic restrictions on civil rights have been shown to reduce elite migration to the United States. See David Karemera et al., *A Gravity Model Analysis of International Migration to North America*, 32 APPLIED ECON. 1745, 1752 (2000).

128 The findings of these hearings are most comprehensively captured in the report of the 9/11 Commission popularly known as the "9/11 Report." For a summary report, see EXECUTIVE SUMMARY TO THE 9/11 COMMISSION REPORT, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004) [hereinafter EXECUTIVE SUMMARY]. A succinct review of the failures that preceded 9/11, with a particular emphasis on intelligence failures is included in a *New York Times* editorial. See Editorial, *Eight Years Later*, N.Y. TIMES, Jan. 8, 2010, at A26.

129 See Editorial, *supra* note 128, at A26.

know their tendencies towards radicalism and notably, no one had snitched.<sup>130</sup>

Fast forward to the present. Nearly ten years after 9/11, it is apparent that Al Qaeda and its affiliates have attempted to move “up” the food chain by attracting even more elite participants.<sup>131</sup> The list of recent high profile suicide bombers reads like a “who’s who” of elites in their countries of origin. Consider, for example, the following persons.

Humam Khalil Abu Mulal al-Balawi, the Al-Qaeda affiliated suicide bomber who killed several CIA operatives in Afghanistan, was a highly regarded doctor who placed very well in the Jordanian national exams.<sup>132</sup> His wife was a Turkish author of some repute.<sup>133</sup> Indeed, he was sufficiently well known to Jordanian elites to have a working relationship with the highest level of Jordanian intelligence, including a member of the Jordanian royal family.<sup>134</sup> His radical tendencies were well known.<sup>135</sup>

Omar Sheikh, the mastermind of the beheading of *Wall Street Journal* reporter, Daniel Pearl, and a financial supporter of the 9/11 attacker Mohammed Atta, was from a rich Pakistani-British family.<sup>136</sup> He studied at a prestigious British boarding school.<sup>137</sup> Indeed, he represented Britain in the International Athletic World Championships, achieved top grades in the Cambridge-administered high school exams and studied at the prestigious London School of Economics.<sup>138</sup> As with the other subjects, the signs were there.<sup>139</sup> Again, no one snitched.<sup>140</sup>

The key is to provide incentives for persons with better information and access to accomplish U.S. goals. The United States already

130 See EXECUTIVE SUMMARY, *supra* note 128.

131 However, it appears that Abdulmutallab was a shadow of Mohammed Atta, the central 9/11 bomber, in his effectiveness.

132 See *Mystery of CIA Bomber’s Identity*, BBC NEWS (Jan. 5, 2010, 1:30 PM) available at [http://news.bbc.uk/go/pr/fr/-/2/hi/south\\_asia/8441292.stm](http://news.bbc.uk/go/pr/fr/-/2/hi/south_asia/8441292.stm).

133 See *The Bomber’s Wife*, NEWSWEEK (Jan. 6, 2010, 7:00 PM) <http://www.thedailybeast.com/newsweek/2010/01/07/the-bomber-s-wife.html>.

134 See R. Jeffrey Smith et al., *CIA Bomber Struck Just Before Search*, WASH. POST, Jan. 10, 2010, at A12.

135 See generally *id.* (detailing the radical past of the bomber).

136 See Alex Hannaford, *The Toughest Boy in School*, GUARDIAN UK (Feb. 22, 2005), <http://www.guardian.co.uk/world/2005/feb/23/alqaida.usa>.

137 See *id.*

138 See *id.*

139 Stephen McGinty, *The English Islamic Terrorist*, SCOTSMAN (July 15, 2002, 8:00 PM), [http://www.scotsman.com/news/the\\_english\\_islamic\\_terrorist\\_1\\_612783](http://www.scotsman.com/news/the_english_islamic_terrorist_1_612783).

140 See *id.*

does this in a competent manner when critical foreign policy goals are at stake.

As the next section contends, it's simply a matter of motivating the right people, namely, repeat-game players who need to visit the United States.

#### D. *Outsourced Diplomacy: Motivating the Right People*

On June 28, 2009, President Manuel Zelaya of Honduras was exiled following an internal coup. In the months subsequent to the coup, the United States repeatedly expressed the view that the coup was inconsistent with the constitutional obligations of the Honduran government.<sup>141</sup> The United States refused to recognize the interim government, and encouraged the interim President Roberto Micheletti (and presumed coup plotter) to come to the negotiating table.<sup>142</sup> For months, the Micheletti administration refused to negotiate, and failed to respond to a series of U.S. efforts to ratchet up the pressure, including the cancellations of the visas of government ministers.<sup>143</sup>

Then suddenly, members of the Honduran business elite found that their visas had been revoked.<sup>144</sup> Even a cursory network map confirms that the subjects of the visa revocations were all businesspersons with close relationships to Micheletti.<sup>145</sup> The revocations were targeted and strategic. The implicit message was clear. They should utilize their influence to bring their government to the negotiating table or face the prospect of having their visas revoked indefinitely.

The visa revocations appear to have stung particularly hard, causing some shame among Honduran elites.<sup>146</sup> These Honduran busi-

141 The best summary of the events surrounding the coup is included in William Finnegan, *Letter from Honduras: "An Old-Fashioned Coup,"* NEW YORKER, Nov. 30, 2009, at 38.

142 See *id.* at 45.

143 See *id.* at 39; see also William Finnegan, *Gone South,* NEW YORKER (Dec. 3, 2009), <http://www.newyorker.com/online/blogs/newsdesk/2009/12/honduras-zelaya.html> (chronicling the diplomatic response of the United States).

144 Finnegan, *supra* note 141, at 39; see also Finnegan, *supra* note 143.

145 Finnegan, *supra* note 141, at 38 (reporting that the Honduran government is reportedly heavily influenced by ten business families, all of which appeared to be critics of Zelaya and, as such, implicit supporters of the coup).

146 See Finnegan, *supra* note 143 ("[T]he coup leaders were privately stunned by the firmness of the American reaction. They seemed especially hurt by the revocation of their U.S. visas. This would not have happened if Republicans were still in power, they seemed to feel. After all, they had overthrown Zelaya partly in the name of anti-Communism . . . Did the U.S. no longer recognize its friends? The coup regime's first foreign minister called Obama, in a TV interview, 'that little black man who

nesspersons are quintessential “repeat game” players with the United States.<sup>147</sup> Their businesses export to the United States.<sup>148</sup> They utilize U.S.-based correspondent banks. Their children often study in the United States.<sup>149</sup> Given these extensive business and familial networks in the United States, visa revocation effectively curtailed their ability to accomplish important personal and commercial objectives. It could not have been lost on them that the United States had the ability to make their lives substantially more difficult if the Micheletti government did not negotiate. Again using game theoretic analogies, individuals with a high degree of dependence on the United States have maximal incentives to comply with U.S. diplomatic objectives, since the costs of defection are obviously high.

Indeed, the United States has utilized similar techniques to accomplish diplomatic goals with respect to Cuba. For example, prestigious hotel chains were operating hotels on properties which were the subject of legal proceedings following their expropriation from Cuban Americans by the Castro regime.<sup>150</sup> Although the hotel chains were not parties to the legal proceedings and simply tenants on the properties now “owned” by the Cuban government, the United States revoked the visas of the hotels’ principals.<sup>151</sup> The hoteliers quickly terminated their leases, thereby depriving the Cuban administration of needed lease revenue.<sup>152</sup> Since these hoteliers were multinational chains that were heavily dependent on American tourists in other markets, they understood that their business model could have been

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doesn’t know anything”—and that is a bland translation.”). *But see* Finnegan, *supra* note 141, at 42 (in which a prominent Honduran business leader takes pains to make clear that his visa has not been revoked).

147 This relationship calls to mind a classic iterated prisoners’ dilemma, in which the game is played repeatedly. In contrast to a conventional prisoners’ dilemma, in which defection is always more beneficial than cooperation, in an iterated prisoners’ dilemma, which is played over several games, each player has an opportunity to sanction the other player for prior noncooperative behavior. Cooperation may arise as an equilibrium outcome since the incentive to defect may be outweighed by the threat of sanction. *See* JOEL WATSON, *STRATEGY 1–7* (2002) (providing a good summary for the nontechnical reader).

