I Introduction

A Creating Terrorists to Catch

James Cromitie became the subject of FBI attention in 2008 when an undercover informant engaged him in conversation about jihad outside a mosque in Newburgh, New York. The informant, Shahed Hussain, had been frequenting the mosque to identify potentially radical individuals; Cromitie was a former drug addict and mental patient.

Hussain massaged Cromitie’s personal frustrations over several months, before offering him $250,000 to participate in a terrorist plot. The plan was to fire rocket-propelled grenades at Stewart Air Base and to bomb a synagogue in New York. Although Cromitie objected to the use of violence, and repeatedly tried to break contract with Hussain, he agreed to the plan almost a year later after losing his job and becoming desperate for money.

Thus, on 20 May 2009, Hussain drove Cromitie and three other men to a mosque and directed them to place explosives (which were not real) in the trunks of two cars parked outside. However before they could do so, the police arrived to arrest them.¹ Cromitie was charged with

---

conspiracy to use weapons of mass destruction in the United States as well as conspiracy to acquire and use anti-aircraft missiles. He was convicted and sentenced to 25 years in prison.²

While the investigation and conviction of Cromitie might be mistaken for a chapter in George Orwell’s 1984, his experience has become increasingly common. Indeed, his case illustrates a new method in the United States’ fight against terrorism. Directed by “radicalization theory”³ the United States has supplemented its foreign war on terror with aggressive domestic sting operations.⁴ The rationale is that the path to terrorism is fixed, with individuals exhibiting a series of identifiable developments which eventually culminate in a terrorist attack.⁵ According to the theory, it is thus possible to monitor and incubate these developments by exposing Americans to radical ideologies and ultimately the opportunity to commit terrorist acts. This technique has been instrumental to almost half of the 500 counter-terrorism convictions in the United States since 2001.⁶

B This Paper

This paper has two objectives with respect to that theory and practice. First, it demonstrates the major failings of counter-terror sting operations and advocates appropriate change. In brief, the strategy is based on a dubious theory of terrorism; probably provides for discriminatory targeting of Muslims; and has a counter-productive

---

³ For the purposes of this paper, 'radicalization' is in its original American spelling.
⁴ See generally Faiza Patel and the Brennan Center for Justice Rethinking Radicalization (New York, NYU School of Law, 2011).
⁵ Mitchell D Silber and Arvin Bhatt, New York Police Department Intelligence Division Radicalization in the West: The Homegrown Threat (2007).
impact on the war against terror overall. The Attorney-General should therefore amend the FBI’s investigative guidelines so that agents may no longer carry out sting operations where there is no articulable basis for suspicion. This change would maximise the positive outcomes of sting operations while ensuring the FBI does minimal harm to parallel counter-terrorism efforts.

The second objective is to explain why the entrapment defence must be altered in order to properly function in prosecutions following counter-terrorism stings. At present, it is effectively impossible to prove entrapment in terrorism trials because the prosecution may defeat it by establishing that the defendant was “predisposed” to commit the crime before the government became involved. In an era of intense “Islamophobia” and fears of “lone wolf terrorism”, jurors are inclined to accept that predisposition is established where defendants have acceded to a terror plot. Accordingly, the federal courts should drop the predisposition requirement and adopt an objective approach to entrapment which focuses on the propriety of the investigation instead of the general character of the accused. In addition, the courts should recognise entrapment as a matter of procedural criminal law for determination by judges rather than a substantive defence to be decided by juries.

II Radicalization and Sting Operations

The perceived nature of terrorist threats in the United States and the reaction to those threats has changed since 9/11. In addition to wars in far-off lands, American counter-terrorism policy now includes prevention of attacks within the country’s borders. As a result, the state has re-directed considerable resources to the detection and neutralisation of domestic terror threats. Among other strategies, the FBI and local police departments now carry out aggressive sting

---

operations to root out individuals who are putatively predisposed to radicalism and terrorism. Following the relaxation of restrictions on the FBI’s investigative powers, sting operations have become more widespread, more aggressive and apparently more successful.

A Radicalization Theory

There is widespread agreement among policy-makers that international organisations such as Al-Qaeda no longer represent the most significant terrorist threat to American security. Attacks such as 9/11 seem unlikely to recur.\(^8\) Instead, events like the near-detonation of a car-bomb in Times Square in 2010 and the Boston bombings in 2013 have reinvigorated fears about “home-grown terrorism”. That is, there is major concern that foreign terrorist organisations will recruit and radicalize American citizens (generally Muslims) to conduct terrorist attacks on their behalf.\(^9\) The fear is that “lone-wolf terrorists” will go undetected in American society before orchestrating devastating attacks against the civilian population.\(^10\)

In line with this view, “radicalization theory” has emerged as a significant school of thought that conceptualises the problem and offers a solution. As the major protagonist of the theory, although there are others,\(^11\) the New York Police Department (NYPD) explained in its

