

ANTI-TERROR STINGS AND HUMAN SUBJECTS  
RESEARCH: THE IMPLICATIONS OF THE  
ANALOGY FOR NOTIONS OF  
ENTRAPMENT AND FOR THE PURSUIT  
OF STRATEGIC DETERRENCE

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I. INTRODUCTION: UNDERCOVER POLICING AND THE PROBLEM OF INFLUENCE

On October 17, 2012, the FBI arrested 21-year-old Quazi Mohammad Rezwanul Ahsan Nafis for attempting to detonate what Nafis believed was a thousand-pound explosive device outside the Federal Reserve Bank in New York.<sup>1</sup> Federal prose-

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1. Dean Nelson & David Bergman, *New York Fed Bomb Plot: How Quazi Ahsan Nafis Became Radicalised*, TELEGRAPH (Oct. 18, 2012), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/9617009/New-York-Fed->

cutors alleged that Nafis had intended to inflict mass casualties and cripple the U.S. economy, but that the plot was foiled because the person whom Nafis recruited to assist him, and from whom he obtained what he believed to be explosives, was really an undercover FBI agent.<sup>2</sup> Critics of the undercover operation expressed doubt about whether Nafis would have committed a terrorist act without assistance from undercover agents, and a number of commentators expressed the opinion that such sting operations ought to be considered a form of entrapment.<sup>3</sup> What are the merits of such claims?

Sam Rascoff has argued that sting operations against aspiring terrorists serve the aims of strategic deterrence by forcing anyone communicating with recruiters for terrorist organizations to reckon with the possibility that they may be dealing with an undercover agent.<sup>4</sup> This, in turn, makes it more difficult for Al-Qaida and other terrorist organizations to convince would-be jihadists of their own bona fides as terrorists and may affect the calculations of terrorist organizations about the risks and benefits of current recruitment strategies. One question that law enforcement agencies must consider in designing such operations, however, is whether the creation of an entirely artificial criminal opportunity amounts to entrapment

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bomb-plot-how-Quazi-Ahsan-Nafis-became-radicalised.html; Press Release, Fed. Bureau of Investigation, New York Man Pleads Guilty to Attempting to Bomb New York Federal Reserve Bank in Lower Manhattan (Feb. 7, 2013), available at <http://www.fbi.gov/newyork/press-releases/2013/new-york-man-pleads-guilty-to-attempting-to-bomb-new-york-federal-reserve-bank-in-lower-manhattan>.

2. *Id.*

3. Richard Walker, *FBI Entrapment Eyed*, AMERICAN FREE PRESS (Oct. 28, 2012), <http://americanfreepress.net/?p=6909>; Seth Freed Wessler, *New York City Terrorism Scheme Latest in Line of 'Entrapment' Cases*, COLOR LINES (Oct. 18, 2012), [http://colorlines.com/archives/2012/10/new\\_york\\_city\\_terrorism\\_sting\\_latest\\_entrapment\\_case.html](http://colorlines.com/archives/2012/10/new_york_city_terrorism_sting_latest_entrapment_case.html); *Quasi Nafis: Another Case of Entrapment*, ISLAMIC AWAKENING (Nov. 20, 2012, 2:36 PM), <http://forums.islamicawakening.com/f47/quazi-nafis-another-case-of-entrapment-62006/>; *Latest FBI Entrapment Shows Trend in Targeting Muslim Youth*, ASEERUN (Nov. 20, 2012, 2:42 PM), <https://aseerun.wordpress.com/2012/10/18/latest-fbi-entrapment-shows-trend-in-targeting-muslim-youth/>; *Entrapment Frenzy: FBI Thwarts Dumbass Terrorist—After Helping Him, Of Course!*, TRUTHAHOLICS (Oct. 18, 2012), <http://truthaholics.wordpress.com/2012/10/18/entrapment-frenzy-fbi-thwarts-dumbass-terrorist-after-helping-him-of-course/>.

4. Samuel J. Rascoff, *Counterterrorism and New Deterrence*, 89 N.Y.U. L. REV. 830 (2014).

under existing law. Beyond the purely legal question, however, such investigations raise normative questions about what the law should be. What implications do such sting operations have for how we *should* think about entrapment?

The intuition behind the entrapment defense is that all people have latent tendencies that could lead them astray, and that the job of the investigator is not to bring out purely inchoate dispositions but to identify people who are already engaged in, or committed to, criminal conduct. Modeling unlawful behavior or encouraging someone to commit a crime can risk corrupting “the unwary innocent,” and such concerns derive some support from cognitive science research suggesting that behavior is heavily influenced by situational factors—not just latent dispositions—and that many otherwise law-abiding people can be manipulated into committing relatively low-level offenses in controlled experimental settings.<sup>5</sup> The entrapment defense, then, captures, at its heart, the notion that undercover operations should not artificially induce crime by creating a situation in which people who might not otherwise commit crimes are led to do so.

Undercover operations raise this concern because the undercover technique is a mode of investigation that interacts with the phenomena it is used to investigate. This distinguishes it from ordinary investigations, in which the investigator identifies himself as such, and in which the crime has already been committed before he enters the picture. In some ways, undercover policing has more in common with undercover sociological research in which a sociologist infiltrates a millennial cult to find out what its members will do when the expected doomsday comes and passes without the predicted cataclysm, or with cognitive psychology experiments in which a researcher planted among his subjects models cheating or other low-level infractions in order to identify the conditions in which subjects will follow suit (though there are, of course, profound disanalogies as well, as I discuss below). In both types of human subjects inquiry, the researcher disguises her true identity and interacts with her subjects in an effort to elicit either the statements or behavior she wishes to study. And in each instance, the researcher must take account of any

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5. DAN ARIELY, *THE (HONEST) TRUTH ABOUT DISHONESTY: HOW WE LIE TO EVERYONE—ESPECIALLY OURSELVES* (2012).

contaminating influence that her presence and interactions with the subjects may have had on the phenomena she is studying.

The impact of the researcher on her subjects is what I call “the problem of influence,” and I argue that the entrapment defense is a special case of the well-known observer effect in human subjects research.<sup>6</sup> Any human subjects research in which researchers interact with their subjects raises methodological issues about how to minimize, measure, or control for the researcher’s influence on her subjects. That is, both immersion research and staged experiments may involve distortions due to the researcher’s impact on her subjects. But the nature of the influence and of the distortions it may introduce into the findings will vary depending on whether the researcher is interacting with her subjects in their natural environment or constructing an artificial scenario in a controlled setting to serve as a proxy for the subject’s ordinary behavior in his natural environment.

