

ENTRAPMENT AND EQUALITY IN TERRORISM PROSECUTIONS: A COMPARATIVE EXAMINATION OF NORTH AMERICAN AND EUROPEAN APPROACHES

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INTRODUCTION

The entrapment defense is no longer peculiarly American. It has been recognized in England and Wales,¹ Canada,² and by the European Court of Human Rights.³ Comparative analysis should be illuminating because entrapment implicates broader questions about the purposes of criminal justice and the respective importance of punishing the guilty and ensuring that the state does not use excessive and unfair methods to prosecute crime. It may also raise questions about attitudes in different countries towards specific crimes, regulation of police behavior, and random virtue-testing in the absence of individualized suspicion.

Commentators are starting to recognize that the entrapment defense will play a role in some terrorism prosecutions. Proactive terrorism investigations follow naturally from the preventive orientation of modern anti-terrorism laws. Terrorism offenses relating to the provision of material support or membership or participation in terrorist groups invite proactive policing where state actors or informers attempt to infil-

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¹ R v. Loosely, [2001] UKHL 53 (Eng.).

² R v. Mack, [1988] 2 S.C.R. 903 (Can.).

³ Teixeira de Castro v. Portugal, 28 Eur. Ct. H.R. 101 (1999).

trate groups of suspected terrorists and provide them with opportunities or more robust inducements to commit the broad array of new terrorist crimes.

Much of the limited commentary on terrorism and entrapment has focused on the implications of the State's greater interests in prosecuting terrorism as opposed to drugs or financial crimes that are often the focus of government stings.⁴ The implications of such arguments are that courts will be more lenient towards the State when they are investigating terrorist crimes. Although it is undeniable that state interests are particularly compelling in the terrorism context, I will suggest that the protection of equality values, and in particular the avoidance of reasonable claims that the State has targeted young Muslim men for discriminatory reasons based on their religious and political views, should also be an important contextual factor when applying the entrapment defense in terrorism prosecutions.

Courts should still determine whether the State has acted excessively in inducing the commission of terrorist crimes, but the State's compelling interests in preventing and prosecuting terrorism will likely allow it to use more intrusive and intensive stings than used in drug or prostitution cases. On the other hand, entrapment doctrine can and should evaluate the initial targeting decision of the police and when appropriate provide a remedy for targeting decisions that are based on discriminatory and stereotypical assumptions as opposed to reasonable suspicion that the targets are or are likely to be involved in terrorist activity.⁵

Terrorism frequently raises concerns about equality and non-discrimination. Today, terrorism prosecutions mainly involve Muslim accused. At other times and in other places, terrorism prosecutions were focused on other minorities. Terror-

⁴ Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125 (2008); Jon Sherman, "A Person Otherwise Innocent": *Policing Entrapment in Preventative, Undercover Counterterrorism Investigations*, 11 U. PA. J. CONST. L. 1475 (2009) [hereinafter *Counterterrorism Investigations*].

⁵ David Ormerod & Andrew Roberts, *The Trouble with Teixeira: Developing a Principled Approach to Entrapment*, 6 INT'L J. EVIDENCE & PROOF 38, 47-48 (2002); ANDREW ASHWORTH & MIKE REDMAYNE, *THE CRIMINAL PROCESS* 261-62 (3d ed. 2005).

ism is motivated by extremist political and religious views and one of the great virtues of the criminal law is its ability to denounce violence and planning for violence regardless of the accused's motive.⁶ The ability of the criminal law to denounce terrorism, however, can be diluted by claims that the State targeted the accused simply because of the accused's political or religious views and then created a crime that would not have occurred absent the State's discriminatory targeting choice. The breadth of crimes related to terrorism and their possible application to activities that involve freedom of speech, religion, and association⁷ makes it particularly important that the criminality and culpability of terrorism be maintained. A successful entrapment defense can turn terrorism from a serious crime that threatens collective security and innocent civilians into a divisive political or religious crime created by the State.

Claims of religious and other forms of discriminatory profiling are already being made in the terrorism context and they should be taken seriously.⁸ They suggest that more attention should be paid to how entrapment doctrine affects the original decision to target the accused. In order to rebut allegations of discriminatory profiling, courts should insist on individualized reasonable suspicion or pre-existing disposition to commit a crime. Courts should be cautious about existing doctrines that allow people to be targeted because of their associations with others or their presence at a location associated with a particular crime.

The need for a focus on the front-end targeting decision is also supported by the likelihood that courts will allow state agents in terrorism stings more latitude when attempting to

⁶ Kent Roach, *The Criminal Law and Terrorism*, in GLOBAL ANTI-TERRORISM LAW AND POLICY 129, 141 (Victor Ramraj, Michael Hor, & Kent Roach eds., 2005). On the values of a criminal law approach to terrorism see also KENT ROACH, *THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM* (forthcoming, 2011).

⁷ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

⁸ Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687 (2010); Eric Schmitt & Charlie Savage, *In U.S. Sting Operations, Questions of Entrapment*, N.Y. TIMES, Nov. 29, 2010, http://www.nytimes.com/2010/11/30/us/politics/30fbi.html?_r=3&hp=&pagewanted=all; Jerry Markon, *Mosque infiltration feeds Muslims' distrust of FBI*, WASH. POST, Dec. 5, 2010, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/04/AR2010120403720.html>.

induce or facilitate a terrorist crime than they might allow them with respect to the so-called victimless offenses of drugs and prostitution. If courts are going to allow intense and prolonged stings in terrorism cases, they should at least make sure that there are proper grounds for subjecting individuals to such intrusive stings.

In the first part of this paper, I will briefly review the leading entrapment decisions in the American federal system where most terrorism prosecutions take place, in Canada, in England and in the European Court of Human Rights. Different approaches are taken in these jurisdictions ranging from the American federal focus on whether the accused was predisposed to commit the crime to more objective approaches in Canada and England that are built around the court's ability to prevent an abuse of the judicial process. The European Court of Human Rights' approach is also based on objective concerns about a fair trial and not the subjective pre-disposition of the accused. In addition, it seems to place especially stringent limits on proactive stings in part because a finding of entrapment in that court is not tied to the drastic remedy of an acquittal or a stay of proceedings.

In the second part of this paper, I will evaluate the ability of different approaches to entrapment to detect and disapprove of discriminatory targeting of the accused in terrorism investigations. I will suggest that all the entrapment defenses to various degrees allow the accused to argue that they are the victims of a discriminatory targeting decision. There is, however, a danger under American federal law that the targeting decision will be unregulated when courts conclude that the State has not offered the accused an inducement to commit the crime. There is also a possibility under English and Canadian law that authorities can justify intensive stings not on the basis of individualized suspicion but on the basis of an individual's attendance at political and religious gatherings and locations suspected of involvement with terrorism. The European Court of Human Rights, however, seems to insist on individualized reasonable suspicion and as such provides the most direct response to claims of discriminatory targeting of the accused.

In the third part of this paper, I will explore the future evolution of entrapment defenses in light of the possible impact of terrorism cases. The European Court of Human Rights may have to re-think its apparent aversion to proactive stings in light of the seriousness of terrorism. Nevertheless, its requirement for reasonable suspicion and full disclosure of the State's basis for targeting the accused is admirable and should be retained. Courts in England and Canada will have to be careful about allowing individuals in locations associated with religious or political radicalism to be targeted in the absence of reasonable and individualized suspicion. They should not condone discriminatory profiling or vendettas against certain religious and political groups. The much maligned subjective American approach may be able to rebut claims of discriminatory targeting by requiring proof that the accused was predisposed to commit terrorism crimes before he or she was subjected to a long and elaborate sting using informers or undercover officers. At the same time, there are concerns that American juries have been reluctant to apply the entrapment defense in terrorism cases, whereas Anglo-Canadian and European entrapment doctrine will be applied by judges who must provide reasons for their decisions.