---

\(^8\) Patel and the Brennan Center for Justice, above n 3, at 1.
\(^10\) YouTube “Terror Factory: Inside the FBI’s Manufactured War On Terrorism” (2 March 2013) <http://www.youtube.com/watch?v=10Q40sjL6g0>.
\(^11\) In 2011, the Homeland Security and Governmental Affairs Committee demanded that the National Security Council and Homeland Security Council develop “a comprehensive national approach to countering homegrown radicalization to violent Islamist extremism.”: Homeland Security and Governmental Affairs Committee “A Ticking Time Bomb: Counter terrorism Lessons from the U.S. Government’s Failure to Prevent the Fort Hood Attack” (February 2011) at 43. Similarly, the theory has been explicitly endorsed by President Barack Obama, the FBI, the Department of Homeland Security and
2007 report Radicalization in the West: the Homegrown Threat that there is a uniform process by which American citizens are transformed into terrorists. It reasoned that “the path to terrorism has a fixed trajectory and each step of the process has specific, identifiable markers” which are “inextricably linked to Muslim religious behaviour”. In other words, there is a “religious conveyor belt” that leads from grievance or personal crisis, to religiosity, to the adoption of radical beliefs, to terrorism.

Apparently, each of these steps is identifiable to law enforcement officials, meaning the best way to stop home-grown terrorism is to identify individuals as they begin the radicalization process. The task of FBI agents is therefore to monitor the development of would-be terrorists and intervene before they execute their plots. In addition, agents must sometimes stimulate the radicalization process in the first place by exposing people to the start of the conveyor-belt or by helping them along it. Put another way, sting operations have become vital.

B Removing Barriers to Counter-Radicalization Strategies

To facilitate this strategy, successive Attorneys-General have relaxed the FBI’s internal guidelines on how agents may conduct undercover investigations. In 2002, Attorney-General Ashcroft permitted indefinite pre-investigation assessments about individuals without any

---

the National Counter-terrorism Center: Center for Human Rights and Global Justice Targeted and Entrapped, above n 1, at 7-8.
12 Patel and the Brennan Center for Justice Rethinking Radicalization, above n 3, at 1.
13 Ibid.
14 Patel and the Brennan Center for Justice Rethinking Radicalization, above n 3, at 1.
15 In the United States, sting operations are regulated principally by the Attorney-General’s “Guidelines on Federal Bureau of Investigation Undercover Operations”. Pursuant to federal statute, the Attorney-General may modify these guidelines in accordance with the broadest discretion recognized by the courts: 28 USC §§ 509, 533 (Supp 2003).
suspicion of wrongdoing or threat to national security.\textsuperscript{16} More particularly, Ashcroft provided that agents may attend religious services or political events for the purpose of gathering information despite there being no factual nexus between those activities and suspected criminal conduct.\textsuperscript{17} Attorney-General Gonzales then supplemented this in 2007 by removing an explicit prohibition on FBI agents and informants engaging in entrapment.\textsuperscript{18} Finally, Attorney-General Mukasey altered the guidelines in 2008 to allow the recruitment of informants from particular communities without any articulable suspicion of criminal wrongdoing within those communities.\textsuperscript{19}

C Sting Operations in Practice

Taken together, the FBI restrictions on investigating and preventing domestic terrorism have been eviscerated to such an extent that they may as well not exist.\textsuperscript{20} Law enforcement agents and informants have become opportunistic and aggressive in their efforts to catch individuals part-way through their supposed development into terrorists, with numerous cases proceeding on similar lines to those in

\begin{footnotesize}
\begin{enumerate}
\item John Ashcroft, United States Department of Justice “The Attorney General’s Guidelines for FBI National Security Investigations and Foreign Intelligence Collection” (2003) at § II.A. This stands in marked contrast to an earlier restriction that preliminary investigations could only take place where there were “allegations or other information that an individual or group may be engaged in activities which involve or will involve the use of force or violence and which involve or will involve the violation of federal law”: Edward H Levi, United States Department of Justice “Domestic Security Investigation Guidelines” (1976) at § II.C.
\item John Ashcroft, United States Department of Justice, “The Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations” (2002) at § II.A.
\item United States Department of Justice “Attorney General’s Guidelines Regarding the Use of FBI Confidential Human Sources” (2006) at V.B.3.a.ii.
\item Michael B Mukasey, United States Department of Justice “The Attorney General’s Guidelines For Domestic FBI Operations” (2008) at § II.A.4.c, f, j.
\item Center for Human Rights and Global Justice Targeted and Entrapped, above n 1, at 14.
\end{enumerate}
\end{footnotesize}
the Cromitie case.\textsuperscript{21} In fact, nearly 50 per cent of all federal counter-terrorism convictions have resulted from informant-based investigations and in almost 30 per cent of those cases the informant played a central role in creating the underlying plot.\textsuperscript{22} Not surprisingly, both government officials and the mainstream media have touted these figures as evidencing the value of stings.\textsuperscript{23}

\section*{III Problems with Radicalization and Sting Operations}

However, there are several reasons to doubt the wisdom of this increasing emphasis on stings. First, the strategy is founded on a dubious theory of radicalization which in turn leads to an implementation which is probably discriminatory against Muslims. Moreover, the strategy’s benefits have probably been exaggerated while some of the costs have not been properly accounted for.

