

WHAT IS WRONG WITH ENTRAPMENT?

The aim of this article is to consider what amounts to entrapment, and under what circumstances (if any) such conduct should be regarded as permissible. The main focus of the article is upon the arguments for and against allowing entrapment, although there is also consideration of the ways in which the criminal justice system (including the courts) ought to respond to cases of entrapment.

AT a time when serious crime is a cause for concern in most countries of the world, it is hardly surprising that law enforcement agencies are adopting all kinds of methods to prevent and detect offences. Terrorist offences, drug trafficking and major robberies pose particular problems for the police, and one response may be to operate proactively – by infiltrating criminal groups or by testing the willingness of certain people to commit offences. In some circumstances, this may go so far as to amount to entrapment, and the purpose of this article is to discuss what (if anything) is wrong with entrapment. The article is not an analysis of how legal systems have responded to entrapment, although some remarks on that are made in part IV. The central concern is to assess the various moral, social and philosophical arguments on either side of the debate.

The first part of the article gives a brief description of a few cases that raise the issue of entrapment. This prepares the ground for part II, in which we consider the requirements of a workable definition of entrapment. Part III consists of a detailed consideration of principled arguments for and against various forms of proactive policing that may fall within a definition of entrapment. In part IV, we look briefly at the four principal ways in which legal systems respond to entrapment.

I. WHEN PROACTIVE POLICING SHADES INTO ENTRAPMENT: FOUR CASES

Much of the work of the police and other investigative agencies consists of responses to reports of incidents and offences. Often, and especially when the crime is an offence of violence or a sexual offence, the victim can give information which assists in identifying the offender. In the absence of such information, the police have to bring their investigative techniques to bear. There are certain types of offence which are not usually reported by victims

– so-called victimless crimes, where there is no direct victim (*eg*, drug offences, corruption, money-laundering); conduct that is criminalised despite the consent of the “victim” (*eg*, some sexual offences, in most jurisdictions); breaches of the law that are perceived by both parties as working to their advantage (*eg*, selling counterfeit goods, or selling to under-age consumers); and conduct which has not yet reached the stage of impinging on any victim directly (*eg*, conspiracy). In order to detect those who commit offences of these kinds, the police¹ may decide to operate proactively, by setting some kind of trap.

The only definitional element of entrapment that is assumed, at this stage, is that the offence has not taken place at the time the police become involved: the use of deceptive practices to investigate an offence already committed is a different topic, although with some similarities, and it is not discussed here.² It will be assumed that some techniques of proactive policing are perfectly acceptable, but that other techniques may cross the line into unacceptability, and it is there that the concept of entrapment will be located. Without in any other way pre-empting the definition of entrapment, save to say that it encompasses impermissible police conduct before or at the time of the commission of the offence, we may now proceed to give brief consideration to four different sets of facts. For present purposes, it does not matter whether the proactive steps are taken by an under-cover police officer or by an informant acting under the direction of the police.

The first illustrative case is *Jacobson v US*.³ J had once purchased two issues of a magazine containing photographs of nude boys, at a time when such material could lawfully be distributed. When the distribution of this kind of pornographic literature became illegal, police officers arranged for J to be sent advertising material that encouraged him to buy a particular (unlawful) magazine. J took no action. Eleven times some advertising material was mailed to him, and on ten occasions he made no response. Ultimately, however, he did order an unlawful magazine, and was prosecuted. This set of facts raises the question of how proactive the police ought to be, and also the question of whether there was sufficient reason to target this man as someone who was disposed to commit this type of offence.

The second illustrative case is *DPP v Marshall and Downes*.⁴ The defendants came to be suspected of selling alcohol beyond the terms of their justices’

¹ For simplicity, reference will be made only to the police; but other investigative agencies may also use the techniques discussed in this article.

² For debate and references, see A Ashworth, “Should the Police be Allowed to Use Deceptive Practices?” (1998) 114 LQR 108.

³ 503 US 540 (1992).

⁴ [1988] 3 All ER 683.

licence, which restricted them to sales of wine and beer “by the case.” Two police officers in plain clothes went to make “test purchases”, by asking for four cans of lager and one bottle of wine. The defendants sold the alcohol to the police officers and were then prosecuted. The conduct of the police was clearly proactive: the question is whether it was reprehensibly so.

The third illustrative case is *Smurthwaite and Gill*.⁵ S let it be known that he was looking for someone to carry out a contract killing of his wife. An under-cover police officer followed this up by contacting S, and later introducing S to another man, also an under-cover police officer, who was said to be willing to do the deed. Two meetings were tape-recorded, and the tapes revealed that the officers did little more than respond to S’s proposals, which included suggestions about how and where the killing might be carried out. S was then prosecuted for soliciting to murder. In this case, there were clearly active elements in the police conduct – the initial decision of one officer to get in touch with S, the subsequent introduction to another under-cover officer – but it can be argued that in substance the police were doing nothing more than responding to requests and ideas initiated by S.

The fourth illustrative case is *Teixeira de Castro v Portugal*.⁶ Two under-cover police officers were introduced to T, who had no criminal record and was not suspected by them of being a drug dealer, and asked him whether he could obtain heroin for them. At the second request he bought drugs from another man and sold them to the under-cover officers for a profit. One salient feature of this case was that there was no previous evidence that T had been involved in drug dealing: essentially, the police incited him to commit an offence and he succumbed to the temptation.

The purpose of setting out these four cases is to introduce some of the distinctions and dilemmas that arise in the debate about entrapment. At this stage the decisions of the courts have not been discussed because the question under consideration is whether the police conduct was wrong, not how the criminal justice system should respond to the cases. Some suggestions about the appropriate legal response to entrapment will be made in part IV of the article. The main task is to consider what, if anything, is wrong with entrapment. And the next step towards that goal is to find a working definition of entrapment.

⁵ (1994) 98 Cr App R 437; the case involved the conjoined appeals of *Smurthwaite* and one *Gill*.

⁶ (1999) 28 EHRR 101.

II. TOWARDS A WORKING DEFINITION OF ENTRAPMENT

The four cases outlined above may well be thought to include examples of what should be permissible and what should not be. In order to move towards a working definition, we may give brief consideration to the approaches taken in jurisdictions that have a doctrine of entrapment. We may begin with the American Law Institute's Model Penal Code, which provides that entrapment may constitute a defence to crime. The essence of the defence is that a police officer has employed "methods of persuasion or inducement that create a substantial risk that such an offence will be committed by persons other than those who are ready to commit it."⁷ It will be noticed that this formulation focuses on the conduct of the police officer, and does not require any reference to the situation of the particular defendant and whether he or she was actually instigated by the police officer's conduct to commit the offence. The rationale for the defence is explicitly to deter the police from using "methods shocking to the moral standards of the community."⁸ This approach therefore has little bearing on the culpability of the defendant: the police must not use "shocking" methods of law enforcement, whether those methods are actually directed at gullible innocents or at regular offenders eager to do business. To reflect its focus, this approach will be referred to here as the official-centred model.

