Non-State Entrapment

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How should courts respond to an allegation that the defendant committed the alleged offence because of an inducement by another person ('the inducer') aimed at securing evidence for a subsequent prosecution – a.k.a. 'entrapment'?[1] English law deems such defendants to be fully responsible for their wrong-doing: entrapment is not a substantive defence.[2] It has been clear since *Looseley*,[3] however, that prosecutions may sometimes be stayed as an abuse of process when entrapment has been employed by state actors ('state entrapment'). Such stays fall under the 'integrity-type' heading of abuse of process – where it 'offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case'.[4] A range of familiar factors, concerned with the propriety of the undercover operation, are relevant to whether state entrapment threatens the court's integrity to the relevant extent: reasonable suspicion of criminal activity; authorisation and supervision of the operation; necessity and proportionality of the operation; whether the inducer offered an 'unexceptional opportunity' to the defendant; and whether the evidence has been authenticated.[5]

What if the inducer is *not* representing, or working at the behest of, the state ('non-state entrapment')?[6] The Court of Appeal's recent decision in *TL*,[7] confirms that stays are also potentially available in such cases where the inducer engages in 'sufficiently gross misconduct'.[8] Although the judgment is far from clear in this respect, the court appears to set a higher bar for non-state than state entrapment cases.

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[1] The term 'entrapment' lacks a clear definition in the existing literature. See D.J. Hill, S.K. McLeod and A. Tanyi, 'The Concept of Entrapment' (2018) 12 *Criminal Law and Philosophy* 539.

[2] Cf. the USA, where state entrapment can potentially remove culpability, but non-state entrapment apparently cannot. See, further: A.M. Dillof, 'Unravelling Unlawful Entrapment' (2004) 94 J. Crim. L. & Crimino. 827; G. Yaffe, 'The Government Beguiled Me: The entrapment defense and the problem of private entrapment' (2005) 1 J. Ethics and Social Phil. 1.

[3] [2001] UKHL 53, [2001] 1 W.L.R. 2060.

[4] *Maxwell* [2010] UKSC 48, [2011] 1 W.L.R. 1837 at [13].

[5] See *Moore and Burrows* [2013] EWCA Crim 85 at [52]. I cannot resolve the question of whether regarding these various factors should (always) be *sufficient* to stay proceedings.

[6] A.k.a. 'private entrapment'. For an argument that special considerations apply to *journalistic* entrapment, see A. Dyer, 'The Problem of Media Entrapment' [2015] Crim. L.R. 311.

[7] [2018] EWCA Crim 1821.

[8] *TL* at [32].

This note doubts the court's decision about the relative tests for stays based on state and non-state entrapment. The core concern should be identical in both state and non-state entrapment: can a sufficiently strong inference be drawn that the defendant was already engaged in criminal activity, or seeking out the opportunity to become so engaged, before the inducer appeared? This test would, perhaps counter-intuitively,[9] make it more likely that a stay will be given in non-state entrapment cases than in comparable state entrapment cases.

TL: The Facts

The defendant (L) was charged with attempting to meet a child following sexual grooming.[10] L had contacted someone representing themselves to be a 14-year-old girl, 'Bexie', on an internet chatroom. Eventually, L discussed with 'Bexie' the prospect of a 'threesome' with his girlfriend, and arranged to meet. L was, in fact, talking to an adult male – Mr U – from an online group ('Predator Hunters') that seeks to find paedophiles on the internet and exposes them. When L turned up to meet 'Bexie', he was duly arrested – Mr U having tipped off the police (which was presumably his plan from the outset).

