Mark Tunick, "Entrapment and Retributive Theory,"

in Mark White, ed. Retributivism: Essays on Theory and Policy (NY: Oxford University Press, 2011), 171-191.
This is a pre-production version.

[171] I. Introduction: Problems of entrapment

In deciding whether to punish someone who violates the law, retributivists consider not whether punishment would deter or prevent future crime, but whether the lawbreaker deserves punishment.[1] It has been said that a retributivist cannot support an entrapment defense. In the criminal law, a defense is a reason why you should not be punished even though you did break the law. Examples include insanity, infancy, duress, mistake, intoxication, provocation, and hypnosis. With entrapment, the defense is that one was lured by the police, who manufactured the crime. There are at least two reasons why a retributivist might oppose an entrapment defense. First, those who were enticed to crime by the police still broke the law and, according to at least J.D. Mabbott's version of retributive theory, this alone justifies their punishment. For Mabbott, there is no essential connection between punishment and moral wrong.[2] Even if we thought someone who was lured to crime did not act badly precisely because they were tempted, on Mabbott's view we don't punish criminals because they acted badly or are wicked; good persons who break the law only because they were enticed by police still broke the law and for that reason alone they deserve punishment. But other retributivists who, breaking with Mabbott, do see punishment as the expression or communication of blame for acting badly, also have reasons to oppose an entrapment defense.[3] Even they, the argument goes, must insist on punishing entrapped criminals because these lawbreakers still are blameworthy, or culpable, and deserve punishment.[4] **[172]** I shall show how a retributivist might support an entrapment defense.

I begin by introducing some problems raised by entrapment. Suppose you are driving at the speed limit when a car begins to tailgate you. Intimidated, and unable to change lanes, you speed up. To your surprise a siren sounds from the car, which turns out to be an unmarked police cruiser, and the officer tickets you for speeding. You did break the law, but only because the officer tailgated you. Should you be punished? The intuition that you should not lies at the root of the entrapment defense. Some would explain this intuition by arguing that we don't want the state to punish "false criminals," or ordinarily law-abiding people who commit crime only because they were enticed or lured by police, whereas we do want the state to punish "true criminals"-- those who would have

---

[1] Cf. Michael Moore, Placing Blame (NY: Oxford UP, 1997); Leo Zaibert, Punishment and Retribution (Aldershot: Ashgate, 2006), p. 5. There are many variants of retributive theory—see, e.g. John Cottingham, "Varieties of Retribution," Philosophical Quarterly 29(116):238-46 (1979)-- and I shall refer to some versions which justify punishment by appealing to consequences such as reducing harm, although some insist that a theory appealing to such consequences is not retributive (cf. Moore, 84).

[2] J.D. Mabbott, "Punishment," Mind 48(190):152-67 (1939), 158, 154-5.

[3] Such retributive theories are presented by Joel Feinberg, "The Expressive Function of Punishment," in Doing and Deserving (Princeton, NJ: Princeton University Press, 1970); G.W.F. Hegel, Philosophy of Right, ed. Wood (NY: Cambridge University Press, 1991)(orig. 1821); and Christopher Bennett, "The Varieties of Retributive Experience," Philosophical Quarterly 52(207):145-63 (2002).

[4] R.A. Duff, ""I might be Guilty, But You Can't Try Me": Estoppel and Other Bars to Trial," 1 Ohio St. J. Crim. L. 245 (2003), 252; Anthony Dillof, "Unraveling Unlawful Entrapment," Journal of Criminal Law and Criminology 94(4):927-96 (2004), 843-55; Richard McAdams, "Political Economy of Entrapment," Journal of Criminal Law and Criminology 96(1):107-85 (2005), 121-2.

committed the crime without the police inducement.[5] On their view, false criminals can claim entrapment and be acquitted.

But why should being enticed by the police constitute a defense, when being lured by a private individual typically does not? When, in Billy Wilder's 1944 film version of James M. Cain's story "Double Indemnity," Walter Neff was lured by the sexy blonde Phyllis Dietrichson to kill her husband in order to cash in on a life insurance policy, he could not claim, as a defense, that he was tempted. When private citizen Cain offers you $100,000 to burn down an abandoned building, and that is too good an offer for you to refuse, you cannot claim, as a defense, that you were tempted. So why should it matter if Cain, or Ms. Dietrichson, was an undercover agent?

In addition to this problem of private entrapment, those defending an entrapment defense face what I call the general problem of entrapment: when should the defense be granted? There are a number of cases where police enticement seems clearly warranted and is no reason to acquit the defendant: a female undercover agent runs in a park to lure a serial rapist who targets women there; or walks around with a wad of money visible from her pocket in a neighborhood in which pickpockets have struck numerous times;[6] or offers a bribe to a Congressman.[7] In the first two cases, defendants who attack the decoy are ready and waiting to commit a crime and it is just their bad luck that their target is an undercover agent—the police catch true criminals. In the latter case, there is a strong public interest in preventing corruption.[8]

But there are also problematic cases of police enticement where it seems wrong to punish the lawbreaker. One sort of example is entrapment by estoppel, which occurs when the police encourage someone to commit a crime by convincing them that the act is legal though it is not.[9] It is also problematic for police to lure a defendant with romantic overtures.[10] Or suppose that an undercover agent arranges to buy cocaine from you; before accepting the cocaine, the agent demands that you cook it to make crack. His purpose is to enhance your sentence, the punishment for selling crack being ten times greater than the punishment for selling cocaine in powder form. While you should be punished for supplying powder cocaine, imposing the additional punishment for supplying crack seems troubling precisely because the state created that aspect of the crime.[11]

> **[173]** There are still other cases that are less clear cut. Consider two examples.
> 1) The shopping mall case: an undercover agent offers to sell drugs to people he randomly encounters in a shopping mall. Most people rebuke him but one person accepts, and is arrested.[12]

---

[5] McAdams, "Political Economy of Entrapment," 126-9. McAdams notes that this distinction can be misleading since there is seldom a zero probability that one would be a true offender given a large enough inducement, 141; cf. Joel Feinberg, Problems at the Roots of Law (NY: Oxford UP, 2003)(hereafter PRL), 62.

[6] Daniels v. State, 121 Nev 101 (2005).

[7] U.S. v. Kelly, 748 F 2d 691 (1984).

[8] Feinberg, PRL, 60-2, 76.

