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The Myth of Entrapment

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misconduct in Green Scare prosecutions

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The word entrapment conjures images of agent provocateurs, phone taps, and men in suits listening to fuzzy conversations in white vans down the street. But most of all, it feeds into the myth of justice in a system that is hell-bent on pursuing the malicious prosecution of any and all movements that dare to oppose it.

When Eric McDavid was arrested in January 2006, then a 28-year-old environmental activist, entrapment was the word on everyone's lips. Accused of "conspiracy to destroy by arson or explosives" public and private property, Eric was arrested at gunpoint, thrown into the Sacramento County, California Main Jail, labeled a "terrorist," denied bail (twice), and sat in jail for almost two and a half years before being convicted of a crime.

When he was found guilty at trial, he was sentenced to an outrageous 19 years and 7 months in prison. All of this was the result of an undercover informant, "Anna," whom Eric had known for over a year and a half at the time of his arrest. She spent that time befriending Eric, drawing him in romantically

and philosophically, and creating a case that would become a shining example of success for the FBI.

At the time of his arrest, Eric (and two other people with whom he was arrested) was living in a cabin in the small town of Dutch Flat, 150 miles northeast of San Francisco.

The cabin was paid for by Anna. The car they traveled in was owned by Anna. When the group went grocery shopping, Anna footed the bill. The computers they used were supplied by Anna. In fact, the group would not have been on the same coast if not for the great efforts of Anna, who drove Eric's companions, Zach and Lauren, from Washington DC to California in her own car.

All of the "bomb recipes" — written in Anna's handwriting in a little black book — were supplied by her, and all of the materials the group purchased to assemble the so-called bombs were paid for by Anna. It is quite simply true: what the government designated a conspiracy would never have existed without Anna's involvement.

If this isn't entrapment, what is?

Case law around entrapment is as varied as the courts themselves. Ultimately, what it comes down to in any courtroom is what the judge tells the jury they must consider when looking at the evidence. In Eric's case, the jury was told that the government must prove "the defendant was predisposed to commit the crime before being contacted by government agents, or 2) the defendant was not induced by the government agents to commit the crime."

To really understand entrapment, then, we must define things like "predisposition" and "inducement." Predisposition simply means that a defendant would have been inclined to commit the crime even without government involvement. Inducement refers to "government conduct that creates a substantial risk that an otherwise law-abiding citizen will commit an offense" (US v. Manarite). According to a brief filed by the government in Eric's case, this can include "persua-

sion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship” (US v. Davis).

This all seems straightforward enough, but it gets tricky when arguing the details at trial, because both sides are trying to offer proof of something that can be incredibly difficult to prove — a person’s intent, their personality, their will. The old saying, “actions speak louder than words” is quite applicable here. People can talk for days about things they may or may not do, but until they actually do them, who’s to say whether or not they are predisposed?

Eric’s case was obviously not the first of its kind. The U.S. Supreme Court first recognized entrapment as a valid defense in 1932. But since Eric’s arrest and conviction there has been an upswing of reports in the media about “terrorist cells” being infiltrated by FBI informants. The way many of these cases were created and prosecuted is strikingly similar to the manner in which Eric’s case unfolded.

Informants work their way into a community (in most recent cases, it’s the Muslim community that is targeted) and starts snooping. They often speak with bravado and talk boldly about illegal actions. They seek out people they perceive as weak and/or easy to manipulate.

In the case of the Newburgh 4, charged with plotting to bomb a Bronx synagogue and a Jewish community center, and shoot down military planes, the informant was promising them large sums of money. One of the four was trying to get money to help pay medical bills for his ill brother.

And, they almost always provide the means for the so-called conspiracy to actually move forward. In Miami, in the Liberty City 7 case, the informant provided the defendants with money, a meeting space, video cameras (ostensibly to conduct surveillance), cell phones, even boots. And, of course, the informant provided them with plenty of suggestions about what their targets should be.

Despite all this, no one charged with a terrorism-related offense since 9/11 has successfully used the entrapment defense.

There are, perhaps, a few different reasons for this. As previously discussed, entrapment is an incredibly difficult thing to prove or disprove. And, if a prosecutor doesn't like the way court proceedings are going, they can always convince the judge to define the terms and present them to a jury in a way that makes proving entrapment virtually impossible (as the judge did in Eric's case).

In today's political climate, most juries, hammered by patriotic rhetoric from the prosecution (and sometimes even the judge), are probably often intimidated into a conviction. Most people who could find themselves in the jury room of a federal terrorism trial would probably want to be seen as anything but "soft on terrorism."

And, let us not forget, the government is quite skilled at bending and manipulating the law to make it work for them. By Anna's own testimony, Eric was not "predisposed" when he met her in August of 2004. Based on transcripts from the discovery phase of the proceedings, when Anna asked Eric what had "radicalized" him, the only specific thing he mentioned was his relationship with her.

To get around this little problem, the government convinced the judge to redefine "first contact" (predisposition refers to a defendant's state of mind prior to contact with a government agent) as the first time the defendant and the agent talk about the alleged crime, which pushed the time period the jury could consider for predisposition back a full year after Eric and Anna met, interacted, and built a relationship.

We must never think that the law will protect us; that is absolutely not what it is designed to do. The state spends a vast amount of resources on building and prosecuting these cases. They are loathe to lose them and will go to great lengths to ensure convictions (including having their witnesses lie on the

stand, losing evidence, trying to have defense lawyers removed from the case, etc.).

Given all this, entrapment, as conceived by most people, doesn't really exist as a defense. The myth of entrapment is not that it doesn't exist, but that it exists for them; not for us. It allows the state to pretend there are safeguards in place to protect us from "outrageous government conduct." It convinces us that if we do everything right, there might be a way out. It makes us believe that if we play along with the system just a little longer, our friend or loved one or brother or sister or son just might get out of jail.

Yes, Eric McDavid was entrapped. So were the Newburgh 4 and the Liberty City 7. And, tomorrow it will be someone else. Because entrapment works.

In an article published on the FBI's website in June 2008, Putting Intel to Work Against ELF and ALF Terrorists, Eric's case is held up as an example of how a successful investigation should be run. Yet, after Eric was convicted, several jurors went on-record with critical statements about Anna and the FBI.

Two jurors signed affidavits stating that Anna and the FBI were an "embarrassment." They felt Eric had a strong case for entrapment, were confused by the judge's instructions, and that Eric deserved, at the very least, a new trial. The thought of Eric's case as a success for the FBI has frightening implications for the future of any movement seeking radical change.

But instead of cowering in fear, which is clearly the government's intended purpose, let us instead learn what we can from our past. And, keep pushing forward.