Although courts in all countries will likely make allowances for terrorism and allow more intensive stings, they should also insist that the State establish either individualized reasonable suspicion or subjective predisposition to commit terrorist crimes. Such findings can rebut claims of discriminatory targeting and they affirm individual culpability for terrorist crimes that is independent of the accused's religious or political views or associations.

I. THE BASIC STRUCTURE OF ENTRAPMENT DEFENSES

The entrapment defense has generated much commentary in large part because of the variety of different entrapment defenses. Distinctions have traditionally been drawn between the subjective approach with its focus on whether the accused was pre-disposed to commit the crime and objective approaches which focus more on the propriety of the State's actions. As will

be seen, the actual tests are more complex than the stark subjective/objective dichotomy.

A. The American Federal System

The leading entrapment case in the American federal system is *Jacobson v. United States*⁹ where the United States Supreme Court held that entrapment had been made out because the government, over a twenty-six month period, induced the accused to commit a child pornography offense, but was unable to prove beyond a reasonable doubt that the accused “was disposed to commit the criminal act prior to first being approached by Government agents.”¹⁰ The Court stressed that the accused’s predisposition to commit the crime must be established before the government intervened. In this case, there was some evidence that the accused was interested in child pornography before the sting commenced, but for his own personal use and at a time when possession was legal. The Court also indicated that predisposition will usually be established when the accused readily commits the crime after having been offered an opportunity to do so.

Since *Sorrells v. United States*, there has been a long debate in the United States Supreme Court about whether a subjective or objective approach to entrapment is preferable.¹¹ In *Sherman v. United States*, Chief Justice Warren for the majority upheld the subjective approach and expressed concern about informers and government agents who play “on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this.”¹² Justice Frankfurter dissented with three others and warned of the dangers that a subjective approach would put the accused’s past on trial and avoid determining whether the State’s behavior fell below acceptable standards regardless of the status of the accused.

⁹ 503 U.S. 540 (1992).

¹⁰ *Id.* at 549 (citing *United States v. Whoie*, 925 F.2d 1481, 1483-84 (D.C. Cir. 1991)).

¹¹ 287 U.S. 435 (1932).

¹² 356 U.S. 369, 376 (1958) (footnote omitted).

B. Canada

The leading Canadian case on entrapment is *Regina v. Mack*.¹³ In that case, the Supreme Court held that the entrapment defense was grounded in concerns about the court's ability to protect its own processes from abuse. The Court explicitly adopted an objective approach that focused on the acceptability of the State's conduct when it induced the commission of the crime and not on the accused's predisposition to commit the crime. In this sense, the Canadian court explicitly sided with those dissenters on the American court who raised concerns that a subjective standard would avoid the central question of the acceptability of the State's behavior.¹⁴

The objective approach placed somewhat greater burdens on the accused than the American subjective approach. The accused under *Mack* would have to establish entrapment on a balance of probabilities and would not benefit if there was a reasonable doubt that there was entrapment including whether he or she was predisposed to commit the crime. The remedy for entrapment is a permanent stay of proceedings in order to protect the administration of justice from disrepute.

Finally, the entrapment defense in Canada is generally litigated after the accused has been convicted on the merits and

¹³ [1988] CarswellBC 701 (Can.) (WL), [1988] 2 S.C.R. 903.

¹⁴ Justice Lamer observed:

[A]n American court following the subjective approach will convict a predisposed accused even if the police conduct was particularly offensive unless, perhaps, it was so outrageous as to trigger a due process defense. It is my view that it would bring the administration of justice into disrepute [sic] to permit a conviction in those circumstances and the goal of preserving respect for the courts would be undermined. . . . given that the focus is not the accused's state of mind but rather the conduct of the police, I think it is sufficient for the accused to demonstrate that, viewed objectively, the police conduct is improper. To justify police entrapment techniques on the ground that they were directed at a predisposed individual is to permit unequal treatment. I gratefully adopt the criticisms espoused in the minority and dissenting opinions of the judgments of the United States Supreme Court discussed earlier, which have convinced me of the fundamental inequality inherent in an approach that measures the permissibility of entrapment by reference to the predisposition of the accused.

Id. at paras. 97, 113.

it is the judge and not the jury who decides whether the entrapment defense has been established. This approach recognizes the objective nature of the defense and requires judicial reasons for decisions whether to accept or reject the entrapment defense. At the same time, litigating entrapment after a verdict makes clear to judges the crime control costs of finding that the accused has established entrapment.

Although the Canadian test is an objective one when focusing on whether the State unacceptably induced the commission of an offense, it also has a separate and preliminary test that governs the State's decision to target the accused and provide him or her with an opportunity to commit a crime. This threshold test is that the State must either have a reasonable suspicion that the accused was involved in criminal activity or that the State was acting in pursuit of a bona fide inquiry into specified crimes usually in a specified area. The Canadian Court has so far been relatively deferential to the State at this preliminary targeting stage. Unlike the United States Supreme Court in *Sherman*, the Canadian Supreme Court has held that prior drugs convictions were enough in *Mack* to provide a reasonable suspicion that justified providing the accused with an opportunity to commit new drug offenses.¹⁵ The Canadian Court also held in *Regina v. Barnes* that random virtue testing in an area of downtown Vancouver known for drugs was a bona fide inquiry.¹⁶ This meant that the undercover officer was allowed to provide anyone found in that area an opportunity to purchase or supply drugs.

C. England

The English courts were even more reluctant than the Canadian courts to recognize an entrapment defense. In the 2001 case of *Loosely*, however, the House of Lords abandoned its reluctance to recognize entrapment as anything more than a mitigating factor in sentencing. Like the Canadian courts, the House of Lords held that entrapment should be a grounds for

¹⁵ *Id.* at para. 156.

¹⁶ [1991] 1 S.C.R. 449, para. 17 (Can.).

staying proceedings when necessary to protect the court's process from abuse. Lord Nicholls accepted the critique of the subjective approach offered by the Canadian courts, namely that it could allow the State to offer excessive inducements just because the accused was predisposed to commit a crime. Like the Canadian courts, he also imposed some restrictions on the ability of the State to provide the accused with an opportunity to commit a crime when he stated:

It goes without saying that the police must act in good faith and not, for example, as part of a malicious vendetta against an individual or group of individuals. Having reasonable grounds for suspicion is one way good faith may be established, but having grounds for suspicion of a particular individual is not always essential. Sometimes suspicion may be centred on a particular place, such as a particular public house. Sometimes random testing may be the only practicable way of policing a particular trading activity.¹⁷

Although less formulated than the comparable Canadian test, this preliminary test similarly suggests that the State must either have a reasonable suspicion about a particular target or be conducting a good faith investigation that is justified by the nature of a particular location or of a particular crime. As in Canada, the accused's criminal record could be relevant to establishing a reasonable suspicion, but is not relevant to the question of whether there has been improper inducement of an offense.¹⁸ It will also be argued below that the suggestion that the police must act in good faith and not have a "malicious

¹⁷ R v. Loosely, [2001] UKHL 53, para. 27 (Eng.); *see also* Lord Hoffmann at para. 68 (endorsing the Canadian bona fide inquiry approach).

¹⁸ Lord Nicholls stated:

The defendant's criminal record is unlikely to be relevant unless it can be linked to other factors grounding reasonable suspicion that the defendant is currently engaged in criminal activity. As Frankfurter J said, past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing repeated convictions, from which the ordinary citizen is protected: *see Sherman v. United States* (1957) 356 US 369, 383.