[9] Gideon Yaffe, "The Government Beguiled Me: The Entrapment Defense and the Problem of Private Entrapment," Journal of Ethics and Social Philosophy 1(1) (2005), 21.

[10] Commonwealth v. Thompson, 335 Pa. Super. 332 (1984).

[11] See U.S. v. Shepherd, 857 F Supp 105 (D.C. 1994), reversed in 102 F 3d 558 (1996).

[12] State v. J.D.W., 910 P 2d 242 (Utah 1995)(not entrapment). Cf. State v. Kummer, 481 NW 2d 437 (N Dak 1992)(entrapment when police sell drugs to defendant); superseded by statute, see State v. Murchison, 541 NW 2d 435 (N Dak 1995).

2) The auto theft case: police leave an unlocked car in a public parking lot with its keys in the ignition and lie in wait where they cannot be seen. They arrest a man who tries to steal the car.[13]

In the shopping mall case, the defendant breaks the law without having faced an inducement so great that it would entice a normally law-abiding person —he may be a true criminal. But the case is troubling because the defendant was not looking to commit a crime—he was approached by the police, who had no reason to think him likely to buy drugs. They created the crime. In the auto theft case, the police create the crime by presenting a temptation one does not usually encounter; yet one hesitates to excuse the defendant because most law-abiding people would resist this temptation.

There are two approaches commonly taken to the general problem of entrapment. One approach is motivated by a fear of oppressive agent provocateurs who create mistrust or are abusive, perhaps by targeting people they don't like, such as political enemies, or by pressuring someone whose cooperation they need.[14] Suppose you are law-abiding but your friend is a wanted criminal. By entrapping and then threatening to prosecute you unless you assist them, police might get you to agree to wear a wire and tape your friend incriminating himself. On this approach, called the 'objective test', the reason to not punish enticed defendants has nothing to do with their subjective state of mind, culpability, or blameworthiness--it is to uphold the integrity of the judicial system and to deter police misconduct; and whether the defense should be available depends not on characteristics of the defendant or his actions, but on the character of the police conduct: if the police act outrageously, or use measures likely to lure an average law-abiding citizen, the defendant should be acquitted.[15]

The other approach relies on the intuition that false criminals should not be punished. It looks at whether the targets of police enticement were predisposed to commit the crime, or ready and willing, so that it is likely they would have committed the crime even absent their encounter with undercover agents. Here a 'subjective test' is invoked: what matters is not what measures the police took, but how predisposed was the defendant to commit the crime.[16] The entrapment defense is available to those not predisposed. Some have suggested an additional consideration: whether the defendant was in the position to commit the crime. Those who are ready and willing to commit the crime but not able, because they lack the resources or know-how, might not be a real threat, which might reduce the need to punish them.[17]

---

[13] People v. Watson, 22 Cal 4th 220 (2000).

[14] On the potential for abuse, see Jonathan Carlson, "The Act Requirement and the Foundations of the Entrapment Defense," Virginia L.R. 73(6):1011-1108 (1987), 1101-14, 1120; and Bruce Hay, "Sting Operations, Undercover Agents, and Entrapment," 70 Mo. L. Rev. 387 (2005), 398-9; on inviting mistrust, see Christopher Slobogin, "Deceit, Pretext, and Trickery," 76 Or. L. R. 775 (1997), 797-8; and Ferdinand Schoeman, "Privacy and Undercover Work," in Heffernan and Stroup, eds., Police Ethics: Hard Choices in Law Enforcement (NY: John Jay Press, 1985), 133, 137, 140.

[15] Grossman v. Alaska, 457 P 2d 226, 229 (1969); People v. Barraza, 591 P 2d 947, 955 (1979).

[16] Having to use a strong inducement might imply the target was weakly predisposed, see Feinberg, PRL, 60; cf. Louis Michael Seidman, "The Supreme Court, Entrapment, and our Criminal Justice Dilemma," Supreme Court Review 1981:111-55 (1981), 120; Carlson, "Act Requirement," 1030-1.

[17] See U.S. v. Hollingsworth, 27 F 3d 1196 (1994); discussed in McAdams, "Reforming Entrapment Doctrine in US v Hollingsworth," University of Chicago Law Review 74:1795-1812 (2007).

For most retributivists, we punish criminals because they are culpable, and as the objective test appears to ignore culpability, retributivists are unlikely to want to adopt it.[18] **[174]** This is not to say that retributivists would object to measures that limit police misconduct and preserve the integrity of the judicial system. A retributivist might oppose an entrapment defense if they thought police enticement does not exculpate the lawbreaker, but defend a bar to trial on the ground that because of its enticement, the state undermines its standing to try the defendant.[19] But in that case the retributivist who does not think that being caught as the result of improper police methods absolves one from blame would be employing a principle that may be at odds with the principle that deserving criminals should get their just deserts.

The subjective test, in contrast, may seem ideal for most retributivists: lawbreakers who are enticed but not predisposed are granted a defense because their lack of predisposition means they are not culpable. (As we shall see, the subjective test can also be given a utilitarian rationale.) One reason a retributivist might nevertheless object to a subjective test is that to absolve the non-predisposed who are enticed to crime by government, while punishing those who are predisposed, is wrongly to assert that a person's culpability hinges on their predisposition and wrongly to punish someone not for their present conduct but for their character or past actions—I shall call this the 'act-requirement concern'.[20] The act-requirement concern is that punishing someone because they are predisposed is to punish them not for an act that took place, but for a hypothetical act we think they are likely to commit. Doing so violates the principle that punishment must be for a wrong actually committed.[21] To support an entrapment defense, a retributivist averse to an objective test and wanting to avoid the act-requirement concern may need to show that regardless of one's past actions, the fact that one was lured to crime by the police (and not by a private party) makes one less culpable.

Before proceeding, I must comment on my use of 'culpable'. Culpability is often used in a narrow sense to refer solely to a subjective or agent-relative factor: a person's state of mind. For example, I am culpable if I purposely or knowingly cause wrongful harm and I am less culpable if I was merely reckless or negligent, regardless of whether my act actually caused harm. I shall use culpable in its broad sense: deserving punishment or being worthy of blame.[22] One may be culpable in the broad sense merely if one is culpable in the narrow sense; but I shall consider an alternative view: that whether one is culpable in the broad sense depends on at least one non-subjective factor—whether one risked harm. Those who would commit a crime with purpose or knowledge are not less culpable in the narrow sense merely if they are not in the position to commit the crime for lack of ability or resources; but the view I shall consider is that they are less culpable in the broad sense--they are less deserving of punishment because they will not risk harm.