If one compares undercover operations to human subjects research, and entrapment concerns to methodological questions about the researcher’s influence on the target environment, the concerns one raises about undercover agents’ influence on their target environment should be very different when the undercover operative immerses himself in an established social milieu or criminal organization, investigating crimes planned by others, than when he investigates a target’s criminal proclivities in an artificial setting, under conditions investigators can control. In what follows, I caution against uncritically transferring notions of entrapment drawn from immersion stings into more artificial, staged scenarios that ought to raise somewhat different concerns. More specifically, I suggest that it may be unwarranted to equate the artificiality of staged, experimental sting operations with entrapment, as, I

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6. For a discussion of this phenomenon, see MICHAEL Q. PATTON, *QUALITATIVE EVALUATION AND RESEARCH METHODS* (1990); Laura L.S. Howe, Warren J. Rice & Valerie M. Hoese, *Psychological Ethics and Third Party Observers (TPO): We’ve Observed Their Effect and Now Need to Act*, 58 *FLORIDA PSYCHOLOGIST* 18 (2007); Julie K. Lynch, *Effect of a Third Party Observer on Neuropsychological Test Performance Following Closed Head Injury*, 4 *J. FORENSIC NEUROPSYCHOLOGY* 17 (2005); A. John McSweeney et al., *Ethical Issues Related to the Presence of Third Party Observers in Clinical Neuropsychological Evaluations*, 12 *CLINICAL NEUROPSYCHOLOGIST* 552 (1998).

contend, most European legal systems tend to do. I argue that concerns about artificial, staged scenarios are often based on assumptions carried over from drug investigations and that these empirical assumptions need to be questioned when they are applied to counterterrorism stings. Such assumptions include the belief that someone who is otherwise law-abiding might be induced to commit a crime if offered an above-market inducement to do so; that the underlying appeal of the crime is profit-driven; that sting operations deter primarily by targeting criminal organizations, rather than individuals prone to recruitment by organized groups; and that effective sting operations target recidivists and sophisticated criminals rather than naïve, first-time offenders.<sup>7</sup> To the extent these assumptions do not apply to aspiring terrorists, I suggest that notions of entrapment that are derived from narcotics investigations and that favor immersive, ethnographic forms of infiltration may not be apposite to counterterrorism stings.

## II. UNDERCOVER POLICING AND HUMAN SUBJECTS RESEARCH

I offer a model for thinking about how undercover operations differ from each other to explain why sting operations that stage artificial criminal opportunities for would-be terrorists may raise special concerns for courts and commentators, and I discuss how the human subjects analogy should lead us to assess the validity of these concerns. The model I propose offers a way of classifying sting operations along a spectrum of types; it allows us to situate anti-terror stings on that spectrum in order to identify the normative criteria that we should use to evaluate both the legality and the desirability of these stings as a matter of policy. I use this classification scheme to contrast American with European approaches to entrapment.

To understand what is unusual about undercover investigations of aspiring terrorists, it is useful to compare undercover operations to human subjects research and to think of undercover operations as varying according to the place they

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7. GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 118–28 (1988); Richard H. McAdams, *The Political Economy of Entrapment*, 96 J. CRIM. L. & CRIMINOLOGY 107 (2005); Ronald J. Allen, Melissa Luttrell & Anne Kreeger, *Clarifying Entrapment*, 89 J. CRIM. L. & CRIMINOLOGY 407 (1999).

occupy on a spectrum of human subjects research that runs from contrived, experimental scenarios used for cognitive behavioral research, like the Milgram experiments,<sup>8</sup> at one end, to ethnographic immersion research among indigenous tribal groups, pool sharks, or radical political groups, at the other. At the cognitive science end of the spectrum, undercover operations may stage a crime in which a target participates under controlled conditions, which allows the risk of harm to be minimized. Such operations identify potential targets largely based on expressed interest in committing a crime and a psychological predisposition to engage in criminal activity, even if the target has not previously committed such an offense. Examples might include an undercover operation targeting someone who has asked for help burning down his failing business, in order to collect on an insurance policy, or someone who wants a hired killer to murder his wife. At the ethnographic end of the spectrum, by contrast, a government mole participates in a crime (such as money laundering or drug trafficking) that the target organization stages. Stings of this kind require undercover agents to immerse themselves in the targeted environment, instead of staging an offense under controlled conditions. Targets for such investigations are largely selected on the basis of their past or ongoing participation in similar offenses; their relationship to an established criminal organization; and their possession of illicit goods or specialized know-how, or access to weapons or precursor materials that serve as some indication that targets serve as conduits, facilitators, or planners of criminal activity.<sup>9</sup>

At one end of the spectrum, accordingly, undercover operations can resemble the artificial, experimental scenarios through which cognitive scientists seek to reproduce natural occurrences under controlled conditions, while the other end

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8. Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371 (1963); Stanley Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 HUM. REL. 57 (1965).

9. See generally, *The Attorney General's Guidelines on Federal Bureau of Investigation Undercover Operations*, <http://www.justice.gov/sites/default/files/ag/legacy/2013/09/24/undercover-fbi-operations.pdf> (discussing considerations that go into approval and monitoring of an undercover operation). See also Marx, *supra* note 8, at 73–74 (discussing distinctions among types of undercover operations, specifically between natural and artificial environments).

of the spectrum features true infiltration of a natural environment which may, however, be altered by the presence of an outside observer. “Reverse sting operations,” in which an undercover agent offers drugs for sale to retail customers, are relatively close to controlled experiments. Other analogues to cognitive science experiments include the whole range of “honeypot” operations, in which the police offer a criminal opportunity to targets who self-select by taking agents up on their criminal offers. Such investigations include random integrity testing of bank tellers, the establishment of storefront “fencing” operations,<sup>10</sup> the positioning of bait cars filled with tempting merchandise, or the deployment of decoy officers posing as prostitutes on the street or as underage girls on the Internet. At the other end of the spectrum, undercover agents, sociologists, and journalists have infiltrated mental hospitals, supermarket chains, and extremist political parties, much as long-term moles have infiltrated the Cosa Nostra,<sup>11</sup> the Hell’s Angels,<sup>12</sup> and the Ku Klux Klan,<sup>13</sup> to document ongoing activities in their targets’ own organizational environment.

To be sure, all undercover operations allow the government secretly to influence the crimes it investigates. But the concerns such influence might raise will be different when the government orchestrates an offense under controlled conditions than when it allows its agents to take part in, and perhaps even steer, offenses that are orchestrated by others, in settings and with consequences that the government may not be able to control, or may be able to steer only at the cost of making the organization’s true ambitions and capabilities difficult to disentangle from the government’s own contribution. Contrived offenses, like controlled experiments, may be criticized by calling into question the extent to which they accurately model or replicate real-world behavior under normal conditions in the natural environment. Anthropological stings, by

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10. In store-front fencing operations, undercover agents set up a business that buys stolen property, with the purpose of identifying thieves. See Marx, *supra* note 7, at 75 (providing an account of how such operations are designed).

11. JOSEPH D. PISTONE & RICHARD WOODLEY, *DONNIE BRASCO: MY UNDERCOVER LIFE IN THE MAFIA* (1988).

12. JAY DOBYNS & NILS JOHNSON-SHELTON, *NO ANGEL: MY HARROWING UNDERCOVER JOURNEY TO THE INNER CIRCLE OF THE HELLS ANGELS* (2010).

