

**Creating Terrorists:
Issues with Counterterrorism Tactics and the Entrapment Defense
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Terrorism is a phenomenon that instills a significant level of fear among the American public. The capacity for destruction is immense and it has the potential to harm the entire nation in a matter of seconds. The constant exposure to terrorist attacks and terrorist-related arrests in the media leads many to mistakenly conclude that it is a common threat. The complex and often misunderstood nature of terrorism leads law enforcement to devote the majority of their resources towards subduing such threats and subsequently claiming a victory in the war on terror. However, law enforcement strategies may actually play a role in the number of terrorists who are apprehended and thus, increase the perception of the likelihood of an attack. While few could successfully argue that the capture of a homegrown terrorist is harmful, a closer look at the characteristics of these cases reveals many concerns.

Although there is no single agreed-upon definition of terrorism, it generally refers to the use of violence against civilians in hopes of accomplishing a political objective (Hoffman, 2006). The term is often misused, and society lacks a concrete understanding that the goal of terrorism is to incite political change (Hoffman, 2006). An individual who engages in violent acts against any number of people cannot be labeled a terrorist if he or she lacks politically motivated ideology. This definition provides a very important framework when analyzing defendants in terrorism prosecutions. It calls into question whether the individuals targeted and arrested by the Federal Bureau of Investigation are legitimate terrorists. As this paper will show, it is likely that many of them are ordinary individuals with weak willpower who eventually succumbed to the coercive tactics of law enforcement. In these instances, the entrapment defense should come into play and provide protection for the innocents. Instead, the unclear language of the entrapment defense appears to provide law enforcement legal cover to engage in these questionable tactics.

Entrapment defenses are systematically unsuccessful; in every terrorism-related case that has emerged after 9/11, the defense has failed (Norris & Grol-Prokopczyk, 2016). This is due to a combination of both the content of the law of entrapment itself as well as the counterterrorism strategies of law enforcement. These fundamental issues have the capacity to diminish the integrity of the criminal justice system as it systematically incarcerates those who should be exonerated through the entrapment defense. This threatens the entire purpose of the law by promoting the use of questionable police tactics while simultaneously refusing to give legal protection to targets. Without this legal protection, the goals of the government in protecting society and civil liberties are not fulfilled. Terrorism investigations are initiated in the name of protection, but this paper argues that society is not being protected through the incarceration of an individual with neither the desire nor the means to complete a large-scale attack.

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The Rise of Undercover Operations

Historically, the federal government infiltrated radical movements such as the Ku Klux Klan, communists, anarchists, and civil rights activists in order to obtain information regarding their objectives and strategies. America's history is replete with targeting movements that were deemed a threat to the norms of society. Sting operations and the use of informants were first initiated during these time periods so that the government could educate itself on the movements that they feared. This tendency further expanded during the 1956- 1972 FBI COINTELPRO program (Norris, 2016). This was fueled by intense paranoia and the fear of those who were dedicated to fighting segregation and structural racism. The program became known for violating civil liberties through the use of heavy surveillance to eradicate movements that the government deemed undesirable. This was considered appropriate, because agents viewed the interest of stopping "dangerous" criminals as more important than upholding individual rights guaranteed by the constitution. In many cases, government agents became "agent provocateurs;" they encouraged action in order to obtain convictions (Norris, 2016). This refers to the process of an officer approaching a target, coaxing them to commit a crime, and then arresting them shortly after. Despite the intensive operations taking place, very few entrapment cases emerged during this time period. Once the public was informed about the intrusive nature of the strategies, the program abruptly came to an end (Norris, 2016).

As expected, the methods and goals of the government regarding terrorism prevention were entirely altered after the devastating attacks on September 11, 2001. The FBI was heavily criticized for failing to prevent this attack; it brought many weaknesses of national security into light. Faced with such a disturbing event, President Bush promised that "never again" would such an attack occur. Thus, the War on Terror began, with law enforcement strategies towards terrorism dramatically shifting as it became the nation's top priority. Far more funding and technology were devoted towards terrorism investigations (Federal Bureau of Investigation, 2016). The response was an aggressive, preventative policing technique that relied heavily on informants, surveillance, and sting operations. As a direct consequence of 9/11, terrorism investigations doubled between 2001 and 2003 and terrorism convictions quadrupled (Laguardia, 2013). In every single state, the FBI is currently investigating potential homegrown terrorists (Federal Bureau of Investigation, 2016). A former FBI agent, Michael German, highlights the many changes in police tactics:

prior to September 11, 2011, if an agent had suggested opening a terrorism case against someone who was not a member of a terrorist group, who had not attempted to acquire weapons, and who didn't have the means to obtain them, he would have been gently encouraged to look for a more serious threat. An agent who suggested giving such a person a stinger missile or a car full of military-grade explosives would have been sent to counseling. Yet... such techniques are now becoming commonplace (Norris & Grol-Prokopczyk, 2016, p. 609).

Strategies that were never previously considered are now heavily relied upon. The last few decades have been characterized by untrustworthy informants, undercover operations, wiretappings, warrantless surveillance, and coercive tactics (Kamali, 2017).

Unfortunately, these questionable methods have only expanded over the last seventeen years, bringing many new issues into light.