\subsection*{A There is no Clear Pathway to Terrorism}

The first reason to hesitate before applauding the increased use of sting operations is that it is based on a theory of terrorism which does not stand up. To begin with, the NYPD theory is based on reductionist conclusions from only ten terrorist cases.\textsuperscript{24} Equally, a number of more rigorous empirical studies have found that there is no linear progression

\footnotesize
\begin{itemize}
\item \textsuperscript{21} Columbia Law School Human Rights Institute \textit{Illusion of Justice}, above n 5, at 23.
\item \textsuperscript{22} At 2.
\item \textsuperscript{23} US Department of Justice “Remarks of Attorney General John Ashcroft” (press conference, 4 October 2002). See also Matt Apuzzo\textsubscript{ojuly} “Holder Urges Europeans to Step Up Antiterrorism Tactics” \textit{The New York Times} (online ed, New York, 8 July, 2014).
\item \textsuperscript{24} Patel and the Brennan Center for Justice \textit{Rethinking Radicalization}, above n 3, at 7.
\end{itemize}
between different phases of terrorist development. Rather, as John Horgan explains:

The reality is that there are many factors (often so complex in their combination that it can be difficult to delineate them) that can come to bear on an individual's intentional or unintentional socialization into involvement with terrorism.

State institutions in the United Kingdom have been similarly reluctant to endorse grand narratives about the causes of terrorism and who is most likely to commit terrorist acts. For example, the state security service MI5 conducted a thorough empirical study on terrorism in 2008 and found that:

there was no typical profile of the British terrorist and that the process by which people came to embrace violence was complex. It emphasized that “there is no single pathway to extremism,” and that all those studied “had taken strikingly different journeys to violent extremist activity”.

Similarly, in 2010, the United Kingdom Homeland Security Commissioner explicitly rejected the idea that individuals move along a “conveyor belt” from normality to eventually presenting a terrorist threat.

---

27 Patel and the Brennan Center for Justice Rethinking Radicalization, above n 3, at 8.
Even within the United States, there has been some rejection of radicalization theory. For example, officials at the Department for Homeland Security have consistently stated that there “are diverse pathways to radicalization” and have rejected the idea that radicalization is a “one-way street.” Similarly, the Office of the Director of National Intelligence has asserted that “radicalization is a dynamic and multi-layered process involving several factors that interact with one another to influence an individual.” Equally importantly, the latter office has specifically rejected the notion that each stage of radicalization is objectively discernible to law enforcement officers.

B Sting Operations Strategy may be Discriminatory

A closely related reason for objecting to the United States’ current use of sting operations is that that it may be discriminatory against Muslims. The present strategy is predicated on the idea that radicalization begins in Muslim beliefs and thus that terrorists are most likely to emerge from Muslim communities. As a result, the FBI and state police forces have directed the overwhelming bulk of their undercover resources to infiltrating Muslim communities.

However, the presumed link between Islam and terrorism has never been corroborated by proper empirical research. On the contrary, academic review has indicated that “violent jihad is discordant with the values, outlook and attitudes of the vast majority of Muslim Americans, most of whom reject extremism.” Thus, there is probably no rational connection between targeting Muslims for investigation and the

---

29 Patel and the Brennan Center for Justice Rethinking Radicalization, above n 3, at 13.
30 At 13.
31 Ibid.
32 Aziz, above n 5, at 183.
33 Center for Human Rights and Global Justice Targeted and Entrapped, above n 1, at 41.
34 Columbia Law School Human Rights Institute Illusion of Justice, above n 5, at 18.
achievement of national security. While it is beyond the scope of this paper to fully address the issue, the possibility of substantive discrimination is corroborated by the recent filing of law suits by Muslim communities against the New York and New Jersey police departments based on the Equal Protection Clause of the American Constitution.35

C  Aggressive Sting Operations are not Effective Overall

The third reason for objecting to the increased use of sting operations is that the strategy – at least in its most aggressive form – is not helpful in the fight against terrorism overall. The supposed benefits have been exaggerated while the costs have been largely overlooked.

1  The security benefit is overstated

As mentioned earlier, government officials and the media have celebrated the convictions of defendants like Cromitie. Apparently, their imprisonment has made the United States safer. For example, after the arrest of Hemant Lakhami then-United States Attorney Chris Christie proclaimed:36

Today is a triumph for the Justice Department in the war against terror. I don't know that anyone can say that the state of New Jersey, and this country, is not a safer place without Hemant Lakhani trotting around the globe attempting to broker arms deals.


Yet such assertions are hard to believe when one has regard to the finer details of many of the cases producing such sound-bites. In Lakhami’s case, the defendant had no real grasp on the terror plot in question and was so delusional that he promised to provide full-size submarines to his co-conspirators.37 Similarly, in Siraj’s case, the defendant felt he needed to seek his mother’s permission before participating in a terrorist attack.38 In Cromitie’s case, the Judge remarked:39

I suspect that real terrorists would not have bothered themselves with a person who was so utterly inept … Only the government could have made a terrorist out of Mr. Cromitie, whose buffoonery is positively Shakespearean in scope.

