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Publication Citation
12 Indiana Journal of Law & Social Equality 209

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COUNTERING JIHADI COOL
AND THE CASE OF RAZA V. CITY OF NEW YORK

Caroline Joan (Kay) Picart*

This Article begins with an explanation of the rhetoric, aesthetics, and culture of jihadi cool/chic, which is a crucial factor in the formation of self-radicalizing individuals. It then analyzes the jurisprudence, and legal and cultural ramifications of Raza v. City of New York, in which the New York Police Department had initiated an intense covert surveillance operation that focused on Muslims in New York and beyond without probable cause. This led to a lawsuit that claimed that the New York Police Department’s Muslim Surveillance Program violated the Fourteenth Amendment’s Equal Protection Clause, the First Amendment’s Free Exercise and Establishment Clauses, and the New York State Constitution. The Article concludes with analyzing the hidden assumptions that underlay the legal and cultural dynamics in Raza to illustrate that both sides ironically assumed one of jihadi cool’s corollaries: that Islam is the gateway to radicalization.

OVERVIEW: SURVEYING THE SHIFTING TERRAIN

This Article springs from a confluence of factors, including the proliferation of both domestic and global instances of terrorism, such as: (1) the development of “self-radicalizing terrorists” as linked to internet activity; (2) the allure of a virtual culture of “jihadi cool” or “jihadi chic,” which has become a powerful recruitment tool of some terrorist groups, and its evolution and propagation through mediated artifacts; and (3) the emergence of a variety of national and international efforts,

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I wish to thank Zion Miller and the editorial team of the Indiana Journal of Law & Social Equality for their meticulous and conscientious work, and for earlier editorial suggestions and support from Tosha Cohen, Richard Sanders, Matthew Salvia, Daniel Muller, Stefania Valantasis, Steve Bolotin, Robert Rosen, Sam Brawand, Harry Keyishian, Lisa Lott, Lela Morris Perez, Karen Kinney, Maureen Surber, Berta Hernandez-Truyol, Danaya Wright, Charles Courtney, and Vincent Colapietro. I dedicate this article to my loving husband, Gerardo M. Rivera, my nurturing parents, Robert and Anarose Picart, my surrogate parents, Jim and Carolyn Terrell, and my supportive siblings, Yvette Picart-Oliveros, Blanche Canio & Richard Picart.
initiated by different actors, both governmental and non-governmental, aimed at countering or demythologizing the culture of jihadi cool/chic.

While recognizing that combatting global terrorism inevitably and pragmatically entails sustained and ever-evolving military efforts and policy adaptations, this Article limits its scope to selected legal and cultural instances of such counter-jihadi cool efforts. Specifically, this Article, on the one hand, focuses both on the cultural and social bases that undergird the persuasive appeal of jihadi cool and on the persistence of domestic and global terrorism. On the other hand, it also critically analyzes whether radicalization theory, which has been theoretically debunked, actually continues to inform current police practices.

Indeed, there appears to be an emerging consensus among counter-terrorism analysts and practitioners that there is a pressing exigency to move beyond security and intelligence measures. There is an urgent need to enact, to the extent possible, proactive measures to prevent potentially vulnerable individuals from self-radicalizing, or perhaps even rehabilitate those who had previously been drawn in by the allure of jihadi cool. Nevertheless, as in C.S. Lewis’s *Perelandra,* perhaps it is best to visualize what is possible as a shifting, undulating milieu rather than as a static ground. As Greg C. Reeson warns, the “war on terrorism” is not “winnable” in the traditional sense; what is a pragmatic but moving target is the management and mitigation of Islamic extremist violence in a manner that it minimally interferes with daily life.

This Article continues ongoing research, the initial theoretical foundations of which were first described in a scholarly monograph, *American Self-Radicalizing Terrorists and the Allure of “Jihadi Cool/Chic.”* Generally sketched, an understanding of how a culture of jihadi cool/chic self-propagates, principally on the internet, flows from the following premises. The internet provides the means through which a “self-activating terrorist” may first self-radicalize through some imaginary or sympathetic connection with an organized terrorist network. Additionally, the internet allows such a self-activating terrorist to move into the stage of radical violent action. The internet serves both functions by not only providing a potential self-radicalizing terrorist with a rhetorical medium for self-justification and communication through the use of “monster talk” and its

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2. See generally, Greg C. Reeson, *Why We Can’t Win the War on Terror and What We Should Do Instead* (2011).
4. The term “monster talk” is grounded in a theoretical framework, Gothic Criminology, I developed in collaboration with Cecil Greek, a sociologist. Noting the proliferation of monstrous metaphors not only in popular culture but also in academic and public policy discourses, this framework attempts to track the complex connections binding the “real” and the “reel” in mediated discourses and narratives. For an example of how this can be applied to the capture, trial and sentencing of the New York/New Jersey bomber, see, for example, Caroline Joan “Kay” S. Picart, *Monstrous Discourses, Jihadi Cool, and Emergent Counter-Terrorist Narratives: The Case of Ahmad Khan Rahami (a.k.a. Ahmad Rahimi) and the 2016 New*
converse, the rhetoric about the “good citizen,” but also by serving as a source for relatively inexpensive and more unpredictable technologies of mass destruction.

Crucial to this analysis is the distinction between a radicalization of thought and a radicalization of action. This is because a theoretical rhetoric of radicalization does not automatically convert into a rhetoric of radical action unless there are catalysts at work. The internet, as well as imagined relations cemented by the rhetoric of “jihadi cool” or “jihadi chic,” along with a host of other factors, may function as these crucial catalysts, galvanizing monster talk into monstrous action. What differentiates this Article from American Self-Radicalizing Terrorists is that the prior book focused specifically on a detailed case analysis of three well-known American self-activating terrorists: Colleen LaRose, Tamerlan Tsarnaev, and Dzokhar (Jahar) Tsarnaev. Each case study was mapped in a manner so as to describe key elements of each terrorist’s childhood and early formative experiences, education, psychological factors, ideology, the turning point at which ideological commitment dictated that radical rhetoric be converted into radical action, and very briefly, the denouement thereafter. In contrast, this Article focuses on comparatively more recent and discrete global efforts to respond to the mystique of jihadi cool/chic within a U.S. court and within mainstream culture, which I describe in greater detail in the sections that follow.

Using a more analytic and applied angle, this Article focuses on narrative patterns that emerge from a sustained analysis of various myths regarding terrorism and counter-terrorism. Indeed, the power of narrative in relation to understanding propagating terrorism and producing effective counter-terrorism rhetorical strategies has long been recognized by both governmental and non-governmental entities. In 2009, the Office of Naval Research (ONR) funded a research project, Identifying and Countering Extremist Narratives, aimed at identifying and analyzing the “master narratives” that characterize Islamist extremist narratives; the study was spearheaded by Communications scholars at the University of Arizona. In 2012, the Pentagon’s Defense Advanced Research Projects Agency (DARPA) funded a concept, “narrative networks,” targeted at studying the connections between narrative and neuroscience with the goal of enhancing national security by understanding the neurobiology of what persuades people to move into radical action. As described by William Casebeer, the lead DARPA official for this project, “neural networks” aimed to “understand how narratives influence human thoughts and behavior, then apply those findings to a security context in order to address security challenges such as radicalization, violent social mobilization, insurgency and terrorism, and conflict prevention and
Similarly, the RAND Corporation’s 2011 presentation *Strategic Narratives: Their Uses and Limitations* to the U.S. Advisory Commission on Public Diplomacy made policy recommendations regarding the ownership, guidance, and control of narratives, and the management of narrative conflict, with a particular, but not exclusive, focus on the deployment of mass media, within a security context. Within this context, one goal of this this Article is not to come up with a competing master narrative. This is because to attempt to do so would only *reinscribe or reinforce* the pattern of rigid ideological rhetorical warfare from which this project attempts to break. Rather, this Article aims to locate various fissures and gaps that reside within global terrorist master narratives; to uncover strategically concealed alternative possibilities hidden within these master narratives’ seemingly seamless contours; and to unveil logical fallacies, unverifiable presuppositions, and absolutist moral prescriptions masked as neutral descriptions. This research program also analyzes the dynamics of recent examples of counter-terrorist rhetorical strategies, and to qualitatively assess their effectiveness as counter or alternative narratives.

Part I, “The Rhetoric and Aesthetic of ‘Jihadi Cool/Chic,’” is principally an explanation for the scope of the Article. Briefly outlined, this work builds upon a research program that explains the power or allure of jihadi cool/chic. Thus, it begins with a description of what that culture of jihadi cool/chic is. What is new is the analysis of more recent instances, in the United States (and globally), of counter-terrorist narratives that emerge from concrete legal and media examples within the context of a “poethics” of witnessing to the trauma and horror embedded within jihadi-cool/chic accounts.

Part II is titled “Raza v. City of New York: An Attempt at a Counter-Narrative with Mixed Results.” One of the implicit claims in jihadi cool/chic media, as specifically espoused by ISIS, for instance, is that “real” Muslims, ethically moved by the suffering of Muslims worldwide, must join the global war by becoming a warrior of the Caliphate. One corollary, equally as fallacious, is that practicing Islam is the necessary gateway to radicalization. This thinking, initially formulated and put into practice by the New York Police Department (NYPD), leads to a particularly linear and reductive model of how radicalization occurs. Moreover, it unconsciously mimes jihadi cool’s claim and has dangerously shaped much law enforcement and public policy in relation to radicalization. The legal and popular ramifications that flow from this assumption are analyzed in this section.

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9 See generally Picart, supra note 3.

10 For a parallel analysis, see Orit Kamir’s description of an “honor”-based culture as opposed to one based on “dignity.” Orit Kamir, *Betraying Dignity: The Toxic Seduction of Social Media, Shaming, and Radicalization* (2020).
Part III, Toward A Poethics of Witnessing, summarizes the Article’s findings and indicates other potential areas for further research, such as in the examination of the conditions of possibility within which a “poethics” of witnessing may be explored.