148 *See* Finnegan, *supra* note 141, at 41 (describing the business successes of elite Honduran families).

149 *See id.* at 44 (describing how many rich Hondurans panicked in the chaotic aftermath of the coup, and sought to send their children to the United States).

150 *Jamaica SuperClubs Exits Cuba after U.S. Threats*, BNET (Cuba News), July 1, 2004, available at <http://www.thefreelibrary.com/Jamaica's+SuperClubs+exits+Cuba+after+U.S.+threats.-a0118952223>.

151 *See id.*

152 *See id.*

greatly compromised if they continued to do business with Cuba. That is, they too had minimal incentives to counter the United States.

In Honduras, the United States succeeded. In Cuba, the United States did not (although it did accomplish the more modest goal of depriving the Cuban administration of needed revenue). Honduras came to the bargaining table quickly. The process was undoubtedly accelerated by the intervention of businesspersons who had better information about their government than the United States and were better placed to apply pressure to their President. The United States effectively "contracted out" their diplomatic functions.

Admittedly, there are clear differences between the Cuban and Honduran instances of "outsourced diplomacy" and this proposal. In both the Cuban and Honduran cases, the target group was small. The threat of visa revocations pressured specific visa holders to take a specific action. That is, there was a direct and non-nebulous connection between the goal in question and the visa holders in question. Additionally, even though this Article's proposal is focused on a relatively small group of elites who inhabit the apices of their societies, it clearly involves a much broader target group (i.e., associates of *as-yet-unidentified* elites who *may* carry out terrorist acts). Thus, the connection between the target group and the desired outcome is clearly more tenuous.

Notwithstanding these differences, the central lesson of outsourced diplomacy is still germane to the challenge of identifying which elites with U.S. visas may carry out a terrorist attack. Individuals care what their peers think about them. Visas not only facilitate travel, they are status conveyers, and visa denial may undermine the status of the person who loses her visa.<sup>153</sup> Thus, persons can be influenced to achieve U.S. goals by the strategic allocation and denial of visas. This is the subject of the next section.

### *E. The Screening and Sanctioning Principles*

The United States currently finds itself in the absurd position of screening elite aliens utilizing poor information. Consular officers may have the standard information: curriculum vitae, bank records,

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153 Indeed, this view was expressed by John Campbell, Former U.S. Ambassador to Nigeria, with respect to members of the Nigerian elite. See *Examining the U.S.-Nigeria Relationship in a Time of Transition: Hearing Before the Subcomm. on African Affairs of the S. Comm. on Foreign Relations*, 111th Cong. 27 (2010) (testimony of Hon. John Campbell, Ralph Bunche Senior Fellow for Africa Policy Studies, Council on Foreign Relations) ("The power of the U.S. government to revoke visitors' visas is particularly potent personal leverage with members of the Nigerian elites.").

professional affiliations, university diplomas. However, consular officers lack the nuanced information needed to read between the lines. For example, why was Abdulmutallab often missing classes at university? Given his strong academic performance, there would be nothing in his paper trail to indicate that he missed classes to frequent mosques that were known for radicalism.<sup>154</sup> And why did he drop out of the elite business program in Dubai?<sup>155</sup> Did he remain in Dubai or did he travel to Yemen? With the benefit of a few conversations with classmates and friends, the authorities would potentially have had access to credible information about his unusual behavior, even after they granted his visa.

Herein lies the paradox. Although terrorist groups are typically difficult for Westerners to penetrate, the same cannot be said of elite networks. Indeed, popular networking websites for elites such as “A Small World” are dedicated precisely to this idea.<sup>156</sup> Yet, the information utilized to process visa applications is what I would term “insufficiently networked.” It is garnered with little reference to the networks aliens typically occupy, including networks of family, friends, high school classmates, university peers, business associates, and tribal members. This is even as these network members are generally better information collectors than the U.S. government. After all, they are “on the ground” with the persons in question.

There is precedent for creating incentives for associates of would-be terrorists to share information. Indeed, this is precisely why Congress created the S visa, which provides long-term visas to those who offer valuable intelligence information.<sup>157</sup> But the S visa is not well

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154 For a description of the dangers of extreme Islamic student societies, which often serve as a gateway to radicalism, see Thompson, *supra* note 120.

155 See *Profile: Umar Farouk Abdulmutallab*, BBC NEWS (Oct. 12, 2011, 11:57 AM), [www.bbc.co.uk/news/world-us-canada-11545509](http://www.bbc.co.uk/news/world-us-canada-11545509).

156 See A SMALL WORLD, [www.asmallworld.net](http://www.asmallworld.net) (last visited Nov. 22, 2011) (A small world is “a private community of internationally minded people from around the world,” typically featuring stories about elites in business, education, government, the nongovernmental sector, and culture from all five continents).

157 One might wonder why this Article argues for a penalty rather than a positive incentive to encourage informing. Such a positive incentive already exists. Thus, it is worth distinguishing this proposal from the S visa. This visa is awarded to persons who provide invaluable information to the U.S. government. The proposal in this Article is completely different, namely, a disincentive for not snitching rather than a reward for snitching (which is what the S visa provides). See LEGOMSKY & RODRIGUEZ, *supra* note 2, at 830–31 (2009) (“INA 101(a)(15)(S) authorizes nonimmigrant visas for certain individuals who are willing to share or have shared ‘critical reliable information’ about either a general criminal organization (so-called S5s) or a ‘terrorist organization’ (so-called S-6s) . . . . Although the S-category had been a temporary program and had expired just two days after the September 11 attacks, Congress soon

targeted to elites and it is elite cooperation that is essential. Given their privileged status in their own countries and their generally easy access to U.S. visa privileges, they are less likely than others to be attracted by the prospect of an S visa authorizing a long-term U.S. stay. Elites need a different kind of incentive. The United States has to threaten to take away something that they value.

Herein enters the power of association. Although the idea of social networks appears to be a modern concept, human beings have always been social creatures; we live, work and play in groups.<sup>158</sup> This basic intuition underlies much of modern life. Facebook's extraordinary success is simply a manifestation of this intuition.<sup>159</sup> And yet, although this seems obvious, we have failed to take account of this intuition in how we grant and revoke visas to enhance national security.

The "visa to snitch" proposal is based on two major arguments, which will be succinctly referred to as the information-screening component and the sanctioning component. The information screening component argues that network members who are proximate to visa recipients may be motivated to share with officials inside information as to which persons are likely to be terrorist threats. The sanctioning

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thereafter passed legislation to make the program permanent. Pub. L. No. 107-45, 115 Stat. 258 (Oct. 1, 2001)). On November 29, 2001, Attorney General Ashcroft wrote a memo launching the "Responsible Cooperators Program," in which he officially encouraged various Justice Department personnel to make liberal use of S visas in "appropriate cases." In those instances in which a person who is willing to share important terrorism-related information is ineligible for an S visa, the Attorney General urged the officials to consider parole or deferred action as an incentive for cooperation. *See* 78 IR, at 1816-17 (Dec. 3, 2001)". There are also other visas that incentivize "snitching" including the following: the U and T visas. For a discussion of the U visa, see LEGOMSKY & RODRIGUEZ, *supra* note 2, at 412 ("The U-visas are for those who have 'suffered substantial physical or mental abuse' as the result of . . . rape, torture, trafficking, incest, domestic violence, sexual assault, prostitution, female genital mutilation, involuntary servitude, abduction, felonious assault, and several other criminal acts. The person must possess information concerning that criminal activity and must help law enforcement officials to investigate or prosecute. INA § 101(a)(15)(U)."). For a discussion of the T visa, see LEGOMSKY & RODRIGUEZ, *supra* note 2, at 412 ("T visas are for victims of a 'severe form of trafficking in persons' who are physically present in the United States or a port of entry as a result of that trafficking. If age 18 or over, the person must comply with any reasonable request for assistance in the investigation or prosecution of the trafficking. INA § 101(a)(5)(T).").

158 Granovetter's landmark work popularized this concept. *See generally* Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. OF SOC. 1360 (1973) (discussing the importance of "linkage" to the development of sociological theory).