Id. at para. 29; *see also* para. 68 per Lord Hoffmann.

vendetta”¹⁹ against individuals or groups could be relevant in terrorism cases where discriminatory targeting is alleged.

As with the Canadian test, the secondary English test of whether the State has improperly induced the commission of a crime is based on a consideration of all the circumstances of the particular case with a goal of protecting the integrity of the justice system. At the same time, the English approach does not categorically attempt to exclude the accused’s predisposition to commit the crime as a factor when determining whether there has been improper inducement. Lord Nicholls indicated that:

The greater the inducement held out by the police, and the more forceful or persistent the police overtures, the more readily may a court conclude that the police overstepped the boundary: their conduct might well have brought about commission of a crime by a person who would normally avoid crime of that kind.²⁰

Similarly Lord Hutton also stated that courts have and should consider:

[W]hether a person has been persuaded or pressurised by a law enforcement officer into committing a crime which he would not otherwise have committed, or whether the officer did not go beyond giving the person an opportunity to break the law, when he would have behaved in the same way if some other person had offered him the opportunity to commit a similar crime, and when he freely took advantage of the opportunity presented to him by the officer.²¹

These statements may allow the court to consider predisposition to commit the crime as one factor in deciding whether there has been entrapment whereas the Canadian approach declares such considerations to be out of bounds in order to preserve a purely objective focus on the integrity of the judicial system.

¹⁹ *Loosely*, [2001] UKHL at para. 27.

²⁰ *Id.* at para. 28.

²¹ *Id.* at para. 101.

D. European Court of Human Rights

The leading European Court of Human Rights case is the 1998 decision in *Teixeira de Castro v. Portugal* where the Court held that entrapment had deprived an accused of the right to a fair trial.²² After having obtained the name of the accused from another suspect, the police went to the accused's home and expressed a desire to buy heroin. Such conduct would likely not have been objectionable under any of the entrapment defenses examined above, but it was held to be a violation of the right to a fair trial by the European Court of Human Rights. The Court stressed that the officers' actions were not undertaken "as part of an anti-drug-trafficking operation ordered and supervised by a judge."²³ These statements relate to a European concern about the proper regulation of undercover officers that could impose impediments to transnational cooperation with American officials.²⁴ In the next section, I will explore a different concern, namely that European courts might defer to judicially authorized undercover investigations even if some of the targeting decisions may be questioned.

In a manner consistent with both the threshold Canadian and English concerns about reasonable suspicion, the Court stressed that it "does not appear either that the competent authorities had good reason to suspect that Mr [sic] Teixeira de Castro was a drug trafficker; on the contrary, he had no criminal record and no preliminary investigation concerning him had been opened."²⁵ This suggests that offering an accused an opportunity to commit a crime in the absence of a reasonable suspicion might result in a finding of a violation of the right to

²² *Teixeira de Castro v. Portugal*, 28 Eur. Ct. H.R. 101 (1998).

²³ *Id.* at para. 38.

²⁴ Jacqueline E. Ross, *Impediments to Transnational Cooperation in Undercover Policing: A Comparative Study of the United States and Italy*, 52 AM. J. COMP. L. 569 (2004) [hereinafter *Impediments*]; Jacqueline E. Ross, *The Place of Covert Surveillance in Democratic Societies: A Comparative Study of the United States and Germany*, 55 AM. J. COMP. L. 493 (2007) [hereinafter *Covert Surveillance*]. In England, the use of covert human intelligence sources is governed by Part II of the *Regulation of Investigatory Powers Act*, 2000, c. 23 (Eng.), whereas neither the United States nor Canada have a comparable statutory framework.

²⁵ *Teixeira de Castro*, 28 Eur. Ct. H.R. at para. 38.

a fair trial. It is also noteworthy that no mention is made of the concept of a bona fide inquiry or good faith investigation into a particular form of crime or high crime location. This again represents a more robust restraint on the State than is found in English or Canadian law.

The European Court of Human Rights also expressed concerns about the manner in which the officers engaged in the investigation even though the conduct of the officers would not appear to go beyond providing the accused with an opportunity to commit the crime and as such would not be objectionable under American, Canadian or English law. The Court stressed that the officers went beyond investigating the offense in “an essentially passive manner, but exercised an influence such as to incite the commission of the offense.”²⁶ In a literal sense, *Teixeira de Castro* suggests that all active forms of investigation may amount to entrapment. As suggested by some of the judges in *Loosely*, this would be an unrealistic position given wide spread acceptance of active forms of policing. A more realistic reading of the European jurisprudence is that active policing presents a problem when it causes the commission of a crime that would not have been committed without State intervention. This reading of the case allows for a balancing of the competing interests in crime control, fairness to the accused and the integrity of the judicial system. It also suggests that even under the European Convention, the question of the accused’s predisposition to commit the offense may be relevant both with respect to whether the State had a reasonable suspicion and also with respect to whether it induced the commission of the offense.

As a supranational court, the European Court of Human Rights in *Teixeira de Castro* did not have the power to reverse a conviction that American, Canadian or English courts recognizing an entrapment defense would have. Instead, the European Court of Human Rights ordered damages for the pecuniary and non-pecuniary damages that the conviction caused to

²⁶ *Id.*

the accused.²⁷ The issue of remedy is an important one especially in terrorism cases where the State's interest in obtaining a conviction will be great. There is a danger in American, Canadian and English law that the remedial tail may wag the dog and that courts will dilute the entrapment defense to allow terrorism convictions.

E. Summary

This brief survey of the leading cases on entrapment suggests that the analytical dichotomy between subjective and objective approach can be misleading. To be sure, the American federal approach does ultimately focus on the accused's subjective predisposition to commit the offense, but it also requires that the accused establish that the State induced the commission of the offense by going beyond simply offering an opportunity to commit a crime. The explicitly objective tests used by Canadian and English courts and the European Court of Human Rights contain elements of the subjective by the reference to the need for reasonable suspicion before the State even offers the accused an opportunity to commit the crime. In addition, the English and European courts also recognize that the accused's pre-disposition to commit the crime may be relevant to the determination of whether the State has improperly induced the commission of the crime.

The Canadian courts are clear that the absence of a reasonable suspicion or of a bona fide inquiry will trigger a finding of entrapment and a stay of proceedings even if the State only offers the accused an opportunity to commit the crime. The European Court's approach is noteworthy in its apparent rejection of both active stings, at least without judicial authorization, and of targeting locations as a legitimate alternative to individualized suspicion. At the same time, the European Court's more robust approach to entrapment cannot be fully appreciated without recognizing that it does not provide a victim of entrapment with an acquittal or a stay of proceedings, but with more limited remedies such as damages. It is also relevant that

²⁷ *Id.* at paras. 46-53.

entrapment in the United States is treated as a true defense and that juries make the decision whether the entrapment defense applies whereas in Canada, England and Europe, judges decide whether an entrapment defense has been established in a particular case.

II. ENTRAPMENT AND CLAIMS OF DISCRIMINATORY TARGETING

A. The American Federal System

As discussed above, the American federal system requires the accused to establish that the State has induced the commission of the crime, but upon such a finding requires the State to prove beyond a reasonable doubt that the accused was pre-disposed to commit the crime before the State began its inducement. Under this defense, there is some risk that the State's initial targeting decision could be unregulated²⁸ and motivated by religious, racial or political profiling in cases where the State only provides the accused with an opportunity to commit the offense. In contrast, entrapment may apply in Canada or England in cases where the state actor has not induced the commission of the crime, but has provided the accused with an opportunity to commit the crime in the absence of a reasonable suspicion that the person was involved in crime or in the absence of a good faith investigation of a high crime area or specific location.