I. THE RHETORIC AND AESTHETIC OF “JIHADI COOL/CHIC”

A. The Genesis and Evolution of “Jihadi Cool”

The terms “jihadi cool” or “jihadi chic” have been much used in the media especially with the beheading of American photojournalist James Foley in 2014 by “Jihadi John,” identified by British security services to be computer scientist from London named Mohammed Emwazi.12 Mumbai-born British author Salman Rushdie expressed fears that the language of “jihadi cool,” propagated through Twitter and YouTube, was seducing young British Muslims to join the “decapitating barbarism”13 of ISIS (an acronym for “Islamic State in Iraq Syria,” also alternatively termed “Islamic State in the Levant” or “Islamic State in al Sham”).14 Rushdie defined “jihadi-cool” as “the deformed medievalist language of fanaticism, backed up by modern weaponry” and opined that “[i]t’s hard not to conclude that this hate-filled religious rhetoric, pouring from the mouths of ruthless fanatics into the ears of angry young men, has become the most dangerous new weapon in the world today.”15 In a similar vein, House Homeland Security Committee Chairman Mike McCaul (R-Texas) raised concerns about the sufficiency of the Obama administration’s response to emergent threats from “the ‘jihadi cool’ subculture—young individuals influenced by the sophisticated propaganda campaigns of Muslim extremist groups such as the Islamic State and al-Qaeda in the Arabian Peninsula.”16 Similarly, Major General Michael K. Nagata focused on the Islamic State’s “magnetic attraction” as a key to understanding, and to destabilizing, its

11 This section is adapted, with permission, from PICART, supra note 3, at 17–26. The author thanks Cambridge Scholars Publishing.
rhetorical campaign online; he stated: “I want to engage in a long-term conversation to understand a commonly held view of the psychological, emotional and cultural power of [Islamic State] in terms of a diversity of audiences. . . . They are drawing people to them in droves. There are [Islamic State] T-shirts and mugs.”\footnote{17}

The term “jihadi cool” was originally coined by psychiatrist and former Central Intelligence Agency (CIA) operations officer, Marc Sageman, to describe al-Qaeda’s growing influence on the internet.\footnote{18} Despite the prevalence of monstrous metaphors pointing to an utterly foreign menace infecting or seducing American or British men, the concept of “jihadi cool” probably began with Adam Yahiye Gadahn, an American raised on a goat farm in Riverside County, California, who spent some of his teenage years with his Jewish grandfather in Santa Ana.\footnote{19} Gadahn left for Pakistan in the 1990s, and emerged around 2004 on propaganda videos as an English-speaking spokesman for al-Qaeda.\footnote{20} Although Gadahn’s early videos as “Azzam the American” were viewed as more “laughable” than “scary,” these rough productions were nevertheless noted as among the first English-language radical jihadist propaganda efforts attempting to reach out to Western audiences.\footnote{21}

Additionally, the slick website of Revolution Muslim became a precursor of what has evolved into the look of “jihadi cool.” Over an eighteen-month period, this small New York-based organization peaked until government officials arrested one of its leaders and shut down the website.\footnote{22} Revolution Muslim was created by three American converts to radical Islam, all of whom are serving prison sentences.\footnote{23} At the height of its popularity, the website was used by authorities to monitor the communication, recruitment, and activities of aspiring radical jihadis.\footnote{24}

With the shutdown of the Revolution Muslim website, \textit{Inspire} magazine, an online publication run by the group al-Qaeda in the Arabian Peninsula targeting English language speakers, moved in to fill the gap.\footnote{25} Described as akin to “the \textit{Sports Illustrated} of jihad,” this magazine has published articles such as giving instructions on creating explosive devices, a copy of which was found in the backpack of one of the Tsarnaev brothers.\footnote{26}


\footnote{20} \textit{Id.}

\footnote{21} \textit{Id.}

\footnote{22} \textit{Id.}

\footnote{23} \textit{Id.}

\footnote{24} \textit{Id.}

\footnote{25} \textit{Jihad is Cool: Jihadiist Magazines Recruit Young Terrorists}, \textit{INVESTIGATIVE PROJECT ON TERRORISM} (Apr. 11, 2013, 4:39 PM), http://www.investigativeproject.org/3969/jihad-is-cool-jihadist-magazines-recruit-young#.

\footnote{26} Walker, \textit{supra} note 19. The Tsarnaev brothers perpetrated the Boston Marathon bombing in 2013. \textit{See id.}
One of Inspire magazine’s productions, the Lone Mujahid Pocketbook, produced in Spring 2013, advertised itself as “A Step to [sic] Step Guide on How to Become a Successful Lone Mujahid.” The issue clearly targeted would-be American jihadis, and employed hip, fashionable language conventions as well as rap lingo to tantalize and inundate its audience with tips, strategies, and incitement to commit acts of terrorism. For example, the cover of that issue drew in its potential readers with the lines:

R U dreamin’ of wagin’ jihadi attacks against kuffar? . . . Well, there’s no need to travel abroad, coz the frontline has come to you. Wanna know how? Just read ‘n’ apply the contents of this guide which had [sic] practical ‘n’ creative ways to please Allah by killing his enemies ‘n’ healing the believers’ chests.

The contents reprised many of Inspire’s first ten issues, such as “Make a Bomb in the Kitchen of your Mom” and the “Ultimate Mowing Machine.” Deploying everyday items such as sugar, motor oil, or pressure cookers, and systematically detailing tactical details such as different types of bombs, areas most vulnerable to a mass attack, and methods of maximizing mayhem, the issue sought to convert its everyday audiences into radical jihadi warriors. “Mixing religious devotion with a desire to be cool in the MTV generation, the magazine offer[ed] an attractive picture for jihadi wannabes, perhaps inspired by the mass popular appeal of rapping gang-bangers who ma[de] gun violence ‘cool.”

Yet even Inspire’s glossy and sophisticated manipulation of the media was eclipsed by ISIS’s deft deployment of social media, such as Twitter and Facebook, which showcased items as diverse as graphic videos to T-shirts featuring ISIS’s logo, which is a black flag. Former Director of the National Counterterrorism Center Michael Leiter acknowledged that ISIS “is using more social media than al-Qaeda ever did.” Similarly, according to Staffan Truve, an analyst with Recorded Future, a non-government entity that monitors Twitter and other social media, in summer 2014 alone more than 60,000 internet accounts expressed positive sentiments regarding ISIS extremists. An even larger number can be extrapolated by multiplying that figure by an average account’s tweets, combined

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27 Investigative Project on Terrorism, supra note 25.
28 Id.
29 Id.
32 Walker, supra note 19.
with the group’s deft use of other social media; Truve estimates that “hundreds of thousands of people are receiving the Islamic State message.” The imagery Truve uses in describing ISIS’s carefully tailored global recruitment campaign is reminiscent of a mythological hydra—cut one head off, and another blooms to rear its deadly head: “Every time a pro-IS Twitter account is closed, another one almost immediately takes its place.” Furthermore, ISIS has taken “jihadi cool” to new merchandising extremes: it now features its own online clothing line run by a company, Zirah Moslem, which specializes in ISIS-themed T-shirts and hoodies, sold via websites in Indonesia, where it is legal to sell jihadi-themed products.

Finally, in February 2023, an Iranian foundation praised Hadi Matar, the 24-year-old Shi’ite Muslim American who, after coming back from a trip to Lebanon, allegedly viciously stabbed Salman Rushdie in the face, neck, and body during a literary event at The Chautauqua Institution in New York. Mohammad Esmail Zarei, secretary of the Foundation to Implement Imam Khomeini’s Fatwas stated:

We sincerely thank the brave action of the young American who made Muslims happy by blinding one of Rushdie’s eyes and disabling one of his hands. Rushdie is now no more than living dead and, to honour this brave action, about 1,000 square metres of agricultural land will be donated to the person or any of his legal representatives.

Although Matar was silent on whether he was inspired by the Ayatollah Ruhollah Khomeini’s 1989 fatwa’s calling for the deaths of anyone associated with the publication of Rushdie’s book, The Satanic Verses, there are indirect indications that Matar was probably inspired by Khomeini. He guardedly stated: “I respect the ayatollah. I think he’s a great person. That’s as far as I will say about that.” In comparison, regarding Rushdie, all Matar stated was that because Rushdie had attacked Islam, he did not like him very much. Matar denied contact with Iran’s Revolutionary Guard, though it is clear that he came back a changed man after a

35 Id.
36 Id.
41 Id.
42 Id.
43 Id.
Regardless of the lack of clear connections to Iran, an Iranian foundation with ties to the Iranian government continued to praise Matar and went as far as stating that the same amount of farmland—1,000 square meters—would be given to anyone who would eventually succeed at taking Rushdie’s life, showing that the fatwa’s rhetorical force remains a potent lure.

B. Explaining the Seductive Appeal of “Jihadi Cool”

How does one explain this upsurge of “jihadi cool” popularity? One factor appears to be the seductive appeal of being a “badass.” As the University of California Los Angeles sociologist Jack Katz noted: “In many youthful circles, to be ‘bad,’ to be a ‘badass’ or otherwise overtly embrace symbols of deviance is regarded as a good thing.” Katz identifies three stages of aggression that an aspirant badass must undergo to become initiated into the ranks of the truly “badass.” First, he must be tough and morally impermeable—not someone who can easily be influenced by others. Second, he must appear alien—uncompromisingly “hostile to any form of civilization” and irreducible to anything comprehensible to “native sensibilities,” resulting in his presence or acts as “unnerving.” Third, and ultimately, to be a “badass” requires a genuine meanness, or the spontaneous ability to engage in acts of violence, devoid of considerations of either utility or self-preservation: “badasses manifest the transcendent superiority of their being, specifically by insisting on the dominance of their will . . . .”

Perhaps the seduction of “jihadi cool” is simply the paradigmatic appeal of the “badass” given a jihadi mask. As Simon Cottee observes:

[T]he paradigmatic badass is still with us, only now he doesn’t have a gangster face; now he has a jihadi face. For the ultimate badasses are the caliphate-invoking, kafir-hating, sword-wielding men in black of Islamic State. This is in no way to glamorize the group. But it may be the key to understanding why some young men from the West give up everything to join it or affiliated groups.

However, a second—and, to some extent, contrary—explanation is the success of promoting a romanticized notion of making one’s mark on the world through adventure, linked with a promise of earthly pleasure—to which allure the badass is theoretically immune, with his imperviousness, toughness, and meanness. This notion, the idea of a “five-star jihad,” appears to have two components: (1) the

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44 Hagstrom, supra note 38.
47 Id.
48 Id. at 81.
allure of celebrity, and (2) the attractions of living in luxury while being “virtuous.” Lorne Dawson, a University of Waterloo sociologist, theorized that “our celebrity-obsessed culture pushes youth to define who they are at ever earlier stages. There is this burden on kids to recreate or reinscribe themselves in their own narratives. They’re trying to figure out ‘how can I be special?’” This image of celebrity comes with stereotypes of necessary luxury. Hence, internet images aimed to recruit U.K.-born Islamic warriors showcased jihadis “lounging in a well-appointed home with laptops and game systems.” For example, reading a Tumblr account of what young British jihadis can enjoy once they penetrate Syria’s borders (through a bribe), gives one the impression that they have achieved the (masculine) earthly version of paradise; not only do they enjoy houses with “5+ bedrooms with swimming pools, etc.” but also junk food and sweets, training with a wide range of weapons, “[internet, phones, cheeseburgers lol [sic] pizza [not ‘foreign muck like tabbouleh or hummus’], ‘kebabs’[,] markets, schools for children, classes for adults, shariah courts.” And if weapons, food, and Brotherhood are not enough, calls for fresh recruits throw in additional tantalizing hooks: “There are plenty of women here waiting to be married; waiting to bare [sic] the offspring of the army of Imam Mehdi by the will of Allah and there is honour for the Muslims here.”

