

Daniel J. Hill, Stephen K. McLeod and Attila Tanyi

Entrapment and ‘Paedophile Hunters’

News stories about so-called ‘paedophile hunters’ have become common. The number of prosecutions based on evidence from paedophile hunters has risen rapidly in England and in Scotland, and there are organized hunter groups in various countries (Hadjimatheou 2019).

The Netherlands has recently seen an upsurge in violence by paedophile hunters. In 2020, Jan Kruitwagen died a few hours after having been assaulted when he went to meet a 15-year-old boy. Various cases of non-fatal assaults by members of hunter groups have also been reported.

As with all sexual abuse, it is difficult to measure, or even estimate, the extent of the production and circulation of images of the sexual abuse of children. It is clear, though, that the widespread ownership of internet-enabled devices has enabled a boom in this kind of crime. People, including the police, often think that the problem has become too big for the authorities to tackle (Hadjimatheou 2019).

As shown in the BBC Three television documentary ‘Paedophile Hunters: The Rise of the Vigilantes’ (27 January 2019) and frequently reported elsewhere, paedophile hunters see themselves as part of the solution. They normally pose online as children to ensnare, and to report to the police, individuals that may then face criminal charges (Gillespie 2019; Hadjimatheou 2019; Purshouse 2020).

Exposure of the target on social media is also common (Hadjimatheou 2019). Some paedophile hunters live-stream while confronting their targets or performing what they—often wrongly (Purshouse 2020)—call a ‘citizen’s arrest’. Individuals are often named and shamed in online lists of ‘offenders’ that include people that have never faced relevant criminal charges and people that have been cleared of them. Public exposure is dangerous to the exposed individuals and their families (Purshouse 2020). Worryingly, it takes place against the background of cases like the murder of Bijan Ebrahimi, in Bristol in 2013, after he was falsely accused of child abuse, and that of Darren Kelly, also falsely accused, in Basildon in 2015.

While some hunter groups do not expose people publicly prior to conviction (Hadjimatheou 2019), many do. This vigilante behaviour can have dreadful consequences. In England in 2015, Michael Duff of Wallsend, Tyne and Wear, was tricked into arranging a meeting with someone posing online as a 15-year-old girl. Shortly after having been exposed on Facebook, and interviewed by police, he took his own life. Similar cases are known (Gillespie 2019), and future cases are likely.

When evidence from paedophile hunters has resulted in a trial, the defence has sometimes argued that the accused was entrapped (Gillespie 2019; Stark 2018). There is concern among some police officers (Hadjimatheou 2019) and legal theorists (Stark 2018; Purshouse 2020) about entrapment by paedophile hunters.

Philosophical questions about entrapment (Hill, McLeod & Tanyi 2018, forthcoming-a) include:

Definition: What are acts of entrapment?

Permissibility: Under what conditions, if any, are acts of entrapment permissible?

Redress: When someone has been entrapped, what forms of redress are appropriate?

An agent's act is one of entrapment, we suggest (Hill, McLeod & Tanyi 2018), when it meets the following five conditions:

1. an agent *plans* that the target commit an act;
2. the planned act is of a type that is criminal, immoral, embarrassing, or socially frowned upon;
3. the agent *procures* the act (by solicitation, persuasion, or incitement);
4. the agent intends that the target's act should, in principle, be *traceable* to the target either by being *detectable* or via *testimony* (including the target's confession), that is, by *evidence that would link the target to the act*;
5. in procuring the act, the agent intends to be enabled, or intends that a third party should be enabled, *to prosecute or to expose the target* for having committed the act.

There is consensus across many jurisdictions that entrapment goes beyond the mere presentation of an opportunity (Hill, McLeod & Tanyi forthcoming-a). Our third condition marks entrapment out as distinct from the mere presentation of an opportunity. We characterize procurement as involving the agent's influence, via the content of a communicative act or series of such acts, upon the target's will (Hill, McLeod & Tanyi 2018, forthcoming-b).

Legal entrapment to commit a crime (also called 'state entrapment') happens when, for example, the police pose online as a child and subsequently persuade a target to send them an image of a child that it is illegal to make, to possess, or to distribute. Depending on the jurisdiction, such persuasion could be illegal.

