

Policing Entrapment

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ABSTRACT

Entrapment has been a prominent, if rarely successful, defence in terrorism prosecutions. In this chapter, I sketch an egalitarian case for entrapment. On this account, the primary moral significance of entrapment is to prevent the police from generating crimes that would not otherwise have been perpetrated. In a context in which most people are, as Richard McAdams puts it, “probabilistic offenders,” the power of the authorities to control the nature, frequency, and timing of an inducement to crime is the power to make criminals out of ordinary, but fallible, people. Entrapment is a means of constraining this power. In this regard, entrapment stands to undercover policing roughly as abuse of process stands to prosecutorial discretion: as a constraint on how officials choose which individuals to investigate, prosecute and punish. However, since judgments as to when this line is crossed are likely to be contestable, and since what is at issue is typically extraordinary state power used to ensnare particular individuals, I argue that courts should do more to encourage Parliament to regulate undercover policing *ex ante* rather than rely solely on an entrapment defence applied *ex post*, for instance by strictly applying an “authorized by law” condition in prosecutions based on undercover investigations.

Keywords: Entrapment, Prosecution, Abuse of Process, Terrorism, Undercover Policing

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I. INTRODUCTION

Consider two cases. In the first, the accused becomes a target of police interest due to his association with another individual whom the police, acting on information from the nation's spy agency, have under surveillance. This individual is believed to be planning to detonate explosives in a major metropolitan area. The accused's conversations with the individual reveal that the accused is aware of these plans. In the course of their investigation, the accused initiates contact with an undercover informant and conveys to the informant his support for detonating truck bombs. He asks the informant for assistance in procuring needed components for the truck bombs. Although the accused later insists that he only agreed to participate in the plot to protect the informant, the evidence establishes that the accused repeatedly asked the informant about the chemicals, discussed his plans to profit financially from the crime, discussed technical details about the bomb, ordered and paid for several tonnes of the chemical precursor, and arranged details of the delivery, including an elaborate plot to disguise the chemicals from prying eyes.

In contrast, in the second case, the police are tipped off that an individual has been espousing violent Jihadist views and are informed by the nation's spy agency that this person has attempted to purchase potassium nitrate, a precursor for manufacturing explosives. As in the first case, the accused in the second case proposes a terroristic plan to an undercover police agent, this time involving pressure cooker bombs rather than truck bombs. However, during the investigation, the accused discusses far more bizarre plans, including seizing a nuclear submarine. Unlike in the previous case, the undercover agent assiduously steers the accused toward the more realistic plan, making suggestions as to both target and timing. The authorities know that the accused has recently been assessed by a psychiatric nurse who reports her belief that he is developmentally delayed. He is also known to have suffered head trauma earlier in his life. In addition, both he and his partner (and co-accused) are known to have substance abuse problems and to have spent time homeless in the recent past. The authorities are aware that they were unemployed, on public assistance, and socially isolated. The undercover agent goes so far as to provide the accused with spiritual guidance and actively steers him away from more moderate views.

Supposing the accused in both cases are arrested and prosecuted, what should their prospects be if they seek to argue entrapment at trial? Since Canadian courts have grappled with both cases, we can answer that question clearly: the entrapment defence in the first case, *Abdelhaleem*, was rejected, whereas the entrapment defence succeeded in the second case, *Nuttall*.¹ Ultimately, the British Columbia Court of Appeal upheld the trial judge’s ruling in *Nuttall* that the police “manufactured the crime... and were the primary actors in its commission.”² The risk that Nuttall and his co-accused would have offended, absent police involvement, while perhaps not zero, was nevertheless minimal. Their crimes were brought about only by virtue of the police exploiting known vulnerabilities and applying persistent pressure upon them, corralling them from the fantastical and focusing their attention on more realistic plots. In contrast, in the first case, *Abdelhaleem* (one of the accused in the Toronto 18 investigation and trials), the Superior Court found little evidence of the police pressuring the accused, nor did they exploit any vulnerability on his part.³ The police “did no more than supply an opportunity to commit the crime.”⁴ *Abdelhaleem*’s actions suggested an independent willingness to participate, even without undue pressure or exploitation on the part of the police. Thus, he could not legitimately complain about being punished, particularly given that the devastating nature of the plot – detonating truck bombs at three separate locations in Toronto – was clear. The distinction between *Nuttall* and *Abdelhaleem*, in short, was centred on the degree to which responsibility for the criminal act could be assigned to the police rather than the accused.

¹ R v. *Abdelhaleem*, [2010] O.J. No. 5693 (Ont Sup Ct); R v. *Nuttall*, 2018 BCCA 479.

² *Nuttall*, BCCA at para 440.

³ Although the police informant attended the accused’s hospital room shortly after he underwent heart surgery, the trial judge accepted the informant’s evidence that it was the accused who pressured the informant during the hospital visit rather than the other way around. In any case, given the nature of the plan, the trial judge noted that “this is not a situation where it can be said that the conduct of the police or their agent would have induced the average person in the position of the accused.” See *Abdelhaleem*, O.J. at paras 76, 78.

⁴ *Abdelhaleem*, O.J. at para 82. See also R v. N.Y., 2012 ONCA 745 at paras 127-34 (dismissing as meritless an entrapment argument because the confidential informant did nothing that would have induced an average person to commit a terrorist offence, was not unusually persistent, did not exploit any vulnerability of the accused, and generally had little contact with or influence over the accused).

A. Why Entrapment is Relevant in Terrorism Cases

Entrapment is, at first glance, one of those old chestnuts of legal scholarship: a topic much beloved by law professors and students but of little significance in actual legal settings. This impression might be bolstered if we focus, consistent with the theme of this volume, on entrapment in the context of terrorism prosecutions. Thus far, *Nuttall* appears to be the only terrorism case in North America in which an accused prevailed on entrapment grounds.⁵ This may suggest that entrapment is largely a dead letter in terrorism cases such as the Toronto 18, legally speaking. Yet that conclusion might be too hasty for three reasons.

First, given the nature of terrorism offences, investigations are commonly reliant on undercover operations and informants, as well as significant planning on the part of the authorities. Since entrapment serves as a form of judicial regulation of undercover operations, it will likely be significant so long as terrorism investigations remain significant.⁶ The political morality of undercover policing thus rightly remains an issue of public concern, even when the legal claim fails. For instance, consider *United States v. Cromitie*, a 2009 prosecution of a plot to bomb synagogues and fire surface-to-air missiles at military planes. This case involved 11 months of efforts by a government agent to persuade the accused to commit the charged offences, including inducements of \$250,000 in cash, a business valued at \$70,000, a BMW, and an all-expenses-paid two-week vacation for the accused and his family.⁷ The accused in this case was described as “impoverished,” supporting himself by committing petty drug offences and working the night shift at Wal-Mart.⁸ The plan to fire Stinger missiles at military planes was entirely planned by the government, and the government provided the accused with fake bombs and instructions on

⁵ Entrapment defences prevail more frequently in other, more routine, contexts, such as retail drug busts. See e.g., *R v. Ahmad*, 2020 SCC 11.