159 Jennifer Valentino-DeVries, *Facebook's Valuation: By the Numbers*, WALL ST. J. (Jan 3, 2011, 12:33 PM), <http://blogs.wsj.com/digits/2011/01/03/facebooks-valuation-by-the-numbers/>.

component contends that astute officials can utilize soft rules, which leverage the ties within networks to send signals to network members about the costs associated with not sharing information that may be relevant to terrorist investigations.

The information-screening component contends that the United States should motivate network members to aid in both *ex ante* and *ex post* screening. That is, network members should be incentivized to share information in the initial screening process, before visas are issued. But as importantly, they should also be provided with incentives to share such information even *after* visa issuance. Thus, an elite visa-recipient would be sanctioned essentially for failing to report evidence of the transgressions of his peers even if these transgressions occurred *after* the person had already received a visa. Why is this important? Some of Abdulmutallab's associates admitted that although they found his behavior troubling, they had not raised an alarm since they took his student visa to constitute evidence that he had already been screened by competent authorities. Under this proposal, excuses such as these would not be acceptable.

#### F. *What Is the Appropriate Sanction?*

Of course a "duty to snitch" must necessarily be accompanied by a sanction. Under "a visa to snitch," the United States would penalize network members by revoking their visas (or at a minimum reducing the likelihood of visa renewal), if they cannot account for their failure to share pertinent information about a network member's terrorist sympathies that it appears that they had reason to know. If not as a *de jure* matter, certainly as a *de facto* matter, elites typically have access to immigration privileges that are not normally available to their fellow nationals.<sup>160</sup> In exchange for this privilege, recipients of elite visa access should understand that there are implicit duties.

This proposal has clear resemblances to collective sanctioning systems, where community members are sanctioned for the sins of their communal peers. Historically collective sanctions have been employed effectively to improve compliance in a variety of informal arenas in which formal structures for the collection of information were either not present or insufficient.<sup>161</sup> Although such resem-

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160 See *supra* note 111 and accompanying text.

161 See Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 349 (2003). Daryl Levinson provides a brief overview of the utilization of collective sanctions both historically and in modern times with an emphasis on functional rationales for collective sanctioning, emphasizing that the central features of modern legal systems, including vicarious, joint and several, and corporate liability, are justified utilizing

blances are thin as opposed to thick, this point should be conceded. Collective sanctioning systems have generally been criticized for failing to abide by the principle that individual wrongdoers should pay for their individual transgressions and, thus raise significant justice concerns.

Thus, the question of the appropriateness of the penalty is delicate, particularly given that the signs of terrorist sympathies are often nebulous. Hence, the sanctioning principle emphasizes that sanctions should be "soft." In so doing, I contrast it with sanctions that are typically experienced as "hard." For example, the U.S. decision to subject all Nigerian travelers to significantly increased scrutiny (following Abdulmutallab's bomb attempt) was understood by Nigerians as an affront to their national dignity and arguably qualifies as a "hard" sanction.<sup>162</sup>

It bears emphasis: signs of terrorist activity are often nebulous. Again, the case of the younger Mutallab is instructive. Take for example, his leadership of a university Islamic society that has been called a "hotbed of radicalism."<sup>163</sup> With the benefit of hindsight commentators argued that this was a clear warning sign.<sup>164</sup> However, it is not clear that this warning sign would have been evident to the average observer. Indeed, given historical context, the very designation of Abdulmutallab's membership in a student group as a "red flag" may cause our antennas to go up. During the McCarthy era, many students were denied First Amendment protection as "radicals."<sup>165</sup> Anti-

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similar functional rationales. *Id.*; see also Lewis A. Kornhauser & Richard L. Revesz, *Joint and Several Liability*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 371 (1998) (defining terms); Alan O. Sykes, *Vicarious Liability*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 673-77 (1998) (defining term). For a further discussion in the law review literature of the moral and functional justifications for collective sanctions, see also Saul Levmore, *Rethinking Group Responsibility and Strategic Threats in Biblical Texts and Modern Law*, 71 CHI.-KENT L. REV. 85, 88-90 (1995).

Beyond the law review literature, the economics literature also has an extensive discussion of functional rationales for collective sanctioning. For example, economic historians credit collective sanctioning for facilitating a commercial revolution in late medieval times by allowing long distance commercial exchange between parties who had no prior knowledge of each other. See Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 AM. ECON. REV. 525 (1993); Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. ECON. HIST. 857 (1989).

162 See Akunyulim, *supra* note 100.

163 Thompson, *supra* note 120.

164 See generally *id.* (explaining the signs which should have tipped off others).

165 For a summary of First Amendment challenges to McCarthyism in universities see, ELLEN W. SCHRECKER, NO IVORY TOWER 3-11 (1986); see also DAVID CAUTE, THE

Vietnam student groups were investigated precisely because they were perceived as “hotbeds of radicalism”<sup>166</sup> by the Nixon administration. Historians have subsequently judged such investigations to have been motivated by paranoia.<sup>167</sup> Thus, there is a fine line between vigilance and paranoia. Leadership of a controversial student group does not necessarily signify a tendency to violence (although an Islamist society is arguably of a different character than a Vietnam protest group).

Was his leadership of an Islamist student group relevant?<sup>168</sup> Since several leaders of this particular student group have been indicted on terrorism charges, it appears that the answer is yes.<sup>169</sup> Should his friends have subsequently been accountable for failing to alert the authorities to his leadership of this group? There is clearly a potential issue of hindsight bias: research on human judgment suggests that the typical subject has difficulty ignoring a known outcome when assessing an event’s likelihood.<sup>170</sup> Moreover, there is also the issue of what behavior we may reasonably expect the average non-expert network member to consider suspicious. While Abdulmutalab’s leadership of an Islamist society might have appeared relevant to an expert eye, this might not have been clear to a reasonable (but non-expert) network member.

This is precisely why prior to visa revocation, the visa recipient (who is suspected of not having shared pertinent information) should clearly have an opportunity to explain herself.<sup>171</sup> Moreover, a soft approach in sanctioning is counseled by the fact that rather than simply imposing negative duties not to cause harm, the authorities would be imposing affirmative duties to prevent harm. The aim is to impose

GREAT FEAR (1978) (discussing the targeting of “radical” students and professors by different federal and state investigations); DIANE RAVITCH, *THE TROUBLED CRUSADE* (1983) (same).

166 Richard Nixon was famously of this view. See CHARLES STUART, *NEVER TRUST A LOCAL* 138 (2005).

167 See *id.*

168 Gardham et al., *supra* note 31.

169 See *id.*

170 For a good discussion of hindsight bias, see Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ? Ex Ante: Determining Liability in Hindsight*, 19 *LAW & HUM. BEHAV.* 89 (1995) (discussing evidence of hindsight bias in diverse fora from jury to surgical decision making).

171 I should note that most visa holders would not typically be entitled to due process. “[A]n unusual provision in the INA 104(a) exempts individual visa determinations from the supervision and control of the Secretary of State. . . . There is no procedure . . . that permits the applicant to appeal a visa refusal to some higher administrative authority.” THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP* 651 (5th ed. 2003).

a soft sanction, that is, a penalty that is sufficiently tough to deter non-compliance, but not so tough as to undermine precisely the cooperation that one is trying to encourage.

Indeed, the INA already allows the authorities discretion to deny visas to individuals who are believed to have weak connections to terrorist networks, without providing them any opportunity to disabuse authorities of such suspicions.<sup>172</sup> This proposal appears more reasonable, in that persons will be given an opportunity to explain themselves. The point is that there is an obvious line-drawing issue here, but it is hardly different than the type of line-drawing issue that law enforcement officials regularly deal with in the course of many investigations. Given the inherently imprecise nature of terrorist sympathies, it will be incumbent on an official to take this into account in determining whether an associate of a suspect should reasonably have known or have reported her suspicions.

Notably, visa applications do not typically ask applicants to list associates. This is an interesting omission. During the Cold War, U.S. visa applicants were regularly asked to name their affiliations with Communist persons.<sup>173</sup> The point is not to ally this proposal with the misguided methods of the McCarthy era, but simply to point out that this omission in the visa application could easily be remedied. In any event, it is unclear that the government would necessarily want to rely on references provided by the applicant. Savvy applicants would simply fail to list associates who might raise alarm. Moreover, even in the absence of associates provided by the applicant, modern network analysis (the subject of the next section) will allow the government to generate its own network list.