Towards the opposite end of the spectrum lie those definitions of entrapment that focus on the dynamics of the particular incident which has given rise to the criminal charge. In the opinions in the United States Supreme Court, this approach has been developed so as to turn broadly on two requirements, inducement or instigation by the police and innocence on the part of the defendant.⁹ The first requirement looks to the part played by the officer: was it active rather than passive? Did it cause the commission of the offence? The second requirement, which must also be satisfied, has been encapsulated in the term "pre-disposition". Thus, if it can be established that the defendant was pre-disposed to commit the offence, the fact that the particular incident was instigated by an official is not sufficient to found the defence. In blunt terms, pre-disposed persons are fair game, whereas the virtue of previously "innocent" citizens should not be tested. To mark the distinction from the first model, this approach will be referred to here as the defendant-centred model.

⁷ American Law Institute, *Model Penal Code* (Final draft 1962), s 2.13.

⁸ American Law Institute, *Model Penal Code: Text and Commentary* (1981), vol ii, at 406-407.

⁹ See the majority opinions in *Sorrells v US* 287 US 435 (1932) and in *Sherman v US* 356 US 369 (1958).

The strength of these and other arguments will be assessed in the next part of the paper. Thus far, we have sketched two possible models for defining entrapment, lying at opposite ends of the spectrum. The official-centred model, sometimes termed “objective” or “procedural”,¹⁰ promotes high standards of probity in law enforcement. The defendant-centred model, sometimes termed “subjective” or “substantive”,¹¹ turns its attention to what might be called the causal responsibility for the incident. Since the two models lie towards the different ends of the spectrum, each of them may be modified in the light of other policies, preferences and principles. Thus, the Model Penal Code definition excludes from the entrapment defence all cases of causing or threatening bodily injury, on the argument that defendants who are prepared to go so far should be liable to conviction and punishment, and that the proper way of dealing with the over-zealous official is to prosecute him or her for incitement.¹² Both those arguments for limiting the official-centred model are contestable. On the other hand, the defendant-centred model can be expanded, so that in cases of egregious misconduct by police officers or their agents the defence should be available whether or not the defendant was “pre-disposed”: the argument here would be that, even if the primary rationale of the defence is not the promotion of proper standards of conduct by officials, it is right to place some limits on the type of conduct that may lawfully be employed in pursuit of suspected offenders, even those believed to be pre-disposed.

What should the definition say about test purchases of the kind illustrated by *DPP v Marshall and Downes*? Arguably, such cases would not fall within the Model Penal Code’s entrapment defence because a proper test purchase does not create a substantial risk that the offence will be committed by persons other than those ready to commit it. But on the other approach one might ask whether it should be necessary for the officers making the test purchases to establish that the seller was pre-disposed to commit such offences, a question that opens up the contestable concept of pre-disposition, to be examined in the following part of the article. If test purchases are acceptable, they should be excluded from the definition of entrapment, perhaps by way of exception.

If “pre-disposition” is one key concept that awaits analysis, what are the others? Concepts such as “inducement” or “instigation” require examination, because both *Smurthwaite* and *DPP v Marshall and Downes* raise

¹⁰ The latter term is chosen by A Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (1993), ch 6, wisely avoiding the term “objective” which already carries too many different meanings in criminal justice.

¹¹ The latter term is chosen by Choo, *ibid.*

¹² ALI, Model Penal Code: Text and Commentary, vol ii, at 420.

questions about the distinction between active and passive involvement by the police officer, and the boundary between facilitation or responsiveness and suggestion or encouragement. Other concepts that play a central role in some approaches to entrapment are “deterrence”, a rationale fraught with both theoretical and practical difficulties wherever it appears, and “integrity” as an argument for preventing the criminal process from taking its normal course when there is evidence of entrapment. Somewhat related to these issues, though little mentioned, is the question whether the doctrine of entrapment should be applicable only where an official or a person working for an official agency is involved in instigating the offence, or whether it should extend to cases of journalists and private citizens who set out to tempt others into lawbreaking.

It will be evident that this preliminary search for a working definition of entrapment has not been successful. What can be claimed is that we have identified two disparate models, one centred on the conduct of the official and the other centred on the conduct of the defendant; and we have also identified several key concepts that await fuller examination. Also to be discussed is the maxim that the end justifies the means, a particularly powerful consideration in some contexts when allied to the importance of preventing serious crime and ensuring improved community safety. Terms such as “community safety” have a strong appeal, particularly when linked to the destructive activities of terrorists and drug dealers. The discussion below will therefore not neglect the claims of either the individuals targeted or the broader community.

III. A PRINCIPLED APPROACH TO PROACTIVE POLICING AND ENTRAPMENT

We now consider certain key issues of principle relevant to the debate about entrapment. Some of the arguments are connected, and there will therefore be some repetition, but it is important to confront the major reasons for and against recognition that entrapment is wrong.

A. *It is Wrong for the Police to Create Crime*

The argument here is that the function of the police is to prevent or detect crime and not to cause it. If the evidence shows that the police instigated provoked or caused a particular crime, then that should be sufficient to

show that the police conduct was wrongful.¹³ Thus, some argue that if the idea for the crime originated with the law enforcement officers, their conduct was wrongful.¹⁴ If, on the other hand, it is clear that the idea originated with the defendant and the under-cover police simply played along with the scheme in order to obtain evidence of the crime (as in *Smurthwaite*, outlined in part II above), it cannot be said that the police created the crime. The “crime creation” argument has some significance for the appropriate response of the legal system to entrapment (see part IV below), since it suggests that neither exclusion of evidence nor mitigation of sentence is a satisfactory response because they fail to take proper account of the fact that entrapment means that the offence would not have been committed but for the instigation of the official. Instead, the “crime creation” argument may be thought to favour the integrity rationale for preventing such cases from being tried (see point E below).

Two difficulties should be noted. First, the “crime creation” argument begs the question of whether a crime really is created by the officer, since it might be contended that the crime was going to be committed anyway, and all that the officer does is to alter the timing of the offence. If the defendant responded willingly to the officer’s overtures, he would have responded to the overtures of anyone else. But this line of argument may be said to depend on the strength of the evidence the police can produce to support this contention; and that leads into the debate about pre-disposition, which will be examined in point C below. Secondly, the “crime creation” argument suggests that test purchases of the kind made in *DPP v Marshall and Downes* (outlined in part II above) cannot be justified, since clearly the officer making the test purchase may be said to instigate the commission of the offence. However, there is another way of classifying the transaction in such cases: if the officer behaves in exactly the same way as any normal customer, in that there is no extra encouragement or inducement to commit an offence, then it could be said that this is not an example of instigation but simply of providing an opportunity for the commission of an offence. This point is taken up in the next paragraph.