The regulation that the entrapment defense provides for State targeting decisions is imperfect and after the fact. Nevertheless, it remains important especially in systems such as the American and Canadian justice systems where stings by the states are not subject to either prior judicial authorization or legislative regulation. There is a danger in the American federal system that random virtue testing of Muslims or others stereotypically associated by the state with terrorism will be allowed and unregulated so long as the state actor does not induce the commission of the crime.

²⁸ There is always a potential for an independent equality or discrimination claim, but these are often particularly difficult to establish.

In cases where American courts find that the State induced the commission of an offense, the State will have to rebut claims of discriminatory profiling by proving beyond a reasonable doubt that the accused was predisposed to engage in terrorism crimes before the sting began. If correctly applied by juries, a requirement for such proof of predisposition by the State has the potential to require the police to justify targeting the accused. It can require the State to demonstrate that the accused was predisposed to commit a terrorist crime such as material support or conspiracy and not that the accused simply associated with terrorists or held similarly extreme political or religious views as a terrorist.

One recent terrorism case that has rejected an entrapment claim expressed doubts that the State had even induced the commission of the crime before concluding that the State had demonstrated that the accused was predisposed to have committed the crime.²⁹ This reveals the danger that the targeting decision could go essentially unregulated if it is held not to be an inducement. Random virtue testing of young Muslims without proof of predisposition to commit terrorist crimes would offend equality or equal protection values and it would chill freedom of speech, association and religion.³⁰ It could also lend support to those who argue that terrorism crimes are essentially crimes of religious and political extremism.

In response to concerns that targeting decisions may violate equality and freedom of speech and religion, it has been suggested that protected speech should be inadmissible in establishing predisposition.³¹ This approach appropriately recognizes constitutional values and avoids the dangers of assuming “a normal person”³² would be immune to inducements even

²⁹ *United States v. Siraj*, 468 F. Supp. 2d 408, 414-16 (E.D.N.Y. 2007), *aff'd*, No. 07-0224-cr, 2008 WL 2675826 (2d Cir. July 9, 2008).

³⁰ For a recognition of the burden that material support can place on these values see *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

³¹ *Counterterrorism Investigations*, *supra* note 4, at 1506.

³² Stevenson, *supra* note 4, at 144. The Canadian approach also uses an average person approach but takes care to ensure that this person is in the same position as the accused including having the same vulnerabilities as the accused. *R v. Mack*, [1988] 2 S.C.R. 903, at paras. 126, 133 (Can.).

though inducements may involve appeals to religious and political loyalties and grievances over an extended period of time that may be foreign to an “average” person. Nevertheless, entrapment cases to date have considered protected speech when determining whether the accused was predisposed to commit a crime³³ and it may be unrealistic not to consider speech that provides important evidence of motive and context. The decision in *Holder v. Humanitarian Law Project*³⁴ also suggests that protected speech can be criminalized when done in association with a listed terrorist group. Given this, it seems inevitable that speech and association will be considered in most terrorism prosecutions. This again points to the importance of the State being able to demonstrate that the accused was subjectively predisposed to commit terrorist crimes before the State initiated its sting.

In cases where the government does induce the commission of a terrorist offense through prolonged stings, the American federal doctrine can provide an indirect but potentially robust remedy for discriminatory targeting decisions. In such cases, the State must prove beyond a reasonable doubt that the accused was predisposed to commit a terrorist crime before the government’s involvement in the case. A generic predisposition to extremism or to political and religious views that may condone terrorism should not be enough. This is especially true in the United States which has a strong tradition of not burdening political or religious speech and does not have crimes relating to the indirect advocacy or **apologie** of terrorism or even membership in a terrorist group. Judge Gershon was sensitive to this danger in *Siraj* when he stressed that the accused’s assertion that the government’s evidence of his predisposition to commit terrorist acts was for the most part evidence that “[his] particular political point of view . . . [was] incorrect.”³⁵ Rather the evidence related to the accused’s own plot to blow up the 34th street subway station in New York City. As such, this evidence satisfied the fairly demanding requirements that predis-

³³ *Siraj*, 468 F. Supp. 2d at 420.

³⁴ *Holder*, 130 S. Ct. at 2723.

³⁵ *Siraj*, 468 F. Supp. 2d at 416.

position evidence relate to (1) an existing course of criminal conduct similar to the crime charged; or (2) an already formed design to commit the crime charged; or (3) a willingness to perform the crime as witnessed by a ready response to the inducement.³⁶

Proof of the first or second factors listed above will provide the strongest evidence that the government has not manufactured a terrorist crime. The third alternative of a willingness to perform the crime, however, may be more problematic especially if the inducement provided is intense and the intent to commit terrorist violence is less clear than it was in *Siraj*. Here it should be recalled that the Supreme Court in *Jacobson v. United States*³⁷ indicated that the predisposition to commit the crime should be proven before the government's inducement.

The subjective predisposition to commit the crime requirement should be observed to respond to concerns that the accused may have been induced into terrorist crimes by the State exploiting their religious and political views and sense of loyalty. Properly applied, such an approach could fulfill a similar purpose to a reasonable suspicion requirement that is present in Anglo-Canada entrapment doctrine and has recently been proposed with respect to the use of informers in terrorism cases in the United States.³⁸ Indeed the subjective predisposition requirement could place even greater restraints on the State than the reasonable suspicion requirement because it should result in an acquittal whenever there is a reasonable doubt that the accused was not inclined to engage in terrorism before the sting started. Such an approach will allow the State to stress that the person should be punished because of their intent to support or conduct acts of terrorist violence and that such intent is independently blameworthy regardless of the political or religious views that may have motivated the ac-

³⁶ *Id.* at 415 (citing *United States v. Salerno*, 66 F.3d 544, 547 (2d Cir. 1995)).

³⁷ 503 U.S. 540 (1992).

³⁸ Professor Said has recently proposed the reasonable suspicion requirement for the use of informers. *See* Said, *supra* note 8, at 691. His proposal is appropriately based on constitutional and societal concerns about equality, but is not likely to be implemented unless anchored in existing entrapment doctrine and its requirement for proof of subjective predisposition to commit the crime.

cused³⁹ or the state's actions in inducing the commission of the offense. In this way, entrapment doctrine can enhance the denunciatory value of the criminal law and underline individual culpability for terrorist crimes.

B. Canada and England

Anglo-Canadian law will address the initial targeting decision by requiring the State to have a reasonable suspicion that the target was involved in similar criminal activity or that the State was acting pursuant to a good faith investigation of a particular crime at a particular location. The standard of reasonable suspicion, like the American predisposition test, is related to the commission of the offense and as such should not be satisfied merely by a showing of religious or political extremism. In drug cases, reasonable suspicion may frequently be established by the existence of prior convictions. In terrorism cases, however, prior convictions will often not be a factor, especially in cases where the suspected terrorists are young and home grown.

Reasonable suspicion in both Canada and England may come from intelligence. In some cases the State may be reluctant to disclose such information thus raising issues of public interest immunity or national security confidentiality. Nevertheless, it will be important for the State to demonstrate reasonable suspicion in order to avoid a stay of proceedings. In Canada in particular, there may be great pressure on the State to disclose this material if the accused raises the entrapment defense after having been found guilty of the terrorist offense. At the same time, the State may attempt to satisfy the reasonable suspicion without reliance on intelligence. Although reasonable suspicion is a lower standard than reasonable and probable grounds, courts should ensure that it relates both to

³⁹ The irrelevance of motive has long been recognized in criminal law. *See, e.g., Reynolds v. United States*, 98 U.S. 145, 167 (1878). For arguments that terrorism should not be defined in relation to political or religious motive, see Kent Roach, *The Case for Defining Terrorism With Restraint and Without Reference to Political or Religious Motive*, in *LAW AND LIBERTY IN THE WAR ON TERROR* 39, 39 (Andrew Lynch et al. eds., 2007).

the individual and to the general type of offense. Reasonable suspicion should still be objective and related to the type of crime committed.⁴⁰ The subjective hunches or biases of investigating officers even when they are proven by subsequent investigations to have been accurate should not be enough to establish reasonable suspicion.

