

## *What is the Incoherence Objection to Legal Entrapment?*

**Abstract.** Some legal theorists say that legal entrapment to commit a crime is incoherent. So far, there is no satisfactorily precise statement of this objection in the literature: it is obscure even as to the type of incoherence that is purportedly involved. Perhaps consequently, substantial assessment of the objection is also absent. In order to inform such assessment in the future, we aim to provide a new statement of the objection that is more precise and more rigorous than are its predecessors. After discussing some forms of incoherence that those that have endorsed or entertained the objection might have had in mind, we argue that the most plausible form of the objection has it that, in attempting to entrap, law-enforcement agents lapse into a form of practical incoherence best characterized as the agents' simultaneously attempting to pursue contrary ends. We suggest, further, that the objection is particularly dangerous as this pursuit makes law-enforcement agents act against the requirements of practical reason.

**Keywords:** crime, criminal solicitation, entrapment, incoherence, irrationality, legal entrapment, practical reason, proactive law enforcement, integrity

### 1. *Legal Entrapment to Commit a Crime*<sup>1</sup>

Cases of entrapment involve a party that intends to entrap, which we call the ‘agent’, and a party intended by the agent to be entrapped, which we call the ‘target’. Let the terms ‘party’, ‘agent’ and ‘target’ encompass both individuals and groups.

We draw two distinctions, which cut across each other, concerning acts of entrapment. The first concerns the status of the agent and the second concerns the act that the target commits and that the agent procures.

*Legal entrapment* occurs when the agent is a law-enforcement officer, acting (legally or otherwise) in their official capacity as a law-enforcement officer, or when the agent is acting on behalf of a law-enforcement officer, as their deputy. When, on the other hand, the agent is neither a law-enforcement officer acting in that capacity, nor the deputy of such an officer, acting in their capacity as deputy, we have *civil* entrapment.<sup>2</sup>

In connection with the procured act, we distinguish between acts that are of a criminal type and those that are not. An investigative journalist might entrap a politician into committing a morally compromising act that is not a crime, in order for the journalist to expose the politician for having committed the act. When the act is non-criminal but is morally compromising (whether by being immoral, embarrassing, or socially frowned upon in some way), we are dealing with ‘moral’ entrapment (using the word ‘moral’ in a wide sense). When the act is of a criminal type, we have ‘criminal’ entrapment.

Thus, four types of entrapment can be distinguished: legal criminal entrapment (e.g., the police entrap someone into dealing in illegal drugs), civil criminal entrapment (e.g., a journalist entraps someone into dealing in illegal drugs), civil moral entrapment (e.g., a journalist entraps

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<sup>1</sup> This section summarizes REDACTED.

<sup>2</sup> For details of alternative terminologies for the legal/civil distinction, see (n1) REF.

a politician into making an embarrassing boast) and legal moral entrapment (e.g., the police, using their offices as law-enforcement agents, entrap a politician into making an embarrassing boast). Our concern in this article is with an objection to *legal entrapment to commit a crime*. Henceforth, we use ‘legal entrapment’ as an abbreviation for ‘legal criminal entrapment’. When this sort of entrapment occurs, we take it, the following conditions are all met:

- (i) a law-enforcement agent (or the agent’s deputy), acting in an official capacity as (or as a deputy of) a law-enforcement agent, *plans* that the target commit an act;
- (ii) the planned act is of a type that is criminal;
- (iii) the agent *procures* the act (by solicitation, persuasion, or incitement);
- (iv) the agent intends that the target’s act should, in principle, be *traceable* to the target either by being *detectable* (by a party other than the target) or via *testimony* (including the target’s confession), that is, by *evidence that would link the target to the act*;
- (v) in procuring the act, the agent intends to be enabled, or intends that a third party should be enabled, *to prosecute or to expose the target* for having committed the act.<sup>3</sup>

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<sup>3</sup> We intend condition (v) to include blackmail cases in which the agent intends not that the target will be prosecuted or exposed but that the target will be placed under threat of prosecution or exposure. Many writers hold that entrapment necessarily involves deception. These include: Gerald Dworkin, ‘The Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime’ (1985) 4 *Law and Philosophy* 17, 30, reprinted in his *The Theory and Practice of Autonomy* (CUP 1988), Chapter 9; Jerome H. Skolnick, ‘Deception by Police’ in Frederick A. Elliston and Michael Feldberg (eds.), *Moral Issues in Police Work* (Rowman & Littlefield 1985) 81; John Kleinig, *The Ethics of Policing* (CUP 1996) 153; Seamus Miller and John Blackler, *Ethical Issues in Policing* (Ashgate 2005) 104; Seamus Miller, John Blackler

Condition (ii) states that the entrapped act is of a type that is criminal. We are not here concerned with whether the target's token act is one for which the target is criminally liable. In our experience, to say that the target's token act is a crime suggests to some readers that the act is one for which the target is criminally liable. We seek to avoid this mistaken impression, and to provide a definition of entrapment that does not prejudge the question of the permissibility of acts or of entrapment or that of the liability of the target.

## 2. *Procurement and the Creation of Crime*

When defining entrapment, some theorists include a counterfactual (or 'but for') condition, according to which the target has been entrapped only if the target would not have committed the crime but for the agent's actions. For reasons we have explained elsewhere, we do not consider it necessary or desirable to include such a counterfactual condition.<sup>4</sup> Nevertheless, we note that while some theorists that include a counterfactual condition appeal to the token side of the type/token distinction, others appeal to the type side.<sup>5</sup> As Stitt and James observe, appeal

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and Andrew Alexandra, *Police Ethics* (2nd ed. Waterside Press 2006) 263; Hock Lai Ho, 'State Entrapment' (2011) 31 *Legal Studies* 71, 74. For full discussion and defence of our conditions, and of our omission of any deception condition, see (n1) REF.

<sup>4</sup> See (n1) REF.

<sup>5</sup> The token side of the distinction is adopted by B. Grant Stitt & Gene G. James in two articles: 'Entrapment and the Entrapment Defense: Dilemmas for a Democratic Society' (1984) 3 *Law and Philosophy* 111; 'Entrapment: An Ethical Analysis', in Frederick A. Elliston and Michael Feldberg (eds.), *Moral Issues in Police Work* (Rowman & Littlefield 1985) 130. It is also adopted by Gerald Dworkin (n3) 30. For a definition of entrapment that appeals to the type side

to the type side precludes the possibility that an agent might entrap a target into committing a token crime that is of a criminal type tokens of which the target was already inclined to commit.<sup>6</sup> With them, we regard this as a logically undesirable feature of the appeal to type-crimes in counterfactual conditions. The type/token distinction is also relevant to the contention, endorsed by some theorists, that legal entrapment is objectionable because it *creates* crime.<sup>7</sup> In the context of entrapment, creation is to be understood, we take it, in terms of the creation of token crimes. A type of act can be illegal even if no one in fact ever happens to commit it; type crimes are neither created by, nor depend on, token crimes. For example, there is such a type of crime as murder, even if no-one ever in fact commits a murder, as long as a legislature outlaws it.

Regardless of the account of creation that is adopted, the incoherence objection to entrapment must rest on the contention that it is incoherent for law-enforcement agents (or their deputies), in their official capacities, to create token crimes. In the literature, the counterfactual account of the creation of crime is popular.<sup>8</sup> According to it, an agent creates a token crime if the token crime would not have occurred but for their actions. This cannot be the right way in

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of the type/token distinction, and which is therefore inconsistent with the conception of the creation of crime that we will shortly advance, see Ho (n3).

<sup>6</sup> Stitt and James (n5, 1984) 114–115.

<sup>7</sup> As we shall shortly see, some theorists that endorse this objection add that to entrap is to create, *rather than to detect*, crime. We shall shortly explain their view, and why we disagree with that element of it.

