Entrapment Minimalism: Shedding the "No Reasonable Suspicion or Bona Fide Inquiry" Test

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In Canada, the entrapment defence can be established in one of two ways. In the first way, "Entrapment 1", the defence must prove that police provided the accused with an opportunity to commit an offence without: (i) reasonably suspecting him or her of committing that offence; or (ii) engaging in a bona fide inquiry. "Entrapment 2" arises when police go beyond providing an opportunity and "induce" the commission of the offence.

The author argues that courts should cease recognizing Entrapment 1 as a discrete defence generating an automatic stay of proceedings. Entrapment 1 coheres poorly with the defence's rationale (deterring police from manufacturing crime), has generated a convoluted and inconsistent jurisprudence, and fails to draw a sensible line between abusive and non-abusive police methods. Instead, Entrapment 1 should be folded into the Charter*'s general abuse of process doctrine, allowing courts to consider all relevant circumstances in deciding whether alleged state misconduct is grave enough to warrant a stay of proceedings. This would leave Entrapment 2 as the only true entrapment defence automatically requiring a stay.*

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Introduction

Entrapment is a strange defence. In fact, it is not a defence at all, at least not in the mould of a substantive bar to criminal liability.[1] Instead, it is a species of the common law abuse of process doctrine. A successful claim results in a stay of proceedings, not an acquittal.[2] Entrapment is also relatively novel: it was first recognized by the Supreme Court of Canada in 1988.[3] There have accordingly been few appellate decisions outlining its parameters.[4]

1. See *R v Pearson*, [1998] 3 SCR 620 at paras 9–11, 233 NR 367.

2. Accordingly, the question is decided by the judge as the trier of law (and not the jury in a jury trial) after guilt has been decided. See *R v Mack*, [1988] 2 SCR 903 at 920, 90 NR 173; *R v Pearson*, *supra* note 1 at paras 9–12. See also *Amato v The Queen*, [1982] 2 SCR 418 at 445–49, 29 CR (3rd) 1, Estey J, dissenting [*Amato* SCC]; *R v Jewitt*, [1985] 2 SCR 128 at 145, 47 CR (3rd) 193, Dickson CJC. Entrapment may thus be raised, and a stay awarded, even after the accused enters a guilty plea. See *R v Maxwell* (1990), 1 OR (3d) 399, 3 CR (4th) 31 (CA).

3. See *R v Mack*, *supra* note 2. See discussion in Part I.A, *below*.

4. Since *Mack*, the Supreme Court of Canada has issued only two other significant entrapment decisions. In *R v Showman*, released with *Mack*, the Court simply applied *Mack* in rejecting entrapment where police reasonably suspected the accused and did not induce the offence. See *R v Showman*, [1988] 2 SCR 893, [1989] 1 WWR 635 [cited to SCR]. *Showman* is discussed further in Part I.C, *below*. In *R v Barnes*, discussed in detail in Part I.B, *below*, the Court elaborated on the meaning of bona fide inquiry. See [1991] 1 SCR 449, 53 BCLR (2d) 129 [cited to SCR].

Enough case law has emerged, however, to reveal two distinct claims. In the first, the defence must prove that police provided the accused with an opportunity to commit an offence without: (i) reasonably suspecting him or her of committing that offence; or (ii) engaging in a bona fide inquiry.[5] The prosecution may accordingly defeat the claim by negating either of these elements, i.e., by showing that police had reasonable suspicion or, if not, were conducting a bona fide inquiry. I call this claim "Entrapment 1".[6] "Entrapment 2" arises when police go beyond providing an opportunity and "induce" the commission of the offence. To make out this claim, the defence must generally show that the accused would not have committed the offence but for the inducement.[7]

This article's purpose is to urge courts to cease recognizing Entrapment 1 as a discrete defence generating an automatic stay of proceedings. Entrapment 1 coheres poorly with the defence's rationale (deterring police from manufacturing crime), has generated a convoluted and inconsistent jurisprudence, and fails to draw a sensible line between abusive and non-abusive police methods. Instead, Entrapment 1 should be folded into the *Charter*'s general abuse of process doctrine, allowing courts to consider all relevant circumstances in deciding whether alleged state misconduct is grave enough to warrant a stay of proceedings. This would leave Entrapment 2 as the only true entrapment defence automatically requiring a stay.

The remainder of this article proceeds as follows. In Part I, I trace the origins of entrapment in Canadian law and outline the current doctrinal formulations of Entrapment 1 and Entrapment 2. Part II assesses the fit between the two species of the defence and the Supreme Court of Canada's professed rationales for them. After reviewing the leading cases and an empirical analysis of 264 published decisions, I conclude that Entrapment 1 fails to mark a coherent, defensible boundary between legitimate and abusive opportuning. Part III provides a framework for absorbing Entrapment 1 into the general abuse of process doctrine, summarizing that doctrine's parameters and highlighting the two types of cases ("*mala fides*" and "crime creation") most likely to lead to stays of proceedings. The final part concludes.

5. As with other procedural remedies, defendants bear the burden of proving entrapment (on a balance of probabilities). See *R v Mack*, *supra* note 2 at 973–76.

6. This terminology is borrowed from Steven Penney, Vincenzo Rondinelli, and James Stribopoulos. See Steven Penney, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada*, 2nd ed (Toronto: LexisNexis, 2018) at §§ 10.38–10.50.

7. Of course, when police facilitate a crime to any degree, the specific offence charged (i.e., its precise nature, location, and timing) would not likely have been committed without that facilitation. When jurists refer to police "creating" or "manufacturing" crime, they mean that police have enticed someone to commit a *type* of crime that they likely would not have committed but for police involvement. See Gerald Dworkin, "The Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime" (1985) 4:1 Law & Phil 17 at 25–30.

I. The Two Types of Entrapment

A. Origins

Entrapment was first recognized by a majority of the Supreme Court of Canada in *R v Mack*.[8] Previously, most courts had held that entrapment was not an independent defence, whether substantive (resulting in acquittal) or procedural (resulting in a stay of proceedings).[9] Entrapment could only be raised in mitigation of sentence.[10]

The seeds for *Mack* were planted in two minority opinions in *Kirzner v The Queen*[11] and *Amato v The Queen*.[12] In his decision for four of nine judges in *Kirzner*, Laskin CJC was prepared to find entrapment where police go "beyond mere solicitation . . . and have actively organized a scheme of ensnarement".[13] He

8. *Supra* note 2.

9. Before *Mack*, courts occasionally acquitted on the basis that police inducement akin to entrapment negated an element of the offence. See *Lemieux v The Queen*, [1967] SCR 492, 63 DLR (2d) 75 (no *actus reus* where homeowner consented to staged break-in, but had accused "committed the offence with which he was charged, the circumstance that he had done the forbidden act at the solicitation of an *agent provocateur* would have been irrelevant to the question of his guilt or innocence" at 496). See also *R v Amato* (1979), 51 CCC (2d) 401, 12 CR (3rd) 386 (BCCA), aff'd [1982] 2 SCR 418; *R v Kirzner* (1976), 14 OR (2d) 665, 74 DLR (3d) 351 (CA), aff'd (1977), [1978] 2 SCR 487; *R v Chernecki* (1971), 16 CR (NS) 230, [1971] 5 WWR 469 (BCCA); *Amato* SCC, *supra* note 2, Ritchie J (stating that "it is only where police tactics are such as to leave no room for the formation of independent criminal intent by the accused that the question of entrapment can enter into the determination of his guilt or innocence" at 473).

A few lower courts had recognized entrapment before *Mack*. See *R v Bonnar* (1975), 14 NSR (2d) 365, 30 CCC (2d) 55 (SC (AD)) (recognizing entrapment as procedural defence but finding it was not made out); *R v Ormerod*, [1969] 2 OR 230, [1969] 4 CCC 3 (CA) (suggesting possibility of recognizing defence but finding no entrapment on facts); *R v Shipley* (1969), [1970] 2 OR 411, [1970] 3 CCC 398 (Co Ct) (stay of proceedings entered for entrapment); *R v MacDonald* (1971), 15 CR (NS) 122, [1971] BCJ No 597 (QL) (BC Prov Ct) (finding abuse of process based on entrapment). See also Robert K Paterson, "Towards a Defence of Entrapment" (1979) 17:2 Osgoode Hall LJ 261 at 261, 267–71 (reviewing cases); Michael Stober, "The Limits of Police Provocation in Canada" (1992) 34:3 Crim LQ 290 at 305–22 (same).

10. See Brendon Murphy & John Anderson, "After the Serpent Beguiled Me: Entrapment and Sentencing in Australia and Canada" (2014) 39:2 Queen's LJ 621 at 645–49.

11. (1977), [1978] 2 SCR 487, 81 DLR (3d) 229 [*Kirzner* SCC cited to SCR].

12. *Supra* note 2.

13. *Supra* note 11 at 494, Laskin CJC.

found, however, that the claim failed on the facts.[14] The majority judges were content to reject entrapment on the facts without opining on its legitimacy.[15]

Dissenting for four of nine judges in *Amato*, Estey J found entrapment along similar lines to Laskin CJC's formulation in *Kirzner*.[16] Of the remaining five, four demurred on the recognition issue, preferring to hold that the defence failed on the facts.[17] Writing only for himself, Ritchie J maintained that entrapment was not a discrete defence.[18]

In *Mack*, the Court unanimously adopted Estey J's view in *Amato* that entrapment is a procedural defence (stemming from the common law abuse of process doctrine) that results in a stay of proceedings.[19] Writing for the Court in *Mack*, Lamer J (as he then was) stated that certain methods of combatting crime are "unacceptable" and bring the administration of justice into disrepute.[20] Like Estey J and Laskin CJC, he concluded that entrapment arises when state agents go beyond "providing an opportunity" and "induce" the commission of an offence.[21] In addition, entrapment may arise without inducement when police engage in "random virtue-testing" or act for "dubious motives unrelated to the investigation and repression of crimes".[22] As discussed, this occurs when police opportune in the absence of either reasonable suspicion or a bona fide investigation.[23] I examine each of these doctrines below.

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14. See *ibid* at 501–03.

15. *See ibid* at 503, Pigeon J.

16. See *Amato* SCC*, supra* note 2.

17. See *ibid*, Dickson J (stating that "on the facts of this case the defence of entrapment, assuming it to be available under Canadian law, does not arise" at 464).

18. See *ibid* at 471–73, Ritchie J.

19. See *R v Mack, supra* note 2 at 919–22. Though the issue was not directly before it, a majority of the Court had earlier suggested that entrapment existed as a procedural defence leading to a stay of proceedings. See *R v Jewitt*, *supra* note 2 at 145.