Issues with Counterterrorism Strategies

Characteristics of Targets

In order to understand the issues that accompany counterterrorism strategies, it is important to carefully analyze how individuals are targeted in the first place. When looking at the individuals who are initially flagged for investigation, it is apparent that most are Muslim-Americans (Norris, 2016). These individuals are easily identified due to the high levels of warrantless surveillance taking place in Muslim communities (Kamali, 2017). Racial profiling is seemingly common due to systematic negative views of Muslims and the subsequent fear that arises from this profile. Federal agents initially target individuals based on religion and ethnicity as if it is a strong indicator of wrongful activity (Aaronson, 2011). These tactics operate on the assumption that only Muslims contemplate committing terrorist acts against the United States (Aziz, 2011). This tendency developed after the 9/11 attacks and have only increased since then, highlighting a disturbing trend (Norris, 2016). Perhaps the most recent example of this fear of foreigners is the immigration ban proposed by President Donald Trump. It reveals the innate fear of a terrorist attack and reflects the reasoning behind why millions of citizens of Muslim communities are being denied entry into the United States (Mosher & Gould, 2017).

In addition, the defendant profile overwhelmingly consists of mentally ill, lonely young men who lead unaccomplished lives (Norris & Grol-Prokopczyk, 2016). These individuals are easy targets because they are generally weak-minded and therefore easily persuaded. Due to these characteristics, it is presumed that they are highly susceptible and unable to fully understand the repercussions of their participation in a terror plot. The goal of many terrorism investigations is to identify an individual with some level of sympathy towards the terrorist cause (Norris & Grol-Prokopczyk, 2016). Therefore, the question is not whether the individuals are capable of committing a successful large-scale attack on their own, but whether they can be induced to do so. This becomes a problem because individuals coinciding with this profile are far more likely to fall victim to the coercive tactics of law enforcement.

In fact, one study identifies 20 cases of “loner suspect terrorists on a quest to locate friends,” and states that 13 of these “terror plots” might more appropriately be called “FBI plots” (Bejesky, 2015, p. 446). This suggests that targets might simply be lonely; the informant plays on this desire to have friends, gains their trust, and then convinces them to commit a crime. The case of Eric McDavid is a particularly devastating case that reflects this idea. Throughout the duration of the FBI’s operation on McDavid, he had little motivation to carry out any attack (Norris, 2016). The FBI preyed upon his need for companions by using a female informant to force radical environmental ideology on him by promising a sexual relationship. The promise of intimacy is commonly used and is referred to as the “honeypot” strategy (Norris, 2016). When McDavid asserted that he no longer wanted to be a part of the informant’s plan, the informant became angry and tried to manipulate him further. Though he maintained that he did not want to participate, he was still arrested because he had already purchased bomb ingredients under the informant’s direction. Though his

criminal intent was very questionable and indicated that the only reason he continued was due to the romantic relationship, he was still sentenced to 19 years in prison. In 2015, however, he was released, after evidence that should have been disclosed to the defense attorney was discovered. McDavid, fitting the common profile of a young man seeking companionship, had still served nine years of his life in prison for a crime that he had no desire to commit. He was erroneously convicted as a terrorist because his actions lacked political motivation.

Questionable Tactics

Once the target has been identified, the government begins utilizing an array of strategies to aid in their investigation. In the commonly used sting operation, the government creates the criminal opportunity in order to identify and arrest those desiring to engage in crime (Field, 2017). The goal is to offer the individual rewards, hoping that he or she will agree to the criminal proposition. Many civil rights activists, including the American Civil Liberties Union (ACLU), disagree with the use of sting operations due to the concerns they raise (Field, 2017). The use of sting operations leads many to question why the government should use their power to guide someone towards crime instead of away from it. However, in *Sorrells*, the Supreme Court gave law enforcement permission to engage in sting operations because they are intended to solely provide the opportunity to individuals already motivated to commit the acts on their own (Peters et al., 2013). Even still, proactive tactics may create severe issues because it tends to “test the virtue of citizens rather than aid in the detection and prosecution of crime” (Hughes, 2004, p.55). The idea is to stop a crime before it occurs, although it is nearly impossible in terrorism cases to determine if the crime would have occurred had the government not initiated an investigation. While sting operations and undercover setups may be an efficient way to satisfy the goal of identifying hard-to-reach criminals, they also run the risk of “ensnar[ing] almost anyone if taken far enough” (Stevenson, 2005, p. 9).

Another questionable tactic is the use of informants. As law enforcement strategies became more “aggressive, proactive, and preventative,” the number of informants began to increase (Norris & Grol-Prokopczyk, 2016, p. 617). One study found that 580 cases have been prosecuted for terrorism since 9/11, with 317 of these cases involving the use of an informant (Norris & Grol-Prokopczyk, 2016). In another study of 508 terrorism cases, 243 used informants (Aaronson, 2011). As demonstrated in these studies and others, the majority of terrorism investigations typically involve an informant. The FBI now boasts a list of over 15,000 informants to aid in their investigations (Aaronson, 2011). Individuals are often coaxed into committing a terrorist act with the informant, who provides the idea as well as the means. The individual is simply following along with the plot, and they often lack a concrete understanding of the nature of their actions. It becomes an even greater issue when considering that many informants have discretion regarding what interactions to record (Field, 2017). There are subsequently many interviews that go unrecorded; the nature of these conversations and their potentially exculpatory contents will never be known to the court.