There are numerous accounts of young jihadi warriors posting “selfies” of themselves glamorously atop tanks and brandishing guns or showing some heartwarmingly human aspect. One such internet celebrity was Yilmaz, a Dutch national of Turkish descent, who engaged in the armed struggle against the Syrian regime. After the photo-sharing site Instagram closed his account, Yilmaz migrated to Tumblr, a blogging platform favored by jihadi warriors eager to boast of their feats in battle. Some of Yilmaz’s popular photos included one of himself tenderly cradling a Syrian toddler swathed in pink, and another of himself, immortalized in the quintessential warrior pose, dressed in a black jacket and camouflage, with one leg propped up and his rifle by his side. Yilmaz’s self-promotion paid off: not only did he develop a following among Syrian watchers, but

52 Id.
54 Id.
56 Id.
57 Id.
he also achieved a presence in international news when the New York Times blogged about him.\textsuperscript{58} Like other Hollywood celebrities, he used social media to make sure his fan base remained secure; he deployed the ask-and-answer forum platform of Ask.fm to answer fan questions about his grand adventure.\textsuperscript{59} Hardly surprisingly, his success spawned imitators—“Other jihadis emulated him, posting photos of themselves on Facebook, Twitter, and other platforms looking happy and relaxed, pointing fingers in the air and casually slinging guns or other weapons.”\textsuperscript{60} The ripple effects were clear, pointing to the power of jihadi cool. In an interview with Dutch TV show Nieuwsuur in 2014, where Yilmaz was shown leading new recruits in target practice in a bleak Syrian field, Yilmaz opined that “90 percent of [the recruits had] never even fired a bullet in their lives, let alone [fought] on an actual battlefield.”\textsuperscript{61}

\textbf{C. Analyzing the Rhetorical Mechanics of “Jihadi Cool”}

Very clearly, part of the reason why the “jihadi cool” message is so popular, particularly among young men, is its careful tailoring and understanding of its targeted audiences. A CIA report stated that approximately 2,000 Westerners had joined the ranks of the radical jihadi fighters in Iraq and Syria, with at least 500 from the United Kingdom and more than 700 from France.\textsuperscript{62} Both the look and the content of “jihadi cool” were crafted principally by American radical jihadi converts Anwar al-Aulaqi, a New Mexico-born Muslim cleric based in Yemen; Omar Hammami, an Alabama native who rose to become a senior commander in Somalia and starred in a rap recruiting video, which became an internet sensation, in which Hammami led an armed group of fighters to a catchy musical beat; and Adam Gadahn, a native Californian who became an al-Qaeda spokesman and was charged with treason in 2006, among others.\textsuperscript{63} “Can you imagine [Ayman al-] Zawahiri or [Osama] bin Laden doing a rap video? That is something that people without the same connection to America or the West would have a harder time pulling off,” proclaimed David Kris, Assistant Attorney General for National Security.\textsuperscript{64}

Both the ability to communicate in the American vernacular in a manner that appeals to the youth, as well as a command of what it takes to create an MTV aesthetic, are crucial components of jihadi cool’s rhetorical persuasiveness. Videos

\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{64} Id.
created specifically for Western audiences try to depict jihad as a “Hollywood-like video game.”65 Quoting Patrick Skinner with the Soufan Group, a security intelligence services company:

They make jihad seem cool, not over the top—beheading videos aren’t recruitment videos—but they do do very slick productions, with music overlaid on top of very slick graphics, and they make it seem like a video game. They don’t show the after effects. They’ll show an attack or they’ll show a killing, or they’ll show shooting with explosions, and it’s very Hollywood-like . . . .66

Yet despite this imagined appeal to the virtual worlds of Hollywood video and MTV aesthetics, these “jihadi cool” videos attempt a connection to “reality” by humanizing the radical jihadi warriors. Hence, radical jihadi warriors are shown with cats and dogs,67 and with American products that would appeal to their young audiences, such as Nutella, a chocolate spread, and Skittles, a rainbow-like colorful candy.68 A group of ISIS fighters, including Mohammed Emwazi, the jihadist who murdered James Foley, and Abdel-Majed Abdel Bary, an aspiring rapper from Britain, called themselves “The Beatles.”69 One of the radical jihadi “Beatles,” Abu Abdullahal-Britani, expressed his passion for Krispy Kreme doughnuts on Twitter while another radical jihadist in Syria posted a photo of himself drinking Red Bull.70

The crossover between the realms of the imagined and the real (as culturally imagined and rhetorically produced) can be quite startling and can sometimes border on the hyperbolic and humorous. For example, Ryan Mauro noted: “Another Islamic State’s supporter’s photo has a Batman-like image with an Islamic State flag on his costume. He recently tweeted that the Islamic State could defeat the Justice League, a team of comic-book superheroes including Batman and Superman.”71

Thus, in order to be convincing, the aesthetic of the “real” must coexist while still appealing to the visual allure of the imagined realms of MTV and Hollywood video (a feature of monster talk and its counterpart, the discourse of the good citizen). Both, however, are culturally imagined and projected. The irony of jihadi cool/chic is that it deploys Western rhetorical tools to destroy the very culture that created these derivative rhetorical forms and culture, and it continues to buttress jihadi cool/chic with powerful persuasive appeal.

65 Behn, supra note 34.
66 Id.
68 Behn, supra note 34; Mauro, supra note 67.
69 Mauro, supra note 67.
70 Id.
71 Id.
Phrased slightly differently, jihadi cool’s rhetorical power lies in a simple formula, hyperbolically magnified upon the collectively imagined stages of social media and the internet; to quote Christopher Dickey, a foreign editor of the *Daily Beast*, the formula that explains the power of jihadi cool is: “TNT,” which stands for Testosterone, Narrative and Theater.”72 As Elizabeth Pearson observed regarding what she termed “Grand Theft Auto Culture”: “Being a ‘Jihadi’ is not just about ideology; it’s about status, as a man. Increasingly, a nexus is being recognized between the macho masculinity of British street culture and criminal gangs, and the behaviours associated with pathways to violent extremism.”73 Interestingly, many of the radical jihadi converts were initially neither overtly religious, nor openly political; many of them seemed “normal” to the point of being banal.74 But the rhetorical elements of jihadi cool seemed an irresistible siren’s song. “Rap videos, romanticized notions of revolution and adventure; and first-hand accounts of the ‘fun’ of guerilla war . . . are the latest tactics used by militant recruiters as part of what experts have identified as an ‘intensification or radicalization’ both in the United States and elsewhere.”75

**D. Jihadi Cool and Gender**

Prior sections make clear the intimate connection between jihadi cool and the performance of masculinity. What of femininity, as it is clear that not only men, but also women, are subject to jihadi cool’s allure? *Inspire* magazine, which is geared for a male audience has a female counterpart: *Al-Shamikha* magazine, which features articles like “Interview with a Jihadi Wife” and “Facing Destruction: Steps to Alleviate Your Pain and Ways to Reach a Cleaner and Better Path.”76 The first article claims to be an “exclusive” interview with a jihadi wife praising her husband’s martyrdom and dispensing an essential tip to living virtuously: “When walking, do not look left or right to avoid attracting sin.”77 Magnus Ranstorp, Research Director at the Center for Asymmetric Threat Studies at the Swedish National Defense College, remarked: “By catering to women, al-Qaeda publications

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72  Savir, *supra* note 62.


77  Id.
are underlining the operational role women play (in terrorist attacks), which is largely ignored, as well as their cultural role in this specific society.”

ISIS has also pitched its recruitment toward young women, but principally as jihadi brides and mothers. For example, one such overt recruitment enticed women to join ISIS in the following way:

You may wear your veils without being harassed, no woman is harmed here and if she is there is a harsh penalty as the woman’s honour is not tampered with whatsoever, there are plenty of mujahideen desiring to get married who have some of the most loving and softest characters I have ever witnessed even though they are lions in the battlefield, there are orphans here waiting for mothers to love them the way their parents would have. Come to the land of honour. You are needed here.79

The recruitment tactics are also working on women, producing a surge in what has been called “jihadi girl power subculture,” as “hundreds” of Western Muslim women have traveled to Syria to marry radical jihadi warriors, sending out a flood of messages via the internet.80 That Western women, with all their freedoms, choose instead a more traditional lifestyle is a huge morale boost for the radical jihadi troops, argues Sasha Havlicek, director of the London-based Institute for Strategic Dialogue.81 Like the men who convert, the women are also young (in general, the demographic covers ages 15–22), and are also well versed in the use of social media such as Twitter, Tumblr, and Kik.82 And although they may pine nostalgically for some imagined version of the lifestyle of early Muslims, the language they use is extremely contemporary, replete with tech-savvy slang and emoticons, with a dash of Arabic religious terms spelled out in English letters—to flash their credentials as being “part of the gang.”83

Of course, there is intelligence that indicates contrary results. Federal investigators believe that approximately 100 Americans, including women, have travelled to Syria to join radical jihadi groups, though this number is not certain.84 According to these reports, some women are seduced into joining by the lure of

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78 Id.
79 Roussinos, supra note 53.
81 Id.
82 Id.
83 Id.
becoming virtual Florence Nightingales, as nurses and medical assistants. However, once they do join, they become virtual sex slaves—much like Jamie Paulin Ramirez.

And though these women converts profess to be innocuous, posing no threat to national security, in their online posts, amid the overwhelmingly domestic and apolitical tweets about washing and the beauty of the sky, are nuggets about the bravery of radical jihadi warriors, who are “real men,” unlike the enemy troops—the Kafir (infidels). For example, Muhajirah Amatullah wrote regarding the ISIS warriors: “Thy [sic] sleep w/eyes open + chop heads off.” Even more radically, Umm Hussain al-Britani, whom the British press identified as a 45-year-old Muslim convert Sally Jones, a one-time singer in a band, stated in her October Twitter feed that “taking female Kafirs [unbelievers] as slaves is ibadah [an act of worship].” Startlingly, it appears to be the women who prove to be staunch defenders of strict moral codes; a Twitter account, identifying itself by the handle “@irhabbyukhts” or “terrorist sisters” (an apparent attempt at irony), dedicates itself to the mission of naming and shaming jihadi men who flirt online with girls.

Notwithstanding the similarities between the rhetorical appeals made to young Western men and women to convert, there is a strict gender demarcation that seems predominantly in place: the place of honor, for a man, is on the battlefield; for the woman, it is the home. “Virtuous” men fight and slaughter the enemy mercilessly; “good” women bear children, tend to domestic chores, and praise their men’s feats on the battlefield. That distinction, as pointed out in the case of Colleen LaRose, was not as clear; she was neither young, of ideal childbearing age (in fact she was incapable of bearing children), nor technologically savvy. She did not shy away from flirting with Muslim men online, and in fact actively sought it. Nevertheless, the allure of jihadi cool clearly worked its magic on Colleen LaRose in her conversion.