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172 INA § 212 declares that a person is not eligible for admission to the United States if they "commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training . . . for the commission of a terrorist activity." 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)-(aa) (2006). See LEGOMSKY & RODRIGUEZ, *supra* note 2, at 851, for a discussion of the controversy surrounding this provision.

173 See, e.g., Scanlan, *supra* note 42, at 1490 (discussing pre-emptive screening of visa applicants for those with Communist affiliations); see also i-192 APPLICATION FOR ADVANCE PERMISSION TO ENTER AS A NON-IMMIGRANT, available at [www.uscis.gov/files/form/i-192instr.pdf](http://www.uscis.gov/files/form/i-192instr.pdf) ("Do not file this application if you are [a visa applicant who is] inadmissible under INA section 212(a)(3)(D) for being a member of a Communist or other totalitarian party . . .").

### G. *Why the Solution Can Work*

Given recent lessons from social network theory,<sup>174</sup> finding the right people to shed light on potentially problematic visa applicants is entirely practical. Although social network theory has only recently gained currency in the popular imagination as a consequence of the ubiquity of social networking sites, its insights are not new, drawing as they do from long-established precepts of sociology, anthropology, computer science, and organizational behavior.

We can understand social network analysis as:

[M]ap[ping] and measure[ing] formal and informal relationships to understand what facilitates or impedes the knowledge flows that bind interacting units, viz., who knows whom, and who shares what information and knowledge with whom by what communication media. . . . Because these relationships are not usually readily discernible, social network analysis is somewhat akin to an “organizational x-ray.”<sup>175</sup>

Network theory coupled with modern technology provides an easy mechanism of verifying which persons are members of a network. Again, Abdulmutallab is a case in question. Notably, he had 287 Facebook friends the day before his terrorist attack.<sup>176</sup> After the incident, the number of Facebook friends appeared to be falling fast. The point is that people care about which networks they are perceived to be a part of. Clearly, his Facebook friends did not want to be perceived as part of his network.

However, there is the problem of information overload. Who precisely is elite? The elite by definition are a group of relatively small size, occupying a position of privilege within a much larger society. But the question remains: Which elites precisely should be targeted?

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174 Olivier Serrat, *Social Network Analysis*, KNOWLEDGE SOLUTIONS, Feb. 28, 2009, at 28, available at <http://www.cin.vfpe.br/idal/SN%20-%20PFD/Social-Network-Analysis.pdf> (Social networks are defined as “[n]odes of individuals, groups, organizations, and related systems that tie in one or more types of interdependence: these include shared values, visions and ideas; social contacts, kinship, conflict; financial exchanges, trade, joint membership in organizations; and group participation in events, among numerous other aspects of human relationships.”).

175 *Id.* at 2; see also Noel M. Tichy et al., *Social Network Analysis for Organizations*, 4 ACAD. OF MGMT. REV. 507, 510–13 (1979) (describing methods of social network analysis).

176 See Rich Tehrani, *Terrorist Umar Farouk Abdulmutallab a Social Networker*, TMCNET (Dec. 29, 2009), <http://blog.tmcnet.com/blog/rich-tehrani/security/terrorist-umar-farouk-abdulmutallab-a-social-networker.html>; see also Adam Gabbatt, *Web Postings of Umar Farouk Abdulmutallab*, GUARDIAN UK (Dec. 29, 2009, 11:52 AM), <http://www.guardian.co.uk/world/2009/dec/29/web-postings-umar-farouk-abdulmutallab> (providing examples of Abdulmutallab’s postings).

There must be thousands (if not more) cases where persons exhibit troubling behaviors, which are unconnected to terrorist tendencies. Verifying the information provided will increase the time and expense required to process visas, but without verification the process seems pro forma. It would be difficult to sort out the truly useful information from the sea of not-so-useful information. How is the U.S. government going to sort through this potential flood of information?

I have resisted the inclination to identify which particular categories of elites the proposal would apply to. This question is best left to technical experts with national security expertise. Even without the benefit of inside information, some mechanisms of classifying elites to reduce information overload are immediately apparent.<sup>177</sup> For example, elite terrorists appear to be disproportionately likely to have science and engineering backgrounds. Similarly, elite terrorists seem to be disproportionately likely to come from particular regions of the world. The authorities might impose the obligation to snitch only on elites from those regions, in the interest of mitigating the problems of information overload. However, this would feed into a perception that the obligation falls disproportionately on Muslims or those of Middle Eastern origin. In the interest of not alienating precisely those elites where cooperation is most needed, DHS might resist the tendency to categorize publicly, imposing the obligation on a much broader category of elites, even if they later focus on information provided by elites of particular nationalities.

### III. WHY DID THE ELDER MUTALLAB SNITCH?

#### A. Background

A more detailed consideration of the elder Mutallab's network is instructive. Umarmutallab was a former Nigerian Cabinet Minister<sup>178</sup> and Chairman of one of Nigeria's largest banks.<sup>179</sup> He was a member of the Board of Directors of several publicly traded Nigerian firms.<sup>180</sup>

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<sup>177</sup> For example, in the Honduran context the persons who lost their visas were recipients of B-1 business visas, which enabled ease of targeting. The B-1 visa applies to noncitizens who are visiting the United States temporarily for business. See 8 U.S.C. § 1101(A)(15)(B) (2006); 22 C.F.R. § 41.31(b)(1) (2006).

<sup>178</sup> A summary of his biography is included in the leading weekly newspaper of the Hausa tribe in Nigeria. See Idris Ahmed, *Mutallab, An Accomplished Banker*, SUNDAY TRUST (Dec.27, 2009, 12:28 AM), [http://sundaytrust.com.ng/?option=com\\_content&view=article&id=2390:mutallab-an-accomplished-banker&catid=41:latest-news&Itemid=26](http://sundaytrust.com.ng/?option=com_content&view=article&id=2390:mutallab-an-accomplished-banker&catid=41:latest-news&Itemid=26).

<sup>179</sup> See *id.*

<sup>180</sup> See *id.*

He was also particularly prominent in the Muslim community as the primary patron of a well-known mosque.<sup>181</sup>

Umarmutallab is described as someone “whose friends cut across states, religion and sex.”<sup>182</sup> In the words of a Nigerian commentator:

[T]he older Mutallab benefitted from his deft positioning across an immense network of family, geo-ethnic and professional layers of interests. Consequently, the man has had a near permanent presence on Nigeria’s economic landscape as government official, banking investor, facilitator or shareholder—working the levers of power—all through civilian and military governments in Nigeria for more than 35 years.<sup>183</sup>

### B. Rational Motives

With the benefit of hindsight, Umarmutallab’s behavior appears to have been well thought out and highly planned. Irrespective of whether his larger strategic goals might have been to save his son’s life, maintain his mobility, protect his financial assets, or preserve his familial honor, tactically, he took several steps to achieve his broader goals.

First, he utilized his private networks to signal disapproval of his son’s behavior. For example, the elder Mutallab withdrew financial support from his son.<sup>184</sup> He did not hide this information; he shared his decision with family and close associates.<sup>185</sup> In so doing, he made clear to his private networks that he disapproved of Abdulmutallab’s decision to relocate to Yemen while implicitly communicating that anyone else who offered support would incur his disapproval.

But notably, the elder Mutallab moved beyond these quintessentially private actions taken in private networks. Importantly, he took the much larger step of signifying his disapproval to the public authorities by snitching. He met with the Nigerian security officials at the highest levels.<sup>186</sup> He sought their assistance in curtailing his son’s travel overseas and arranging his return to Nigeria.<sup>187</sup>

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181 *See id.*

182 Chido Nwangwu, *The Mutallabs: Terror-bound Son Farouk and Business Mogul Father Umar*, USAFRICAONLINE, (Dec. 26, 2009), <http://www.usafricaonline.com/mutallabs-chido-usafrica/>; *see also* Walker et al., *supra* note 105 (discussing the wealth of Umarmutallab); Rice, *supra* note 108 (noting that his father’s affluence upset Abdulmutallab).