20. See *supra* note 2 at 940–42. See also *Amato* SCC, *supra* note 2 at 446, Estey J, dissenting.

21. *R v Mack*, *supra* note 2 at 959. Entrapment by non-state actors is not a defence: "Entrapment concerns the conduct of the police and the Crown." See *R v Pearson*, *supra* note 1 at para 11. "For entrapment to apply, the court must conclude that the appellant was convicted of an offence that was the work of the state." See *R v Carson* (2004), 185 CCC (3d) 541 at para 29, 185 OAC 298 (Ont CA). See Morris Manning & Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law*, 5th ed (Markham, Ont: LexisNexis, 2015) at ¶¶ 13.98–13.99; Kate Hofmeyr, "The Problem of Private Entrapment" [2006] Crim L Rev 319.

22. *R v Mack, supra* note 2 at 956.

23. See *ibid* at 956–59, 964. See also *R v Barnes*, *supra* note 4 at 460.

B. Entrapment 1: No Reasonable Suspicion or Bona Fide Inquiry

To make out Entrapment 1, the defence must first show that police gave the accused an "opportunity" to commit the offence. The Supreme Court of Canada did not elaborate on this requirement in *Mack* or any later decisions. Lower courts have nonetheless drawn a distinction between "legitimately investigating a tip" (which does not engage entrapment) and "giving an opportunity to commit a crime" (which does).[24] This aspect of Entrapment 1 is discussed in more detail in Part II.B.(ii), below.

If the "opportunity" requirement is satisfied, the next step is to show that police lacked both reasonable suspicion and bona fides. The Supreme Court of Canada has said little about the meaning of "reasonable suspicion" in this context. For police detention and search powers, it means "something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds".[25] Lower courts have held that this definition also applies to entrapment.[26]

The concept of bona fides has received more attention. Justice Lamer explained in *Mack* that police may legitimately opportune even if they do not reasonably suspect any individual of committing the offence.[27] But if they lack individualized suspicion, they must have bona

24. *R v Imoro*, 2010 ONCA 122 at para 15, aff'd 2010 SCC 50. See also *R v Benedetti* (1997), 200 AR 179, 51 Alta LR (3d) 16 (CA); *R v Milley (RS)* (1995), 125 Nfld & PEIR 97 at 101, 389 APR 97 (Nfld CA).

25. *R v Kang-Brown*, 2008 SCC 18 at para 75, Binnie J; *ibid* at paras 164–65, Deschamps J, dissenting. See also Steven Penney, "Standards of Suspicion" (2017) 65:1/2 Crim LQ 23 at 35–41.

26. See *R v Olazo*, 2012 BCCA 59 at paras 16–17; *R v Ahmad*, 2018 ONCA 534 at para 41; *R v Ayangma*, 2016 PECA 6 at para 37, leave to appeal to SCC refused, 37066 (12 January 2017); *R v Nuttall*, 2018 BCCA 479 at para 299. In deciding whether police had reasonable suspicion, courts may consider the target's known criminal propensity, but only if it "can be linked to other factors leading the police to a reasonable suspicion that the individual is engaged in a criminal activity" and only if there are logical and temporal connections between the investigated crime and the target's criminal history. See *R v Mack*, *supra* note 2 at 953–58. See also *R v Ahmad*, *supra* note 26 at para 46; *R v Fortin* (1989), 33 OAC 123, 47 CRR 348 (CA). But see *R c Lebrasseur* (1995), (*sub nom R v Lebrasseur*) 102 CCC (3d) 167, 1995 CanLII 4697 (Qc CA) (no entrapment where accused involved in "drug milieu" offered opportunity to traffic despite absence of specific evidence of trafficking); *R v Morin (IJ)* (1999), 175 Sask R 305, 1999 CanLII 12466 (QB) (no entrapment where police gave opportunity to traffic drugs where accused reasonably suspected of possession).

27. See *supra* note 2 at 956. See also *R v Ladouceur*, [1990] 1 SCR 1257 at 1280–84, 108 NR 171 (noting in the context of a section 1 justification for arbitrary vehicle stops that random checks for regulatory compliance are necessary to ensure traffic safety).

fides if they target a suspect for an illegitimate, non-criminal justice purpose or engage in "random virtue-testing".[28] An example of the former, he stated, would be an officer who disliked parole who offered parolees prostitutes to "get them to commit an offence and so have their parole revoked".[29] As an example of the latter, he invoked an officer who "plants a wallet with money in an obvious location in a park, and ensures that the wallet contains full identification of the owner".[30] "[W]hether or not we are willing to say the average person would steal the money," he concluded, this tactic "carries the unnecessary risk that otherwise law-abiding people will commit a criminal offence."[31]

If police had received "many complaints" of handbag thefts in a bus terminal, in contrast, they would be justified in planting one "in an obvious location" in the terminal.[32] Random opportuning is legitimate, he concluded, if it is conducted in a "particular location . . . where it is reasonably suspected that certain criminal activity is occurring".[33] Unlike the "wallet in the park" scenario, he asserted, this does not create an undue risk of tempting otherwise innocent people to offend.[34]

The Court elaborated on the "random virtue-testing" concept in *R v Barnes*, where police had conducted a "buy-and-bust" operation over a six-block area.[35] Though there was little reason to suspect the accused of selling drugs, the majority found bona fides because police acted for legitimate law enforcement reasons and reasonably believed that drug trafficking was occurring throughout the area.[36] Focussing on a smaller area where trafficking was concentrated, Lamer CJC reasoned for the majority, would have thwarted the police's ability to "deal with the problem effectively".[37] "It would be unrealistic for the police to focus their investigation on one specific part," he continued, "given the tendency of traffickers to modify their techniques in response to police investigations".[38] In

28. *R v Mack, supra* note 2 at 956. See also *ibid* at 959.

29. *Ibid* at 956–57.

30. *Ibid* at 957.

31. *Ibid*.

32. *Ibid*.

33. *Ibid* at 956–57.

34. See *ibid*.

35. *Supra* note 4.

36. See *ibid* at 460. The officer testified that he typically approached "males hanging around, dressed scruffy and in jeans, wearing a jean jacket or leather jacket, runners or black boots, that tend to look at people a lot" (*ibid* at 456).

37. *Ibid* at 461.

38. *Ibid*.

the circumstances, he concluded, police had defined the target area with "sufficient precision" to justify opportuning without reasonable suspicion.[39]

Writing only for herself, McLachlin J (as she then was) dissented, arguing for a more constrained conception of bona fides. In her view, the majority failed to properly value innocent people's interest in "being able to go about their daily lives without courting the risk that they will be subjected to the clandestine investigatory techniques of agents of the state".[40] Courts should consider "not only the motive of the police and whether there is crime in the general area," she asserted, "but also other factors relevant to the balancing process, such as the likelihood of crime at the particular location targeted, the seriousness of the crime in question, the number of legitimate activities and persons who might be affected, and the availability of other less intrusive investigative techniques".[41]

C. Entrapment 2: Inducement

As mentioned, Entrapment 2 arises when police go beyond providing a criminal opportunity and induce an offence. In *Mack*, Lamer J recognized that the line between these categories was not perfectly bright: the "totality of the circumstances" must be considered.[42] A key consideration, however, is whether the enticements "would have induced the average person in the position of the accused . . . into committing the crime".[43] A person so induced is still blameworthy, Lamer J observed. But the "average person" test suggests that police have "exceeded the bounds of propriety" by becoming involved in the "*manufacture* as opposed to the detection of crime".[44] Though the average person may take on some of the accused's characteristics (such as the vulnerabilities

39. *Ibid* at 463. See also *R v Kenyon* (1990), 61 CCC (3d) 538, 1990 CanLII 1263 (BCCA) (no reasonable suspicion that drug dealing taking place at pub); *R v Franc*, 2016 SKCA 129 (reasonable suspicion that drugs being sold at tavern); *R v Benjamin*, 1994 CanLII 6, [1994] OJ No 1373 (QL) (Ont CA) (area targeted too large); *R v Swan*, 2009 BCCA 142 (while geographic precision may not be feasible for "dial-a-dope" investigation, cold-calling without effort to substantiate suspicion not bona fide); *R v Chiang*, 2012 BCCA 85 (no entrapment where police placed an advertisement for underage prostitutes; placement in "erotic services" section analogous to geographic area in *Barnes*).

40. *R v Barnes, supra* note 4 at 480, McLachlin J, dissenting.

41. *Ibid* at 483, McLachlin J, dissenting.

42. *Supra* note 2 at 959, 965.

43. *Ibid* at 959.

44. *Ibid* at 960 [emphasis in original].

noted in the paragraph immediately below), the test is ultimately an objective one that focuses on police conduct.[45]

The average person test is not determinative, however. Entrapment 2 may sometimes arise even when the ordinary person would not have been induced.[46] Relevant considerations include:

i. the number of opportuning attempts before the accused agreed to commit the offence;[47]
ii. the nature of any positive or negative inducements, including deceit, reward, and (express or implied) threats;[48]
iii. whether there is ongoing criminal activity;[49]
iv. whether police exploited emotions such as compassion, sympathy, or friendship;[50]
v. whether police exploited personal vulnerabilities, such as youth, intellectual disability, or addiction;[51]

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45. The accused's predisposition to commit the offence is therefore irrelevant to Entrapment 2. Whether police went beyond making an offer to inducing the offence "is to be assessed with regard to what the average, non-predisposed person would have done". See *ibid* at 965.

46. See *ibid* at 961–62. See also *R v Nuttall*, *supra* note 26 (stating that although police conduct would not have induced the average person to "[plant] bombs that would kill many people," police "manufactured the crime that was committed and were the primary actors in its commission" at paras 431–40).

47. See *R v Mack*, *supra* note 2 at 962, citing *Amato* SCC, *supra* note 2, Estey J, dissenting (inducement "ordinarily but not necessarily will consist of calculated inveigling and persistent importuning" at 446); *R v Showman*, *supra* note 4 at 901–02 (no lengthy or persistent opportuning).

48. See *R v Mack*, *supra* note 2 at 962, 964; *Amato* SCC, *supra* note 2, Estey J, dissenting (stating that inducement "may be but is not limited to deceit, fraud, trickery or reward" at 446). See also *R v S (J)* (2001), 152 CCC (3d) 317, 139 OAC 326 (Ont CA) (pressing of 14-year-old accused to sell marijuana to bigger, larger police officers constituted inducement).