II. Raza v. City of New York: An Attempt at a Counter-Narrative with Mixed Results

A. Radicalization Theory as a Fallacious Master Narrative

As explained in Part I, one of the implicit claims in jihadi cool/chic media, as specifically espoused by ISIS, is that “real” Muslims, ethically moved by the suffering of Muslims worldwide, must join the global war by becoming a warrior of

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85 Id.
86 Id.
87 Saleh, supra note 80.
88 Id.
89 Id.
90 Id.
91 See Picart, supra note 3, at 41–59.
the Caliphate. Phil Gursky succinctly distilled the potent content of the al-Qaeda master narrative into three components:

1. The West hates Islam and Muslims.
2. The West is in a state of perpetual war with Islam and Muslims.
3. True Muslims have a divine mandate to fight in a violent jihad.92

The master narrative thus positions Muslims as righteous victims, and therefore burdens the recipients of its message with an ethical imperative to avenge all alleged wrongs done to all Muslims by the monolithic “West.”93 Along a parallel track, this extremist master narrative is heavily espoused by Salafi-Jihadism, as distinct from Salafism and Jihadism. Salafis believe that the most authentic and truest version of Islam is recovered by a return to not only the spirit but also the letter of law, as lived by the early, righteous Muslims (Salafs), closest in time and proximity to the Prophet Muhammad. Thus, Salafis emulate both the manner of dress and habits of the Prophet by, for example, cuffing their trousers at ankle-length or brushing their teeth with a *miswak* (a natural cleaning twig).94 Beyond personal modes of dress and habits of hygiene, Salafis generally prefer a “quietist” approach to politics, avoiding confrontation with state authorities, and instead preferring preaching, religious education, and when engaging in politics, advocating for specific *shariah*-based policies.95

Jihadism, in comparison, is spurred by the idea that religiously sanctioned warfare (jihad) is an individual obligation (*fard 'ayn*) rather than a collective obligation enacted by legitimate representatives of the Muslim community (*fard kifaya*), as it was traditionally grounded to a specific set of circumstances (citing specific Quranic verses dealing with violence and the use of force), rules of classical warfare, and the clerical determination of whether war was justified.96 The jurisprudence of jihad, traditionally, had a specific context and were bound by rules concerning classical rules of warfare. However, adherents of global jihad contend that Muslim leaders are no longer legitimate representatives, and thus do not have the authority to command justified violence.97

Salafi-jihadism, as instantiated in the jihadi cool/chic rhetoric espoused by groups like al-Qaeda and ISIS is a particular confluence of these two particular schools of thought that stresses the military exploits of the Salaf in order to imbue their own violent objectives with a seemingly immediate divine imperative. Salafi-

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93 Gurski points out that “The West,” as constructed in jihadi cool/chic’s narrative refers to “not only the ‘traditional’ West (the United States, UK, Canada, and Western Europe) but also Israel, Russia, China, India, and anyone else seen as an enemy of Islam. Muslim countries closely allied to the West—Saudi Arabia, Jordan, and so on—are usually folded into this group.” Id. at 9.


95 Id.

96 Id.

97 See id.
jihadis thus have distanced themselves from the development of Islamic law for over twelve centuries, and have selectively dipped into shariah law when it grants them a justification, but choose to ignore the boundaries of the law when the law prescribes certain limits.\textsuperscript{98} Unmoored from Islamic classical scholarly underpinnings and context-laden development, Salafi-jihadists engage in a type of exceptionalism, regarding their interpretation of Islam as the only true form of Islam; consequently, they justify their acts of violence against even fellow Muslims if these do not share their views on the basis of \textit{takfir}, or the excommunication of fellow Muslims, who are regarded as apostates.\textsuperscript{99} It is thus clear that this pathologizing narrative is the rhetorical currency being used to incite self-radicalizing individuals to engage in acts of violence. Along a parallel track, Ajit Maan does a very detailed analysis of specific examples of such “pathologizing” narratives, exposing the unverifiable premises, fallacies, faulty analogies, “white spaces” (the Derridean underside that the master narrative conceals but which it requires, in order to achieve its rhetorical power), and invisible slippage from description to prescription that lurk behind jihadi cool/chic’s master narrative’s seemingly irrefutable logical façade.\textsuperscript{100}

Ironically, one corollary, equally as fallacious, which unconsciously accepts and mimes one of jihadi cool’s/chic’s central premises, and has shaped much law enforcement and public policy in relation to radicalization especially in the United States, is that \textit{practicing Islam is the necessary gateway to radicalization}. Indeed, Amna Akbar’s critique of how radicalization theory’s cardinal postulate that an increase in the outward signs of religiosity and politicization inevitably leads to an increased threat of terrorism remains a timely caveat.\textsuperscript{101}

The uncritical acceptance of this specific postulate led to a particularly linear and reductive model of how radicalization occurs, initially formulated and put into practice by the New York Police Department. Two senior intelligence analysts in the New York City Police Department, Mitchell Silber and Arvin Bhatt, developed a four-stage model to conceptualize the transition from radical thought to radical action.\textsuperscript{102} The model was developed from performing a comparative case analysis of homegrown terrorist plots planned and/or enacted by terrorists in countries as diverse as Spain, the Netherlands, the United Kingdom, Australia, and Canada,\textsuperscript{103} and within the United States, in places as diverse as Portland, Oregon; Lackawanna, New York; and Northern Virginia.\textsuperscript{104} This model became “widely

\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} \textit{In Ajit Maan, Counter Terrorism: Narrative Strategies} 19–30 (2015).
\textsuperscript{103} Id. at 23–56.
\textsuperscript{104} Id. at 57–82.
understood and accepted as the model for understanding and informing training and strategies for law enforcement officials in dealing with cases of terrorism.”

Briefly outlined, Silber and Bhatt characterized the Radicalization Process in four stages: (1) Pre-Radicalization; (2) Self-Identification; (3) Indoctrination; and (4) Jihadization. The first stage is the Pre-Radicalization Phase, in which individuals live “ordinary” lives, and usually have no criminal history. Then, something tragic acts as a catalyst, causing these individuals to become alienated or disassociated from general society. These traumatic, catalytic events could range from losing a job, undergoing a divorce, a tragic accident, or a death in the family, among others.

Such traumatic events leave a void, which must be filled, either by seeking spiritual guidance, for example, or integration into a group. This finding of a new “home” constitutes the second stage, Self-Identification. Although the forging of such new identities or memberships can be sought out in new physical spaces such as in mosques or schools, where radical imams preach, more often, the most typical venue these days is virtual, through the internet, where anonymity appears to provide a measure of security. Thus, self-radicalization occurs technically at this stage, when an individual begins to seek out jihadist websites, for the purpose of filling such a spiritual void through establishing imagined relations with a virtual community.

Nevertheless, it is usually interaction with members of a virtual community that cements stage three—Indoctrination. Social media serves to create a loose virtual community of radical mentors and likeminded extremists, who provide resources, support, and communication, thus furthering the individual’s conversion to radicalization, and strengthening imagined ties to this loose, virtual community. Indeed, a May 2008 report by the U.S. Senate Committee on Homeland Security concluded that the internet “play[s] a critical role throughout the radicalization process” because it is the principal medium through which potential self-activating terrorists can discover radical jihadi propaganda, become converted, and become connected with “the global violent Islamist terrorist movement.”

Once the individual’s indoctrination has moved from radical rhetoric to the rhetoric of radical action, the individual has reached stage four—Jihadization—in which self-radicalized terrorists “accept their individual duty to participate in jihad


This summary of Silber and Bhatt’s model of radicalization is adapted from: PICART, supra note 3, at 15–16.

Id. (citing Silber & Bhatt, supra note 102, at 6).

Id. (citing Silber & Bhatt, supra note 102, at 6–7).

Id. at 16.

Id. (citing Silber & Bhatt, supra note 102, at 6–7).

and self-designate themselves as holy warriors or mujahideen,” actively planning, preparing for, and executing terrorist attacks.\textsuperscript{112}

It is important to note that the New York Police Department was not a singular outlier in espousing the view that American Muslims serve as the necessary support base for the radicalized propagation of al-Qaeda-inspired ideology, and that “[r]eligion is assumed to lie at the heart of Islamist terrorism . . . .”\textsuperscript{113} Law enforcement from California, Kansas, and New Jersey expressed similar views;\textsuperscript{114} Senator Joseph Lieberman, former Chairman of the U.S. Senate’s Homeland Security and Governmental Affairs Committee, and his then-counterpart in the U.S. House, Representative Peter King, stated similar concerns about the potential for attacks by American Muslims, and commenced a series of hearings to investigate the threat.\textsuperscript{115} This view also appeared to have achieved some popular support, as evidenced in the controversy over plans to build an Islamic cultural center in downtown Manhattan and widespread protests against mosques within the United States.\textsuperscript{116}

While I think Silber and Bhatt’s model has some rough heuristic (but not reductively predictive) value, as pointed out in \textit{American Self-Radicalizing Terrorists}, the problem was that the model was used as an unqualified “terror

\textsuperscript{112} Id. (citing Silber & Bhatt, supra note 102, at 7).
checklist,” leading to the criminalization of anything related to the practice of Islam,\textsuperscript{117} which brings us to the specific topic of the next section.

**B. Raza v. City of New York: Criminalizing the Practice of Islam**

In the aftermath of the 9/11 attacks, the New York Police Department (NYPD) initiated an intense covert surveillance operation that focused on Muslims in New York City and beyond; two Associated Press reporters, Adam Goldman and Matt Apuzzo, revealed extensive evidence that the NYPD engaged in a comprehensive religious-based surveillance and mapping program targeted specifically at Muslims within the United States.\textsuperscript{118} “Rakers” (police officers dressed in civilian clothing)\textsuperscript{119} and “mosque crawlers” (informants embedded in Muslim communities) were deployed anywhere Muslims congregated including coffee shops or even their own homes without any suspicion of wrongdoing.\textsuperscript{120} Entire mosques were labeled “terrorism organizations,”\textsuperscript{121} leading to the necessary corollary that every Muslim was a potential terrorist. This rationale provided the justification for infiltrating specific religious organizations with sweeping and lengthy surveillance operations, even if the NYPD had never criminally charged a particular mosque or Islamic organization.\textsuperscript{122}

“Rakers” and “mosque crawlers,” as part of this secret dragnet surveillance operation, eavesdropped on conversations in restaurants and cafes, cataloged memberships in mosques and student organizations, and even occasionally engaged in entrapment-style tactics, baiting people into making inflammatory remarks.\textsuperscript{123} The Muslim Surveillance Program thus had two components: (1) the investigation of Muslims under a human-mapping “Zone Assessment” or “Demographics” Unit to generate a database of the locations where Muslims lived or worked; and (2) the

\textsuperscript{117} Picart, supra note 3, at 15; Faiza Patel, 
\textit{Rethinking Radicalization}, Brennan Center for Justice at the N.Y.U.
School of Law, (Mar. 8, 2011) at 3, https://www.brennancenter.org/publication/rethinking-radicalization; see
Aziz Z. Huq, 
\textit{Modeling Terrorist Radicalization}, 2 DUKE F. L. & SOC. 39, 39–69 (2010); Veena Dubal, 

\textsuperscript{118} Adam Goldman & Matt Apuzzo, 
\textit{NYPD Secretly Designated Entire Mosques as Terrorism Organizations},


\textsuperscript{120} Id. at 8.

\textsuperscript{121} See Goldman & Apuzzo, supra note 118.