Civil entrapment to commit a crime (also called 'private entrapment') happens, for example, when paedophile hunters act in the same way as the police did in the example just given. Depending on the jurisdiction, this could put the paedophile hunters themselves at risk of prosecution, this time for sexual offences. Paedophile hunters are unlikely to be agents of a regulated covert operation, and they might not be legally permitted to have indecent images of children on their devices. In England and Wales, this, at least in principle, could lead to a charge of 'making' or of 'possessing' indecent images of children. These offences can carry substantial custodial sentences. The risk of being charged with them arises, too, in situations that put paedophile hunters at the mercy of police forces and courts that react to their activities in inconsistent and unpredictable ways (Gillespie 2019; Hadjimatheou 2019).

The courts almost always treat the distinction between legal entrapment and civil entrapment as significant to justice. Objections to legal entrapment often treat as fundamental considerations concerning the integrity of the state, the coherence of the system of criminal justice (Hill, McLeod & Tanyi forthcoming-b), the fitness of the state to condemn the accused, and affront to the public conscience (Hill, McLeod & Tanyi forthcoming-a). While there is disagreement as to what, if anything, is wrong with legal entrapment, the European Court of Human Rights (ECtHR) has ruled that it breaches Article 6.1 of the European Convention of Human Rights (ECHR) in respect of the defendant's right to a fair trial (Hill, McLeod & Tanyi forthcoming-a). The ECtHR sees this right as relevant to the criminal investigation, not only to court proceedings. This shifts the emphasis away from the

implications for the state or how it is regarded by the public, and towards the rights of the accused. In countries that are parties to the ECHR, the continuing disparity between how the courts treat legal entrapment and how they treat civil entrapment is therefore hard to justify. This is because it is *how* the evidence against the accused was gathered that is prejudicial to the right to a fair trial, not *who* gathered it. This point has not yet been widely acknowledged in the legal world: even recent cases that discuss entrapment focus more often on the standing of the court, or of the state, than on the right of the accused to a fair trial. Also, that right has normally been construed as being unrelated to how the evidence was gathered.

What kind of activity by paedophile hunters would be entrapment? Putting a fake profile, containing no sexually suggestive content, online would not count: this is mere presentation of an opportunity. If the investigator is the one to turn an online chat with a potential target sexual, to suggest a meeting, or to request the sending of an indecent image, then that conduct involves entrapment rather than the mere presentation of an opportunity, since the investigator is actively suggesting that an offence be committed. This is a line that some paedophile hunters cross (Gillespie 2019).

Is entrapment by paedophile hunters permissible? We do not think that it is morally permissible, granted the existence of a competent police force. We also do not think that it ought to be permitted legally. Even if there is a case for allowing the police to entrap, for example as part of an authorized and regulated controlled operation targeting a suspect that they already have reasonable grounds to believe is an habitual child abuser, any rationale for doing so would not necessarily extend to the actions of private individuals. Indeed, given the unregulated nature of their activity, it would seem very unlikely to do so.

What forms of redress are appropriate when paedophile hunters cross the line into entrapment? Options that the police and courts can or might consider include:

- issuing of a police caution, to the hunters, the hunted, or both;
- as in the case of like legal entrapment, discretionary exclusion of the evidence thereby obtained (Gillespie 2019);
- similarly, a permanent stay in proceedings (Gillespie 2019; Stark 2018);
- where applicable, prosecution of the paedophile hunters for the making, possession or distribution of indecent images of children;
- court injunctions dissolving the hunter group and/or debarring individuals from future hunting expeditions;
- payment of damages to the entrapped party.

More generally, a legislative response to paedophile hunters might be required. Gillespie (2019) makes this suggestion in relation to whether the courts should work with the evidence gathered by paedophile hunters. Legislation might instead, or also, restrict the hunters' activities by debarring them from confronting, detaining and prematurely exposing their quarry. To tackle both child abuse and paedophile hunting, Jim Gamble has proposed the criminalization of posing online as a child. Further discussion seems needed about the practicability of this measure and about the accompanying risks.

References

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