Thus, the national security risk posed by some – but of course not all – of the defendants arrested in sting operations is suspect. Indeed, some of “the alleged terrorist masterminds end up seeming, when the full story comes out, unable to terrorize their way out of a paper bag without law enforcement tutelage.”40

2 There is no imperative to choose between stings and surveillance

Proponents of sting operations also commonly argue that they are justified as a better alternative to other counter-terror techniques such as intrusive domestic surveillance.41 On this view, there is “an inevitable trade-off between stings and surveillance” such that a reduction in sting

37 Ibid.
38 Center for Human Rights and Global Justice Targeted and Entrapped, above n 1, at 36.
40 Perlstein, above n 35.
operations would necessarily result in heightened surveillance.\textsuperscript{42} According to Rascoff, stings are preferable as the primary response to terrorism because surveillance interferes with the civil liberties of all citizens.

Again, though, the argument is overstated. It is not the case that any reduction in one counter-terrorism strategy necessarily results in the increased use of another. One need not replace a particular strategy if, in fact, that strategy was not effective in the first place. In my view, this is probably true of sting operations that are directed at vulnerable, clueless and largely benign individuals. If the sting operations policy were refined to only target truly dangerous individuals, there would be no need to increase other counter-terror measures because there would be no security loss to compensate.

Furthermore, even if such substitution were necessary, surveillance is not the only, let alone the best, alternative.\textsuperscript{43} As the United States government has recognised, another means of preventing terrorist attacks is to build respectful communication channels with Muslim communities as a means of gathering intelligence.\textsuperscript{44}

3 Sting operations undermine parallel counter-terror strategies

On the other side of the equation, sting operations come with significant costs to the broader fight against terror. In particular, they undermine the purpose of a community outreach program called Countering Violent Extremism (“CIE”). The idea of CIE is to build trust and cohesion between law enforcement agencies and American

\textsuperscript{42} Rascoff, above n 40.

Muslim communities in order that the latter might serve as effective sources of information regarding terrorist activity.  

Yet aggressive sting operations alienate the very communities to which the government hopes to reach out.  

Not surprisingly, Muslims feel a sense of demonisation, betrayal and fear when they learn that the FBI has paid informants to build relationships with their peers for the express purpose of luring them towards crime.  

As a result, Muslims are much less willing to engage with law enforcement officers even if only to provide non-incriminatory information. 

4 Conclusion

Despite the inherent difficulty in measuring the value of sting operations, it is clear that the costs outweigh the benefits in at least the most extreme cases. Where an individual poses a particularly low risk to national security by virtue of naivety or incapacity, the security benefit from neutralising him through an aggressive sting is minimal while the loss to community confidence is significant.

IV Solution: Articulable Suspicion a Prerequisite to Investigation

In light of the foregoing, the FBI investigative guidelines should be altered to restore the requirement that covert surveillance and the use of informants only take place where there is an articulable suspicion of wrong-doing or a criminal threat which justifies such an inquiry. This

---

47 Columbia Law School Human Rights Institute Illusion of Justice, above n 5, at 3.
48 Patel and the Brennan Center for Justice Rethinking Radicalization, above n 3, at 23.
restriction would respond to the three key problems discussed in the previous section, meaning its adoption would help to justify any continued use of sting operations.

Requiring an articulable suspicion of wrong-doing would prevent the “fishing expeditions” which have come to define the FBI’s undercover operations. Instead of random virtue testing on the basis of colour, ethnicity or religion, law enforcement officers would only be able to pursue communities and individuals once an objectively reasonable basis for doing so is formed. This would lessen the scope for illegal discriminatory conduct.

In addition, restoring the restriction would hopefully mean the state would only lure towards crime and conviction those who pose a significant threat to national security. In turn, this targeted approach would better maintain the cooperative relationships that the United States government is trying to build with Muslim communities. Thus, readopting the restriction would increase the benefits of sting operations (neutralising dangerous individuals) while minimising the cost (jeopardising effective intelligence channels).

V Entrapment Fails in Terrorism Cases

Unfortunately it appears unlikely that the foregoing recommendation will be adopted. Attorney-General Eric Holder has recently implored European states to adopt more American-style counter-terrorism strategies, including the use of aggressive sting operations.\(^4\) One can infer from this that things are unlikely to change in the United States.

Accordingly, it is especially important that there are proper protections for defendants involved in such operations. In particular it is essential that the entrapment defence, which has been described as “the primary

mechanism [...] for policing undercover investigations”, provides a realistic avenue for relief.\textsuperscript{50}

This section outlines the rationale of entrapment in the United States before explaining why it is essentially worthless to defendants charged with terror crimes. In brief, the United States federal courts have adopted a subjective approach to entrapment whereby juries focus predominantly on the predisposition of defendants to commit the relevant crime, rather than on the conduct of the authorities involved in the sting. This means the question of guilt or innocence is determined largely on the basis of character evidence, which makes it exceptionally difficult for would-be terrorists to successfully deny predisposition and thus establish entrapment.