⁶ According to one scholar, the United States has prosecuted over 500 terrorism cases in the decade after 9/11, and the FBI claims to have over 3000 confidential operatives engaged on terrorism-related files, in some cases paying informants \$100,000 for information. See T. Ward Frampton, “Predisposition and Positivism: The Forgotten Foundations of the Entrapment Doctrine,” *Journal of Criminal Law & Criminology* 103, no. 1 (2013): 111–12.

⁷ *United States v. Cromitie*, 727 F.3d 194, 210–11 (2nd Cir 2013).

⁸ *Cromitie*, F.3d at para 200.

their use; the defence also argued that the government’s undercover agent emotionally and religiously manipulated the accused.⁹

On appeal, a divided Second Circuit panel affirmed Cromitie’s conviction. Given the parallels between *Cromitie* and *Nuttall*, it is perhaps questionable whether Canadian courts would have come to a similar conclusion. Indeed, it is questionable whether other American courts would have reached the same conclusion. Had the case arisen under the Seventh Circuit’s *Hollingsworth* test for predisposition – requiring that the government prove that the accused would likely have been induced to commit the crime even absent the actions of the government – the accused would very likely have prevailed on entrapment, as the accused was highly unlikely to have been in a position to bomb synagogues or shoot down airplanes.¹⁰ Whatever the prevailing legal standard, however, the actions of the FBI in investigating and prosecuting Cromitie, as with the actions of the RCMP in investigating and prosecuting Nuttall, are worthy of careful scrutiny.

Second, precisely because terrorism investigations tend to be elaborate, costly, and planned in advance, it may be misleading to gauge the significance of entrapment law through decided cases. Entrapment’s significance may rather lie in how the police internalize judicial expectations about undercover operations in the design of terrorism investigations at the outset.

Finally, given the publicity and significance attached to many terrorism trials, there is a heightened interest in avoiding a stay of proceedings, particularly when the stay concerns issues collateral to guilt. By the same token, however, it is precisely in contexts such as these that courts might be thought to have a special obligation to uphold liberal values of equality and due process.

⁹ *Cromitie*, F.3d at paras 219–20.

¹⁰ *United States v. Hollingsworth*, 27 F.3d 1196, 1200 (7th Cir 1994) (*en banc*). Indeed, in *Cromitie*, the trial judge was convinced “beyond a shadow of a doubt that there would have been no crime here except the government instigated it, planned it, and brought it to fruition.” See *Cromitie*, 727 F.3d 194 at para 210.

B. Beyond the Debate about Subjective versus Objective Entrapment

Academic commentary on the entrapment defence has largely centred on the distinction between its so-called “subjective” and “objective” versions. On the subjective version, prevalent in much of the United States, including in federal law, the central issue is whether accused persons are predisposed to commit the criminal act for which they are being prosecuted. On the objective version, prevalent in the rest of the common law world, as well as in a significant minority of American states and the Model Penal Code, the central issue is the permissibility of the techniques used by the authorities in encouraging the accused to commit the criminal act.¹¹

In Canadian law, entrapment takes one of two versions. In the first version, an accused was entrapped if the police provide that person with an “opportunity” to commit an offence while either (1) lacking reasonable suspicion connecting them to criminal activity or (2) outside of a “bona fide inquiry.” A “bona fide inquiry” may include, the Supreme Court has held, suspicionless sting operations so long as they are geographically targeted based on reasonably held beliefs about the prevalence of crime in that geographic area.¹² The second version provides that even if the police do have reasonable suspicion connecting an individual to criminal activity or are acting pursuant to a bona fide inquiry, an accused may nevertheless be entrapped if the police “induce” that person into committing the crime.¹³

However, I will not be focusing on the distinction between these two legal conceptions of entrapment, nor on the distinction between

¹¹ See Paul Marcus, *The Entrapment Defense*, 5th ed. (Lexis Nexis 2016), §1.05A, §12.01. Alaska (§11.81.450), Arkansas (§5-2-209), California (People v. Barraza, 591 P.2d 947 (Cal. 1979)), Colorado (§18-1-709), Florida (§777.201), Georgia (§16-3-25), Hawaii (§702-237), Michigan (People v. Turner, 210 N.W.2d 336, 342 (Mich. 1973)), New York (Penal Law §40.05), North Dakota (§12.1-05-11), Pennsylvania (18 P.S.A. §313), Texas (Penal Code §8.06) and Utah (§76-2-303) use versions of the objective test. See also Model Penal Code, §2.13 [MPC]. In addition, New Hampshire (§626:5), New Mexico (Baca v. State, 742 P.2d 1043 (New Mexico 1987)) and New Jersey (§2C:2-12) have adopted “hybrid” entrapment defenses combining elements of both the subjective and objective tests. *Id.* §1.05C.

¹² R v. Barnes, [1991] 1 S.C.R. 449, 3 C.R. (4th) 1. The Supreme Court recently reaffirmed the basic parameters of this branch of entrapment in *Ahmad*, SCC.

¹³ R v. Mack, [1988] 2 S.C.R. 903 at 957-63, 67 C.R. (3d) 1.

“subjective” and “objective” theories of entrapment.¹⁴ While there are important differences between the two varieties, those differences should not obscure that both versions are variations of a shared theme, namely the concern to ensure that official investigative activity does not bring about the very crime that it is meant to target.¹⁵ The accused’s predisposition is one proxy for this, as is the question of whether the police effectively “induced” a crime, especially when targeting people whom they had no prior reason to suspect were connected to criminal activity. Whether we focus on the state of the accused or the conduct of the police, in either case, the underlying question is whether the police activity contributed to bringing about the crime. For example, although *Nuttall* involved an objective form of entrapment, the Court’s concerns were quite similar to those raised by the United States Supreme Court in *Jacobsen*, a foundational case for the subjective version of entrapment. In *Jacobsen*, the U.S. Supreme Court pointed to the elaborate, lengthy, and persistent efforts to cause the accused to purchase child pornography as grounds for deeming the accused entrapped.¹⁶ Similarly, the Model Penal Code, which adopts an objective approach, focuses on whether officials have “create[d] a substantial risk that... an offense will be committed by persons other than those who are ready to commit it.”¹⁷

¹⁴ There is a significant literature on that topic already. See, e.g., Andrew Altman and Steven Lee, “Legal Entrapment,” *Philosophy & Public Affairs* 12, no.1 (1983): 51–69; B. Grant Stitt and Gene G. James, “Entrapment and the Entrapment Defense: Dilemmas for a Democratic Society,” *Law & Philosophy* 3 (1984): 111–31; Gideon Yaffe, “The Government Beguiled Me’: The Entrapment Defense and the Problem of Private Entrapment,” *Journal of Ethics and Social Philosophy* 1, no. 1 (2005): 2–50.