49. See *R v Mack, supra* note 2 at 963.

50. See *ibid*. See also *R v Showman*, *supra* note 4 (no exploitation of "close personal relationship" at 901); *R v Meuckon* (1990), 57 CCC (3d) 193, 78 CR (3rd) 196 (BCCA) [cited to CCC] (open to trial judge to find entrapment based on "making gifts, by persistent importuning, and by relying on compassion, sympathy and friendship through a fabricated story about failing to gain a job if he did not supply cocaine to his prospective employer's son" at 197–98); *R v Abboud*, 2012 ONSC 3862 (sexually suggestive message from undercover agent and accused's desire for sexual relationship did not induce drug sale).

51. See *R v Mack, supra* note 2 at 963. See also *R v NRR*, 2014 ABQB 282 (police exploited young person's isolation and vulnerability by suggesting use of and supplying hit man; without police entreaties "it is doubtful if NRR's wish to kill his girlfriend's husband would ever have

vi. the degree of police involvement in committing the offence (compared to the accused), including the degree of harm caused or risked and the commission of any illegal acts;[52]
vii. whether the police undermined other constitutional values, such as freedom of expression and association;[53] and
viii. whether the offence was amenable to other investigative techniques.[54]

In *Mack*, the Court found that entrapment was established by persistent, lengthy, and threatening requests to induce a former drug trafficker to sell drugs.[55] The average person in the accused's position, Lamer J wrote, "might also have committed the offence, if only to finally satisfy this threatening informer and end all further contact".[56] In the companion case of *R v Showman*, in contrast, the Court found that there was no inducement despite several requests to buy drugs and appeals to friendship.[57] There was no exploitation of a "close personal relationship" and the requests were non-threatening and made over a brief period of time.[58]

II. Does the Jurisprudence Cohere with the Rationale for Entrapment?

A. Theory

Jurists have long debated entrapment's normative rationale.[59] I do not engage with this vast literature at length here. Instead, I take the Supreme Court

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gotten beyond the level of big talk" at para 59); *R v Evans* (1996), 2 CR (5th) 106, 1996 CanLII 3116 (BCSC) (exploitation of mental illness, intellectual disability, and suggestibility).

52. See *R v Mack, supra* note 2 at 963.

53. See *ibid* at 964.

54. See *ibid*.

55. See *ibid* at 977–79.

56. *Ibid* at 979.

57. *Supra* note 4 at 901.

58. See *ibid* at 901–02. See also *R v Voutsis* (1989), 73 Sask R 287, 47 CCC (3d) 451 (CA).

59. See Simon France, "Problems in the Defence of Entrapment" (1988) 22:1 UBC L Rev 1; ML Friedland, "Controlling Entrapment" (1982) 32:1 UTLJ 1; Andrew Ashworth, "Re-Drawing the Boundaries of Entrapment" [2002] Crim L Rev 161; Richard H McAdams, "The Political Economy of Entrapment" (2005) 96:1 J Crim L & Criminology 107; Joseph A Colquitt, "Rethinking Entrapment" (2004) 41:4 Am Crim L Rev 1389; Jessica A Roth, "The

of Canada's conception of the defence at face value: police should not create crime that would not likely have occurred otherwise.[60] In the Court's view, such conduct unfairly intrudes upon liberty and privacy[61] and wastes law enforcement resources.[62]

Entrapment 2 fits squarely within this conception of the defence. The Supreme Court of Canada's "average person" test deems police to act abusively when they engage in the "manufacture" of crime instead of its "detection".[63] It will sometimes be difficult, of course, to draw the line between these poles. But "inducement" operationalizes entrapment's rationale coherently and straightforwardly.

The same cannot be said for Entrapment 1. To begin, before *Mack*, no court in the common law world had accepted that entrapment can occur without inducement.[64] Entrapment 1 appears to have been invented, more or less out of

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Anomaly of Entrapment" (2014) 91:4 Wash UL Rev 979; Hock Lai Ho, "State Entrapment" (2011) 31:1 LS 71.

60. See *R v Mack, supra* note 2 at 941–42, 959–60. See also *Amato* SCC, *supra* note 2, Estey J, dissenting (describing defence as a "control mechanism for over-zealous crime detection and prosecution where inducement or incitement leads the otherwise innocent to the commission of an offence" at 429).

61. See *R v Mack, supra* note 2 at 942, 960–61. See also Paul M Hughes, "Temptation and Culpability in the Law of Duress and Entrapment" (2006) 51:3 Crim LQ 342.

62. See *R v Mack, supra* note 2 at 958. See also Richard A Posner, "An Economic Theory of the Criminal Law" (1985) 85:6 Colum L Rev 1193 (resources used to apprehend and convict accused who would not have committed offence but for police efforts "socially wasted, because they don't prevent any crimes" at 1220); Steven Shavell, "Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent" (1985) 85:6 Colum L Rev 1232 (if persons "would not ordinarily commit criminal acts, there is no behavior that needs to be deterred" at 1256); Bruce Hay, "Sting Operations, Undercover Agents, and Entrapment" (2005) 70:2 Mo L Rev 387. For a review and critique of the economic approach to entrapment, see McAdams, *supra* note 59 at 126–42.

63. *R v Mack, supra* note 2 at 959–60 [emphasis omitted].

64. At the time *Mack* was decided, entrapment was firmly established in only one comparable jurisdiction: the United States. While there have been various formulations of the defence in the federal and state jurisdictions, all have required state agents to induce crime and not simply provide an opportunity to commit it. See Wayne R LaFave, *Criminal Law*, 3rd ed (St. Paul, Minn: West Group, 2000) at § 5.2. A less stringent version of Entrapment 1 was later adopted in England and Wales. See *R v Loosely*, [2001] UKHL 53 (reasonable suspicion and bona fide inquiry relevant considerations but not determinative). The European Court of Human Rights has also adopted a broad conception of entrapment that can be interpreted as requiring reasonable, individualized suspicion in all cases. See *Teixeira de Castro v Portugal* (1998), 28 EHRR 101. It should be noted, however, that this Court can issue only compensatory remedies

whole cloth, by Lamer J in *Mack*.[65] He cited no authority for the proposition. It was not mentioned in *Kirzner*[66] or *Amato*.[67] Nor had it appeared in any institutional law reform proposals.[68]

Justice Lamer nonetheless asserted a connection between Entrapment 1 and the crime creation rationale for the defence. "The absence of a reasonable suspicion or a *bona fide* inquiry," he wrote, "is significant in assessing the police conduct because of the risk that the police will attract people who would not otherwise have any involvement in a crime."[69] That said, even bona fide, location-based opportuning risks capturing people "who would not otherwise have had any involvement in criminal conduct".[70] This is unfortunate, he concluded, but is an "inevitable" cost of giving police the means to combat organized and consensual crimes such as drug trafficking.[71]

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such as damages and cannot order acquittals, stays, or the exclusion of evidence. For overviews of the law of entrapment in comparable jurisdictions, see Simon Bronitt, "The Law in Undercover Policing: A Comparative Study of Entrapment and Covert Interviewing in Australia, Canada and Europe" (2004) 33:1 Comm L World Rev 35; Kent Roach, "Entrapment and Equality in Terrorism Prosecutions: A Comparative Examination of North American and European Approaches" (2011) 80:4 Miss LJ 1455 [Roach, "Entrapment in Terrorism"].

65. See *R v Mack, supra* note 2.

66. See *Kirzner* SCC*, supra* note 11.

67. See *Amato* SCC, *supra* note 2. In his dissenting reasons in *Amato* SCC, Estey J mentions reasonable suspicion, but only in the context of deciding whether police induced the offence. "[R]easonable suspicion" was relevant in deciding whether the "accused would commit the offence without inducement" (*ibid* at 446).

68. See Report of the Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (Ottawa: Queen's Printer, 1969) at 75–80; The Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Second Report, vol 2: Freedom and Security Under Law* (Ottawa: Queen's Printer, 1981) at 1047–53; American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes* (Philadelphia: American Law Institute, 1985), s 2.13; US, *Final Report of the National Commission on Reform of Federal Criminal Laws: A Proposed New Federal Criminal Code* (Washington, DC: US Government Printing Office, 1971) at § 702.

69. *R v Mack, supra* note 2 at 956. Additionally, Lamer J stated that providing opportunities without reasonable suspicion or a bona fide inquiry "carries the unnecessary risk that otherwise law-abiding people will commit a criminal offence" (*ibid* at 957). Justice Lamer also sought to justify Entrapment 1 by asserting that "it is not a proper use of the police power to simply go out and test the virtue of people on a random basis" (*ibid* at 965). See also *R v Barnes*, *supra* note 4 at 460. I examine this aspect of Entrapment 1 in Part II.B.(iii), *below*.

70. *R v Mack, supra* note 2 at 956. See also Stober, *supra* note 9 at 330.

71. See *R v Mack*, *supra* note 2 at 956. See also *Kirzner* SCC*, supra* note 11 at 492–93, Laskin CJC; *R v Imoro*, *supra* note 24 at para 8. This begs the larger question of whether, and in what

Entrapment 1's connection with the defence's rationale is therefore much looser than Entrapment 2. By definition, an "induced" offence would not likely have been committed without inducement. It is much more difficult to say whether someone who is merely given an opportunity would have committed the offence absent the opportuning.[72] The answer could be "no", even if police had reasonable suspicion or opportuned in a sufficiently defined location. But it could also be "yes", even if police lacked reasonable suspicion and the location was imprecisely defined.

Of course, many doctrinal tests are indeterminate. As courts repeatedly apply them, patterns often emerge demarcating firmer boundaries between permissible and impermissible conduct. One cannot dismiss the possibility, in other words, that in practice Entrapment 1 has provided a descriptively coherent and normatively sensible framework for identifying abuses of process warranting a stay of proceedings. Unfortunately, the empirical record does not bear this out. As I show in the following section, the Entrapment 1 case law is neither coherent nor sensible.

B. An Empirical Study

To better understand how courts have applied entrapment doctrine, I attempted to find every reported decision from 1989 (the year after *Mack*) to April 2018.[73] I found 264 cases (from all levels of court) where entrapment was raised at trial. Of these, the defence was successful in 44 cases (17%).[74] Of these, 33 involved drug trafficking (75%).

None of this is surprising. Entrapment claims are rare.[75] Successful claims are rarer still. What is surprising, however, is the relative success of Entrapment

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circumstances, such activities ought to be criminalized. See Don Stuart, *Canadian Criminal Law*, 7th ed (Toronto: Thomson Reuters, 2014) at 652–53.