As well as blaming his girlfriend for the messages, the defendant asked for the proceedings to be stayed on the grounds that he had been entrapped. The trial judge agreed to this (for reasons explained below) and the prosecution appealed. The first question on appeal was whether abuse of process was available to L, or whether non-state entrapment's relevance was limited to potential exclusion of evidence, or indeed only sentence mitigation.[11]

Authorities before *TL*

The law on non-state entrapment has never been clear, typically because the inducer's conduct in relevant cases was relatively minor, and no question of real equivalence with state entrapment

[9] R.A. Duff, L. Farmer, S. Marshall and V. Tadros, *The Trial on Trial: Volume 3 – Towards a Normative Theory of the Criminal Trial* (2007), p. 243.
[10] Sexual Offences Act 2003, s. 15, when read with Criminal Attempts Act 1981, s. 1.
[11] For discussion of these potential responses, see, e.g. *Shannon* [2001] 1 W.L.R. 51 and *Tonnessen* [1998] 2 Cr. Ap. R. (S.) 328.

arose.[12] Most leading cases (including *Looseley*) deal only with state entrapment. Only three authorities (two being short *Criminal Law Review* summaries) stand out.

First, in *Hardwicke*, the Court of Appeal indicated that the trial judge's direction had been favourable to the defendant in equating 'commercial' and 'executive' lawlessness in relation to abuse of process.[13] This implied that different bars were in place for state and non-state (or at least *journalistic*) entrapment, but both could lead to a stay in appropriate circumstances (whatever those were thought to be).

Secondly, in *Shannon v UK*, the European Court of Human Rights remarked that 'it cannot be excluded that evidence obtained as a result of entrapment by a private individual may render proceedings unfair'.[14] It is not clear *when* the Court thought that this might happen, or indeed if a different bar would be in place in non-state cases, when compared with state cases, of entrapment.

Thirdly, in *Council for the Regulation of Health Care Professionals v GMC and Saluja*,[15] the connection between integrity-type abuse of process and state entrapment in previous authorities was noted,[16] and it was concluded that 'the rationale of the doctrine of abuse of process is therefore absent' in non-state cases.[17] This did not lead Golding J to the conclusion that the courts should *never* allow a stay on the basis of non-state entrapment.[18] Stays could be available where, 'given sufficiently gross misconduct by the non-state agent, it would be an abuse of process of the court's process (and a breach of Article 6) for the state to seek to rely on the resulting evidence. In other words, so serious would the conduct of the non-state agent have to be that reliance upon it in the court's proceedings would compromise the court's integrity'.[19] No examples were given (the inducement in *Saluja* was modest), but such stays would be 'very rare indeed'.[20]

It might have been hoped that the staying of proceedings against Tulisa Contostavlos, on the basis of non-state (specifically, journalistic) entrapment, would have led to more useful guidance, but no attempt was made to appeal the trial judge's decision. Additionally, the issue

[12] See, e.g., *Marriner* [2002] EWCA Crim 2855 at [37]-[39].
[13] [2001] Crim. L.R. 220 at 220-221.
[14] [2005] Crim. L.R. 134 at 134.
[15] [2006] EWHC 2784 (Admin), [2007] 1 W.L.R. 3094.
[16] *Saluja* at [80].
[17] *Saluja* at [81].
[18] Cf. K. Hofmeyr, 'The Problem of Private Entrapment' [2006] Crim. L.R. 319. Hofmeyr would rely on the exclusion of evidence under s. 78 in non-state entrapment cases, accepting that this may – in the end – result in proceedings being abusive for want of sufficient non-entrapment evidence (at 335-336).
[19] *Saluja* at [81].
[20] *Saluja* at [81].

of non-state entrapment is clouded by the journalist's apparent lack of credibility and alleged attempts to interfere with the proceedings.[21]

Before *TL*, then, the law on non-state entrapment was charitably described as 'uncertain'.[22] The path to rejecting integrity-type abuse of process in non-state cases, or holding that the test was in fact the same in both state and non-state scenarios, was not blocked. The next section critically analyses the court's decision in *TL* to endorse the guidance in *Saluja*.

Entrapment and Hypocrisy

There are at least two ways of explaining what is wrong with (some instances of) entrapment, and justifies courts acting to stay proceedings and preserve their integrity. Both apply in cases of state entrapment, but point towards different answers regarding non-state entrapment.

The first view is based on an idea of hypocrisy: in state entrapment cases, *the state's* courts are seeking to condemn wrongs that *the state* encouraged the defendant to perpetrate.[23] To avoid being mired in such hypocrisy, the courts must ensure that 'executive agents of the state do not misuse the coercive, law enforcement function of the courts and thereby oppress citizens of the state'.[24] There must therefore be a test (provided by *Looseley* et al.) to establish when the state's agents have gone 'too far'.