13. RON STALLWORTH, *BLACK KLANSMAN* (2014).

contrast, raise questions about whether and how the presence of an observer has distorted or otherwise altered the dynamics of the social environment he is studying and what responsibility he may bear for social pathologies he documents—either, in the case of anthropological research, by supplying a native tribe with tools that, for example, alter power relationships and that may even be used as weapons, or, in the case of undercover operations, by making the undercover agent himself potentially complicit in criminal activities whose harms may be difficult to head off or contain. One might say that when contrived offenses and contrived experiments are problematic, they suffer from too little realism. When real power relationships and real offenses are manipulated—or manipulated badly, so that innocent people are hurt—they suffer from too much realism instead.

Yet the human subjects analogy has severe limitations. Human subjects research is meant to be benign for its subjects, not to result in their arrest and criminal prosecution. Controlled experiments in cognitive science are designed to study how ordinary people behave under certain conditions, not how a particular individual—selected precisely because he is not ordinary, but potentially a criminal—responds to a contrived opportunity. In undercover operations, there is no consent and no control group. Unlike law enforcement agents designing an undercover operation, human subjects researchers must give Miranda-like warnings to their subjects to obtain informed consent and must secure a warrant in the form of approval by a university's Institutional Review Board.<sup>14</sup>

But the human subjects analogy does capture the difference between staging an artificial social interaction under controlled conditions, on the one hand, and, on the other, studying a natural environment by immersing oneself in the real-world behavior of an established social group, under conditions that the observer does not control and with real-world consequences whose ill effects the observer may not be able to stave off. The analogy captures the differences between the problems of influence peculiar to each of these models for investigating human behavior. I contend that the problem of influence—the problem that is at the heart of the entrapment

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14. 45 C.F.R. § 46 (2009) (regulating human subjects research).



defense—takes different forms at the two opposite ends of the spectrum.

Most undercover investigations are hybrids. To some extent, they bring undercover agents into contact with targets in their natural social environment, seeking to mimic criminal opportunities that approximate those that are already available to them and to replicate offenses that targets are suspected of already committing independently of government influence. At the same time, many relatively “naturalistic” undercover operations also craft new criminal opportunities that may be shaped to varying degrees by the government.<sup>15</sup>

An undercover agent who infiltrates a motorcycle gang as a prospective member is close to the naturalistic end of the spectrum. The same is true of a mole who infiltrates a criminal organization in order to document the scope and variety of its criminal activities. The mole may, at most, assist in carrying out criminal objectives and in exploiting criminal opportunities that are identified and created by his targets.

By contrast, an undercover agent who poses as an underage girl and sets up a meeting with a target who is looking for sex with a minor is closer to the experimental end of the spectrum. The sting operation creates an artificial scenario for the realization of the target’s criminal plans, under conditions controlled by the government, without an established link to prior criminal activities of this type (though evidence of other similar offenses may emerge as a result of the investigation).

Undercover operations in which the agent poses as a killer or arsonist, “honeypot” bribery or bait car operations, reverse stings in which the undercover agent offers drugs for sale, and storefront fencing or money laundering operations are somewhere in between, but also relatively close to the experimental end of the spectrum. These operations set up artificial criminal opportunities, on the one hand, while at the same time inserting themselves into an existing criminal network or scenario in which a target is already believed to be dealing in drugs, laundering his proceeds, soliciting bribes, stealing cars, committing burglaries, or actively looking for someone to carry out an arson of a particular structure or a killing of an intended victim. Undercover drug buys are closer

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15. For a discussion of how such operations are crafted, see Marx, *supra* note 7, at 73–74.

to the naturalistic end of the spectrum, because they typically involve undercover agents as fungible actors carrying out transactions that, ideally, are indistinguishable in kind or in volume from other similar transactions that the target engages in with others in his natural environment.

### III. A TRANSATLANTIC CONTRAST

In contrast to the United States, some countries, such as France, Germany, and Italy, tend to prohibit as forms of entrapment all but the most naturalistic undercover operations, reserving the undercover technique largely for offenses in which the undercover agent inserts himself as an observer in an existing chain of distribution for some illegal commodity, such as drugs, weapons, or stolen property.<sup>16</sup> Reverse stings, bait cars, and the payment of bribes are considered per se forms of entrapment, as are decoy investigations in which undercover agents pose as prostitutes or investigations in which undercover agents pose as underage girls, i.e., as potential victims of online sexual predators (though the police may take over the email account of a real minor who has already been solicited, which turns the investigation into a naturalistic sting that would be legal in Europe).<sup>17</sup>

I argue that the European preference for naturalistic stings over more contrived scenarios arises in part from historical concerns about the state use of *agents provocateurs* in the realm of political surveillance and from the widespread practice of using undercover investigations of narcotics offenses and other transactional crimes as models for thinking about

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16. Jacqueline E. Ross, *The Place of Covert Policing in Democratic Societies: A Comparative Study of the United States and Germany*, 55 AM. J. COMP. L. 493, 557 (2007) [hereinafter *Covert Policing*]; Jacqueline E. Ross, *Impediments to Transnational Cooperation in Undercover Policing: A Comparative Study of the United States and Italy*, 52 AM. J. COMP. L. 303, 337 (2004) [hereinafter *Impediments*]. Such statements were also made to me in interviews with undercover agents in Germany (Wiesbaden, 2004), Italy (Rome, 2001–2002), and France (Paris, 2006) (on file with author).

17. Cyrille Fijnaut & Gary T. Marx, *Introduction: The Normalization of Undercover Policing in the West: Historical and Contemporary Perspectives*, in POLICE SURVEILLANCE IN COMPARATIVE PERSPECTIVE (Cyrille Fijnaut & Gary T. Marx eds., 1995); *Covert Policing*, *supra* note 16; *Impediments*, *supra* note 16, at 338–39. The example of online stings is drawn from my own interviews with French and German police officers in Paris (2013) and Wiesbaden (2013), respectively (on file with author).

the risks and pitfalls of undercover operations. To the extent that European law enforcement agencies tend to use undercover operations primarily for the investigation of those kinds of crimes which can be investigated by more naturalistic stings, and for which contrived stings pose particular dangers, their suspicion of more contrived scenarios is apt to be more pronounced than it is in the United States. But even in the United States, most undercover investigations target drug offenses, particularly at the local level.<sup>18</sup> Accordingly, such investigations have played an enormous role in shaping the assumptions about the promise, as well as the risks, of undercover investigations, so that undercover operations at the contrived end of the spectrum remain more controversial, as they are often claimed to raise heightened concerns about entrapment.<sup>19</sup>

#### A. *Undercover Policing and the Agent Provocateur*

European suspicions of what many European officials view as overly entrepreneurial American stings are partly based on historical experience. Undercover tactics in Europe continue to be associated with totalitarian regimes and with government surveillance of political opponents—part of a tradition that dates back to the Seventeenth and Eighteenth Centuries and that intensified in the Nineteenth Century.<sup>20</sup> In the United

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18. At the local level, most undercover investigations are performed by narcotics units. At the federal level, the DEA, the FBI, and U.S. Immigration and Customs Enforcement all target drug offenses for undercover investigation. While drug investigations are only a subset of FBI investigations, they are the mainstay of U.S. Customs and DEA investigations.

