Moral Subversion & Structural Entrapment*

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In 1984, the U.S. Congress enacted the Child Protection Act, which made it a crime to purchase sexually explicit images of children. Prior to the Act's passage, a man named Keith Jacobson had mail-ordered two *Bare Boys* magazines from a bookstore. His name remained on the bookstore's mailing list, which U.S. Postal Service inspectors later acquired. Investigators undertook a plot to get Jacobson to purchase some freshly criminalized pornographic material. Posing as members of fabricated organizations, they sent Jacobson several letters that decried censorship and an "outdated puritan morality," fueled by enemies of free expression. After repeated offers to sell Jacobson child pornography, he placed an order with them, and was subsequently arrested.[1]

Did the government do anything wrong by encouraging Jacobson to commit the crime? The U.S. Supreme Court avowed it had: "In their zeal to enforce the law, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may

* Previous versions of this article were presented at the Nuffield Political Theory Workshop in Oxford, the Oxford DPIR Political Theory Workshop, the annual conference of the Association for Legal and Social Philosophy at the University of Leeds, and the annual conference of the American Political Science Association in Chicago. The project was supported by Nuffield College and the Department of Politics and International Relations at Oxford University, and by the Institute for Humane Studies. I am thankful to Lea Ypi for her editorial guidance and to two anonymous reviewers for helpful comments. Throughout the project, I have received invaluable advice from, among others, Paul Bou-Habib, Neal Carrier, Simon Cotton, Bryan Cwik, Iason Gabriel, Bill Glod, Bob Goodin, Amanda Greene, Keith Hankins, Malte Frøslee Ibsen, David Miller, Shmulik Nili, Avia Pasternak, Jesse Tomalty, Jeremy Waldron, and Caleb Yong.

[1] *Jacobson v. United States*, 503 U.S. 540 (1992). A fuller description of the case is offered in John Kleinig, *The Ethics of Policing* (New York: Cambridge University Press, 1996), p. 151.

prosecute."[2] The state's operations, the Court reasoned, did not *identify* violators of the Act; it created them. In so doing, it violated the legal contravention against *criminal entrapment*.

Political and legal philosophers tend to agree that entrapment is problematic. Yet the available accounts of entrapment's wrongness are, I believe, incomplete. Moreover, because we lack a comprehensive account of why entrapment is wrong—because we have failed to grasp one of the most salient dimensions of its wrongness—we have failed to notice it in all of its manifestations.

The first task of this article will be to illuminate one crucial explanation of why entrapment is wrong, which available accounts have failed to capture. I shall argue that entrapment is wrong, in part, because it *subverts* the moral capacities of entrapped persons. To subvert an agent's moral capacities is to interfere with the agent's practical reasoning in ways that increase the likelihood she will culpably choose to act wrongly. Such activity, I contend, is incompatible with respect for that agent. Specifically, it is incompatible with a core regulative attitude that respect enjoins: an attitude of support for the successful operation of others' moral capacities.

This view differs from prevailing accounts in several ways. Firstly, it denies that the wrongness of entrapment necessarily inheres in the prosecution and eventual punishment of the entrapped defendant. Rather, entrapment's wrongness partly attaches to the initial act of inducement itself: in the objectionable way that an agent relates to another agent when the former sets

[2] *Ibid*., at 548.

up the latter to fail morally. Secondly, my account reveals an important commonality between official entrapment by state officials, on the one hand, and private instigation to criminal offense by one's fellow citizens, on the other. The wrongness of both, I propose, is partly traceable to the same underlying moral principle. Finally, the view I defend does not rely on the assumption that entrapment is necessarily intentional. The duty to refrain from conduct that sets up others to fail morally is one that can also be violated through negligence.

That final point of difference sets the stage for this article's second core task. The version of subversion we observe in familiar entrapment cases involves intentional interventions by state actors against targeted individuals. Once the possibility of negligent subversion is acknowledged, however, we can recognize more diffuse, macro-level versions of the phenomenon. What I term *structural entrapment* transpires when the state negligently sets up its own citizens to fail morally as a foreseeable consequence of the contexts its policies create. I shall employ the case of urban injustice in the contemporary United States to illustrate how subversion can be structural, suggesting that a gauntlet of unjust laws makes it rational for citizens to join violent criminal drug gangs. Thus one need not be the deliberate target of a sting operation to consider herself subverted; it is enough that she is subjected to (certain) criminogenic social policies. The urban poor thus have an even more powerful complaint against their state than we initially believed. Far more perniciously than simply subjecting them to unjust policies, the state has undercut their quests to be just persons.

I. The Limitations of Prevailing Accounts

Why object to entrapment? Among the variety of reasons offered in the scholarly literature are the following:

a. *Culpability.* Entrapped defendants, like persons who have been coerced or drugged, may not be *culpable* for their offences; entrapment morally exculpates offenders, rendering their punishment unjustified.[3]

b. *Incoherence.* Entrapment is incoherent; the state acts inconsistently when it insists that citizens adhere to the law, but then takes measures to induce them to break it.[4]

c. *Crime Prevention.* By entrapping persons into committing crime, the state violates its duty to decrease, rather than increase, the crime rate.[5]

d. *Unfairness.* Because only some susceptible persons will find themselves targets of a sting operation, it is a matter of bad luck who is entrapped and who isn't. [6]

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[3] This argument is suggested by the fact that, under U.S. law, entrapment is a *defense* in court. This rationale is also suggested by U.S. Supreme Court; see *Sorrells v. United States*, 287 U.S. 435 (1932). For a defense, see Paul M. Hughes, "What is Wrong with Entrapment?", *The Southern Journal of Philosophy* 42, 1 (2004), 45-60.

[4] This argument finds expression in Gerald Dworkin, "The Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime," *Law and Philosophy*, 4 (1985), 17-39, p. 30; Andrew Ashworth, "What is Wrong with Entrapment?", p. 310; Antony Duff *et al.*, *The Trial on Trial, Volume 3: Towards a Normative Theory of the Criminal Trial* (Oxford: Hart Publishing, 2007), pp. 242ff.

[5] This argument is suggested in Andrew Ashworth, "What is Wrong with Entrapment?" *Singapore Journal of Legal Studies* (1999): 293-317; B.G. Stitt and G.G. James, "Entrapment and the Entrapment Defense: Dilemmas for a Democratic Society," *Law and Philosophy*, 3 (1984), 111-31; and Jonathan C. Carlson, "The Act Requirement and the Foundations of the Entrapment Defense," *Virginia Law Review*, 73 (1987), 1011-1108.