¹³ Even before *Sang*, the English judiciary had made this point: see Lord Parker CJ in *Birtles* [1969] 2 All ER 1131: “it is one thing for the police to make use of information concerning an offence that is already laid on But it is quite another thing, and something of which this court thoroughly disapproves, to use an informer to encourage another to commit an offence”

¹⁴ BG Stitt and GG James, “Entrapment and the Entrapment Defense: Dilemmas for a Democratic Society”, (1984) 3 Law and Philosophy 111.

B. *Any Involvement of Police Officers should be Passive, not Active*

This proposition is sometimes advanced as a more refined and sophisticated version of the “crime creation” argument. It recognises that under-cover police officers may properly play some role in the planning of an offence, and proposes that the limits should be set by reference to the active/passive distinction. The *Smurthwaite* case might be offered as an example of police conduct that remained within the bounds of acceptability: there was no active encouragement of the defendant by the officer, even though the latter responded to requests and offered assistance when it seemed appropriate in order to maintain the deception. The *Jacobson* case falls clearly on the other side of the line: the officers actively solicited the defendant to commit the offence. It could be contended that they merely provided an opportunity for him to offend and went no further; the reply would be that they provided this opportunity eleven times, and that this amounts to objectionable “virtue-testing”. It could not be described as passive.

This point may be developed by reference to *DPP v Marshall and Downes*, the case of test purchases. On a straightforward interpretation one would say that the conduct of the officials¹⁵ was active rather than passive. But what is the significance of those terms? Is normal, everyday behaviour “active”? If the defendants are in a licensed business and the officers do no more than any other customer would do, in what sense is their behaviour “active”? Surely one should reserve that adjective for cases in which the officer does something abnormal in the situation, or provides some particular or extra incentive for the defendant to commit the offence. In the same way one might justify the use of decoys, as for example where a policewoman is dressed as a prostitute would normally dress, in the hope that men will solicit her as if she were a prostitute, or is clothed in the manner of an elderly lady, so that other officers can catch anyone minded to attack and rob the elderly.

It might be countered, however, that this need to re-define the active/passive distinction demonstrates that it is inadequate to the task, as was the “crime creation” argument. Instead, we should be openly discussing the rights and wrongs of virtue-testing. Should the police be allowed to test citizens to see whether they will succumb to temptation? Once the question is phrased in this way, the justification for making test purchases appears somewhat stronger. Where people are conducting a licensed business

¹⁵ Everything said here applies equally to informants acting under the direction of the police. See, for example, *London Borough of Ealing v Woolworths plc* [1995] Crim LR 58, where a trading standards officer used his 11 year old son to make a test purchase.

which requires them to observe certain standards and prohibitions, it is appropriate for the licensing agency or other officials to test this from time to time. In practice they may only carry out test purchases if they have been given some reason to believe that offences are being committed,¹⁶ but it can be argued that there should be no need to establish even “reasonable suspicion” in these cases. The seller or service provider has assumed a certain responsibility, through being licensed to sell alcohol or tobacco or whatever it happens to be, and that responsibility should be discharged on all occasions, whoever the customer may be.¹⁷ A similar line of argument might be developed in relation to the incorruptibility of public officials, although that will not be pursued here.¹⁸

Is it objectionable for police officers to dress up so as to test the virtue of citizens? In the case of dressing like an elderly lady there can surely be no objection: an old lady walking along a street is a perfectly normal occurrence, and no-one other than an intending criminal would treat it as an invitation to crime. It is the provision of an opportunity for crime, but hardly one that could be described as out of the ordinary or abnormal. The case of dressing as a prostitute might be thought different: if the aim is to attract men passing in their cars, so that they then solicit from the car and thereby commit an offence,¹⁹ this might be thought to travel a little beyond merely providing an opportunity for crime. The appearance of a prostitute is an invitation to commit an offence. On the other hand, it might be argued that if the apparent prostitute is on the street in an area well-known for prostitution, it is likely that many of the men driving past will know this and will already have resolved either to ignore the fact or to approach an apparent prostitute – in which case the police decoy is not testing virtue to an unfair extent.²⁰

¹⁶ This is a requirement of the Code of Practice on “Undercover Operations”, issued in 1999 by the Association of Chief Police Officers of England and Wales and other agencies, which also prescribes a procedure for the authorisation of test purchases, undercover operations, and the use of decoys.

¹⁷ English law contains a few specific statutory provisions permitting officials to make test purchases of certain kinds.

¹⁸ The point is taken a little further when discussing entrapment by private individuals at point E below.

¹⁹ The offence in England is called “kerb-crawling”, and its essence is soliciting a woman for the purposes of prostitution from a motor vehicle: Sexual Offences (Amendment) Act 1985, s1.

²⁰ Cf the distinction drawn by the California Supreme Court in *People v Barraza* 591 P.2d 947 (1979): “Was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? For the purposes of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that

Without resolving that argument absolutely, we might turn to another example of virtue-testing. In *Williams and O'Hare v DPP*,²¹ the police, as part of an initiative against vehicle crime, left an unattended van with its rear shutter partly open and cartons of cigarettes visible. After about half an hour, during which many passers-by appeared to notice the van but walked on, two eight year old boys took a carton of cigarettes, and they were intercepted and reprimanded by the police. About an hour later two men walked past the van several times until eventually, having decided that it was truly unattended, they began to remove several cartons from the rear of the van. They were then arrested. What distinguishes this from other "sting" operations is that there was no reason to suspect the defendants of any lawbreaking before they succumbed to the temptation: the van was an open temptation to all members of the public, rather like leaving an unattended wallet in full view to see who would pick it up and whether they would try to keep it. Many would argue that this crosses the line into unacceptability. The police are testing the virtue of citizens, and are likely to ensnare some people who would not otherwise have committed this or any other crime. They are creating crime. The "sting" is in no way confined to, or targeted on, those who would otherwise commit offences of this kind. This shows the weakness of the much-quoted observation that, in "sting" cases, it is the defendants who apply themselves to the trick rather than the police who apply the trick to the defendants.²² Such a statement draws no distinction between those who can fairly be assumed to have decided to offend before the opportunity is provided by the "sting", such as thieves or their agents who enter a jeweller's shop to sell stolen jewellery, and those who are merely passers-by who fall prey to temptation. Even if it can be said that the latter group "applied themselves to the trick", one can maintain that they should not have been subjected to such a degree of temptation, deliberately and by State officials.

opportunity to the suspect – for example, a decoy program – is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning or other affirmative acts likely to induce a normally law-abiding person to commit the crime." The use of the term "overbearing" in the final sentence suggests a threshold of permissibility somewhat lower than that proposed here.