II. Theorizing about entrapment

Before considering whether being enticed by the police makes one less culpable for one's crime, I want to acknowledge the approach to entrapment taken by utilitarians, for **[175]** whom the issue of culpability in the broad sense is not central. (Culpability in the narrow sense is relevant for

[18] Yaffe, 7.
[19] Duff, "Estoppel and Other Bars to Trial," 252-3.
[20] Cf. Sherman v. U.S., 356 US 369 (1958), 382; Carlson, "Act Requirement,"1041.
[21] Cf. Michel Foucault, Discipline and Punish (NY: Vintage, 1979), 17-18.Yaffe calls it "monstrous" to base punishment on a prediction of how one might act, but distinguishes doing so from basing punishment on one's past actions ("Problem of Private Entrapment," 14-15).
[22] Cf. Moore, 403.

utilitarians because whether a defendant acted with purpose, knowledge, recklessness, or negligence will bear on the defendant's need to be deterred or incapacitated.) The utilitarian asks whether punishing someone who the police entice will yield benefits that exceed the costs of punishing. Possible benefits include deterring the criminal from committing crimes in the future (individual or specific deterrence), deterring others from committing similar crimes (general deterrence), incapacitating people who pose a threat to society, or reforming them.[23] Punishing a person who the police entice would likely promote general deterrence. But it would yield individual deterrence, incapacitation, and reform benefits only if the police nab true criminals. One problem for the utilitarian is determining whether someone is a true criminal; to decide that, utilitarians might use a subjective test and look at predisposition, including prior arrests or convictions, or other evidence of the person's tendencies. The utilitarian's rationale for using a subjective test would differ from that of a retributivist: for the utilitarian, predisposition is a signal not of culpability, but of the need for deterrence, incapacitation, or reform. Alternatively, a utilitarian might use an objective test, and look at whether the police offered a below-market-price inducement: for example, if an undercover agent offered high-grade marijuana at $1/gram when the going rate is $20/gram this would be entrapment regardless of the buyer's predisposition. The utilitarian's rationale, here, would be to promote not judicial integrity, but economic efficiency: offering large inducements to people who normally obey the law (false criminals) wastes resources.[24]

In contrast, for retributivists, generally, we punish not primarily to promote economic efficiency, deter, or incapacitate, but to express blame or vindicate the law. They insist we focus on whether the criminal is culpable and deserves punishment. This is true even for Mabbott, who argues that we punish a person solely because they broke the law, but adds that to be deemed a law violator one must be responsible and complicit.[25]

Does your being enticed by the police to commit a crime make you less culpable for your crime?[26] I shall consider a few reasons for thinking you may be less culpable. First, you are less culpable insofar as you do not cause harm. There are two senses in which you may not cause harm: the crime you commit is artificial and will result in no harm; and not you but the police cause the

---

[23] Mark Tunick, Punishment: Theory and Practice (Berkeley, CA: University of California Press, 1992).

[24] See McAdams, "Political Economy of Entrapment"; McAdams, "Reforming Entrapment Defense Doctrine,"1807-8; Ronald Allen et.al., "Clarifying Entrapment," Journal of Criminal Law and Criminology 89:407-31 (1999); and Judge Merrill's dissent in Greene v US, 454 F 2d 783 (1972).

[25] Mabbott, "Punishment," p. 162; cf. p. 158.

[26] Carlson argues the entrapped are less culpable as they don't cause harm ('Act Requirement', 1060-5, 1097-1101)--I develop that idea further in the next section. Roger Park and Gideon Yaffe hold that at least the non-predisposed are less culpable when enticed by police. Park says this "seems obvious" but provides no argument, in "The Entrapment Controversy," Minnesota Law Review 60:163-274 (1976), 240-1. Yaffe does provide an argument: when the non-predisposed are enticed by police, they do not bring the punishment on themselves, because their decision to commit the crime arose "in the wrong way" ("Problem of Private Entrapment,"24). "He brought it on himself" means: "the reason-giving force of the act's illegality was included in the calculus of reasons that entered into [the defendant's] deliberation and he nonetheless chose an action that was illegal"(26). Being predisposed implies one had prior deliberations about whether to commit the crime one later commits, and having faced pressure to grant the act's illegality reason-giving force, that one brought it on himself (32). But, Yaffe argues, this does not happen when the government induces me (33). Yaffe assumes the government tracks the target, increasing the temptation until the target succumbs (33-4)—the target was in effect coerced and therefore did not bring the punishment on himself. (Because private enticers do not track, he argues, this solves the problem of private entrapment, 37-9.) But most entrapment doesn't involve such extensive tracking. If it did--if the police literally forced you to commit the crime--you would have a defense of coercion. I thank Katherine Mockler for bringing Yaffe's important article to my attention and sharing her insights about it with me.

crime. A further reason I shall consider is that defendants who were enticed by the police are less culpable insofar as their action was not fully voluntary, the police having in effect coerced them.

II. A. The risk of harm requirement

One reason a retributivist might regard those who are entrapped as not culpable is that their actions will not result in harm.[27] According to what I shall call the 'risk of harm' requirement for culpability, if one does something that will produce no harm, one is not legally blameworthy.[28] When the police encourage a person to break the law as part of a sting or decoy operation, then unless something goes terribly wrong, there is no actual **[176]** victim and no harm caused: when an undercover agent lures a rapist or mugger, an arrest is made before anyone is hurt; if Ms. Dietrichson were an undercover agent, surely Walter Neff would not have completed a murder; and the politician who accepts a bribe in a sting operation is brought in before he or she can dispense illicit favors, although in this case something bad does transpire—he betrays the public's trust. There are exceptions in which police inducements do result in harm. Suppose the police set up a false fencing operation and entice a person to bring in stolen goods with the promise of huge cash payouts. Here harm is caused when the defendant steals. Applying the risk of harm requirement, we would grant an entrapment defense for the crime of attempting to fence stolen goods, but not for the theft, because that act risked actual harm.[29] To hold that defendants are culpable only if they create a risk of harm is of course not to require that a person actually cause harm before they can be punished. Criminals who risk harm but are caught before harm results satisfy the risk of harm requirement and may be punished.