[6] E.g., *U.S. v. Twigg*, 558 F. 2d 373 (3d Cir. 1978), which speaks of "fundamental fairness" at 381; see also Dworkin, "The Serpent Beguiled Me," p. 32.

e. *Manipulation.* Insofar as entrapment serves some useful public purpose, such as deterrence, entrapped offenders are disrespectfully used merely as a means to an end.[7]

f. *Sadism.* Entrapment sadistically transforms punishment from something that wrongdoers deserve or that is instrumentally valuable to something that we should pursue for its own sake.[8]

g. *Deception*. Through staging entrapment operations, the state contravenes its duty not to lie to its citizens, thereby tainting the evidence secured through such deception.[9]

h. *Standing.* A state that induces its citizens to break the law forfeits its moral standing to hold those citizens accountable; it thus lacks the authority to punish entrapped defendants for their crimes.[10]

I doubt whether any of these reasons succeed as decisive, or even *pro tanto*, considerations against entrapment.[11] *Culpability* implausibly suggests that encouragement diminishes another's moral responsibility when performed by an undercover state official, but not by an ordinary citizen. In a recent case, a group of men conceived a plot to bomb two New York City synagogues at the

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[7] Anthony M. Dillof, "Unraveling Unlawful Entrapment," *Journal of Criminal Law and Criminology*, 94 (2004), 827-96, p. 876.

[8] Andrew Carlon, "Entrapment, Punishment, and the Sadistic State," *Virginia Law Review*, 93 (2007), 1081-1134.

[9] The idea that entrapment is wrong because the evidence secured through it is procedurally improper is suggested by English and Welsh law, in which entrapment triggers a stay of prosecution.

[10] This argument is suggested—and rejected—in a brief discussion in R.A. Duff, "Blame, Moral Standing, and the Legitimacy of the Criminal Trial," *Ratio*, 23 (2010), 123-40, pp. 133ff. See also G.A. Cohen, "Casting the First Stone: Who Can, and Who Can't, Condemn the Terrorists," *Royal Institute of Philosophy Supplements*, 81 (2006), 113-136.

[11] This list is not, of course, exhaustive. Other object to entrapment, to name one example, because it is epistemically disabling: it undermines the government's knowledge of the kind of person the entrapped offender is. See Kleinig, *The Ethics of Policing*, p. 158.

encouragement of an undercover FBI informant.[12] Were we to imagine the informant as simply an ordinary citizen, we would never entertain the suggestion that those he encouraged were consequently exculpated. [13] *Incoherence* and *Crime Prevention* are also unpromising. We need only to imagine a well-publicized, routine practice of virtue-testing by undercover police to see that entrapment could be part of a cohesive government strategy to slash crime, as citizens would trust no one encouraging them to do wrong.[14] And *Unfairness* fails to convince for the simple reason that if entrapment unfairly catches some and spares others, then all punishment is unfair for the same reason (as many non-entrapped criminals are bound to go uncaught, too). Yet that result cannot be right.

The other theories have greater promise, but suffer from various limitations. *Manipulation* objects to entrapment because it punishes citizens as a means to deter others, but this controversially implies the rejection of deterrent punishment in general.[15] *Sadism* relies on the widely disputed thesis that the permissibility of an action depends on the agent's intention or motivation. *Deception* counterintuitively condemns all sting operations, even

[12] The court ultimately decided that it was not an instance of entrapment at all, since it established that the perpetrators possessed sufficient predisposition to commit the crime independent of their *agent provocateur's* encouragement. I shall question the significance of predisposition later on, but for now, let us simplify matters by assuming, *pace* the court, that this was, in fact, a case of entrapment. See Al Baker and Javier C. Hernandez, "4 Accused of Bombing Plot at Bronx Synagogues," *The New York Times*, May 20, 2009, available at http://www.nytimes.com/2009/05/21/nyregion/ 21arrests.html; accessed 17 July 2014.

[13] For other criticism of this argument, see Ashworth, "What is Wrong with Entrapment?", pp. 311-12; Mike Redmayne, "Exploring Entrapment," in Lucia Zedner and Julian V. Roberts (eds.), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford: Oxford University Press, 2012), p. 158; and Dan Squires, "The Problem with Entrapment," *Oxford Journal of Legal Studies*, 26 (2006): 351-376, p. 362.

[14] For similar criticism, see Redmayne, "Exploring Entrapment," p. 160.

[15] I am grateful to an anonymous referee for pointing this out.

those against ongoing criminal masterminds. And *Standing* controversially presupposes the truth of expressive or communicative theories of punishment.

To be sure, these reservations hardly qualify as decisive refutations. No doubt some of the considerations above succeed, under some interpretation, in capturing at least part of why we rightly balk at criminal entrapment. But they cannot be the whole story, for there is a further difficulty common to most (if not all) prevailing views, and it is this particular difficulty that will concern me here.

To see the difficulty, consider again *Standing*: the idea that a state lacks the moral standing to blame and punish those whom it entraps. Such a view has two implications: firstly, that entrapped offenders should not be punished; and secondly, that provided that the state declines to prosecute and punish the entrapped wrongdoer, entrapment's wrongness is largely obviated. Both implications, however, are difficult to accept. Recall the case of young Muslim men coaxed into bombing a synagogue. Firstly, it is not obvious that someone who is convinced to bomb a synagogue should go without punishment.[16] As I mentioned, we would never contemplate that result in the case of someone instigated by a private citizen. Secondly, even without punishment, there remains something deeply morally unsavory about agents of the state going out of their way to cause other moral agents to act wrongly. It is highly counterintuitive to think that entrapment would have become morally unproblematic in our example case, if only the FBI had neglected to press

[16] Indeed, entrapment law often makes an exception precisely for cases involving dangerous crimes. See U.S. Model Penal Code, Article 2, Section 2.13, Part 3.

charges once the men were prevented from detonating the bombs. Or consider again the case of Keith Jacobsen: even if federal agents had declined to press charges, they still would have acted wrongly by entrapping him into ordering child pornography.[17] And while none of the theories we have considered is strictly incompatible with the claim that entrapment is wrong independent of subsequent prosecution and punishment, none can motivate this intuition.[18] There must, then, be some further reason to object to entrapment, independent of any objections we might have to *punishing* entrapped offenders.