¹⁵ See Jonathan C Carlson, “The Act Requirement and the Foundations of the Entrapment Defense,” *Virginia Law Review* 73 (1987): 1011–108.

¹⁶ *United States v. Jacobsen*, 503 U.S. 540 (1992), 542–43. This is not to say that the two tests are extensionally equivalent. *Nuttall* shows why not: the accused in that case were predisposed to commit a terrorist act but were highly unlikely to do so. See *Nuttall*, BCCA at para 439. They would not have had the benefit of entrapment if predisposition was the sole proxy for police contribution to crime. The claim is just that both versions of entrapment are ways of gauging the state’s causal responsibility for “manufacturing” or “inducing” criminal acts.

¹⁷ MPC, §2.13. See also Kate Hofmeyr, “The Problem of Private Entrapment,” *Criminal Law Review* (April 2006): 319–36 (noting that, although the House of Lords purported to reject “predisposition” in its treatment of entrapment, “the more one analyses the distinction [between providing an unexceptional opportunity and causing a crime]... the more the causal requirement seems to pivot on issues of predisposition”); Gerald

Rather than focusing on the distinction between subjective and objective versions of entrapment, I will instead consider, first, an egalitarian case for entrapment's underlying concern with preventing the authorities from inducing crime. I will then turn, in the third part of the chapter, to a brief discussion of the role of courts in using the entrapment defence to regulate undercover policing. The fourth and final section proposes imposing a requirement that undercover police operations rest on powers explicitly delegated to the police by positive law, rather than leaving it to *ad hoc* regulation by the courts in litigation.

II. AN EGALITARIAN CASE FOR ENTRAPMENT

Although the rhetoric surrounding the entrapment defence, particularly in its objective version, can give the impression that the main point of the defence is to censure police for engaging in conduct that offends the sensibilities of the court, the primary moral significance of entrapment lies elsewhere.¹⁸ A rule allowing courts to exclude unconstitutionally obtained evidence, after all, already provides a venue for courts to vent their frustration at what they regard as police misconduct, at least so long as they can plausibly tie the grounds for their frustration to a suitably serious *Charter* violation.

The primary moral significance of entrapment, I suggest, is in preventing the police from generating crimes that would not otherwise have been perpetrated. On this view, at the heart of entrapment is a causal question: would the accused have committed the offence (or a sufficiently similar offence) even had they not been offered the inducement, encouraged, or otherwise afforded the opportunity by the police? This view of entrapment rests on the assumption that prosecution of crimes is only valuable as a means to some further end. If prosecution were intrinsically valuable, then perhaps it would be less clearly objectionable for the police to give up crimes in order to have them prosecuted. But if the value of criminal prosecution lies (for instance) in preventing crime, and if the target would not have offended but for the inducement, then the most

Dworkin, "The Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime," *Law & Philosophy* 4 (1985): 17–39; Andrew Carlon, "Entrapment, Punishment, and the Sadistic State," *Virginia Law Review* 93, no. 4 (2007): 1081–134.

¹⁸ See e.g., *Nuttall*, BCCA at para 440 (condemning the police for violating "the concepts of fairness and justice"); *Mack*, S.C.R. at 904.

straightforward way to prevent that offence is to not offer the inducement in the first place. Conversely, if there is reason to believe that the accused would likely have offended anyway, then the fact that the particular occasion of offending, in this case, was provided by the authorities provides no defence. This explains why the justification of “randomly testing [...] virtue,” as the Supreme Court put it in *Mack*, depends on the tightness of fit between the group of individuals ensnared by undercover stings and the group of individuals who would have offended anyway.¹⁹

In an insightful paper, Richard McAdams observes that low base rates in criminal offending can make a tight fit very difficult to achieve.²⁰ If very few people are likely to offend on their own (i.e., without the disguised inducement), then even if it is the case that random sting operations rarely implicate people who would otherwise have offended, nevertheless, in the aggregate, the latter group can dwarf the former. To use McAdams’ example, suppose that the false positive rate for a given type of undercover operation is 5% and that there are no false negatives. Offhand, this would seem to be impressively accurate. However, if the base rate of offending is low, then the majority of people ensnared by this type of operation will nevertheless be people who would not otherwise have offended. Suppose, for instance, that only one out of every 1000 individuals would offend without the inducement. If the police target each person in this group, then they will indeed find that one person who was predisposed to offend. But they will ensnare 50 individuals who were not predisposed (5% of 1000), meaning that the vast majority of people ensnared by the operation would be people that would not have otherwise offended.²¹ For this reason, it is hard to conceive of a plausible scenario in which random virtue testing for terrorism – e.g., by focusing on a mosque or political meeting – would be sufficiently sensitive to exclude the non-predisposed.²²

¹⁹ *Mack*, S.C.R. at 904.

²⁰ Richard H McAdams, “The Political Economy of Entrapment,” *Journal of Criminal Law and Criminology* 96, no. 1 (2005): 137–38.

²¹ This problem is by no means limited to the context of undercover policing. Low base rates in criminal offending bedevil all predictive exercises in criminal justice, an issue that has gained new salience in the debates over algorithmic risk assessment in criminal justice. For an overview, see Sandra Mayson, “Bias In, Bias Out,” *Yale Law Journal* 128 (2019).

²² On this point, see Kent Roach, “Entrapment and Equality in Terrorism Prosecutions: A Comparative Evaluation of North American and European Approaches,” *Mississippi*

Conversely, if the base rate is sufficiently high, then an undercover operation of this kind is more readily defended. Suppose that a quarter of the targeted population is prone to offend, regardless of inducement. In that case, the undercover operation would (again, assuming a population of 1000 individuals) capture all 250 predisposed individuals, along with 50 non-predisposed individuals. Of course, whether that is an acceptable trade-off is arguable and is likely to vary with context. But the point is that random virtue testing operations are more easily defended provided the base rate is high enough. It is important to note, however, that my example – in which a quarter of the targeted population is prone to offending – is probably quite exaggerated. In *Barnes*, the Supreme Court took the view that suspicionless buy-bust operations are permissible when they are narrowly tailored to geographic areas in which the police reasonably suspect crime. The main question here is whether the tailoring is sufficient to push up the base rate of offending to a point where the error costs are defensible. This will depend, of course, on an assessment of the error rate of the investigative technique in question. (My example, in which it returns no false negatives and false positives a mere 5% of the time, may be overly optimistic in most actual settings).

