

## [The Possible World Defense: Why Our Current Legal Thinking about Entrapment is Philosophically Suspect](#)

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By [Luke William Hunt](#)

I was an FBI Special Agent before making the natural career change to academic philosophy. During my time in the FBI, I often wondered about the limits of the FBI's use of elaborate undercover and sting operations. Shortly after I left the Bureau, agents engaged in an undercover operation to apprehend a band of [cattle-prod-wielding, kidnapping rabbis](#). The rabbis were in the business of torturing— via cattle prods on certain parts of the body— Jewish men in an effort to force the men to give their wives religious divorces (“gets”). However, in their last venture, the rabbis were caught up in a government sting in which an FBI agent posed as a wife who was seeking a get from her uncooperative husband.

The point of the story is that—from religious divorces to counterterrorism—stings are all the rage. By stings I mean undercover operations in which law enforcement officers and informants gather evidence against criminal subjects by engaging in clandestine acts that would otherwise be a violation of substantive criminal law (what the FBI calls “otherwise illegal activity,” or “OIA”). Perhaps the sting in the divorce torture plot was justified and ended well, but these sorts of tactics raise a variety of philosophical questions. One way to examine these questions is to revisit the legal doctrine of entrapment.

Law enforcement officials expend tremendous amounts of time and resources to construct undercover sting operations. But ultimately their legitimacy under federal precedent is based on the mind of the

target of the operation—not the police’s tactics. Judges and juries apply a *subjective test* for entrapment: they must determine whether the target was “[predisposed](#)” and thus would have committed the crime without any sort of police inducement. If so, then the person was not entrapped.

This way of adjudicating such cases is flawed. Specifically, there are four problems that show why entrapment should have less to do with criminal law and what is in the mind of the target—the subjective test—and more to do with criminal procedure and objective factors regarding the reasonableness of tactics used by the police. [[Call my argument the “possible world defense.” ]]

To flesh out these concerns, consider the following hypothetical scenario: Suppose a man—call him “Michael”—is known to enjoy hanging out at a local café. Michael prefers large, sugary, expensive “coffee drinks”—those involving some combination of foam, cream, and exotic spice. However, Michael’s doctor advises that such beverages are undermining his health, and so Michael begins visiting the café for green tea instead. The baristas know Michael and try to keep him on track, suggesting new teas as they arrive. But the owner—call him “Robert”—eyes an opportunity. He concocts an elaborately sugary coffee drink that includes behind-the-counter spices, offers it to Michael, and gets him hooked again. The baristas object to Robert’s aggressive tactics, but he laughs it off, saying: “If not here, then he would have gotten it somewhere else. I might as well be the one to make the money.”

Robert’s take on the situation expresses—in an informal way—a claim about the way the world is, namely: The world could have existed in a particular way that is different from the way the world actually is. He says that Michael would have consumed a coffee drink in a world in which he did not tempt him with a drink because Michael was predisposed to consume coffee drinks anyway. Most

people don't stop to consider the metaphysical implications of such claims. However, sometimes getting to the bottom of these counterfactuals is necessary in order to resolve important issues. The cases in which this is relevant are often the ones in which the stakes are highest: Guilty verdicts that are based upon a finding that one was not entrapped because one was predisposed and would have committed the crime anyway.

Such counterfactual claims face four philosophical problems. First, the subjective test for entrapment raises questions related to the nature of possible worlds. Roughly, possible worlds are the countless ways that things could have been, rather than the way they are in the actual world. Although we know that Robert tempted Michael with a coffee drink in the actual world, we might think things could have been different: Perhaps the world could have been such that Michael succumbed to his coffee weakness without being tempted by Robert—in other words, perhaps there is a possible world in which that happened.

So what's the problem? Well, what is the nature of the possible world in which things happened differently? Does it exist? Is it an abstract copy of the concrete world? Is it simply linguistic? What is the best way to make sense of propositions we know to be false but believe to be possibly true in a different, non-actual state of affairs? Admittedly, these questions seem far-removed from the work of judges and juries, but they lead to more pressing practical questions.

Second, the difficulty of the metaphysical question belies the more pressing epistemological problem: We might all agree that there are “modal facts”—regarding what is possible, for example—while still

disagreeing about whether we can know what might be the case in a particular possible world. How do we know a proposition is possible when we do not know that it is true (including when we know the proposition is false)? These concerns do not bode well for the use of the subjective test to determine whether one will lose one's freedom to incarceration based upon a finding of guilt *beyond a reasonable doubt*.

Third, the subjective test also raises ethical questions about the nature of character traits and the extent to which one is granted the presumption of responsibility. The test seems to embrace the view that people have traits that will always be displayed over a wide range of situations. But are we justified in presuming to know how a "predisposed" person would act in a possible world that is even slightly different from the actual world? Is it possible, for example, that a heavy versus a light breakfast could affect Michael's decisions? If so, perhaps one's "predisposition" and character traits are richly complex in a way that inhibits one from simply pegging another as "predisposed to do  $x$  in possible world  $w$ "—and knowing that proposition with certainty.

Otherwise, our political institutions would seem to dispense with the presumption that persons are responsible agents. A prominent tenet of many theories of justice is that legal systems should give one a fair opportunity to account for penal sanctions, address one as a rational agent, and give appropriate weight to one's liberty. However, the subjective test—in suggesting that one may be marked as "predisposed"—in a sense treats one as incapable of responsible action. The test justifies the police's use of tactics to induce a person to commit a crime because there is a presumption that the person would commit the crime anyway.

Fourth, the subjective test challenges fundamental political concerns. The rule of law—roughly, governance by law rather than the whim of government officials—is a core commitment of constitutional democracies in the liberal tradition. The justified use of discretion is an important part of the rule of law generally and policing specifically. However, undercover sting operations include clandestine acts that would otherwise violate substantive criminal law (what the FBI calls “otherwise illegal activity,” or “OIA”). OIA is thus sanctioned law breaking that avoids review under the subjective test.

There are no doubt instances in which OIA is necessary—emergencies in which there is a risk of death or serious bodily injury come to mind. But protecting the rule of law requires care about the limits of OIA. The subjective test mostly avoids an examination of the reasonableness of the police’s tactics—including OIA—because the test instead focuses upon the mind of the target. This contributes to the vast discretion law enforcement has to engage in OIA.

These problems demand a different entrapment test that focuses instead on the reasonableness of such tactics—rather than the subjective “predisposition” of law enforcement targets. Legal institutions should replace the subjective test because it is a bad decision procedure that is rife with theoretical problems. Perhaps an *objective test* that relies upon something other than counterfactual conditionals is more appropriately justified: A test that examines what happened in the actual world in terms of the reasonableness of the tactics used by the police. Ultimately, I think any new entrapment policy should begin by clarifying the limits of the police’s power to break the law. This is a topic I’ve discussed at length [elsewhere](#), and I hope to write a follow-up post on this blog. Until then, the “possible world

defense” provides a philosophical critique of the subjective test for entrapment. Just don’t call it that in court.

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