There are many legal issues connected to the use of informants; the Supreme Court generally has a negative view towards their use (Aaronson, 2011). Many informants have criminal records, lie during trial, fail to record integral conversations, and are motivated financially. It is therefore reasonable to conclude that they have a

“vested interest” in the investigation and they would benefit if a person succumbed to the proposition of a terrorist plot (Field, 2017). Informants are generally either compensated for their time or working to remove a criminal charge; again, their underlying motives may impact behavior (Norris & Grol-Prokopczyk, 2016). Informants are offered large sums of money for their participation, thus encouraging them to provide evidence of terrorism, no matter how weak it may be (Norris, 2016). In some cases, informants were even obtained through blackmail; agents would threaten to deport undocumented individuals or tell wives that they were being cheated on if they didn’t agree to become an informant (Aaronson, 2011). This interest in the outcome of an investigation may lead informants to take extreme measures in order to satisfy the government’s goals. Physical violence is not an exception. In one case, the informant threatened to slit a young man’s throat if he decided to back out of the plot (Norris & Grol-Prokopczyk, 2016). Agents and informants may also use an array of other tactics as a method of inducement. This includes constantly pressuring the suspect, offering jobs, providing large sums of money, supplying them with alcohol or drugs, threatening death or bodily harm, and urging suicide (Norris & Grol-Prokopczyk, 2016). Each of these factors may ultimately drive the suspect to agree to the proposed terror plot. While the promise of financial gain is not enough to drive most people to commit terrorism, the targets are not representative of the population. They are targeted for their vulnerability and are thus highly susceptible to promises of resources. It is easy to imagine that “most, if not all, individuals have a ‘price’ at which they would commit most crimes” (Carlson, 2007, p.1103).

James Cromitie is one of the best-known cases highlighting the many issues involving the use of informants. He met Hussein in church one day, who became a brotherly figure to him. Unbeknownst to Cromitie, Hussein was an informant for the FBI. Although Hussein told the FBI that Cromitie had an elaborate and violent terrorist plan, the court could not find any active involvement in the plot. Hussein later coaxed him into agreeing to bomb synagogues when he played on Cromitie’s intense hatred of Jews (Aaronson, 2011). He did not take any action alone and no incriminating evidence was discovered aside from the testimony of the informant. Throughout each stage of the process, Cromitie made several mistakes, highlighting his incapability. He could not activate the bomb, forgot codewords, and forgot to set the timer on the bomb. Even in the very beginning, he made it clear that he did not want to harm; he only agreed to plans that would kill the lowest number of people (Laguardia, 2013).

It seemed that Cromitie participated solely to please Hussein, who was giving him much-desired friendship as well as money. Hussein promised him a quarter of a million dollars if he proceeded with the plot, even though the FBI was reportedly unaware that such a deal was offered. Cromitie was still convicted, despite Judge McMahon stating that she “believe[d] beyond a shadow of doubt that there would have been no crime here except the government instigated it, planned it, and brought it to fruition” (Norris & Grol-Prokopczyk, 2016, p. 612). The issues regarding the informant were also acknowledged. Hussein was paid \$100,000, hours of time were dedicated to this investigation, and the costs of prosecution were staggering. The informant became a joke at trial: he lied in court several times, had his own criminal record, and discriminately videotaped interactions with the defendant. Like many others, this case is characterized by an incapable defendant and visibly dishonest informant.

A Difficult Task for the FBI

There is an intense pressure to find and capture terrorists in our post 9/11 society, making the search for terrorism a top priority despite the difficulty that accompanies the search. With little other options, the use of sting operations and informants appears to be an honest effort to keep the public safe. From the perspective of the FBI, it is nearly impossible to identify a terrorist before an attack happens (Federal Bureau of Investigation, 2016). Dark networks are hard to identify and are very unpredictable; the nature of terrorism makes it particularly problematic to detect. Proactive law enforcement strategies are therefore considered necessary to discover and prevent certain crimes due to their “invisibility” (Hughes, 2004, p. 45). Law enforcement must then rely on hunches because that is the only information available; they may have reason to believe that someone may engage in crime and then attempt to confirm their suspicions (Hughes, 2004). Further, there are guidelines set forth in the United States Attorney General’s *Guidelines on Federal Bureau of Investigation Undercover Operations* in order to promote good conduct. This does act as a restraint on unlawful behavior and when used in addition to statutory requirements, increases the likelihood that civil liberties will be preserved (Stevenson, 2008).

Additionally, many of the tactics even resemble actual terrorist recruiters. Current law enforcement strategies do try to “imitate the recruitment process” (Laguardia, 2013, p. 187). This may indicate that law enforcement is catching those who may have fallen victim to terrorist recruiters’ promises in the future (Field, 2017). Looking at the actions taken by many defendants, it also becomes clear that they may have been slowly headed towards the path of criminality on their own. Some purchased weapons from undercover officers or bought materials on their own accord (Field, 2017). Some even made very clear statements in support of terrorist ideology and their desire to win fame in Al Queda. Many posted violent thoughts and encouraged violence against the United States in online forums. The FBI cites social media as an effective strategy for identifying potential terrorists precisely for this reason (Federal Bureau of Investigation, 2016). While social media accounts are being monitored, the target will often make pro-terrorist comments. Perhaps even more worrisome is that even when informants seemingly gave the target multiple opportunities to withdraw, some still refused to walk away from the plan (Field, 2017). Courts would receive severe backlash if they were to exonerate a defendant who later committed an act of terrorism.

Consequences of these Strategies

Even despite the difficult task that the FBI is faced with regarding terrorism, the current use of counterterrorism strategies is inherently harmful. Returning to the definition of terrorism, a true terrorist is not motivated by financial gain, but by terrorist ideology and radical beliefs. Trevor Aaronson (as cited in Field, 2017) exemplifies the harmful repercussions of counterterrorism tactics by boldly stating that:

the FBI currently spends \$3 billion annually to hunt an enemy that is largely of its own creation... today’s terrorists in the United States are nothing more than FBI creations, impressionable men living on the edges of society who become bomb-triggering would-be killers only because of the actions of FBI informants.

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In other words, without government intervention, it is extremely unlikely that these defendants would have ever committed a terrorist act on their own. This issue has also gained support from the ACLU, who agree that most defendants did not take any steps towards becoming a terrorist before contacted by an informant (Field, 2017).