II. Subversion

When an agent of the state entraps a citizen, the former *instigates* the latter to commit crime, only then to punish her for it. The accounts of entrapment I have so far considered focus their concern tightly on the significance of the facts, firstly, that it is an agent of the *state*, rather than a private citizen, who is engaging in the instigation, and secondly, that the agent may be motivated to engage in such instigation for the purposes of securing a criminal conviction. But an undue emphasis on these features, I believe, has constrained our thinking about entrapment, leading us to overlook one of its central wrong-making features. The key to grasping a further crucial dimension of entrapment's wrongness lies elsewhere: namely, in identifying what, precisely, goes wrong when *any* moral agent induces another moral agent to act wrongly.

[17] The standing theory is not alone in suffering from these two limitations. *Culpability* disavows punishment of entrapped offenders because they are not blameworthy, and *Unfairness* complains precisely about the *punishment's* unfairness.
[18] I am thankful to an anonymous reviewer for clarifying this point.

A

Consider a fictional but standard case of instigation. Barry suggests to Carl that he ought to kidnap and torture his neighbor, Leila, and proceeds to provide Carl with helpful information about when Leila will be home alone. Carl carries out the attack. Note that Barry is not *coercing* or *exploiting* Carl into perpetrating the crime; Carl's responsibility is not diminished. So what, exactly, has Barry done wrong? In particular, *whom* has he wronged? The most familiar answer, of course, specifies that Barry has wronged Leila. By acting in ways that increase the likelihood that Carl would attack her, Barry has failed to regulate his conduct by appropriate concern for the value of Leila's interests. The bad-making feature of Barry's instigation is that it exposes Leila to weighty risks of harm, and for no good reason. While Barry has not personally carried out the attack, he is an accessory to it. He is guilty of *complicity* in the attack.

That Barry is complicit in posing a threat to Leila is one reason for objecting to his conduct.[19] But it is vital to see that it is not the only thing objectionable about his conduct. Were Carl some dangerous machine that Barry had somehow mis-programmed, that would be so. But he is no machine; he is a moral agent. And as a moral agent, he, too, has a complaint against Barry, and it is this complaint that I seek to analyze. In inducing Carl to act wrongly, Barry is not simply relating to Leila disrespectfully. He is relating *to Carl* disrespectfully. By acting in ways that increase the likelihood that Carl's

[19] Here I follow the idea that, to be complicit in wrongdoing, one must have actually made a causal difference; Chiara Lepora and Robert E. Goodin, *On Complicity and Compromise* (Oxford: Oxford University Press, 2013), and John Gardner, "Complicity and Causality," in *Offences and Defences*: *Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007). Cf. Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge: Cambridge University Press, 2007).

moral capacities will malfunction, Barry is failing to relate to Carl in the way that moral agents ought to relate to one another.

The explanation for that thesis is this. Barry owes it to Carl to regulate his choices by principles that are consistent with respect for Carl's moral agency. What is it to respect Carl's moral agency? Drawing on a familiar strand of contemporary political philosophy, let us stipulate that respecting Carl's moral agency is a matter of respecting his *two moral powers*: firstly, his capacity to reason about right and wrong and regulate his conduct by the conclusions of that reasoning; and secondly, his capacity to conceive his own rational advantage, his own good, and pursue it.[20] Liberal political theory has a relatively rich understanding of what it is to disrespect an agent's second moral power. The wrongfulness of paternalistic policies, for example, is best explained by the way that those policies fail to respect agents' capacities to decide for themselves what is and what is not good for them.[21] Indeed, policies that disrespect the second moral power need not even be straightforwardly coercive for them to be wrongful. Nations with an official state religion, in which adherence to that religion is deemed a matter of good citizenship, disrespect agents' second moral power even if membership in the religion is legally optional.[22] These familiar examples testify to just how deep the liberal concern with respecting the second moral power runs. Far less attention has been granted to what exactly is involved in respecting agents' *first* moral power.

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[20] John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), pp. 47ff.
[21] Jonathan Quong, *Liberalism without Perfection* (New York: Oxford University Press, 2011), pp. 80ff.
[22] Martha Nussbaum, "Perfectionist Liberalism and Political Liberalism," *Philosophy & Public Affairs*, 39 (2011), 3-45, p. 35.

When Barry goes out of his way to get Carl to trip up morally, he is failing to respect Carl's first moral power. To see this, consider what is involved in actually *respecting* something. Respecting *x* consists, firstly, in the possession of a set of appropriate attitudes toward *x*, in virtue of its value, and, secondly, in the regulation of one's conduct toward (or involving) *x* by norms that reflect those underlying appropriate attitudes.[23] But what are the regulative attitudes involved in respecting the first moral power? I submit that there are two. Firstly, to respect a person's first moral power involves recognizing the power's existence: the person's capacity to reason about the demands of morality and live up to those demands. But mere recognition is not enough. Moral agents don't simply see one another as *capable* of living up to morality's demands; they *expect* one another to live up to morality's demands—in that phrase's normative, rather than predictive, connotation.[24] It is precisely because we have such moral expectations of one another that we are frustrated with others when they fail to meet them. "Blame," as Christine Korsgaard memorably notes, "declares to its object a greater faith than she has in herself."[25] Because the value of the first moral power inheres largely in its successful exercise,

[23] This definition is broadly, though not entirely, ecumenical. For a rejection of the idea that respect involves attitudes, see Joseph Raz, *Value, Respect, and Attachment* (Cambridge: Cambridge University Press, 2001), p. 138. For the claim that such rejection is implausible, with which I agree, see Leslie Green, "Two Worries about Respect for Persons," *Ethics,* 120 (2010), 212-231, p. 219.

[24] That the expectation I have in mind is moral, rather than predictive, is crucial. There is nothing incompatible about acting in ways that increase an agent's likelihood of moral failure while simultaneously holding the empirical expectation that she will nevertheless succeed in living up to her moral capacities (e.g., I can throw basketballs at an agent to try to stop her from swimming to rescue a drowning child, while nevertheless predicting that she will succeed anyway—since that's how good a swimmer she is). I thank an anonymous reviewer for helping me see just how significant the distinction between moral and predictive expectation is.

[25] Christine Korsgaard, *Creating the Kingdom of Ends* (Cambridge: Cambridge University Press, 1996), p. 196.

respecting that value involves an attitude of support for such exercise. Such an attitude of support is not a one-sided matter of moralistic condescension, with one side pointing fingers and making demands of others. It is the proper mark of all moral agents who reciprocally expect from one another moral success. And because such an attitude is regulative—it aims to govern our choices—conduct that is incompatible with such an attitude is ruled out as disrespectful.