19. Drug trafficking offenses typically insert undercover agents into an existing distribution network or as a fungible participant in an arms-length transaction that mimics other, ongoing offenses involving the same targets. By contrast, contrived undercover scenarios in an artificial environment craft a new criminal opportunity and result in criminal charges for inchoate offenses of a sort that the target may not already be committing on his own. This raises particular concerns for commentators, because “[w]hen the government criminalizes . . . inchoate, equivocal acts, the undercover informant is charged with an even more delicate task of avoiding entrapment, while securing evidence of a crime. The earlier the intervention, the greater the risk of entrapment will be. Similarly, the more inchoate the offense charged, the greater the risk of entrapment.” Jon Sherman, “*A Person Otherwise Innocent*”: *Policing Entrapment in Preventative, Undercover Counterterrorism Investigations*, 11 U. PA. J. CONST. L. 1475, 1486 (2009).

20. FIJNAUT & MARX, *supra* note 17, at 1–28; MARX, *supra* note 7, at 17–35.

States, where undercover tactics have also been used for such purposes in the Twentieth Century, the undercover technique predates such politicized uses, as it was originally developed as a crime-fighting tool and a form of private self-defense, due to the lack of a strong standing police force on the country's western frontier.<sup>21</sup> In Europe, undercover techniques have a close association with state power and with a powerful police apparatus, while in America, undercover tactics were never the exclusive preserve of government actors acting purely on behalf of the state. Such tactics were only gradually appropriated by law enforcement agencies, and later scandals about the political misuses of such tactics only reinforced the view that undercover tactics should be a crime-fighting tool rather than a domestic intelligence technique.

Even when American undercover operations have been used for surveillance of political and social movements and for the disruption of labor unions, these tactics were sometimes developed by private employers and by mixed networks of influential newspaper columnists, citizen groups, detective agencies working for industry, and law enforcement officers acting in concert.<sup>22</sup> From the 1930s through the 1960s, private surveillance networks working closely with prominent journalists compiled their own lists of suspected subversives, used their own undercover personnel to infiltrate labor movements and political organizations, and maintained copious surveillance archives, which they allowed the FBI to consult.<sup>23</sup> In the United States, such tactics are sufficiently ordinary outside the law enforcement context that undercover bosses, undercover restaurant critics, secret shoppers, undercover investigative journalists, and television shows in which journalists conduct sting operations against online sex predators have become familiar fixtures of social surveillance in everyday life.

In the United States, the Prohibition Era and the advent of vice squads in local police departments played an important

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21. See MARX, *supra* note 7, at 17–35.

22. Dolores Janiewski, *Private Scrutiny, Public Exposure: Anti-Communist Surveillance and the Media in the United States, 1919–1956* (2014) (unpublished manuscript) (on file with author); Simon J. Judkins, *Under Prying Eyes: Repression, Surveillance and Exposure in California, 1918–1939* (2014) (unpublished master's thesis, Victoria University of Wellington) (on file with author).

23. Janiewski, *supra* note 22.

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role in making undercover tactics a staple of law enforcement throughout much of the Twentieth Century. In Europe, which did not legalize undercover policing until 1990 and beyond, such tactics remained associated primarily with political surveillance and were used mostly by intelligence agencies throughout the Cold War Era.<sup>24</sup> When the end of the Cold War and the porousness of Europe's internal borders forced intelligence agencies and customs services to redefine their institutional roles, organized crime emerged as a paramount concern for police, customs, and intelligence agencies alike.<sup>25</sup> But the legalization of undercover tactics in Europe also brought with it concerns about reviving past uses of *agents provocateurs* to radicalize political opponents and stir up violence. In Germany, where domestic intelligence agencies continue to infiltrate extremist organizations to the present day, regular scandals about government infiltration of the top ranks of neo-Nazi organizations fueled concerns, when undercover operations were first legalized, that leakage of such tactics into the law enforcement domain would undermine the rule of law and corrupt the police, as law enforcement agencies adapted the dark arts of intelligence agencies to crime-fighting.<sup>26</sup> Accordingly, Section 110a of Germany's federal Code of Criminal Procedure limits the types of offenses that undercover operations may be used to investigate, partly through a (non-exhaustive) catalogue of predicate offenses and partly by explicitly restricting undercover operations to the investigation of serious crime.<sup>27</sup> These constraints reflect concerns that undercover policing invades privacy—and that intrusions on privacy, which are an unavoidable part of intelligence operations, must be more tightly cabined when they are effectuated by the police, as part of a criminal investigation.

Such fears are no doubt part of the reason for European reluctance to countenance sting operations that contrive artificial criminal opportunities that allow undercover agents to

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24. *Covert Policing*, *supra* note 16.

25. René Levy, *Légaliser pour Mieux Contrôler? Le Cas des Livraisons Surveillées de Stupéfiants et la Loi Française du 19 Décembre 1991*, CTR. FOR SOCIOLOGICAL RESEARCH ON LAW AND CRIMINAL JUSTICE INSTS. 6 n.5 (July 2, 2004), <http://www.cesdip.fr/spip.php?article119>.

26. *Id.* at 537.

27. STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT [BGBL. I] 110a, as amended.

play too active a role in facilitating an offense, even when targets are predisposed to commit such a crime. In the realm of political surveillance, the core intuition underlying this reluctance is that opponents might well be disposed to use violence and commit crimes if incited to do so, but that the role of police or intelligence agencies should be to channel dissent into legitimate forms of expression when this is possible.<sup>28</sup> This criticism, like the problem of influence itself, is not unique to undercover operations but has also been leveled at police responses to urban riots, based on evidence suggesting that police interactions with rioters can escalate violence.

Translated into the more recently legalized domain of law enforcement stings aimed at the interdiction of organized crime, and drug trafficking in particular, this concern expresses itself in the view, often reiterated by police, prosecutors, and judges I interviewed in Germany, France, and Italy, that even an established drug trafficker can be entrapped.<sup>29</sup> What matters to the determination is whether an undercover agent is at the origin of a criminal opportunity—even an opportunity to do something the target is eager to do. Indeed, courts and commentators in France, Germany, and Italy take the position that undercover agents cannot become the “but-

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28. Shawn Boyne, *Law, Terrorism, and Social Movements: The Tension Between Politics and Security in Germany's Anti-Terrorism Legislation*, 12 *CARDOZO J. INT'L & COMP. L.* 41 (2004) (contrasting Germany's modern approach to policing dissent with the history of Germany's anti-terrorist legislation and policing of dissent from the 1960s through the 1980s). Boyne argues that, during this earlier period, the reluctance of the West German political establishment to integrate left-wing critics into the political process and the increasing virulence of domestic terrorist attacks contributed to Germany's adoption of anti-terrorist legislation that stifled and criminalized peaceful forms of dissent along with violent political subversion. She contrasts this with Germany's current reluctance to criminalize street protests and distrust of forms of infiltration that radicalize and channel political dissent into unlawful forms of expression. *Id.*

