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8. Use of stings in counter-terrorism: entrapment and ethics

Seumas Miller

1. INTRODUCTION

This chapter provides an ethical analysis of the use of stings or traps in police counter-terrorism operations in liberal democracies and, specifically, in the US. The conclusion reached is that such operations are morally justified under certain conditions, such as that they are effective, there are no less-intrusive methods available, and the inducements offered are ones that the targets of the sting could reasonably be expected to resist. An important novel condition that is proposed is that the suspect has a standing intention (and/or an immediate intention) to commit a serious terrorist offence – for example, they occupy a role in a terrorist organization as a bomb-maker, recruiter or trainer – or has otherwise expressed the standing and/or immediate intention to commit a serious terrorist offence – for example, the suspect has drawn up a plan of the terrorist attack and is actively seeking the means to execute it.

2. USE OF STINGS IN COUNTER-TERRORISM

While the use of ‘stings’ or ‘traps’ in policing in the US, the UK, Australia, India and elsewhere is a long-standing practice in, for instance, drug law enforcement and in relation to paedophiles, it is controversial.¹ If a police officer pretends to be a drug dealer and repeatedly offers someone drugs in exchange for money, might not the officer be ‘creating crime’, supposing the person initially rejects the offer but finally succumbs and hands over cash for the drugs offered? Here, what is meant by ‘creation of crime’ is not that the manufactured event would not have happened absent the sting (although this is obviously true), but rather that the target did not have the predisposition, the ability and/or the opportunity to commit crimes of that type and, therefore, does not and would not commit them (unless via a sting).

On the other hand, if a police officer pretends to be a child in an online sting operation targeting a suspected paedophile, and the suspect responds in the

manner of a paedophile ‘grooming’ a child, does so on repeated occasions and then turns up to a face-to-face meeting with the officer believing that they are about to meet a child, then the arrest and subsequent conviction of the suspect is evidently morally justified – especially given the seriousness of the crime of sexual abuse of prepubescent children and the difficulty of acquiring sufficient evidence to convict paedophiles by means of alternative methods. What of the use of stings in counter-terrorism (Sherman 2009)? Let us consider two somewhat different scenarios extracted from two US court cases in order to focus our discussion.

Scenario 1:² Employees of a store in 2006 reported to police a video provided to them for conversion to DVD showing six men doing military training and shouting ‘Allah Akbar’. A Federal Bureau of Investigation (FBI) informant infiltrated the group and recorded an expressed intention to attack Fort Dix and kill soldiers. The group had a map of Fort Dix and conducted surveillance of it. The FBI informant presented himself to the group as an arms dealer. Members of the group tried to procure weapons from him, such as AK 47s, and were arrested. Five members of the group were convicted of conspiracy to commit terrorist acts; two are serving life sentences, one is serving 33 years.

Scenario 2:³ James Cromitie is a former drug addict and mental patient in New York with extremist jihadist sympathies. An FBI-paid undercover informant (and convicted fraudster), Shahed Hussain, offered Cromitie \$250 000 to fire a rocket-propelled grenade at Stewart Air Base and bomb a New York synagogue. Cromitie initially rejected the offer but agreed after he lost his job. Hussain provided Cromitie with (fake) explosives and drove him to a mosque where he was arrested. He received a prison sentence of 25 years.

Before turning directly to consider these two scenarios, let us set forth some of the key elements of stings. Stings should be distinguished from, firstly, police operations in which a police informant simply observes and provides information in relation to a crime, and, secondly, police operations in which an undercover operative might have minimal participation in a particular crime that has already been initiated and that would have been committed or attempted, irrespective of the actions of the undercover operative. For instance, an undercover operative might provide input into the planning of a crime but do so without initiating the crime, without inducing others to carry it out and without participating in the actual execution of the crime.⁴ Rather, stings involve law enforcement providing an opportunity for a suspect to perform a crime in circumstances controlled by law enforcement, and they involve law enforcement offering some form of inducement to a suspect to commit the crime in question. Stings, if well planned and successful, guarantee that there is adequate evidence for a conviction (unlike in the case of crimes that are not under the control of law enforcement). Of course, if stings are to be successful,

then they need to be sufficiently realistic to fool wary, often experienced, offenders.

There are various legally enshrined ethical constraints on stings and accountability measures to ensure that these constraints are complied with (see, for example, Sherman 2009). These constraints vary somewhat from one jurisdiction to another. However, some of these constraints will pertain to the suspect. Although the suspect has not committed that particular offence on that particular occasion since it was a manufactured event, there is an assumption that the suspect would have committed another offence like it on another occasion; therefore, there might be a requirement that the suspect has in fact committed crimes of that type on other occasions. In many jurisdictions, an important accountability mechanism is the requirement that law enforcement be granted a judicial warrant to conduct a sting.