72. See *R v Mack, supra* note 2 at 956.

73. The database of cases is available here: <goo.gl/22wJa8>. The cases were obtained from the CanLII, Westlaw, and Lexis Advance Quicklaw databases. The database includes only cases that were published in these databases (i.e., it did not include unpublished cases referenced in published ones). I am very grateful to David Tanovich for sharing a comprehensive database of entrapment decisions from 1989 to 2009. See David M Tanovich, "Rethinking the *Bona Fides* of Entrapment" (2011) 43:2 UBC L Rev 417 [Tanovich, "Rethinking the *Bona Fides*"].

74. The defence was counted as successful if: (i) entrapment was found at trial (with that finding either not appealed or upheld on appeal); or (ii) entrapment was not found at trial but found on appeal (with that finding either not appealed or upheld on further appeal). In all cases where entrapment was found (or upheld), the court entered (or confirmed) a stay of proceedings.

75. See generally Stuart, *supra* note 71 at 647.

1 claims. In *Mack*, Lamer J intimated that they would be marginal.[76] There is no evidence, he asserted, that police engage in the kind of random virtue testing occurring in the "wallet in the park" hypothetical.[77] Requiring reasonable suspicion or a bona fide inquiry would not be unduly burdensome on police, he reasoned, as police are unlikely to "waste valuable resources attempting to attract unknown individuals into the commission of offences".[78] "[T]his type of situation must be considered," he concluded, "if only to ensure that the structure of the doctrine of entrapment is internally coherent".[79] He accordingly devoted most of his attention to the meaning of inducement under Entrapment 2, which as mentioned had hitherto been the defence's exclusive concern. This approach continued in *Barnes*, where eight of nine judges rejected McLachlin J's reformulation of bona fide inquiry and gave police latitude to randomly opportune in large geographic areas.[80]

As it turns out, however, successful Entrapment 1 claims are more common than successful Entrapment 2 claims. Of the 44 cases resulting in a stay, Entrapment 1 was found in 37 (84%). Entrapment 2, in contrast, was found less than half as often (16 cases; 36%).[81] Of course, the fact that the cases diverge from what was envisaged in *Mack* does not, in and of itself, prove that the decision is being applied improperly. Though more common than Entrapment 2, successful Entrapment 1 claims are still very rare (37/264 cases; 14%). The relative infrequency of successful Entrapment 2 claims (16/264; 6%) could be a function of many factors, including the possibility that police have taken *Mack* to heart and largely avoided inducing offences.

On closer examination, however, many of the Entrapment 1 decisions are troubling. Most revealing are the 26 cases where Entrapment 1 was found but not Entrapment 2. These are cases, in other words, where police did not induce the offence, yet the court stayed the proceedings because they acted without either reasonable suspicion or a bona fide inquiry. It is useful to group these into three categories: (i) "no reasonable suspicion" cases (n=15); (ii) "no bona fide inquiry" cases (n=7); and (iii) "hybrid" cases (n=4).

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76. See *R v Mack, supra* note 2 at 959.

77. See *ibid* at 957.

78. *Ibid* at 958.

79. *Ibid* at 957.

80. See the discussion in Part I.B, *above*.

81. Both forms of entrapment were found in eight cases. In two cases where the court found Entrapment 1, it was not possible to determine whether Entrapment 2 was made out. In all other cases where Entrapment 1 was found but there was no formal analysis of Entrapment 2, it was clear either from the reported facts or defence concessions that Entrapment 2 did not arise. In all cases where Entrapment 2 was found, it could be definitively determined whether Entrapment 1 was also made out.

(i) No Reasonable Suspicion Cases

In each of these cases, police provided an opportunity to traffic drugs or firearms to someone who was not randomly targeted, i.e., they had obtained information (typically either from an anonymous tipster or confidential informant) associating a specific person or phone number with trafficking.[82] The courts found, however, that the information did not rise to the level of reasonable suspicion.

To find Entrapment 1, of course, the court also had to find that police were not conducting a bona fide inquiry. In each case, the court explicitly or implicitly held that the bona fide inquiry "exception" does not apply where police target a specific, identifiable person.[83] Some courts accepted that a bona fide inquiry could include the opportuning of unknown persons associated with a sufficiently delineated, non-geographic domain, such as a telephone number or internet chat room.[84] Most have held, however, that (as with geographic spaces) police must reasonably suspect that the domain is being used for the

82. See *R v Swan*, *supra* note 39; *R v Arriagada*, [2008] OJ No 5791 (QL) (Ont Sup Ct); *R v Peters* (2002), 92 CRR (2d) 122, [2002] OJ 496 (QL) (Ont Sup Ct) [cited to CRR]; *R v Gosselin*, 2010 BCPC 164; *R v Nosworthy*, 2010 ONSC 743; *R v Gladue*, 2012 ABCA 143, leave to appeal to SCC refused, 34906 (8 November 2012); *R v Coutre*, 2013 ABQB 258; *R v Clarke*, 2018 ONCJ 263; *R v Om*, 2011 BCPC 485; *R v Mann*, 2009 ABPC 238; *R v Dubeau*, [1992] OJ No 3000 (QL), 1992 CarswellOnt 2251 (WL Can) (Ont Ct J (Gen Div)); *R v Seymour*, 2016 MBCA 118; *R v Marino-Montero*, [2012] OJ No 1287 (QL) (Ont Sup Ct); *R v Izzard*, [2012] OJ No 2516 (QL) (Ont Sup Ct); *R v Thorington* (2012), 268 CRR (2d) 307, [2012] OJ No 5052 (QL) (Ont Ct J) [cited to CRR].

83. See *R v Peters*, *supra* note 82 (stating that bona fide inquiry "applies only in cases involving offering opportunities to unknown persons where the police are conducting an investigation in an area known to be a place where the same type of criminal activity occurs" at para 46); *R v Nosworthy*, *supra* note 82 (exception does not apply because "the opportunity drug buy was not carried out in the context of an ongoing investigation regarding the sale of drags [sic] in the area" at para 24); *R v Arriagada*, *supra* note 82 (stating that "[t]his is not a case of the police investigating a person who is associated with a location where it is reasonably suspected that criminal activity is taking place" at para 29).

84. See *R v Swan*, *supra* note 39 at para 36; *R v Clarke*, *supra* note 82 at paras 47–53; *R v Om*, *supra* note 82 at paras 50–52. In *Gladue*, the Court mooted the possibility of interpreting bona fide inquiry in this manner but refrained from deciding the point. See *supra* note 82 at para 12. See also *R v Ahmad*, *supra* note 26 at paras 58–68 (targeting of phone numbers reasonably suspected to be associated with dial-a-dope drug trafficking bona fide inquiry); *R v Chiang*, *supra* note 39 (targeting of sexual services section of online classified advertisements bona fide inquiry where "credibly based belief" that sexual exploitation offences being facilitated through site at paras 18–21); Brent Kettles, "The Entrapment Defence in Internet Child Luring Cases" (2011) 16:1 Can Crim L Rev 89.

criminal activity in question. If police dial a number and offer to buy drugs from the person answering, for example, they must first reasonably suspect that the number is associated with drug dealing, even if they do not know the dealer's identity.[85]

There are several problems with these decisions. To begin, the reasonable suspicion standard is notoriously ambiguous.[86] Depending on the factual context and mindset of the judge applying it, it may range from barely more than a hunch to just shy of reasonable and probable grounds.[87] In some entrapment cases, for example, unconfirmed, anonymous tips have been sufficient;[88] in others, courts have demanded thorough reliability assessments and corroboration.[89]

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85. See *R v Clarke*, *supra* note 82 (stating that "there must be a reasonable suspicion that this particular cell phone number is being used to commit that same crime" at para 53 [emphasis omitted]); *R v Ahmad*, *supra* note 26 (reasoning that calls to suspected dial-a-dope numbers must be "directed at a phone line reasonably suspected to be used in a dial-a-dope scheme" at para 58); *R v Gladue*, *supra* note 82 (stating: "Assuming, without deciding, that a phone can be equated to a specific physical location, the requirement for a reasonable suspicion must still be met" at para 12). See also Bruce A MacFarlane, Robert J Frater & Croft Michaelson, *Drug Offences in Canada*, 4th ed (Toronto: Thomson Reuters, 2015) (loose-leaf June 2018 supplement) vol 2, ch 26:80.40 at 26-4 to 26-6.

86. See Penney, *supra* note 25 at 35–41; Manning & Sankoff, *supra* note 21 at ¶ 13.102. See also CMA McCauliff, "Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?" (1982) 35:6 Vand L Rev 1293 at 1327–28, 1332 (asked to assign fixed point probability, 97% of US judges surveyed estimated reasonable suspicion between 10% and 60%, with an average of 30%).

87. See Penney, *supra* note 25 at 38–39.

88. See *R v Virgo (G)* (1993), 67 OAC 275 at 277–78, 1993 CanLII 1322 (CA) (anonymous tip giving name, description, and pager number); *R v Bogle*, [1996] OJ No 1768 (QL) at paras 6, 14–18, 1996 CarswellOnt 1819 (WL Can) (Ont Ct J (Gen Div)) (tip from unknown informant giving pager number only); *R v Germain*, 2012 SKCA 9 (anonymous tip that licensed medical cannabis grower was trafficking).

89. See *R v Gosselin*, *supra* note 82 at para 13 (two anonymous tips providing specific identifying information insufficient); *R v Seymour*, *supra* note 82 (stating that although police confirmed confidential informant's tip regarding accused's identity, address, and the fact that firearms were for sale, "there was no evidence regarding when the illegal firearms transactions took place, whether the informant had a proven track record for providing reliable information to the police, whether the informant had a criminal record or whether the informant's information was firsthand or not" at para 13); *R v Marino-Montero*, *supra* note 82 (unconfirmed tip providing "nickname, phone number, age, physical description, name of friend, type and amounts of drugs sold and location" at para 23); *R v Izzard*, *supra* note 82 at paras 6, 14–17 (confidential tip from informant of unknown reliability insufficient despite inclusion of description and phone number that police confirmed); *R v Thorington*, *supra* note 82 at

The same ambiguity arises in decisions applying the bona fide inquiry principle when police obtained a phone number associated with drug trafficking. Some courts have insisted that police possess substantial, concrete information that the number is currently connected to trafficking before calling.[90] Others have held that reasonable suspicion can crystalize after the call is placed, as when the person answering confirms aspects of the tip.[91] And even more broadly, the British Columbia Court of Appeal has concluded that reasonable suspicion is not required for "dial-a-dope" stings as long as police do not make "hundreds of random calls".[92]

This indeterminacy puts police in a difficult position. Because the mandatory remedy for entrapment is a stay, they may be dissuaded *ex ante* from opportuning when the court would have found *ex post* that they had reasonable suspicion. Conversely, if they forge ahead and opportune and the court later decides that they lacked reasonable suspicion, the prosecution will be stayed, even if they acted in good faith on information slightly short of the

310–12, 319–20 (despite informant's provision of name, phone number, working area and his previous reliability as police did not adequately interrogate informant on basis for information); *R v Arriagada*, *supra* note 82 (unconfirmed anonymous tip); *R v Peters*, *supra* note 82 (same); *R v Nosworthy*, *supra* note 82 (same); *R v Gladue*, *supra* note 82 (same); *R v Coutre*, *supra* note 82 (same).