\textit{A} Competing Rationales

\textit{1} Background

The contours of entrapment emerged in the United States in the late 19\textsuperscript{th} century as the law began to regulate previously private matters such as sex, drugs and morality. Given that ‘wrong-doing’ in these spheres was exceptionally difficult to detect, police resorted to sting operations to catch people out. Defendants argued in response that although they had fulfilled the material elements of the relevant crimes they could not be held accountable because the government had effectively made them commit them. In some early decisions the courts accepted this argument, holding that convictions could not stand if the origin of criminal intent was properly attributable to the government, not the defendant.\textsuperscript{51}

\textsuperscript{50} Roth above n 6, at 987, 1027; See also Waddie E Said “The Terrorist Informant” (2010) 85 Wash L Rev 687 at 687, 711, 732.

2 Objective and subjective tests

From the very beginning, wherever entrapment has been formally recognised as a defence the jurisprudential discussion has centred on whether it should be objectively or subjectively oriented. In Sorrells v United States, the first Supreme Court case to decide the issue, the Bench was unanimous in holding that the defence applied but was divided between those two perspectives. In Sorrells the defendant was a World War I veteran who had been visited by a government informant at his home. After repeated requests, the defendant agreed to sell the informant half a gallon of whisky, thus ostensibly violating the Prohibition Act.

According to Justice Hughes for the majority, however, the defendant had not fallen foul of the Prohibition Act. In his view, the Act when properly construed did not extend to the defendant’s conduct because the legislature could never have intended to criminalise conduct resulting from government inducements of a defendant who “had no previous disposition to commit it”. In his view, the statute was not intended to apply to the conduct of persons who were “otherwise innocent”.

By contrast, Justices Roberts, Brandeis and Stone argued that their power to enter an acquittal stemmed from the public policy requirement that courts be able to protect their processes from executive abuse. On their approach, the defendant’s disposition towards criminality was irrelevant because the court in this context was solely concerned with the need to maintain the purity of the justice system. While the difference in reasoning was inconsequential to the result in Sorrells, it has defined the debate on entrapment in the United States ever since.

---

53 At 448–489.
54 At 451.
55 At 457.
The majority’s view is described as the subjective approach because of its focus on the defendant’s predisposition. Under this approach, the defendant must establish two elements: first, that on the balance of probabilities the government “induced” him to commit the crime; second, that there is reasonable doubt that he was not predisposed to commit the crime before the government became involved. As a general rule, inducement requires proof that the executive went beyond the mere presentation of an opportunity to commit the crime and effectively implanted the criminal design in the mind of the defendant.\textsuperscript{56} Predisposition is established where the defendant was “mentally ready and willing” to commit the crime if invited to do so.\textsuperscript{57}

The minority’s view is labelled the objective approach because it focuses exclusively on the propriety of executive conduct, albeit in light of the defendant’s actions and the seriousness of the offence. Under this test the prosecution must be stayed if the executive’s impropriety is so significant that allowing it to proceed would undermine the integrity of the justice system and the public’s confidence therein. Importantly, though, the objective test is not only distinguished from the subjective approach merely by its elements, but also by its characterisation as a matter of procedural law rather than a substantive defence. This is significant because it means entrapment is decided by judges, whereas under the subjective approach it is decided by juries.\textsuperscript{58}

The debate about which test should prevail continued for decades after \textit{Sorrells}. Although the objective test was never endorsed by a majority of the Supreme Court, it was forcefully advocated in a number of

\textsuperscript{56} While the threshold for “inducement” is drawn slightly differently across the different courts, no further discussion is required for present purposes; See generally Center for Human Rights and Global Justice Targeted and Entrapped, above n 1, at 102-104.

\textsuperscript{57} \textit{Jacobson v United States} 503 US 540 (1992) at 561; \textit{United States v Ulloa} 882 F 2d 41 (2d Cir 1989) at 44.

\textsuperscript{58} Roth, above n 6, at 988.
dissents.\textsuperscript{59} In 1988, however, even the dissenting voices accepted that the subjective approach had become a matter of \textit{stare decisis}.\textsuperscript{60} Since then, all federal courts have applied the subjective approach,\textsuperscript{61} which is essential in the counter-terrorism context because almost all terror crimes are tried in federal court.\textsuperscript{62}

\section*{B \hspace{3em} Entrapment is Effectively Useless in Terror Trials}

In practice, entrapment is remarkably ineffective in counter-terrorism prosecutions. Hundreds of defendants have pleaded the defence yet not one has done so successfully.\textsuperscript{63} While the jury’s rejection of entrapment can sometimes be explained by the merits of the case, this conclusion is often dubious. Where FBI informants aggressively lead vulnerable individuals towards crime, as occurred in the Cromitie and Siraj cases, it is reasonable to ask whether the defence should really be rejected.\textsuperscript{64} In fact, a number of judges have explicitly raised this concern while stopping short of disturbing the jury’s findings. In the Cromitie case, for example, the judge questioned the rejection of entrapment, noting that “the government [had come] up with the crime, provided the means, and removed all relevant obstacles”.\textsuperscript{65}