183 Nwangwu, *supra* note 182.

184 *See id.*

185 *See id.*

186 *See id.*

187 *See id.*

Third, through Nigerian security officials, Umarmutallab arranged meetings with their American counterparts. He met with Embassy officials repeatedly, providing evidence of his son's increasing radicalism including details of his travel to Yemen.<sup>188</sup> He expressed particular concern that his son indicated in a telephone call that he did not expect to see his family again.<sup>189</sup> Furthermore, the elder Mutallab reportedly met with a senior officer at the CIA.<sup>190</sup> Through all these efforts, Umarmutallab indicated very clearly whose side he was on. Not only was he not providing support to a terrorist network, he also underlined that he was willing to help disrupt it.

Why did Umarmutallab snitch? Although commentators emphasized the heart-wrenching nature of the father's decision to report his child to the authorities, the emotional nature of the decision does not preclude strategic behavior. Speculation as to the father's motives in subsequent analyses has been rife. Motives are notoriously difficult to ascertain. Indeed, two millennia after Judas Iscariot snitched to the Chief Priests,<sup>191</sup> we are still speculating about what made him do it! Yet in this instance ascertaining potential motives may be fruitful to the extent that it helps us to provide incentives for similar behavior in the future.

Some may have a rather cynical view of Umarmutallab's actions. As a very wealthy man with assets in many countries, he could hardly afford for these assets to be frozen simply because of the wayward actions of his son. As one relative noted, "[t]his is somebody who has investments in the Western world since before the boy was born . . . [h]e's got a £4 million house in London. Now the boy is jeopardizing everything."<sup>192</sup> Moreover, he was necessarily dependent on global mobility to conduct his business. Snitching may have been a pre-emptive mechanism of protecting his mobility and his assets.

On this view, one could posit what might be broadly characterized as rational choice or welfarist accounts of Umarmutallab's behavior. Simply put, on this account, Umarmutallab is a rational utility maximizer who has decided that he is most likely to maximize his welfare by snitching on his son. That is, when faced with the prospect of visa revocation and the potential freezing of his assets if the authorities suspected that he had provided financial support for his son's attempted terrorist attack, he decided that he was simply better off

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188 See Nossiter, *supra* note 32, at A10.

189 See *id.* at A1.

190 See Nwangwu, *supra* note 182.

191 See *Matthew 27:3-8*.

192 Nossiter, *supra* note 32, at A10.

reporting his son. (It is precisely such a view that is reflected in the quotation from a relative in the preceding paragraph.)

The larger point is that it is helpful to view his behavior through a game theoretic lens. That is, like the aforementioned Honduran businesspersons, as a wealthy international banker, the elder Mutallab may be conceptualized as engaging in a series of repeat-game arrangements with overseas actors. For example, if Umarmutallab engages in transnational banking transactions, with intermediary U.S.-based banks, these repeat-game arrangements are necessarily contingent on the cooperation of the U.S. government. Indeed, Umarmutallab may be quite reasonably conceptualized as engaging in a series of repeat game arrangements with the U.S. government itself. The future consequences of noncooperative behavior may give him good reason to pre-emptively snitch.

There is a broader point here. Can the United States expect network members to reliably meet their informational sharing function? Utilizing game theoretic analogies, this Article contends that the answer will generally be yes. In a competitive globalized context in which elites value the access that they have to the United States, the repeated nature of their interactions with the United States increases the likelihood that they will share information.

Yet, this recommendation is not dependent on whether elites “generally” snitch rather than risk withdrawal of their visa privileges. Using the previous game-theoretic analyses, if a player does not perceive that she will suffer in the long term from noncooperative behavior with the United States, she may well defect early in the “game.” Perhaps her U.S. visa is not particularly valuable, particularly if she does not believe that U.S. visa revocation will trigger other Western countries to revoke her other visas.<sup>193</sup> Thus, if a potential snitch has other valuable visas (such as visas to Canada or the European Union) which provide her Western market access, and she does not perceive these visas to be at risk, she may be willing to put her U.S. visa at risk.

Moreover, there are many reasons that she might hesitate to snitch. She might feel there is not really enough evidence to justify her suspicions. Moreover, she might fear that the United States itself will act uncooperatively by failing to keep her cooperation confidential. In so doing, the United States would undermine her status in the

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193 That is, a potential snitch may not believe that Western governments would act cooperatively and collectively revoke her visas. Indeed, this would not be an unreasonable perception since even after the British immigration authorities denied Abdulmutallab's visa application, other countries including the United States did not revoke his visa.

group or even provoke her expulsion from the group. She might also have concerns about the personal safety of family members in her home country who are not able to travel and as such may be quintessential "hostages."<sup>194</sup> Furthermore, even if the consequences are not so extreme, she might be concerned that community members will question her motives. Rather than being perceived as honorable, she might be branded as a U.S. lackey. Moreover, she might remain silent out of a belief that the U.S. government is very unlikely to discover that she had this information. Thus the case does not rest on an acceptance of the prediction that elites will "generally" snitch. It should be enough to posit that elites will snitch in some significant number of cases. Whatever that number is, the benefit of this proposal to the U.S. national interest is considerable, given the terrible potential toll of even a single terrorist act.

### C. Norms-based Motives

Word is, on the streets in Nigeria and abroad, that the name 'Mutallab' is now a bonafide word in the English dictionary! As a noun, it means 'someone who brings shame to his family, to others or to his country.'<sup>195</sup>

Traditional deterrence theory posits a relationship between the perceived certainty and severity of legal sanctions and the likelihood that a rational individual will abide by a rule. Conceptualizing man as a rational calculator of potential costs and rewards from potential acts, legal sanctions are viewed as a cost that would accompany a potential illegal act. Given this view of the "rational man," we should mandate information sharing and enforce tough penalties to motivate network members who suspect terrorist activities to share information. Yet, there is an alternative view. In norm-driven cultures, shame is a primary mechanism of social control and may be utilized to motivate persons to share critical information with the government. Indeed, a less traditional view of effective deterrents (namely successful disincentives to anti-social behavior) is based primarily on this view of social control.

For example, the sociologist Dennis Wrong decried the disproportionate focus on formal sanctions in traditional theories of deter-

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194 See, e.g., Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519 (1983) (arguing that hostages are used for economic purposes).

195 From a popular Nigerian diaspora blogger, "Tochi." Tochi, *In Spite of Mutallab I Am Still Here*, AND TOCHI SAYS . . . WHOSE THOUGHTS ARE YOU THINKING (Jan. 11, 2010), <http://www.tochi.us/blog/?p=1572>.

rence and contended that informal sanctions in the form of social disapproval were potentially as effective deterrents, since man is “essentially motivated by the desire to achieve a positive image of self by winning acceptance or status in the eyes of others.”<sup>196</sup> Since Wrong’s landmark paper, considerable empirical evidence has emerged from the behavioral sciences to support the notion that the withdrawal of esteem is an effective mechanism of sanctioning.<sup>197</sup>

Wrong’s supplement to traditional deterrence theory proves relevant to theories of normative deterrence such as the one posited here. Of course, communal norms do not always reinforce U.S. law enforcement goals. For example, some communities appear to celebrate suicide bombing as a legitimate means of political statement.<sup>198</sup> It would be difficult to stimulate community members to withdraw esteem as an effective method of sanctioning if the very behavior that the United States is seeking to deter is instead celebrated.<sup>199</sup>

However, this is unlikely to be true of elite communities, which the sociological literature tells us generally share an inclination to avoid unwelcome attention.<sup>200</sup> Indeed, although official sanctioning might play some role in the individual decision-making matrices of Umarmutallab, a potentially more relevant factor is that his elite community perceives terrorist violations to be unattractive because they draw unwanted attention to the community. Under a social deterrence framework, Umarmutallab’s action may be viewed against the background of such an elite culture, which prioritizes shame avoidance and honor restoration.<sup>201</sup>

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196 Dennis H. Wrong, *The Oversocialized Conception of Man in Modern Sociology*, 26 AM. SOC. REV. 183, 185 (1961).

197 For a summary of such studies, see Donna M. Bishop, *Legal and Extralegal Barriers to Delinquency: A Panel Analysis*, 22 CRIMINOLOGY 403 (1984). For a summary of more recent work, see Herbert Jacob, *Deterrent Effects of Formal and Informal Sanctions*, 2 LAW & POL’Y Q. 61, 69 (1980).