29. This author conducted hundreds of interviews with police, prosecutors, and judges who supervise or participate in undercover investigations in Germany, France, and Italy, from 2001–2013, for the purpose of identifying the practices by which they implement and adapt to legal constraints on the use of undercover tactics. Interviewees expressed caution about their tactics, voicing the view that even established offenders can be entrapped by criminal opportunities that originate with the police.

for” cause of an offense, even if the target would have committed a crime very much like it with somebody else.<sup>30</sup>

What, concretely, does it mean to become the “but-for” cause of such a crime? For German, French, and Italian narcotics investigations, it means that an undercover agent importing narcotics from abroad must insert himself into an already existing channel of distribution. He cannot purchase or import drugs from abroad, or assist in bringing them into the country, unless the seller is already working with an established customer base or distribution network domestically. The undercover agent may not import drugs for the foreign supplier and then look for customers locally, brokering the connection or simply taking receipt of the narcotics, because he would then become more than a simple middleman or service provider (such as a transporter, or warehouse owner) who greases the wheels of a machine that is already up and running without him.

Nor can French, Italian, or German undercover agents offer drugs for sale, in what is known as a “reverse sting” operation in the United States, because they would then become the causal catalyst for the particular transaction they arrange—even if the target purchases drugs from others all the time. “Reverse sting” operations are disfavored, too, because they may reveal more about a target’s willingness to commit a crime than about the capacities or workings of the organization to which the target belongs. There is a strong preference in German, French, and Italian undercover investigations for using stings as a means of infiltrating a network in order to make the undercover agent into a passive witness to offenses committed by others.<sup>31</sup>

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30. This claim and the following discussion is based on field interviews with police, prosecutors, and judges that this author conducted from 2001 to the present in the United States, Italy, Germany, and France. For more specific references to statements made in interviews about the importance of maintaining a passive stance in undercover negotiations, see *Covert Policing*, *supra* note 16, at 557 and *Impediments*, *supra* note 16, at 604. This research is the subject of a book this author is currently writing for Oxford University Press, to be titled *Undercover Under Scrutiny: A Comparative Look at Covert Operations in the United States, Germany, Italy, and France*.

31. Interviews with French, German, and Italian undercover agents, prosecutors, and judges, 2001–2013 (on file with author).

Under German, French, and Italian doctrines of entrapment, then, the more an undercover operation contrives an artificial sting in which the government creates a criminal opportunity, and the more an undercover investigation diverges from a naturalistic scenario in which an undercover agent passively observes a transactional offense engineered by his targets, the more likely it becomes that the sting operation will be considered a form of entrapment. Favored undercover operations target offenses committed by an organization that the undercover agent can infiltrate and to which he lends only minor forms of assistance. In particular, undercover agents must avoid becoming the “but-for” cause of a criminal offense. While even major forms of assistance do not necessarily turn the agent into an essential, “but-for” cause of the crime she facilitates, significant forms of assistance to a target do raise the concern that the target might have been less confident of success, and therefore less likely to commit an offense, had an undercover agent not provided a major form of assistance. Since German undercover agents do not enjoy immunity for participating in criminal acts undercover, major forms of assistance also expose German undercover operatives to the risk of being prosecuted as co-perpetrators. In Italy, where undercover agents do enjoy limited immunity from prosecution, they may nonetheless be prosecuted as instigators or accomplices if excessive facilitation crosses the line into entrapment.<sup>32</sup>

B. *The Long Shadow of the Agent Provocateur in German Undercover Operations: How the United States and Germany Differ in Their Use and Design of Undercover Drug Investigations*

Another reason for the European preference for naturalistic stings is that undercover tactics were legalized there relatively recently as a tool for narcotics interdiction. Moreover, in Italy, France, and Germany, most undercover operations are

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32. However, judges and prosecutors generally discount minor forms of assistance as too inconsequential to merit criminal penalties, marshaling doctrines such as the lack of criminal intent or the necessity defense to protect undercover agents from criminal liability, so long as they keep their offense contribution to a minimum. *Covert Policing*, *supra* note 16, at 547; *Impediments*, *supra* note 16, at 329.



still used for drug trafficking and other consensual transactional offenses, while the United States uses such techniques against a far wider range of offenders, including high-status offenders such as corrupt public officials, business leaders, and stock traders.<sup>33</sup> A number of legal developments have both reinforced the continental preference for immersive stings in a target’s natural environment and made it relatively easy to adapt these constraints to drug investigations.

In Germany, as in Italy and France, undercover policing was long considered a gray zone tactic that could trigger criminal penalties for undercover agents who participate in criminal activity. Unlike France and Italy, Germany has enacted no immunities to protect undercover agents from criminal liability for participating in crimes undercover. German police and prosecutors therefore worry that creating an artificial criminal opportunity makes an undercover agent an outright participant in criminal conduct.<sup>34</sup> What once was considered criminal may no longer result in criminal sanctions, because prosecutors and judges view undercover agents as lacking in criminal intent, but the erstwhile criminal prohibition has been incorporated into the doctrine of entrapment.

Accordingly, an undercover operation can be challenged on grounds of entrapment if an undercover agent played a comparatively greater role than his otherwise predisposed target in facilitating the commission of an offense. And while entrapment is not a defense in either Germany or Italy, it is a sentencing factor that, in Germany, can drastically reduce punishment.<sup>35</sup> As a sentencing factor, it is scalar, and many judges routinely apply an “entrapment discount” to offenses resulting from undercover operations, depending on the degree of government contrivance and facilitation involved.<sup>36</sup> This gives German police a strong reason to use undercover

33. Gary T. Marx, *When the Guards Guard Themselves: Undercover Tactics Turned Inward*, in POLICE SURVEILLANCE IN COMPARATIVE PERSPECTIVE, *supra* note 17, at 213–32; *Covert Policing*, *supra* note 16.

34. *Covert Policing*, *supra* note 16, at 540–41.

35. *Id.* at 539; *Impediments*, *supra* note 16, at 324.

36. *Covert Policing*, *supra* note 16, at 539; *see also* Jacqueline E. Ross, *Valuing Inside Knowledge: Police Infiltration as a Problem for the Law of Evidence*, 79 CHI.-KENT L. REV. 1111, 1118 (2004) (discussing German sentencing law which links punishment to “harms and risk of harms” and treats crimes involving undercover officers as “reducing the risk of harm”).

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investigations solely as a window into independent criminal activity, for which there is no sentencing discount.

This German preference for immersive stings that insert undercover agents into existing criminal conspiracies is relatively easy to accommodate in investigations of drug trafficking conspiracies and similar transactional offenses. Posing as service providers who assist targets in transporting and warehousing drugs, or laundering drug proceeds, undercover agents can facilitate seizures of drugs imported and distributed by others. Likewise, undercover drug buys can be used to illuminate how a criminal organization operates, what volumes of narcotics it distributes, and with what frequency.