Let us now turn to the analysis of our two scenarios. There are a number of contrasts between Scenario 1 and Scenario 2 in respect of the initial justification for the sting operations, the nature of the inducements, the extent of the participation of the undercover operatives in devising and initiating the crime and, therefore, whether or not the target had a predisposition to commit the crime, and whether or not the undercover operatives were law enforcement officers or persons with a criminal background who were paid to engage in the sting.⁵

Concerning the initial justification for the sting operations, Scenario 1 involved reasonable suspicion of engagement in terrorist activities, for example, the military training video received from a member of the public. By contrast, arguably, Scenario 2 simply involved the exercise of an individual right – specifically, the public expression of an extremist political view. The latter is grounds for further scrutiny of someone but, arguably, not for conducting a sting.

Concerning the nature of the inducement, the undercover operative in Scenario 2 provided a strong financial inducement, for example, \$250,000, to an unemployed person. By contrast, the undercover operative in Scenario 1 presented himself as an arms dealer in the context of the members of the group's surveillance of Fort Dix, possession of a map of Fort Dix, and their expressed intention to attack it. In short, the inducement in Scenario 1, but not in Scenario 2, was simply the provision of an element of the means to further the already existing intended goal of the target.

The undercover operative in Scenario 1 inserted himself as a collaborator in a pre-existing terrorist plot and offered to provide a key element of the means to realize it, that is, weapons that might have otherwise been difficult to obtain, given their prior convictions. By contrast, the undercover operative in Scenario 2 provided the target with the plan and know-how – while also providing the target with the means that was not otherwise available to him – that is, the

'fake' explosives – to carry it out. So the role of the undercover operative in Scenario 2 was far greater than in Scenario 1; indeed, arguably, it was necessary in Scenario 2 but not in Scenario 1. Certainly, given the significant role of the undercover operative and the nature of the inducement in Scenario 2, it is questionable whether the target had a predisposition to commit the terrorist act.

In Scenario 1, the undercover operative was a law enforcement officer, whereas in Scenario 2 he was a person with a criminal background who was paid or promised a reduction in his own sentence to engage in the sting. This latter scenario presents potential problems, including the recognition that many criminals are unreliable witnesses; for example, they may fail to record exculpatory conversations and/or commit perjury, and are prone to engage in manipulation or coercion, for example, offer an unacceptable level of inducement to the target. These problems are compounded given the incentives in play, for example, a reduction of his own sentence or a large payment if a conviction is secured. Accordingly, the reliability and, therefore, credibility of the person with a criminal background is less than that of a law enforcement officer and, as a consequence, the testimony provided should have less weight, other things being equal. The problems of reliability and credibility are, of course, significantly mitigated by the fact that the conversations between the undercover operative and the target were recorded, as is typically the case, in both Scenarios 1 and 2.

Given these identified contrasts between the two scenarios, we are evidently entitled to conclude, firstly, that the justification for conducting the sting in Scenario 2 was considerably weaker than for conducting the sting in Scenario 1, and, secondly (and notwithstanding the legal situation⁶), that the target in Scenario 2 (but not the target in Scenario 1) was the victim of a morally unjustified sting. At any rate, having analysed our two scenarios and, as a result, identified some of the salient ethical issues to be analysed in Section 2, we might usefully conclude this introductory section with some discussion of the extent of the use of stings in counter-terrorism operations in the US in particular.

Post-9/11, the FBI (working with local police in a Joint Terrorism Task Force) increased its reliance on stings in its efforts to combat terrorism and, in doing so, conducted a significant number of stings. According to a database of terrorist prosecutions (Norris and Groc-Prokopezzyk 2016), during the period from 9/11 to February 2016, there were 580 prosecutions of terrorists, of which 58 per cent were jihadists; 317 of the 580 involved undercover agents or informants. There were 144 Islamic State (ISIS) cases prosecuted in the US during the period from March 2014 to August 2017 (Greenberg 2017). These involved eight attacks, of which two were mass attacks, namely, San Bernardino, California, in 2015 and a nightclub in Orlando, Florida, in 2016. The average sentence handed down was 14.5 years. Of the ISIS cases, 49 per

cent of the suspects were foreign fighters, and 45 per cent of the attacks were on domestic targets. Moreover, 61 per cent of the ISIS cases prosecuted by federal authorities involved undercover agents or informants.