²¹ (1994) 98 Cr App R 209.

²² The phrase of Lord Taylor CJ in *Christou and Wright* (1992) 95 Cr App R 264, a case in which the issue was slightly different (in that it was assumed that the "sting" was to gather evidence of crimes already committed) but where his Lordship was seeking to draw the same distinction. The key passage was cited with approval by Yong Pung How CJ in *SM Summit Holdings v Public Prosecutor* [1997] 3 SLR 922.

This discussion of the justifications for virtue-testing has shifted the focus of the argument somewhat, since it concerns the proper limits of State action. It is relevant to the active/passive distinction insofar as it assists in elucidating what should be regarded as normal conduct and therefore “passive”, since the idea of the normal is partly a normative, as well as a statistical, concept. The normative element should include some conception of the proper limits of virtue-testing, and the argument here is that offering a specially-devised opportunity for offending, which is open to all members of the public, should be regarded as active (impermissible) conduct by the police. The line should be drawn between *Williams and O’Hare*, which ought to have been regarded as active encouragement, and the use of a decoy, which ought normally to be acceptable if there is a properly founded belief that someone in the locality is committing this kind of offence. The alleged distinction between applying the trick to the suspect and cases where a person “applies himself to the trick” fails to reflect the true moral difference.

C. Is Proactive Conduct Easier to Justify if the Defendant can be Said to have been “Pre-Disposed” to Commit the Offence?

In drawing distinctions between sets of facts such as those in part II above, courts have often resorted to the notion of pre-disposition. Thus, in *Jacobson v US*,²³ the Supreme Court of the United States held that the defendant could not be said to have been pre-disposed to commit the offence, on the basis of a single piece of conduct several years earlier at a time when the distribution of such material was not illegal. Similarly, in *Teixeira de Castro v Portugal*,²⁴ the European Court of Human Rights held that the conduct of the under-cover officers went beyond what was permissible, in that they twice tried to tempt the defendant and had no grounds for suspecting him of previous involvement in drug dealing. The Court suggested that it might have been otherwise if it had been established that the defendant was pre-disposed to commit such offences.

Two questions arise: first, what is pre-disposition and on what kind of evidence is it proper to base a finding? And secondly, why should pre-disposition be relevant to entrapment? The answers to the questions are inevitably connected, but we will begin by considering the first. The judicial decisions certainly differ in their notions of pre-disposition. The clearest cases are those in which the defendant is already involved in the criminal

²³ 503 US 540 (1992).

²⁴ (1999) 28 EHRR 101.

activity at the time that it is infiltrated by the police.²⁵ Then there are cases in which the police have reasonable grounds for suspecting that D is involved in a certain type of offending: this is the requirement laid down by the Supreme Court of Canada in *Mack*,²⁶ and it is one on which the prosecution could be put to proof. “Reasonable suspicion” should not be founded on rumour or unspecified “information received”,²⁷ and ought ideally to be supported by surveillance reports or similar evidence, although the Supreme Court of Canada has held that to target people dressed in a certain way and frequenting a “known” area does satisfy the test.²⁸

Next we come those cases in which the defendant is clearly “ready and willing” to become involved in the illegal enterprise, as where D responded enthusiastically to the suggestion of an offence.²⁹ It should be noted, however, that such cases often depend on an inference from D’s response to the officer’s approach, which signifies that at the time of the approach the officer may not have had reasonable grounds to single out this person. That would be relevant if we were devising rules to guide law enforcement officers, but it is less so if we are conducting an *ex post facto* enquiry. The most troubling issue is whether the existence of previous convictions for like offences is sufficient to establish pre-disposition. In *Jacobson v US*, the Supreme Court had a relatively easy decision to make on this point, since there was only one previous incident and it was not an offence because the conduct was not illegal when the previous incident took place. But it is surely fair to argue that distant previous convictions can never suffice: if reliance is to be placed on previous convictions, they must be sufficiently recent to demonstrate that D was “ready and willing” to commit this kind of offence. There is also a strong argument against encouraging the police to target known offenders, since in practice this may lead to unfair harassment and slipshod police methods unless there is some clear and present connection between D and the type of crime under investigation, and in principle it contradicts equality before the law by treating convictions as a permanent

²⁵ For example, *Ludi v Switzerland* (1993) 15 EHRR 173.

²⁶ [1988] 2 SCR 903.

²⁷ Reliance on such inferior grounds for suspicion was criticised by Stewart J, speaking for the majority in *US v Russell* 411 US 423 (1973).

²⁸ *Barnes* (1991) 3 CR (4th) 1; see the discussion by DR Stuart, *Canadian Criminal Law* (3rd ed, 1995), at 532-536.

²⁹ This was said to be true of Shahzad in the case of *Latif and Shahzad* [1996] 2 Cr App R 92, see note 59 below and text there at.

indication of propensity.³⁰ However, the main question is whether recent convictions ought to be regarded as proof, without more, of a predisposition sufficient to justify the police in taking proactive measures targeted at D, and the answer ought to be in the negative. The Supreme Court of Canada surely has it right, as submitted earlier, in requiring proof of reasonable grounds to suspect D of being involved presently in this kind of unlawful activity.³¹ The term “pre-disposition”, with its connotation of previous convictions, ought to be abandoned in favour of a term with contemporaneous reference such as “presently disposed” or “ready and willing”.

The second question posed earlier was why pre-disposition should be relevant in entrapment cases, and the conclusion we have reached is that it should not. We should sever the link with that concept and with previous convictions, and instead insist on reasonable grounds for suspecting D of being (presently) involved in this type of crime. But this should only make it permissible for the police to go so far as to provide an opportunity for the offence to be committed: a line should still be drawn between providing the opportunity and encouraging or inducing D to commit an offence. It may therefore be right to extend virtue-testing to those who are reasonably suspected of being involved in crime (and, one should add, where no other method of evidence-gathering is likely to be productive).³²

Again, as in point B above, the language has drifted towards giving guidance to the police, whereas we should also focus on the rights of the defendant. The argument seems to be that if D has behaved in such a way as to give the police reasonable grounds for suspicion, D no longer has the citizen’s general right not to be virtue-tested by the State.

³⁰ This point was made as long ago as 1958 by Frankfurter J, dissenting in *Sherman v US* 356 US 383. It is repeated in the Commentary to the Model Penal Code (*supra*, note 8), Part I at 412. See also the “equal protection” guarantee in Article 12 of the Singapore Constitution. However, it is to be noted that English law generally is placing greater emphasis on some types of previous convictions. Thus one purpose of the Sex Offenders Register, introduced by the Sex Offenders Act 1997, is to require offenders to register their names and addresses so that the police know where they are; no doubt if sex offences of a particular kind are committed in a certain locality, the police will consult the Register and visit any registered offender who has a record of similar offending.