<sup>8</sup> E.g., Dworkin (n3) 21, Stitt and James (n5, 1984) 114, Ho (n3) 74. Counterfactual accounts of the creation of crime appear (as in the case of Ho (n3)) to be localised versions of the more general strategy of attempting to account for causation in counterfactual terms.

which to understand the creation of a token crime. This is because token crimes would not have occurred but for all manner of things: but for the existence of the criminal, but for the meeting of the criminal's parents, the criminal's grandparents, but for the existence of the victim, but for the meeting of the victim's parents, the victim's grandparents etc.

The analysis of creation in terms of the 'but for' counterfactual drains the notion of the creation of token crimes of the applicability that it is presumably intended to have when it is invoked in an attempt to advance the incoherence objection. That without which an act could not have occurred is not (even if itself an act) to be confused with that which happens to have brought it about.<sup>9</sup>

The notion of creation as we understand it must also be distinguished from that of having acted in a manner that, even if not *necessary* to the target's commission of the token crime, made the target's act *more likely* than would otherwise have been the case.<sup>10</sup> In a decoy operation, the actions of the law-enforcement agents make more likely the target's commission of the token act, and thus the situation meets the condition just mentioned. The actions of an agent that poses, during a decoy operation, as a potential victim of a type of crime do not thereby amount to actions that, if a token crime is in fact committed against that agent, mean that the agent *created* the crime. If creation were to be understood so widely, then the incoherence objection would not be to entrapment *per se*. Instead, it would be a wider objection, to all forms of proactive law-enforcement that involve the active presentation to the target of an opportunity to commit a crime. In consequence, we henceforth assume that creation goes beyond the mere presentation of an opportunity. We assume, instead, that to have created a

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<sup>9</sup> See further (n1) REF.

<sup>10</sup> By 'more likely' we intend to suggest an act that raises the probability to something less than 1 but greater than 0.5.

crime is, in the relevant sense, to have procured it.<sup>11</sup> To put this another way, creation is not, for us, the creation of an *opportunity*: rather, it is the agent's creation of the target's *intention* to commit a token act of a criminal type.

Let us explain the conception of procurement with which we are working in condition (iii). For an agent to procure a target's act is for the agent to influence the target's will through responsiveness, on the target's part, to the content of a communicative act, or series of such acts, on the part of the agent. These communicative acts (which need not be spoken or written and can, for example, be gestural) persuade, solicit or incite the target.<sup>12</sup>

The considerations in this section, along with our account of procurement, lead us to the following conclusion about how the notion of creation, as it features in the incoherence objection, is to be understood. For the agent to *create* a crime is for the agent to procure an act, on the part of the target, that the agent expects will constitute a token crime. In *procuring* an act of a criminal type, the agent influences the target's will (via the agent's communicative act(s)) in order to bring about the act (which the agent intends to constitute a token criminal act).

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<sup>11</sup> For a different view, on which both entrapment and creation are conceived of more loosely, see Seamus Miller and John Blackler, *Ethical Issues in Policing* (Ashgate 2005) 107. On their conception, the mere presentation of an opportunity, such as leaving cash somewhere in the hope that the target will steal it, can count both as an act of creation and as one of entrapment.

<sup>12</sup> For a different account of procurement, which appeals to causation rather than to specific influence upon the target's will, see David Perry, 'UK: Secondary Liability in the Criminal Law', *Mondaq* ([www.mondaq.com](http://www.mondaq.com)), (accessed 26/11/18). For more on the view that procurement and causation are distinct, see (n1) REF.

### 3. *Interpreting the Incoherence Objection to Legal Entrapment*

The literature in legal philosophy includes various objections, both legal and moral, to legal entrapment.<sup>13</sup> Among them is the objection of present concern. This objection is, broadly speaking, of a logical nature, namely that there is some form of incoherence involved in legal entrapment. (At least initially, the objection also has a legal-cum-moral taint.)

What appears to be clear from the literature is that there are two broadly different ways of appealing to incoherence in cases of entrapment. The first focuses on law-enforcement officials and stays within the confines of the practice of law-enforcement. The second focuses on the criminal justice system as a whole and is interested in the integrity of the criminal process leading up from the pre-trial phase (law-enforcement/policing) to the eventual criminal trial. The idea what is meant by the charge that entrapment is incoherent appears fairly clear on the second approach. It is assumed that entrapment is a wrong or failing committed at the pre-trial stage, which would make it inconsistent (contradictory) to continue the criminal process at the trial stage.<sup>14</sup> The underlying idea, often defended in the form of the ‘integrity principle’, is that the criminal justice system is composed of different parts that have to cohere with each other and cannot be treated in isolation.<sup>15</sup> Entrapment, insofar as it is considered to be a wrong

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<sup>13</sup> For a short survey, see Jeffrey W. Howard, ‘Moral subversion and structural entrapment’ (2016) 24 *Journal of Political Philosophy* 24, 25–28.

<sup>14</sup> See Andrew Ashworth, ‘Re-drawing the Boundaries of Entrapment’, (2002) *Criminal Law Review* 161; Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, *The Trial on Trial, Volume 3: Towards a Normative Theory of the Criminal Trial* (Oxford: Hart Publishing, 2007), pp. 242-247.

<sup>15</sup> For more on the ‘integrity principle’, see also Ashworth, ‘Exploring the Integrity Principle in Evidence and Procedure’ in P. Mirfield and R.J. Smith (eds.), *Essays for Colin*

perpetrated at an early phase in the criminal process, would introduce incoherence between the different parts of the criminal justice system and thereby damage its integrity: For, why should we consider the courts to have proper standing to pass judgments on a defendant on the basis of a pre-trial investigation that was marred by the wrongful act of entrapment?

Despite its apparent clarity, there are many questions to be asked about the integrity-based interpretation of the incoherence objection.<sup>16</sup> However, our interest in this paper lies with the first kind of incoherence charge. Here the waters are much murkier. In particular, the exact nature of the alleged incoherence is, from a review of the literature on the objection so far, difficult to grasp. Moreover, the objection is stated in various ways that are apparently not all equivalent to each other by those that advocate or mention it.

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*Tapper* (Butterworths 2003); ‘Further Notes on Coherence in Criminal Justice’ in P. Asp, C.E. Herlitz and L. Holmqvist (eds.), *Flores Iuris et Legum: Festschrift till Nils Jareborg* (Iustus Vorlag, Uppsala, 2002); Andrew Ashworth and Mike Redmayne, *The Criminal Process*, (Oxford: Oxford University Press), 2010; Jill B. Hunter, Paul Roberts, Simon N. M. Young, David Nixon, *The Integrity of the Criminal Process: From Theory into Practice*, (Oxford: Hart Publishing), 2016.

<sup>16</sup> The, perhaps, two obvious questions to ask are: in what does the wrongfulness of entrapment consist and why should we accept the integrity principle? As for the latter, the previous footnote provides the relevant references. As for the former, generally speaking, the integrity principle has two parts: one that uses moral coherence (hence the ‘wrong’ spoken of is of a moral kind) and another that uses coherence without the qualifier (hence the ‘wrong’ spoken is some other kind of non-moral failing). Entrapment is normally considered to belong to this second part, the failing being that entrapment creates crime (instead of, as we shall claim, preventing it). See Duff *et al.* REF as well as note 28.

In this and the next section we demonstrate that existing accounts of the incoherence objection (henceforth confined to the first approach) are diverse and that, particularly over the question of the nature of the purported incoherence, they are far too imprecise. We aim to render more precise the various versions of the objection that are in the literature as well as some versions that, while absent from the literature, are interesting theoretical possibilities. To do so, we begin by considering Gerald Dworkin's advocacy of the objection (which, to our knowledge, is also the oldest documented formulation of the objection). We think Dworkin is the best to start with since he explicitly and in some detail puts forward the objection. Discussing and interpreting the objection as it appears in his work makes it possible for us to settle on a new and relatively precise specification of the objection that, we argue, is the candidate in the list with the best prospect of rendering the objection plausible. In the next section we then discuss other existing versions of the objection, of varying degrees of complexity, to show how their best (or only) defensible interpretation is the one put forward by us in this section.