Thus the duty to respect the first moral power grounds a derivative duty not to engage in certain activity that increases the likelihood of others' wrongdoing. Let us refer to such activity as *subversion*.[26] There are two broad categories of subversion. The first, *motivational subversion*, transpires when an agent either creates a reason for another agent to act wrongly, or strengthens the practical force of a temptation the agent faces to act wrongly (such as through incitement). Think here of cases in which agents offer to pay other agents to perform some nefarious act, or offer descriptions of the benefits of perpetrating some injustice that render it more attractive. The second, *epistemic subversion*, transpires when an agent causes the formation of false beliefs in another agent. These beliefs may concern the substance of morality—as, for example, when an agent convinces another agent to endorse and guide her actions by white supremacist convictions. Or they may concern the role of morality—as, for example, when an agent convinces another agent to regard moral reasons as on par with non-moral reasons, rather than decisive and regulative. And there are doubtlessly complex hybrid cases—as when an agent

[26] This term is also used, albeit in a different context, by Allen Buchanan, "Philosophy and Public Policy: A Role for Social Moral Epistemology," *Journal of Applied Philosophy*, 26 (2009), 276-290.

convinces another agent of some fact that renders the latter's behavior morally unproblematic ("It's fine for you to drive—you haven't drunk that much"[27]). All such activity subverts the operation of agents' first moral power, and accordingly violates the duty to respect that power. Note that subversion need not involve one agent malevolently altering the conduct of some innocent party. Two co-principals in a wrongful enterprise, egging each other on to do evil, are mutually maltreating each other.

B

Many actions increase the likelihood of others' wrongdoing. Should we condemn all of it? Does all of it qualify as the injustice of *subversion*? Surely not. This is partly because an agent is blameworthy for an action only when she knew or should have known that the action had the effects that it did. It is not *murder* when one electrocutes one's neighbor by casually flicking on a light switch that normally works well but triggers a freak blast of electricity.[28] *Mutatis mutandis*, it goes, with subversion. [29] If a particular agent did not know, or could not reasonably have been expected to foresee, that her conduct would increase the likelihood of another's wrongdoing, then she is clearly off the moral hook.

That clarification considerably narrows the range of conduct for which agents are appropriately condemned. But we must go further in tightening the

[27] David Pears, *Motivated Irrationality* (South Bend, IN: St. Augustine's Press, 1998).
[28] This example is from Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990), p. 229.
[29] My preference is to say that such an agent has not engaged in subversion at all, for subversion—like murder—refers to a particular type of *culpable wrongdoing*.

account. In many cases, it is plain that seemingly subversive activity is, in fact, perfectly proper. Consider two examples:

> ***1.*** Jones, a black man, walks down a street frequented by white supremacists, increasing the likelihood they will attack him.

> ***2.*** The government removes a tax subsidy that it had corruptly granted to the farming industry, effectively increasing that industry's tax rates—but also exacerbating the temptation faced by corporate farmers to cheat on their taxes or unjustifiably evade them.

The proposition that racist assailants and tax evaders have a complaint against their putative tempters in these cases does not strike us simply as laughable; it strikes us as pernicious. But why? What distinguishes the class of cases in which a complaint of subversion is appropriate from cases in which it is not?

Our answer is that the activities of Jones and the justice-seeking government are what I will call *morally protected*. Morally protected activity is activity that one has an antecedently established right or duty to engage in. In the case of Bob, he has a right to freedom of movement. And in the case of the government, it has not only a right to enact the just tax policy; it has a *duty* to do so. It would be implausible to say that the government has *wronged* the prospective tax cheats by assigning them their just tax rate.

There is a temptation to say that *all* activity that increases the probability of moral failure in a given case is wrongful, but overridable by other

considerations. To use our first case: it is *pro tanto* wrong for Jones to take that walk, but given that he has a right to do so and we tend to think that rights are morally weighty, the moral calculus delivers the result that it is all-things-considered justified to take the walk. This way of pursuing the analysis, however, is misguided in two ways.

Firstly, it yields the implausible result that we should feel regret, perhaps even owe compensation, for the white supremacists and the prospective tax-cheats when we increase the likelihood that they will act wrongly. Secondly, however, it rests on a morally perverse understanding of the relation between ideal moral justice, on the one hand, and contingent facts about the probability of compliance with those standards, on the other. What it is that fundamental standards of justice protect and demand is invariant against changing probabilities of compliance.[30] If the tax-wary farming executives are going to start shooting innocent children the moment the aforementioned tax is increased, or hijack the economy, that fact generates enforcement dilemmas that we must take seriously before deciding our next move. But it does not change the answer to the question: "what tax rates does justice ideally demand?" To answer *that* question, we do not need to know how much compliance or resistance certain tax rates are likely to elicit.

In short, the wrongness of subversion enters the picture once we have *already* specified what persons' fundamental rights and duties are; it does not affect their content. Indeed, we *need* a pre-existing account of what people's

[30] See G. A. Cohen, *Rescuing Justice and Equality* (Cambridge: Harvard University Press, 2008), and David Estlund, "Human Nature and the Limits (If Any) of Political Philosophy," *Philosophy & Public Affairs*, 39 (2011), 207-237.

moral duties are in order for us to know what it even *is* to subvert—what it is to decrease the likelihood that people will not live up to their duties. Thus if the performance of my duty or exercise of my right happens to increase the likelihood of others' wrongdoing, that does not void the existence of the duty or right.

That is the analysis of how to think about morally protected activity that increases the likelihood of others' moral failure. Beyond that zone, however, our thinking becomes more complex. Consider a fresh example: violent pornography. Many people hold the conviction that such pornography induces its consumers to commit violent acts. Assume this is so. Let's also assume that violent pornography is not morally protected; even if agents have an interest in accessing it, it is not weighty enough to ground a right. Is it therefore morally impermissible to make and distribute violent pornography, given that, *ex hypothesi*, it increases viewers' likelihood to engage in sexual violence? Here balancing could well be appropriate: we weigh the significance of the interests against the seriousness of the subversive risks.[31]

C

Subversion, then, is otherwise morally unprotected activity that foreseeably increases the likelihood that others' first moral power will culpably operate defectively. One important subset of subversive injustices comprises actions that, independent of their subversive character, are already condemned as

[31] A third possibility, of course, is that agents lack an interest in the relevant activity altogether, in which its subversive status would simply settle the matter. See Danny Scoccia, "Can Liberals Support a Ban on Violent Pornography?" *Ethics*, 106 (1996), 776-779.

wrongful. A racist lynching that foreseeably inspires copy-cats is wrong independent of its subversive effects. That it subverts, too, means that it is an even more horrifying—and complex—injustice than we initially supposed. In other cases, the only thing problematic with an action is that it increases the likelihood of others' wrongdoing. Here there are typically two dimensions to the wrong, as in the aforementioned case of Barry, Carl, and Leila: Barry violates both his duty to Leila not to risk the violation of her rights, and his respect-based duty to Carl not to subvert his sense of justice. But there is also a class of "pure" cases in which subversion is, in fact, the only wrong that attaches to an act. This can happen if, for example, Barry was never going to let Carl get near Leila, and so was not, in fact, risking her rights, when he tried to persuade Carl to kidnap her. In such a case, the only thing Barry would be doing wrong is to subvert Carl's moral agency.