It is helpful to take the utilitarian perspective and calculate costs and benefits of such strategies. Counterterrorism tactics, especially the use of informants, are significantly costly and dominate the majority of the FBI's budget (Miceli, 2007). It incarcerates individuals who are not actually dangerous while simultaneously wasting resources; large sums of time and money are devoted to such operations and prosecutions. In addition to the strategies themselves, terrorism prosecutions are costly for taxpayers because offenders receive long prison sentences. It is also expensive in terms of sending an innocent person to prison; there is no way to calculate the degree to which entrapment affects the lives of the vulnerable individuals who are targeted and later convicted. These tactics may also unnecessarily increase the crime rate and public perceptions of the prevalence of terrorism (Miceli, 2007). There is publicity involved because once the person completed enough steps under the direction of the government, they are arrested and then the media quickly explains how the FBI prevented an attack (Aaronson, 2011). However, there is an increasing number of articles that criticize these arrests and argue that the FBI is not doing their job, despite the arrests being made.

The fact that law enforcement fixates on the stereotypical profile of a Muslim terrorist takes away resources and focuses on the wrong people (Aziz, 2011). An issue arises when the FBI then fails to detect right-wing terrorist plots in a shocking number of cases because they are not deemed as threats (Norris, 2016). Even though the country has been harmed more by radical conservatives, the FBI still prefers to focus on the Muslim community. This focus blinds law enforcement from detecting legitimate terrorist plots that create actual harm to the United States (Aziz, 2011). This is the reason why despite all the money, time, and infringement on rights that is devoted to terrorism, the FBI still failed in preventing actual attacks that killed hundreds of individuals (Aziz, 2011). Right-wing extremists are responsible for more deaths in the United States than Muslims, yet they consistently remain ignored by the government until it is too late (Aziz, 2011).

However, because they are deemed effective, the use of law enforcement stings and informants are increasingly prevalent. This increase should be accompanied by an increase in protections against the convictions of otherwise innocent defendants. This has not occurred, calling the integrity of the system into question. A police officer should not use his power to push one toward crime, but to guide one out of crime (Laguardia, 2013). Judge Marston supports this point by stating that officers should attempt to improve the "would be criminal" as opposed to "aiding in his further debasement" (Laguardia, 2013, p.184). Yet, the favorable outcomes for the government at trial send the message to police that it is okay to use unreliable informants and pressure suspects (Laguardia, 2013). Regarding terrorism, the government is encouraging rather than preventing.

Success of Strategies: Is America safer?

After examining the issues that accompany counterterrorism strategies, it is important to establish whether the public safety claim is valid by determining whether

these strategies actually reduce the threat of terrorism. Strategies employed by law enforcement must be evaluated to determine if they are fulfilling the original goal of their programs. One study demonstrated that only 9% of the 580 terrorism cases presented an actual threat (Norris & Grol-Prokopczyk, 2016). In other words, only 9% of convictions may have actually prevented a terrorist attack. Another study claims that only 1% of terrorism prosecutions were a product of a true threat (Aaronson, 2011). In 2007, the Justice Department indicated that they had saved many lives by intervening in potential terror plots; they victoriously claimed that there were 261 terrorism cases prosecuted 2001-2006 and thus saved many lives as a result (Bejesky, 2015). However, there is a growing amount of evidence that refutes their bold claims of success. During those 5 years, there were only 2 legitimate cases of terrorism that harmed citizens; though there were 261 prosecutions, only 2 attacks caused damage (Bejesky, 2015).

Another study concluded that since 9/11, there were 11 cases of "potentially significant" terrorist threats and only 3 of them succeeded (Downs & Manley, 2014, p. 14). These 3 attacks resulted in 17 deaths and a couple hundred injuries in total. While still devastating, terrorist attacks are much less likely than the FBI and the media leads citizens to believe. Faced with these statistics, it seems that the money devoted to these operations is not justified. An interesting finding to add is that the terrorist crimes that defendants are charged with typically do not involve any violence. Only 6% of jihadists had a violent offense before the arrest for terrorism (Norris, 2016). In fact, the most common charge is providing material support to a terrorist group, which accounts for 192 out of 508 cases (Aaronson, 2011). It is important to note that the most common charge does not result in any form of violence. The least common were bombings (6), attacks on public transport (4), and hostage taking (2) (Aaronson, 2011). Those last three crimes are typically deemed to be stereotypical terrorist crimes, although the statistics show the opposite is true.

In reality, these strategies may actually decrease public safety by focusing on the wrong individuals. The FBI has consistently failed to follow other leads that could have prevented danger. Warnings often ignored as agents focus more on sting operations. This would indicate that the nation is not safer, but perhaps more in danger. For example, the FBI had been monitoring Timothy McVeigh, the terrorist responsible for the Oklahoma City Bombing for a while before he committed the attack. Unfortunately, however, the attack was not prevented, despite surveillance taking place (Kamali, 2017). Even U.S. Senators even expressed concern with the Department of Justice's claim that many terrorism plans were thwarted by stating: "we have not yet seen any evidence showing that the NSA's dragnet collection of Americans' phone records has produced any uniquely valuable intelligence" (Bejesky, 2015, p. 397). This does not support the public safety claim, because despite the intrusive measures, law enforcement is seemingly unable to pursue substantial threats.