#### *A. Dworkin's Incoherence Objection*

Gerald Dworkin, as noted, supports the objection. His account of it appeals to the notion of the creation of crime and, more specifically, to that of criminal procurement.<sup>17</sup> His initial statement of the objection appears to be relatively clear:

the law is set up to forbid people to engage in certain kinds of behavior. In effect it is commanding 'Do not do this.' And it shows that it is commanding, as opposed to

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<sup>17</sup> Dworkin (n3) 30–34.

requesting or advising by saying that it will impose sanctions on those who refuse to conform. [...]

But for a law enforcement official to encourage, suggest, or invite crime is to, in effect, be saying ‘Do this.’ It is certainly unfair to the citizen to be invited to do that which the law forbids him to do. But it is more than unfair; it is conceptually incoherent.<sup>18</sup>

This passage gives the impression that the incoherence is a case of *utterance contradiction*. Two utterances are contradictories when one is the negation of the other. Among utterance contradictions, we may distinguish between *statement (or assertion) contradiction* and (unconventionally, but usefully in the context) *command contradiction*. A contradictory pair of statements (or assertions) cannot be true together and cannot be false together. If two statements (or assertions) are in contradiction, then exactly one of them is true. A contradictory pair of commands, requests or bans cannot both be complied with, or both be flouted, by the same agent at the same time. If two commands are in contradiction then for any given agent at a given time, the agent is compliant with exactly one of them. While Dworkin appears to depict the incoherence at issue as a form of *command contradiction*, his suggestion readily lends itself to construal, as follows, as involving a deontic-logical *statement contradiction*. On this construal, when the agent entraps, the agent suggests that the entrapped act is permissible. Given that the law debars acts of that type, it logically implies the impermissibility of the entrapped act. Thus, what the agent suggests contradicts what the law implies about the permissibility of the type act. This statement-contradiction interpretation, however, suffers from the flaw that the attempted (or successful) procurement of a token act of a criminal type

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<sup>18</sup> Dworkin (n3) 32.

need not (and typically will not), involve any communicative act (or series of such acts) on the agent's part the content of which implies the legal permissibility of the entrapped act. The entrapping agent will typically not be concerned to convey any message, or impression, to the target that the entrapped act is not illegal. Would a command-contradiction interpretation fare better? Strictly speaking, it would not, and for a similar reason. The procurement of a token act of a criminal type involves having a certain kind of influence, as explained in section 2 above, on the will of the target. To command the target to commit the act is only one of many ways in which to attempt (or to achieve) this. So, to attain a plausible conception of the sort of incoherence involved in Dworkin's version of the incoherence objection, we require a notion weaker than that of *command contradiction*.

In any case, in so far as our concern is with understanding wherein, precisely, the supposed incoherence of legal entrapment lies on Dworkin's account, the above quotation sets us off, according to Dworkin's own subsequent remarks in the piece, on the wrong path. While the quotation suggests an utterance-contradiction account of the alleged incoherence, Dworkin almost immediately announces that the incoherence objection is not to be construed this way. Regrettably, the piece then characterizes the incoherence that is supposedly involved only in negative terms, leaving us none the wiser as to why, exactly, legal entrapment is supposed to be incoherent and wherein the incoherence lies.<sup>19</sup> A possible escape route from this situation might emerge, we believe, from a little more reflection on the command-contradiction interpretation. Given that the act that the agent intends the target to commit is of a criminal type, it is an act of a type that is legally prohibited. Thus, the law commands that it not be committed. The agent's communicative act (or series of such acts) of procurement is of such

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<sup>19</sup> Dworkin (n3) 32–33. Dworkin's negative characterization of the incoherence consists in the denial that it involves either a 'literal' or a 'pragmatic' contradiction.

content as to be intended to encourage the target to commit the act. It expresses a desire, on the agent's part, for the target to break the law. It is the agent's *desire* and the law's *requirement* that fail to cohere with each other: for the target cannot simultaneously satisfy the requirement of the law (which debars acts of the type that the agent wants the target to commit), and satisfy the agent's desire that the target should commit a token act that is of that type.<sup>20</sup> As a party out to entrap, the agent has a desire that is contrary to that concern: for the satisfaction of the desire precludes the satisfaction of the concern.

We offer this observation as a way of trying to convert Dworkin's incomplete, and wholly negative, characterization of the incoherence into something more precise. We believe, and argue over the course of this article, that the best prospects for the incoherence objection indeed lie in the appeal to the notion of *practical* incoherence.<sup>21</sup> In order to cast the objection in its best light, proponents of the incoherence objection ought to allude not to a formal or utterance contrariety, but rather to the notion, recognized by Aristotle and within the Aristotelian philosophical tradition, of *contrariety of ends*. Two ends, such as enforcing a party's observance of a law and encouraging that same party to disobey that law, are contraries when the attainment of one of them by an agent necessarily precludes the simultaneous attainment, by the agent, of the other.

This is, however, still not precise enough. In particular, we need to get a grip on exactly what the above contrariety of ends consists in: what exactly are the contrary ends the entrapping

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<sup>20</sup> Dworkin (n3) 32 remarks that 'it is not the purpose of officers of the law to encourage crime' and he holds, further, that it is contrary to their purpose for them to do so. Thus, we take his to be what we will call a 'functional' version of the incoherence objection.

<sup>21</sup> This, as we shall argue later, opens entrapment to the further charge of forcing law-enforcement agents to be practically irrational.

agent possesses? We can get to an answer by noticing, first, that Dworkin's ultimate position does not seem to be that entrapment is always incoherent. Instead, he appears to hold that incoherence enters the picture when law-enforcement agents attempt to entrap any individual whom they do not have good reason to believe to be engaging, already, in acts of the same type as the intended token criminal act.<sup>22</sup>

Dworkin claims that random entrapment involves testing virtue, rather than detecting crime.<sup>23</sup> This is a restricted version of Justice Frankfurter's position that entrapment *creates*, rather than *detects*, crime.<sup>24</sup> To entrap an agent, A, that has not already been engaging in committing crimes of a given type, C, is to create a token crime that manifests neither prior nor ongoing criminal conduct of the same type. Dworkin appears to hold that to entrap into committing an act of type C a target that is already engaged in criminal conduct of type C genuinely counts as detection (rather than testing of virtue). He seems to regard testing of virtue as inconsistent with the detection of crime for this reason: to test virtue is, in Dworkin's view, to create, rather than to detect, that crime when the target fails the test. It seems, then, that, for Dworkin, creation of crime occurs when a target is entrapped into committing a crime that is

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<sup>22</sup> Dworkin (n3) 33. We use hesitant language in making this claim about Dworkin because our interpretation of what he says relies on connecting incoherence to impermissibility. Namely, we reason that if Dworkin thought that entrapment were always incoherent then, plausibly, he would think it impermissible in all circumstances too. Instead, his position appears to be that entrapment is impermissible only in cases we describe in the text ('virtue testing'). Ultimately, though, whether we are right in our interpretation of Dworkin makes no difference to the cogency of our argumentation.

<sup>23</sup> Dworkin (n3) 33.

<sup>24</sup> *Sherman vs United States*, 356 U.S. 359 (1958).

of a type none of whose tokens the target was already engaged in committing. Dworkin's ultimate position is that it is the use of entrapment against people that are not already suspected of committing crimes of the relevant type that is incoherent: for, on Dworkin's view, creation is inconsistent with detection, and detection, but not creation, is a legitimate aspect of law enforcement. In short, the contrary ends we have been looking for on the part of the entrapping agent are those of detection (of crime), on the one hand, and of creation (of crime), on the other.