My proposal is that ordinary entrapment by the state is this kind of case—a case of pure subversion. When the FBI instigated young Muslim men to plan a synagogue bombing, there is no plausible sense in which the FBI were guilty of seriously risking the rights of the synagogue members, and thus as guilty of the additional wrong of complicity. The FBI took elaborate measures to ensure that no actual explosive material was ever actually in the entrapped citizens' possession. Yet we nevertheless judge that the FBI did something wrong. Given the failure of the various arguments for entrapment earlier, we have heretofore lacked a convincing explanation as to what accounts for that intuition. The analysis of subversion furnishes precisely that account.

The subversion-based account of entrapment differs from prevailing accounts in several ways. Notably, it refuses to locate the wrongness of entrapment (solely) in the prosecution and eventual punishment of the entrapped defendant. Given that entrapped defendants have committed, or attempted to commit, culpable wrongs—have perpetrated actions that constitute often significant failures to be moved by the value of others—it is not obvious why punishment is inappropriate. Note that believing that entrapped persons should still be punished is wholly consistent with the conviction that the government ought not to engage in entrapment. Here we hold the same attitude as in private incitement: we believe that the crime ought never to have been incited, but we believe the crime should nevertheless be punished. Thus police should be officially disallowed from engaging in entrapment. But if they do nevertheless engage in it, both they—and the culpable offenders they entrap—ought to be held accountable.

The claim that police should be disallowed from engaging in subversive activity raises the broader question of whether all subversive action, by all actors, should be prohibited. The account I have offered is committed to no such sweeping claim. Firstly, some instances of subversion will concern wrongs that are none of the state's business. If I encourage Jones to break a promise to a friend, I am surely subverting him. But it is not an instance of subversion that should incur the public's concern, since it is not the public's concern whether or not Jones keeps his promises to his friends.[32] These wrongs are not the state's

[32] This is, at least, a commonly held liberal position. For the argument that the law should only be concerned with public wrongs, see R.A Duff and Sandra Marshall, "Criminalization and Sharing Wrongs", *Canadian Journal of Law and Jurisprudence* 11, (1998), 7–22; and more

concern for the basic reason that they unrelated to the moral aims that justify the state's authority: to create conditions that secure the liberty and opportunity of citizens.[33] Thus we can distinguish between *public subversion*, which concerns the state, and *private subversion,* which does not.

Secondly, even once we have identified the instances of subversion that qualify as public, it is a further question which instances ought to face criminal sanction. A theorist's answer to this question will depend on her preferred general theory of criminalization. According to wrongness-based theories of criminalization, the fact than an action is (publicly) wrong grounds a *pro tanto* reason to attach penalties to that action.[34] Such views would ground a *pro tanto* case for criminalizing all instances of public subversion. But according to harm-based theories of criminalization, one should hold a *pro tanto* commitment to criminalizing only those instances of public subversion that cause or risk wrongful harm.[35]

It is beyond the scope of this article to determine which theory of criminalization is correct. But notice the following. Firstly, many instances of subversive action that we intuitively judge to be criminalizable—such as instances of incitement to violence—are criminalizable under either theory. Secondly, instances of police entrapment that pose genuine risks of harm to

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recently, "Public and Private Wrongs," in James Chalmers et al. (eds.), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh: Edinburgh University Press, 2010), pp. 70–85.

[33] For a version of this view, which alters Joseph Raz's theory of authority in an anti-perfectionist direction, see Quong, *Liberalism without Perfection*, pp. 128ff.

[34] See R.A. Duff, "Towards a Modest Legal Moralism," *Criminal Law and Philosophy*, 8 (2014), 217-35.

[35] For the harm-based approach, see J.S. Mill , "On Liberty," in *On Liberty in Focus*, ed. John Gray and G. W. Smith (London: Routledge, 1991), p. 30. For discussion of the harm-based standard of criminalization, see also Joel Feinberg, *Harm to Others* (New York: Oxford University Press, 1984), p. 26. Feinberg suggests the possibility of prohibiting non-harmful conduct in his *Harmless Wrongdoing* (New York: Oxford University Press, 1988), pp. 323ff.

third-parties—such as when police officers attempt to convince persons to initiate an attack, with the intent to stop the attack but no guarantee they will succeed—are criminalizable under either theory. Thirdly, instances of police entrapment that do not pose genuine risks of harm to a third party are wrongful principally in virtue of the disrespect they express to the moral agents they subvert. Thus we might *think* that these cases of entrapment can only be prohibited if one endorses a wrongness-based theory. But this is misguided: even a defender of the harm-based standard can explain why harmless entrapment cases should be disallowed. When it comes to setting state policy, we have reason for insisting on a higher threshold for government officials than "do no harm." Even if a publicly established religion did no harm, it would still express disrespect for citizens who were not adherents to that established religion.[36] This is a sufficient reason to disallow such a policy, and to discipline state officials who contravene it. Likewise, the disrespect that the state communicates to citizens by entrapping them—even if there is no risk of harm to third parties—objectionably disrespects them, which is sufficient grounds for prohibiting such operations.[37]

Thus the account I have offered generates strong grounds for prohibiting entrapment. But because it also alters our understanding of why, precisely, entrapment is problematic, it gives guidance in determining what kinds of interventions are liable to condemnation. It does so in two important ways. Firstly, it condemns a greater degree of police action than prevailing views

[36] Nussbaum, "Perfectionist Liberalism and Political Liberalism."
[37] It is a further question whether contravention of this prohibition should be handled through disciplinary proceedings within the police force, or through the justice system.

condemn. Many political defenders of proactive police efforts wish to restrain the definition of entrapment. One popular approach suggests that *if* an agent already possessed an inclination to commit the relevant crime, then police solicitation or persuasion is not objectionable. This so-called "subjective test" is the favored approach in U.S. federal courts, for whom the relevant question is whether the putatively entrapped agent did or did not have a "predisposition" to commit the crime. If the prosecution can prove that the defendant already possessed a predisposition, then the fact that officials provided her with an opportunity to commit it, even if they encouraged her, is immaterial. It is not entrapment.