This argument involves denying the 'separation thesis'[25] – the idea that state courts can meaningfully disassociate themselves from the actions of the state's police and prosecutorial bodies, such that those actions would not impact on the court's integrity. Doctrinally, *Looseley* suggests that actions of state inducers *cannot* be disowned by the state's courts.[26] This is plausible from a legal and a lay perspective in the state entrapment context.[27] The state is, to this extent, indivisible, and the courts' integrity – its moral authority to condemn the defendant – would plausibly be jeopardised if it was seen to be complicit in the police's (and/or their agent's) abuse of power.[28]

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[21] J. Dein and L.V. Collier, 'Non-state Agent Entrapment – the X Factor' [2014] 9 Arch. Rev. 4.
[22] A.L.-T. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (2008), 2nd edn., p. 152.
[23] G. Dworkin, 'The Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime' (1985) Law & Phil. 17 at 32-33.
[24] *Looseley* at [1].
[25] See A. Ashworth, 'Exploring the Integrity Principle in Evidence and Procedure' in P. Mirfield and R. Smith (eds.), *Essays for Colin Tapper* (2003), p. 107.
[26] See, too, *Ramanauskas v Lithuania* (2010) 51 E.H.R.R. 11 at [63].
[27] There is not space here to deal with the question of *whose* views should be determinative here, but see F. Stark, 'Moral Legitimacy and Disclosure Appeals' (2010) 14 Edin. L.R. 205 at 213-215.
[28] H.L. Ho, 'State Entrapment' (2011) 31 L.S. 71 at 78.

No such obvious hypocrisy exists in relation to non-state entrapment, and so it might be suggested that non-state entrapment can *never* threaten a court's integrity.[29] The defendant in *TL* argued, to the contrary, that admitting Mr U's evidence tacitly endorsed the activities of groups such as Predator Hunters, and would encourage similar unregulated, unsupervised activities in the future.[30] One reading of this argument is that encouragement of Mr U (and others) by allowing the trial to proceed would associate the court sufficiently with the non-state actor's misdeeds that the court's integrity would be compromised. The Court of Appeal was unconvinced: it did not view its decision to overrule the trial judge as somehow associating itself with Mr U's conduct, or undermining 'the stated position of the police, by which they discourage private individuals from setting out to identify those who groom children and arrange to meet them for sexual purposes'.[31]

(Noting that the police disapprove of a practice, whilst nevertheless allowing cases to proceed, does not send a particularly clear message of *judicial* disassociation and denunciation, particularly where the inducer commits an offence and is (as often seems to be the case) not prosecuted. Mr U was careful to avoid committing any offences.[32] Nevertheless, liability for encouraging or assisting (in cases like *TL*, an attempted) crime, under the Serious Crime Act 2007 or secondary liability would be made out in many circumstances.[33] Prosecution of *both* the defendant and the inducer in such situations could more meaningfully achieve the ends of dissuading private individuals from pursuing criminals through criminal means (rather than seeking state assistance, with its safeguards, at an early juncture), condemning them for any criminal activity they had engaged in, and making entrapment an unattractive way to 'use' the state's apparatus – and particularly its *courts* – against other citizens.)

If the only integrity-based argument available concerned the hypocrisy involved in state courts convicting defendants of plausibly state-created crimes, then non-state entrapment seems irrelevant to integrity-type abuse of process. There is, however, a second way of conceiving of the integrity-based concerns in entrapment cases (which, in the state entrapment context, complements the points above about association).

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[29] E.g.: Hofmeyr, 'Private Entrapment' at 332-335; Ho, 'State Entrapment' at 91; F. Leverick and F. Stark, 'How Do You Solve a Problem Like Entrapment? *Jones and Doyle v HM Advocate*' (2010) 14 Edin. L.R. 467 at 472.
[30] *TL* at [10]. See, too, Dyer 'Media Entrapment' at 327, 331 (n. 182).
[31] *TL* at [39].
[32] *TL* at [34].
[33] In the context of the 2007 Act, much depends on how the 'reasonableness' defence in s. 50 would apply to non-state entrapment cases.