198 See Adam L. Silverman, *Just War, Jihad, and Terrorism: A Comparison of Western and Islamic Norms for the Use of Political Violence*, 44 J. CHURCH & STATE 73 (2002).

199 See *id.*

200 See generally BOTTOMORE, *supra* note 13.

201 Indeed, precisely this point is captured in two classic works of literature from Nigeria which share similar themes: the Nobel Laureate Wole Soyinka’s *Death and the King’s Horsemen* and the Nobel nominee Chinua Achebe’s *Things Fall Apart*. *Death and the King’s Horsemen* is inspired by a famous incident in Nigerian colonial history. See Bernth Lindfors, *A Last Shot at the 20th-Century Canon*, in NEW DIRECTIONS IN AFRICAN LITERATURE 109 (Ernest N. Emenyonu ed., 2006) (noting that in both Soyinka and Achebe’s texts, the protagonists go to great lengths to extirpate shame and restore family honor, even by committing ritual suicide).

Given this background context, it is perhaps unsurprising that in the Nigerian blogosphere, the younger Mutallab's actions were widely perceived as bringing shame not only to the family, but also to the nation. One blogger on a popular Nigerian diaspora blog decried the failure of Nigerian elites to defend their country's name publicly in the face of the Obama administration's decision to put Nigeria on a "high risk" terror list,<sup>202</sup> declaring, "the Mutallab effect seems to be shutting us all up. The shame is collectively shared. The collateral damage is resulting in embarrassment and self-doubt."<sup>203</sup> As if to extirpate such shame, a headline in a major Nigerian newspaper appropriated the words of a Nigerian Minister to capture the sentiments of the entire country: "He is not one of us."<sup>204</sup>

A noble view of the older Mutallab's motives highlights the potential disgrace to the family name that would, and did, result from his son's actions. In anticipation of the monumental blow to the family's honor, the father's decision to snitch might be viewed as a pre-emptive attempt to restore honor. While the son has sullied the family and the nation, the elder Mutallab's actions have been perceived as a valiant attempt to restore the dignity of his family and the broader Nigerian society.

It bears emphasizing that these constructs are not peculiar to Nigeria, and, as such, the broader insight has larger applicability. Shame has been a historical mechanism of sanctioning in a wide range of cultures from the Hebrew nation, to indigenous tribal groups on all five continents.<sup>205</sup> Even biblical prophets were subject to shame when they transgressed widely understood social rules.<sup>206</sup> The Israelite King David was shamed repeatedly for committing adultery in violation of biblical laws, despite his elevated status. David's narrative is simply a biblical antecedent to that of the Mutallab family;<sup>207</sup> many

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202 Micheline Maynard & Liz Robbins, *New Restrictions Quickly Added for Air Passengers*, N.Y. TIMES (Dec. 26, 2009), <http://www.nytimes.com/2009/12/27/us/27security.html>.

203 See Reuben Abati, *Mutallab: We Are Guilty by Association*, NIGERIAN VILLAGE SQUARE (Jan. 3, 2010, 05:01 AM), <http://www.nigeriavillagesquare.com/articles/reuben-abati/mutallab-we-are-guilty-by-association.html>.

204 Akunyulim, *supra* note 100.

205 Two such classic texts are MICHAEL BARKUN, *LAW WITHOUT SANCTIONS* 20 (1968) and E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN* 232 (1954).

206 The following text in Jeremiah is understood to be a warning to prophets who would transgress social rules: "The wise men are put to shame, They are dismayed and caught; Behold, they have rejected the word of the Lord, And what kind of wisdom do they have?" *Jeremiah* 8:9 (New American Standard).

207 The narrative of David's transgression and punishment by God, including public shaming, are contained in the Old Testament at 2 *Samuel* 11–12.

societies have their own Davids. Communal shame-based sanctioning has a long heritage (and surely a longer heritage than law-based sanctioning!).<sup>208</sup> Although much has been made of the decline of shame as an effective mechanism of sanctioning in modern society, in many societies, shaming is still an effective mechanism of social control.<sup>209</sup>

*D. What Are the Implications of a Norms-based Analysis?*

Given this background recognition of a shame-based approach to motivating compliance with legal rules, the U.S. government may be better served by a soft, as opposed to a heavy-handed approach. Hence, the focus on visa revocation. The revocation of such a privilege, which is typically done privately by the State Department (and as such, is not a matter of the public record), is a quintessential “soft” approach.

By articulating a duty to snitch and reinforcing extant communal norms in a subtle as opposed to heavy-handed manner, the U.S. government will potentially reduce the likelihood that network members will fence-sit. The aim is for the government to motivate network members to signal clearly which side of the fence they fall on. In so doing, they may even motivate network members to withdraw esteem from any other network member who had reason to know valuable information and failed to snitch.

A final point may be in order. The emphasis on norms/communal based sanctioning derives in part from an appreciation of the clear differences between the manner in which the state functions in less-developed states such as Nigeria and the traditional understanding of state function in the Anglo-American legal tradition. In many developing countries, the state is not a reliable provider of public goods; it is functionally irrelevant.<sup>210</sup> Rather, the individual will rely on

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208 McAdams makes this point forcefully. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 350–75 (1997). The point is discussed in all of the following texts, which discuss individual shaming, particularly as a mechanism of mitigating collective shame. See generally COLLECTIVE RESPONSIBILITY (Larry May & Stacey Hoffman eds., 1991); PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY (1984); CHRISTOPHER KUTZ, COMPLICITY (2000); LARRY MAY, SHARING RESPONSIBILITY (1992); LARRY MAY, THE MORALITY OF GROUPS (1987); Joel Feinberg, *Collective Responsibility*, 65 J. PHIL. 674 (1968).

209 McAdams has a good summary of the continued prevalence of shame-based sanctioning systems. McAdams, *supra* note 208. Indeed, modern Chinese shopkeepers in New York regularly post the names and pictures of shoplifting suspects as a deterrent to future shoplifters. Corey Kilgannon & Jeffrey E. Singer, *Shoplifting Suspects' Choice: Pay or Be Shamed*, N.Y. TIMES, June 22, 2010, at A1.

210 This point is made particularly well in the literature in context of post-conflict societies. See, e.g., Donald L. Horowitz, *Conciliatory Institutions and Constitutional*

extended tribal and familial ties for the protection of life, liberty, and property, and even "public goods" (e.g. roads, public utilities etc.) will often be provided through extended tribal and familial networks. In such a context, it becomes particularly important to leverage extant tribal/communal based norms. Thus, a duty to snitch may be perceived as an attempt to "nudge" the elder Mutallab off the proverbial fence to report behavior that is already in violation of communal-based norms.<sup>211</sup>

#### IV. THE DANGERS

I now turn to discussing a few of the elephants in the room. First, there are concerns about the dangers of alienating subsections of society that are critical to law enforcement efforts by placing affirmative obligations upon them that are not perceived to apply more broadly to other sections of the society. Second, there is a concern regarding the McCarthyite implications of imposing a duty to snitch.<sup>212</sup> Third, there is a concern regarding the dangers of corruption of the process more generally. Moreover, there may be major due process and equal protection concerns among immigrants and Muslim Americans.<sup>213</sup> If

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*Processes in Post-Conflict States*, 49 WM. & MARY L. REV. 1213 (2008); Jamie O'Connell, *Here Interest Meets Humanity: How to End the War and Support Reconstruction in Liberia, and the Case for Modest American Leadership*, 17 HARV. HUM. RTS. J. 207 (2004); Paul Richards, *War and Peace in Sierra Leone*, 25 FLETCHER F. WORLD AFF. 41 (2001).

211 The utilization of the term "nudge" here is a play on the utilization of the term in RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* (2008). The book draws on research in psychology and behavioral economics to defend libertarian paternalism and active engineering of choice architecture.

212 Although the policy proposal undoubtedly raises some of the concerns of this earlier era, First Amendment challenges to perceived exclusion on the basis of certain ideological commitments (or even more tenuously association with those bearing certain ideological commitments, since this proposal specifically targets "associates") are unlikely to be successful. See *infra* note 240 and accompanying text.