\section*{C \hspace{3em} Proposed Solutions}

The practical inapplicability of entrapment to terrorist defendants has attracted some academic attention. Most of that commentary argues that the defence should be altered to make it more favourable to

\textsuperscript{61} \textit{Mathews v United States}, above n 59; \textit{Jacobson v United States}, above n 56.
\textsuperscript{62} Stevenson, above n 40, at 133.
\textsuperscript{63} Frampton, above n 50.
\textsuperscript{64} William Glaberson “Newburgh Terrorism Case May Define When Sting Operations Become Entrapment” \textit{The New York Times} (online ed, New York, 16 June 2010).
\textsuperscript{65} \textit{United States v Cromitie} 727 F 3d 194 (2d Cir 2013) Transcript (8 July 2011).
defendants in terror trials; however, a minority also argues that the balance should swing further in favour of the prosecution. This section briefly canvases those views before setting out my own proposed solution to the problem.

1 Academic debate

Among those who advocate change in favour of defendants, Margulies argues that the subjective approach should be abandoned in favour of the objective test. However, Margulies interestingly maintains that the defence should still be decided as a matter of substantive criminal law by jurors rather than a procedural matter for judges.\(^{66}\) Conversely, others argue that judges should have some oversight in deciding the issue but that the subjective approach should remain. Roth, for example, suggests judges should make pre-trial rulings on whether or not the substantive elements of entrapment – most importantly predisposition – should be put to the jury in the first place.\(^{67}\)

Others would endorse absolute judicial resolution, albeit by working outside the entrapment doctrine. Although not writing in the counter-terrorism context specifically, Donald Dripps\(^{68}\) and Paul Marcus\(^{69}\) argue that the outrageous government misconduct defence should replace entrapment so that the determination is made by judges, not jurors. According to United States v Russell, a prosecution must be stayed irrespective of the defendant’s predisposition if the executive misconduct is so extreme that it violates fundamental fairness or is “shocking to the universal sense of justice” mandated by the Due

\(^{66}\) Peter Margulies “Guantanamo by Other Means: Conspiracy Prosecutions and Law Enforcement Dilemmas After September 11” (2008) 43 Gonz L Rev 513 at 556.

\(^{67}\) Roth, above n 6, at 1027.

\(^{68}\) Donald Dripps “At the Borders of the Fourth Amendment: Why a Real Due Process Test Should Replace the Outrageous Government Conduct Defense” (1993) U Ill L Rev 261.

Process Clause of the Fifth Amendment. According to Dripps and Marcus, this doctrine provides sufficient protection for defendants who are wrongfully ensnared in the criminal justice process by government impropriety.

Laguardia similarly advocates a remedy that does not alter the substantive entrapment principles. In her view, judges should enter vastly shorter sentences if they consider that predisposition should not have been found on the facts or if they are particularly perturbed by the executive’s impropriety in the investigation or prosecution. Again, under this approach entrapment pleadings would be heard entirely as they are now but the courts would then resort to alternative principles to do justice.

Finally, some recommend piece-meal solutions. Sherman, for instance, recommends that the government should be required to show that the defendant initiated contact with the informant; and that prosecutions should automatically be barred where government agents continued to pressure the defendant despite refusal to participate, or where they misrepresented the illegality of the conduct. In addition, Sherman suggests that evidence of the defendant’s political and religious views should only be admissible where it is probative of whether or not the defendant actually committed the crime.

On the other side of the debate, Stevenson promotes a rebuttable presumption of predisposition in all prosecutions of terrorism crimes. In his view, the inherent distinctiveness of terrorism offences, coupled with the vital importance of sting operations to the war on terror,

---

70 United States v Russell 411 US 423 (1973) at 431–432.
71 Francesca Laguardia “Terrorists, Informants, and Buffoons: The Case for Downward Departure as a Response to Entrapment” (2013) 17(1) LCLR 171 at 179.
justifies narrowing the application of entrapment in terrorist trials as much as possible. According to him, “the stakes are plainly higher for deterring or incapacitating perpetrators of terrorism as opposed to the traditional "victimless" crimes”, which makes special standards appropriate. Failing such special standards, Stevenson claims, the jury wields a dangerously wide discretion to determine predisposition and thus to return terrorists to the streets.

2 My proposal

None of the foregoing proposals sufficiently identifies and addresses the practical inapplicability of entrapment in terrorism prosecutions. First, the suggestions from Dripps, Marcus and Laguardia are unacceptable because they fail to address the area of law which should properly respond to this problem. Entrapment is the one doctrine which is expressly designed to achieve justice in the kinds of terrorism cases which are now appearing before United States courts. It is therefore inappropriate to simply accept entrapment’s deficiencies and look for an alternative legal solution.