³¹ In *Mack*, *supra*, note 21.

³² The Code of Practice on “Undercover Operations” published by the Association of Chief Police Officers in England and Wales (1999) provides that authority can only be given if “the desired result of the test purchase cannot reasonably be achieved by other means”. Woolf LJ alluded to this point in *DPP v Marshall and Downes* [1988] 3 All ER 683, although without elevating it to a precondition of the permissible use of a test purchase.

D. *Is Deterrence the Rationale for the Entrapment Doctrine?*

We have not yet reached the stage of discussing whether the legal system should respond to entrapment by means such as staying a prosecution, excluding evidence, granting a defence to liability or allowing mitigation of sentence. But even at this stage, it may be questioned whether the shape of the doctrine – *ie*, what we define as entrapment and what we regard as permissible proactive policing - is not influenced by the supposed rationale. Thus the American Law Institute, building on the early US Supreme Court decisions, states that the rationale of the doctrine is to deter police behaviour that would be “shocking to the moral standards of the community.”³³ This rationale led them to propose an official-centred definition that focuses on the conduct of the officer rather than the response of the actual defendant. Others have insisted on the link between official-centred (sometimes termed “objective”) definitions of entrapment and a deterrent rationale.³⁴

However, there are two difficulties with this link. First, it is by no means clear that an entrapment doctrine, with either procedural or substantive consequences in the criminal process, does operate as an effective deterrent to law enforcement officers. Of course, it would rarely be the case that the entrapment doctrine would be the only mechanism for preventing unacceptable proactive policing, since there would be internal guidance backed by internal disciplinary proceedings. Yet, even accepting that, it seems statistically rare for courts to recognise entrapment as a chilling factor in prosecutions. At federal level in the United States, where entrapment has long been recognised as a criminal law defence, it has rarely been sustained. In Canada, where a finding of entrapment may lead the court to stay the prosecution for abuse of process, this has rarely happened. Since the operation of deterrence requires the persons who are to be deterred to believe that there is a significant risk of being caught and of being “punished” for the misconduct,³⁵ it seems unlikely that a doctrine of entrapment would add greatly to the forces of dissuasion. The second difficulty in asserting an inevitable link between an official-centred definition and a deterrent rationale is that other rationales might equally well support a doctrine of entrapment that focuses on the conduct of the official. One such rationale is the preservation of the integrity of the criminal justice system, to which we now pass.

³³ ALI Model Penal Code: Text and Commentary, vol ii, pp 406-407.

³⁴ Eg. PH Robinson, *Criminal Law Defenses*, vol 1, 209(d)(3).

³⁵ For a recent thoughtful review of deterrence and its operation in criminal law, see A von Hirsch, AE Bottoms, E Burney and P-O Wikstrom, *Criminal Deterrence* (1999).

E. *Is the Preservation of the Integrity of the Criminal Justice System the Rationale for the Entrapment Doctrine?*

Some supporters of the entrapment doctrine, whilst rejecting the deterrence rationale, have argued in favour of a “judicial integrity” rationale. This maintains that the legal process should signify its insistence that those who enforce the law should also obey the law,³⁶ and that where the police cross the line between acceptable and unacceptable methods to detect criminals, it would damage the integrity of the criminal justice system if the courts were to act on the fruits of that investigation.³⁷ Some would add that to act on those fruits would involve the legal system in self-contradiction, whereas others would argue that the wrongful conduct creates a kind of estoppel against the system taking advantage of it.³⁸ Criminal justice must carry moral authority and legitimacy, and those qualities would be undermined if the courts were to “countenance behaviour that threatens ... the rule of law.”³⁹ The American philosopher Gerald Dworkin has put the argument thus:

“The normative issue may be phrased in the following manner: what methods of apprehending and detecting offenders are consistent with the view of a system of criminal sanctions as a choosing system and as the enforcement of law, *ie*, authoritative rules backed by sanctions? I am claiming that it is not consistent with such a system that law enforcement officials attempt to see if they can cause a person to commit a crime by suggesting or encouraging in any way that a crime can be committed.

It is not that such suggestions are improper only if they are such as to overwhelm the will ... I am arguing for the much stronger view that it is not proper to solicit, encourage or suggest crime even if this is done by no stronger means than verbal suggestion. It is not that the offender can complain after the fact that his will was overborne. It is that we, any of us, can complain before the fact that it is not

³⁶ See, *eg*, Stephen and Aickin JJ In *Bunning v Cross* (1978) 141 CLR 54, at 75.

³⁷ Supreme Court of Canada in *Amato v R* (1982) 69 CCC (2d) 31.

³⁸ An estoppel argument was used by Glanville Williams in his early examination of entrapment: *Criminal Law: the General Part* (2nd ed, 1961), at 781-782.

³⁹ *Per* Lord Griffiths in *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42.

the purpose of officers of the law to encourage crime for the purpose of punishing it.”⁴⁰

This leads Dworkin to oppose any form of virtue-testing, unless the officials have reasonable cause to believe that the people approached are engaged or intending to engage in activity of a similar nature. Random solicitation of people is no more defensible than random searches of citizens and their homes.

Dworkin’s argument stems from a well-founded view of the values that the system is meant to uphold, such as maximum autonomy and choice for individuals compatible with the protection of other values. Its logic applies only to entrapment by law enforcement officials.⁴¹ Those who ground the integrity principle in the avoidance of contradictions in the system need to be confident of rebutting two counter-arguments. First, critics would argue that this symbolism can cut both ways. If the result of the court’s ruling is that the prosecution fails, even though it appears plain that the defendant was (factually) guilty of the offence, this may put the criminal justice system in a disreputable light so far as some sections of the public are concerned. They may contend that acquitting the apparently guilty is likely to undermine the integrity of the system, not to enhance it.⁴² However, that would be to place the reputation of the criminal justice system with the general public (and/or sections of the media) above the significance of the fundamental rule-of-law values which the courts ought to re-affirm.⁴³ The true principle of judicial integrity is one based on constitutional values and on principle.⁴⁴

⁴⁰ G Dworkin, *The Theory and Practice of Autonomy* (1988), at 142-143.

⁴¹ The proper response to entrapment by private individuals or by investigative journalists would require separate argument. On the one hand, individuals are treated as autonomous beings and if they are tempted by the proposals of other citizens, they should be held responsible for their actions. On the other hand, there is no public interest in allowing those who are not authorised to enforce the law to place temptation in the way of their fellow citizens.

⁴² This counter-argument is to be found, *eg*, in the judgment of Yong Pung How in *SM Summit Holdings v Public Prosecutor* [1997] 3 SLR 922 (“judicial integrity is undermined when the public perceives that factually guilty people are getting away with serious crimes because of a trivial breach of legislation”), although the Chief Justice went on to hold that “the integrity of the administration of criminal justice” required the exclusion of the evidence in that case.