On this second view, it is not (contrary to what most previous cases suggest) *who* induced the crime, but rather the fact that there is a credible allegation that the crime would not have happened without the relevant inducement. There are hints of such an evidence-focussed view in *TL*: 'a prosecution needs evidence; and it is not inconceivable that given sufficiently gross misconduct by a private citizen, it would be an abuse of the court's process (and a breach of Article 6) for the state to seek to rely on the product of that misconduct'.[34]

Consider the categorical ban on admitting evidence obtained by torture.[35] Although there are also doubts about the reliability of evidence obtained by torture, it is possible to justify this ban in terms of court integrity: in using evidence obtained by torture, the courts implicitly suggest that torture is a legitimate investigatory tool; that this is a type of evidence upon which a conviction can legitimately be based.[36] This endorsement undermines the court's moral authority to condemn the accused: it cannot claim *the court* is acting in a morally defensible manner if it makes use of the products of the immoral behaviour of others. Given the nature of torture, the question 'Ah, but who performed it?' is not one posed by someone with real moral authority or integrity.

Non-state entrapment is far removed from torture in its severity, but a similar type of integrity-based objection could be made in relation to certain instances of it. The main objection to the use of entrapment as an investigatory tool is that it is sometimes not 'investigatory' at all: it can constitute the manufacture of crimes that might, without the inducement, credibly never have been committed.[37] To avoid the risk of legitimating an illegitimate 'investigatory' process (and thus risking its moral authority to condemn the defendant), the courts could stay proceedings unless there is a suitably robust inference from the circumstances of the case that the defendant was (i) *already* in the course of offending, or (ii) looking for an opportunity *to do so*, before the inducer arrived.[38] Call this the requirement of 'ongoing criminality'.

On this account, the guidance in *Looseley* et al. seeks to establish whether a reliable inference of ongoing criminality exists or not, and thus whether the court can proceed with integrity to try the case and, if appropriate, convict the defendant. A famous difficulty is that

[34] *TL* at [32].
[35] *A v Secretary of State for the Home Dept (No 2)* [2005] UKHL 71, [2006] 2 A.C. 221.
[36] Duff, Farmer, Marshall and Tadros, *The Trial on Trial*, p. 239.
[37] This line of thought may also lead to an argument for a substantive *defence* of entrapment, but – given English law's consistent and strong rejection of such a defence – that possibility will not be discussed further here.
[38] See M. Redmayne, 'Exploring Entrapment' in L. Zedner and J.V. Roberts (eds.), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (2012), p. 157.

the weight to be applied to each factor is unclear in state entrapment cases,[39] complicating the task of the proving or negating a credible allegation of state entrapment.[40] The decided cases at least give broad pointers, though, and perhaps this is all that can be hoped for.

If this is right, then it would be natural to focus on the same sorts of factors as are found in *Looseley* et al. in non-state entrapment cases (although some, such as adequate operational oversight, will be inapplicable). Indeed, it was explained in *TL* that the 'starting point… is to ask whether the same, or similar, conduct by a police officer' would cross the line laid down in the existing authorities on state entrapment.[41]

In *TL* itself, the trial judge focussed on reasonable suspicion that the defendant was engaged in ongoing offending (finding it to be absent), but the Court of Appeal held that Mr U had a level of suspicion about the website the defendant was using (which was suspected to be frequented by men looking for sex with underage persons) that would have warranted *state* entrapment being pursued without necessitating a stay of proceedings.[42] Furthermore, Mr U had offered an unexceptional opportunity to commit an offence to L: Mr U was 'scrupulous to avoid encouraging his interlocutor in the proposed sexual activity and at no time did he take the lead'.[43] And so, the court concluded, a stay would not have been warranted if there had been state entrapment in similar terms.[44] The 'grossness' questions did not arise.

Although it is far from clear from the judgment in *TL*, 'grossness' appears to be an *additional* test for non-state entrapment cases. Otherwise, the 'starting point' noted above would, presumably, also have been the end point. The question is why it appears that non-state inducers must go *further* than their state counterparts before a stay is justified.

