

University of Liverpool

The Concept of Entrapment

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- ▶ (Legal entrapment may, but need not, be *illegal* in the other sense of the word 'legal'.)
- ▶ Otherwise, we are dealing with *civil* entrapment.

Classifying Acts of Entrapment

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- ▶ We are classify acts of entrapment into four types.

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- ▶ **Civil moral entrapment:** other agent tempts target to commit a non-criminal act that is, or is considered by the agent immoral (etc.).

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- ▶ **Legal moral entrapment:** law-enforcement agent (etc.) tempts target to commit a non-criminal act that is, or is considered by the agent immoral (etc.).

Three Questions about Entrapment

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- ▶ Our concern here is with the first question.

Definition by Stitt and James (1984, 114)

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- ▶ the agents *induce* the target to commit it;
- ▶ the agents (intend to) *arrest* the target for having committed it;
- ▶ *counterfactual condition*: if it were not for the agents' actions then the token (as opposed to type of) crime would not have been committed by the target.

Consequences of the Definition by Stitt and James (1984)

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- ▶ So merely asking a suspected drug dealer whether they have any drugs (rather than actively asking the suspect to sell drugs), does not, on this definition, count as entrapment.

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 - ▶ *counterfactual condition*: the target would not have committed the particular crime but for the agents' having procured it.

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- ▶ The *arrest* condition of Stitt and James is too strong: an agent could entrap in order to blackmail, rather than in order to arrest.
- ▶ Dworkin's *observation* condition is also too strong (for reasons to be presented in a minute).
- ▶ We propose replacing the arrest and observations with an *intended traceability* condition: the agent intends that the crime be traceable to the target by evidence that would link the target to the act.

The Intended Traceability Condition: Better than the Observation Condition

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- ▶ While travelling to the scene, the agent is involved in a car accident. The agent arrives at the crime scene an hour after the crime happened. There were no witnesses.
- ▶ While the target was running away from the scene, fibres from the target's clothing, containing his DNA, were left behind on a screw that was jutting out of a doorway.

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- ▶ Thus, in an entrapment scenario the the agent himself or herself need not manage to secure either an arrest or observation of the criminal act).

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- ▶ Rather, the crucial trap is for the target to fall into being vulnerable, owing to their involvement in the criminal act, to the agent's power to have the target prosecuted, exposed, or threatened with prosecution or exposure.

Entrapment: A General Definition

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- ▶ Entrapment may be defined more generally by dropping the reference to law-enforcement agents and widening the class of induced acts.

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- ▶ Civil entrapment to commit a crime is a form of, but at the same time distinct from, criminal solicitation.
- ▶ Every act of civil entrapment to commit a crime is one of criminal solicitation, but not *vice versa*.
- ▶ If I persuade you to commit a crime that you would not have committed but for my having procured it (by solicitation, enticement or persuasion) but I lack either the intention that you will traceably be linked to the crime or the intention that I or a third party will be enabled to prosecute or expose you, then, while I have *solicited* the crime, I have not *entrapped* you into committing it.

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- ▶ Dworkin considers all cases of legal entrapment to be cases of proactive law enforcement that meet his procurement condition and his counterfactual condition.
- ▶ Perhaps Dworkin does this because he has in his mind scenarios in which an entrapment defence might be mounted in the USA.
- ▶ On our definition, however, a scenario in which law-enforcement agents intend to blackmail, rather than to enforce the law, can still count as a case of entrapment (including legal entrapment).

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- ▶ What the literature usually calls the 'subjective' and 'objective' tests for entrapment are, as Stitt and James (1984, 114) note, different accounts not of when entrapment occurs, but of when entrapped persons should be held (criminally) responsible for their offences.

Formulation of the Subjective and Objective Tests

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- ▶ *Objective test.* The target is (morally or legally, depending on the case) *culpable* only if the act that they have been entrapped into committing is such that a hypothetical ethically-upstanding or, in the legal case, law-abiding, person would be unlikely to have been led, in the circumstances of the agent's having *planned* and *attempted to procure* the act, to have attempted.

- Dworkin, G., 1985. The serpent beguiled me and I did eat: Entrapment and the creation of crime, *Law and Philosophy*, 4, 17–39.
- Stitt, B.G. and James, G.G., 1984. Entrapment and the entrapment defense: Dilemmas for a democratic society, *Law and Philosophy*, 3, 111–132.