The threat of Jihadist terrorism is vastly overstated; locking these offenders in prison doesn't increase the nation's security (Downs & Manley, 2014). The government spends billions of dollars on attempting to prevent terrorism from killing an average of six people a year (Mosher & Gould, 2017). When examining the causes of death in the United States, one's chance of death by terrorism is remarkably small compared to others. Ironically, one is nearly six times more likely to die by the police than a terrorist attack (Mosher & Gould, 2017). Of course, this is just based on probability alone and does not take demographics into consideration, but the results put the danger into

perspective. Because the FBI doesn't release a report detailing the success and failures of their counterterrorism initiatives, we do not really have a way of evaluating success of their efforts (Mosher & Gould, 2017). The findings discussed in this section just make easier to determine whether the public safety claim is valid. Most empirical evidence suggests that it is not.

Advocates of current strategies assert that a large-scale attack on U.S. soil has not occurred since 9/11 (Aaronson, 2011). But the question is whether this is due to the strategies of law enforcement, or the fact that terrorism is statistically very rare. It is unknown if these defendants would have ever committed the crime on their own, but research suggests that it is very unlikely (Aaronson, 2011). Currently, there is little evidence that the nation is any safer with these intrusive, preventative strategies in place (Kamali, 2017). This reflects the underlying issue behind many counterterrorism strategies: although the government provokes criminal behavior, it will then punish defendants without affording them an appropriate level of legal protection. Given that research indicates that Americans are not "safer" as a result of these strategies, it increases the need for protection of innocent defendants.

The Entrapment Defense

Perhaps the most well-known attempt to provide defendants with this much-needed legal protection is the entrapment defense. The defense is a fairly new concept of criminal law, as it originated in the 20th century (Stevenson, 2005). Entrapment is an affirmative defense, meaning that the defendant must first provide some evidence that they were entrapped before allowing prosecution to refute the claim (Stevenson, 2005). Two landmark cases, *Sorrells v. United States*, 287 U.S. 435 (1932) and *Sherman v. United States*, 356 U.S. 369 (1958), signified the recognition of the entrapment as a defense of excuse. The cases offered a framework detailing two tests, the objective and subjective, to aid courts in determining whether the defendant should be exonerated by reason of entrapment. In many scholarly analyses of the court opinions, a common language trend emerges. Scholars have generally used words such as "lure," "induce," "irresistible," and "tempt" when describing their interpretation of entrapment (Hughes, 2004, p. 49). This reflects the current societal understanding of the defense as well.

The test used varies depending on the jurisdiction, and some even utilize a combination of the two (Stevenson, 2008). In the subjective test, the focus is on whether the defendant was predisposed to committing the crime and therefore had criminal intent (Hughes, 2004). The defendant must assert by preponderance of evidence that the government induced him to commit the crime (Dillof, 2004). If this is established, the government must then prove beyond a reasonable doubt that the defendant was predisposed (Dillof, 2004). This second part is much more difficult for the defendant because juries are far more likely to determine that the defendant was in fact "ready and willing" to commit the crime (Dillof, 2004, p. 833). The objective test instead focuses on whether government's conduct was a complete violation of due process because their tactics were so outrageous that it shocks the conscience (Norris, 2016). It does not consider the characteristics of the defendant but rather how the tactics might hypothetically alter the decisions of an ordinary person (Dillof, 2004). Thus, the two competing views on entrapment are the subjective defendant characteristics versus objective police tactics. Though the language of these tests differs,

many argue that they are actually mirror images of each other and provide the same outcome regardless (Stevenson, 2008; Dillof, 2004). The number of entrapment cases that each jurisdiction handles is unrelated to the test used and is instead determined by police tactics (Stevenson, 2005). In virtually all jurisdictions, however, it is increasingly difficult to successfully argue entrapment. This is attributed to the “weak procedural posture that decreases likelihood of success” (Stevenson, 2005, p. 36). Because the doctrine is so vague, and each court is left to decipher it on their own without clear guidance from the Supreme Court, lawyers are hesitant to argue entrapment at all.

There are cases where the entrapment defense succeeds, but these exclusively involve lower-level crimes without any relation to terrorism. For example, in *United States v. Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994) (en banc), the entrapment defense was successful because the majority argued that the defendants were “foolish” with “no prayer of becoming money launderers without the government's aid” (Preis, 1999, p. 1870). The majority further explained that the defendants did not have any means to commit the crime themselves, so they were “harmless” (Preis, 1999, p. 1870). Because the defendants lacked the ability to commit a crime on their own, they did not rise to the level of culpability necessary for a conviction. Unfortunately, this reasoning is not applied to terrorism prosecutions. Terrorism is different than most other crimes, but it should not severely diminish one’s legal protections. The rule should be different due to the grave nature of the crime and the high stakes involved (Stevenson, 2008), but there is also much more liberty at stake in these cases.

Failure to Protect Defendants

While the entrapment defense is the solution offered by the Supreme Court to protect innocent defendants from intense police tactics, it systematically fails to provide any level of legal protection in terrorism prosecutions. Not a single defense counsel has successfully argued the entrapment defense in a terrorism prosecution (Norris & Grol-Prokopczyk, 2016). Entrapment cases fail because it is difficult to prove beyond a reasonable doubt that the defendant was not predisposed, and the government went beyond merely providing the opportunity (Norris, 2016). It seems that in terrorism prosecutions, “laughably incompetent criminals of little motivation and few philosophical opinions appear upon arrest as scheming ideological masterminds requiring immediate intervention, only to have those appearances dissipate over the months and years of prosecution that follow” (Laguardia, 2013, p. 175). Despite this occurrence, defendants are still found guilty, because they agree to a proposal that most would not (Field, 2017).