A problematic alternative to reasonable suspicion in both Canadian and English law is for the State to argue that it was conducting a bona fide or good faith investigation into a particular crime or place even though it did not have reasonable suspicion about the targeted individuals. The leading case in Canada is *Regina v. Barnes*⁴¹ where the Supreme Court held that an undercover officer, who acted on a hunch that fell below reasonable suspicion in approaching a young man in an area of downtown Vancouver known for drugs, was nevertheless acting in a bona fide inquiry by investigating drug offenses known to occur in the area. Similarly, the House of Lords in *Loosely* made clear that the State sometimes could use random methods to investigate particular crimes or to target high crime areas.

The State may be tempted to rely on the concepts of bona fide inquiries or good faith investigations in terrorism cases.⁴² This arm of the entrapment doctrine could potentially allow them to target anyone found at a location associated with terrorism or perhaps even political or religious radicalism. There are cases in Canada where findings that the police had targeted an area known for illegal drugs effectively precluded any examination of whether the police targeted an individual within that area because he was African-Canadian.⁴³ Thus, the bo-

⁴⁰ One issue here will be the breadth of terrorist offenses. An intrusive sting might be started on the basis of concerns that the suspect might be willing to engage in a bombing but conclude with the suspect agreeing to commit a less serious terrorist crime such as financing of terrorism.

⁴¹ [1991] 1 S.C.R. 449 (Can.).

⁴² ARVINDER SAMBEI, ANTON DU PLESSIS & MARTIN POLAINE, COUNTER-TERRORISM LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK ¶ 4.261 (2009) (“for the time being and on the basis of the speeches in *Loosely*, suspicion as to location is clearly enough”).

⁴³ *R v. Sterling*, [2004] CarswellOnt 3319 (Can. Ont. Sup. Ct. J.) (WL), 23 C.R. (6th) 54.

na fide inquiry alternative to reasonable suspicion may mask and legitimize discriminatory targeting of individuals for what may be prolonged stings. In other words, the State may act on the stereotyped assumption that anyone found at a particular mosque or political meeting is a possible terrorist. Relying on a bona fide inquiry approach in a terrorism case may also allow the State to disclose less sensitive material from informers and intelligence agencies if all that has to be established is a reasonable concern about terrorism in a particular location as opposed to reasonable suspicion about particular individuals.

In my view, Canadian and English courts should be cautious when applying the bona fide inquiry arm of their entrapment defenses because of concerns about condoning discriminatory forms of profiling and targeting of political or religious radicalism. A bona fide inquiry aimed at a mosque or a group that meets for political or religious purposes implicates the values of freedom of association, expression and religion as well as freedom from discrimination. Although these values do not make a person immune from a terrorism investigation, they should be considered in assessing whether the State has acted improperly in a manner that triggers the court's concern about abuse of process. The administration of justice can be brought into disrepute by discriminatory targeting and random virtue testing of members of religious or racial minorities. *Loosely* may be helpful in this regard because it recognizes that a "malicious vendetta" against an individual or a group would be improper.⁴⁴ The targeting of those associated with an extremist mosque or Imam could in some circumstances be the result of an improper vendetta especially when the location is targeted more because of political and religious extremism than reasonable suspicions of involvement with terrorism.

Random virtue testing in terrorism investigations will generally be more objectionable than random virtue testing of people who are located in high crime areas that are associated with drugs or prostitution for several reasons. First, terrorist

⁴⁴ R v. Loosely, [2001] UKHL 53, at para. 27.

stings will often be much longer and intense than typical random virtue testing in drug or prostitution cases. The random virtue testing in the Canadian drug case *Barnes* took a matter of minutes whereas a terrorist sting will often take months and even years.

Second, terrorist stings will often involve state agents engaging the target in political and religious discussions. Such discussions implicate fundamental freedoms and may also support claims that the person was targeted because of their political or religious beliefs. Proactive State conduct that implicates such values can be even more objectionable than passive surveillance.

Ideally, reasonable suspicion that the target was involved in a terrorist crime would be established in all cases before a sting was undertaken. At a minimum, Canadian and English courts should insist on strong evidence that a particular location is associated with terrorism, not just political or religious extremism. Even if a bona fide inquiry is established, courts should be sensitive to discriminatory targeting and leading political or religious discussions when determining whether the State has induced the crime. At the end of the day, it is in the State's interest to be able to demonstrate the criminality and culpability of those prosecuted for terrorism crimes. State creation of terrorist crimes is not in society's interests because it will undermine the denunciatory value of punishing real terrorism in cases where the accused had a subjective predisposition to commit terrorist crimes or the state had a reasonable suspicion before the sting that the accused was involved in illegal terrorist activity.

C. European Court of Human Rights

The approach of the European Court of Human Rights also has some potential to respond to the dangers of discriminatory targeting. In *Teixeira de Castro*, the Court noted that there was no reasonable suspicion that the accused was involved in drugs. It also made no reference to the targeting of high crime

locations as an alternative to reasonable suspicion.⁴⁵ Thus, there should be entrapment resulting in an unfair trial under the European Convention on Human Rights in cases where an individual is targeted without reasonable suspicion that they were engaged in terrorist activity.

The Court's concern with the investigation in *Teixeira de Castro* seemed to be that the investigation had not been properly supervised by a judge.⁴⁶ There is thus some danger that the Court may defer to a regularly constituted terrorism investigation even if it includes those who may simply be associates of the prime target. This is a particular concern in countries such as France where investigating prosecutors and judges in terrorism cases work closely with intelligence agencies. Such investigating judges may be influenced by an intelligence mindset that may focus on locations and a person's associations and ideology more than whether there is a reasonable suspicion that the person is involved in crime.⁴⁷ Strategic and unsourced intelligence about groups and locations may not establish reasonable suspicion about individuals.⁴⁸

In other contexts, however, the European Court of Human Rights has been sensitive to the dangers of discriminatory targeting in terrorism investigations. In its recent decision in *Gillan v. United Kingdom* which involved stop and search powers under the Terrorism Act 2000, it found that the interference with private life inherent in random stops and searches was not in accordance with law even though they were authorized by senior officials and subject to judicial review. It stated:

In the Court's view, there is a clear risk of arbitrariness in the grant of such a broad discretion to the police of-

⁴⁵ *Teixeira de Castro v. Portugal*, 28 Eur. Ct. H.R. 101, paras. 37-39 (1999).

⁴⁶ *Id.*

⁴⁷ For arguments about the differences between an evidential focus on individual actions and guilt and an intelligence focus on a person's associations, and potential to be a security threat, see Kent Roach, *The Eroding Distinction Between Intelligence and Evidence in Terrorism Investigations*, in COUNTER-TERRORISM AND BEYOND 48, 49 (Nicola McGarrity et al. eds., 2010).

⁴⁸ Intelligence used by investigating prosecutors or judges may not be sourced and obtained in circumstances that cast doubt on its reliability. HUMAN RIGHTS WATCH, PREEMPTING JUSTICE: COUNTERTERRORISM LAWS AND PROCEDURES IN FRANCE 33 (2008).

ficer. While the present cases do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons is a very real consideration The available statistics show that black and Asian persons are disproportionately affected by the powers, although the Independent Reviewer has also noted, in his most recent report, that there has also been a practice of stopping and searching white people purely to produce greater racial balance in the statistics.⁴⁹

The scheme that was held to violate Article 8 of the European Convention in *Gillan* did provide for some internal controls in the form of approvals by senior officers and the Secretary of State, but the Court still found that there was a risk of arbitrariness. This decision suggests that the European concern with procedural regularity can be combined with a concern about discriminatory targeting. At the same time, *Gillan* might be distinguished in the entrapment context if judicial officials as opposed to senior police officers authorize investigations.