Underlying the risk of harm requirement is the idea that we have criminal laws not to test people's character, but to avoid harmful conduct.[30] This idea is pivotal to Mabbott's retributivism;[31] and while it appeals to what appears to be a utilitarian framework—that we punish ultimately to avoid future disutility—the idea is compatible with the views of many other retributivists. We should not be confused by the thought that a retributivist appeals to consequences. Many theories that most people would recognize as retributive assume that we legally punish because doing so has desirable consequences, such as reducing harm, expressing disapproval, or promoting human freedom.[32] For example, on Hegel's view we punish to vindicate or restore right because only in a

[27] Cf. Carlson, "Act Requirement," 1060-1, 1067.

[28] On Michael Davis's version of retributive theory, which draws on Herbert Morris', "Persons and Punishment," Monist 52:475-501 (1968), we punish to respond to the criminal's taking an unfair advantage, which criminals might do even though they may cause no harm—see "Harm and Retribution," Philosophy and Public Affairs 15(3):236-266 (1986). But the entrapped person will not risk taking an unfair advantage, since he'll be caught.

[29] Andrew Carlon, in "Note: Entrapment, Punishment, and the Sadistic State," 93 Va. L. Rev. 1081 (2007), 1123-4, favors an entrapment defense for the theft.

[30] Cf. U.S. v. Hollingsworth, 27 F 3d 1196, 1203; and Judge Marston, concurring in Saunders v People, 38 Mich. 218 (1878):"Human nature is frail enough at best, and requires no encouragement in wrong-doing. If we cannot assist another and prevent him from violating the laws of the land, we at least should abstain from any active efforts in the way of leading him into temptation."

[31] Mabbott says we choose to have laws, and which laws to have, by considering consequences (Mabbott, 161, 163-5); but he denies that we choose to punish for utilitarian reasons (161), or to express moral disapproval (see text accompanying note 2).

[32] Feinberg, PRL 69; Mabbott, 163-4; Bennett, "Varieties of Retributive Experience"; Douglas Husak, "Why Punish the Deserving," Nous 26(4):447-64 (1992), 451; and on 'mixed views' drawing on both retributive and utilitarian principles, Louis Kaplow and Steven Shavell, Fairness versus Welfare (Cambridge, MA: Harvard University Press, 2002), pp. 314-15, n.46.

society that recognizes right are we free.[33] Nor should we assume that retributivists must adopt the view that the severity of legal punishment depends on the depravity of the act and must match the criminal's moral wickedness.[34] They can regard the amount of punishment we inflict in particular cases as a function of other factors including whether the punishment would deter or incapacitate.[35] Retributivists who appeal to such consequences do not adopt a framework according to which decisions about whether or how to punish are guided solely by the principle of utility, and while I cannot expand on the point here, their theories do not collapse into utilitarianism.[36] We should not assume that retributivists must want to test people's virtue so as to increase the amount of virtue in the world.

The position that we allow an entrapment defense where the lawbreaker will cause no harm solves the problem of private entrapment.[37] In almost all cases where a defendant was induced by a private party and not the government, there is a danger of harm being caused. One exception would be cases of private entrapment in which a private party resembles a state actor in seeking to lure targets in order to turn them over to the police. We might think that in such cases an entrapment defense should be available precisely because there was a controlled environment in which no harm will be caused. Such were the circumstances in *Topolewski v. State* (1906). Officials of a private meat-packing **[177]** company, made aware that the defendant hatched a plan to steal from the company, secretly encouraged and were an active participant in the plan, making sure that the company's property was placed on a loading platform so it could be easily taken, and ordering its workers not to interfere, with the purpose of ensnaring the defendant. The Supreme Court of Wisconsin reversed the conviction on the ground that the company aided and encouraged the crime, which lacked the essential element of nonconsent. That the defendant came up with the idea of the crime was "not controlling"; what did control was that the company "in practical effect delivered [the property] to the would-be thief."[38] As with government entrapment cases, there was little chance the defendant would cause actual harm, which is not usually the case when someone is enticed to crime by a private party.[39] Absence of nonconsent to the crime is arguably also a feature of most government entrapment cases involving decoys, who invite a crime and hope to become a potential victim. It is for other reasons, which I discuss later, that use of decoys usually will not constitute entrapment.

The argument that to be culpable your actions must risk harm may support a positional defense. Unusual circumstances aside, those who are not in the position to commit a crime and can do so only with the assistance of undercover agents will never cause the harm associated with that

---

[33] Mark Tunick, Hegel's Political Philosophy: Interpreting the Practice of Legal Punishment (Princeton, NJ: Princeton University Press, 1992).

[34] Rawls refers to this view without himself endorsing it, in John Rawls, "Two Concepts of Rules," The Philosophical Review, 64:3-32 (1955), 5.

[35] Cf. Hegel, Philosophy of Right, Par. 99 Remark: "The various considerations [such as deterrence and correction] are of essential significance…primarily only in connection with the modality of punishment. But they take it for granted that punishment in and for itself is just."

[36] Mark Tunick, "Efficiency, Practices, and the Moral Point of View: Limits to Economic Interpretations of Law," in White, ed., Theoretical Foundations of Law and Economics (NY: Cambridge University Press, 2009); Tunick, Punishment.

[37] Cf. Carlson, "Act Requirement," 1066-7.

[38] Topolewski v. State, 109 N.W. 1037 (Wisconsin, 1906), 1041; referred to in Leo Katz, Bad Acts and Guilty Minds (Chicago: University of Chicago Press, 1987), 159.

[39] See Woo Wai v. U.S., 223 F 412 (9th Cir 1915), 415-16; cf. the 'mail sting' cases finding that when government arranges for a defendant to send a letter to a non-existent person that, if sent to an actual person would violate a statute, there can be no conviction as the law was not actually violated: U.S. v. Adams, 59 F 674 (1894), 676; US v. Matthews, 35 F 890 (1888); US v Whittier, 5 Dill. 35 (1878).

crime because the only time they will commit the crime, the police will intervene before harm results. When a positional defense is supported it is usually for utilitarian reasons: society should not waste its resources by punishing someone who lacks the ability to commit a crime.[40] But if one is culpable only if one risks harm, a retributivist could also support this defense. One objection to a positional defense is that punishment will be meted out unequally for reasons that may seem arbitrary. Suppose a defendant living in rural Nebraska in the 1980s is enticed by undercover agents to purchase child pornography. McAdams supports an entrapment defense in this situation, on the assumption that anyone living in rural Nebraska in the pre-internet age would not be in the position to commit the crime on their own.[41] It might seem unfair that because someone lives in a city or has access to the internet, they would be punished for responding to police inducements to purchase child pornography while a rural dweller without internet access who responds to the same inducements is not punished, though they break the same law. If it were impossible to commit a crime by living in a certain environment, that you lived in that environment would not be an arbitrary basis for determining if you deserve punishment. But I expect that a greater impediment to this defense will be establishing that one could not have committed the crime without government assistance. In the example, if the government reached the defendant through the mail, probably private pornography suppliers could as well. This impediment becomes greater as geographical location becomes less important to one's ability to commit crimes.