Even though the success of entrapment claims is nonexistent, research has demonstrated that many of the cases actually met the criteria for entrapment and should have been successful. Norris and Grol-Prokopczyk (2016) develop a series of indicators of entrapment and apply them to the terrorism cases that have arisen after 9/11. These indicators include: no prior terrorism offense, whether the government suggested the crime, the degree of informant pressure, if material incentives were present, the defendant’s reluctance, the level of government control over the events, whether the government furnished the means, and informant motivation. Each case was then scored based on the number of entrapment indicators; higher numbers reflect a greater likelihood that the offender was entrapped. The average number of indicators

across all terrorism cases is 5.3 (Norris & Grol-Prokopczyk, 2016). Even more disturbing is that 37% of the cases had over 7 indicators (Norris & Grol-Prokopczyk, 2016). One case even had 15 out of 20 indicators, yet the defense still failed (Norris & Grol-Prokopczyk, 2016). This may not be entirely accurate and individual facts of the case must be considered as well, but it gives some indication of the prevalence of entrapment. These indicators provide some evidence that these cases did not necessarily provide a significant threat. Given these circumstances, it seems impossible to imagine a case in which a defendant could succeed in arguing entrapment in a terrorist case; even the most promising cases inevitably fail (Laguardia, 2013).

The defendant's actual ability. There are many reasons why the defense fails in terrorism prosecutions. First, there is no consideration regarding whether the defendant posed a legitimate threat. In these cases, the actual threat deserves legal consideration; although it may not be enough for acquittal, it certainly may lessen their culpability (Laguardia, 2013). The question is whether the "inability to independently" engage in criminal activity should constitute a viable legal defense (Preis, 1999, p. 1871). Although I argue that it should, whether the individual could ever have succeeded as a criminal on his own accord is legally irrelevant. This is ironic because government is supposed to punish only those with a guilty mind who pose a legitimate threat to society (Preis, 1999). The government cannot criminalize thoughts alone; the *actus reus* must be present. Otherwise, everyone would face criminal charges by construing a crime only in their head with no intention of carrying it out. The fact that the doctrine does not mention the question of capability suggests that it is acceptable to punish moral character as opposed to actual actions (Carlon, 2007). This does not coincide with any theory of punishment because such individuals do not need to be deterred, incapacitated, or rehabilitated since they are not actual criminals that will harm society (Carlon, 2007).

Without making ability a requirement, law enforcement may create crimes at their will by coercing criminality (Preis, 1999, p. 1893). If ability was a legally relevant factor, it would still satisfy the purpose of entrapment doctrine and the goals of the government. However, the law recognizes that even incomplete attempt crimes are still culpable. In considering this, the impossibility doctrine is of use because it measures culpability of the defendant when the crime was impossible (Preis, 1999). Current entrapment defenses surrounding terrorism may closely resemble the concept of inherent impossibility: the defendant wanted to commit a crime but their method of achieving that objective would be questioned by most. This includes the example of someone trying to kill by using a voodoo doll (Preis, 1999). While they had intent, they were unable to calculate the appropriate level of action necessary to commit the act. It further assumes that if the person had the level of *mens rea* punishable by law, they would have taken steps towards a crime that made sense rather than using grossly miscalculated judgement. It would be unreasonable to assume that the person was actually dangerous because it is "so inherently unlikely to result in the harm intended" (Preis, 1999, p. 1899). In many of these terrorism cases, the defendants did not have the ability to commit the crime. Of course, this would still be a difficult hurdle to overcome in court, because the defendant's acts must be unreasonable and also absurd (Preis, 1999). If ability were considered, it would allow the most ludicrous defendants an opportunity for exoneration without compromising public safety. The failure to consider ability is an inherent flaw of the entrapment defense.

Cases such as the Cleveland Five demonstrate how actual ability is not given any legal consideration. This group consisted of five young, unemployed, and semi-homeless men, three with mental issues. They initially expressed a desire to take down bank signs to protest corporations (Norris, 2016). An FBI informant with a long criminal history consisting of fraud and bribery befriended them and convinced them to create a plan to blow up a bridge. This idea was created by the informant alone, and the men initially did not agree. Only after supplying them with alcohol, drugs, money, and jobs, did the informant succeed in persuading them to partake in the terrorist plot (Norris, 2016). These individuals were radicalized slightly, but there is no indication that they could have done this on their own. They did not have any desire to cause harm, and they most likely would not have been successful at committing the act anyways. They were all convicted and sentenced; the entrapment claim, of course, failed (Norris, 2016). Had ability been taken into account, the results may have been different.

Misunderstanding predisposition. In addition, there is a distorted view of the concept of predisposition which results in unequal application of the entrapment defense. Courts are provided with very little guidance and are left to their own interpretations. This confusion is illustrated through the statement: “if we ask, ‘why did he do it?’ the answer is, ‘because he was predisposed to do it;’ and if we ask, ‘why was he predisposed to do it?’ the answer is, ‘because he did it.’” (Norris & Grol-Prokopczyk, 2016, p. 626). The circular reasoning reflects how difficult it is to handle the question of predisposition. Nevertheless, on the surface level, predisposition is generally considered “preexisting criminal intent” (Hughes, 2004, p. 47). The law is designed only to punish those with a guilty mind in addition to a criminal act (Hughes, 2004). Yet current interpretation of predisposition considers other factors, making it far more than a question of the defendant’s state of mind. Predisposition is determined by considering extralegal factors including: the defendant character, past criminal history, who proposed the initial activity, whether profit was a factor, initial reluctance, and the nature of government techniques (Norris, 2016). This becomes a problem because a criminal record, for example, is not necessarily a predicate of predisposition. The goal is to separate unwary innocents from unwary criminals, yet this is determined without considering blameworthiness. Instead, the focus is on criminal background and past actions, which is not an indicator of one’s present criminal intent.