Although the proposals of Margulies and Roth are better, they still fall short. For reasons described more fully below, I suggest that entrapment in the United States is hamstrung by two distinct problems which must both be remedied to revitalise the defence. The first problem is that by adopting a subjective approach, the jury is required to focus on the character of the accused. This invariably ensures a conviction when the accused looks and sounds like a terrorist. The second closely related problem is that in an era of intense fear and racialisation of terrorism, juries are not an appropriate body to decide the question of entrapment. Thus, the appropriate solution is to adopt

---

73 Stevenson, above n 40.
74 At 139.
75 Ibid.
76 Roth, above n 6, at 987, 1027; Said, above n 49, at 687, 711, 732–733.
77 Aziz, above n 5.
the objective approach to entrapment and to have the matter decided by judges.

3 Superiority of the objective test

According to the subjective test, once inducement is established the jury must determine whether or not the defendant was predisposed to commit the crime before the government became involved. By definition, this requires jurors to analyse the defendant’s character: indeed, the very preference for the subjective approach in the first place was rooted in the positivist assumption of the time that all human beings fell into – or somewhere in between – two inherently different species, namely, the law-abiding and the criminal.\(^78\)

In pleading entrapment, defendants are said to “open the door” to otherwise inadmissible character evidence.\(^79\) Thus, the prosecution offers evidence about the defendant’s background, opinions, beliefs and reputation, essentially arguing that the government induced a bad person, not a good one.\(^80\) Jurors are presented with violent jihadist videos and inflammatory speeches and are told by prosecutors and expert witnesses that the fact the defendant consumed this content proves an inherent attraction to terrorist activity.\(^81\) Taken together, this evidence is highly problematic for Muslim defendants because in a climate of “Islamophobia” jurors tend to equate Islamic beliefs with general bad character.\(^82\)

To make matters worse, jurors often resolve the character inquiry by assuming that only a predisposed person could possibly agree to a

\(^{78}\) Frampton, above n 50.
\(^{79}\) Federal Rules of Evidence, 404(a)(1).
\(^{80}\) Columbia Law School Human Rights Institute Illusion of Justice, above n 5, at 58.
\(^{81}\) “Terror Factory: Inside the FBI’s Manufactured War On Terrorism”, above n 9, at 56 minutes 40 seconds.
\(^{82}\) Center for Human Rights and Global Justice Targeted and Entrapped, above n 1, at 18.
terrorist plot. As Cole explains, jurors place themselves in the position of the accused and ask whether, if confronted with the same opportunities and pressure, they too would join a terrorist enterprise.\textsuperscript{83} Insofar as jurors can never imagine themselves agreeing to violent terrorist attacks, they resolve that the defendant must have been predisposed to the crime. Coupled with the highly prejudicial evidence discussed above, this invariably leads to a finding of bad character and predisposition to crime, and thus rejection of entrapment.

Yet this cuts across the fundamental principle that criminal liability is determined on the basis of actions, not character. As Frampton explains, Anglo-American criminal law is premised on the notion that criminals and non-criminals are distinguished merely by contingent events. Only where rational actors voluntarily engage in conduct proscribed by the State are they properly regarded as criminals and must face the appropriate legal sanction.\textsuperscript{84} That the subjective approach cuts across this ideal is unacceptable. It is the principal reason why in the United Kingdom\textsuperscript{85} and Canada\textsuperscript{86} courts have explicitly rejected it in

\textsuperscript{83} Cole, above n 42.
\textsuperscript{84} Frampton, above n 40.
\textsuperscript{85} In the United Kingdom, entrapment is considered as a particular manifestation of abuse of process, for which the ultimate question is always “whether the conduct of the police or other law enforcement agency was so seriously improper as to bring the administration of justice into disrepute”: \textit{R v Loosely} [2001] UKHL 53, [2002] 1 Cr App R 29 at [25]. Moreover, the House of Lords has specifically rejected predisposition, describing it as “inherently speculative” and “an inadequate tool” for deciding entrapment cases because the defendant’s bad character cannot “make acceptable what would otherwise be unacceptable conduct on the part of the police or other law enforcement agencies”: \textit{Loosely} at [24].

\textsuperscript{86} Similarly in Canada, the Supreme Court has characterised entrapment as a form of abuse of process which, when established, necessitates a permanent stay of proceedings. In doing so, the Canadian Supreme Court has explicitly sided with the dissenting voices in the early United States decisions, adding that a focus on the defendant’s predisposition would avoid the central question of the propriety of the executive’s conduct: \textit{R v Mack} [1988] 2 SCR 903 at [97]; \textit{R v Babos} [2014] 14 SCC 14.
favour of the objective approach and it is also the most significant reason why the United States courts should follow suit.

In doing so, it bears noting that the United States would not abandon predisposition altogether. First, entrapment under the objective approach would turn on the propriety of executive conduct, one aspect of which is the initial decision to investigate and pursue an individual. Here, as the United Kingdom and Canadian authorities have explained, there must be a reasonable basis for pursuing a particular individual, which can often be established by that person’s past history and character.87 Furthermore, predisposition would remain relevant in a policy sense because the underlying rationale of sting operations – which entrapment is charged with regulating – is to neutralise individuals with who have a predisposition towards crime. By permitting the police to present opportunities to commit crime, while prohibiting aggressive inducements, the law would allow them to weed out only the truly predisposed.88 Accordingly, predisposition would remain relevant to the inquiry but would be treated as an underlying intellectual concern rather than a legal element to be proved.