Entrapped criminals generally do not create a risk of harm because the police have constructed an artificial crime in a controlled environment, and lie in wait. But what if the police entice the defendant into committing a crime, planning to intervene, but harm does result because the police fail to stop the crime due to unforeseen circumstances, or **[178]** ineptitude? It seems reasonable to hold defendants responsible for harm they cause that is not directly attributable to the police having induced the crime. For example, even if the police induce a target to provide insider trading information, not the police but the target would be responsible for assaulting a business executive to get that information. But if the only harm is the harm of the specific act the police induced and not secondary acts the police did not proximately cause, entrapped defendants may not be culpable even though their act does result in harm, because the risk of their act causing harm was very small--no harm would have been risked had things gone as the police planned. But a better explanation for their lack of culpability in this case may be that the police and not the defendant cause the harm (a position I discuss below).

It may seem puzzling to rest the defendant's culpability on the conduct of the police and not on the defendant's mental state. We must recall that I am invoking a broad and not narrow sense of culpability. The defendant thought they were doing something that risked harm, but the risk of harm requirement is an objective, not subjective standard. It appeals to whether harm in fact was risked. We should not confuse the adoption of an objective risk of harm requirement with acceptance of the objective test of entrapment, according to which a defendant is entrapped if the police used inducements likely to lead the average or normally law-abiding person to commit crime.[42] The police may use inducements that would not lure the average person, yet still lure a defendant into a situation in which no harm is risked; on the objective test, this would not be entrapment, but using the risk of harm requirement, it would be.

[40] McAdams, "Reforming Entrapment Doctrine," 1800; cf. Dillof, 894.
[41] McAdams, 1811; referring to Jacobson v. U.S., 503 U.S. 540 (1992).
[42] See fn 15 and accompanying text.

Adopting the 'risk of harm' requirement, I am culpable even if my act results in no harm, so long as my act risked harm. This position must be distinguished from the position that one should be punished for doing an act that causes no harm if the act is of the sort that tends to cause harm. We sometimes punish anticipatory offenses, such as driving under the influence of alcohol, even though often one commits the offense without harm resulting.[43] McAdams notes that we may punish "proxy offenses" even where an instance of the offense causes no harm, so long as there is a high enough correlation between committing that offense and conduct that does cause harm.[44] Bentham argues that we should punish those who don't pay their taxes even if their failure to pay the tax causes no detriment, because the tendency of not paying taxes, if done by many people, would be detrimental.[45] But in adopting the 'risk of harm' requirement, one takes a different position. We punish persons who attempt to attack decoy agents not because their sort of act tends to result in harm—that might be true of any entrapped person's act. Rather, we punish them because they would have caused harm had the police not been lying in wait. We can assume they would have caused harm so long as the decoy was representative of actual, non-police targets in the area. If this condition is met, then the reason decoy operations do not result in harm is not that police created an artificial crime in a controlled situation, but that the police deployed surveillance in a way calculated to increase the likelihood of catching a true criminal. Assuming the above condition is met, decoy cases can be viewed **[179]** as instances of effective surveillance. In contrast, where there is entrapment, the defendant creates no risk of harm.

Objection one: punishment and moral luck

One objection to the position that an entrapped person has a defense because they create no risk of harm is that moral responsibility should not be contingent on actual harm caused. Whether one's actions result in harm can often be a matter of luck and, the objection goes, we cannot assign or withhold moral blame for consequences that result from luck.[46] Those who attempt to rape an undercover decoy do not cause harm but only because they happen to be the victim of a decoy operation, so that police prevent them from causing harm. Assassins who miss their target out of luck do not cause the same amount of harm as assassins who succeed.[47] But, according to this objection, their luck in not producing harm is no good reason to reduce their punishment and regard them as less culpable; we blame someone for what lies within their will, and not for what they cannot control.

Joel Feinberg presents this objection when addressing how we should punish the inchoate crime of attempt. Feinberg argues that culpability is determined not by harm actually caused but by harm intended; what matters is whether an act was done purposely, knowingly, recklessly, negligently, out of duress, mistakenly, with provocation, or with good intent.[48] Those who intend to cause harm and fail, he argues, should still feel guilty.[49] While it is fortunate that they harmed no one, they are still morally at fault, and their luck in not causing harm should not be a ground for

[43] See Douglas Husak, "Is Drunk Driving a Serious Offense?", Philosophy and Public Affairs 23:52-73 (Winter, 1994).
[44] McAdams, "Political Economy," 160-2.
[45] Jeremy Bentham, Principles of Morals and Legislation (PML), ch. 12, Sec. 17. Cf. Carlson, 1097; Feinberg, PRL, 82.
[46] Feinberg, PRL (discussed below); cf. Richard Parker, "Blame, Punishment, and the Role of Result," American Philosophical Quarterly 21(3):269-76 (1984); Steven Sverdilik, "Crime and Moral Luck," American Philosophical Quarterly 25(1):79-86 (1988); but see Moore, ch. 5; and Leo Katz, "Why the Successful Assassin is More Wicked than the Unsuccessful One," 88 Cal. L. Rev. 791 (May, 2000).
[47] But they still cause harm if we are aware that they made the attempt, by creating alarm and other of what Bentham calls "secondary mischiefs"--Bentham, PML, ch. 12.
[48] Feinberg, PRL, 100-1.
[49] PRL, 88-9.

reducing their punishment. Feinberg would reform the criminal law so that completed crimes and failed attempts are punished the same.[50] He sees an incoherence in basing punishment on moral blame, but then allowing luck, or the amount of harm caused, to determine blameworthiness. He recognizes that people do feel more anger at someone who causes actual harm, but argues that such natural feelings are "unsavory emotions" and do not constitute a rational argument for punishing failed attempters less.[51] You are not a better person for not causing harm due to luck.[52]

On Feinberg's view, the assassin who fails because of luck, as when a fly lands on his face and causes him to miss his target, deserves the same punishment as the assassin who succeeds, because luck should not determine one's moral responsibility.[53] As a practical matter, it may be difficult to determine when failure is due to luck, and when it is due to contingencies that might have been controlled by someone more skilled, more determined, or better positioned to succeed. A skilled assassin will anticipate more contingencies that could lead to failure, such as flies landing on one's face, and is therefore more deserving of punishment than a bungling assassin. A utilitarian would say such a person should receive more punishment because, being more likely than the inept assassin to cause future harm, they are in greater need of deterrence or incapacitation.