All terrorism defendants who have brought their entrapment cases to trial have been considered predisposed. However, the fact that most did not have any evidence of violent behavior calls their predisposition into question. A very severe issue is that mental weakness cannot be considered an indicator of predisposition (Laguardia, 2013). Yet even still, both mental and physical capabilities of the defendant are considered to determine positional predisposition, which refers to whether the defendant was initially in the position to engage in the criminal act on his own (Preis, 1999). Both the mental component and positional component are examined to determine criminal propensity (Dillof, 2004). The mental state refers to whether the defendant is ready and willing, while the positional component hypothesizes if the offender was likely in a position to commit the crime on their own (Dillof, 2004). Typically, both parts of predisposition are established in terrorism prosecutions. The issue is that courts and juries are not only confused, but they also allow the admittance of later actions of the defendant to determine predisposition as long as it is independent from government conduct. The

concept of predisposition is one of the many reasons why the entrapment defense fails defendants.

Jury usage is inappropriate. Most juries are unable to look past the catastrophic consequences that would have occurred had the defendant succeeded (Laguardia, 2013). They cannot grasp the fact that the defendants are incapable of such violence when they are faced with evidence of them committing acts supposedly in furtherance of terrorist ideologies (Laguardia, 2013). Judges also don't instruct juries to contemplate whether the defendants had the actual capacity to commit the crime (Laguardia, 2013). Their decisions to indict are indeed understandable. They are given instructions to either convict or acquit, without substantive judicial oversight (Laguardia, 2013). With a goal of prevention, the jury's decisions reflect our innate desire to punish terrorists harshly. The defendant's actual capacity for harm is irrelevant to jurors' analyses because they are blinded by the severe nature of terrorism. It is difficult to concoct an image of a more dangerous offender than one who is willing to harm large amounts of people.

Given these circumstances, the question of entrapment is not an appropriate task for the jury to consider. Instead, it should be a task for judges who are more familiar with the issues with law enforcement strategies. It is a difficult task for jurors to accept the defendant wrongdoing and claim not guilty due to entrapment (Peters et al., 2013). One study demonstrated that in sex offender sting operations, potential jurors are more likely to decrease guilt ratings when it was the undercover officer that initiated criminal activity (Peters et al., 2013). This outcome was correlated with the juror's due process or crime control orientation; agent solicitation decreased the perception of guilt when the juror had a due process view (Peters et al., 2013). A similar study has not been conducted in regards to terrorism. But given the current research, it is likely that agent solicitation would not decrease guilt in the eyes of the juror when faced with one charged with terrorism. Entrapment is a defense of excuse; defendants acknowledge that they committed the crime but claim that they aren't culpable (Peters et al., 2013). This question of intent is difficult for juries to grasp and even though studies suggest that they should grant the entrapment defense, juries still return a guilty verdict.

Level of dangerousness. With roots very early in American history, preemptive prosecution condones punishment due to perceived levels of dangerousness. While the law is supposed to protect innocents, it is also used to subdue ideas that the government views as potentially harmful. The current terrorism prosecutions reflect this idea as it concerns defendant's future acts and "potential for violence" (Downs & Manley, 2014, p. 5). Few could successfully argue that incarceration due to perceived dangerousness potential would be constitutional in the absence of a crime, but it is readily accepted in terrorism cases. Perhaps it is because the defendants still agreed to commit the act, and there is always the possibility that they could have succeeded on their own. It is impossible to be entirely certain that law enforcement prevented violence. But under the same rationale, it would be acceptable to punish anyone simply because there is a chance that they could harm another. This is punishing for dangerousness rather than an actual act. This refers to an important facet of law: "punishment for a crime can only proceed upon a finding of culpability, not merely a finding of dangerousness" (Preis, 1999, p. 1902). This conflicts with the entire process of the entrapment defense because it is essentially punishing solely based on one's perceived danger to the community.

Consequences of a failed defense. The entrapment defense intended to be a check on questionable police tactics, but it fails and instead protects these tactics. Because law enforcement is aware that their strategies will almost never result in a successful entrapment defense, they are more likely to use questionable tactics to serve their goals. The only risk is not public safety, but rather innocents who lack legal protection. This decreases the respect for the law and further harms the reputation of law enforcement (Dillof, 2004). Further, each purpose of punishment- retribution, deterrence, incapacitation, and rehabilitation- is threatened when entrapment defenses fail to protect defendants (Laguardia, 2013, p. 175). The retributive “eye for an eye” reasoning does not apply to these cases because they do not deserve punishment (Dillof, 2004). The deterrence claim is also invalid because true terrorists are not deterred by any threat of punishment, and specific deterrence does not apply because the defendant never would have committed the crime on his own in the first place. The only purpose of punishment that may be acceptable is incapacitation to prevent future crimes, but this reverts back to the dangerousness as a crime reasoning.

The failure of the entrapment defense is even more consequential because “once terrorism defendants have been indicted, their charge is virtually certain to stick” (Aaronson, 2011, p. 36). It is very likely that the defendant will not succeed in any entrapment claim. A direct consequence is that it often led the defendants to plead guilty to lessen their punishment as opposed to risking trial (Aaronson, 2011). Lawyers understand that the defense fails and therefore may pressure their client to plead guilty and avoid harsher punishment (Norris & Grol-Prokopczyk, 2016). A disturbing finding is that although 41% of defendants prosecuted did not belong to any terrorist organization, 66% pled guilty (Aaronson, 2011). Another study determined approximately half of the terrorism cases resulted in a guilty plea (Bejesky, 2015). This is not indicative of guilt, but of a system replete with inequality.