90. See *R v Swan*, *supra* note 39 at para 36; *R v Clarke*, *supra* note 82 at paras 47–53; *R v Om*, *supra* note 82 at paras 50–52; *R v Thorington*, *supra* note 82 at 320–21. See also *R v Gladue*, *supra* note 82 at para 12.

91. See *R v Ahmad*, *supra* note 26 (stating: "While no inquiries appear to have been made about the source's reliability, the source's information about 'Jay' was confirmed when the person who answered the phone replied positively to the name" at paras 69–76; stating that "[w]hile the person who answered the call did not confirm he was Romeo, the name provided in the tip, he did not question the name" at paras 77–79); *R v Le*, 2016 BCCA 155 at para 91, leave to appeal to SCC refused, 36969 (27 October 2016) (even if no reasonable suspicion before call, aspects of the tip were confirmed when the telephone was answered by an Asian-sounding male); *R v Olazo*, *supra* note 26 at paras 17–18; *R v Townsend*, [1997] OJ No 6516 (QL) (Ont Ct J (Gen Div)) (stating: "[W]here a tip involves a telephone or pager number, it is acceptable for the police to call that number and if they get a response, engage the person at the other end in conversation, provided that this initial contact is used to investigate and confirm information and that no opportunity is offered to the suspect to commit a crime until the point at which the police have grounds for reasonable suspicion" at paras 42–51); *R v Bogle*, *supra* note 88 at paras 16–17 (police engage in bona fide inquiry when they contact pager number provided by untested informant and accused calls back).

92. *R v Le*, *supra* note 91 at para 96. See also *R v Bond* (1993), 135 AR 329, 33 WAC 329 (CA), leave to appeal to SCC refused, [1993] 3 SCR v (no entrapment despite targeting of individual without reasonable suspicion, police engaged in bona fide inquiry in acting on unconfirmed tip).

required standard. In contrast, when police make similar mistakes in obtaining evidence in violation of the *Charter*, the prosecution can often salvage the case by arguing for admission under subsection 24(2) or relying on untainted evidence.

The problem with using reasonable suspicion in this context, however, runs even deeper. Even if courts settled on an interpretation of the standard at the lower end of the spectrum (e.g., fifteen per cent), it would still unduly hinder legitimate police work.[93] Compare the individualized reasonable suspicion standard with the bona fide inquiry test. Recall that in *Barnes*, the Supreme Court of Canada allowed police to opportune random suspects in a six-block area of downtown Vancouver. Even if drug trafficking were especially prevalent there, the odds of finding a person willing to sell drugs on any random encounter were presumably lower than fifteen per cent. The Court found this opportuning acceptable, however, because police sufficiently defined the geographic area and approached targets without individualized suspicion. Yet in many (if not all) of the "reasonable suspicion" cases (where police had significant, but not quite "reasonable", individualized suspicion), their odds of success were likely much greater than in *Barnes*. Even under McLachlin J's more restrictive interpretation of bona fide inquiry, the success rate for random opportuning would often be much lower than fifteen per cent.

To illustrate, imagine that police receive an individualized tip giving them a fourteen per cent chance of successfully opportuning a drug sale. Presumably this is less than "reasonable suspicion" and would result in a stay. Now imagine that they have no individualized suspicion, but randomly opportune with a ten per cent probability of success within a well-defined area known for drug dealing.[94] How could the former constitute an abuse of process but not the latter?[95]

This incongruity has likely spurred some courts to evade the reasonable suspicion requirement by permitting police to take "investigative steps" short of "providing an opportunity" in "buy-and-bust" cases. In *R v Imoro*, police received an anonymous tip that a man was selling drugs on the twelfth floor of an apartment building. [96] As an undercover officer exited the elevator on that floor,

93. See generally Chris De Sa, "Entrapment: Clearly Misunderstood in the Dial-a-Dope Context" (2015) 62:1/2 Crim LQ 200 at 203–05.

94. See e.g. *R v Neacsu*, 2015 ONSC 5255 (bona fide inquiry where police targeted concentrated drug trafficking area and opportuned several people unsuccessfully before approaching accused).

95. See *R v Marino-Montero*, *supra* note 82 (Court had "hard time reconciling" the "clearest of cases" principle from *Mack* with requirement to order stay based on significant but unconfirmed grounds for suspicion at paras 33–34); De Sa, *supra* note 93 at 204–05 (criticizing result in *Marino-Montero*).

96. *Supra* note 24 at paras 2–5.

the accused approached and said, "'[c]ome with me.' The officer responded, 'You can hook me up?'"[97] After the accused answered positively and sold drugs to another person in the officer's presence, the officer bought drugs from the accused.

The Court of Appeal for Ontario held that the question "[c]an you hook me up?" was "simply a step in the police's investigation of the anonymous tip".[98] Police did not therefore need to establish either reasonable suspicion or the pursuit of a bona fide inquiry. Police did not give the accused an opportunity to sell drugs, the Court reasoned, until after they had established reasonable suspicion.[99]

Many courts have since adopted this approach and found that analogous queries are not opportuning.[100] While the impetus to avoid finding entrapment in these circumstances is understandable, the plausibility of the distinction is dubious.[101] As Ducharme J stated in *R v Henneh*, "[a]sking someone if he is

97. *Ibid* at para 2.

98. *Ibid* at para 16.

99. See *ibid*.

100. See *R v Ralph*, 2014 ONCA 3, leave to appeal to SCC refused, 35934 (6 November 2014) (officer's statement "'I need product' similar to the 'Can you hook me up?' question in *Imoro*" at paras 30–32); *R v Ahmad*, *supra* note 26 (officer's question ("you can help me out?") over phone and accused's response ("what do you need?") occurred before provision of opportunity at para 77); *R v Le*, *supra* note 91 (asking accused if he could "hook a person up with drugs" was merely "part of the investigation of the tip to see if the target responded", not "an opportunity to commit a crime" at paras 92–93); *R v Olazo*, *supra* note 26 (officer's "initial questions designed to set up a deal, if the recipient of the call were willing" were investigative steps, not opportuning at paras 19–28); *R v Shaver*, 2015 ONSC 6948 at paras 17–18 (officer's identification on cold-call as drug user mere investigative step); *R v Govang*, 2010 NBQB 425 at paras 14–19 (questions designed to determine if accused was drug dealer not opportuning, police had reasonable suspicion before offering to purchase); *R v Charles*, 2015 ONSC 7642 (officer's initial comments could "reasonably be paraphrased as 'I hear you sell drugs'", not opportuning at para 26). See also *R v Bayat*, 2011 ONCA 778 ("opportunity was not given until well into the communication at a time where the officer had a reasonable suspicion that the respondent was engaged in child luring" at paras 18–19); *R v NRR*, *supra* note 51 at paras 31–38 (undercover officers permitted to probe accused's interest in arranging killing in developing reasonable suspicion before providing an opportunity to commit offence of counselling murder).

101. Even courts that have endorsed the distinction have admitted that it entails difficult line drawing. See *R v Bayat*, *supra* note 100 (reasoning that "the line between simple investigation and offering an opportunity to commit an offence will sometimes be difficult to draw" at para 19); *R v Shaver*, *supra* note 100 (stating that "in conducting a cold call, there is a fine line between when an officer is using neutral language to investigate a tip, and when an officer is effectively ordering drugs" at para 13).

dealing drugs" (which courts have typically characterized as a mere investigative step) is "no different from asking if he will sell you a specific kind and amount of drugs" (which is undoubtedly opportuning).[102] Similarly, it is difficult to understand how introductory online communications between a target and an officer posing as minor could be interpreted as "mere investigative steps" in one case[103] and providing an opportunity to commit the offence of "child luring" in another.[104]

Consider the following scenarios from the perspective of an innocent person receiving a dial-a-dope call from police. Assume that police lack reasonable suspicion in both scenarios. In the first, a stranger dials your number, you pick up the phone, and the caller says something like, "can you hook me up?", "I need product", or "you can help me out?" After a brief interchange during which you will likely ask "who is calling?" or "what are you talking about?", the call will end.

The second scenario plays out in the same manner, except that the stranger immediately asks (in coded language) to buy a specified quantity of an illegal drug. Your response is likely to be very similar to that in the first scenario. It defies common sense to permit police to do the former but not the latter.[105] As Pringle J stated in *R v Clarke*, "[a]sking a stranger 'Are you a drug dealer?' is not a conversational ice-breaker that leads into discussion about where to buy shoes."[106]

As I elaborate below in Part III, rather than engaging in these semantic contortions, courts would be better off recognizing de jure what the jurisprudence already demonstrates de facto: that opportuning suspects with something less than a "reasonable" suspicion rarely constitutes an abuse of process warranting a stay of proceedings.

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102. 2017 ONSC 4835 at para 24. *Henneh* was referred to in *R v Clarke*. See *R v Clarke*, *supra* note 83 at para 28. See also *R v Gambin*, 2017 NLTD(G) 39 (asking accused whether he knew where undercover police could "get something to party with" constituted opportuning, not mere investigative step at para 10). See also Tanovich, "Rethinking the *Bona Fides*", *supra* note 73 at 437 (criticizing the *Imoro* approach); De Sa, *supra* note 93 (focusing exclusively "on the particular wording used by the undercover officer in his initial conversation is unduly technical and can often lead to absurd results" at 202–03).

103. See *R v Bayat*, *supra* note 100.

104. See *R v Argent*, 2016 ONCA 129.

105. See generally *R v Clarke*, *supra* note 82 (endorsing Ducharme J's characterization of the distinction in *Henneh* as "nonsensical" at para 28).

106. *Ibid* at para 29.