\textsuperscript{122} Complaint at 7–9, 

\textsuperscript{123} Id. at 8.
investigation of Muslims in order to carefully monitor any speech or actions that
could be viewed as reactionary.124

The New York Police Department implemented this particular counter-
radicalization program with the assistance of the Central Intelligence Agency (CIA),
leading to a dozen mosques coming under the scope of “terrorism enterprise
investigations” (TEI). Placing a mosque under a “TEI” label effectively meant that
anyone attending the institution was a potential terror suspect, and could be subject
to unrestricted surveillance.125 Initially, the NYPD’s Muslim Surveillance Program
was conducted, partially, with the assistance of a CIA operative who had very little
oversight from any agency and whose assignment was very loosely defined.126
Following an internal investigation by the CIA’s Inspector General, the operative’s
assignment was terminated and the operative was replaced with a different
intelligence officer under a more formal arrangement to work for the NYPD.127

Because the CIA is technically not allowed to collect domestic intelligence,
the overall effect was to make “the wall between domestic and foreign operations . . .
more porous” and to transform the NYPD into something structurally and
functionally resembling a domestic branch of the CIA.128 It is hardly surprising
that, with the assistance from the CIA, the NYPD’s Muslim Surveillance Program
expanded well beyond the jurisdictional boundaries of New York, and into New
Jersey, Pennsylvania, and Massachusetts.129 The NYPD meticulously matched
Pakistani-American officers to infiltrate Pakistani neighborhoods, Palestinians
were dispatched into Palestinian neighborhoods, and so on, in order to “rake the
coals, looking for hot spots,” leading to the term “rakers.”130

The “unusual activity” on which the Demographics Unit was authorized to
conduct surveillance included such innocuous activities as a beauty supply store
selling chemicals that could be used to make bombs, or a hawala—that is, a broker
who could transfer money globally with little documentation, or an ethnic bookstore

124 Matt Apuzzo and Joseph Goldstein, New York Drops Unit That Spied on Muslims, N.Y. TIMES (Apr. 15,
Chris Hawley, Law May Not be on Muslims’ Side in NYPD Intel Case, SAN DIEGO UNION-TRIB. (Nov. 7,
intel-case-2011nov07-story.html.

125 See MATT APUZZO & ADAM GOLDMAN, ENEMIES WITHIN: INSIDE THE NYPD’S SECRET SPYING UNIT AND BIN
LADEN’S FINAL PLOT AGAINST AMERICA 180 (2013); see also David Crary, AP Series About NYPD Surveillance
nypd-surveillance-wins-pulitzer.

126 Adam Goldman & Matt Apuzzo, CIA to Pull Officer from NYPD After Internal Probe, TIMES WEST VIRGINIAN
from-nypd-after-internal-probe/article_ce398edd-de8a-5452-acff-6fc740554c7f.html.

127 Id.

128 Matt Apuzzo & Adam Goldman, With CIA Help, NYPD Moves Covertly in Muslim Areas, ASSOCIATED PRESS
hawley.

129 Id. (“The department has gotten some of its officers deputized as federal marshals, allowing them to work
out of state. But often, there’s no specific jurisdiction at all.”).

130 Id.
saying “radical literature.” Thus, despite protests from the CIA and the NYPD that all intelligence gathered resulted from traditional leads, the report from Apuzzo and Goldman demonstrated that “even the most generic lead was used to justify surveillance of entire neighborhoods.” Interestingly, although many people of Syrian heritage were Jewish, Jews were excluded from being monitored; similarly, documents regarding the Egyptian community excluded the Coptic [Christian] Egyptian community. This revealed, once again, the assumption that Islam was the gateway toward radicalization.

On June 18, 2013, New York residents who were religious and community leaders, represented by the New York Civil Liberties Union (NYCLU), the American Civil Liberties Union (ACLU), and the Creating Law Enforcement Accountability and Responsibility (CLEAR) project of Main Street Legal Services, Inc. at the City University of New York School of Law, filed a lawsuit in the U.S. District Court for the Eastern District of New York. The lawsuit, Raza v. City of New York, argued that the New York Police Department’s Muslim Surveillance Program violated the Fourteenth Amendment’s Equal Protection Clause, the First Amendment’s Free Exercise and Establishment Clauses, and the New York State Constitution. Another lawsuit, Handschu v. Police Department, regarding the widespread religious profiling of Muslim New Yorkers, was filed by the ACLU in 2012. In January 2016, the New York Police Department settled both cases. As a result of these negotiations, there were modified timelines for investigations and

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131 Id.
132 Goldman & Apuzzo, supra note 128.
135 There is a long history to this lawsuit. Briefly summarized, in 1971, Barbara Handschu joined with other plaintiffs in a class action lawsuit against the New York Police Department, challenging the police department’s surveillance strategies or tactics, and in specific, the use of files or dossiers on activists and its undercover infiltration of political organizations. In 1985, a settlement and consent decree generated the Handschu Committee, which was a panel designated to oversee covert New York Police Department surveillance operations. See Handschu v. Special Servs. Div., 605 F. Supp. 1384 (S.D.N.Y. 1985). The Handschu agreement theoretically requires that undercover personnel must have “fact-specific” reasons for their necessity and proscribes the targeting of suspects for their political preferences. Id. at 1391–92. Nevertheless, these protections were gradually eroded. For example, in 2003, the Handschu court removed all restrictions on New York Police Department investigative activity. See Handschu v. Special Servs. Div., 273 F. Supp. 2d. 345 (S.D.N.Y. 2003). Additionally, in 2007, the Handschu court amended the consent decree by requiring that plaintiffs demonstrate a pattern of systematic violation for the court to be able to enjoin any New York Police Department policy. See Handschu v. Special Servs. Div., 71 Civ. 2203, 2007 U.S. Dist. LEXIS 43176, at *67 (S.D.N.Y. June 13, 2007). The overall effect was to essentially allow the New York Police Department to ignore the modified Handschu agreement, ironically expanding its surveillance powers and rendering ineffective the Handschu Committee’s authority. See id.
the creation of an eleven-person Handschu Committee, whose task was to oversee the NYPD's compliance with the consent decree.\textsuperscript{138} As part of the settlement, the NYPD, while not admitting any wrongdoing, agreed to prohibit investigations where race, religion, or ethnicity functions as a “substantial or motivating factor.”\textsuperscript{139} The NYPD also agreed to appoint a civilian to monitor its counter-terrorism efforts, whose tasks included reporting all objections to the NYPD, and to pay $1.6 million to cover the plaintiffs' legal fees.\textsuperscript{140} The revised consent decree is notable for its mandating that this civilian representative must never have been an employee of the NYPD; inform the Handschu court of all systematic and repeated violations of the revised guidelines; and, although being unable unilaterally to block investigations, must serve as an important whistleblower in relation to police misconduct.\textsuperscript{141} The settlement also entailed very strong language that the New York Police Department “[did] not, ha[ls] not, and will not rely on” Silber and Bhatt’s \textit{Radicalization in the West}, briefly described earlier, and that the NYPD would purge the document from its website.\textsuperscript{142}

This section aims to analyze the jurisprudence that results from \textit{Raza v. City of New York} and to assess whether, and to what extent, its results constituted a legal and cultural counter-narrative to the narrative espoused by the culture of jihadi cool, and its corollary, that the practice of Islam is the gateway to self-radicalization. The result, as I demonstrate, is far from unambiguous, largely because both sides relied upon essentially the same assumption, which, as shown above, is still one of jihadi cool/chic’s assumptions: that Islam functions as the gateway to radicalization.

\textbf{C. The Battleground of Expedited Discovery: The Importance of a Discriminatory Animus in Equal Protection}

Given the amount of popular press that \textit{Raza v. City of New York} received, one may be surprised to see that the case did not move beyond the issue of expedited discovery.\textsuperscript{143} Nevertheless, the pre-trial pace and the flurry at which the case moved reveals how much was at stake for all parties. The plaintiffs filed for

\textsuperscript{138} \textit{Handschu}, 241 F. Supp. 3d at 438.


\textsuperscript{141} \textit{Handschu}, 241 F. Supp. 3d at 438, 440.


expedited discovery while the defendants, within a day of filing their answer, filed for bifurcated discovery; briefly outlined, the defendants questioned the plaintiffs' standing and whether they had actually suffered constitutional violations. The plaintiffs made it clear, through their requests for expedited discovery, that they sought a wide range of documents and information focused on the New York Police Department’s “investigative policies and activities relating to all Muslim individuals and organizations, and relating to all non-Muslim individuals and organizations, where the policy or activity is or was based on the individual’s or organization’s religious speech, beliefs, practices, and activities.” In turn, the defendants’ response used the standard objections based on a lack of relevance, overbreadth, and undue burden; stressed the “heightened law enforcement sensitivity” of the information; and argued that the plaintiffs had failed to meet the standard required for expedited discovery.

There were four causes of action raised by the plaintiffs, who were three Muslim individuals, two mosques, and a non-profit Muslim organization; these were violations of: (1) the Equal Protection Clause of the Fourteenth Amendment; (2) the Free Exercise Clause of the First Amendment; (3) the Establishment Clause of the First Amendment; and (4) the right to exercise their religion freely under Articles One and Three of the New York State Constitution.

It is important to note that this case was never decided on the merits. The standard of review for whether a motion for expedited review was properly denied is abuse of discretion—an extremely permissive standard. The court found that the plaintiffs did not meet the required standard because the plaintiffs’ “claims of fear and stigmatization, which are largely unsupported,” did not “demonstrate good cause warranting expedited discovery.” Because it became clear that the parties could not even agree on a discovery schedule, the court ultimately decided simply to impose a timeline for discovery that attempted to strike a balance between the competing pleadings of the parties.

As to the plaintiffs' discovery requests, the court attempted a complex balancing act by granting the plaintiffs’ request for documents that were directly about them; if, however, other non-plaintiffs were included, the defendants were allowed to redact these names provided the defendants indicated: (1) whether non-

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145 Id. at 74.
146 Id. at 74–75.
147 Id. at 73.
150 Raza, 998 F. Supp. 2d at 75.
151 Id. at 76 n.2.
parties were Muslim, and (2) whether non-parties had been the subject of surveillance or an investigation.\footnote{Id. at 76–77.} To make the balancing act even more nuanced, the court required another limit point: the data had to be disclosed “unless the disclosure of this information would indirectly reveal the subject’s identity or threaten to undermine an ongoing investigation.”\footnote{Id. at 77.}

The court also granted the plaintiffs’ request for general charts and information related to the structure, organization, general operations, and purpose or mission of the New York Police Department’s Intelligence Division; the limit point was “specific activities” of this division.\footnote{Id. at 77–78.} But the court did its most careful analysis in relation to what they considered the heart of the matter: the plaintiffs’ request for “Intelligence Division reports, assessments, presentations, memoranda, policy statements, operational directives, strategy documents, and training materials” that reflected a basis for, or were relevant to the decision to engage in, surveillance or investigations on: (1) “Islam, its adherents or schools of thought, including but not limited to . . . Salafism”; (2) “Non-Islamic religions, their adherents, or their schools of thought”; and (3) “Ancestries of interest,” which were already made available in an Intelligence Division presentation.\footnote{Id. at 78.}

As to relevance, the burden lay with the plaintiffs to prove their Equal Protection and First Amendment claims that the defendants conducted investigations or surveillance with a discriminatory purpose or intent.\footnote{Id. \textit{at} 76–77.} As an outward manifestation of this discriminatory purpose, the plaintiffs could either show that a law or policy “expressly classify[ed] person[s] on the basis of race,” or show that a facially neutral law or policy was applied in an intentionally discriminatory way.\footnote{Id. at 77–78.} Alternatively, the plaintiffs could also demonstrate that a facially neutral statute or policy had an adverse effect and was motivated by a “discriminatory animus.”\footnote{Id. (citing Brown v. City of Oneonta, 221 F.3d 329, 337 (2d Cir. 1999)).}

The plaintiffs, through their pleadings, indicated that they intended to use one or two ways indicated in \textit{Brown}: (1) through an express classification theory—i.e., by showing that the New York Police Department overtly “classified Muslims by adopting a policy of singling them out for heightened policy scrutiny;” or (2) via a discriminatory application theory—i.e., “by showing that [the plaintiffs] were subject to [New York Police Department] investigations of unequal and
unwarranted scope, duration and invasiveness as a result of their religious beliefs and activities.” 159