Now, to entrap a target that has not previously committed a crime of type C is not necessarily to intend to test that agent's virtue. The police might do it, for example, because they want to increase the number of convictions they are making in a given period of time. The nub of Dworkin's objection should charitably be understood, therefore, as that the creation of a token crime, committed on the part of a target that does not already practise that type of crime, is inconsistent with the role of the police as law-enforcement agents. There is a question also, however, about whether it is really detection with which such cases of the creation of crimes are to be held inconsistent.

Recall that, on our account, when an agent procures a crime the agent has a certain sort of influence upon the target's will. To procure a crime is to bring it about through solicitation, persuasion or incitement, that another commits that crime. Acts of solicitation, persuasion and incitement are communicative acts: these include, but are not restricted to, speech acts.<sup>25</sup> To

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<sup>25</sup> Flagging down a taxi, for example, is a communicative act that is not a speech act. In this respect, it differs from a gesture of a sign language such as British Sign Language. The gestures of BSL are part of an overall system of communication that possesses both a syntax and a semantics. It seems to us that this cannot be said of such gestures as flagging down a taxi, waving or giving the thumbs up, at least when these gestures are not parts of an overall system of communication in which the symbols involved are type homogeneous (e.g., they are all

have procured a crime that a target has committed is to have inclined, via the content of such a communicative act, or series of such acts, the target's will towards committing that token crime. Now a target may be inclined to commit a given type of crime because, for example, they are already regularly committing token crimes of that type. It is nevertheless possible for an agent to entrap a target with the general predisposition to commit crimes of a certain type into committing a token crime of that type. Even a will that is generally disposed to committing crimes of a certain type need not be inclined, whenever an opportunity to commit such a crime with an apparently low risk of being caught is presented, to take up that opportunity. In fact, even a record of convictions for crimes of a given type is strong evidence only of predisposition to commit crimes of that type: it is not the case that, for every token of that type, it is strong evidence of a predisposition to commit the token. It is therefore unclear whether the incoherence objection can really be restricted, as Dworkin seeks to have it, to cases of the 'virtue testing' of those that were innocent of the type crime prior to the entrapment scenario.

Let us clarify this further by providing a more formal representation of Dworkin's position. Dworkin seems to appeal to the following principles:

1. When legal entrapment occurs, the target is either already reasonably suspected of engagement in crimes of the same type as the token entrapped crime, or not so suspected.

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inscriptions, or phonemes, or gestures) and in which there are formation rules for strings of them. A case involving the flagging down of a taxi is *Nottingham City Council v Amin* [2001] 1 Cr App R 426. The case is classified as one of entrapment by Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th ed, CUP 2010), p. 287.

2. If the target is not so suspected, then the token crime is created (whether or not it is traced to the target).
3. If the agent is so suspected, then the token crime is detected (on the assumption that it is traced to the target).
4. One and the same token criminal act cannot be both created and detected.
5. Creation and detection are contrary functions: thus, the creation of a crime by a law-enforcement agent is inconsistent with their role of detecting crimes.

Principle 1 is just an instance of the law of excluded middle, which is uncontroversial in the context. Principle 2 follows from the fact that to procure a crime is to bring it about through the right sort of influence upon the target's will. However, principle 3, we have argued above, is not possible to maintain. To get around this, one might argue that it should be supplanted by the principle that to entrap an agent that is already suspected of committing crimes of a given type is to attempt to establish that the target commits crimes of that type: in other words, the detection is of a type-crime on the target's part rather than of the token-crime that they have actually been entrapped into committing. The trouble with this is that it appears to be a case of inductive reasoning from one case. Evidence that the target is inclined to commit crimes of that type would have to be presented, other than just the fact that they actually committed the entrapped crime, if the case is to be substantially different from entrapping a previously unsuspected target into committing a token crime of the same type. If the agent entrapped the target then, whichever of those two cases we are dealing with, the agent inclined the target towards committing a token act of a criminal type (and thus, if that act was criminal, created the crime).

So, there is a problem already with principle 3 but, more importantly, the above points to a more fundamental problem with Dworkin's apparent position: principle 4 is false. When

agents entrap, they help to bring about (and so create) a token crime. No facts about the target, including a predisposition to commit criminal acts of the same type, or a history of doing so, can change this. If the target is already willing to commit the token crime, even before the agents attempt to procure it, then the agents have not relevantly influenced the target's will: the case is not one of entrapment because the procurement condition is not met. If the target is not already willing to commit the token crime then, no matter how strongly predisposed the target is, in general, to commit crimes of that type, it is possible for the agents to entrap the target (by having the right sort of influence on the target's will). If they do entrap the target then they have procured, and thus created, the crime. Of course, they may also find evidence that links the target to the crime, in which case they detect it too. The predicates 'is a created token act of a criminal type' and 'is a detected token act of a criminal type crime' are compatible. The creation/detection incompatibility, if there is one, does not lie at the level of the target's token act. If creation and detection are contrary functions, then this is not because it is impossible both to create and to detect the same token act of a criminal type: on the contrary, doing this is clearly possible. We conclude, therefore, that the incoherence objection cannot succeed if it appeals to the alleged incompatibility of creation and detection at the level of the target's token act.

An agent can both create and detect a given token act of a criminal type: indeed, that is precisely what happens in many successful cases of entrapment. To make incoherence work, we thus need to find some other contrariety in the agent's ends. Let us go back to our original idea: it is the agent's desire that the target should commit an illegal act and the law's injunction against that act that are incompatible: for the satisfaction of one necessarily precludes the satisfaction of the other. Dworkin's incoherence objection, when interpreted in the most charitable way, consists, we take it, in the claim that the function of law enforcement is incompatible with, and therefore subverted by, satisfaction of the entrapping agent's desire

(since the satisfaction of that desire necessarily excludes conformity, on the part of the target, to the law). Since, in the cases of entrapment that are of concern to us, it is impossible to entrap without having that desire, entrapment itself is functionally incompatible with law-enforcement. Now, we know that the agent's desire that the target break the law amounts to creating crime; this much is clear. What is not clear is what stands on the other side: if the relevant function of law-enforcement is not one of detection, then what is it?

The real incompatibility, we submit, is not between creation and detection, but between creation and *prevention*. It is impossible for an agent both to intentionally create and to prevent a token crime: if it has been created then it has not been prevented; if it has been prevented then there is no such token (and so nothing that has been created). This insight enables us to fasten on the sort of incoherence that is genuinely relevant to Dworkin's incoherence objection. Since it is impossible for an agent both to intentionally prevent and to create a given token crime, but possible for that agent to do neither, we are dealing with a form of contrariety rather than a form of contradiction. Agents who procure a token act of a criminal type create it, and have intended to create it. They have not intended to prevent it. The law expresses the intention that the act should not occur, while the act of entrapment expresses the intention that it should. More widely, we take it that the hidden root of Dworkin's incoherence objection appeals to a form of functional contrariety. Accordingly, it claims that it is a function of law-enforcement, never apt for suspension in favour of any function to the contrary, not to create token crimes (and, in most cases, to prevent crimes).<sup>26</sup> Entrapment is contrary to this function because to

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<sup>26</sup> We have opted to not use the stronger formulation: that the relevant function is to prevent crime. There are cases that stop us from adopting this formulation. For example, there will certainly be many occasions when the police officer has to choose between preventing two crimes, so there is one crime that he/she doesn't prevent. Or, to take a stronger example, there

entrap is to create a crime. Unlike Dworkin, we intend this reading of the objection, to cover all cases of entrapment. For, though there are instances of entrapment when the creation of a token-crime is intended to promote, as a consequence, the prevention of further tokens of the same type (that is, to take an example, when an officer entraps a mafioso with the intended consequence of preventing him from committing more crime in the future), it still remains the case that the entrapping agent's purpose is to prosecute the target for the token-crime that is created. While the consequences (intended or not, foreseen or not) of entrapment might matter for its moral assessment (say, from a consequentialist point of view), they have no relevance for understanding the alleged incoherence of the entrapping agent's act.