[180] A retributivist might defend more punishment for the skilled assassin on one of two views. Mabbott might say that they deserve more punishment only if the law against successful attempts proscribes harsher punishment than the law against failed attempts, which the law might do for utilitarian reasons. For other retributivists, skilled assassins might deserve more punishment because they are more blameworthy: either because the effort it takes to become a skilled assassin belies a more wicked character; or because knowingly using one's skills for wrongful ends merits more blame the greater one's skills, even if the skills were originally obtained for laudable purposes, in that one's instant act is more likely to risk greater harm. Note that this view and the view Mabbott might adopt both differ from the utilitarian argument that we punish more severely those who are more adept at causing future harm in order to yield greater specific deterrence or incapacitation benefits.

But suppose we knew that the reason I caused less or no harm really is luck and has nothing to do with my skill, disposition, or position. Feinberg's view is that I deserve as much legal punishment as the person who succeeds in causing harm: I am as morally blameworthy and I am not a better person for being lucky. That position has been challenged by others.[54] But even if he were correct about that moral judgment, a retributivist need not hold that ascription of legal responsibility involves the same considerations as ascription of moral responsibility.[55] Ascriptions of responsibility may differ in legal as opposed to non-legal contexts. If in ascribing legal responsibility our goal is to reduce harm rather than test people's virtue, we might think the target of a police inducement to crime lacks legal culpability or blameworthiness for breaking the law since their act does not in fact risk harm, even though they intended to risk harm and are therefore morally culpable in the narrow sense of culpability.[56]

---

[50] PRL, 79.
[51] PRL, 91-4.
[52] PRL, 67-8.
[53] PRL, 78.
[54] Katz, "Successful Assassin."
[55] Feinberg, PRL, 344-6, 350-1.
[56] Cf. text accompanying notes 32-36.

One can advocate an entrapment defense for those who do not risk harm without holding that failed attempters should get less punishment than successful ones. The failed attempter intends to cause harm and risks harm but does not cause harm; the entrapped person intends to cause harm but does not in fact risk or cause harm. Both are lucky but only the entrapped person fails to meet the risk of harm requirement for culpability. If the entrapped person was predisposed to commit the crime, and would have risked harm had he not been entrapped, then he may be no less morally (as opposed to legally) responsible merely because he was induced by the police. The retributivist who argues that an entrapped defendant is less responsible morally would have to establish this either by pointing to the defendant's predisposition (which raises the act-requirement concern), or by showing that the police inducement amounted to coercion and that one is less morally deserving of blame for acts one was coerced to perform.

Objection 2: victimless crimes

A further objection to the 'risk of harm' requirement for culpability is that some lawbreakers cause or risk no harm to any victim, but nevertheless commit what is regarded as **[181]** a crime deserving of punishment. Examples sometimes given of such victimless crimes include adultery, gambling, prostitution, or marijuana use.[57] If one is not culpable or deserving of punishment unless one risks harm, then on a retributive theory we might not be permitted to punish anyone who commits victimless crimes. One response to this objection is to welcome it, and reply that indeed the state should prohibit only actions that cause harm.[58] While I am now sympathetic to that position, it is a controversial one that not all retributivists may endorse.[59] But another response is available. We might reconceptualize the 'risk of harm' requirement to be a 'risk of wrong' requirement, where wrongs are whatever actions the law prohibits regardless of whether the actions risk harm. If the defendant's action risks no wrong because the police will intervene prior to the wrong transpiring, an entrapment defense may be available. The underlying rationale for the 'risk of wrong' requirement is similar: the point of legal punishment is to reduce harm or wrongs, not to test people's virtue. But this is not a satisfying response if we regard as a wrong merely possessing an intent to commit a wrong.

A variation of this objection is that one is culpable merely for flouting the law, regardless of the law's content; law in general needs vindication regardless of whether harm was caused or risked by a particular act of lawbreaking. Mabbott seems to take that position. But the objection has force only if we agree that people should be punished merely for breaking the law whether or not there is good reason for the law. I disagree with that assumption, and I am not alone in doing so.[60] But even Mabbott might agree that the state should not test people's willingness to obey the law merely for the sake of increasing the amount of virtue or law abidingness in the world.

II. B. Causation

So far I have considered just one part of the argument that entrapped persons are not culpable because they do not cause harm: when someone is entrapped, actual harm will not result since the crime is artificial, with no non-consenting victim. But there is another sense in which they

[57] Carlon, 1098; but see Carlson, 1065, 1067.
[58] J.S. Mill, On Liberty (1869); Joel Feinberg, Harm to Others (NY: Oxford University Press, 1987).
[59] Moore, Placing Blame.
[60] Mark Tunick, "The Moral Obligation to Obey Law," Journal of Social Philosophy 33:464-83 (2002); M.B.E. Smith, "Is there a prima facie obligation to obey the law?" Yale Law Journal 82:950-976 (1973); Richard Wasserstrom, "The Obligation to Obey the Law," UCLA Law Review 10:791-93 (1963); Moore, Placing Blame, 70-2.

may be said not to cause harm: even if harm were to result, we might think the harm was caused not by them, but by the police who enticed them.

Who causes the crime when police entice the defendant? The crime would not occur if the defendant were not predisposed, unless the police compelled or forced the defendant; but the instant crime would also not occur if there were no police enticement. As Joel Feinberg argues, any ascription of responsibility for a complex event that would not occur but for multiple antecedent causes requires us to decide upon the cause most relevant for our purposes.[61] Not all causes are morally relevant. Oxygen is in a sense the cause of a house fire because it is a necessary condition for the fire; but the more relevant cause is what departs from the normal conditions (e.g., lighting a gasoline-saturated rag in the basement).[62] If a person's predisposition to crime is strong enough, they have the ability to commit it, and the opportunity to do so normally presents itself to them, then the police enticing that person to commit a crime may not be a departure from the normal conditions.