By contrast, the possibility of triggering mandatory penalties in the United States, and the appeal of using undercover buy-busts as an alternative to the time-consuming infiltration of a criminal organization, mean that American law enforcement agencies have reasons, in drug cases, to press cases built on a contrived offense such as an undercover drug buy rather than independent criminal activity, particularly if independently committed offenses can be used to prove predisposition at trial or to increase punishment at sentencing, under a lower standard of proof. In the United States, then, the government can premise a conviction and hefty penalty on a contrived transaction standing alone, with independently committed offenses used primarily to increase punishment beyond the mandatory minimum, by establishing the volume of the organization's criminal activities.<sup>37</sup>

Both in the realm of drug investigations, in which American undercover agents are free to offer drugs for sale (provided they make an arrest and secure the drugs immediately after the transactions), and in other domains, American undercover investigations go well beyond the immersive stings favored by their continental counterparts. Many offenses such as online solicitation of minors, solicitation of murder or arson, and terrorist offenses are far easier to investigate undercover if the government is allowed to contrive a criminal opportunity. What makes this possible is not only the greater protection American undercover agents enjoy from criminal liability, but also a rather different American notion of entrapment, which focuses more on the effect of the government's tactics on an

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37. Ross, *supra* note 37, at 1118.

actual or hypothetical target's mental state than on the artificiality of the undercover scenario or the role of the undercover agent in carrying out or assisting in the prohibited criminal conduct.<sup>38</sup>

C. *How European and American Notions of Entrapment Diverge*

By comparison with their German (as well as French and Italian counterparts), American tests for entrapment are relatively lenient and accommodate contrived criminal opportunities as well as more ethnographic and immersive types of operations. Among American tests of entrapment, the "subjective" variant of the entrapment defense makes the defense available only to those offenders who were not predisposed to commit the crime they were eventually encouraged or persuaded to commit.<sup>39</sup> By contrast, the so-called "objective" test concerns itself with the nature and strength of the inducement employed by the government instead of the predisposition of offenders (bringing it closer to the European conception of entrapment, since a powerful inducement is more likely to be a "but-for" cause of an offense). While a particular defendant may well have been predisposed to commit the crime with which he is charged, an excessively appealing inducement may nonetheless amount to entrapment if it has a tendency to overcome the resistance of the average law-abiding person.

Only a minority of jurisdictions, such as California and Alaska, have embraced this version of the entrapment defense.<sup>40</sup> A third, hybrid variant makes the defense available only if the defendant can establish both that he was not predisposed to commit the crime *and* that the government's tactics were unfair, meaning that the pressures and inducements used were excessive. This test, which has been adopted at the

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38. See *Bailey v. People*, 630 P.2d 1062 (Colo. 1981) (discussing the American entrapment defense).

39. *Sorrells v. United States*, 287 U.S. 435, 448 (1932). "Under a subjective test . . . the outcome varies with each individual defendant's state of mind; no general standards governing the permissibility of police conduct are set." *Bailey*, 630 P.2d at n.5.

40. Decisions adopting an objective approach include *People v. Barraza*, 591 P.2d 947 (Cal. 1979); *Pascu v. State*, 577 P.2d 1064, 1064 (Alaska 1978). The Model Penal Code has also adopted an objective test of entrapment. MODEL PENAL CODE § 2.13 (Proposed Official Draft, 1962).

federal level,<sup>41</sup> is the most restrictive variant of the entrapment defense, as a purely subjective test would sustain a defense of entrapment even when the government offered a target otherwise reasonable inducements, so long as the targeted offender could establish a lack of predisposition.

Under any of these tests, however, undercover operations that approximate the experimental end of the spectrum by contriving artificial criminal opportunities can withstand a claim of entrapment if an ordinary law-abiding citizen would not have yielded to the government's inducement, or if the defendant was predisposed to commit the crime, which is usually true of sting operations that target someone who is looking to hire a killer, that offer drugs for sale at the market price, or that set up meetings with someone who is seeking sex with an underage girl.

American notions of entrapment, therefore, accommodate a greater willingness on the part of American police and prosecutors, compared to their European counterparts, to investigate unrealized intentions or predispositions—that is, to pursue people who are identified as dangerous, even if they are not on the brink of a criminal attempt and have not committed similar crimes in the past.<sup>42</sup> Nonetheless, terror stings that offer criminal opportunities to a predisposed individual who lacks the technical know-how and hardware to carry out a terrorist attack without government assistance are even further removed from the naturalistic end of the spectrum than most other American stings in which undercover agents contrive a criminal opportunity.

#### IV. HOW STING OPERATIONS AGAINST WOULD-BE TERRORISTS CHALLENGE NORMS DERIVED FROM UNDERCOVER INVESTIGATION OF TRANSACTIONAL AND TRAFFICKING OFFENSES

Stings that offer criminal opportunities to aspiring terrorists raise particular concerns because their targets are even less likely than targets of other undercover operations to en-

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41. *Sherman v. United States*, 356 U.S. 369, 372 (1958).

42. Richard McAdams, *The Political Economy of Entrapment*, 96 J. CRIM. L. & CRIMINOLOGY 107 (2005); Richard Warner & Claire Hill, *Valuing Inside Knowledge: Police Infiltration as a Problem for the Law of Evidence*, 79 CHI.-KENT L. REV. 1111 (2004).

counter the type of opportunities offered by the government, or to carry out a similar crime without government assistance. After all, someone who solicits an undercover agent for sex, believing him to be a twelve-year-old girl, may not have great difficulty in finding other minors on the Internet. Even someone who is looking to hire a killer is more likely to be able to find someone willing to carry out his plans than a would-be terrorist who needs plutonium or logistical and technical support to carry out a terrorist attack, if only because the latter type of assistance requires more specialized skill and equipment that is harder to procure than a gun. The target in terror stings may also make relatively smaller contributions to the success of the crime, in that what he offers, practically speaking, may only be his willingness to activate the detonator of an explosive device supplied by others.

Such sting operations place greater pressure on our intuitions to determine whether the criminal law permits the government to punish someone for a largely theoretical willingness or desire to commit a crime that he may lack the connections, expertise, and equipment to bring to fruition, or even to the level of an attempt. Even in the United States, courts and commentators sometimes take a skeptical view of undercover operations that engineer criminal opportunities that the target is unlikely to encounter or is ill-equipped to take advantage of in his natural environment—that is, without government assistance.<sup>43</sup>

But to the extent that both American and European sting operations still focus more on drug dealing and other transactional or trafficking offenses, understandings of what constitutes entrapment, and what kind of inducements are permissible, may be shaped by assumptions that do not apply to undercover investigations of aspiring terrorists. Counterterrorism stings challenge many of the empirical assumptions that underlie undercover investigations of narcotics trafficking and transactional offenses. First among these assumptions is the notion that an otherwise law-abiding person might be induced

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43. See, e.g., CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, TARGETED AND ENTRAPPED: MANUFACTURING THE 'HOMEGROWN THREAT' IN THE UNITED STATES (New York: NYU School of Law, 2011) (discussing concerns about the government's role in undercover operations and entrapment as well as human rights concerns).