In short, we submit that the incoherence objection must rest upon the contention that law-enforcement agents have a general duty not to create crimes. This is not because, in creating a crime, they become criminally liable themselves (even if they do). Rather, it is because creation is incompatible with prevention. Prevention, in turn, is a general duty of law-enforcement agents. Of course, they cannot always be focusing their energies on crime prevention. Nevertheless, they can always abstain from intentionally creating crimes.

The detection of an entrapped crime does not, merely because the crime is created, fail to be a case of detection at all. Rather, the detection of an entrapped crime is detection of a created crime (and so incompatible with the general duty to prevent crime). What the proponent of a Dworkin-style incoherence objection should hold is not that detection and creation are mutually exclusive. Rather, it is that the *right type of detection* is the detection of uncreated crimes.

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are crimes whose prevention would not be in the public interest: the police allow to travel to Switzerland those taking a loved one to commit suicide there. Although in this case the police don't prevent the crime they don't create it either.

*B. Summing Up (so far)*

In the course of our discussion of Dworkin, we have come across the following forms of incoherence and weighed each of them up as interpretations of the alleged incoherence. Let us summarize these interpretations and our evaluations of them.<sup>27</sup>

*Statement contradiction.* According to this interpretation, when the agent entraps they state that a type of action that is legally debarred by statute or common law is, in fact, legally permissible. This is not a plausible interpretation of Dworkin's objection, because it is untrue that the entrapping agent must make, or even suggest, any such statement.

*Imperative contradiction.* This interpretation has it that, when entrapping, the agent enjoins the target to commit an act that is of a type the criminal-justice system enjoins people not to commit. While perhaps more plausible than *statement contradiction*, this objection is also based on an exaggerated generalization—an entrapping agent need not go so far as to *enjoin* the target to commit the act. If the target's act has been procured by solicitation, persuasion or incitement on the agent's part, then it does not follow that the agent has specifically enjoined the target to commit it: even if incitement constitutes or involves enjoining the target to commit the act, solicitation and persuasion can be subtle forms of encouragement that need not involve

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<sup>27</sup> We do not claim that these interpretations exhaust the possibilities. For example, it might be claimed that the entrapping agent's utterance is contrary to one of the agent's law-enforcement functions, or that it is the utterances of the judge and/or the prosecution, if the case gets to court, that are contrary to those of the agent. We admit that these possibilities, among others that we have not discussed, are in logical space (although some of them are probably covered by our setting aside the integrity-based form of the objection). We have concentrated on what we take to be the more plausible candidate interpretations of the incoherence objection.

going so far as to enjoin the target to commit the act. For example, a communicative act that is intended to ‘nudge’ the target and succeeds in doing this can procure the act.

The two forms of contradiction listed so far are both cases of *utterance-contradiction*. This provides what is the strongest form of the incoherence objection from a logical point of view, but which is consequently the weakest in terms of philosophical credibility. When two utterances contradict each other this situation cannot be changed by the addition of further utterances. It could easily be written in statute that, while it is a criminal offence for civilians to abet or encourage someone in committing a crime, the police may do so in the context of attempting to prosecute someone. If the incoherence objection had to be interpreted as involving an allegation of utterance contradiction, then it would be utterly implausible. Moreover, other, more plausible, interpretations are available. Thus, no utterance-contradiction interpretation should be adopted.

*Functional contradiction/contradiction of ends.* When legal entrapment occurs, at least one of the agent’s functional roles, such as the detection of crime or its prevention, is supplanted by an end (the procurement of a criminal act) that contradicts the function (because procurement creates a token act of a criminal type). Since, as we have argued, detection and prevention are not contrary categories, it follows that they are not contradictory categories. Also, preventing crime and procuring crime are not *contradictory* functions or ends, because it is possible, at a given time, for an agent to be pursuing neither. Nevertheless, we consider a functional form of incoherence to be closer to what is required in order to render Dworkin’s objection as plausible as possible.

*Functional contrariety/contrariety of ends.* When an agent entraps, the agent pursues an end (the encouragement of a target to commit a crime) that cannot be pursued (by the same agent) at the same time as the agent’s end of enforcing the law. The agent creates a token act of a criminal type, and this is contrary to the end of preventing such acts. The latter end, in

turn, is one that the agent has, whether it is present to the agent's mind or recognized in their actions and intentions, in virtue of the agent's offices as a law-enforcement agent. It is part of the functional role of law enforcement to prevent, and so not to create, acts of a criminal type. This is the interpretation of Dworkin's version of the incoherence interpretation that we have defended, on the grounds that the assertions it makes about the nature of legal entrapment scenarios are, among those of the candidate interpretations, the most plausible. Unlike earlier candidates, this interpretation does not appear to rest upon a false empirical generalization about the behaviour of entrapping agents.

#### *4. Other (Better) Interpretations of the Incoherence Objection?*

Dworkin is not the only one who puts forward (some version) of the incoherence objection in the literature. In this section we survey these alternative formulations to see if any of these fares better than the interpretation put forward by us in the previous section. As foretold, we argue that this is not the case: either these alternative formulations do not give us a workable version of the objection, or they are best interpreted along the lines suggested above.

##### *A. Ashworth's Incoherence Objection*

Andrew Ashworth is another prominent supporter of the incoherence objection.<sup>28</sup> The following remarks suggest a version of the objection:

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<sup>28</sup> Ashworth, see note 14, is also a supporter (in fact, perhaps the most prominent and explicit supporter) of the integrity-based form of the objection, which we set aside at the start of the previous section. Note that the suggestions we put forward on behalf of Ashworth can be seen as ways of spelling out in more detail the wrongness of entrapment, which then can be used to

[When entrapment occurs] 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, 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, 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.<sup>29</sup>

There are several suggestions in play here. We rephrase them in our own language, and by reference to the account of legal entrapment given in section 1:

*Rule breach:* a law-enforcement officer that engages in entrapment breaches the internal rules of the officer's law-enforcement agency.

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introduce incoherence also on the level of criminal justice system taken as a whole thereby giving us the integrity-based form of the incoherence objection.

<sup>29</sup> Andrew Ashworth, 'What is Wrong with Entrapment?', (1999) *Singapore Journal of Legal Studies* 293, pp. 310-311. See also Ashworth, 'Re-drawing the Boundaries of Entrapment', (2002) *Criminal Law Review* 161 (notes 36-8 focus in particular on the contention that legal entrapment involves criminality on the part of the agent; for more on this see also Glanville Williams, *Criminal Law: the General Part* (2nd ed. 1961), at 781-782).

*Criminality through complicity*: to procure a crime entails being complicit as an accomplice to the crime; entrapment involves procurement; so, entrapment involves criminal complicity.

*Criminality through incitement*: usually, entrapment involves incitement to commit a crime; incitement to commit a crime is itself a crime.

Each of these suggestions can be construed as providing a reason why legal entrapment might be considered, at least under certain circumstances, incoherent.