The subversion-based view, however, condemns this approach as insufficiently nuanced. How could the mere fact that an agent is more susceptible to certain temptations than others—thereby harboring a putative "predisposition"—make it appropriate for the state to exacerbate that susceptibility? Even if she already faces a higher-than-average probability of committing some crime, it is still wrong to ratchet up that probability.[38] The subversion-based approach, then, insists that many more policing operations be deemed entrapment, and thus regarded as unacceptable, than present U.S. practice suggests.[39]

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[38] The lesser-used "objective test" in U.S. law deems police conduct objectionable only if it would induce a statistically average person to commit the relevant crime. On the subversion-based view, however, it is not clear why facts about statistical regularities in agents' susceptibility to wrongdoing should be any more salient to our determination of whether the state has acted wrongly than facts about particular individuals' susceptibility to wrongdoing. For discussion on these tests, see Andrew Altman and Steven Lee, "Legal Entrapment," *Philosophy & Public Affairs*, 12 (1983), 51-69.

[39] This is not to suggest that it is never appropriate for police to use deceptive tactics. If an agent has already formed the intention to act wrongly and begun to plan a criminal plot, the agent's likelihood of moral failure is approaching certainty. The police do not subvert *that*

Secondly, the subversion-based account gives us no reason to be concerned only with *intentional* instances of entrapment.[40] They are obviously the most familiar; police who entrap do so intentionally to boost conviction rates. But it is important to note that there is nothing in our definition of subversion that necessitates that subversion be intentional in order to be wrongful. It is, in this respect, like manifold other wrongs: it can be perpetrated *negligently* as well as intentionally. Suppose I'm headed to the store, and John asks me to drop him off at his ex-girlfriend's, Betty's, on the way. John is fuming with rage, and I know, or could reasonably have been expected to know, that Betty was sensibly seeking a restraining order against John due to his repeated violent threats against her. Suppose that if I don't give him a ride, he won't be able to get to hers. I give him a ride. Unlike an *agent provocateur*, I do not *intend* to increase the likelihood of a morally heinous act by John in this situation. But my act nevertheless constitutes a failure to support his moral capacities.

Of course, intentional subversion is *more blameworthy* than negligent subversion: the attitudes betrayed by someone who deliberately plans to make someone else fail morally are more pernicious than the attitudes of someone who carelessly subverts. But as a matter of act-evaluation (rather than agent-appraisal), negligent subversion can still be seriously wrongful because of its effects. For a morally unprotected act to qualify as the culpable wrong of

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agent when they contrive a sting operation to catch him in the act. Police officers who perpetrate such sting operations are rightly exempt from accomplice liability, as they typically are. An account of how to operationalize this insight is beyond the scope of this article. For instructive discussion, see Redmayne, "Exploring Entrapment."

[40] Cf. Hock Lai Ho, "State Entrapment," *Legal Studies*, 31 (2007): 71-95, pp. 73ff.

subversion, then, what matters is that it *foreseeably* increases the likelihood of moral failure. This feature of my view is a sobering one. For it reveals that subversion could well be all around us—not in its intentional guise, but in its negligent guise.

III. Structural Entrapment

A

The subversion-based analysis has a double pay-off. In addition to revealing a distinct dimension of entrapment's wrongness that other accounts do not capture, it helps us identify entrapment-like phenomena in places where we never imagined them. I shall focus on one particularly important instance of negligent subversion, which transpires when the government enacts laws that have the foreseeable consequence of setting up citizens to fail morally. While the phenomenon I will describe is not similar to ordinary entrapment in all respects, it is similar in the crucial respect that it is subversive, and accordingly wrongful for the same reason.

Let us use the suggestive phrase *structural entrapment* to refer to conditions in which agents are subjected to morally unprotected features of their social structure that increase the likelihood of their own moral failure.[41] To establish that a law, or a cluster of laws, perpetrates structural entrapment, it is therefore necessary to answer two questions affirmatively. Firstly, do the

[41] The only other usages of the term "structural entrapment" concern, firstly, safety regulations (e.g., babies becoming trapped in cribs) and, secondly, biochemistry. The idea that we might think of ghetto youth as "entrapped" is suggested in Douglas G. Glasgow, *The Black Underclass* (London: Jossey-Bass, 1980). Note that punishment is not part of my definition, though it is of course true that the state punishes many of those whom it structurally entraps.

laws foreseeably increase the likelihood of agents' wrongdoing—for example, by creating or exacerbating temptations to act wrongly, or by inducing the formation of false moral beliefs? This question is at root an empirical question that depends on social scientific inquiry. Secondly, are the laws in question morally unprotected? To say that a law is morally protected is to say that the activity of enacting and enforcing the law is activity that the state has an antecedently established right or duty to engage in.[42] One obvious instance of a morally unprotected law, of course, is a law that we already have decisive reason to regard as unjust. Thus the allegation that a set of laws perpetrates structural entrapment depends upon both empirical and normative argumentation.

How might the state set up its own citizens to fail through the contexts its unjust laws create? Here I shall focus on one particular example, which I will use to illustrate the existence and significance of structural entrapment. Consider a particularly egregious instance of moral failure: homicide. Taking the year 2010 as a reasonably representative year in recent history, 16,238 persons were murdered in the U.S. that year. Of those 16,238, 2,020 of them were gang-related.[43] Gangs can be extraordinarily violent organizations. Not only do they perpetrate an alarming quantity of murders, they regularly engage in violence of less severe but still egregious sorts—assault, rape, and

[42] Remember that even laws that protect negative rights demand positive "doings" of the state to enact, administer, and enforce the attendant regulatory and legal regime. Liam Murphy and Thomas Nagel, *Taxes and Justice: The Myth of Ownership* (Oxford: Oxford University Press, 2004).