Importantly, according to Norris and Groc-Prokopezzyk (2016), there were no successful uses of the defence of entrapment in the cases in their database, that is, that the defendant was tricked or deceived into terrorist action, for example, by unreasonable inducements (including threats) and/or did not have a predisposition to perform the terrorist action. However, they also argue that, in a significant number of these cases, the targets were in fact entrapped according to many of the main criteria for entrapment. This might mean that the legal defence of entrapment was not properly applied or adjudicated, or that the legal defence of entrapment, at least in the US, is inadequate as it stands and, therefore, in need of reform. These legal issues are beyond the scope of this chapter. Instead, let us turn to the underlying ethical issues (Dworkin 1985; Sinnott-Armstrong 1999; Miller and Blackler 2006, Ch. 5; Miller and Gordon 2014, Ch. 11; Miller 2016, Ch. 7).

3. ENTRAPMENT AND ETHICS

While we need to distinguish the conditions definitive of entrapment defences from conditions under which stings might be morally – and ought to be legally – justified, nevertheless, the conditions that *ought to be* definitive of entrapment defences are among the conditions under which stings might be morally – and ought to be legally – justified. So the so-called subjective and objective tests used in the US in relation to the legal defence of entrapment provide a useful initial guide to the discussion of the wider ethical issues raised by stings, including counter-terrorism stings and, in particular, the issues of ‘creating crime’ and (relatedly) of injustice. Presumably, the target of a successful sting who is convicted of terrorism has been unjustly treated if they did not commit, and would not have committed, an act of terrorism, absent the sting. After all, in these circumstances, the only crime (if crime it is) that has been, or will be, committed is the one manufactured by the sting. Of course, in addition to the problem of the injustice to the target, there is the matter of prevention. The primary purpose of stings is to prevent crime and, in the cases of interest to us here, prevent terrorist attacks. However, if the target of a sting did not and would not have committed an act of terrorism (absent the sting), then obviously the primary purpose of the sting has not been achieved, since no terrorist attack has been prevented (other than, perhaps, the one manufactured by the sting operation).

The subjective test of entrapment focuses on the disposition of the defendant. One problem here is to determine what counts as an adequate evidential basis for the existence of a disposition. If a suspect commits an offence

without any inducement from law enforcement, then the offence is, in and of itself, evidence of a disposition to commit the offence (although this evidence is defeasible – it is possible that there was no disposition, as in some cases of provocation). But if law enforcement provides an inducement to commit the offence, then the existence of a disposition must be demonstrated independently of the inducement, and this can be difficult. However, such evidence of a disposition might be provided, for instance, if the suspect has committed such offences in the past.

There is also a question in play here in relation to the analysis of the concept of a disposition. For instance, if someone has an addiction, then they have a disposition. However, one can have a disposition that one is seeking to control, for example, a paedophile who avoids children.

In the case of suspects who are members of a terrorist organization, perhaps the concept of a *standing intention* should be utilized. The conceptual model here is that of a member of the armed forces in wartime. Combatants, by virtue of their occupancy of a role in an armed force engaged in armed conflict, are reasonably presumed to have a standing intention to kill combatants in the opposing force (and will do so unless the latter intervene to protect themselves by killing the former). Roughly speaking, standing intentions activate immediate intentions which, in turn, cause actions. However, one can have a standing intention without having a relevant immediate intention, for example, a combatant who is eating lunch in a secure building, and one can have an immediate intention without having a standing intention, for example, a husband who intentionally kills his adulterous wife in a fit of anger but without any premeditation. Clearly, terrorist-combatants have, or can be presumed to have, standing intentions by virtue of their role in an armed force. Perhaps members of terrorist organizations operating in well-ordered peacetime settings can likewise be presumed to have a standing intention to kill, or assist in killing, innocent civilians. If so, the difficulty of successfully applying the subjective test would be greatly reduced. It would not, however, deal with the problem of so-called ‘lone wolf’ terrorists (or others apparently only loosely associated with a terrorist organization), since it is precisely their membership of a terrorist organization (and, therefore, occupancy of a functional role in that organization⁷) that is in question. In relation to our two scenarios, it seems that the targets of the sting in Scenario 1 had a standing intention to commit a terrorist attack whereas, arguably, in Scenario 2 the target did not.