If *rule breach* is intended as an empirical generalization, then it is easily seen to be false. For example, there are police officers in certain jurisdictions, e.g. China, in which neither the force itself nor the law proscribes entrapment as being against the rules or a form of misconduct.<sup>30</sup> In order to get around this objection, one might distinguish, as D'Agostino (1981) does in the case of games, between formal rules, which are codified and which tend to be documented (e.g., by being recorded in written form), and informal rules, which, although they govern practice, do so as a matter of 'custom and practice', or as a matter of 'ethos' without being formally codified or documented.<sup>31</sup> While it may be true that 'custom and practice' and/or 'ethos' within some law-enforcement agencies may tell against legal entrapment, even when no formal rule debars it, *rule breach* remains objectionable if construed as an empirical

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<sup>30</sup> For the case of China, see Sijia Zhou, 'Research on Entrapment in China—With Reference to the Experience in Canada', LLM Thesis, Institute of Comparative Law, McGill University, Montreal, Quebec, August 2013.

<sup>31</sup> Fred D'Agostino (1981) 'The Ethos of Games', 8 *Journal of the Philosophy of Sport*: pp. 7-18. Thanks to REDACTED for this reference.

generalization about informal rules. For in any jurisdiction in which legal entrapment breached no formal rule, and in which it was practised with impunity (both under the law and under the internal disciplinary procedures of the relevant agencies), it would appear that it would not be in breach of any informal internal rules—construed in terms of ‘custom and practice’ and/or ‘ethos’, rather than in terms, for example, of the demands of morality or the mores of wider society<sup>32</sup>—governing the behaviour of law-enforcement agents.

Since *rule breach* is implausible if interpreted as an empirical generalization, it is pertinent to ask whether it expresses any more plausible point against legal entrapment. Our answer is that *rule breach* appears more plausible when interpreted as making the same essential point as Dworkin’s ‘functional’ version of the incoherence objection. On this construal, it is a rule internal to the practice of law-enforcement, rather than either a formal or informal rule (after the fashion of a D’Agostino-style classification), that law-enforcement does not involve entrapment.<sup>33</sup> This is for the subsidiary reason, not stated, but implicit in the above statement of *rule breach*, that to entrap is to procure a token crime, which procurement is incompatible

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<sup>32</sup> How about informal, uncodified rules of practice that have moral foundations? Arguably, democratic politics is largely governed by such rules of conduct. See Janos Kis, *Politics as a Moral Problem*, Budapest: CEU Press, 2008, pp. 133-140. However, our claim about the falsity of empirical generalization still stands: there is no reason to hold as a matter of fact that different jurisdictions all have such morally justified internal rules in place.

<sup>33</sup> One might be tempted to construe this rule as a ‘practice rule’ in John Rawls’s sense (in his ‘Two Concepts of Rules’, *The Philosophical Review* 64:1, pp. 3-32). However, as we note below, it is perfectly possible to conceive of a law-enforcement practice that has only the function to make arrests (detect crime). Hence this rule cannot be taken to constitute the practice of law-enforcement as Rawls would have it.

with the function of law-enforcement, as this latter may legitimately involve preventing, but does not involve creating, (token) criminal acts. Since rule-breach is intended as a hard generalization that debars all acts of legal entrapment on the grounds of their alleged incoherence, it must appeal to a factor that is common to all cases of legal entrapment. Neither breach of formal rules nor breach of informal rules can, as we have explained, be such a factor. In identifying procurement as this factor, we are able to advocate, to some extent, on Ashworth's behalf.

There is another drawback, however, with *rule breach* as Ashworth states it. This is that it is too narrow to construe rule breach as happening when an entrapping law-enforcement agent's conduct is inconsistent with the rules of the law-enforcement agency to which the agent belongs, or, as we prefer, as inconsistent with a principle internal to the practice of law-enforcement. To see this, note that a law-enforcement agency could be established whose sole function was to make arrests, with law-enforcement's other functions being carried out by other agencies. There are no rules internal to the practice of making arrests that debar the creation of token crimes. This drawback can be remedied by widening the sort of rules involved. A very wide way of doing this would be to include all and only those rules that are internal to all and only those functions that the practice of law-enforcement has, rather than to any particular branch of it or agency responsible for it.<sup>34</sup>

As a result of the above discussion, a full argument can now be reconstructed based on considerations inspired by the above quotation from Ashworth:

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<sup>34</sup> It might be tempting to extend things even further, so that it is rules that belong to the practices internal to the criminal justice system as a whole, but this would be going too far.

1. It is a rule internal to the practice of law-enforcement that the law-enforcement agent does not create a token crime. (Premise)
2. Whenever a law-enforcement agent entraps, that agent creates a token crime. (Premise)
3. Whenever a law-enforcement agent entraps, that agent breaches a rule that is internal to the practice of law-enforcement. (From 1, 2)
4. To breach a rule that is internal to a practice in which one is involved is to engage in conduct that is incoherent. (Premise)
5. Whenever a law-enforcement agent entraps, the agent engages in conduct that is incoherent. (From 3, 4)

Premise 2 comes from the previous section and premise 4 follows from our discussion above: it is incoherent to pursue an end (crime-creation) that is contrary to another end (crime-prevention) the agent has when enforcing the law. Premise 1 can be questioned but for our dialectical purposes it is enough to see that either the premise is stated in this way or *rule breach* cannot be given a defensible interpretation.

Let us now turn to Ashworth's other suggestions. *Criminality through complicity* can also be developed into a more substantial argument, as follows:

1. The prevention of (token and type) criminal acts is a general end/function of law-enforcement. (Premise)
2. All acts of entrapment are acts that procure token crimes. (Premise)
3. For every token criminal act that one procures, one is an accomplice to that token criminal act. (Premise)

4. For a law-enforcement agent to be an accomplice to a token criminal act is for that agent to be acting in a manner that is of a criminal type in respect of that token criminal act. (Premise)
5. To act in a manner that is of a criminal type in respect of a token criminal act is culpably to fail to have prevented an action that is of a criminal type. (Premise)
6. Whenever a law-enforcement agent entraps, the agent is an accomplice to a token criminal act. (From 2, 3)
7. Whenever a law-enforcement agent entraps, the agent acts in a manner that is of a criminal type in respect of a token criminal act. (From 4, 6)
8. Whenever a law-enforcement agent entraps, the agent culpably fails to have prevented an action that is of a criminal type. (From 5, 7)
9. Whenever a law-enforcement agent entraps, the agent's conduct is inconsistent with a general end/function of law-enforcement. (From 1, 8)

Premises 1 and 2 have been covered in our preceding discussion and we assume them to be correct here. The remaining premises can all be questioned but this isn't a task we will carry out here.<sup>35</sup> For, as with *rule breach*, our dialectical purpose here is not to defend the above argument but to show that the only plausible interpretation of *criminality through complicity* is one that involves our understanding of the incoherence objection. And this much is clear from

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<sup>35</sup> Premise 5, we think, could be defended by using Douglas Husak's 'control principle' as it appears in his (1987) *Philosophy of Criminal Law* (Totowa, NJ: Rowman and Littlefield). Premise 4 we regard as relatively unproblematic and thus it seems to us that the crucial premise is 3. To assess it, one must clarify what it is to be an accomplice to a token criminal act and this isn't a task we can (and need to) take up in this paper.

the above statement of the argument. When *rule breach* and *criminality through complicity* are spelled out in their more developed versions, the differences between them emerge as minimal. Crucially, they both rely upon that contention that the prevention of crimes, or at least the abstention from the creation of crimes, is a general function/end of law-enforcement, and that a law-enforcement agent who entraps therefore engages in conduct that is incoherent (since he/she has the contrary ends of crime-creation and crime-prevention). The main difference between the two arguments is that *criminality through complicity* goes further than *rule breach* in that it also alleges a form of criminality. However, this additional aspect of *criminality through complicity* (and the correctness of the corresponding grounding premises in the argument) are immaterial to our dialectical purposes in this paper.