(ii) No Bona Fide Inquiry Cases

The no bona fide inquiry cases are not as incongruous as the "reasonable suspicion" ones. In each case, police had little if any reason to suspect the accused (of drug trafficking in all cases) before giving an opportunity to commit the offence. The cases therefore turned on whether police conducted a bona fide inquiry in a sufficiently delineated domain. Each court found that police did not reasonably suspect that drug trafficking was especially common at the targeted location.[107]

The bona fide inquiry principle is still problematic, however. To begin, it is even more indeterminate than the individualized reasonable suspicion standard. There is no discernable metric for deciding whether police had good reason to believe *ex ante* that trafficking was sufficiently concentrated at the targeted location. Some courts have required objective evidence of concentration;[108] others have been content to rely on subjective attestations.[109]

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107. See *R v McGivern*, 2007 YKTC 29 (undercover police set up drug paraphernalia kiosk in centre of small community); *R v Benjamin*, *supra* note 39 (undercover police opportuning over large, indeterminate urban area); *R v Dusang*, [1990] OJ No 1629 (QL), 1990 CarswellOnt 3308 (WL Can) (Ont Dist Ct) (no reasonable suspicion that trafficking occurring in targeted lounge, evidence that officer had previously bought cocaine there lacked detail); *R v Kenyon*, *supra* note 39 (no evidence of trafficking at targeted pub); *R v Schieman*, 1990 CarswellOnt 3428 (WL Can), [1990] OJ No 2700 (QL) (Ont Prov Ct) [cited to WL Can] (only vague evidence of previous purchases and search warrants in imprecisely-defined urban area); *R v Gambin, supra* note 102 ("no particular basis to believe that drug transactions were occurring" at targeted lounge at para 29); *R v McDonald*, 2017 ABPC 225 at paras 69–92 (insufficient evidence that targeted transit station was trafficking hub).

108. See *R v McDonald*, *supra* note 107 (reasoning that "[a]lthough statistical analysis is not a prerequisite to a finding that the police were engaged in a *bona fide* inquiry . . . empirical data can go a long way in allowing a court to make an objective determination as to the *bona fide* of the investigation" at para 68); *R v Schieman*, *supra* note 107 (stating: "Before an entire neighbourhood of the city is characterized as falling within the purview of the Mack decision, some fairly detailed, cogent evidence must be presented" at para 12).

109. See *R v Faqi*, 2011 ABCA 284 (statistical evidence not "prerequisite for finding that a location is one where it is reasonably suspected that certain criminal activity is occurring" at paras 18–19); *R v Franc*, *supra* note 39 (stating that "in light of the information that the officers had in this case they were not required to offer statistical evidence to establish a reasonable suspicion" at para 35); *R v Sterling* (2004), 23 CR (6th) 54, 2004 CanLII 6675 (Ont Sup Ct) (officer's testimony based on tips and personal experience sufficient as there was no evidence "that challenged either their credibility or the sources upon which they formed their reasonable belief" at para 30).

But even if bona fide inquiry could be defined more precisely, its normative purchase is questionable. "Random virtue-testing" is not as categorically wrongful (and hence deserving of an automatic stay) as the misconduct captured by the general abuse of process doctrine. Consider the seven no bona fide inquiry cases mentioned above. In most of them, police merely offered to buy an illegal drug, the targets readily agreed, and the transactions were completed in short order.[110] The targets, in other words, were already trafficking (or at least readily prepared to do so). In the American parlance, they were "predisposed" to commit the offence.[111] Police did not therefore manufacture any crime that would not likely have occurred otherwise.[112] As Bennett J stated in *R v Le*, "innocent and otherwise law-abiding individuals would not be 'manipulated' or tempted to enter the dangerous and illicit drug trade if asked by a stranger over the phone to sell him drugs".[113]

Of course, these kinds of operations also affect people who are not involved in selling drugs. Even if there is little risk that they will be tempted to break the law, opportuning does intrude on their liberty and privacy. It is this concern that Lamer J likely had in mind when he stated in *Mack* that "it is not a proper use of the police power to simply go out and test the virtue of people on a random basis".[114]

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110. In four of the seven cases, the accused immediately indicated a willingness to traffic. See *R v Dusang*, *supra* note 107 (officer asked accused bar server "where he could get some blow", accused returned three minutes later with price and drugs delivered seven minutes later at para 3); *R v Kenyon*, *supra* note 39 (officer in bar asked co-accused where he could "buy some weed", co-accused pointed to accused, co-accused and accused took $250 from officer, and shortly thereafter, officer went with co-accused to retrieve drugs from accused's truck at 539); *R v Schieman*, *supra* note 107 (officer saw accused on street, asked him where her could buy drugs; he told her of a location and then took her there, where he went "inside, returned, and then traded 4.6 grams of hashish in exchange for $55" at para 4); *R v McDonald*, *supra* note 107 (police asked accused "can you do 30?" and accused replied that he could "do 20"; entire encounter "lasted no more than four minutes" at paras 20, 93). In one of the remaining three cases, it was not possible to determine whether the accused decided to sell drugs to the police agent immediately as the court did not relate the relevant facts. Given that it was a buy-and-bust street operation, however, the accused was very likely already engaged in drug trafficking. See *R v Benjamin*, *supra* note 39. I discuss the two remaining cases in Part III.B, *below*. See *R v McGivern, supra* note 107; *R v Gambin*, *supra* note 102.

111. See *Jacobson v United States*, 503 US 540 (1992); *Sherman v United States*, 356 US 369 (1958); *Sorrells v United States*, 287 US 435 (1932).

112. See Ashworth, *supra* note 59 (noting that it cannot be entrapment for police to give a person an opportunity to commit an offence where that person would likely "have responded in the same way to an opportunity offered by someone else" at 165).

113. *Supra* note 91 at para 95.

114. *R v Mack*, *supra* note 2 at 965. See also *Barnes*, *supra* note 4 at 460.

The intrusiveness of mere opportuning, however, should not be exaggerated. As discussed, in the typical case an undercover agent makes a request to purchase, the innocent target declines, and the interaction ends. To the extent that opportuning without suspicion is unsavoury or inefficient, it pales in comparison to the type of misconduct typically associated with abuses of process leading to stays of proceedings.[115]

This is not to say that opportuning without inducement can never be abusive. As I elaborate in Part III below, stays should be awarded under the general abuse of process doctrine when opportuning is accompanied by either *mala fides* (including discriminatory profiling) or an undue risk of manufacturing crime (short of inducement).

(iii) "Hybrid" Cases

The four "hybrid" cases involved tobacco sales to underage agents.[116] In each, the court effectively merged the reasonable suspicion and bona fide inquiry prongs of Entrapment 1, finding that there was no reasonable suspicion attaching to either the defendant or retail location.[117]

Most courts have concluded, in contrast, that reasonable suspicion is not required for regulatory offences like selling tobacco to minors.[118] On this view,

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115. See generally Penney, Rondinelli & Stribopoulos, *supra* note 6 at §§10.51–10.59.

116. See *R v Hong*, [2001] OJ No 568 (QL), (*sub nom Toronto (City) v Hong*) 2001 CarswellOnt 6044 (WL Can) (Ont Ct J) [cited to QL]; *Directeur des poursuites criminelles et pénales c Liu*, 2010 QCCQ 1227 [*Liu*]; *R v Myers*, 2000 SKQB 226; *R v Tyzuk*, 2009 ABPC 282.

117. See *R v Hong*, *supra* note 116 at para 93 (despite prior warning, no evidence of recent sales to minors by defendant or from store); *Liu*, *supra* note 116 at paras 79–81 (no reasonable suspicion, but if seller had received prior warning there would have been); *R v Myers*, *supra* note 116 at paras 7–10 (no reason to suspect seller; inspectors' policy to opportune all sellers in city); *R v Tyzuk*, *supra* note 116 (no reasonable suspicion that accused or store "was engaged in selling tobacco products" to minors at para 22).

118. See *R v Clothier*, 2011 ONCA 27 at para 33 (no reasonable suspicion required to check if vendors would sell tobacco to underage buyer); *R v Reid (L) et al* (2001), 202 Nfld & PEIR 69 at 78–82, 608 APR 69 (Nfld Prov Ct) (same); *R v Canada Safeway Ltd*, 2011 BCPC 385 at paras 6–8 (same); *Dépanneur Sénécal c Directeur des poursuites criminelles et pénales (DPCP)*, 2014 QCCS 6828 at paras 21–33 (same); *Ordre des opticiens d'ordonnances du Québec c Zouki*, 2012 QCCS 1471 at paras 35–62 [*Zouki*] (no reasonable suspicion needed for random audit of eyewear retailer for professional standards compliance); *Ordre des hygiénistes dentaires du Québec c Cassista*, 2016 QCCQ 807 at paras 22–24 (same); *R v Au Canada Monetary Exchange Inc*, 1999 CanLII 5510, [1999] BCJ No 455 (QL) (BCSC) (noting that police do not require reasonable suspicion to provide an opportunity to commit record-keeping offences under

random opportuning is necessary to deter wrongdoing and maintain regulatory efficacy.[119] In most retail or commercial contexts, moreover, opportuning is unlikely to capture "ordinary people" not predisposed to commit the offence.[120]

These decisions suggest that courts have largely discarded Entrapment 1 as a discrete defence for regulatory offences. Absent inducement (Entrapment 2) or other misconduct associated with general abuse of process doctrine, authorities should be permitted to opportune for regulatory offences without restriction. In the remainder of this Article, I argue that the same should be true for criminal offences.

III. Absorbing Entrapment 1 into General Abuse of Process Doctrine

Conceiving entrapment as a special category of abuse of process requiring a stay of proceedings has its advantages. If police believe (with reasonable certainty) that a specific investigative technique will likely generate a stay, they will often refrain from using it. And if the definition of entrapment captures most objectionable techniques and excludes most unobjectionable ones, we can live with the occasional stay that is arguably out of proportion to police culpability. Bright-line, formulaic rules also often foster jurisprudential consistency. Judges disinclined to stay proceedings for serious offences, for example, may feel compelled to do so when the law clearly dictates that police stepped over the line.[121]

Entrapment 2 fulfills these criteria well. Though "inducement" is not free of indeterminacy, it captures a normatively compelling principle (police should not do things to create crime that would not have occurred otherwise) and can be applied with reference to a few key contextual factors, such as persistence and the exploitation of vulnerability. The rarity of successful Entrapment 2 claims, moreover, suggests that it has had a strong deterrent effect.

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the proceeds of crime legislation). See also *R v Sobeys Inc* (2000), 181 NSR (2d) 263 at paras 18–21, 560 APR 263 (SC) (interpreting statute authorizing "test purchases" as precluding entrapment defence). See also Manning & Sankoff, *supra* note 21 at 625.