213 Although this is undoubtedly a serious concern, it bears emphasizing that this is not a primary topic of this Article. Indeed, this has been dealt with ably elsewhere. See, e.g., Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling after September 11*, 34 CONN. L. REV. 1185 (2002); see also, Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1413 (2002); Marie A. Taylor, *Immigration Enforcement Post-September 11: Safeguarding the Civil Rights of Middle Eastern-American and Immigrant Communities*, 17 GEO. IMMIGR. L.J. 63, 72–85 (2002); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002); Karen C. Tumlin, Comment, *Suspect First: How Terrorism Policy is Reshaping Immigration Policy*, 92 CALIF. L. REV. 1173 (2004). Several of the articles in *supra* note 71 also discuss this concern.

these concerns are left unaddressed, Muslim American advocacy groups have argued that such perceived targeting of communities will undermine intelligence sharing.<sup>214</sup>

Writing in the racially charged context of the civil rights movement, Malcolm X famously warned of the dangers of placing affirmative duties (i.e. to prevent harm) as opposed to negative duties (simply not to cause harm) on certain subsections of the society.<sup>215</sup> Malcolm X argued that the imposition of such obligations on blacks and black Muslims in particular (even implicitly) threatened to alienate precisely those portions of the population whose cooperation is critical to law enforcement efforts.<sup>216</sup>

The applicability of this critique to this proposal is obvious. Indeed, among public intellectuals, there has been considerable disquiet about the distinction between “moderate” and “other” Muslims.<sup>217</sup> There also appears to be an implicit obligation that seems to attach to Muslims to display their moderate bona fides.<sup>218</sup> To the extent that this proposal is formulated specifically in response to Al Qaeda’s penetration of Muslim elites, and might appear to disproportionately impact Muslim elites, critics might reasonably argue that obligations are yet again, attaching to Muslims to prove their “moderation” in a manner that is not expected of non-Muslims. Such actions potentially undermine faith in law enforcement.

Moreover, Natapoff has written convincingly of the dangers that an excessive reliance on snitching will undermine faith in law enforcement in the context of another community, namely poor African American urban communities:

The policy [of disproportionate reliance on snitching] presupposes a community filled with criminals that needs to be infiltrated in order to be saved. It is a community with reduced privacy interests in which it is permissible for the state to use informants to penetrate the most private zones in pursuit of prosecutorial goals. It is, in essence, a community with lessened dignitary interests in the eyes of the state . . . [a community that] is treated as having relinquished some of the basic rights to privacy and to be let alone.<sup>219</sup>

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214 See *supra* notes 45–46 for references containing a discussion of these concerns.

215 See *supra* note 46 and accompanying text.

216 *Id.*

217 The debate between Daniel Larison and Ross Douhat on the *New York Times* blog epitomizes the concern regarding this distinction. See Ross Douhat, *More on Rauf and Moderate Islam*, EVOLUTIONS (Aug. 27, 2010, 9:10 AM), <http://douhat.blogs.nytimes.com/2010/08/27/more-on-rauf-and-moderate-islam/>.

218 See *id.*

219 Natapoff, *supra* note 39, at 695 (footnote omitted).

Some of these concerns are unavoidable. Nevertheless, they can be mitigated. Indeed, it is precisely for this reason that I have taken pains to emphasize the "soft" nature of the sanctioning for non-compliant persons. Notably, the Department of Justice has been criticized for what has been characterized as prosecutorial overreaching in relation to the communities of terrorist suspects.<sup>220</sup> The concern is that law enforcement targets community members even when they play no role in attacks, for unrelated and relatively minor immigration transgressions, thus undermining the likelihood that communities will share intelligence with the authorities.<sup>221</sup> Moreover, these communities are now transnational.<sup>222</sup> If an immigrant is deported for a minor immigration infraction, she will take the animosity she feels towards the United States back to her community and country of origin, thereby undermining the likelihood that her broader circle of family and friends will cooperate with the United States.

This point is particularly relevant in light of the earlier point about the distinction between the manner in which the state has traditionally been conceptualized in the Anglo-American legal tradition, and the limited utility of the state in developing countries such as Nigeria. If developing countries are not well placed to be reliable intelligence partners,<sup>223</sup> it is especially important to keep the communities within these countries on the side of the United States. Hence, the necessity for a more flexible approach to sanctioning that allows one to leverage these communal ties.

A. *The Dangers of the Imposition of an Affirmative Duty More Generally*

The critique is augmented by the proposal's imposition of affirmative duties as opposed to the traditional negative duties on elites. In

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220 See Ashar, *supra* note 213, at 1193 ("[T]he DOJ, working on less-than credible tips, has effectively disrupted individual lives, families, and communities.").

221 See *id.*

222 The transnational nature of the alien population is a major theme in the sociological literature, but the law review literature generally appears not to have incorporated this insight. For a summary of the transnationalism research, see Peggy Levitt, *Salsa and Ketchup: Transnational Migrants Straddle Two Worlds*, in THE CONTEXTS READER 445 (Jeff Goodwin & James M. Jasper eds., 2008). The sociology literature generally refers to transnational persons as migrants who maintain strong connections to their countries of origin. The only person who seems to have incorporated this insight in the legal scholarship is Kim Barry. See Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 11 (2006).

223 This may be the case even if the state is well intentioned; its unreliability may simply be due to its limited reach. Indeed, this point is made particularly well in a *New York Times* article on Nigeria's intelligence failures. See Adam Nossiter, *Security Flaws in Nigeria Are Now Drawing Notice*, N. Y. TIMES, Jan. 2, 2010, at A10.

the traditional liberal philosophical conception of moral personhood, all persons are moral agents who have varying moral duties. Yet not all duties are created equal. That is, there is a moral and conceptual distinction between affirmative and negative duties.<sup>224</sup>

Negative duties restrict actions; they set limits of behaviors that we may not pursue without infringing on the rights of others.<sup>225</sup> Negative duties follow from liberalism's prioritization of individual autonomy and rights. On a traditional conception of negative moral duties, it would be understandable if visa recipients have a duty not to harm. This proposal however, goes further. Not only do visa recipients have a duty not to harm, they have a duty to share such information to prevent such harm, to the extent that information, which may prevent terrorist threats is accessible to them. They have an affirmative duty to take action. Such a duty is bound to be more controversial, because it arises from an affirmative conception of human obligation. Although positive duties are more likely understood to hold generally (that is, we have a general duty to help others), how we fulfill that duty is typically left up to us.<sup>226</sup> In this proposal, an obligation is imposed on the individual to help the authorities. The individual appears to have little say in the matter.

The imposition of affirmative duties is a logical extension of an emerging consensus (certainly post 9/11) that we have affirmative obligations to prevent terrorist attacks. We are all familiar with the injunctions in airports and train stations to report strange behaviors, strange bags etc. Typically, for American nationals, there are rarely legal consequences for a failure to report suspicious activity.

However, the same cannot be said for noncitizens. For example, at least one friend of the would-be Times Square bomber, Shahzad was deported for a minor visa infraction although he was never charged and no evidence was presented publicly that he had specific knowledge of Shahzad's nefarious activities.<sup>227</sup> The reason for the deportation was clear. The FBI was clearly sending a message to the

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224 An accessible summary of the difference between the two types of duties is H. M. Malm, *Directions of Justification in the Negative-Positive Duty Debate*, 27 AM. PHIL. Q. 315 (1990).

225 *See id.*

226 *See id.*

227 Shelly Murphy, *Pakistani Testified Before Grand Jury*, BOSTON GLOBE, June 5, 2010, at B10, available at [http://www.boston.com/news/local/massachusetts/articles/2010/06/05/man\\_arrested\\_in\\_ny\\_terror\\_plot\\_testified\\_before\\_grand\\_jury/](http://www.boston.com/news/local/massachusetts/articles/2010/06/05/man_arrested_in_ny_terror_plot_testified_before_grand_jury/). Minor violations would not as a matter of practice result in deportation even in what scholars have characterized as a hostile "crimmigration" climate. *See, e.g.*, Chacón, *supra* note 71 (discussing the "criminalization of migration in the United States").

community of Pakistanis. If you suspect something, speak up. Otherwise, your own visa privileges may later be at risk. Yet while it was clear that the authorities were sending a message, the FBI refused to confirm reporters' suspicions. But why the subterfuge?<sup>228</sup> If as a *de facto* (if not *de jure*) matter, certain aliens are subject to visa revocation for failing to report behavior that the authorities believe that they had reason to know, shouldn't DHS be forthright about precisely what their reporting obligations are?