Finally, unlike *rule breach* and *criminality through complicity*, as they were originally paraphrased, *criminality through incitement* provides an objection to some but not all acts of entrapment. According to *criminality through incitement*, entrapment usually involves incitement to commit a crime and that incitement is itself a crime. Now, if the reference to incitement here is replaced by a reference to procurement (which includes, but is not limited to, incitement), then the resultant objection, *criminality through procurement* extends to all acts of entrapment (since, we take it, they all involve procurement). There is nothing to be gained from advancing *criminality through incitement* as an objection separate from *criminality through complicity* given the greater generality of *criminality through complicity*. When that same generality is obtained, by replacing *criminality through incitement* with *criminality through procurement*, the latter appears to be a mere variant of *criminality through complicity*.

The upshot of our discussion of Ashworth's version of the incoherence objection is that it, like Dworkin's objection, is most plausible when interpreted as resting on the appeal to a form of practical incoherence stemming from a contrariety of ends. Our interpretations of what these

two theorists have to say about the incoherence of entrapment are thus in a relationship of mutual support.

*B. Howard on the Incoherence Objection*

Jeffrey Howard states the incoherence objection (without endorsing it) as follows: ‘Entrapment is incoherent; the state acts inconsistently when it insists that citizens adhere to the law, but then takes measures to induce them to break it.’<sup>36</sup> On this construal, the alleged incoherence appears to be between, on the one hand, *pronouncements* or *utterances* of the state that citizens must adhere to the law and, on the other, *actions*, on the part of some of its agents, that are designed to encourage some citizens, in some circumstances, to break the law. We can call the general type of incoherence that appears to be at play in Howard’s statement of the objection ‘*utterance/action contrariety*’.

We see three ways to read Howard’s words above. It is familiar, as in the case of the person who does not practice what he or she preaches, that an individual agent’s pronouncements may be at odds with the agent’s behaviour. A television evangelist, for example, might (as has been known) condemn adultery in public but practice it in private. This sort of incoherence is hypocrisy. Suppose, for now, that the state (rather than merely its agents) can act. The analogy with the television evangelist is only straightforward if the state, in inducing someone to break the law, thereby *does* what it itself condemns (namely breaking the law). That is, the question is whether legal entrapment is a crime itself. In discussing Ashworth’s *criminality through complicity (incitement)*, we saw that this might be the case. Understood in this way, Howard’s formulation could indeed tell us something new about the incoherence involved in legal entrapment. However, it would only do so by adding another layer to the incoherence charge

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<sup>36</sup> Ibid., 26.

understood along the lines of *criminality through complicity (incitement)*. In other words, the incoherence-as-hypocrisy reading that we take now Howard to be putting forward is parasitic upon our own interpretation of the incoherence objection (in effect, what we get is a nested structure of incoherence problems: legal entrapment involves practical incoherence understood as a contrariety of ends, as well as, through its criminality, hypocrisy, understood as utterance/action contrariety).

Another problem with this interpretative proposal is that, as we made clear, *criminality through complicity (incitement)* requires substantial philosophical defence, which we haven't provided (because we didn't have to). In short, the criminality of legal entrapment is far from obviously clear.<sup>37</sup> And in fact, Howard's exact formulation of the charge doesn't seem to assume that legal entrapment is a crime: he speaks not of the state breaking the law but of the state *encouraging* its citizens to break the law. This suggests that the incoherence, if any, of legal entrapment is not like that of the television evangelist mentioned earlier. Rather, it is more like that of a television evangelist who preaches against adultery but, without committing it, intentionally tempts someone else to do so, with the aim that this person will succumb to the temptation. Now, intentionally to tempt someone, in this manner, to do something that one

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<sup>37</sup> It is important that one cannot get to this conclusion in the 'easy' way by demanding, on pain of inconsistency, that if entrapment by a civilian is a crime (which we can assume for now to be the case) then so should entrapment by a law-enforcement agent be a crime. This is because the special responsibilities of law-enforcement agents come with a certain amount of special licence that they have in virtue of their offices as law-enforcement agents. For example, there is no inconsistency in its being the case both that the state insists that drivers should not exceed the speed limit and that the police may do so in high chase whilst in pursuit of a suspect who is driving away from them.

declares to be wrong (in our case: criminal) might be hypocritical, criminal as well as morally wrong. However, while we are willing to keep an open mind on these charges and even assuming that the first is correct, hypocrisy of this kind doesn't differ in any significant extent from the way we have viewed entrapment so far and have already provided an interpretation of in terms of practical incoherence. Hence nothing new is added to our discussion in this way and we can therefore disregard this interpretation.

Both interpretations discussed so far assume that when legal entrapment occurs, it is the *state* that is acting. How about giving up this assumption? In this case, rather than construing the incoherence objection in terms of the state's doing something that is inconsistent with its pronouncements, which would involve entanglement in the issue of whether the state itself is an agent, it is perhaps better to view it in the following terms. When law-enforcement agents entrap, one group of state agents, namely the law-enforcement officers (who are part of the executive), encourages the target to do something that another group of state agents, constitutive of the legislature, has deemed (in statute) to be legally impermissible and which a third group of state agents, consisting of the judiciary, might deem (e.g., on the basis of case law) to be impermissible under the law. Read in this way, the incoherence involved in legal entrapment wouldn't be one of hypocrisy, which focuses on one agent only, but would appear on the level of the criminal justice system. However, this way of reading Howard's words would be reading it as just another, albeit perhaps weaker, formulation of the integrity-based form of the incoherence objection, which we have set aside at the start of our discussion.<sup>38</sup>

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<sup>38</sup> Ho (n3), p. 75, though he does not specifically discuss or draw out the incoherence objection, explicitly speaks of integration in this regard. How weak this version of the integrity-based version of the objection is depends on exactly where and how incoherence appears in the system.

#### 4. *A New Statement of the Incoherence Objection*

Our proposal in this paper is that the incoherence objection is best formulated as using the distinction between prevention and creation of crime that, in the case of law-enforcement agents, gives rise to a contrariety of ends and thus a kind of practical incoherence. In particular, when an agent entraps, the agent pursues an end (the encouragement of a target to commit a crime) that cannot be pursued (by the same agent) at the same time as the agent's end of enforcing the law (which the agent has in virtue of his/her role as a law-enforcement agent). Using this understanding of incoherence as involved in cases of legal entrapment, we can now provide a more exact formulation of the incoherence objection, as follows:

1. The prevention of crimes<sup>39</sup> is a general function of law-enforcement. (Premise)
2. If the prevention of crimes is a general function of law-enforcement, then law-enforcement agents must neither intentionally bring about, nor intentionally help to bring about, token crimes. (Premise)
3. It is consistent with the general functions of law-enforcement for a law-enforcement agent to entrap a target. (Assumption)
4. When an agent entraps a target, that agent intentionally procures a token crime. (Premise)
5. If an agent intentionally procures a token crime, then the agent intentionally brings about, or intentionally helps to bring about, that token crime rather than preventing it. (Premise)

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<sup>39</sup> If one endorses Husak's control principle (note 35), then here and elsewhere where needed one should add that these are cases over which the agent has control. Since we have opted not to discuss (endorse) this principle, we have omitted including this clause in the argument.

6. When an agent entraps a target, the agent intentionally brings about, or intentionally helps to bring about, a token crime, rather than preventing it. (From 4, 5)
7. Given the general functions of law-enforcement, law-enforcement agents must not bring about, or intentionally help to bring about, token crimes. (From 1, 2)
8. Given the general functions of law-enforcement, law-enforcement agents must not entrap. (From 6, 7)
9. It is not consistent with the general functions of law-enforcement for a law-enforcement agent to entrap a target. (From 3, 8, *reductio ad absurdum*)

Assuming that the definition of entrapment upon which this argument draws is correct, the controversy is likely to centre upon Premise 2 (which spells out what we intend Premise 1 to mean based on our understanding of incoherence as a form of contrariety of ends). Note that the consequent of Premise 2 is normative, for it states what law-enforcement agents *must not* do. The question is how this normativity is to be construed.