The defendants, through their answers, “effectively concede[d] the relevance of the [New York Police Department]’s strategy and policy documents,” but argued that the plaintiffs were not entitled to access to these documents during the discovery phase. 160 This was because, the defendants argued, the plaintiffs “[had to] first establish an underlying constitutional violation, in other words, they [had to] establish that the [New York Police Department] had an improper motive” in investigating them. 161 However, the Raza court disagreed, holding that there was a clear distinction between the Fourth Amendment and an Equal Protection claim; it stated:

In contrast to a claim under the Fourth Amendment, the existence of criminal predication, e.g., reasonable suspicion or probable cause, does not automatically defeat an Equal Protection claim. An Equal Protection claim can be established where there exist “mixed motives” for the challenged government conduct. See Hunter v. Underwood, 471 U.S. 222, 225, 105 S. Ct. 1916, 85 L. Ed. 2D 222 (1985); Vill. of Arlington Heights, 429 U.S. at 270; Mt. Healthy City School Dist. Bd. Of Educ. v. Doyle, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2D 471 (1977). Even if Defendants’ investigations of Plaintiffs were supported by criminal predication, if those investigations were improperly influenced by Plaintiffs’ religion, they may be unconstitutional. 162

As a basis for this holding, the court cited to Whren v. United States, which distinguished between “actions based on the Fourth Amendment, where the defendants’ ‘[s]ubjective intentions play no role,’ and actions based on the Equal Protection clause, which are based on an ‘intentionally discriminatory application’ of the law.” 163 The court also relied upon two other cases: (1) United States v. Avery, which held that “[t]he Equal Protection Clause of the Fourteenth Amendment provides citizens a degree of protection independent of the Fourth Amendment protection against unreasonable searches and seizures” 164 and (2) United States v. Scopo, which stated: “Though the Fourth Amendment permits a pretext arrest, if otherwise supported by probable cause, the Equal Protection Clause still imposes restraint on impermissibly class-based discriminations.” 165

The court went on to stress that in cases involving a “mixed motive” or “dual motivation[s],” where at least one factor is improper or discriminatory, the existence of other motives, even if proper, does not preclude a cause of action based on Equal

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159 Id. at 78–79 (citing Brown, 221 F.3d at 337)).
160 Id. at 79.
161 Id.
162 Id. (footnote omitted).
163 Id. (quoting Whren v. United States, 517 U.S. 806, 813 (1996)).
164 Id. (quoting United States v. Avery, 137 F.3d 343, 352 (6th Cir. 1997)).
165 Id. (quoting United States v. Scopo, 19 F.3d 777, 786 (2d Cir. 1994) (Newman, C.J., concurring)).
Protection. Nevertheless, plaintiffs were required to prove, via a preponderance of evidence, that the alleged “discrimination was a substantial or motivating factor” for the government’s actions, or in this case, the New York Police Department’s actions.

The court acknowledged that it was striking into relatively unexplored territory by stating:

The Court recognizes that, other than in the selective prosecution model, the application of the “dual motivation” framework to allegedly discriminatory law enforcement activities is not well established. However, the Second Circuit’s decision in Pyke v. Cuomo supports the proposition that a plaintiff can bring an Equal Protection claim with respect to law enforcement conduct without alleging selective prosecution.

In selective prosecution cases, a plaintiff must both allege and prove that similarly situated persons outside of their protected class were treated differently; this is called the “Armstrong Rule.” However, as the Pyke court explained, when no claim of selective prosecution is made, the Armstrong Rule does not apply. Pyke therefore stands for the rule that “a plaintiff can bring an Equal Protection claim with respect to law enforcement conduct without alleging selective prosecution.”

In Pyke v. Cuomo, residents of the Mohawk Indian reservation in upstate New York claimed that the State was discriminatorily withholding police protection on the reservation. The district court granted summary judgment to the defendants because the plaintiffs had failed to show disparate treatment and had not raised the issue of express racial classification; nevertheless, the Second Circuit vacated and remanded. The Second Circuit panel specifically stated:

A plaintiff alleging an equal protection claim under a theory of discriminatory application of the law, or under a theory of discriminatory motivation underlying a facially neutral policy or statute, generally need not plead or show the disparate treatment of other similarly situated individuals.

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167 Id. at 80 (citing Hunter v. Underwood, 471 U.S. 222, 225 (1985)).

168 Id. (footnotes omitted) (emphasis in original).


170 Pyke, 258 F.3d at 109.

171 Raza, 998 F. Supp. 2d at 80 (emphasis omitted).

172 258 F.3d at 108.

173 Id. at 108, 110.

174 Id. at 108–09.
Thus, the panel distinguished between Equal Protection causes of action claiming selective prosecution, which require a showing that disparate treatment of similarly situated individuals occurred, and causes of action that “challeng[e] a law or policy that contains an express, racial classification” for which “it is not necessary to allege the existence of a similarly situated non-minority group.”175 In part, the panel’s decision was grounded in the fact that it is often objectively difficult to make direct comparisons between different groups (even if similarly situated) in order to demonstrate animus.176 Finally, the panel also expounded on the Circuit’s holding in Brown, stating that the rule that Equal Protection claims do not require a showing of disparate treatment is not limited purely to challenges to policies with express racial classifications. The Pyke panel stated:

We now clarify—a plaintiff who, as in Brown, alleges an express racial classification, or alleges that a facially neutral law or policy has been applied in an intentionally discriminatory race-based manner, or that a facially neutral statute or policy with an adverse effect was motivated by discriminatory animus, is not obligated to show a better treated, similarly situated group of individuals of a different race in order to establish a claim of denial of equal protection.177

Thus, building on the Pyke jurisprudence, the Raza court concluded that the plaintiffs could proceed with their Equal Protection claim based on the New York Police Department’s allegedly discriminatory investigation and surveillance of the plaintiffs without needing to allege selective prosecution and without having to prove disparate treatment of a similarly situated non-Muslim group.178

Since evidence of the New York Police Department’s intent in relation to their surveillance or investigations of the plaintiffs was crucial to the plaintiffs’ Equal Protection allegations, the Raza court concluded that the plaintiffs’ discovery requests regarding any NYPD policy or program involving the investigation of Muslims as group based, in whole or in part, on their religion, was necessary.179 Without access to such discovery, the Raza court reasoned, the plaintiffs would be unjustly “pre[-]emptively and irreparably prohibited from proving [the] defendants’ alleged discriminatory intent was a motivating factor in the investigation and surveillance of [the] plaintiffs.”180 To the defense’s objection that this would allow an unlimited “fishing expedition,” the court pointed out that attachments to the plaintiffs’ submissions strongly suggested that the New York Police Department did have documents relevant to this inquiry, as evidenced in references to either the Taqwa mosque or Plaintiff Elshinawy, or both.181

175 Id. at 109 (quoting Brown v. City of Oneonta, 221 F.3d 329, 337 (2d Cir. 1999)).
176 Id.
177 Id. at 110.
179 Id.
180 Id.
181 Id.
The *Raza* court also emphasized certain flaws in the New York Police Department’s reasoning. First, the defense presumed what the supposed outcome of the discovery would be: that any documents beyond those that specifically reference the plaintiffs “could never be relevant to a showing of discriminatory intent with respect to [d]efendants’ investigations of [p]laintiffs.”\(^{182}\) In other words, the defense assumed that the revelation of criminal predication (reasonable suspicion or probable cause) for their investigations would automatically preclude or supersede a finding of discriminatory intent. As the court stated, this would so curtail the evidence to which plaintiffs would have access and make it even more difficult for them to meet the standard required to prove a violation of Equal Protection.\(^{183}\)

Second, the defense also tended to construe the purposes of discovery too narrowly, which was contrary to the existing jurisprudence regarding the proper scope of discovery, which encouraged principles of broad discovery, especially where proving discriminatory intent was required.\(^{184}\) The need for not only such broad but also “sensitive” parameters of discovery were made even more so in relation to Equal Protection claims because there is seldom a “smoking gun” that shows direct proof of such animus; usually, plaintiffs have to prove discriminatory intent via the “cumulative weight of circumstantial evidence.”\(^{185}\)

Third, precluding plaintiffs from obtaining any information regarding an overarching “Muslim surveillance program” would severely and unfairly hamper them from meeting the standard required: that discrimination based on their religion was, at least in part, a motivating factor in the New York Police Department’s decisions to conduct surveillance or investigations on them.\(^{186}\)

The New York Police Department, in its arguments regarding the need for bifurcated discovery, relied heavily on *Dinler v. City of New York.*\(^{187}\) In *Dinler*, the court issued a writ of mandamus that reversed the district court’s order that compelled the New York Police Department to produce intelligence reports written by undercover officers covering potential security threats in relation to the Republican National Convention.\(^{188}\) However, the *Raza* court distinguished *Raza*

\(^{182}\) *Id.* at 82.

\(^{183}\) *See id.*

\(^{184}\) *Id.* (citing Hunter v. Underwood, 471 U.S. 222, 228 (1985) (“Proving the motivation behind official action is often a problematic undertaking.”)); Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (“Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”)); Gray v. Bd. of Higher Educ., City of New York, 692 F.2d 901, 906 (2d Cir. 1982) (reversing district court’s denial of discovery in part because “[t]he district court minimized the importance of appellant’s discovery needs” in relation to evidence of intent and finding that “if unable to engage in discovery, [the plaintiff] cannot prove intent, and without proof of intent, he has no case”)).

\(^{185}\) *Id.* n.8 (first quoting Chambers v. TRM Copy Centers Corp., 43 F.3d 29, 37 (2d Cir. 1994) and then quoting Rosen v. Thornburgh, 928 F.2d 528, 533 (2d Cir. 1991)).

\(^{186}\) *Id.* at 82–83 (citing Brown v. City of Oneonta, 221 F.3d 329, 337 (2d Cir. 1999) (affirming the denial of Equal Protection claims because the plaintiffs failed to show “any law or policy that contain[ed] an ‘express racial classification’”).

\(^{187}\) *Id.* at 83 n.9.

\(^{188}\) *Dinler v. City of New York,* 607 F.3d 923, 928 (2d Cir. 2010).
from *Dinler* because in *Dinler*, the issues involved violations of the Fourth Amendment (which rendered defendants’ motives irrelevant), the challenge of only the defendants’ arrests and detentions, and the upholding of law enforcement privilege. In contrast, as explained above, in *Raza*, the issues revolved around Equal Protection, which necessarily entailed the proving of a discriminatory animus as motive for the New York Police Department’s surveillance or investigations and the challenge of not only the plaintiffs’ surveillance and investigations but also of a larger “Muslim surveillance program.” Furthermore, the *Raza* court reasoned, in *Dinler*, mandamus was the only relief possible because the district court had ordered the production of documents that were subject to law enforcement privilege. In contrast, in *Raza*, the court stated that the order did not “impinge upon [the New York Police Department]’s ability to claim law enforcement privilege with respect to particular documents, which [could still] be addressed on a document-specific basis.”