### B. *The Dangers of Corruption in Social Networks*

In most visa-allocation programs, typically, the number of qualified applicants will exceed the number of visa slots. Therefore, the potential rent-seeking problems are apparent. In this particular proposal, the corruption concern is arguably augmented. How so? Projects that are reliant on leveraging social networks are particularly prone to corruption because they are necessarily reliant on friendships and familial relationships.<sup>229</sup> This project suffers from the same deficiency that characterizes projects that are similarly reliant on social networks.

What is the implication of this insight for this proposal? One could imagine that members of one tribal group may receive preferences not available to members of another tribal group. The implication of this is that certain elites may be inclined to receive the benefit of the doubt with respect to potentially suspicious behavior in relation to other elites. Thus, repeated travel to Yemen may be perceived as problematic for members of one elite group but not for members of another elite group.

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228 The term "subterfuge" in legal scholarship has been popularized by Guido Calabresi. Policy makers often employ "subterfuges," that is, fictions to shield the tragic nature of their choices that offend deeply held values from public view. GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW* 88 (1985).

229 As one commentator has said:

[T]here is an important cultural component to corruption. Many corrupt officials do not seek to transgress social rules; rather, the rules of their society demand that they help family and friends *before* they see to the general public interest. In many ways, nepotism is one of the most natural of human impulses.

Francis Fukuyama, *Social Capital and Development: The Coming Agenda*, in *SOCIAL CAPITAL AND POVERTY REDUCTION IN LATIN AMERICA AND THE CARIBBEAN* 35, 45 (Raúl Atria et al. comps., 2004).

### C. *McCarthyite Tendencies: Undermining Social Trust*

There is also the question of whether the spirit (if not the letter) of the First Amendment is being breached.<sup>230</sup> Decisions during the Cold War era to exclude aliens for their associations with suspected American communists (and implicitly for their unwillingness to “snitch” on these communists) have withstood judicial scrutiny; it seems clear that we may set aside constitutional concerns.<sup>231</sup> However, even if we are able to get around the constitutional questions, aspects of the proposal rightly offend our deepest moral intuitions.

Indeed, the reliance on a culture of snitching that is reminiscent of the McCarthy era, in and of itself raises serious concerns. For example, detailed ethnographic studies of the impact of an informant culture in East Germany illuminate the dangers of an over-reliance on snitches to the social fabric of the broader society.<sup>232</sup>

With husbands snitching on wives and neighbors snitching on neighbors, a widespread atmosphere of distrust developed in the broader society. Indeed, one author described the “indirect harm” of a widespread societal “malaise” or societal “schizophrenia.”<sup>233</sup> In the words of one East German intellectual, “[t]hese informers determined my life . . . [i]n one way or another—because they poisoned us with mistrust.”<sup>234</sup>

A similar culture of suspicion is said to pervade the Palestinian territories, partly because of the widespread suspicion that Israel is

230 Supreme Court jurisprudence makes it clear that any First Amendment challenges to immigration restrictions are likely to fail, even when the First Amendment interests of American citizens are at stake. This jurisprudence is summarized in *Kleindienst v. Mandel*, 408 U.S. 753 (1972). Although American citizens have the right to associate with and receive information and ideas from aliens whom the government desires to exclude, this right will generally not outweigh “Congress’ ‘plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.’” *Kleindienst*, 408 U.S. at 766 (quoting *Boutlier v. INS*, 387 U.S. 118, 123 (1967)); see also *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 117 (2nd Cir. 2009); *Bustamante v. Mukasey*, 531 F.3d 1059, 1061 (9th Cir. 2008); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 682 (6th Cir. 2002); *Price v. INS*, 41 F.2d 878, 842 (9th Cir. 1991).

231 Notably the duty will apply only to foreign nationals on foreign soil who would typically have difficulty pressing First Amendment claims. Indeed as the cases in the previous footnote illustrate, even American citizens who seek to associate with or benefit from the ideas of such excluded foreign nationals have had difficulty pressing First Amendment claims.

232 The most comprehensive work in this regard is Barbara Miller’s. BARBARA MILLER, *NARRATIVES OF GUILT AND COMPLIANCE IN UNIFIED GERMANY* (1999).

233 *Id.* at 133.

234 *Id.* at 101.

highly reliant on Palestinian informants.<sup>235</sup> Palestinians who are perceived to be beneficiaries of elite privileges (such as access to travel permits) are often the targets of suspicion.<sup>236</sup> Similar stories also emerge from Northern Ireland, again because of the perceived reliance of the authorities on informants.<sup>237</sup>

Of course, the diffuse utilization of snitches in diverse elite networks on different continents is not equivalent to the concentrated efforts of the East German secret police. Yet, one need not go so far to recognize the dangers to the communities from which the snitches originate. The effect that the McCarthy era had in cultivating a culture of suspicion in targeted communities (such as the artistic and academic communities) provides plentiful examples.<sup>238</sup> Thus, if visa revocations are too widely utilized, those who retain their visas will necessarily become the targets of suspicion in their communities (not unlike the aforementioned Palestinians).

Moreover, the dangers of reliance on informant institutions are exacerbated because we often cannot know the motives of the persons who are snitching. In addition to the previously discussed corruption problem, there are also dangers of elite capture.<sup>239</sup> Given the highly competitive nature of some elite networks, consider the following example. One could imagine that an elite entrepreneur might share inaccurate information about a competitor in a deliberate effort to discredit her and even have her removed from the United States.

Although generally we hope that the persons who come forward to share information will be "good" types who have sincere concerns regarding a peer who may be a terrorist threat, there may be either "bad" types or "mixed" types who proffer information. These would include individuals who purposefully utilize this process to tarnish the reputation of someone who is not a terrorist threat. They could also use the process to curry favor with the authorities for their own pur-

235 See Lee Hockstader, *Palestinians Battle the Enemy Within: Menace of Israeli Collaborators Spawns Executions, Vigilantism, Revenge Killings*, WASH. POST, Feb. 2, 2001, at A18.

236 See *id.*

237 See Editorial, *Haunted By an Informer*, BOSTON GLOBE, May 20, 2003.

238 A comprehensive text documenting the effect of the McCarthy era on cultural communities, particularly Hollywood, is VICTOR S. NAVASKY, *NAMING NAMES* (1980). The playwright, Arthur Miller recognized this risk decades ago. On risks of snitching, see John Lahr's review of Arthur Miller's seminal play, *A View from the Bridge*. John Lahr, *Devil in the Flesh: Arthur Miller and Noël Corwald on Acting Out*, NEW YORKER, Feb. 1, 2010, at 78.

239 A good summary of the challenges of elite capture is included in Pranab Bardhan & Dilip Mookherjee, *Capture and Governance at Local and National Levels*, 90 AM. ECON. REV. 135 (2000) and Jean-Philippe Platteau, *Monitoring Elite Capture in Community-Driven Development*, 35 DEV. & CHANGE 223 (2004).

poses, including motivating the authorities to forgive their own criminal behavior.<sup>240</sup>

However, these concerns can be mitigated if it is made clear that information will not be taken at face value, but rather will be subject to rigorous verification. The best deterrent to such behavior is to make clear that individuals may compromise their visa privileges if it later turns out that they knowingly shared false information for nefarious motives. The goal is to provide incentives for persons to share information that they reasonably believe to be troubling, while providing disincentives for them to share information that they have good reason to believe is false.

#### CONCLUSION

In contexts beyond Nigeria, the United States may strategically deploy both the revocation of privilege and this cultural valuation of family honor as a mechanism for motivating persons to share important information. By articulating a duty to snitch, which reinforces communal norms, the United States can nudge the Umarmutallabs of the world in the right direction.

Importantly, the “nudge” should be sufficiently soft so as to be constructive. Moreover, if communal norms are already working in the United States’ favor, soft sanctions such as a threat of visa revocation may be more effective than heavy-handed approaches.

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240 “Mixed” types include individuals who may not harbor ill will towards other elites who have visas. Nevertheless, they share information for motives other than a general affirmative duty to prevent harm, without taking reasonable efforts to verify such information even if they have reason to believe that such information may not be accurate.