⁴³ See the distinction made by P Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (1997), at 23-28, between “court-centred” and “public attitude” versions of the integrity principle. For discussion of the integrity principle, see A Ashworth, “Testing Fidelity to Law: Official Involvement and Criminal Justice” (unpublished conference paper, deposited with the Editor.)

⁴⁴ For the development of an approach based on constitutional values in a neighbouring sphere of law, see M Hor, “The Presumption of Innocence – a Constitutional Discourse for Singapore” [1995] SJLS 365.

Arguments grounded in versions of public opinion introduce several rogue elements – incomplete information, failure to consider counter-arguments, manipulation by the mass media – which are unworthy foundations for public policy, even though they must sometimes be acknowledged as constraints on public policy. Arguments that avoid this reliance on public reactions, such as that of Dworkin, are more convincing.

The second counter-argument is that the criminal process, or criminal justice system, has such a unity that a court deciding whether or not a defendant should be convicted can be said to have its integrity compromised if it acts upon evidence resulting from an investigative procedure, well before the trial, that deviated from the rules. One reason in favour of accepting this point is that the court's judgment is a solemn and public pronouncement, representing the culmination of the criminal process and carrying considerable symbolic significance. But there is another view, powerfully stated by the Court of Criminal Appeal of Singapore in *How Poh Sun v Public Prosecutor*,⁴⁵ that it is not the province of a trial or appeal court to consider whether law enforcement agencies were right to have gone about their work in one way or the other. This seems to be more than a simple rejection of the deterrent rationale (see point D above), following *Sang*. Yong Pung How CJ was not simply making the point that the criminal courts do not exist to discipline or superintend the activities of law enforcement agents; it seems that he was declaring that courts should act on the evidence adduced, so long as it is reliable, and that to act in that way does not compromise the integrity of the judicial system. However, in the subsequent case of *SM Summit Holdings v Public Prosecutor*,⁴⁶ the integrity argument was discussed and applied in a case where a private investigator had set up the offence by offering counterfeit “masters” for the defendants to copy.

The approach of acting on evidence (other than confessions) irrespective of its source has a long pedigree in the common law,⁴⁷ but it is an approach now left behind in many countries as the discretionary exclusion of evidence has broadened and as the doctrine of abuse of process has come to play a greater part. A difference ought to be recognised between legal guilt and factual guilt. The verdict of the court is a public outcome of the criminal justice process, and it should express all the values applicable to that process (rather than just one). Of course, this line of reasoning leaves some room

⁴⁵ [1991] 3 MLJ 216; the reason has been repeated in later decisions such as *Lai Kam Loy and Ors v Public Prosecutor* [1994] 1 SLR 787.

⁴⁶ [1997] 3 SLR 922.

⁴⁷ Recall, for example, the statement of Crompton J in *Leatham* (1861) 8 Cox CC 498, that if the prosecution have obtained incriminating evidence, “it matters not how you get it; if you steal it even, it would be admissible in evidence.”

for argument, because what is absolutely plain in a case where evidence has been obtained by torture may become more contestable in some borderline cases of entrapment. But the force of the judicial integrity argument remains considerable: the judiciary is rightly expected to affirm its commitment to constitutional values and to international human rights standards.⁴⁸

F. If the Evidence Proves Guilt, then the End Justifies the Means

This is an approach which few judges would be willing to declare. It belongs to the utilitarian tradition of evidence scholarship, stemming from Jeremy Bentham – a tradition in which individual rights count for little, and in which aggregate benefit is the most important outcome. It celebrates the primacy of truth-finding, rectitude and the “accuracy” of verdicts, and finds little or no room for other values – such as human rights, and the “rule of law” values – in this context. The reason for re-stating it here is that it is undoubtedly a consideration that is kept in mind, if only “at the back of the mind”, in many of the decisions about entrapment. Perhaps because the enforcement of the law is relatively difficult in the spheres in which proactive policing (and entrapment) come to be used, courts may be tempted to overlook rights reasoning and to by-pass the integrity principle, especially where the crimes under investigation are serious ones. That, however, would be to subvert the whole idea of rights, since one of the values they uphold is that individuals ought to be protected from certain uses of State power. The argument for a “serious crimes” exception to the protection of rights is a fallacy. If the crimes are serious ones, crimes that give rise to great public concern, then it is no less serious for the suspect to be subjected to investigative methods that violate rights or other standards. Seriousness, in other words, is a two-way street.⁴⁹

IV. RESPONDING TO EVIDENCE OF ENTRAPMENT

If the defendant raises the issue of entrapment, and this is sustained, what should be the response of the criminal justice system? Certainly, it should be recognised that the entrapping officer has breached the internal rules of the police or other law enforcement agency, and may well have committed a crime. Entrapment will usually involve the inchoate offence of incitement,

⁴⁸ For decisions on the European Convention on Human Rights, see *supra*, notes 24, 25; Art 14 of the International Covenant on Civil and Political Rights provides broader protection than the European Convention.

⁴⁹ For a fuller argument against regarding “the seriousness of the offence” as a significant factor, see A Ashworth, *The Criminal Process* (2nd ed, 1998), at 56-58.

and may make the entrapper an accomplice to the substantive offence as a counsellor or even a procurer. The English Law Commission went so far as to suggest that there should be a specific crime of entrapment,⁵⁰ which an officer would commit if he incited the commission of an offence and even if he intended that the completion of that offence would be prevented or nullified. However, the main question concerns the response of the criminal justice system so far as the defendant's trial is concerned. There seem to be four major options: to stay the prosecution, to grant the defendant a defence to liability, to exclude the evidence resulting from the entrapment, and to mitigate the defendant's sentence on conviction. How should the choice of response be made?

We may begin by considering the appropriateness of a special defence to criminal liability, common in the United States but not elsewhere. Probably the most misconceived argument against the creation of a special defence is that entrapment does not negative either *actus reus* or *mens rea* and therefore cannot qualify as defence.⁵¹ This reason, advanced by (among others) the English Law Commission in 1977,⁵² is weak because there are already various established defences which do not satisfy that criterion, such as duress and necessity. But this line of argument does serve to raise the question whether the case for recognising entrapment as a defence rests on non-culpability. If it does, then one problem that needs to be resolved is why D's culpability is lower when he is encouraged and persuaded to commit an offence by a law enforcement official and not when he is encouraged and persuaded by a non-official. Many are the cases where one private individual incites, persuades or coaxes another to commit an offence.⁵³ Indeed, the doctrine of complicity provides expressly for the liability of those who counsel or procure. Unless pressure amounting to duress is alleged,

⁵⁰ Law Com No 83, *Defences of General Application* (1977), para 5.48.