119. See *R v Clothier*, *supra* note 118 at para 45. This principle is paralleled in search and seizure law, where courts have generally found that regulators do not require warrants or reasonable grounds for inspections and audits. See Penney, Rondinelli & Stribopoulos, *supra* note 6 at §§ 3.165–3.177.

120. See *R v Clothier*, *supra* note 118 (stating: "Test shopping does not provide an opportunity to the store clerk that is not routinely available in the course of the store's business" at para 43).

121. See generally Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56:4 U Chicago L Rev 1175 at 1184.

Entrapment 1 is another matter. As we have seen, it is both descriptively ambiguous and normatively overbroad. It should therefore be discarded as a discrete defence and folded into the general abuse of process doctrine. This would permit courts to continue to sanction misconduct currently encompassed by Entrapment 1, but only where it meets the "'clearest of cases'" standard applying to ordinary abuses of process.[122] As I elaborate below, this doctrine can readily accommodate cases of truly abusive opportuning.

A. Abuse of Process

In ordinary abuse of process cases, courts may stay the proceedings to remedy prejudice to either: (i) the accused's right to make "full answer and defence" in a fair trial; or (ii) the integrity of the justice system.[123] Only the latter category is relevant here.

Obtaining a stay on the basis of "integrity" prejudice is difficult.[124] Often referred to as the "residual category" of abuses,[125] it encompasses the "panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice".[126] As Moldaver J put it in *R v Babos*, "there are limits on the type of conduct society will tolerate in the prosecution of offences".[127]

Courts may grant a stay only where the prejudice would be "manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" and if there is no other remedy capable of removing it.[128] Prejudice must also be weighed against society's interest in an adjudication on the merits.[129]

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122. *R v O'Connor*, [1995] 4 SCR 411 at para 68, 130 DLR (4th) 235.

123. See *ibid* at paras 75–92; *Canada (Minister of Citizenship and Immigration) v Tobiass*, [1997] 3 SCR 391 at paras 89–90, 151 DLR (4th) 119 [*Tobiass*]; *R v Regan*, 2002 SCC 12 at para 55; *R v Babos*, 2014 SCC 16 at para 31.

124. See *Tobiass*, *supra* note 123 at para 89; *R v Babos*, *supra* note 123 at para 44; *R v Gowdy*, 2016 ONCA 989 at paras 64, 75.

125. See *R v O'Connor*, *supra* note 122 at para 73; *Tobiass*, *supra* note 123 at para 89.

126. *R v O'Connor*, *supra* note 122 at para 73.

127. *Supra* note 123 at para 35. See also *R v O'Connor*, *supra* note 122 at para 80.

128. See *R v O'Connor*, *supra* note 122 at para 75; *R v Regan*, *supra* note 123 at paras 54, 56; *Tobiass*, *supra* note 123 at para 90; *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38 at para 74; *R v Babos*, *supra* note 123 at para 32; *R v Gowdy*, *supra* note 124 at paras 69–70. See also David M Paciocco, "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept" (1991) 15:5 Crim LJ 315 at 340–41.

129. See *R v Babos*, *supra* note 123 (noting that the court "must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and

Though the "perpetuation" criterion suggests that past misconduct will rarely warrant a stay,[130] the Supreme Court of Canada has recognized there may be "exceptional cases" where it is "so egregious that the mere fact of going forward in the light of it will be offensive".[131] The "alternative remedies" hurdle is similarly daunting. In some cases, however, nothing less than a stay will sufficiently "dissociate the justice system from the impugned state conduct".[132]

Despite these obstacles, courts have been willing to order stays for police misconduct in a variety of circumstances.[133] Most relevant here are abuses of process arising from coercive undercover operations. In *R v Hart*, the Supreme Court of Canada held that proceedings may be stayed for coercive attempts to extract confessions in "Mr. Big" stings.[134] Courts may exclude such confessions on reliability grounds,[135] but they may also stay the proceedings or award other remedies if the police committed an abuse of process.[136] Writing for the majority, Moldaver J urged courts to use a "more robust conception" of abuse of

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ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits" at para 41). See also *R v SB*, 2014 ONCA 527 ("third balancing requirement must always be considered for the residual category" at para 26); *R v Poletz*, 2014 SKCA 16 at paras 11–12 (even if no alternative remedy available, stay not warranted where misconduct minor and balance of interests favours continuation of trial).

130. See *Tobiass*, *supra* note 123 (stay not appropriate unless the misconduct "is likely to continue in the future" or the continuation of the prosecution "will offend society's sense of justice" at para 91).

131. *Ibid*. See also *R v Babos*, *supra* note 123 at para 36.

132. *R v Babos*, *supra* note 123 at para 39.

133. See *R v Bellusci*, 2012 SCC 44 (excessive force); *R v Tran*, 2010 ONCA 471 (same); *R v Singh*, 2013 ONCA 750 at para 43 (intimidation, threats and violence during interrogation); *R v B*, 2010 ONCJ 561 (unlawful strip search); *R v Chowdhury*, 2009 ONCJ 478, aff'd [2011] OJ No 2171 (QL) (Sup Ct) (same).

134. 2014 SCC 52 at paras 148–49. See also Chris Hunt & Micah Rankin, "*R v Hart*: A New Common Law Confession Rule for Undercover Operations" (2014) 14:2 OUCLJ 321; Lisa Dufraimont, "*Hart* and *Mack*: New Restraints on Mr. Big and a New Approach to Unreliable Prosecution Evidence" (2015) 71 SCLR 475; Adelina Iftene, "The *Hart* of the (Mr.) Big Problem" (2016) 63:1/2 Crim LQ 178; Steve Coughlan, "Threading Together Abuse of Process and Exclusion of Evidence: How it Became Possible to Rebuke Mr. Big" (2015) 71 SCLR 415; Brendon Murphy & John Anderson, "Confessions to Mr. Big: A New Rule of Evidence" (2016) 20:1 Intl J Evidence & Proof 29; Timothy E Moore, Peter Copeland & Regina A Schuller, "Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the 'Mr. Big' Strategy" (2009) 55:3 Crim LQ 348.

135. See *R v Hart*, *supra* note 134 at paras 84–90.

136. See *ibid* at paras 11, 120. See also Coughlan, *supra* note 134 at 428.

process in Mr. Big cases than that traditionally employed.[137] Abuses of process arise when police use inducements that "overcome the will of the accused and coerce a confession," considering the use of violence, threats, and the exploitation of vulnerability.[138]

Though the Court in *Hart* focused on coercive inducements akin to those found in Entrapment 2 cases, it recognized that non-coercive forms of misconduct could also constitute abuses of process.[139] As elaborated below, Entrapment 1 cases involving *mala fides* or crime creation are prime examples of such abuses.

B. Mala Fides

As Lamer J stated in *Mack*, opportuning must be conducted for legitimate, criminal justice reasons.[140] If police target someone out of malice or self-interest this will normally be considered an abuse of process warranting a stay of proceedings.[141] This would include targeting based on membership in a racial, ethnic, religious, sexual, or analogous group.[142]

Some commentators have argued the existing bona fide inquiry test should be informed by concerns about discriminatory profiling.[143] Professor

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137. *R v Hart*, *supra* note 134 at para 84. See also *ibid* (recognizing that the doctrine "has thus far proved less than effective in this context" at para 86); *R v Allgood*, 2015 SKCA 88 at para 55, leave to appeal to SCC refused, 36672 (10 March 2016).

138. See *R v Hart*, *supra* note 134 at paras 115–16. See also *Laflamme c R*, 2015 QCCA 1517 at para 56 (recognizing that combined with other factors, Mr. Big's barely veiled threat of violence against the accused caused an abuse of process); *R v Derbyshire*, 2016 NSCA 67 at paras 114–43 (noting that police committed abuse of process in obtaining confession after making implied threats posing as gang members). See also generally Jason MacLean & Frances E Chapman, "Au Revoir, Monsieur Big? Confessions, Coercion, and the Courts" (2015) 23 CR (7th) 184.

139. The Court did not elaborate, however, noting that "only so much guidance . . . can be provided" and entrusting trial judges to identify abuses of process when they see them. See *R v Hart, supra* note 134 at para 118. See also Coughlan, *supra* note 134 at 420–21.

140. See *R v Mack*, *supra* note 2 at 956–59.

141. See *R v Clothier*, *supra* note 118 at paras 46–47; *Zouki*, *supra* note 118 at paras 64–65.

142. See *R v Clothier*, *supra* note 118 at para 48. See also *R v Storrey*, [1990] 1 SCR 241, 75 CR (3rd) 1 (section 9 of the *Charter* violated where police detain "because a police officer was biased towards a person of a different race, nationality or colour, or that there was a personal enmity between a police officer directed towards the person arrested" at 251–52).

143. See Tanovich, "Rethinking the *Bona Fides*", *supra* note 73; Roach, "Entrapment in Terrorism", *supra* note 64. For discussion of the problem of discriminatory profiling in other

Tanovich proposes that courts in buy-and-bust cases should consider the racial composition of the targeted location, any evidence of racial profiling in the area, and (potentially) whether police sought the input of community members in deciding whether to opportune there.[144] Similarly, Professor Roach proposes that terrorism investigators be prohibited from opportuning in mosques or analogous places without specific information that they are connected to terrorist activities.[145] Targeting people or places based solely on their association with extremist religious or political expression would be not be bona fide.

As I argued in Part II.B.(iii), the bona fide inquiry concept is too indeterminate to serve as a workable boundary between abusive and non-abusive opportuning. Adding discrimination-based considerations would muddy the waters even further. Discriminatory profiling should be considered *mala fides*, however, even without proof of overt hostility. Tanovich points to three cases, for example, where police opportuned suspects (in part) because they were black.[146] If a court determines that police likely targeted a person or place based on race, ethnicity, religion, sexual identity, or analogous characteristic, it should normally stay the proceedings for an abuse of process.[147]

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aspects of criminal investigation, see *R v Brown* (2003), 64 OR (3d) 161 at paras 7–8, 173 CCC (3d) 23 (CA); Steven Hayle, Scot Wortley & Julian Tanner, "Race, Street Life, and Policing: Implications for Racial Profiling" (2016) 58:3 Can J Corr 322; David M Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006). Discriminatory profiling does not arise, of course, when police opportune a person whom they reasonably suspect of engaging in the crime in question because of non-generic, identifying description that includes the suspect's race. See Tanovich, "Rethinking the *Bona Fides*", *supra* note 73 at 433; Samuel R Gross & Debra Livingston, "Racial Profiling Under Attack" (2002) 102:5 Colum L Rev 1413 at 1415; David M Tanovich, "Moving Beyond 'Driving While Black:' Race, Suspect Description and Selection" (2004) 36:2 Ottawa L Rev 315.