[43] http://www.nationalgangcenter.gov/survey-analysis/measuring-the-extent-of-gang-problems

destruction of public and private property.[44] Moreover, the kinds of violence in which gangs engage is not restricted to fellow gang members. Non-members regularly find themselves unluckily caught in the crossfire of inter-gang urban warfare. These phenomena are particularly striking in the contemporary United States, but are by no means excluded to it. In the United Kingdom, rape is an increasingly common tool of gang violence, as gang leaders draw up lists of women—usually sisters or girlfriends of rival gang members—to be targeted as retaliation for transgressions.[45]

Needless to say, these acts constitute egregious instances of culpable wrongdoing. Even if we somehow regarded urban ghettos as similar in certain respects to a Hobbesian state of nature, the suggestion that agents in such contexts lack natural moral duties to refrain from harm against innocents would strike most contemporary liberal political theorists—and citizens—as implausible.[46] The members of America's gangs who murder young children, and of Britain's gangs who rape the sisters of gang members, are surely blameworthy for the deplorable choices that they make.

But they are not, I suggest, the only ones to blame. If unjust policies themselves make it rational for citizens to join and remain in gangs, thereby positioning them to perpetrate wrongs that they would have been otherwise less likely to perform, blame is also rightly allocated to the state for violating its duty to refrain from subversion. I air that claim in deliberately conditionalized form. Establishing the truth of each conditional depends upon elaborate

[44] http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment
[45] http://www.theguardian.com/society/2014/jul/19/gangs-rape-lists-sex-assault
[46] Cf. Sarah Buss, "Justified Wrongdoing," *Noûs*, 31 (1997), 337-369.

empirical argumentation—that the relevant laws do, in fact, increase the likelihood of moral wrongdoing—and normative argumentation—that the relevant laws are unjust and so, *a fortiori*, morally unprotected. I will gesture toward, though not exhaustively defend, those arguments here. My purpose is simply to deepen our understanding of what structural entrapment might involve by exploring one possible manifestation of it in contemporary political life.

How might the state's unjust policies induce participation in violent criminal gangs? Here, briefly, is the kind of story I have in mind:

Unjust economic policies and educational policies together create a structure in which numerous citizens are stranded without access to stable and gainful employment in their home communities.[47] Faced with disempowering social exclusion[48] and a lack of meaningful prospects, many citizens rationally conclude that the prudentially optimal option is to join a gang, which furnishes the social bases of their self-respect, enabling them to embrace an identity of which they are proud.[49] Meanwhile, dire financial straits make it rational for citizens to perpetrate illegal activities to make money, the risky but lucrative sale of narcotics.[50] Gangs are enlisted in this business, becoming the street arms of powerful criminal organizations. That the sale of narcotics is illegal leads to

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[47] William Julius Wilson, *When Work Disappears: The World of the New Urban Poor* (New York: Knopf, 1999).
[48] Elizabeth Anderson, *The Imperative of Integration* (Princeton: Princeton University Press, 2010).
[49] Elijah Anderson, *Code of the Street: Decency, Violence, and the Moral Life of the Inner City* (New York: W.W. Norton & Company, 1999); Scott H. Decker and Barrik Van Winkle, *Life in the Gang* (Cambridge: Cambridge University Press, 1996).
[49] See Robert Garot, *Who You Claim? Performing Gang Identity in School and on the Streets* (New York: NYU Press, 2010), especially pp. 70-3.
[50] Sudhir Alladi Venkatesh, *Off the Books: The Underground Economy of the Urban Poor* (Cambridge, Mass.: Harvard University Press, 2006). For discussion of how

all the pathological features of black markets, in which disputes are rationally resolved through violence.[51] That gang members' self-worth is connected to the success of the gangs themselves means that injuries from rival gangs are construed as intolerable affronts, moving members to re-assert their interests and identity through violence.[52] Under-enforced and unjustly permissive gun laws enable gang members to acquire lethal weapons. Risks to physical safety faced by appearing "unmanly" or deferential on the street makes it rational to flaunt those weapons and risk provoking lethal altercations, rather than develop a comparably fatal reputation as weak.[53] When arrested for their crimes, unproductive and often unfair punishments meted out by the courts do little but harden offenders' gang allegiance and self-understanding as professional criminals.[54]

This is the kind of story that needs to be justified in order to make an indictment of structural entrapment. It need not always be this complex; in some cases, it may simply be one important law that exerts subversive effects. In others—like the case I have described—it may be a matter of *interaction* between different morally unprotected laws. There are, of course, numerous pitfalls involved in advancing the requisite arguments. I shall explain what they are, again with illustrative reference to my example case.

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[51] Jeffrey Miron, "Violence, Guns, and Drugs: A Cross-Country Analysis," *Journal of Law & Economics* 44 (2001): 615.

[52] Jeffrey Fagan and Deanna L. Wilkinson, "Guns, Youth Violence, and Social Identity in Inner Cities," in Crime and Justice, Vol. 24, ed. Michael Tonry and Mark H. Moore (Chicago: University of Chicago Press, 1998), pp. 104–88.

[53] See Garot, *Who You Claim?*

[54] Margaret P. Spencer, "Sentencing Drug Offenders: The Incarceration Addiction," *Villanova Law Review* 40, 2 (1995): 335-81; Marc Miller and Daniel J. Freed, "The Disproportionate Imprisonment of Low-Level Drug Offenders," *Federal Sentencing Reporter* 7, 1 (1994): 3-6; Marc Mauer, "The Causes and Consequences of Prison Growth in the United States," *Punishment & Society* 3, 1 (2001): 9-20.

B

Firstly, it is not sufficient simply to show that the laws in question increase the likelihood of crime *simpliciter*. What matters is that the crimes are *morally wrongful*. This is why our example case concerns clearly wrongful crimes such as homicide, assault, and rape. It may be that certain crimes are, in fact, morally justified. As Tommie Shelby has powerfully argued, citizens who are subjected to unfair terms by a particular social and economic basic structure may not be obliged to comply with those terms.[55] Accordingly, certain crimes—like fraud, tax evasion, or peaceful sale of narcotics—could be permissible.[56] As such, they would not count as instances of wrongdoing, and so acts that increase their likelihood would not qualify as subversive. [57]

Secondly, in determining whether a law is morally unprotected, we need not rely on claims about what perfect justice requires in the ideal society. There is and always will be intense reasonable disagreement about which laws and policies might meet that exacting standard. Diagnosticians of structural entrapment do better to focus on laws that are flagrantly unjust—that no reasonable conception of justice could defend. Arguably, on matters of justice about which people can have reasonable disagreement, the reasonable position that is ratified democratically is politically legitimate—citizens are bound by its

[55] Tommie Shelby, "Justice, Deviance, and the Dark Ghetto," *Philosophy & Public Affairs* 35 (2007): 126-60.
[56] Shelby, of course, agrees that natural duties to refrain from harm obtain in the urban ghetto; see "Justice, Deviance, and the Dark Ghetto," pp. 151ff.
[57] Though they may be problematic for other reasons. Cf. Jonathan Wolff and Avner de Shalit, *Disadvantage* (Oxford: Oxford University Press, 2007), pp. 48ff.

strictures—and so is morally protected.[58] The vast preponderance of law in contemporary liberal democracies no doubt falls within this category: provided the laws are affirmed through standard democratic procedures, and do not run afoul of certain substance-based constraints, complaints that such laws may subvert are out of place.