The objective test of entrapment focuses on the inducement; specifically, is the inducement one that it is unreasonable to expect the defendant to refuse? For instance, if law enforcement falsely represents the offence as being legal, then this would be an unreasonable inducement. Again, an ‘inducement’ might take the form of a threat that an ordinary citizen could not reasonably be expected to resist, for example, a threat to one’s life if one does not commit the

offence. On the other hand, offering \$250 000 to conduct a terrorist attack (as in Scenario 2) is surely an inducement that an ordinary citizen could reasonably be expected to resist.

While these are clear-cut cases, not all inducements are so easily classified in terms of the reasonable/unreasonable criterion. For instance, what if the 'inducement' is a threat not to one's life but to one's limb? Thus, there is a problem of determining what counts as an unreasonable inducement. Moreover, the objective test (narrowly specified) is not sufficient to defeat entrapment for even if an inducement is one that it is reasonable to expect the defendant to refuse, it might still be the case that the defendant would not have committed this kind of offence absent the inducement. Perhaps, for instance, the defendant would not have had the opportunity to commit the offence. Or, perhaps, to return to the subjective test, the defendant had no prior disposition or, better, standing intention to commit the offence.

The implication of the above discussion of the subjective and objective tests for the defence of entrapment is evidently that a counter-terrorism sting would only be morally justified if the target had a standing intention to commit a serious terrorism offence and if the inducement was one that the target could reasonably be expected to resist. However, as the above discussion has also revealed, these conditions are not sufficient to justify the use of counter-terrorism stings.

Stings can be an effective method in relation to preventing terrorist offences by ensuring would-be terrorists are convicted and receive lengthy sentences for stings can enable terrorists to be convicted who otherwise might not be convicted due to lack of evidence. Perhaps Scenario 1 is an instance of this. On the other hand, stings can simply 'create crime' rather than prevent it. Perhaps Scenario 2 is an instance of this since, arguably, it was unlikely that Cromitie would have committed a terrorist offence absent the sting.

However, even if stings are an effective counter-terrorism method, their use would not be justified if less intrusive or otherwise less harmful methods were available, for example, surveillance. Moreover, the harm in question might consist of a reduction in community trust of law enforcement and, as a result, a reluctance to assist law enforcement in combating terrorism. On the other hand, the use of other methods, such as interception of communications, may well be ineffective in some circumstances due, for instance, to the use of strong encryption by terrorists.

Assuming counter-terrorism stings are effective and less harmful than alternative methods, there are, nevertheless, questions in relation to the appropriate targets of stings and the specific offence types that justify sting operations. Presumably, stings should consist of targeted testing of individuals reasonably suspected of engaging in serious terrorist crimes. Accordingly, if an individual merely exercises their right to free speech by expressing an extremist view,

this is not a sufficient justification to conduct a sting, although it may well be a sufficient justification to monitor the individual.⁸ Moreover, a problem arises here in relation to very broad definitions of terrorism and a concomitantly expanding set of terrorism offences,⁹ for example, prohibitions on travelling to geographical regions such as Syria. Although an expansion of the set of terrorism offences might be justified in terms of, for instance, reducing the flow of recruits into terrorist organizations, reasonable suspicion that one might engage in such an offence (for example, travel to Syria from Australia) would not justify a sting operation, since the offence is, in itself, not a sufficiently serious one and would not, in and of itself, demonstrate membership in a terrorist organization, let alone participation in a terrorist attack. Further, mere associates of persons reasonably suspected of terrorism should not become the targets of stings, for example, by offering to get them to attend a terrorist training camp. Likewise, stings should not consist of random testing (as opposed to merely monitoring) of members of certain groups, for example, of those attending certain mosques, or of otherwise testing the virtue (that is, without reasonable suspicion of terrorist activity) of ordinary citizens. Individuals have a right to freedom from intrusive state interference, that is, a right not to be subjected to integrity tests if one's actions have not otherwise reasonably raised suspicion of unlawful behaviour. There is a contrast here with those in positions of special trust (for example, police) or those using dangerous equipment (for example, driving cars). Random testing of these groups might well be justified under certain circumstances.