It is tempting to say that the normativity in question arises simply from the incoherence involved. However, it would make the incoherence objection stronger if we could go beyond this and tell a story about why this kind of incoherence is problematic. Consider the following contrast. Many of us have contrary ends that we cannot simultaneously pursue: I would, while writing this, also like to be out in nature hiking in the nearby mountains but I cannot do both at the same time. (After all, desires are not like beliefs: we can desire that *p* and *not-p* at the same time.) So, it is natural to ask: what's wrong practical incoherence understood as a contrariety of ends?<sup>40</sup>

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<sup>40</sup> Notice the corresponding case with the integrity-based form of the incoherence objection. Those who advocate the objection don't just simply say that there is incoherence introduced

Now, some of the usual candidates we can discard, certainly without further substantive argumentation provided to the contrary. Thus, the normativity of the prohibition on entrapment is a matter neither of law nor, in the first instance at least, of morality. Rather, it is to be taken to be alluding to a requirement of practical reason. This kind of normativity normally comes in two forms: rationality and reason. Without taking sides in the complex meta-ethical debate on how the two relate to each other and to normativity, let us see what we can say about entrapment from each of this point of view.<sup>41</sup> Start with rationality. Rationality as understood here is often called structural rationality: it has to do with structural requirements on our attitudes; as advocates of this approach often say, rationality supervenes on the mind. Is there practical irrationality involved in entrapment? We think there is. Consider the following remarks by Thomas E. Hill, Jnr, on different forms of practical incoherence that are irrational:

if certain means are necessary to an end, one must choose the means or else give up the end; to hold on to an end while refusing to take the necessary steps to achieve it is a form of practical incoherence. [...] Similarly, it is generally a mark of incoherent (though

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into the system and this is wrong. They also say *why*: because it would damage the integrity of the criminal justice system. It is this kind of ‘extra ammunition’ that we are looking for here.

<sup>41</sup> For the debate see R. Jay Wallace, ‘Practical Reason’, *The Stanford Encyclopaedia of Philosophy*, Spring 2018, ed. E. N. Zalta, esp. §4 URL: <https://plato.stanford.edu/archives/spr2018/entries/practical-reason/>; Niko Kolodny and John Brunero, ‘Instrumental Rationality’, *The Stanford Encyclopedia of Philosophy*, Winter 2016, ed. E. N. Zalta, esp. §1; URL: <https://plato.stanford.edu/archives/win2016/entries/rationality-instrumental/>

possible) practical thinking to pursue goals that undermine one's other goals or to employ means that violate the values that were the basis for choosing one's goals.<sup>42</sup>

The first requirement is given by what is called the instrumental principle and is perhaps the only undisputed form of practical rationality. However, in cases of entrapment the agent doesn't violate the instrumental principle: when the agent entraps, he/she takes the best means to one of his/her ends. This end happens to be not consistent with his/her role as a law-enforcement agent (or so we have argued) but this is not an issue of structural rationality: there is no incoherence between the agent's desire to entrap/create crime (or, perhaps more broadly, to make an arrest), his/her belief that entrapping serves this aim best, and his/her intention/action to entrap.<sup>43</sup>

However, the other two phenomena Hill enlists do seem to fit cases of entrapment (although, it has to be said that they are also more disputed as instances of irrationality).

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<sup>42</sup> Hill, Thomas E. Jnr (1997) 'Reasonable Self-Interest', *Social Philosophy and Policy* 14: 1, p. 68, note 27.

<sup>43</sup> This could be denied in two ways. One would be to claim that, as a law-enforcement officer, the agent doesn't have the end to entrap; the other would be that the agent has this aim, but this end is overridden by the end of preventing crime. However, recall that this form of rationality "supervenes on the mind": the structural instrumental requirement is on 'what is in the agent's mind'. It is therefore hard to deny that the agent has the end to entrap on this view – as we shall see, this will change when we turn to theories of reasons. As for the second idea, it is true that the instrumental principle is not a principle of adjudication (among ends). The question is whether instrumental rationality requires such a principle – this is not clear and we have no space to discuss the question in this paper.

Consider again the contrast with the kind of ‘simple desires’ mentioned earlier. If I choose to hike instead of writing, nothing is going to happen: I can always return to my writing and take it up where I left it; I will still be writing, no damage has been done (except, perhaps, to my schedules if there is a deadline). However, when a law-enforcement officer entraps he/she goes against the very values and rules that make him/her a law-enforcement officer in the first place (namely: the prevention of crime). Consequently, by entrapping, the agent also does something that makes it impossible for her/him to remain a law-enforcement officer and thus pursue the aim of preventing crime. In these ways, the kind of practical incoherence entrapment involves turns into something more damaging: practical irrationality.<sup>44</sup>

What can we say from the point of view of theories of reasons? This depends on what theory one employs. On the desire-based approach, a critical view of the entrapping agent is contingent on the strength of the desires the agent happens to have. This doesn’t seem to offer much critical ammunition.<sup>45</sup> The value-based approach offers more hope. Consider the following remarks by Tim Scanlon:

Being a good teacher, or a good member of a search committee, or even a good guide to a person who has asked you for directions, all involve bracketing the reason-giving force of some of your own interests which might otherwise be quite relevant and legitimate reasons for acting in one way rather than another. So the reasons we have for living up to the standards associated with such roles are reasons for reordering the reason-giving force of

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<sup>44</sup> Notice the interesting parallel here with the integrity-based form of the objection. The irrationality described by us can also be seen as a loss of intrapersonal integrity.

<sup>45</sup> Although, of course, a lot depends on how one construes the theory; however, we have no space to go into details. See also our remarks in the next footnote.

other considerations: reasons for bracketing some of our own concerns and giving the interests of certain people or institutions a special place.<sup>46</sup>

In our view, the law-enforcement officer is like the (good) committee member: in virtue of his/her role, he/she has reasons to do what prevents crime from happening; and in virtue of the same role, he/she has no reasons (because they are bracketed) to create crime. Since entrapping is an instance of the latter, the law-enforcement officer has no reason to entrap. Consequently, should the law-enforcement officer entrap, he/she would be acting against the balance of reasons that apply to his/her case. Although this might not be construed as a form of irrationality (since that would require understanding rationality as responsiveness to the balance of reasons and no longer as a structural requirement on the agent's attitudes), it does constitute a significant practical failing on the agent's part that he/she must avoid.

##### 5. *Conclusion*

Finally, we face a possible objection to our views coming from legal philosophy. We assess the logical relationships between the incoherence objection and some leading general philosophies of law. Our aim is to show that the objection is compatible with each of these theories while being entailed by, and entailing, none of them: in other words, the objection is logically independent of the theories. Thus, both the evaluation of the objection and the

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<sup>46</sup> Thomas Scanlon, *What We Owe to Each Other*, (Cambridge, Mass.: Harvard University Press), 1998, p. 53. It should be noted that while Scanlon intends this (and other similar) phenomena to constitute a general challenge to the desire-based theory of reasons, there are ways the latter theory might meet his challenge. See REDACTED for details.

outcome of that evaluation are innocent in respect of commitment to the any of the rival contentions of those theories. The objection, in short, can be assessed on its own merits.

Legal positivism. The above rendering of the incoherence objection includes normative material but, as we noted, the normativity involved appeals neither to law nor to any substantive moral principle, but only to the requirements of practical rationality. So construed, the incoherence objection does not embody a morally loaded conception of the law, or of the criminal justice system. It is therefore consistent with legal positivism, for legal positivism does not entail that the law, or law-enforcement agents, are ever legitimately exempt from the requirements of practical rationality.

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