Whether a given person was “induced” to commit a crime, or would have offended regardless, depends, of course, on the nature of the inducement. The inference that the accused was not induced to commit the offence is stronger if the inducement in question is reasonably common, whereas it is weaker if the police offer a significantly above market rate inducement or one that is highly unusual (or are unusually persistent, etc.). The same goes for occasions in which the police exploit the accused in a vulnerable moment.²³ In those cases, as McAdams notes, it will often be more plausible that most of the people ensnared by the inducement were unlikely to have offended in more typical scenarios.²⁴ Unsurprisingly, courts have been alive to these concerns. For instance, in *R v. N.Y.*, the Court of Appeal for Ontario relied on the fact that the undercover informant had

Law Journal 80, no. 4 (2011): 1474 (warning of the potential for “random virtue testing” to be uncritically applied in discriminatory ways). Roach focuses on the intensity of terrorism investigations, as well as their proximity to protected religious and political speech. In addition, for the reason given in the text, I suspect that blanket operations of this sort are likely to be substantially over-inclusive.

²³ McAdams, “The Political Economy of Entrapment,” 174–75.

²⁴ McAdams, “The Political Economy of Entrapment,” 158.

not exploited any vulnerability on the part of the accused, been unusually persistent, threatened him, or otherwise engaged in conduct that would have induced an average person to engage in activities in support of terrorism.²⁵

Although McAdams regards this as a problem of “unproductive” or “wasteful” policing, it is not difficult to regard it equally as a problem of fairness. Indeed, McAdams provides the key insight when he observes that most people are likely to be, as he puts it, “probabilistic offenders.” By this, McAdams means that a person’s likelihood of criminal offending is neither certain nor completely ruled out: even if someone is generally unlikely to offend in most common scenarios, they may offend in other, less common scenarios.²⁶ These include, for instance, an unusually tempting (above market rate) inducement, a scenario of persistent or repeated temptation, or temptations that present themselves at particular moments of vulnerability.²⁷

Investigatory techniques that are prone to ensnare people who are unlikely to offend without the intervention of the authorities are arguably unfair for two distinct reasons. First, even if these techniques provide some social benefit in preventing and/or deterring crimes (after all, probabilistic offenders offend with a non-zero probability), that benefit is not likely to be great given the low probability with which they commit such offences. From that individual’s point of view, their conviction and punishment provide a very modest social benefit to others but come at the cost of a very serious personal sacrifice on their part. It is difficult to see how an entrapped individual could regard such a deal as fair. Hence, entrapment serves to prevent conviction under circumstances in which the undercover operation imposes unreasonable burdens on an accused because it forces them to accept significant personal costs for relatively little social gain.²⁸

²⁵ N.Y., ONCA at para 132.

²⁶ “It is,” as the Fourth Circuit once put it, “simply naïve to suppose that public officials, or other defendants, can be neatly divided between the pure of heart and those with a ‘criminal’ outlook.” See *U.S. v. Hunt*, 749 F.2d 1078, 1085 (4th Cir 1984).

²⁷ As McAdams puts it, undercover operations “give the police the power to control the fortuity of legal compliance: the power to make scarce criminal opportunities plentiful, the power to control the timing of criminal opportunities, and the power to repeatedly offer opportunities so as to maximize the probability of finding the target at the time when she is most willing to offend.” See McAdams, “The Political Economy of Entrapment,” 153. See also Marcus, *The Entrapment Defense*, §3.03.

²⁸ For reasons noted above, whether entrapment is a true “defence” varies by jurisdiction.

Second, in a context in which most people are probabilistic offenders, the power of the authorities to control the nature, frequency, and timing of an inducement to crime is the power to make criminals out of ordinary but fallible people. The authorities would, in principle, have the power to enforce the law in a potentially quite arbitrary manner, whether in the sense of randomly making criminals out of ordinary people or in the sense of targeting enforcement efforts against disfavored individuals in ways that they, like most of us, would be ill-placed to withstand. The entrapment defence is a means of constraining this power. In this regard, entrapment stands to undercover policing roughly as abuse of process stands to prosecutorial discretion: as a limit to constrain how officials choose which individuals to investigate, prosecute, and punish.²⁹

This account provides an answer to the objection that inducing someone to commit a crime and then punishing that person for doing so might be an effective way of preventing crime (e.g., by “sending a message”). Ensnaring people in criminal acts and then punishing them for their crimes is permissible when there is reason to believe that the accused would likely have offended anyway. How do we know whether an accused would likely have offended anyway? The varieties of entrapment provide some guidance: we can ask whether the accused was “predisposed” to commit that type of crime or we can ask whether the authorities used means that are sufficiently uncommon, persistent, or exploitative that even ordinarily law-abiding people would be prone to give in. In cases where an inducement is not especially tempting, persistent, or exploitative, there is a stronger inference that the accused would likely have offended even absent the police intervention, as the proffered inducement is of a nature that is prone to arise in any event. In those cases, the accused has little ground to complain that she is being scapegoated. However, in cases where the inducement is unusually tempting or persistent, then the accused has a stronger claim that the authorities have arbitrarily decided to make an example out of her, even though she was otherwise quite unlikely to have offended.

III. JUDICIAL REGULATION OF UNDERCOVER POLICE CONDUCT

²⁹ McAdams, “The Political Economy of Entrapment,” 156–58.

In the last section, I sketched, albeit in quite general terms, an egalitarian rationale for a defence of entrapment. The central idea is to restrict the power of the authorities to induce crime in order to subsequently prosecute it to contexts in which it is reasonably clear that an accused would have offended in a similar way regardless. Determining when this is the case is difficult and inevitably involves some degree of speculation. I have suggested that both the subjective and objective versions of entrapment are attempts to address this question. I do not suggest that either version adequately addresses the concerns one might have about how we could know what someone would have done under different circumstances.³⁰ Rather than explore this thorny epistemological question further, I now turn to consider a different question, namely whether entrapment is best left to the courts to develop on a common-law basis rather than delegated to legislatures to define.

This might seem like a departure from traditional questions about the parameters of entrapment but concerns about the responsibilities of the court in responding to police overreach, on the one hand, have a long history in the law of entrapment. Throughout its history, the entrapment defence has been responsive to institutional and political developments outside the courts. Entrapment is a doctrine originally devised by American courts as a response to a new institutional problem, namely the use of controversial modes of undercover policing in the early decades of the 20th century. This was a problem that arose after American police forces began to professionalize. Prior to the emergence of the modern law of entrapment in the United States in the waning decades of the 19th-century, state courts had relied on traditional private law doctrines of consent or contract, according to which a victim who cooperated with authorities in an effort to ensnare the defendant had “consented” to the crime.³¹

What precipitated the shift to a more modern law of entrapment? Legal historians have pointed to the growing power of law enforcement, particularly during the Prohibition era, as a catalyst for judicial innovation

³⁰ Luke Hunt has recently criticized subjective forms of the entrapment defence on this basis. See Luke Hunt, *The Retrieval of Liberalism in Policing* (New York: Oxford University Press, 2018), chap. 5.1.