[182] Predispositions need to be triggered. If my predisposition is easily triggered by common situations, then when the police trigger it they may not cause the crime, provided that my disposition and low threshold are not themselves a result of police manipulation. But if my predisposition is triggered only in rare cases, then when the police trigger it they may well cause the crime and I may not be culpable.[63] Feinberg notes that few of us will commit murder. Yet perhaps all of us are weakly predisposed to murder—we can imagine circumstances when someone causes us such tremendous aggravation and literally ruins our life, that we might be driven to kill them.[64] But the circumstances that would trigger that disposition for most of us are quite rare. For true criminals they are not that rare. Culpability depends, then, both on one's predisposition, and on whether the opportunity presented by the police mimicked opportunities that realistically present themselves to the defendant.

Predisposition, on this view, is relevant to culpability because it may indicate that police enticement was not the departure from normal circumstances that caused the crime, in which case there is no entrapment defense.[65] But there are cases in which someone is predisposed to crime and has a weak trigger, but is not culpable. Sherman was undergoing treatment for his drug addiction. Until he successfully completes his treatment, he has a weak trigger when it comes to committing a drug offense. When undercover agents lure him with drugs while he is undergoing treatment, knowing he has a weak trigger, one wants to say they cause the crime and that Sherman should be granted an entrapment defense.[66] It's wrong of police to go after those trying to reform themselves.

---

[61] Joel Feinberg, Doing and Deserving, 143, 146.

[62] Doing and Deserving, 143.

[63] Doing and Deserving, 169-71.

[64] Feinberg, PRL, 62-3. Cf. note 5.

[65] Feinberg himself draws this conclusion only with some hesitation and only in his later work. In his earlier work, Doing and Deserving, he says it is hard to decide whether an act was coaxed and involuntary (174). If, when police enticement precipitates a crime, we punish only highly primed defendants with loose triggers, but police intervention was necessary for the crime to occur, we would be punishing them for their predisposition and, he argues, intuitively this is disconcerting and unjust (175). But, he notes, from a moral point of view according to which luck is irrelevant, that the predisposed person was unlucky enough to encounter the police should not matter. In Doing and Deserving, Feinberg concludes that the entrapment issue is "too complicated to pursue further"(176). In PRL, Feinberg is open to an entrapment defense if the defendant is weakly primed and faces a strong police inducement (60; cf. 74-5), in part because it will keep police honest and promote trust (75).

[66] Sherman v U.S., 356 U.S. 369 (1958), ruling entrapment; cf. State v. Lively, 130 Wash. 2d 1 (1996).

Someone might have firmly fixed habits of mind that dispose one to crime, yet still the police could be the morally relevant cause if they capitalize on those firmly fixed habits.[67]

The retributivist, in deciding whether to punish, is guided not by "considerations of mere convenience" but by "the essential demands of justice."[68] A person enticed by police may not deserve punishment (is not culpable), insofar as 1) they do not risk harm and 2) not they but the police cause the crime. Whether the latter is the case depends on how strongly predisposed they were, on how common the triggering situation is, and on whether the police inappropriately capitalized on their target's weakness--though I have not addressed how we are to distinguish appropriate and inappropriate targetings of those with character failings. The argument that an entrapped defendant is not culpable because they did not cause the crime, insofar as it appeals to the character or past actions of the defendant, does not avoid the 'act requirement concern': one fully avoids this concern only when resting the argument that the defendant is not culpable on the claim that no actual harm is risked, or on the next argument I discuss, that the defendant did not act voluntarily.

II. C. Coercion

The other argument that those who are enticed to crime by the police aren't culpable is that they don't voluntarily commit the crime: there is a sense in which they are coerced. **[183]** In developing this argument I draw on Robert Nozick's essay "Coercion."[69]

Nozick wants to make sense of the claim that one acts involuntarily when responding to a threat, but voluntarily when responding to an offer, in light of some apparently contradictory evidence: one chooses to do what there is a threat against his doing, just as one chooses to do what there is an offer to do; and sometimes an offer is so tempting that a person can't reasonably be expected not to go along with it.[70] In saving the offer/threat distinction, Nozick has us focus on a rational man's preferences both before and after the offer or threat.

Nozick says the rational man will normally welcome credible offers, which he can always decline without being worse off had the offer not been made (leaving aside the costs of decision-making); and won't normally welcome credible threats.[71] He then distinguishes a pre-situation, which is the situation prior to the offer or threat, from the situation after a threat or offer is made. The rational man is normally willing to go from the pre-offer to the offer situation and when put in the offer situation, does not normally prefer to be back in the pre-offer situation. But the rational man is normally unwilling to go from the pre-threat to the threat situation and when placed in the threat situation, would normally prefer being back in the pre-threat situation.[72] Nozick then formulates the following principle: "If the alternatives among which Q must choose are intentionally changed by P, and P made this change in order to get Q to do A, and before the change Q would not have chosen…to have the change made…and before the change was made Q wouldn't have chosen

[67] Feinberg, Doing and Deserving, 158.
[68] Sorrells v U.S., 287 U.S. 435 (1932), at 451.
[69] Robert Nozick, "Coercion," in Philosophy, Science and Method: Essays in Honor of Ernest Nagel, eds. Morgenbesser, Suppes, and White (NY: St. Martin's Press, 1969).
[70] Nozick, 460.
[71] Nozick, 460-1. He notes some atypical exceptions, e.g.: P tells Q that he'll give Q $10K if next week someone threatens Q.
[72] Nozick, 462.

to do A, and after the change is made Q does A, then Q's choice to do A is not fully his own."[73] His point is "[w]e must look also at the (hypothetical) choice of getting (and willingness to get) into the threat and offer situations themselves."[74]

Think of the offer as police enticement to commit a crime and suppose Q is rational and predisposed and would commit a crime had a non-state actor made the offer. Does Q prefer to be in the pre- or post-offer situation? If A in Nozick's formulation above is 'commit a crime in which punishment is certain' then of course Q would not have chosen to do A. Normally when someone gives you the chance to commit a crime, you are aware there is a potential punishment and will assess the likelihood it would be imposed. But police involvement changes things. Had the police used no deception, Q would have known that punishment was certain and assuming the sanction was greater than any benefits of the crime he would be able to keep, Q would refuse the offer. But with the deception, the offer situation seems preferable to Q because he mistakenly underestimates the probability of getting caught—he does not know it is 1. A rational criminal will commit a crime with a payoff of 100 if it succeeds, where the probability of succeeding is .75 and of getting caught is .25, and where he must disgorge the fruits of the crime if caught, where $.75(100) - .25P > 0$, P referring to the punishment, and so where the punishment is less than 300. With entrapment, the apparent probability of capture remains .25, and the apparent payoff remains 100. But the actual probability of capture is 1, and the actual payoff will be 0. If Q knew the actual situation after the offer, he would rather go back to the pre-offer situation. Because of the deception, we might regard the offer as coercive.