4 The need for judicial resolution

Arguably, the adoption of an objective test would also neutralise the second problem with the current law of entrapment: namely, the tendency of jurors to enter a conviction on the basis of a defendant’s Islamic background viewed against sensationalised fears about terrorism. Perhaps, by avoiding the invasive character inquiry and the presentation of inflammatory evidence, the scales would tip back adequately in favour of the accused.

However, it is insufficiently clear that this would occur, and so it remains necessary to transfer jurisdiction over entrapment from juries

87 R v Mack, above n 85, at [156]; R v Loosely, above n 84, at [27], [58].
88 Lord Nicolls and Lord Hutton expressed a similar view in R v Loosely, above n 84, at [28] and [101] respectively.
to judges. As Roach explains, the significance of acquittals raises a serious possibility that the “remedial tail may wag the dog”: that is, convictions may be entered merely because the spectre of an acquittal is unpalatable. I suggest the courts should be particularly alive to this concern in the counter-terrorism context. Given that terrorism crimes are generally regarded by the public as extremely serious offences, there is probably considerable reluctance among jurors to acquit and to be responsible for a terrorist walking free. Accordingly, even without the predisposition inquiry making it easier for jurors to convict, jurors might still work backwards from their desire to convict to the conclusion that no improper inducement has occurred. This is an unacceptable risk when determining charges that carry extraordinarily long prison sentences.

5 Justifying pro-defendant measures

Some will inevitably object to my proposal. Most likely, they will argue that entrapment cannot be recast simply because it is effectively inapplicable to one narrow form of crime. However, even if the federal courts will not abandon the subjective approach absolutely, this does not preclude them from recasting entrapment for terrorism proceedings alone.

Many have argued that the counter-terrorism paradigm is fundamentally distinct to others the law has managed to date. In particular, some have suggested that effective counter-terrorism requires the application of different legal standards in various contexts including the design of terrorism crimes and the rules relating to detention and trial. Even entrapment has become the subject of such suggestion, with Stevenson arguing that “terrorism is a special category

---

of crime, something particularly horrific” which justifies a narrower reading of traditional defences.\(^{90}\)

While it is questionable whether this view is actually correct,\(^{91}\) it is worth entertaining it to illustrate that converse conclusions also flow from the premise that counter-terrorism is an inherently special paradigm. If nothing else, the United States government has responded as if terrorism offences were a special type of crime. For example, the nature of terrorism has demanded the suspension of traditional defence rights, while statutes demand exceptionally long sentences for terrorism crimes. Thus, even if terrorism crimes are not inherently special, the United States government has created an environment in which, for practical purposes, they are.

The key, though, is that terrorism crimes are ‘special’ from both the State’s and the defendant’s perspective. In the same way that “the stakes are plainly higher” for the government and the public, the spectre of maximal sentences equally raises the stakes for defendants. So if anything, the counter-terrorism paradigm has simply raised the stakes for all those involved. Accordingly, the war on terror is not something that only the state can invoke to justify the extension of state power and the abrogation of defendants’ rights. It would be highly dangerous to assume that it did. But, by the same token, the nature of the war on terror should also necessitate greater, not lesser, protections for defendants. In my view, recasting entrapment is just one example of this broader imperative.

\(\text{VI} \quad \text{Conclusion}\)

In the years since 9/11 the terrorist threat to the United States has changed. As a result, the Government has developed various new

\(^{90}\) Stevenson, above n 40, at 140.

counter-terrorism strategies. One of those has been to closely monitor communities, most often Muslim, and to stimulate the “radicalization” of its members in a controlled environment. This strategy has been implemented with extraordinary aggression in some cases, with FBI agents and informants creating the plot, providing the logistics and moulding otherwise clueless individuals into ‘dangerous’ terror suspects.

This paper has criticised that strategy on a number of grounds and suggested that the FBI investigative guidelines be redrawn to ensure that sting operations are reserved for only the most appropriate cases, namely, where there is already an objective reason to suspect the subject.

However, such reform probably will not occur. Accordingly, this paper has also called for changes to the law of entrapment to ensure terrorism suspects are provided proper protection from the misuse of state power during sting operations. In particular, it has advocated a shift from the subjective approach to an objective approach, by which the finder of fact would decide the issue of entrapment by reference to the conduct of the executive, not the character of the accused. It has also suggested that the finder of fact should be a judge, not a jury, because there is too great a risk that jurors might reject the defence for fear that they might be allowing a potential terrorist to walk free.

While there is every possibility that these recommendations will fall on deaf ears, at the very least they will hopefully serve as a counter-current to the increasingly conservative attitude to the rights and interests of terror suspects. If the criminal paradigm really has changed as a result of 9/11, the law must respond appropriately to guarantee all the values underlying the criminal justice system. This means that in addition to changes facilitating effective criminal investigation, the United States must also make changes to ensure that defendants’ rights are upheld.