to commit consensual, transactional crimes such as gambling or drug-dealing if the price is right—that is, if offered an above-market rate of return. This is not an assumption that generally applies to terrorists. Even more fundamental, here, is the belief that the underlying appeal of the crime is profit-driven, not ideological. Profit is not typically the prime motivation of potential terrorists, though there may be financial rewards for the families of suicide bombers.<sup>44</sup>

A second important assumption is the normative view that the government's real target should be the organization, or network, in which the individual offender is embedded. This, too, is a cornerstone of drug investigations. Yet the aim of deterring terrorist organizations may make it more advantageous to target those whom the organizations themselves are liable to recruit, both because it may simply not be feasible to infiltrate an Al-Qaida cell, and because such sting operations may make it harder for terrorist organizations to recruit lone wolves who must worry about distinguishing real terrorists from undercover agents. Sting operations against lone-wolf or self-radicalized terrorists—that is, against Al-Qaida's potential recruits—are fundamentally different from traditional drug investigations in which an undercover agent works his way up the supply chain by flipping dealers and middlemen.

Third, undercover investigations of transactional crimes must also take into account the risk of generating more crime by creating a market—a common concern with storefront “fencing” operations, in which undercover agents may worry about encouraging people to steal by offering a stable market for stolen products. Storefront money laundering investigations have also, at times, been accused of enabling drug cartels to launder too much money and to carry on business as usual before seizures and arrests interrupt the process.<sup>45</sup> But anti-terrorism stings do not intervene in a market economy or target transactional, profit-driven offenses. They are, for that rea-

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44. See, e.g., Francie Grace, *Sadam's Suicide Bomb Funds*, CBSNEWS (Nov. 17, 2004), <http://www.cbsnews.com/news/saddams-suicide-bomb-funds/> (reporting on assertions that Saddam Hussein paid the families of Palestinian suicide bombers).

45. Interviews with supervisors of American undercover investigations and former American undercover agents (Chicago, 2012) (on file with author).

son, less likely to generate a favorable economic context for the targeted crimes.

Because anti-terrorist stings do not target repeat offenders, it also makes less sense to insist, as those who criticize drug investigations frequently do, that sting operations should not target those who would like to commit a crime but do not know how. On this view, the government should not target latent dispositions, but only those persons who are already engaged in similar crimes independently of the government. Behind this normative position is the assumption that the proper aim of an undercover operation is to prove some crime that a target has committed, is committing, or will commit independently of the government. A contrived transaction is sometimes said to be legitimate only to the extent that it approximates a crime that the target was already resolved to commit and that he expects to repeat. Ideally, on this view, the undercover agent inserts himself as a fungible actor into an existing supply chain whose members are ongoing participants. But the kinds of crimes that antiterrorist stings target are likely one-time occurrences that have no antecedents and probably will have no sequels, if the target expects to be killed or arrested after his crime. Undercover investigations may, in a sense, offer targets a once-in-a-lifetime opportunity to commit a crime that the target has long thought about committing but has never committed before, may never commit, and will probably not be able to repeat if he commits it. Unlike transactional offenders, the target is not offered a chance to repeat a crime—under government supervision—that he commits every day with others or on his own.

Finally, both trafficking stings and undercover operations in other types of offenses frequently target relatively sophisticated offenders. Ordinary undercover investigations make the key assumption that certain crimes—like money laundering or accepting bribes—can only be carried out by experienced offenders, by sophisticated targets who are skilled at insulating themselves from outside observation, or by professionals in a position of public trust. On this view, a meritorious undercover investigation should target someone who can be expected to commit the crime without significant help from investigators. This may make sense when investigating entrenched trafficking networks or corrupt judges and bankers, but terrorist offenses often rely on remarkably credulous and

unsophisticated accomplices, whose primary qualification for the task is their ideological motivation and their willingness, if necessary, to die in the commission of the crime. The main reasons for targeting someone who fits those criteria is that someone else—a real terrorist rather than an undercover agent—might get to them first, and that such third parties may encounter greater difficulties in recruiting accomplices once word gets out that the recruiter may be an undercover agent.

To the extent that normative expectations of what undercover investigations should look like are built on these empirical assumptions, stings that offer unique opportunities to the unsophisticated may invite claims of entrapment, even when offenders seem otherwise eager to commit the offense. As discussed above, this is particularly true in Europe, where proof of predisposition to commit a crime is insufficient to rebut a claim of entrapment, so long as the undercover agent created the criminal opportunity or otherwise acted as the “but-for” cause of an offense. As mentioned above, German police, prosecutors, and judges understand this to mean that the particular crime or attempt facilitated by the state would not have happened but for the agent’s assistance—even if the target had committed similar crimes in the past.

But even in the United States, sting investigations of suspected terrorists have a greater tendency than other types of undercover operations to target people for desires and intentions that they lack the connections and ability to put into action. Even in the United States, accordingly, such stings require some legitimating explanation for why the usual normative assumptions and constraints should be relaxed.

American tests of entrapment may convince jurors that would-be terrorists deserve to be punished, because someone who was not predisposed to commit a terrorist attack would not have eagerly grasped at an opportunity to do so.<sup>46</sup> But just

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46. Drew Stevenson has argued for eliminating the required showing of predisposition when applying the entrapment defense to terrorism cases, because someone who was not predisposed would not agree to commit such a crime. Drew Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125 (2008). While predisposition may not be difficult to prove in such cases, however, the artificiality of the criminal opportunities contrived in many such sting operations means that the prohibited act is often a product of the undercover investigation itself; the only remaining purpose of such sting operations, then, is to test a target’s willingness to commit such a crime. Presum-



as electronic surveillance must also be justified on grounds of necessity—by considering the insufficiency of other investigative alternatives in identifying significant threats to the public—terror stings that go further than other quasi-experimental scenarios in testing someone’s willingness to act on latent dispositions to commit an offense must also legitimate themselves in the realm of public policy by reference to investigative ends and the inadequacy of other enforcement alternatives. To make that case, it is necessary to excavate the empirical assumptions that ground more familiar and common types of undercover investigations, particularly in the realm of narcotics interdiction and other trafficking offenses. Such an argument must make explicit why empirical assumptions about what motivates narcotics traffickers or who constitutes a worthy target are inapposite for undercover investigations of aspiring terrorists. What makes it legitimate to target suspects who have not previously committed similar offenses and who are not embedded in an organizational structure?

To answer that question, it is also necessary to make explicit the greater difficulties in infiltrating an ideologically driven organization such as Al-Qaida. Infiltration may be too risky, insofar as the crimes that an infiltrator facilitates may be too difficult to prevent, whereas the artificial scenarios are far easier to control and their risks far easier to contain. It may therefore be preferable to question the ordinary preference for naturalistic sting operations in which the undercover agent witnesses the realization of someone else’s criminal designs.