³¹ Rebecca Roiphe, “The Serpent Beguiled Me: A History of the Entrapment Defense,” *Seton Hall Law Review* 33, no. 2 (2003): 271.

in developing the modern law of entrapment.³² By the end of the 1920s, “the question of entrapment had shifted almost entirely from a formal analysis of the elements of the crime and the evaluation of consent with old contract principles to a new focus on the malleability of human nature in light of the powerful state.”³³ Others have pointed to the influence of the Italian positivist school of criminological thought – with its focus on identifying predisposed criminal types – in American legal thought during the early decades of the 20th-century.³⁴ Entrapment had become established law in all U.S. federal courts by the early 1930s.³⁵ Moreover, by that point, state courts had already been tinkering for 50 years with an expanded conception of entrapment that focused on whether “the government manipulated the defendant into committing a crime he would not otherwise have consummated,” rather than whether the ostensible victim had constructively “consented” to the crime.³⁶ The challenges arising out of terrorism prosecutions, then, are but the newest form of a long-standing interplay between courts and the police.³⁷

Entrapment was unknown outside the United States until fairly recently, in part because in many other jurisdictions undercover police operations were far less common and, indeed, generally prohibited. If a state official induced a criminal act, that did not weaken the case for convicting the accused but rather strengthened the case for prosecuting the official as well.³⁸ Some have suggested that the reason other common law jurisdictions

³² Roiphe, “The Serpent Beguiled Me,” 283–84. See also Kenneth Murchison, *Federal Criminal Law Doctrines: The Forgotten Influence of National Prohibition* (Duke University Press, 1994), 41–44. As Murchison puts it, “[t]he entrapment defense is one of the enduring doctrinal legacies of the prohibition era.”

³³ Roiphe, “The Serpent Beguiled Me,” 278–79.

³⁴ See Frampton, “Predisposition and Positivism.”

³⁵ Murchison, *Federal Criminal Law Doctrines*, 31.

³⁶ Roiphe, “The Serpent Beguiled Me,” 278.

³⁷ 59% of cases in the United States involving ISIS are known to have involved government informants or undercover agents; the figure is even higher (71%) in “domestic plot” cases. See “Case By Case: ISIS Prosecutions in the United States,” *Center on National Security at Fordham Law*, (2014–16): 18, <https://static1.squarespace.com/static/55dc76f7e4b013c872183fea/t/577c5b43197aea832bd486c0/1467767622315/ISIS+Report+-+Case+by+Case+-+July2016.pdf>.

³⁸ Jacqueline Ross, “Tradeoffs in Undercover Investigations: A Comparative Perspective,” *University of Chicago Law Review* 69, no. 3 (2002): 1501–541; Dru Stevenson, “Entrapment and Terrorism,” *Boston College Law Review* 49 (2008): 125–215. Entrapment in this respect parallels exclusion of evidence, in that while misconduct shows why the police should be sanctioned, it does not show why the accused should

did not recognize entrapment until half a century after the first American federal case is that “most liberal democracies were so skeptical of undercover operations – particularly the idea that police may commit criminal acts as part of such operations – that there was not much need for a defense.”³⁹ It is not that police outside the United States had no experience with undercover operations; far from it.⁴⁰ Rather, given their first-hand experiences with Nazi and communist police states, European police agencies displayed greater reticence in undercover policing than their counterparts in the United States.⁴¹ Other scholars have made the opposite argument, namely that countries that were slower to recognize an entrapment defence had a comparatively much more robust pattern of police surveillance.⁴² Some European countries, for instance, have been reported to authorize wiretaps at 20 to 30 times (or more) the rate in the United States.⁴³ Similar claims have been made about Canada.⁴⁴

I have emphasized the courts’ role in developing the law of entrapment to underscore that the law of entrapment, particularly in its early 20th-century American origins, arose out of a need to solve a practical moral problem rather than as the unfolding of some fully formed philosophy. This suggests, in turn, that some of the traditional doctrinal concerns about entrapment – subjective versus objective, acquittal versus stay, negation of culpability or branch of abuse of process – may not necessarily reflect deeply held or principled commitments as much as path-dependent contingencies

be rewarded. Indeed, Australian courts treat exclusion as the appropriate remedy for a successful entrapment claim. See *Ridgeway v. R.*, (1995) 184 CLR 19.

³⁹ McAdams, “The Political Economy of Entrapment,” 110.

⁴⁰ “From the 16th century onward, the emerging nation-states in Europe made extensive use of undercover techniques to protect their political, military and economic interests.” See Cyrille Fijnaut and Gary T. Marx, “Introduction: The Normalization of Undercover Policing in the West: Historical and Contemporary Perspectives,” in Fijnaut and Marx, eds. *Undercover: Police Surveillance in Comparative Perspective* (Kluwer Law International, 1995): 2.

⁴¹ Fijnaut and Marx, “Normalization of Undercover Policing,” 15.

⁴² See Ross, “Tradeoffs in Undercover Investigations,” 1510–512.

⁴³ See H-J Albrecht, C. Dorsch, and C. Krüpe, “Rechtswirklichkeit und Effizienz der Überwachung der Telekommunikation nach den §§ 100a, 100b StPO und anderer verdeckter Ermittlungsmaßnahmen,” (Freiburg i. Br.: edition iuscrim, 2003): 104–05 (esp. abb. 34), <http://hdl.handle.net/11858/00-001M-0000-002E-4DB5-9>.

⁴⁴ Jean-Paul Brodeur, “Undercover Policing in Canada: A Study of its Consequences,” in Fijnaut and Marx, “Introduction,” 71–10. The more recent Albrecht study, however, indicates roughly comparable rates of wiretap activity in the United States and Canada.

concerning the preoccupations of the courts that first began developing the defence.

Consider the question of whether entrapment should amount to a substantive defence negating culpability, or whether it should instead amount to a showing of abusive practices by the authorities, leading the courts to stay proceedings in the name of ensuring the integrity of their process. This question, largely tracking the distinction between subjective and objective strains of entrapment, has engendered some degree of controversy among both courts and legal scholars. Although the United States Supreme Court treated entrapment as a substantive defence leading to an acquittal in *Sorrells*, more recent treatments in England, Australia, and Canada have rejected that approach, instead treating entrapment as grounds for a stay of proceedings.⁴⁵ Some legal scholars have argued that a stay is the appropriate remedy, on the grounds that treating entrapment as negating culpability raises the problem of “private entrapment”: presumably the identity of the entrapper – government agent or private actor – does not bear upon culpability.⁴⁶ Hence, a denial of culpability interpretation creates a *prima facie* inconsistency with the settled norm that entrapment is not available to an accused who claims they were “entrapped” by a private party. Others have defended a culpability-based approach. Gideon Yaffe, for instance, has provided a characteristically subtle and penetrating defence of the subjective approach, arguing that a subjective approach is consistent with denying an entrapment defence when the would-be entrapper is a private actor.⁴⁷

Without taking a position on either side of this dispute, it is worth considering why American federal courts conceptualized entrapment as a denial of culpability in the first place. The United States Supreme Court first acknowledged the existence of entrapment as a defence in *Sorrells*, a case

⁴⁵ *Sorrells v. United States*, 287 U.S. 435 (1932) (acquittal on the merits) (US); *R v. Looseley*, [2001] UKHL 53 at para 16 (stay of proceedings or exclusion of evidence) (U.K.); *Ridgeway v. R.*, (1995) 184 C.L.R. 19 at paras 30, 31 (exclusion of evidence, potentially leading to a stay) (Australia); Mack, S.C.R. 903 (stay of proceedings).