The *Raza* court also carefully weighed whether the New York Police Department’s request for bifurcated discovery could be granted and arrived at a similar conclusion: even if, *arguendo*, a bifurcated approach would reveal the existence of reasonable suspicion or probable cause for surveillance or investigation, the court would still be compelled to require further discovery regarding whether such a broad-based policy that discriminated against Muslims as a group existed. And even if, *arguendo*, there would be no evidence of a “Muslim surveillance program” found in this initial phase, precisely because of the broad construction of principles of discovery in relation to the existence of a discriminatory intent that an Equal Protection claim requires, the court would still be equally compelled to move into the second phase. This was rendered even clearer because the New York Police Department failed to produce any relevant case law involving Equal Protection “in which a court dismissed the plaintiff’s complaint based solely on a finding of probable cause.” The *Raza* court further explained that the existence of reasonable suspicion or probable cause, as a matter of law, did not itself resolve the “possibility of causation between the allegedly discriminatory policy” and the plaintiffs’ surveillance or investigations. Furthermore, this type of determination of whether legitimate criminal predication existed, according to the *Raza* court,

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189 *Raza*, 998 F. Supp. 2d at 83–84 n.9.
190 *Id.* at 81.
191 *Id.* at 83–84 n.9 (citing *Dinler*, 607 F.3d at 931, 934–35).
192 *Id.*
193 *Id.* at 83.
194 See *id*.
195 *Id.*
196 *Id.* at 84.
should be made at the end, and not at the start, of the discovery process. The Raza court thus concluded, emphasizing the primacy of a discriminatory animus:

Discriminatory intent is at the core of Plaintiffs’ claims—and the existence of a formal policy or practice, if one exists, certainly would be relevant to Plaintiffs’ claims. Plaintiffs are entitled to seek evidence that would tend to show Defendants’ discriminatory intent in investigating them. Federal Rule of Civil Procedure 26(b)(1) provides for broad discovery into evidence “regarding any nonprivileged matter that is relevant to a party’s claim or defense” and that “the court may order discovery of any matter relevant to the subject matter involved in the action.” Here, if Defendants have a policy, whether formally adopted or adhered to in pattern or practice, its existence would make it more likely that Plaintiffs themselves were investigated on the basis of their religion, potentially in violation of constitutional rights. Accordingly, artificially limiting discovery in the manner suggested by Defendants, to wit, exclusively to documents referring to Plaintiffs, would be inadequate under these circumstances.

Nevertheless, keeping in mind the potential burden and expense to be incurred by the New York Police Department in complying with the plaintiffs’ Request Number Four, the Raza court tailored the request to include only:

*Intelligence Division documents containing operational directives, presentations, memoranda, strategy initiatives, training procedures, and policies,* concerning any of the following as a basis for, or a factor considered in, deciding to engage in Surveillance or Investigations:

a. Islam, its adherents, or its schools of thought, including but not limited to Salafis or Salafism;

b. Non-Islamic religions, their adherents, or their schools of thought with any alleged link or connection to terrorism;

c. “Ancestries of interest” as identified as an Intelligence Division presentation . . . .

In contrast, the plaintiffs’ requests (Numbers Five and Six) for various documents from 2004 until 2013 regarding the investigation or surveillance of all Muslims, and all non-Muslims, on the basis of their religious beliefs or practices were denied. In brief, the Raza court agreed with the New York Police Department’s conclusion (but not rationale) that there was no meaningful way to compare all Muslims who were investigated (including but not only the plaintiffs) to all non-Muslims because “[g]iven the myriad of factors that go into every investigation and, indeed, every step of every investigation, attempting to compare

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197 Id.

198 Id.

199 Id. at 84–85 (emphasis in original).

200 Id. at 85–86.
hundreds, if not thousands, of different investigations to each other to discern a pattern of disparate treatment of similarly situated individuals would be futile.”

Even more importantly, as explained earlier, the demonstration of an express racial classification or of a facially neutral law or policy that has been applied in an intentionally race- or religion-based discriminatory manner obviated the need for a showing of a better-treated similarly situated group of persons of a different race or religion to prove an Equal Protection violation. Thus, these requests were of very limited probative value and would be “impossibly burdensome” to the New York Police Department in terms of resources, manpower, time, and expenses.

The plaintiffs’ requests (Numbers Seven, Eight, and Nine) were similar to items Five and Six outlined above and were treated similarly. These were requests for statistics concerning Muslim individuals or organizations versus non-Muslim individuals or organizations who were criminally charged as a result of the activities of the Intelligence Division. The New York Police Department argued that they did not classify their investigations according to religion, and thus were unable to produce these statistics. The Raza court agreed, citing in part to Scherbakovskiy v. Da Capo Al Fine, Ltd. Furthermore, as explained earlier, even if such statistics existed, because of the complex nature of the way decisions are made in relation to investigations, such data were of limited probative value and relevance and were not even necessary for the plaintiffs to prove an equal protection violation.

The plaintiffs also requested that the New York Police Department respond to an interrogatory regarding whether they had a database or means of electronic analysis that would enable the plaintiffs to sort through data from 2004 to 2013 regarding Muslim individuals or organizations as opposed to non-Muslim individuals or organizations who were either kept under surveillance, investigated, or criminally charged based on religious affiliation, speech, belief, or activities. Because the New York Police Department flatly denied that such a database existed and provided no legal justification, the court granted the plaintiffs’ request that the interrogatory be answered.

Nevertheless, the Raza court closed with an acknowledgment of the importance of protecting the privileged information related to ongoing or contemplated investigations, the privacy of individuals who were investigated but not charged, and the safety and efficacy of undercover police officers and

201 Id. at 86.
202 Id. (citing Pyke v. Cuomo, 258 F.3d 107, 110 (2d Cir. 2001)).
203 Id.
204 Id. at 86–87.
205 Id.
206 Id. at 87 (citing 490 F.3d 130, 138 (2d Cir. 2007) (“[A] party is not obliged to produce, at the risk of sanctions, documents that it does not possess or cannot obtain.”)).
207 Id.
208 Id. at 87–88.
209 Id. at 88.
confidential informants. Eventually, even if the plaintiffs’ request for expedited discovery was partially granted and the New York Police Department’s request for bifurcated discovery was denied, given the degree of fractiousness in litigation between both parties, the *Raza* court took it upon itself to set the Discovery and Briefing Schedule as outlined below:

- 2 weeks from order—Parties serve their document requests and interrogatories.
- 1 month thereafter—Defendants respond to Document Requests #1 – #3 and the Interrogatory; and Plaintiffs respond to Defendants’ discovery requests, if any.
- 1 month thereafter—Defendants respond to Plaintiffs’ Document Request #4.
- 3 weeks thereafter—Parties serve deposition notices.
- 2 months thereafter—Depositions completed.
- 2 weeks thereafter—Parties serve requests for admission.
- 3 weeks thereafter—Parties respond to requests for admission.
- 4 weeks thereafter—Parties serve their motion for preliminary injunction on Defendants.
- 4 weeks thereafter—Defendants serve their response to the preliminary injunction motion on Plaintiffs.
- 3 weeks thereafter—Plaintiffs serve their reply regarding the preliminary injunction motion on Defendants. Parties file their preliminary injunction submissions with the Court.

The jurisprudence that therefore results from *Raza v. City of New York* is noteworthy principally for pointing out a key difference between Equal Protection claims and Fourth Amendment claims. Equal Protection claims allow for a broader application of discovery principles because of the plaintiffs’ hurdle of proving discriminatory intent, unlike searches and seizures where discriminatory intent is not generally considered relevant based on existing case law. Interestingly, at least at the level of discovery, a civil, rather than criminal, case afforded greater protection for a class-action suit for non-governmental entities that had banded together.

However, it is wise to note the disparities between the popular representations of *Raza* versus the actual case law that resulted from it. *Raza* has been popularly hailed as either a defeat of the pseudo-scientism of the Radicalization model, where the practice of Islam is viewed as the gateway to self-radicalization and thus criminalized, or as a capitulation to the onslaught of forces...
of political correctness.\textsuperscript{213} Both popular narratives, in certain senses, aspire to be master narratives that ironically result from precisely accepting the premise that flows from jihadi cool/chic’s siren song: that there is no way out of the devil’s bargain in relation to the practice of Islam as its adherents are framed to be marginalized culturally, socially, and legally by “Western” institutional structures. This is, in some ways, hardly surprising as modes of popularization tend to hyperbolize or oversimplify, concentrate, and reduce into a sound bite what is complex and nuanced. Modes of popularization in the virtual world also led to a splintering of worlds, where virtual communities can create insular universes that screen out dissent, leading to something resembling a collective neurosis.\textsuperscript{214}

The legal narrative that results from \textit{Raza v. City of New York}, in contrast, should be of significance mainly to legal tacticians or constitutional scholars because of its emphasis on delineating the differences between the Fourth Amendment (involving searches and seizures) and the Fourteenth Amendment (involving Equal Protection). There is thus a need to form a bridge between these two spheres: the sphere of the courtroom, where the esoteric and specialized generate the jurisprudence and practice of law, and the spheres of the public marketplace of culture, where the esoteric becomes simplified and reduced into tweets or posts in echo chambers of elective micro-communities.

Ludwik Fleck’s \textit{The Genesis and Development of a Scientific Fact}\textsuperscript{215} provides a parallel model because, arguably, the history and philosophy of science provide fruitful models to study both the progressive and regressive aspects of modes of popularization. Briefly summarized, Fleck posited that the conversion of a scientific fact, initially within the arena of the esoteric inhabited by specialists, to a “fact,” which resides in the exoteric sphere occupied by the “normal” of the everyday occurs through a translation or form of metaphoric reinvention by a scientific popularizer—one capable of proverbially dancing across the realms of both the exoteric and the esoteric.\textsuperscript{216} An example of this would be Stephen Jay Gould, whose popular writings on saltationism, also known as punctuated equilibrium (that is, that evolution proceeds via sudden, unpredictable leaps rather than gradual and cumulative increments), did much to educate the public on evolutionism.\textsuperscript{217} Analogously, what may be necessary is a fresh new way to think through how


\textsuperscript{215} LUDWIK FLECK, \textit{THE GENESIS AND DEVELOPMENT OF A SCIENTIFIC FACT} (1979).

\textsuperscript{216} See \textit{id.} at 101–106.

individuals and non-governmental actors critically interact with, rather than passively consume, the onslaught of revolving and competing master narratives. For the last section of this Article, I briefly sketch an outline for such an approach through a “poethics” of witnessing.

III. CONCLUSION: TOWARD A “POETHICS” OF WITNESSING

Part I above analyzed the rhetorical and aesthetic dynamics of a culture of jihadi cool/chic, and why these rhetorical and aesthetic techniques have been such a powerful recruitment force for particular terrorist groups. Crucial to this analysis is the distinction between radicalization of thought and radicalization of action because a theoretical rhetoric of radicalization does not automatically convert into a rhetoric of radical action unless there are catalysts at work. The internet, as well as imagined relations cemented by the rhetoric of jihadi cool/chic, can function as crucial catalysts, galvanizing monster talk into monstrous action. Of course, this insight always needs to be nuanced with the empirically based finding by various terrorism experts that there is no single deterministic pathway toward radicalization. For example, Marc Sageman, a former CIA officer and psychologist, analyzed over 500 cases, and concluded that although one could describe distinct stages of radicalization, cautioned against the illusion that “[o]ne can[] simply draw a line, put markers on it and gauge where people are along this path to see whether they are close to committing atrocities.” Similarly, the Rand Corporation, based on a fourteen-year study of the process of radicalization, concluded that “no single pathway towards terrorism exists,” and that the attempt to predict who among a group of similarly situated individuals would likely adopt radical views, much less turn violent, is fraught with difficulty, as much seems to be due to “happenstance.” Finally, in a Department of Homeland Security-supported study, Clark McCauley and Sophia Moskalenko concluded that although they had outlined eleven possible pathways to radicalization (while leaving room for the possible discovery of more), “radicalization progression cannot

219 Id. at 71–88. Sageman’s four stages are: (1) moral outrage about the suffering of fellow Muslims; (2) the fit between this outrage and an individual’s worldview; (3) the resonance of the jihadist interpretation with an individual’s personal everyday experiences; and (4) mobilization by already existing networks. Id.
220 Id. at 72.
be understood as an invariable set of steps or ‘stages’ from sympathy to radicalism.”