Another substantial issue is that terrorism enhancements significantly increase the defendant’s sentence. A study conducted in 2011 found that out of 585 terrorism prosecutions, 66 received a sentence greater than 15 years (Laguardia, 2013). Terrorism-related convictions quadruple the sentence, even when there is little connection to terrorism (Downs & Manley, 2014). The strong penalties were written with the image of a severe terrorist with the capacity to destroy the nation; the possibility of innocents being ensnared in government strategies was not given appropriate attention (Laguardia, 2013). The enhancements are excessive when considering that law enforcement does not catch true terrorists that pose a significant threat. True terrorists are willing to risk everything; there is no deterrence effect by increasing punishment. The harsh penalties do not prevent terrorism but instead harm the innocent as the government “plays on the weakness of an innocent party” (Laguardia, 2013, p. 183). Not only are they given more severe punishments after trial, but they also suffer pretrial consequences as well. For example, these defendants are also more likely to be placed in solitary confinement prior to trial due to the serious nature of their charge (Downs & Manley, 2014). Because they are unnecessarily punitive and provide no deterrence, the enhancements should be reduced.

Discussion

Counterterrorism Tactics and the Entrapment Defense

The growing trend in intrusive counterterrorism strategies reflects society's great fear of terrorism, typically reliant on Muslim stereotypes. Opinions and biases, rather than facts, often dictate law enforcement decisions. This unfortunately increases the risk of entrapment in the process. We must use caution when learning about terrorist sting operations through the media. On the surface, the defendant may look like a terrorist but when delving further, many issues arise. Some are teenagers, mentally ill, lonely, or poor. These populations may pose a criminal threat, but it also increases the consequences of intentionally encouraging criminal activity. The vulnerability of those populations targeted by the FBI threatens the integrity of the criminal justice system, specifically because they lack criminal intent. These individuals are simply persuaded to engage in an act due to the promise of attractive incentives or a compromised mental state.

These issues increase the need for legal protection. Yet, entrapment defenses fail, even when there is strong evidence to support the claim. Even judges themselves have acknowledged that there is a high likelihood that certain defendants have been entrapped, yet the defense fails nonetheless. Thus, this paper argues that the entrapment defense is entirely useless for terrorism defendants, despite those being the cases that should receive the most legal protection. The entrapment defense, in its current application, does not apply to terrorism cases even though it should due to the liberty at stake. Reform is necessary but unlikely, as it requires a case to be brought to the Supreme Court.

Moreover, in its current application, the entrapment defense is flawed and fails to afford terrorism defendants the appropriate level of legal protection. Regarding the law of entrapment, the totality of circumstances should be considered, as well as a combination of subjective and objective tests in order to evaluate government tactics first and then examine the defendant's mental state should the first test fail. The focus should be on the government tactics as well as the individual. The complicated nature of entrapment should not be a question for the jury but for a judge, and actual ability should be taken into consideration. This would reduce the tendency to punish for dangerousness. As terrorism prosecutions are likely to increase, it should be accompanied by a strict tailoring of the entrapment defense to reduce the prevalent inequalities of the justice system. The defense should be strengthened to provide courts more guidance and afford defendants better legal protection.

The FBI states that there is a massive threat of terrorism in the United States, yet it has failed to issue a report regarding how many terrorists attempts they have thwarted (Federal Bureau of Investigation, 2016). It does not offer a collective picture of the actual threat of terrorism, nor the type of individual or group that is successfully apprehended. This lack of transparency unfortunately hinders a comprehensive evaluation of their strategies, although most studies indicate that they are failing. Returning to the definition of terrorism, the action of the defendant must be in furtherance of a political message. Yet in most of these cases, the individuals who are prosecuted and labeled terrorists do not understand pro-terrorist views or desire to send any political message through their attempted attacks. Even if they could somehow still be classified as terrorists, the majority of individuals who sympathize with terrorist views never carry out an attack, or even plant to commit one (Norris & Grol-Prokopczyk, 2016).

Sting operations may hinder successful counterterrorism strategies by consuming time and resources (Norris, 2016). They may become so fixated on the success of these that they ignore other opportunities to catch an actual terrorist. Yet, these strategies are likely to continue because law enforcement is given legal cover. Everyone seemingly benefits from these prosecutions except the defendant. The informant is rewarded financially or reduced charges, the officer makes a good arrest, and DA appears to be fighting crime, which may aid in re-election (Carlon, 2007). However, the government is given the power to punish its citizens, and we expect a degree of fairness and safety in response (Carlon, 2007). The fact that this is not occurring exposes the inequalities of the justice system and supports the unfortunate truth that the government is “creating crimes to solve crimes, so they can claim a victory in the war on terror” (Aaronson, 2011).

The nature of counterterrorism strategies therefore seems to create “terrorists” out of ordinary citizens. Law enforcement takes someone who may be committing crimes, although completely lacking any relation to terrorism, and encourages them to commit those crimes in furtherance of terrorism. They urge them to share their profits with a terrorist group, buy weapons for them, or support the terrorist cause in a new crime (Downs & Manley, 2014). The ideas did not originate within the defendant themselves, but with the government. In many instances, the defendants were reluctant to commit the crime and had to be bribed with thousands of dollars or threatened to do so (Norris, 2016). Even more concerning is that many had mental issues and no prior plans of criminality, making them therefore incapable of committing an organized attack without the government providing every direction (Norris, 2016). “True” terrorists are nearly impossible to find due to the nature of their dark networks, so attention is therefore diverted to activists who are easy targets (Norris, 2016). This sends the message to the public that terrorism is being addressed. This is the wrong focus, because in the process, government critics are labeled dangerous terrorists (Norris, 2016). These strategies threaten autonomy and encourages wrongdoing in a deliberate test of character (Hughes, 2004). This reflects the underlying issue behind many counterterrorism strategies: the government will provoke criminal behavior and then punish without offering the defendant legal protections.

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