⁴⁶ Alan Brudner, *Punishment and Freedom* (Oxford University Press, 2009), 263; Ho Hock Lai, “State Entrapment,” *Legal Studies* 31, no. 1 (March 2011): 84; Kate Hofmeyr, “The Problem of Private Entrapment,” *Criminal Law Review* (April 2006): 326–28. Compare Andrew Carlon, “Entrapment, Punishment and the Sadistic State,” *Virginia Law Review* 93, no. 4 (June 2007): 1115–116 (acquittal prevents the intended wrong, namely punishment of the entrapped).

⁴⁷ Yaffe, “The Government Beguiled Me.”

in which the defendant was prosecuted for selling whiskey to undercover government agents in violation of the *Volstead Act*. The majority construed the *Volstead Act* to have implicitly excluded abusive forms of investigation and enforcement, applying the principle that statutes should be interpreted “so as to avoid absurd or glaringly unjust results.”⁴⁸ Consequently, an entrapped person is entitled to an acquittal since the statute simply does not reach the facts of their case. Since then, American federal law has treated entrapment as a denial of culpability.

Justice Hughes’ stated reason for interpreting the *Volstead Act* this way was because he regarded the alternative as unduly trenching upon the legislative power. As Hughes saw it, it would exceed the judicial mandate to hold that the *Volstead Act* did indeed reach the facts of Sorrells’ case but then decline to enforce it because doing so seemed unfair.⁴⁹ To do so would amount to a kind of judicial “nullification” of the statute. “Judicial nullification of statutes, admittedly valid and applicable, has,” Hughes claimed, “happily, no place in our system.”⁵⁰ If the legislature truly wanted courts to apply the *Volstead Act* to people who had been unfairly targeted, they were free to make that clear in subsequent legislation.⁵¹ In other words, the majority in *Sorrells* did not decide to treat entrapment as a substantive defence to the *Volstead Act* because it adhered to a theory of legal culpability according to which an entrapped person acted faultlessly. Rather, it did so to avoid a direct challenge to Congress’s authority, a challenge the Court was eager to avoid given its view of the respective roles of Congress and the Supreme Court in a constitutional democracy. The *Sorrells* majority avoided this challenge by treating entrapment as a matter of statutory construction rather than as a freestanding judicial doctrine regulating police powers.

Of course, this does not prove that the question of whether entrapment should be treated as a denial of culpability or as an abuse of process is of no independent interest. However, at least when taken at face value, *Sorrells* suggests that the reason that the United States Supreme Court initially

⁴⁸ *Sorrells*, US.

⁴⁹ “Where defendant has been duly indicted for an offense found to be within the statute, and the proper authorities seek to proceed with the prosecution, the court cannot refuse to try the case in the constitutional method because it desires to let the defendant go free.” See *Sorrells*, US.

⁵⁰ *Sorrells*, US.

⁵¹ *Sorrells*, US.

adopted a subjective approach to entrapment has more to do with concerns about the legitimacy of judicial “nullification” of otherwise plainly applicable statutes than it does with any particular theory of culpability.⁵² In the common law world, entrapment is a defence first developed by American courts, and many American courts continue to adhere to a version of the defence that other courts have since rejected. Yet, taking *Sorrells* at face value suggests that this may not be because of a principled difference of opinion about culpability, so much as a reflection of the history in American courts of disagreement as to the appropriate relationship between the courts and the legislature in a constitutional democracy.⁵³

IV. THE CASE FOR REGULATING UNDERCOVER INVESTIGATIONS THROUGH LEGISLATION

Looking back at the early entrapment cases discussed in the last section suggests that instead of focusing narrowly on whether a stay or an acquittal is a more fitting response to overzealous policing, we might do well instead to consider the broader question of the institutional competence of courts to patrol law enforcement efforts, on the one hand, and their authority to create novel defences on a common-law basis, on the other.⁵⁴ In this respect, entrapment is perhaps usefully compared to search and seizure law. As in the context of entrapment, search and seizure law is clearly animated by a concern to regulate the investigative activities of the authorities and prevent

⁵² *Sorrells* was decided in 1932, just a few years before the Supreme Court began its campaign of wholesale opposition to Roosevelt’s New Deal, and only five years before Roosevelt responded with his notorious court packing plan. However, as Frampton points out, the Supreme Court in 1932 – including judges in the *Sorrells* majority – were hardly averse to aggressive assertions of judicial power. See Frampton, “Predisposition and Positivism, 132–33.

⁵³ See Carlson, “The Act Requirement,” 1033–36 (noting that the Justices in *Sorrells* were more concerned with disputing the Court’s power to devise a defence of entrapment than with its precise content). Compare the Supreme Court of Canada’s construction of s. 8(3) of the *Criminal Code* to permit the courts to develop novel defences on a common law basis, despite the fact that the plain language of s. 8(3) does not suggest any such power. See *R v. Amato*, [1982] 2 S.C.R. 418, 140 D.L.R. (3d) 405.

⁵⁴ A perhaps more material distinction between the two standards is whether the evidence that would be used to mount an entrapment defence – for instance, of the defendant’s character and prior record – might potentially jeopardize other defence strategies. See Stevenson, “Entrapment and Terrorism,” 137.

overreach. Yet, unlike the modern law of entrapment, the jurisprudence of search and seizure has a built-in concern with democratic legitimacy via the principle that search powers must be authorized by law. To be sure, the Supreme Court has not always been consistent in upholding that principle, but for my purposes here, the point I wish to draw attention to is that it is possible for the courts to regulate investigative activities without injecting their own view about fair play into the jurisprudence, at least in the first instance.

The way in which this concern with democratic legitimacy is manifested in Canadian law is in the first part of the *Collins* framework. Against a default rule requiring all searches to be backed by judicial pre-authorization, the Crown must show that a warrantless search was authorized by law.⁵⁵

This is a threshold question: if the Crown cannot point to some form of legal authorization for the search, the search is unlawful. The significance of *Collins*, step one, can hardly be exaggerated. It signifies, first, that the police are not exercising inherent search powers, to be developed and utilized at their pleasure, but rather exercise only those powers assigned to them by positive law. Secondly, it signifies that the primary source of legal authorization for police search powers is Parliament, rather than the courts. In asking whether a search was authorized by law, the courts are asking whether the Crown can point to an express delegation of power by Parliament.