To make the case for contrived anti-terror stings, it is necessary, finally, to distinguish the dangers headed off by other artificial criminal opportunities, in which an undercover agent poses as a killer for hire, from those averted or reduced by anti-terror stings, in which the target’s capacity to put his intentions into action, or to link up with others who can, is more open to question. In the relatively contrived sting operations targeting pedophiles who solicit undercover agents posing as underage girls, or desperate businessmen seeking to burn down a warehouse for insurance money, the danger proceeds primarily from the target himself. In the case of anti-terror st-

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ing such a willingness, even where a target was encouraged by undercover agents to resort to violence, effectively eliminates the only real factual dispute from consideration in the resulting criminal prosecution.

ings, however, the danger to the public arises not only from targets themselves but from the terrorist organization that seeks to recruit someone like them to carry out their attacks.

This means that the intended audience for such sting operations is not only the potential recruit but the organization that must take into account the greater difficulties that they may encounter in the future in finding aspiring terrorists willing to trust that they are not dealing with an undercover agent. These greater difficulties, in turn, may affect the cost-benefit calculations of such organizations in deciding how to recruit new operatives and how likely they are to be able successfully to carry out an attack on American soil through the recruitment of strangers. And, conversely, if anti-terror sting operations lead potential recruits to foreswear their search for accomplices and act on their own, their capacities to inflict harm on a large scale may be significantly reduced (though the likelihood of catching them in advance may also drop significantly, if they become less willing to confide in potential confederates).

Of course, it may be argued that many other types of undercover operations, such as narcotics investigations, send a message to criminal organizations, requiring them to invest resources in detecting or avoiding infiltration by undercover agents. But counterterrorism stings compound this effect because not only do they require criminal organizations to consider that their potential recruits may be undercover agents, but they also increase the wariness of potential recruits when they are contacted by criminal organizations. Accordingly, recruiters for terrorist organizations must worry not only that the potential recruits may be undercover agents, but also that potential recruits who are not undercover agents may view the organization itself as an FBI front.

These considerations are at the heart of justifications grounded in the aims of strategic deterrence. Making the case for such operations requires making the argument that the crimes they target are *sui generis* in ways that make many of the ground rules for drug operations or even more artificial criminal scenarios inapplicable. Accepting the legitimacy of such stings means that notions of what constitutes entrapment must take into account, to a greater extent than they have until now, differences between the targeted offenses themselves, insofar as these affect the likelihood that a particular operation will

attract either merely opportunistic offenders or repeat offenders who can be identified and caught by more naturalistic operations.

#### V. ANTI-TERROR STINGS AND THE IMPLICATIONS OF THE HUMAN SUBJECTS ANALOGY

Locating terror operations on the spectrum that runs from contrived scenarios to naturalistic stings makes it possible to reframe the issue of entrapment as a question about the tradeoffs between two variants of the problem of influence—that is to say, as a choice between two types of human subjects experiments. The choice between them, I argue, should depend on the different background conditions that affect the crimes under investigation and the availability of investigative alternatives. The human subjects analogy suggests reasons why opting for a more contrived scenario might be defensible in anti-terror stings, while more naturalistic scenarios are preferable in the investigation of market-driven, transactional offenses.

Because they contrive an artificial scenario, anti-terror stings make it possible to ensure that the planned terrorist attack does not happen. As in other experimental scenarios, the government controls the conditions under which the crime is attempted, insofar as the necessary device has to be supplied by the government. Infiltrating an existing organization poses the risk of facilitating an offense that the government may not be able to prevent. The choice among these stings may depend on (1) the degree to which a naturalistic scenario creates risks of third-party harms that the government may not be able to prevent or contain; (2) the degree of risk to the undercover agent from immersive sting operations; and (3) the extent to which infiltration is even a feasible option for certain types of organizations (such as Al-Qaida). Infiltrating criminal organizations may also require greater reliance on informants, while experimental scenarios can assign undercover agents, who are more professional and more reliable, to key portions of the operation.

Investigating rare events, rather than repeated criminal conduct, may also give the government a reason to construct an opportunity rather than to await the chance to witness one. If a criminal organization does not commit its offenses with

predictable regularity, or commits them differently each time, this too may foreclose any realistic option for awaiting and predicting the next iteration of a terrorist attack, in order to observe the targets in their natural environment.

If a government-created opportunity is unlikely to attract opportunistic offenders and is instead likely to appeal to those already ideologically committed to terrorism—or if it can be designed to test the target's commitment, by offering him non-violent options for expressing his rage—this, too, may be a reason to be less concerned about offering a criminal opportunity to the unsophisticated, or for hewing less closely to the opportunity structures the target is likely to encounter in his natural environment. These are not only practical concerns; they are some of the legitimating reasons for choosing a fundamentally different—and more contrived—operational design for anti-terror stings than for the investigation of narcotics offenses or organized crime.

Differentiating between artificial criminal opportunities and naturalistic undercover operations as ideal types makes it possible to distinguish between the distorting influences that either type of operation can create. This in turn can alert courts, investigators, and policymakers alike to the right questions to ask about such operations and the right concerns to raise. At the experimental end of the spectrum, what should concern us about a sting operation is not that it contrives an artificial criminal opportunity or that the undercover agent supplies an essential ingredient, such as a (non-working) bomb, if the target's desire to commit such an offense is unequivocal and the investigation targets a type of crime that cannot realistically be investigated through a more naturalistic type of investigation involving the infiltration of an existing criminal conspiracy. Given that contrived criminal opportunities may lack verisimilitude, the right question to ask about the design of such an operation is whether it accurately models what the target would have been likely to do if he had been contacted by genuine terrorists rather than undercover agents, not whether he was already engaged in the planning of terrorist attacks as part of an existing terrorist network. To the extent that such sting operations test a target's predisposition to commit a terrorist offense, it is particularly important for an operation that already creates an artificial criminal opportunity not also to induce the desire to commit such an offense,

which can occur if an undercover agent characterizes the conduct as unlikely to inflict casualties, suggests that the target's grievances legitimate a violent response, or otherwise manipulates or radicalizes a target into contemplating an offense he had not previously expressed a desire to commit.

With more naturalistic operations in which an undercover agent infiltrates the target's own social environment and observes the target's handling of existing criminal opportunities, the risks are somewhat different. Undercover agents may distort the social dynamics or facilitate crimes that they cannot prevent. These concerns are more about unintended consequences, third party harms, and the government's risk of becoming responsible for crimes that it could not prevent and for which it may even have paved the way. Notions of entrapment that question an operative's direct participation in criminal activity are more appropriate with respect to naturalistic stings in which an undercover agent comes to play a causal role in an existing criminal environment or risks responsibility for failing to act and allowing real harms to materialize. Such concerns have little application to contrived undercover operations whose risks of harm to third parties are part of the illusion created by undercover agents. Thus, one might say that the particular abuses to be concerned about, depending on the nature of the undercover operation, are undue influences on the formation of criminal intent in the case of an artificial scenario, and undue influence on the actual or attempted commission of a crime—the *actus reus*—in the case of a naturalistic one.