⁵¹ There are a few situations in which one of the elements of entrapment may operate so as to negative an element required for conviction, *eg*, where stolen goods are restored to their owner before D purports to "handle" them or where the owner of property consents to its being "stolen" in the knowledge that it will not be lost: see Glanville Williams, *Criminal Law: the General Part* (2nd ed, 1961), at 772, written prior to the Theft Act 1968 and the decision in *Gomez* [1993] AC 442. In many of these situations, a charge of attempt (*ie*, attempting the impossible) will succeed.

⁵² *Ibid*, para 5.37.

⁵³ The distinction drawn here between officials and private individuals might be further refined, for there are some cases in which journalists have done acts that might amount to entrapment if carried out by officials. It is assumed here that journalists should be classified as private individuals, but the English Court of Appeal has suggested otherwise (in *Morley and Hutton* [1984] Crim LR 919, where the issue was mitigation of sentence).

there is no question of excusing the principal simply because another person encouraged him. The criminal law, here as in most other respects, assumes that every individual is an autonomous person able to make choices and therefore responsible for his or her actions.⁵⁴ This suggests that there is unlikely to be a significant difference, in point of culpability, between the entrapped defendant and a defendant encouraged or even led on by someone who is not a law enforcement official (or acting under the direction of such an official).

Now this does not conclude the case against recognising a defence, because there are also several defences that are not based on non-culpability. However, most of these are justifications (such as self-defence or the prevention of crime), where the essence of the argument is that D had a right to act as he did, and it is unlikely that such a claim can be sustained in entrapment cases. Still, there is absolutely no reason why the law should not recognize a defence *sui generis* if the arguments are strong enough. An entrapment defence might thus be supported on a dual rationale, less on the defendant's reduced culpability and more on the active involvement of the State (in the form of a law enforcement official or person acting under his direction) in the creation of the offence. Having dismissed the deterrence rationale as unconvincing, it seems that the integrity rationale must form a major part of the foundation for any such defence. The defence is a means of ensuring that the law does not allow the conviction of someone whose offence was effectively created by an officer of the law.

Once this stage in the argument is reached, however, it is important to enquire whether a defence to liability is the most appropriate and effective method of achieving this goal. If the integrity rationale is accepted, would it not be best to ensure that the prosecution does not even come before a court for trial? Not only does the integrity rationale fail to fit the normal criteria for a criminal law defence (although this is not a conclusive reason), but there is a specific mechanism – the judicial stay of a prosecution for abuse of process – that appears much more appropriate. If the concern is defective process, *ie*, the early stage of law enforcement when the officer (in order to obtain evidence that D was committing offences) engaged in conduct that amounts to entrapment, then the doctrine of abuse of process seems to be tailor-made. If the officer's conduct compromised the integrity of the process at that stage, then a court should not go so far as to try the case.

⁵⁴ For references on this issue, the contentiousness of which will not be explored here, see A Ashworth, *Principles of Criminal Law* (3rd ed, 1999), at 27-29.

In many jurisdictions, the doctrine of abuse of process has undergone a revival in the last 10 or 15 years: in Canada,⁵⁵ Australia⁵⁶ and England and Wales,⁵⁷ its role appears to have expanded. Thus in *R v Horseferry Road Magistrates, ex parte Bennett*⁵⁸ the police had brought the applicant to England by force, deliberately flouting the rules on extradition. The House of Lords invoked the doctrine of abuse of process and stayed the prosecution, holding that the English courts “should not countenance behaviour that threatens either basic human rights or the rule of law,” and should not “turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction.” This resounding endorsement of the integrity principle is somewhat muted by the subsequent decision in *Latif and Shahzad*,⁵⁹ where one of the defendants had been lured to England by a deception practised by an under-cover customs officer. The House of Lords distinguished *Bennett* and declined to stay the prosecution. Lord Steyn stated that:

“the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be charged and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means.”

However, although the House did not apply the doctrine of abuse of process, it re-affirmed its centrality and merely held on the facts that the unlawful act and deceptive practices of the customs officer were not such an affront to the public conscience that the prosecution should be stayed.

The doctrine of abuse of process has undoubtedly been developed to cover some of the cases previously covered by the common law discretion to exclude evidence. When the House of Lords held in *Sang*⁶⁰ that there is no defence of entrapment known to English law, they stated that it would be inconsistent with this if entrapment were a ground for the exclusion of evidence. If that reasoning is accepted, then one might have thought it *a fortiori* inconsistent to allow the stay of a prosecution for abuse of process where the basis was entrapment. But should the reasoning be accepted? One could argue that the House perpetrated a *non sequitur*, because a defence

⁵⁵ *Eg, Mack* (1988) 67 CR (3d) 1.

⁵⁶ *Eg, Jago v District Court (NSW)* (1989) 168 CLR 23.

⁵⁷ *Eg, Attorney-General's Reference (No 1 of 1990)* [1992] QB 630, and *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42; and generally A Choo, “Halting Criminal Prosecutions: the Abuse of Process Doctrine Revisited” [1995] Crim LR 864. [1994] 1 AC 42.

⁵⁸ [1994] 1 AC 42.

⁵⁹ [1996] 2 Cr App R 92.

⁶⁰ [1980] AC 402.

prevents conviction whereas the exclusion of tainted evidence leaves open the possibility that conviction may be secured by relying on other evidence, *eg*, real evidence of what was found in the defendant's possession. The exclusion of evidence is therefore only a little more inconsistent with the absence of an entrapment defence than is mitigation of sentence, which the House of Lords commended in *Sang*.

The decision in *Sang* is still followed with considerable reverence in Singapore.⁶¹ However, it held sway in English law for less than a decade, because section 78 of the Police and Criminal Evidence Act 1984 introduced a statutory discretion to exclude evidence if, having regard to the method by which it was obtained, its admission "would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it." Freed from the shackles of the common law as interpreted in *Sang*, the English Court of Appeal began to use section 78 to exclude evidence obtained through entrapment. The leading case is now *Smurthwaite and Gill*,⁶² the facts of which were outlined in part II above, in which the Court identified two key questions to be asked in cases where entrapment is alleged. Was the role of the under-cover officer passive or active? And "was the officer acting as an *agent provocateur* in the sense that he was enticing the defendant to commit an offence he would not otherwise have committed?" The passive/active distinction has been applied so as to classify as "passive" those cases where officers merely respond to or "play along with" the true offenders, without initiating or instigating the offence.⁶³ It appears that where there is some evidence of pre-disposition, which suggests that the offence "might otherwise have been committed" (to adopt the words from *Smurthwaite*), the role of the officer can be somewhat more active without amounting to entrapment. This is crucial in cases where under-cover officers target suspected drug dealers by approaching them and asking whether they can supply drugs. Ordinarily, that might be regarded as instigation; but the English Court of Appeal in *Edwards*⁶⁴ regarded this as permissible when

⁶¹ See, for example, *How Poh Sun v Public Prosecutor* [1991] 3 MLJ 217 (with commentary by S Yeo at [1992] SJLS 202) and *Chi Tin Hui v Public Prosecutor* [1994] 1 SLR 778, and *cf Public Prosecutor v Rozman bin Jusih* [1995] 3 SLR 317. For an excellent analysis, see Tan Yock Lin, "Sing a Song of *Sang*, a Pocketful of Woes?" [1992] SJLS 365.