As I have noted, the Supreme Court has been far from unwavering in its dedication to this principle. Perhaps most notoriously, the Supreme Court has relied upon the so-called ancillary powers doctrine to authorize modes of street policing – including the contentious issue of investigative detentions – in a common law, post-hoc manner.⁵⁶ However one feels about the merits of the Supreme Court’s jurisprudence on investigative detention, it is, I think, a loss to the democratic credentials of the police that such a contentious form of street policing received legal imprimatur without significant Parliamentary input. Whatever the substantive merits of stop-and-frisk policing, authorization for that kind of police power should have

⁵⁵ R v. Collins, [1987] 1 S.C.R. 265 at 276–78, 38 D.L.R. (4th) 508.

⁵⁶ R v. Mann, 2004 SCC 52. The Supreme Court has sometimes taken the lead in making law in the s. 8 context as well. See, e.g., R v. Chehil, 2013 SCC 49 (sniffer dogs); R v. Fearon, 2014 SCC 77 (searches of cell phones incident to arrest); R v. Golden, 2001 SCC 83 (strip searches).

come via an express delegation of power by Parliament. Parliament may be better placed to consider the evidence, and it is certainly better placed to hear from a wide range of constituents and to be held politically accountable for unpopular decisions.

Nevertheless, the important point for my purposes is that there is a structural commitment in the section 8 jurisprudence to the principle that search powers require legal authorization and, hence, political legitimation. In contrast, there is no similar requirement with respect to undercover operations by the police. Entrapment operates entirely after the fact. Once an entrapment claim is before the court, the court simply proceeds on its own steam to evaluate the fairness of the investigation by appeal to substantive standards developed by the courts themselves.

It is not obvious why if the police have no inherent powers to search and require express delegation of power by Parliament to be active in that domain, they should have inherent powers to lure, encourage, or incite people into committing criminal offences. Offhand, it does not seem as if the latter context is more innocuous than the former or necessarily less prone to abuse. They are, to be sure, less likely to affect as many people as broad search powers, particularly in light of technological developments that enable population-level searches. But for those who are affected by undercover policing, the impact is likely to be much more significant than in the case of searches. Arguably, the significance of controlling the police power to induce even ordinarily law-abiding people to commit criminal offences is more easily explained than that of protecting an increasingly amorphous interest in a “reasonable expectation of privacy.” This is not, of course, to say that police should under no circumstances have powers to lure, encourage, or incite people into committing criminal offences. It is only to question whether those powers might require prior legal authorization.⁵⁷

Consequently, one might envision a parallel “authorized by law” requirement for both the search and undercover operations contexts.⁵⁸ If a case presents a potential issue of entrapment, a reviewing court might be

⁵⁷ Compare *Teixeira de Castro v. Portugal*, 28 Eur. Ct. H.R. 101 (1999) (finding a violation of Article 6 § 1 in part because the undercover agents were not acting under the orders and supervision of a judge).

⁵⁸ It would be awkward to house such a requirement under either s. 8 or s. 9, given that most entrapment-type scenarios involve neither searches nor detentions. The best bet might be a general-purpose requirement, under s. 7, that police activity designed to facilitate prosecution be backed by express authorizing legislation.

empowered to investigate the legal basis for the power asserted by the police in undertaking the operation in question. The most obvious way in which Parliament could delegate powers of this kind is through *Criminal Code* amendment. Alternately, and perhaps more realistically, Parliament could delegate broader regulatory authority to the police and require police to devise their own rules, operations manuals, and similar agency-specific regulations, with such rules subject to judicial review for reasonableness.⁵⁹

To be clear, the proposal is not that each and every undercover operation must be backed by judicial pre-authorization, although that might be appropriate for more elaborate or high-stakes operations. Rather, the proposal concerns the delegation of general police power; for instance, a statutory power to engage in random virtue testing under certain conditions or a power to offer inducements of a certain kind with respect to certain types of offences (and, perhaps, certain types of suspects). Judicial pre-authorization via an investigative warrant could well be appropriate when the police seek to make unusually tempting or persistent efforts to encourage someone to offend, especially in cases where a target may have unusual difficulty in conforming to law.⁶⁰ That said, evaluating the merits of such a proposal is, in the first instance, a matter for Parliament to decide.

Holding an investigation unlawful because it was not authorized by law would not rely upon a court's own view as to the fairness of the investigation. Rather, it would serve to ensure that Parliament does not shirk its responsibility to make law. Otherwise put, the point is not that legal authorization by Parliament ensures greater protections for suspects. The point is to provide undercover police operations greater political legitimacy. If the government is aware that police investigations, particularly into high salience, difficult-to-monitor crimes such as terrorism, will be regarded as unlawful unless backed by an express delegation of power – even if the investigations seem otherwise reasonable and fair – then it will be aware that it cannot punt controversial questions about the fairness of undercover operations in those types of cases to the courts. With a vigorously enforced

⁵⁹ For instance, the FBI's use of undercover operations is subject to Department of Justice guidelines. See U.S., Office of the Inspector General, *The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines* (Washington, D.C.: U.S. Department of Justice, 2005): chap. 2, <https://oig.justice.gov>. Those guidelines, however, appear to lack meaningful enforcement mechanisms. See Stevenson, "Entrapment and Terrorism," 163.

⁶⁰ McAdams, "The Political Economy of Entrapment," 179–84.

“authorized by law” requirement, Parliament would be forced to legislate or face political repercussions for failing to provide the police with legal methods for responding to the issues du jour. In short, the point of *Collins*, step one, is to encourage democratic deliberation of difficult and controversial questions about the appropriate extent of police powers, as well as to prioritize legislation over judicial seat-of-the-pants policymaking.

There is some precedent for this suggestion. When the Supreme Court of Canada has applied step one of *Collins* rigorously to invalidate otherwise reasonable searches, Parliament has reacted by enacting authorizing legislation. Consider *Wong*, in which the Supreme Court was fairly literal minded in refusing to regard a video search as authorized by law, even though the *Criminal Code* at the time did contemplate audio searches. It would not have been a great stretch on the part of the Supreme Court to read the existing language in the *Criminal Code* “purposively,” so as to implicitly cover video searches as well.⁶¹ The justices resisted that temptation and instead insisted that any such searches would require Parliament to explicitly authorize video warrants, which Parliament promptly did.⁶² A similar story unfolded in *Stillman*: after the Supreme Court refused the warrantless extraction of bodily samples from the accused, Parliament subsequently enacted section 487.05, authorizing police to obtain a warrant to obtain samples, a power that did not exist at the time of the original search.⁶³ What cases like *Wong* and *Stillman* show is not that the police had acted unreasonably, but that their actions were of doubtful democratic legitimacy because Parliament had failed to explicitly authorize them to exercise the relevant search powers.