Consider, for instance, *Moon*,[45] where police officers hassled a drug addict until she reluctantly supplied them with drugs. One reason for using integrity-type abuse of process in *Moon* was the pressure placed on the defendant by the officers, who feigned drug withdrawal symptoms and repeatedly sought drugs despite her initial resistance to supply them.[46] But the decision to allow the appeal against conviction (on the grounds of abuse of process) in *Moon*

[39] For useful critiques, see Ho, 'State Entrapment' and D. Squires, 'The Problem with Entrapment' (2006) 26 O.J.L.S. 351.
[40] The European Court places the burden of proof on the prosecution, where the defendant's allegation of inducement is 'not wholly improbable': *Furcht v Germany* (2015) 61 E.H.R.R. 25 at [53]. This goes, however, against the grain of decisions on the burden of proof in other abuse of process contexts: e.g. *R v Norwich Crown Court* [1992] 1 W.L.R. 54.
[41] *TL* at [35]
[42] *TL* at [36].
[43] *TL* at [34].
[44] *TL* at [37].
[45] [2004] EWCA Crim 2872.
[46] *Moon* at [44], [49]-[50].

turned also on the absence of sufficient confirmation of events (the tape recording arrangements were inadequate) and effective oversight/authorisation of the operation by a senior officer.[47] On the argument being advanced here, such confirmation and oversight is meant as a bulwark against random testing of citizens' virtue by insufficiently controlled inducers, something that could undermine the inference of ongoing criminality, and make any trial and conviction based on such a questionable investigatory model threaten the integrity of the courts.

What if it had been independent citizens who had taken it upon themselves to proactively seek drugs from Moon? The implication of *TL* is that this may, or may not, have been something that the court should base a stay on, depending on the 'grossness' of the inducer's (mis)conduct. But beyond the mundane criticism that this guidance is vague – How does one define 'grossness'? How much 'further' must non-state inducers go? – it also appears to be wrongheaded, if reliability of an inference of ongoing criminality is what is ultimately, and most urgently, at issue in entrapment cases. On the account sketched above, adequate recording and oversight are meant as indicators pointing in favour of such reliability. If there is no adequate recording, oversight, or formal training of the inducer, there appears to be *less* security in the inference of ongoing criminality. If that is right, there is *more* reason to worry that allowing the prosecution to proceed might risk legitimating the illegitimate.

It might be responded that the police are more likely to be believed than others if they lie about what occurred between inducer and defendant, and thus that recording and oversight are only immediately relevant to the state entrapment context. Again, this might justify refusing a stay in a non-state context where identical conduct by a state inducer would have crossed the *Looseley* line. Although the point about credibility is perhaps correct, this response does not address meaningfully the point that courts should only endorse investigatory methods in this area that are sufficiently robust in their finding of ongoing criminality. Authenticating what happened ensures that the court's integrity is not hostage to the vagaries of witness credibility. Adequate oversight and training provide yet further safeguards against illegitimate 'investigatory' zeal.

What of the more general point that higher standards of procedural propriety should be expected of state agents in inducing people into committing crime, *because* of their superior resources, training, etc.? Should this not make it easier to argue abuse of process in state entrapment cases, as *TL* appears to suggest? An analogy might be drawn, in this regard, with illegally-obtained evidence, where the courts might – to reflect the importance of the relevant

[47] *Moon* at [50].

rules – be keener to exclude evidence obtained by state officials in (typically knowing) breach of their powers, than private citizens who have no such powers. Such an analogy is, however, false. The evidence discovered illegally is typically independently reliable and probative of a crime that has already happened, without the finder's involvement. There is no allegation that the 'investigatory' tactic has in fact created a crime that credibly would not otherwise have occurred. *That* allegation, and its implications for their integrity, is ultimately what the courts should be most concerned with in entrapment cases. It has been argued that this worry may arise more pressingly in cases of non-state than state entrapment. Although the Court of Appeal was right in *TL* that non-state entrapment *can* threaten the courts' integrity, the test it endorsed does not address this threat sufficiently.