Targeting decisions in terrorism cases may frequently be informed by intelligence. As discussed above, states may be reluctant to disclose such intelligence even in order to establish that they had a reasonable suspicion to justify offering targets an opportunity to commit terrorism offenses. The European Court of Human Rights 2007 decision in *V. v. Finland*⁵⁰ found that the right to a fair trial had been violated in a drug sting case on the basis that the accused had not received full disclosure. This holding made it unnecessary for the Court to determine whether the sting constituted improper instigation of an offense under *Teixeira de Castro*. At the same time, the Court recognized that the accused's right to disclosure was not absolute. It will be interesting to see if the Court is more receptive to the State's interests in secrecy in terrorism investigations. Nevertheless the Court's approach suggests that entrapment issues will likely be viewed by the European Court of Human

⁴⁹ *Gillan v. United Kingdom*, [2009] Eur. Ct. H.R. 28, para. 85.

⁵⁰ [2007] Eur. Ct. H.R. 40412/98.

Rights through a more holistic focus on fair trial rights. The accused will at least prima facie have a right to disclosure of material that will be relevant to determining the reasonableness of the State's targeting decision. State investigators would be well advised to think through how they will demonstrate reasonable suspicion in court before they undertake a complex terrorist sting.

D. Summary

Although the entrapment defenses examined above differ, they all provide some opportunities for accused to argue that they were targeted in a discriminatory manner. The European Court of Human Rights seems to require reasonable suspicion for proactive stings, but there is a danger that judicial authorization may be enough. Judicial authorization of proactive investigations may be informed by intelligence and not always be based on reasonable suspicion about individuals. The grounds for targeting a person may not even be disclosed to the accused for reasons relating to national security.

In the federal United States system, the accused can argue that the State has failed to prove that the accused had a pre-existing predisposition to commit a terrorist crime, but there is some danger that discriminatory targeting may be condoned in cases where the State simply provides the accused an opportunity to commit the crime.

In the Canadian and English systems, the accused can argue that they were targeted in the absence of reasonable suspicion that they were involved in terrorism activities and that such targeting merits a stay of proceedings. In both jurisdictions, however, the State can argue that even if there was no reasonable suspicion, it was acting in good faith in conducting an investigation that focused on a particular location or particular crime. Courts should carefully evaluate such claims because of the danger that they could authorize random and intensive virtue testing of people simply because of their religious or political beliefs or attendance at events and places associated with political or religious extremism. All of the entrapment defenses examined in this article allow the accused in varying degrees to challenge discriminatory targeting deci-

sions. Courts and juries should refuse to condone targeting that is based only on religious or political beliefs and opinions and stereotyped assumptions that relate such forms of expression with terrorist violence. It will be particularly important for courts to use the entrapment defense to police targeting decisions if, as suggested in the next section of the paper, the courts will allow the State to conduct intense stings in terrorism investigations.

III. THE FUTURE OF ENTRAPMENT DEFENSES IN TERRORISM OFFENSES

Although entrapment doctrines have the potential to scrutinize the State's reasons for targeting a person in a terrorist investigation, it is also undoubtedly true that such doctrines will be placed under pressure by the important social interests in preventing and prosecuting terrorism. This is particularly so when entrapment constitutes a complete defense to a crime or requires a permanent stay of proceedings as the only remedy for a finding of entrapment. Indeed, the war on terrorism could do much more to weaken the entrapment defense than the war on drugs. In what follows, I will sketch some possible effects that terrorism cases could have on entrapment defenses.

A. The American Federal System

In cases where there is not much evidence of predisposition to commit the offense, there may be a tendency for governments to try to avoid the discriminatory targeting issue by arguing that no inducement actually took place. Because of the seriousness of terrorism offenses, courts may be inclined to hold that governments and informers can conduct fairly elaborate and intense sting operations without reaching the threshold of inducement. Indeed, Judge Gershon in the *Siraj*⁵¹ case appeared willing to conclude that the State had not induced the commission of a terrorist crime before ultimately holding that even if the State had induced the commission of the crime, it

⁵¹ *United States v. Siraj*, 468 F. Supp. 2d 408, 408 (E.D.N.Y. 2007).

had satisfied its burden of proving beyond a reasonable doubt that the accused was predisposed to commit terrorist crimes.

One weakness of the American defense compared to the Anglo-Canadian defense is that the American subjective defense allows government targeting to be essentially unregulated by the judiciary provided that the government is not found to have induced the commission of the terrorism offense. In this sense, random virtue testing of young Muslims is possible under American entrapment doctrine so long as courts hold that the State has not induced the commission of the offense. In addition, the non-judicial restraints on American stings may not be robust given findings that undercover operations are much less regulated in the United States than in other countries, particularly Europe.⁵²

At the same time, the oft-criticized subjective focus on the accused's predisposition to commit a crime has some definite virtues in the terrorist context. The traditional fear that the subjective approach will allow the State to prey on those with past convictions is not likely to be a factor in many terrorism cases. Moreover, the subjective approach allows the accused to argue that he or she would never have committed the crime unless subject to a sting that was motivated by fear and suspicion based on the accused's religious or political beliefs. The United States Supreme Court in *Jacobson* emphasized the need for evidence of predisposition prior to State involvement and courts should be cautious about relying on behavior after the accused was subject to a sting as evidence of predisposition.⁵³

Courts should focus on predisposition to commit terrorist crimes and not the political or religious beliefs that may motivate terrorist acts. It is particularly important to maintain this focus if, as in *Siraj*, evidence of the accused's religious and political extremism is held to be admissible.⁵⁴ Professor Said has suggested that "it is inevitable that the predisposition analysis delves into matters of an individual's political and religious

⁵² *Impediments*, *supra* note 24, at 569; *Covert Surveillance*, *supra* note 24, at 493.

⁵³ *Jacobson v. United States*, 503 U.S. 540, 549 (1992).

⁵⁴ *Siraj*, 468 F. Supp. 2d at 420.

beliefs.”⁵⁵ He suggests that in the context of Muslims accused of terrorism, the admissibility of political and religious views will trigger social equations between Islam and terrorism thus making the American subjective predisposition test “no defence at all.”⁵⁶ Professor Said’s pessimistic conclusion is well supported by the post-9/11 record of no recorded entrapment-based acquittals in American terrorism cases.⁵⁷ Nevertheless, it discounts the requirement in *Jacobson* that the accused’s predisposition to commit the crime be established before the government’s involvement. To be sure, the government will be given extensive latitude to establish subjective predisposition, but there are limits to how far the government can go in admitting evidence of the accused’s religious and political beliefs in order to establish subjective predisposition.⁵⁸ Judges should make it crystal clear to American juries that the issue is whether the accused was predisposed to commit terrorist *crimes* before being contacted by an informer and subject to a sting. Evidence of even extreme political and religious *opinions* or *beliefs* should not be sufficient to establish subjective predisposition to commit terrorist *crimes*. Professor Said’s pessimism about the entrapment defense seems to be based on concerns about how the jury will deliberate more than concerns about entrapment doctrine. In order to respond to these legitimate concerns, it will often be necessary to screen potential jurors and challenge for cause those who are not able to distinguish between political and religious beliefs and a predisposition to commit terrorist crimes.⁵⁹ There is no guarantee that jurors will follow the law, but the subjective predisposition test provides an important resource against discriminatory targeting.