144. See Tanovich, "Rethinking the *Bona Fides*", *supra* note 73 at 444–45.

145. See Roach, "Entrapment in Terrorism", *supra* note 64 at 1475, 1483–84. See also Kent Roach, "Be Careful What You Wish For? Terrorism Prosecutions in Post-9/11 Canada" (2014) 40:1 Queen's LJ 99 at 118–19.

146. See Tanovich, "Rethinking the *Bona Fides*", *supra* note 73 at 433–36. The three cases are *Sterling*, *Faqi*, and *Imoro*. See *R v Sterling*, *supra* note 110 at para 6; *R v Faqi*, 2010 ABPC 157 at paras 4, 11–14, rev'd 2011 ABCA 284; *R v Imoro*, *supra* note 24. Note, however, the trial judge's finding of profiling in *Faqi* was subsequently reversed on appeal. The Court of Appeal of Alberta stated that though police observed that the accused was one of just a few black patrons in the bar, they did not testify that his race was "one of the reasons they approached him". See *R v Faqi*, *supra* note 109 at para 7.

147. See generally Roach, "Entrapment in Terrorism", *supra* note 64 at 1463–64.

C. Crime Creation

As discussed in Part I.A, Lamer J recognized Entrapment 1 in *Mack* largely to deter "random virtue-testing".[148] But as we have seen, the doctrinal tool he chose to demarcate this phenomenon (no reasonable suspicion or bona fide inquiry) is too broad. In limited circumstances, however, opportuning may be abusive even without malice, discrimination, or inducement. This will occur where the opportuning creates an undue risk that people will commit an offence that they would not have committed otherwise.

Of course, this category of cases overlaps conceptually with Entrapment 2, which also focuses on whether the offence would likely have been committed without police involvement.[149] Consider again the "wallet in the park" example from *Mack*, which Lamer J noted carried the serious "unnecessary risk" of manufacturing crime.[150] At first glance, it does not display any hallmarks of inducement, such as persistent opportuning or the exploitation of vulnerability. But planting a wallet in plain view does exploit people's inclination to wrongfully enrich themselves when there is little risk of detection and punishment.[151] Whether or not the "average person" would commit this offence,[152] undoubtedly many would.[153] And because wallets full of cash are rarely left in plain view, police would have created a crime that would not likely have occurred otherwise.[154] Unlike dial-a-dope dealers waiting for calls to buy drugs, few criminals wander

148. See *R v Mack*, *supra* note 2 at 956.

149. See *R v Mack, supra* note 2 (recognizing that "absence of a reasonable suspicion or a *bona fide* inquiry is significant in assessing the police conduct because of the risk that the police will attract people who would not otherwise have any involvement in a crime" at 965).

150. See *ibid* at 957. See also *R v Loosely*, *supra* note 64, Hoffman LJ (key consideration in determining entrapment is whether "police conduct preceding the commission of the offence was no more than might have been expected from others in the circumstances" at para 23); *Ridgeway v The Queen*, [1995] HCA 66, McHugh J (reasoning that "once the State goes beyond the ordinary, it is likely to increase the incidence of crime by artificial means" at para 32).

151. See e.g. Joel Slemrod, "Cheating Ourselves: The Economics of Tax Evasion" (2007) 21:1 J Econ Persp 25.

152. *R v Mack*, *supra* note 2 at 959.

153. See Dworkin, *supra* note 7 (stating: "[A]s social scientists who leave wallets lying about in phone booths find out, almost any of us is likely to commit a crime" at 26).

154. See *ibid* at 25–26. See also Ashworth, *supra* note 59 (noting that leaving a wallet or cartons of cigarettes unattended in public spaces "represent extraordinary temptation" where "police would be creating crime" as opposed to "unexceptional opportunities" at 175); Friedland, *supra* note 59 at 4 (arguing that entrapment should be found where police offer to accept payment to drop careless driving charge to induce attempted bribery); Eric Colvin, "Controlled

public spaces hoping to find unattended wallets. Whether these scenarios are considered under the general abuse of process doctrine or Entrapment 2, the result should be the same. If the accused establishes that the crime would probably have not been committed but for the opportuning, the court should normally find an abuse of process and stay the proceedings.

Two Entrapment 1 cases fit this description. In *R v McGivern*, undercover police set up drug paraphernalia kiosks in ten small communities.[155] The accused approached one and asked if pipes were being sold. They were not. The officer asked him, however, if he "would help him out with a little weed".[156] The accused indicated either that he "would" help or that he "would see" if he could help.[157] In any case, he soon returned and exchanged a small amount of marijuana for a toque.[158]

Though the accused did not argue that he was induced under Entrapment 2, the fact that he traded a personal quantity of cannabis for an inexpensive article of clothing suggests that he was not predisposed to traffic. Instead, he was likely a mere consumer of cannabis. If so, police manufactured a trafficking offence that would not have occurred but for their opportuning.[159]

In *R v Gambin*, two female undercover officers approached the male accused in a bar.[160] One asked if he knew where they could "get something to party with?" He asked what they wanted; she replied, "a gram" (of what was mutually understood to be cocaine). The accused said he was not a dealer but would give them some of his own supply. After she declined and he consumed some cocaine, he asked her if she was "still looking for a gram?" She said yes and they agreed on a price. He left the bar, returned with the cocaine, and completed the transaction.[161]

Operations, Controlled Activities and Entrapment" (2002) 14:1 Bond L Rev 227 (referring to the wallet example from *Mack* and noting that "randomly tempting people will catch some persons who are predisposed to engage in the criminal activity" at 244). Ashworth's "carton of cigarettes" example is drawn from *Williams v DPP*, where the Court rejected entrapment on the basis that similar crimes had occurred in the area. See [1993] 3 All ER 365, (1994) 98 Cr App R 206 (QB). See also Geoffrey Robertson, "Entrapment Evidence: Manna from Heaven or Fruit of the Poisoned Tree?" [1994] Crim L Rev 805.

155. *Supra* note 107.

156. *Ibid* at para 4.

157. It is not clear from the decision whether he said the former or the latter. See *ibid*.

158. See *ibid*.

159. Police witnesses testified that fifteen other non-targeted people were charged during the operation. See *ibid* at para 5. The trial judge did not indicate whether they were all charged with trafficking offences. Based on what happened with the accused, however, it is possible that others were charged with trafficking who were not regularly engaged in that vocation.

160. *Supra* note 102.

161. *Ibid* at paras 6–22.

When the officers told the accused they were leaving for the night, the accused was disappointed. In the trial judge's words, he "wanted to continue to socialize" and hoped that the cocaine would lead to "something more".[162] When the officers met the accused and his friend the next day, they said that they wanted to buy more cocaine. After more socializing, drinking, and cocaine consumption by the accused, they arranged for another purchase, which was completed later that day. Police witnesses conceded at trial that "given the prices quoted and the amounts of cocaine supplied", the accused "would have made no profit on the sale".[163]

The trial judge concluded that the police did not induce the offence in a manner sufficient to make out Entrapment 2. Though the accused sold the cocaine for sexual (and not financial) reasons, the officers did not unduly exploit this desire or take advantage of a drug addiction or other vulnerability.[164] In finding Entrapment 1, however, he stated that the facts highlighted "the risk that the police may entice people who would otherwise have no involvement in a crime".[165] Given the lack of evidence that the accused was a drug dealer and his non-financial motivation, it is likely that the officers did create a crime that would not have occurred without their involvement.

Unlike the other no bona fide inquiry cases discussed in Part II.B.(ii), it made sense to stay the proceedings in *McGivern* and *Gambin*. While random opportuning may sometimes be necessary to combat ongoing, "invisible" crimes like drug trafficking,[166] it serves no purpose to entice a drug user to sell drugs in a one-time transaction for non-financial reasons. Entering a stay in these circumstances sends a strong signal to police that they should not use this tactic.

In the other cases, in contrast, police approached traffickers who were ready and willing to sell drugs for a profit.[167] The police did not do anything that could have caused someone not already engaged in trafficking to do so.[168] In the absence of evidence of bad faith or discrimination, awarding a stay in such circumstances is overkill. Whatever one's views on the utility of efforts to stamp out street-level drug trafficking, it is not the proper role of courts to micromanage the police, especially when the rules they have created to do so are so imprecise that police cannot know their limits with reasonable certainty *ex ante*.

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162. *Ibid* at para 12.

163. *Ibid* at para 22.

164. See *ibid* at paras 60, 62.

165. *Ibid* at para 45.

166. See generally Dworkin, *supra* note 7 at 25–26.

167. See *supra* note 109 and accompanying text.

168. See Dworkin, *supra* note 7 (stating that "it is reasonable not to count the mere provision of opportunity to commit a crime as the manufacture or creation of crime" at 27).

Applying a "crime creation" test under the general abuse of process doctrine would also capture improper opportuning not currently encompassed by either prong of the entrapment defence. Imagine that in *McGivern* and *Gambin* police did reasonably suspect the targeted locations as hotbeds of drug trafficking. Because the opportuning would have been bona fide and without inducement (as the latter is currently understood) there would be no entrapment. Yet in both cases police enticed a person who was not previously engaged in trafficking to do so. The happenstance of being (or not being) in a place loosely identified as a focal point for trafficking should not determine the success of an entrapment claim. Instead, courts should simply ask the question inhering in the rationale for the entrapment defence: did police create a crime that would not likely have happened without their involvement?

Conclusion

The intuition underlying the entrapment defence—that it is wrong for the state to "manufacture" crime—is sound. But its implementation has gone awry. For reasons that are not entirely clear, the Supreme Court of Canada in *Mack* deviated from this intuition and created a novel category of entrapment where police do not reasonably suspect the targeted person or location. Entrapment 1, as I have termed it, does a poor job distinguishing legitimate from abusive opportuning and should be discarded.

Some compelling Entrapment 1 claims could be upheld under Entrapment 2. Those that remain should be treated as general abuse of process claims, with special attention to cases of *mala fides* (including discriminatory targeting) and crime creation. Compared to the status quo, this approach would give police firmer guidance and free them to conduct random opportuning to combat "invisible" crimes, but only if they act in good faith, without discrimination, and without manufacturing crime that would not have occurred otherwise.