When the police entice you, their offer pretends to increase your choices, but unlike the private tempter's, it does not, since punishment is inevitable.[75] Had I not been **[184]** deceived about the probability of capture, I would prefer the situation before the offer was made to the situation after the offer was made. This makes the choice coercive and, because culpability should be for freely chosen acts, casts doubt on the defendant's culpability. The problem of private entrapment is solved insofar as accepting a private inducement to crime is voluntary, but accepting a police inducement is not.

Because of the deception it involves, entrapment is also unfair. The undercover agents present me with a choice—commit the crime, or don't. But it is not a fair choice because they fail to tell me the probability of being caught is 1. Being entrapped is not a fair gamble, since there is no chance of keeping the gains—the game is rigged. Larry Alexander argues that using a doomsday machine that would unfailingly exterminate people even for minor offenses like trespassing is not unfair if there is prior notice and the machine reacts only to wrongful acts. He argues that "most people would deny a duty to compensate for all injuries stemming from risks undertaken in ignorance of the true odds, especially if it were wrong to undertake the risk in the first place."[76] Even if he is correct about what most people would think, I am not sure the doomsday machine provides a fair bargain. But entrapment is surely unfair because it provides no prior notice of certain punishment.

---

[73] Nozick, 463.

[74] Nozick, 464.

[75] I disagree with Seidman, who argues that police enticement merely expands one's choices rather than threatens; see Seidman, 139. Feinberg, PRL, 57, argues that if a buyer of drugs approaches an undercover seller, there is no entrapment because the defendant is deceived about no element of the crime, and I agree. However, if the undercover agent approaches the defendant with an offer, the deception may make the defendant's acceptance involuntary.

[76] Larry Alexander, "The Doomsday Machine," The Monist 63:208-27 (1980), 217.

I think this better explains than some other accounts the sense in which entrapment is not fair. Dilloff appeals to fairness to explain why we allow an entrapment defense by arguing that it is unfair to randomly select one particular predisposed target to pay for what everyone benefits from.[77] But that account of fairness does not explain why, if I was entrapped, I do not deserve punishment, since my culpability does not depend on whether the state unfairly singled me out. Linking the unfairness of the deceptive offer to its coerciveness better explains why an entrapped person is not culpable.[78] By articulating this account of why entrapment can be seen as unfair, I do not mean to say that its unfairness best explains why we have an entrapment defense. I am not sure we should compare the criminal justice system to a game of chance.

The argument that those who are enticed by the police do not freely choose to commit their crime does not apply to most decoy cases, where the police do not approach a target with an offer but rather lie in wait, and which are better characterized as instances of police surveillance. In decoy cases defendants may well underestimate the probability of capture, but they were not lured by an offer, unless the police decoy was not representative of actual, non-police targets the defendant could have encountered.

III. Applications and Conclusion

Entrapment is troubling because the police create an artificial situation in which they test a person's virtue. They use deception to create a crime that will risk no actual harm, and lie in wait so that the target will be punished. We may want to entice people to teach them a lesson. The police, for example, may wish to reduce prostitution by having undercover **[185]** agents solicit customers and issue warnings to any who respond favorably to the solicitation. But it is problematic to entice people in order to punish them, decoy targets being an exception.

Consider the two difficult cases I introduced in the opening section. Some of the arguments I have presented imply that in the shopping mall case, the person who is approached by an undercover agent and buys drugs was entrapped and should not be punished. His action risks no harm; and the police deception means his choice is not fully voluntary. Whether the defendant or the police caused the crime will depend on whether the police inducement presented an unusual opportunity that is not normally encountered, as well as on the extent to which the defendant was primed to purchase illegal drugs. If people aren't generally approached randomly at public places such as malls to buy drugs, or the drugs were offered at a very cheap price, the police may have caused the crime. The auto theft case may be different in an essential way. It might be regarded as a decoy case, an instance not of police making an offer to the defendant, but of effective surveillance, but only if the police have not created an unusual opportunity. If people would rarely encounter the temptation of an unlocked, unoccupied car with the keys in the ignition, then even though most people are weakly disposed to succumb to this temptation, and even if the defendant who does succumb is predisposed and highly primed, we still may conclude that the police cause the crime. The risk of harm requirement for culpability is not met, unless the decoy was representative of actual non-police targets in the area so that the case is one of surveillance.

I have not discussed what relative force each of the three arguments I discuss has in deciding whether a police target should be able to invoke the entrapment defense. Nor have I

[77] Dilloff, 874-9.

[78] Some English judges also depict entrapment as unfair, saying it violates "English notions of decency and fair play"--see R. v. Loosely, [2001] UKHL 53, at §49; cf. §§19, 53.

defended a number of assumptions underlying the retributive case for an entrapment defense; for example, I have not defended Nozick's account of coercion, or Feinberg's account of causation; nor have I justified the claim that in punishing we should be guided by the goal of reducing harm. I also have not attempted to solve the general problem of entrapment. If we categorized the numerous examples of police inducements as either improper entrapment or legitimate crime-fighting strategies, no doubt we would find other factors that matter besides the ones I have considered. What I have tried to show is that a retributivist can defend an entrapment defense insofar as there is something less blameworthy about a defendant who does not risk harm and who is lured into a choice by deception.

I have appealed to a version of retribution that is consequentialist in seeing the point of our criminal justice system as preventing harm. I believe such a version of retribution is necessary because the view that the point of punishment is to make a criminal suffer just as he has caused others to suffer is deeply unsatisfying. Entrapping someone is testing their character rather than focusing on harm prevention, and moral virtue testing should not be the point of our criminal justice system, except perhaps in rare cases such as when we want to ensure that public officials do not betray our trust. The criticism that **[186]** entrapping is moral virtue testing loses much of its force if the police have probable cause to suspect that their target is a dangerous criminal and have no practical alternative for establishing that.[79]

[79] On a reasonable suspicion or probable cause requirement, see Gerald Dworkin, "The Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime," Law and Philosophy 4(1):17-39 (April 1985), 33.