Crucial to the appeal of jihadi cool/chic are the ability to communicate in the American vernacular in a manner that appeals to the youth, as well as a command of what it takes to create an MTV aesthetic, as significant components of jihadi cool’s rhetorical persuasiveness. Videos created specifically for Western audiences try to depict jihad as a “Hollywood-like video game.” Yet despite this imagined appeal to the virtual worlds of Hollywood video and MTV aesthetics, these “jihadi cool” videos attempt a connection to “reality” by humanizing the radical jihadi warriors. Hence, radical jihadi warriors are shown with cats and dogs, and with American products that would appeal to their young audiences, such as Nutella, a chocolate spread, and Skittles, a rainbow-like colorful candy.

Furthermore, as illustrated above, jihadi cool/chic videos are micro-tailored to draw in different and particularly targeted audiences. Indeed, there has been much recent research analyzing the Islamic State’s micro-tailoring of its messages so as to appeal to particular audiences, similar to the way marketing companies aim their ads to cater to the preferences, values, and “likes” of particular groups. Some of jihadi cool’s/chic’s appeal lies in its ability to tap into the fantasies of the young, which are also gendered in a conservative manner: for young men, for example, the glory of being a warrior, the thrill of adventures on the battlefield, and the promise of unyielding brotherhood are compelling; for young women, the romance of being married to mujahideen (and bearing their children), and of faithful sisterhood and camaraderie in an ideal state, a Muslim Utopia, appear to be irresistible. Thus, notwithstanding the similarities between the rhetorical appeals made to young Western men and women to convert, in general, there is a strict gender demarcation


224 Behn, supra note 34.

225 Mauro, supra note 67.

226 Behn, supra note 34.


that seems predominantly in place: the place of honor, for a man, is on the battlefield; for the woman, it is the home. “Virtuous” men fight and slaughter the enemy mercilessly; “good” women bear children, tend to domestic chores, and applaud their men’s battlefield feats.

Nevertheless, jihadi cool/chic materials are not aimed only at potential recruits or converts. They are also aimed at third parties or bystanders: to instill awe and further spread terror, to further propagate their trademarked brutality porn, and even simply to assign to them the necessary roles of serving as spectators to their mythical feats of bravery and strength. Luke Howie astutely observed: “[C]ontemporary terrorists want a lot of people watching, not just a lot of people dead.”

A consequent question with which this article wrestles is: how does one ethically bear witness to the onslaught of such terror- and trauma-laden images and narratives (even if under the appearance of glory and heroism, as propagated by jihadi cool materials), as a third party, and not be a direct participant to their production and consumption? This article argues that there is a difference between passively consuming, as a spectator would, and critically witnessing, even if one vicariously experiences a traumatic event, or experiences it through a virtual and mediated encounter, as on the internet. A witness, as Richard Quinney noted, is “moved by conscience to observe and report these sufferings.” Furthermore, as Howie notes: “Witnessing is far more than merely watching or seeing. Witnesses are never passive. Witnessing is active, performed[,] and embodied, even when it occurs at a distance.” Taking this stance implies a refusal to conflate or to elide the moral differences between victims, perpetrators, and bystanders.

The ethical dilemma one faces, in relation to such narratives of trauma and terror, is similar to that faced by one who watches Holocaust films. In Holocaust films, similar to the material examined in his book, “[j]udgment … is not merely portrayed but actively performed by [these] films, together with their (constructed and/or actual) viewers; it is often a function of film’s constitution of a community-of-viewers and [cinematic] engagement in [the] social constitution of primary values, institutions[,] and concepts.” Furthermore, an added dimension to Holocaust films, as well as jihadi-cool material (or those that seek to counter the allure of

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230 LUKE HOWIE, WITNESSES TO TERROR: UNDERSTANDING THE MEANINGS AND CONSEQUENCES OF TERRORISM 160.
232 Howie, supra note 230, at 20 (emphasis added).
jihadi-coolness), is the question of realism, whether construed as “true,” “accurate,” or “realistic.”

Nevertheless, there is one crucial difference between many Holocaust-related films, and much of the material generated by adherents of jihadi-cool/chic culture. While Holocaust-related films generally shy away from what Holocaust scholars call the “negative sublime,” like the descent into the gas chambers, the jihadi-cool/chic materials, especially those targeted for male recruits, glory in the spectacle of brutal torture and bloody beheadings, imbuing inhumanity with the veneer of hypermasculinity. Additionally, the material is targeted to strike fear and terror in “infidel” communities. The spectatorial dynamics, to some extent, thus resemble the shock value of B-level horror films, but with the technical sophistication of blockbuster Hollywood films, thus drawing in its mesmerized and horrified audiences into the power of its narrative. Nevertheless, the ethical dilemma a witness faces, in light of such material, remains.

The answer to such a dilemma, in my view, is pragmatic, and was initially theoretically developed in relation to exploring a critical lacuna from which to view emotionally laden and historically freighted materials that potentially invite two twin dangers: (1) absolute identification (the response of the uncritical convert); and (2) absolute rejection (the response of the indifferent cynic). Such a careful balance can be maintained by a critical openness to a dialectical tension between multiple frames or points of view and a certain amount of irreducibility. In other words, this project finds an analogue in Ariella Azoulay’s analysis of the hermeneutic of the photographic moment: “With the assistance of the spectator, the point of view under consideration . . . permits the event of photography to be preserved as one bearing the potential for permanent renewal that undermines any attempt to terminate it or to proclaim that it has reached its end.”

Nevertheless, the crucial question remains: How does one move from a deconstructive turn, which seems simply a revolving door of warring narratives, toward what I term a “poethics” of producing and viewing various artifacts that have assimilated the look of the “real” while being unavoidably embedded in the politics and aesthetics of such trauma- and terror-infused narratives?

By “poethics” I mean, generally, the same kind of project Richard Weisberg alludes to, after the Nietzschean “Umwertung der Werte” (roughly translated, not simply an “overturning” of values but their “re-evaluation” or “trans-valuation”): a project that “endeavors nothing less than to fill the ethical void in which legal

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235 For an account that analyzes The Godfather Trilogy as Francis Ford Coppola’s attempt to demythologize America as “a pluralistic society living by the rule of law and serving as a model for the rest of the world,” see David Ray Papke, Myth and Meaning: Francis Ford Coppola and Popular Response to the Godfather Trilogy, in LEGAL REELISM: MOVIES AS LEGAL TEXTS 1, 1–22 (John Denvir ed., 1996).


237 Some of these ideas were first proposed in Caroline Joan (Kay) S. Picart, Nationalities, Histories, Rhetorics: Real/Reel Representations of the Holocaust and Holocaust Trials and a Poetics of Film and Law, 29 DAPIM: STUDIES ON THE HOLOCAUST 114, 117–19, 130–31 (2015).

thought and practice . . . [in which] literature [and in this book, mediated artefacts, whether they be video, film or photography, for example] provid[e] a lively and accessible medium for learning about law [and terrorism/counter-terrorism] in an ethical way.  

This approach is particularly evident in Section II of this Article, which critically analyzed the popular and legal narratives surrounding Raza v. City of New York. The jurisprudence that resulted from Raza sharply outlined the differences between an Equal Protection claim based on the Fourteenth Amendment and a Fourth Amendment search and seizure claim. At the discovery stage, as the court carefully reasoned, an Equal Protection claim is not defeated purely by a claim of reasonable suspicion or probable cause for surveillance or investigations because an element of an Equal Protection claim is proving the defendant’s discriminatory animus. Combined with the broad construction of discovery principles, the Equal Protection clause thus imposes limits on impermissible class-based discriminations, such as one based on Islam, generally construed, in this case. Applying a poetics of witnessing requires one to critically note assumptions both sides relied upon, and one assumption that both the plaintiffs and defendants based their arguments on was that Islam—broadly construed, with no distinctions between Salafism, Jihadism, or Salafi-Jihadism—was the necessary rhetorical and pragmatic battleground upon which contestations had to be waged. In so doing, through their pleadings, both sides essentially ironically affirmed that Islam is the gateway toward the final stage of Jihadization. Numerous experts, as explained earlier, have argued that the complex analysis of the numerous factors that influence self-radicalization has revealed this conclusion to be fallacious. By agreeing on that assumption, both parties ended up endorsing the Radicalization Model while negotiating, apparently to take down the website on this model. However, there are indications that the Radicalization Model is still being used in relation to keeping surveillance on, investigating, and prosecuting individuals, both on the right and the left of the political spectrum. Nevertheless, by parsing out this assumption and being critical of it, one may navigate carefully past the Scylla and Charybdis or twin dangers of being an uncritical adherent of extremes or being an indifferent outsider, a different type of extreme.

As to the popular narratives regarding Raza v. City of New York, depending on one’s politics, one side cast it as a David versus Goliath narrative where the behemoth of government power, the police, engaged in systematic and comprehensive discrimination against all Muslims in the United States and were stopped through the assiduous efforts of religious and community leaders and
several non-governmental entities. The other side cast a narrative where the police admitted no wrongdoing by settling the matter. Nevertheless, again, both narratives hinged on a polar narrative of us versus them, with being Muslim being the hingepoint of difference. By placing the emphasis on markers of race, religion, or ideology, both popular narratives missed the mark of staying focused on evidence-based investigations, while staying attuned to the complex interplay of these factors with a sensitive and alert eye to enforcing domestic criminal and civil law.244

To summarize this article, Part I described the rhetorical and aesthetic dimensions of jihadi cool/chic, which appear to be crucial factors in the generation of self-radicalizing individuals. Part II analyzed the jurisprudence and larger legal and cultural ramifications that sprang from Raza v. City of New York. The Raza ruling effectively pulled the New York Police Department back from the practice of treating all Islamic institutions as breeding grounds for radicalization—a discriminatory practice that violated their religious rights. Part III, rather than attempting to create a new master narrative to counteract jihadi cool/chic, instead analyzed the hidden assumptions that underlay the legal and cultural dynamics in Raza v. City of New York to illustrate that both sides ironically assumed one of jihadi cool/chic’s corollaries: that Islam is the gateway to radicalization. I close with a caveat from Friedrich Nietzsche that resonates with some of the concluding insights of this article: “He who fights with monsters might take care lest he thereby becomes a monster. And when you gaze long into an abyss the abyss also gazes into you.”245

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245 FRIEDRICH NIETZSCHE, JENSEITS VON GUT UND BOSE. ZUR GENEALOGIE DER MORAL (1886) Aphorism 146 (Giorgio Colli & Mazzino Montinari eds., reprt. 2002).