Despite valid concerns about how American juries have and will administer the entrapment defense, the American fed-

⁵⁵ Said, *supra* note 8, at 732.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *United States v. Al-Moayad*, 545 F.3d 139, 161-63 (2d Cir. 2008) (overturning terrorism conviction on the basis that the trial judge had allowed the government to introduce prejudicial evidence of limited relevance to establish predisposition).

⁵⁹ Laura K. Donohue, *Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law*, 59 STAN. L. REV. 1321, 1330-32 (2007).

eral test allows those accused of terrorism to argue that they were victims of discriminatory targeting decisions and that they had no predisposition to commit terrorist crimes. A genuine conclusion that the accused has been shown beyond a reasonable doubt to have been predisposed to commit a terrorist crime should rebut allegations that the State has created terrorist crimes by targeting young Muslims. Such conclusions should help convince the public, including Muslim communities, of the criminality of those convicted of terrorist crimes even after prolonged stings. In other words, the subjective focus on the accused's pre-existing predisposition to commit the crime should, if properly applied, amplify the denunciatory effects of the terrorism prosecution.

Although the terrorism context confirms the importance of requiring proof of subjective predisposition, it also will likely influence how far judges will allow state agents to go in inducing the commission of a crime. Judge Posner, in an influential opinion outside of the terrorism context, has suggested that an accused's lack of ability to commit a terrorist crime should be an important factor in the predisposition test.⁶⁰ The wisdom of this approach in the terrorism context is, however, questionable in part because of the seriousness of the offense. For example, the supply by state agents of materials such as explosives that are not readily available but could be used for terrorism could actually strengthen conclusions that the accused were prepared to go ahead with the acts.⁶¹ Similarly, it may be inappropriate to apply the defense of excessive governmental involvement that has been recognized in some cases as an alternative to entrapment in cases where the accused was predisposed to commit the crime.⁶² Although it may be excessive for the State to supply materials to targets in a drug case, it may not be excessive to do so in terrorism cases given the State's compelling interest in preventing terrorism and the unique dangers that a terrorist plot may quickly develop beyond pre-

⁶⁰ *United States v. Hollingsworth*, 27 F.3d 1196, 1200 (7th Cir. 1994).

⁶¹ *United States v. Lakhani*, 480 F.3d 171, 172 (3rd Cir. 2007).

⁶² *United States v. Twigg*, 588 F.2d 373, 377 (3rd Cir. 1978). I am indebted to Arnold Loewy for bringing this case to my attention.

liminary planning and ideological stages to operational stages that can inflict mass casualties. The existing literature on entrapment and terrorism similarly stresses that courts will likely allow the State to take greater liberties when conducting terrorist stings as opposed to drug or prostitution stings.⁶³ The greater latitude that will be extended to the State once a person has been targeted in a terrorist investigation makes it even more important to ensure the propriety of the initial targeting decision.

B. Canada and England

The Anglo-Canadian entrapment doctrines, unlike the American federal doctrine, will require courts in all cases to address the legitimacy of the initial targeting decision and find either a reasonable suspicion or a bona fide inquiry. This has the virtue of providing some judicial regulation of all of the State's targeting decisions.

Those conducting terrorist stings should be aware that they may have to produce admissible and public evidence to justify their targeting decision. Nevertheless, police, intelligence agencies and prosecutors in Canada and England can avoid having to establish that they had a reasonable suspicion that targeted individuals were involved in terrorism by establishing that they were conducting a good faith or bona fide investigation of a particular crime or location. Although the Supreme Court of Canada has been relatively deferential to the State in allowing brief acts of random virtue testing in areas associated with drugs,⁶⁴ courts should take a less deferential approach in terrorism cases because such stings will generally be more intrusive than in drug or prostitution cases and because they may also implicate political and religious freedoms and claims to equal treatment without discrimination from law enforcement officials. At the least, courts should require the

⁶³ Stevenson, *supra* note 4, at 125.

⁶⁴ R v. Barnes, [1991] 1 S.C.R. 449 (Can.). *But see* R v. Swan, [2009] CarswellBC 798 (B.C.C.A.) (WL), 244 C.C.C. (3d) 108 (holding that there is no reasonable suspicion or bona fide inquiry when the police made cold drug calls to numbers supplied by an informer of unknown reliability).

State to demonstrate a reasonable suspicion that a particular location or group is associated with terrorist activities and not just religious or political extremism.

Many attempts to raise the entrapment defense in terrorism prosecutions will fail, but the reasons that are given by judges for dismissing such claims are important. An accused in a recent prosecution of a Toronto terrorism plot unsuccessfully raised an entrapment defense. The State to its credit did not rely on a bona fide investigation or the accused's religious and political beliefs as the justification for offering the accused opportunities to commit crimes in an elaborate sting involving multiple informers, a training camp and a controlled delivery of substances represented to be explosives capable of detonating three truck bombs in downtown Toronto.

The judge in the Toronto case characterized the preliminary requirement of reasonable suspicion as “meaningful but not onerous” and held that it was satisfied because the accused both associated with a person planning a terrorist bomb plot and counseled him about his terrorist activities and how to evade surveillance by intelligence agencies.⁶⁵ The judge also concluded that while the police informer used deception, he did not induce the commission of the crime and nothing that the informer did would have pressured a reasonable person with the strengths and weaknesses of the accused to commit such a serious offense.⁶⁶ The judge also emphasized that the “degree of harm posed by the bomb plot was so substantial that it is difficult to comprehend. The approach taken by the police through their agent . . . was not out of proportion. There is no evidence of any threats being made by the police”⁶⁷

The Toronto terrorism case suggests that judges will not ignore the seriousness of the crime when determining whether there has been improper inducement, but it also illustrates how

⁶⁵ R v. Abdelhaleem, [2010] CarswellOnt 9938, para. 71 (Can. Ont. Sup. Ct. J.) (WL).

⁶⁶ *Id.* at para. 72.

⁶⁷ *Id.* at para. 75; see also Isabel Teotonio, *No entrapment in Toronto 18 case, judge rules*, TORONTO STAR, Feb. 16, 2010, available at <http://www.thestar.com/news/gta/crime/article/766387—no-entrapment-in-toronto-18-case-judge-rules>.

the State can satisfy the reasonable suspicion requirement without relying on either random virtue testing or the accused's religious or political beliefs. Even when entrapment defenses fail, as they often will, there is a value in the judge carefully explaining that the State had legitimate reasons for targeting the accused. In this sense the judge driven English and Canadian approach may have some advantages over the jury driven American approach because it will produce reasoned decisions that should stress that the State targeted the accused for legitimate reasons related to criminality and not simply because of the accused's religion or politics. The American approach which relies on jury verdicts may foster reasonable suspicion that jurors have dismissed entrapment defenses because they have wrongfully equated religious and political extremism with a subjective predisposition to commit a terrorist crime.

C. The European Court of Human Rights

The European Court of Human Rights' approach of apparently prohibiting active investigations may prove to be unrealistic when applied in the terrorism context. One of the advantages of sting operations as opposed to reliance on electronic surveillance is that stings may allow the State to better control the danger that a terrorist cell will quickly move beyond planning and preparation and actually initiate a terrorist act. In order to stay within a terrorist cell, undercover officers and informers may often have to go beyond the passive role that may arguably be required under the *Teixeira de Castro* decision. This does not mean that illegal conduct by such undercover operatives should be ignored. Nevertheless a strict requirement of passivity is arguably not needed in the European context. In Europe, undercover operatives are more likely to be held accountable for any illegal actions through judicial authorization of the sting or through a regime of legislative regulation of stings such as exists in England. In contrast, undercover stings in North America are primarily subject to ad hoc and after the fact judicial regulation.