⁶² (1994) 98 Cr App R 437; see DJ Birch, "Excluding Evidence from Entrapment: What is a 'Fair Cop'?" [1994] CLP 73.

⁶³ *Eg, Smurthwaite and Gill, ibid; Mann and Dixon* [1995] Crim LR 647; and the "sting" case of *Christou and Wright* (1992) 95 Cr App R 264.

⁶⁴ [1991] Crim LR 45; similar reasoning was employed by the Court of Appeal and House of Lords in *Latif and Shahzad* [1996] 2 Cr App R 92 when declining to invoke the doctrine of abuse of process.

there was evidence of pre-disposition. And in that case the Court went so far as to infer pre-disposition from the actions of the defendant subsequently to the officer's approach: he readily agreed to supply drugs, showed familiarity with the drugs scene and the slang, and offered a discount on future supplies. Finally, it is noticeable that the development of the section 78 discretion in entrapment cases lends some support to the integrity principle, in the sense that the English courts now accept that unlawful or improper conduct by a law enforcement officer at an early stage in the process may be said to have an "adverse effect on the fairness of the proceedings," an interpretation encouraged by the wording of section 78 which refers to the circumstances in which the evidence was obtained.

It was suggested above that, if entrapment is established, it is more appropriate to stay the prosecution for abuse of process rather than to exclude the evidence. The reason is that the entrapment creates an offence that would probably not have been committed otherwise: the matter is not simply one of evidence, but of the very commission of the crime. In this connexion we should consider the ruling of the European Court of Human Rights in the case of *Teixeira de Castro v Portugal*,⁶⁵ the facts of which were outlined in part II above. The European Court held that, because T was not a known or suspected offender before the police officers approached him twice and asked to buy drugs, the facts disclosed a violation of the right to a fair trial in Article 6.1 of the European Convention on Human Rights. The Court held that the police incitement of a person who was not known to be pre-disposed to this kind of offence meant that T was "deprived of a fair trial from the outset." It appeared that the offence would not have been committed, but for the police instigation. The Court compared those facts with *Ludi v Switzerland*,⁶⁶ where L had been reasonably suspected of drug dealing and an under-cover officer went to buy drugs from him, a case which passed the "pre-disposition" test. These decisions say nothing about the possibility of "reasoning backwards", as in *Edwards*, from the defendant's apparent willingness and familiarity with the drug scene. But they do suggest that it is unfair to incite someone who is known only as a drug user to become a supplier, as was the case in *Teixeira*. Moreover, the Court's strong language, "deprived of a fair trial from the outset", suggests that an English court under the Human Rights Act 1998 might more appropriately stay the prosecution for abuse of process. The European decisions certainly strengthen the argument that the exclusionary discretion is an insufficient response to the entrapment of those who are not "pre-disposed", and suggest that courts should ensure

⁶⁵ (1999) 29 EHRR.

⁶⁶ (1993) 15 EHRR 173.

that the police had reasonable grounds for suspecting the defendant of committing similar offences before they accept that approaches by under-cover officers (typically, to buy drugs) were permissible.

If the discretionary exclusion of evidence is an insufficiently strong response to cases of entrapment, then it follows that mitigation of sentence is certainly inadequate. Between the *Sang* decision in 1979 and the coming into force of the Police and Criminal Evidence Act in 1986, this was the only response that English courts were authorized to make. In fact, the jurisprudence of the Court of Appeal on mitigation for entrapment has developed considerably in the last 20 years. In *Underhill*⁶⁷ the Court of Appeal held that, where officers over-stepped the line between passive assistance and active instigation, mitigation would be appropriate. This is subject to an exception in cases where the defendant is reasonably suspected of involvement in the type of crime: in such circumstances it is acceptable for the under-cover officer to “test” the defendant, for example, by asking him to supply drugs⁶⁸ or by sending a package of money through the post office where the defendant worked.⁶⁹ However, where there were no grounds for suspicion, the Court of Appeal has allowed a significant discount on the sentence. Where the defendant was known to be a drug addict but not a dealer, the Court has held that if the police actively solicit him to supply drugs that constitutes a sufficient element of entrapment to justify around one-third discount from the sentence⁷⁰ – although in some of those cases, on the arguments above, the entrapment ought surely to have had a more profound chilling effect. Where officers became involved in the planning of an offence, it was held that they would not over-step the mark if the conspiracy was on foot before their involvement, if they merely responded so far as necessary to retain their cover, and if there was evidence that the other conspirators were steering the plans and determined to commit the crime.⁷¹ In such a case, there would be no mitigation for entrapment.

⁶⁷ (1979) 1 Cr App R (S) 270.

⁶⁸ *Springer* [1999] 1 Cr App R (S) 217.

⁶⁹ *Ramen* (1988) 10 Cr App R (S) 334.

⁷⁰ *Eg, Beaumont* (1987) 9 Cr App R (S) 342, *Chapman and Denton* (1989) 11 Cr App R (S) 222, *Mackey and Shaw* (1993) 14 Cr App R (S) 53, and *Tonnesen* [1998] 2 Cr App R (S) 328 (where the entrapment was by journalists). *Cf Mayeri* [1999] 1 Cr App R (S) 304, where 4 under-cover officers in succession approached the defendant in a night-club and asked for Ecstasy tablets, and he supplied all of them: it is assumed (although it was not stated) that the police had grounds to suspect him, and the Court saw no reason for mitigation, adopting the maxim “seller beware”.

⁷¹ *Eg, White and Harrison* (1994) 15 Cr App R (S) 714.

V. CONCLUSION

It has been argued that some forms of proactive policing should be regarded as entrapment, particularly where the police have been actively involved in the creation of a crime, have tested the virtue of ordinary citizens rather than targeting their methods on persons against whom there are reasonable grounds for suspicion, or have gone too far in instigating crime where there was reasonable suspicion against the defendant. It has been further argued that the most appropriate judicial response to entrapment is to stay the prosecution for abuse of process, relying on the principle of judicial integrity and the importance of adherence by courts to constitutional principles and international standards. If there is evidence of proactive law enforcement methods not quite reaching the level of entrapment, it may be appropriate to exclude the evidence or, more frequently, to mitigate the sentence.

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