Accordingly, let us assume that counter-terrorism stings ought only to be conducted under the following restricted conditions: they are effective and less harmful than alternative methods, and they target individuals who are reasonably suspected of engaging in serious terrorist crimes. Moreover, it was earlier argued that a counter-terrorism sting would only be morally justified if the target had a standing intention to commit a serious terrorism offence and if the inducement was one that the target could reasonably be expected to resist. Accordingly, the following five conditions suggest themselves as morally justifying the use of counter-terrorism stings (Miller 2016, Ch. 7):

1. The counter-terrorism sting in question is likely to be effective and less harmful than alternative methods, and it targets an individual(s) who is reasonably suspected of engaging in serious terrorist crimes;
2. The suspect has the motive and ability to commit a serious terrorist offence, for example, the suspect espouses extremist violence and has bomb-making know-how;
3. The suspect has a standing intention (and/or an immediate intention) to commit a serious terrorist offence (for example, they occupy a role in a terrorist organization as a bomb-maker, recruiter or trainer¹⁰), or has

otherwise expressed the standing and/or immediate intention to commit a serious terrorist offence (for example, the suspect has drawn up a plan of the terrorist attack and is actively seeking the means to execute it);

4. The suspect is likely to be presented with, or be able to create (as an individual or by acting jointly with others, for example, other members of a terrorist organization) the kind of opportunity afforded them in the sting scenario, for example, the opportunity to commit a suicide bombing; and
5. The inducement offered is one that the suspect could reasonably be expected to resist.

Note, firstly, that the opportunities to commit a type of terrorist offence might be abundant and the required ability to do so quite minimal, for example, drive a truck into a crowd. Accordingly, in such cases, the burden of the justification for a counter-terrorism sting might lie in (1), (3) and (5) (and (2), in respect of the existence of a motive).

Note, secondly, that, as mentioned above, determining whether or not a suspect had a standing and/or immediate intention (as opposed to a motive) to commit a serious terrorist offence might be difficult in the case of 'lone wolf' terrorists. Or, at least, it is difficult to determine until they commence the initial stage of their planned attack, at which point their immediate intention is manifest, and, therefore, a sting operation, even if possible, would serve no purpose; rather, interception is now not only justified but obligatory. Here, the notion of the initial stage of a planned attack is itself problematic; however, at the very least, we should distinguish the planning stage, including any reconnaissance activities (plotting a terrorist action), the provision of the means to execute the plan, and the execution of the plan (the terrorist action itself). In relation to the last of these, there is a difference between attempting to perform the terrorist action – for example, in the case of a sting, planting what is believed to be a live bomb – from actually performing the terrorist action – for example, detonating a live bomb. Perhaps evidence of planning a terrorist attack is not sufficient to demonstrate the existence of a standing intention (let alone of an immediate intention) to conduct the attack (unless, of course, there is corroborating evidence, such as communicating one's intention to others). However, evidence of planning a terrorist attack and of providing oneself with the means to execute the plan is surely sufficient (other things being equal) to demonstrate the existence of a standing intention to conduct a terrorist attack.

4. CONCLUSION

In this chapter, an ethical analysis of the use of stings or traps in police counter-terrorism operations in liberal democracies and, specifically, in the US has been provided. It has been argued that such operations are morally

justified under certain conditions, notably, that they are effective; there are no less-intrusive methods available; the targets of the sting are known to have the motive, ability and opportunity to commit serious terrorist crimes; and the inducements offered are ones that the targets of the sting could reasonably be expected to resist. An important novel condition that is proposed is that the target in question has a standing intention (and/or an immediate intention) to commit a serious terrorist offence – for example, they occupy a role in a terrorist organization as a bomb-maker, recruiter or trainer – or have otherwise expressed the standing and/or immediate intention to commit a serious terrorist offence, for example, the target has drawn up a plan of the terrorist attack and is actively seeking the means to execute it.

NOTES

1. For discussions of the ethical issues arising from traps or stings, see Dworkin (1985), Sinnott-Armstrong (1999), Miller and Blackler (2006, Ch. 5), and Miller and Gordon (2014, Ch. 11).
2. *United States of America v. Duka*, 671 F.3d 329 (3rd Cir. 2011).
3. *United States of America v. Cromitie* (Williams) – 11-2763.
4. However, it needs to be noted that, in the case of some crimes, such as terrorism in some jurisdictions, planning a crime is itself a crime.
5. There are, of course, other considerations, such as whether the target of the sting merely plotted the terrorist act or actually attempted it. It might be argued that, in Scenario 1, the target merely plotted the terrorist act since they never received the weapons, whereas, in Scenario 2, the target attempted it since he was actually provided with the explosives.
6. In both cases, the convictions of the targets were appealed and the appeals failed.
7. The notion of a functional role in an organization can be considered in terms of the collective end theory of organizational action (see Miller 2010).
8. See Chapters 9 and 10 in this volume.
9. See Chapters 1 and 2 in this volume.
10. Conceivably, an individual might be a member of a terrorist organization and have no intention of committing or contributing to terrorist acts. If so, there would still be a presumption in favour of the individual having a standing intention to committing or contributing to terrorist actions – a presumption that could, nevertheless, be overridden.

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