The purpose of imposing an “authorized by law” requirement on police activities that are designed to lure, encourage, or opportune people into committing criminal acts is to force deliberation and policymaking by an institution that is more democratically accountable and in a better position to consult widely than courts. Democratic resolution, I would argue, is particularly important when it comes to novel and controversial questions of political morality, such as the appropriate means for preventing and prosecuting acts of terrorism. This is not to say that, in extraordinary cases, the courts might not regard authorizing legislation as nevertheless unlawful

⁶¹ R v. Wong, [1990] 3 S.C.R. 36, 1 C.R. (4th) 1.

⁶² The *Criminal Code* now specifically contemplates video warrants. See *Criminal Code*, R.S.C. 1985, c. C46, s. 487.01(4).

⁶³ R v. Stillman, [1997] 1 S.C.R. 607, 144 D.L.R. (4th) 193.

under prevailing *Charter* norms (paralleling *Collins*, step two), but it would mean that the development of entrapment law would be a matter for legislative, rather than judicial, initiative in the first instance.⁶⁴

A secondary benefit from putting the onus onto legislatures to define the parameters of acceptable undercover operations is that legislatures may choose to authorize different types of policing measures for different types of offences, as opposed to a general-purpose defence of entrapment as defined by courts.⁶⁵ Some crimes, such as terrorism, may plausibly permit more aggressive forms of undercover policing and opportuning because of their seriousness or because there are few truly “probabilistic” offenders.⁶⁶ As Kent Roach has noted, “[i]t is likely and probably justifiable that the courts will give the State more leeway in terrorism cases in terms of proactively participating in ongoing stings.”⁶⁷ Crimes that few would engage in at any price (child sex offences, to take another example) may raise fewer concerns about targeting, precisely because there are fewer probabilistic offenders to begin with. In contrast, other crimes may hold broad appeal, meaning that many people are probabilistic offenders (McAdams mentions stealing from one’s employer and various types of victimless crime). In crimes of that type, the potential for abuse is greater, as broad police powers to inveigle and opportune would be more prone to ensnaring people who would, under ordinary circumstances, not commit the offence.

A potentially sticky issue is to define the threshold question in a way that avoids drawing parallels to the threshold question in the section 8 jurisprudence, namely whether someone enjoys a “reasonable expectations of privacy.” The section 8 cases have not inspired much confidence in terms of either clarity of analysis or predictability of outcome on this question. To

⁶⁴ One might object that legislatures cannot be trusted to give police appropriately limited powers to engage in undercover operations. There are, of course, no guarantees that even a fair process of public deliberation will always yield the outcomes that we might wish, but in a social world in which reasonable disagreement is permanent and ubiquitous, there are no such guarantees in any case.

⁶⁵ See McAdams, “The Political Economy of Entrapment,” 168–73.

⁶⁶ See Stevenson, “Entrapment and Terrorism.” How persuasive arguments of this kind are may depend, in part, upon how broadly “terrorism” is defined. Perhaps the more inchoate the conduct, the less compelling the inference. See Jon Sherman, “A Person Otherwise Innocent: Policing Entrapment in Preventative, Undercover Counterterrorism Investigations,” *University of Pennsylvania Journal of Constitutional Law* 11 (2009): 1475–510.

⁶⁷ Roach, “Entrapment and Equality in Terrorism Prosecutions,” 1488.

avoid a similar fate, it would be desirable to frame the threshold question in terms that do not draw upon evocative but contested concepts such as “privacy.” The main function of the threshold question is simply to determine when police activity in inducing criminal acts is sufficiently serious as to warrant prior legal authorization. There may be grounds for optimism here, as – unlike in the section 8 context, in which private individuals regularly observe and interact with each other in ways that engage privacy interests – private individuals only rarely have cause to induce others to engage in criminal acts.⁶⁸ Consequently, it should be less controversial to frame a relatively straightforward threshold question as to whether the police conduct in question was designed to lure, encourage, or opportune people into committing criminal acts, as there should be fewer difficult questions concerning how to distinguish police conduct from the behaviour of private individuals.

The proposal to place the onus on Parliament to define the terms of acceptable police conduct in inducing criminal acts stands in contrast with Luke Hunt’s proposal to instead treat entrapment as an instance of a broader prerogative power on the part of the executive, most notably as deployed in the national security context. Hunt, drawing inspiration from Locke’s account of the prerogative power, points out that the police, as a branch of the executive, sometimes reasonably depart from existing legal rules in the face of *bona fide* emergencies, whether that be the threat of terrorist acts or violent crimes targeting vulnerable individuals.⁶⁹ Rather than try to whitewash this power by declaring it “legal,” Hunt suggests imposing (presumably, by means of judicial oversight) a series of constraints on the executive’s prerogative to break the law. First, the executive must act for a public purpose; second, the situation must be one of genuine emergency, such that the legislature does not have time to make law; third, the actions must not “be an affront to liberal personhood”; and fourth, the emergency must involve both an acute threat of death or physical injury and be otherwise unavoidable.⁷⁰

I note two points of comparison. First, whereas my approach seeks to keep the legislature in the driver’s seat by ensuring that they make law

⁶⁸ On the difficulties in distinguishing between police surveillance and ordinary expectations of privacy, see Jed Rubenfeld, “The End of Privacy,” *Stanford Law Review* 61 (2008): 101–61.

⁶⁹ Hunt, *The Retrieval of Liberalism in Policing*, 198.

⁷⁰ Hunt, *The Retrieval of Liberalism in Policing*, 197.

authorizing specific types of policing that might otherwise raise issues of entrapment, Hunt's approach, in keeping with his focus on emergencies, hands the reins over to the executive. Second, by focusing on judicial review of executive action under the prerogative power, Hunt's approach adopts an essentially *ex post* perspective. In contrast, the approach taken here, while it does not seek to prohibit the courts from making law in this arena, nevertheless seeks to foster the rule of law by inducing Parliament to provide guidelines to the police *ex ante*.⁷¹ The mundane predictability that even serious types of crimes – including acts of terrorism – will occur suggests that we should be loath to allow executive actors, including the police, to defend the legitimacy of their undercover operations on the basis of emergency powers. This is not to say that genuine emergencies will never occur, of course, but rather that democratic values counsel in favour of prior authorization, through positive law, of police activities designed to lure, encourage, or opportune people into committing criminal acts.

⁷¹ Hunt's focus on the executive's prerogative power is broadly consistent with American responses to terrorism over the last two decades, which, as Roach has noted, is dominated by sweeping assertions of extra-legal authority by the executive. See Kent Roach, *The 9/11 Effect: Comparative Counter Terrorism* (Cambridge, U.K.: Cambridge University Press, 2011), 161–238.