European entrapment doctrine is more demanding than American, Canadian or English approaches in several respects.

As suggested above, the European Court seems to frown on proactive police investigations at least if they are not judicially authorized. The European Court also has yet to follow Anglo-Canadian law authorizing investigations into locations as an alternative to individualized suspicion, though such an approach might be implicit in some judicial authorization of terrorist stings, especially in cases where they are authorized on the basis of intelligence.

The European Court also takes a more holistic approach to entrapment and sees it as part of a broader right to a fair trial including disclosure of the State's case. In both *Edwards and Lewis v. United Kingdom*⁶⁸ and *V. v. Finland*,⁶⁹ the European Court of Human Rights found a violation of the right to a fair trial not because of actual entrapment, but because the accused was denied access to information that would be required to establish the entrapment defense. In the terrorism context, there may be compelling reasons to protect at least some of the background intelligence that might establish a reasonable suspicion to justify targeting a particular accused. For example, revealing the grounds for reasonable suspicion might reveal the existence of an informer among the accused's inner circle or the use of electronic surveillance in a particular location.

Although the European Court of Human Rights recognizes that the accused does not have an absolute right to disclosure and that disclosure can be limited for reasons related to national security, accused in terrorism cases may have some success in arguing either that they were entrapped or they were denied a fair trial because of the State's failure to disclose intelligence that is relevant to the entrapment claim. In this sense, European entrapment doctrine may be more of an impediment to proactive terrorism investigations and prosecutions than American or Canadian entrapment doctrine. That said, the Eu-

⁶⁸ *Lewis v. United Kingdom*, 40 Eur. H.R. Rep. 593 (2004).

⁶⁹ *V. v. Finland*, [2007] Eur. Ct. H.R. 40412/98, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Finland%20|%2040412/98&sessionId=67017658&skin=hudoc-en>.

ropean Court could back away from some of the more dramatic implications of its nascent entrapment doctrine and take an approach that defers more to regularized judicial decisions to target people as terrorist suspects including those made on the basis of intelligence not disclosed to the accused.

The more robust restraints that the European Court appears prepared to impose on proactive investigations may be more acceptable if the ultimate remedy is damages and not an ending of the prosecution. The remedies for the entrapment defense are drastic in America, Canada and England because a successful entrapment defense results in an acquittal or a permanent stay of proceedings.⁷⁰ Concerns about remedies often influence liability rules. A desire to avoid acquittals and stays in serious terrorism cases risks diluting the American, and Anglo-Canadian entrapment defenses. At the same time, there is a danger under the European approach that damage awards may not be particularly meaningful for accused who are subject to entrapment, including discriminatory targeting decisions, and who are convicted and receive long imprisonment sentences for terrorism crimes. Indeed, the finding of entrapment may dilute the denunciatory value of the underlying criminal conviction by suggesting that the State has created the particular terrorist crime, perhaps in response to the politics and religion of the accused.

IV. CONCLUSION

The entrapment defense is likely to be claimed in terrorism prosecutions and the terrorism context is likely to affect the evolution of the entrapment defense. There will be a temptation for courts to water down the entrapment defense especially when its successful invocation might result in terrorists going free. In this sense, it is not surprising that the European Court of Human Rights has a more robust defense than Anglo-

⁷⁰ In some cases, however, the entrapment defense may only apply to some part of a multi-part indictment. See *United States v. Nettles*, 400 F. Supp. 2d 1084 (N.D. Ill. 2005) for a case involving a sting where the accused was acquitted of material support of terrorism but convicted of counterfeiting and explosive charges.

American courts where an acquittal or a stay of proceedings is generally the only remedy for a successful entrapment defense.

It is likely and probably justifiable that the courts will give the State more leeway in terrorism cases in terms of proactively participating in ongoing stings over a matter of months and sometimes years. Although some extreme State behavior such as threats of violence should still cross the line and result in a finding of entrapment, it is unrealistic to expect undercover agents and informers to play a purely passive plot in ongoing terrorist plots. The European Court of Human Rights' entrapment jurisprudence is especially vulnerable to a critique that it sets unrealistic standards that could prohibit the proactive investigation of terrorism. This does not mean that anything goes or that undercover officers and agents should not face sanctions for illegal acts, but rather that the distinction between active and passive investigation is not sensitive enough to the challenges of investigating terrorism. In the American context, it may also be unrealistic to prohibit the State for supplying the means to commit terrorist crimes or to refrain from engaging in what in a drug or prostitution case might be thought to be excessive governmental involvement in a case.

Although the terrorist context will likely give the State more leeway in how stings are conducted, the State's initial decision to target the accused should be carefully examined by the courts in all the jurisdictions examined in this article. The danger is that people will be targeted for elaborate and intensive stings simply because of their political or religious beliefs and opinions and attendance at places of worship or political discussion. Such stings would adversely affect equality rights as well as freedom of expression and religion. They might also give support to those who would argue that terrorism crimes are being created by the State as religious and political crimes and do not represent a real threat of criminality and violence.

Different entrapment doctrines have different vulnerabilities when it comes to condoning discriminatory targeting decisions. Anglo-Canadian entrapment doctrine that allows targeting of particular locations or crimes without reasonable individual suspicion creates a risk of condoning random virtue testing of those who attend at certain locations of religious worship

and political discussions. It should be recalled that random virtue testing in the terrorism context will generally be much more intensive and intrusive than that done in locations associated with illegal drugs or prostitution. For example, terrorist stings frequently involve the State agent engaging in prolonged discussions of religious or political matters with the accused. In the American federal system, there is a danger that the State could engage in discriminatory targeting and avoid having to demonstrate that the accused had a predisposition to commit a terrorist crime if judges hold that the sting did not induce the commission of the crime or if juries conflate subjective predisposition to commit terrorist crimes with extreme religious or political views.

Prosecutors and courts should be cautious about departing from individualized suspicion requirements and of accepting random virtue testing of those who participate in religious or political activities. Such random virtue testing will have discriminatory effects on Muslims and adverse effects on freedom of religion and expression. It could also give credence to arguments that the police target and harass radicalized Muslims into committing political or religious crimes. Courts should interpret alternatives to reasonable suspicion narrowly and insist on at least reasonable suspicion that the location being investigated is the site of terrorist activities and not simply political or religious radicalism. American courts should avoid deregulating initial targeting decisions by holding that the State has not induced the commission of the crime. They should also insist on requiring the State to demonstrate that there was a predisposition to commit a terrorist crime before the sting was started. Entrapment doctrine as applied to terrorism prosecutions should regulate the targeting decisions of the authorities in a manner that is sensitive to equality and freedom of speech and religion values.

The American entrapment defense has often been criticized for its subjective focus, but the terrorism context potentially places the subjective approach in a favorable light. The focus on the accused's predisposition to commit a crime has the virtue of serving as a powerful antidote to claims of discriminatory targeting for intense terrorist stings. To be sure, there is a

danger that prosecutors will attempt to establish predisposition through evidence of religious and political extremism. This danger is aggravated by the fact that American juries, unlike English and Canadian judges, will not give reasons for why they have rejected an entrapment defense. Nevertheless, at the end of the day, if they follow American law, juries must be convinced of the accused's pre-existing predisposition to commit crimes of terrorism.

The reasonable suspicion requirement in Anglo-Canadian and European entrapment law and the American federal predisposition requirement should be embraced as a critical constitutional restraint on terrorism investigations. In the long run, such requirements will bolster the legitimacy of applying the criminal sanction to terrorists. The requirements of reasonable suspicion or subjective predisposition can ensure that terrorists are rightly regarded as criminals as opposed to the victims of discriminatory profiling and targeting or of the State creation of religious or political crimes.