Consider again our example case, which concerns a range of unjust policies concerning welfare, housing, drugs, guns, and punishment. To show, for example, that prevailing economic policy in the urban U.S. is morally unprotected does not depend on demonstrating the truth of a particular principle of distributive justice, like Rawls's difference principle. It is enough simply to show that prevailing economic policy would be deemed as unjust by all reasonable conceptions of justice—for example, because redistributive transfers are inadequate,[59] or because a minimally plausible conception of equality of opportunity is not fulfilled.

Note, too, that even if a statute's justice is a matter of reasonable disagreement, it could still be regarded as beyond the pale in virtue of the *penalty* attached to its contravention. Take drug policy. It is not necessary to endorse the reasonably controvertible argument that drug bans necessarily

[58] This way of thinking about political legitimacy is traceable to Rawls, *Political Liberalism*. See also Quong, *Liberalism Without Perfection*, p. 133.

[59] That could be true even for libertarians. See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 231, where Nozick contends that historic injustices justify compensatory redistribution from rich to poor. While I have run my argument from an explicitly liberal-egalitarian perspective, nothing I have said in this essay is necessarily incompatible with basic libertarian ideals. Insofar as libertarians ground their deontology in fundamental Kantian claims about respect for persons' moral personality—as Nozick suggests in *Anarchy, State, and Utopia*, p. 32-33—it is at least possible to run an argument from libertarian premises to the conclusion that committed libertarians have strong moral reasons not to encourage or induce their fellow moral agents to violate others' natural rights.

violate the autonomy of citizens and are beyond the pale for that reason.[60] All we need to do to affirm that prevailing penalties are unjust. Even if it is in principle permissible for the state to prohibit the sale and use of certain narcotics, the current penalties enacted against drug criminals are disproportionate by any reasonable standard of proportionality.[61] This is sufficient for such penalties to be regarded as beyond the pale.

Thirdly, in order to diagnose a law as subversive, it is not necessary that the character of subversion be identical across all subverted citizens. In our example case, I doubt that there is one species of subversion transpiring for all persons in such circumstances. For some, the policies simply heighten temptations to commit violent crime—a straightforward instance of motivational subversion. These citizens hope for a better day when they need not kill and assault their fellow citizens to survive, and they believe that what they are doing is wrong, but they cannot seem to break from their current situation: to attain certain fundamental goods of income, belonging, and security, participation in gang violence is prudentially rational. For others, however, the subversion may be more problematic. For some, their circumstances may have led them to hold false beliefs about the role that morality rightly plays in their practical reasoning—thinking that what they do is wrong, but that reasons of self-interest rightly override the demands of justice. That is a serious error in reasoning. But for a third group, things may be even darker. They may well believe that they hold stringent moral obligations

[60] Doug Husak, "Liberal Neutrality, Autonomy, and Drug Prohibitions," *Philosophy & Public Affairs*, 29 (2000): 43-80.
[61] Spencer, "Sentencing Drug Offenders," and Miller and Freed, "The Disproportionate Imprisonment of Low-Level Drug Offenders," *Federal Sentencing Reporter*, 7 (1994): 3-6.

to their fellow gang members to fight and kill, no matter the costs on the surrounding community.[62] Those gangsters may be the most subverted of all—not simply tempted, not simply confused about morality's role, but indeed possessed by disastrously mistaken views about what justice demands.[63]

Social deprivation, we can conclude, is far more morally objectionable than liberal political philosophers have acknowledged. It is not problematic simply in virtue of the fact that it is the upshot of a social structure that does not comport with fundamental principles of distributive justice. It is not problematic simply in virtue of the fact that it imperils innocent citizens' safety by increasing crime. Far more perniciously, it constitutes an assault on the endeavors of citizens to exercise their first moral power.

C

Consider an objection to this argument. Perhaps it is not the state's crushing injustices that are centrally responsible for inducing criminal wrongdoing in our inner cities; it is, rather, its leniency.[64] Even if it is true that certain social policies trigger criminal temptations, the job of the criminal law is precisely to counteract such temptations by stacking the decks of prudential self-interest against wrongdoing. On this view, if the state were to threaten and effectively enforce significantly harsher punishments on its citizens, it would deter crime far more successfully. Rather than complain of structural entrapment, we should instead complain about objectionably light punishments. Perhaps

[62] Cf. Seth Lazar, "Associative Duties and the Ethics of Killing in War," *Journal of Practical Ethics*, 1 (2013): 3-48.
[63] See, especially, Anderson, *Code of the Street,* and Decker and Van Winkle, *Life in the Gang*.
[64] I am thankful to an anonymous reviewer for elaborating this instructive objection.

criminals themselves can even complain that they are not being held to account as rigorously as is proper.

We can wholeheartedly accept that significantly harsher penalties could well override the criminogenic effects of social policies. And if it is true, then one ready option available to state authorities seeking to eliminate structural entrapment is indeed to erect greater penalties to undo the criminogenic effects of subversive laws. Even if the kinds of policies I've described do incentivize criminal wrongdoing, as I have suggested they might, the increased magnitude of agents' prudential reasons to avoid punishment could well neuter those policies' effects. To avoid the indictment of structural entrapment, then, a state merely needs to ratchet up the severity of its criminal laws. Especially if the increases do not render the penalties *disproportionately* harsh—i.e., beyond the severity ceiling of punishment for the crimes in question—this may be both a workable solution and a desirable one.

Whether this would work is, of course, an empirical matter. Perhaps draconian penalties would be as likely to result in resistance as in compliance. Even if it worked, however, responding to structural entrapment by getting tougher on crime could have normative costs that rightly make us worry about its moral desirability. Given that prevailing penalties in the U.S., for example, are widely believed to be disproportionately harsh *already*, this strategy could well exacerbate penal injustice.[65] Getting tough on crime would thus

[65] For the idea that prevailing drug sentences are disproportionate, see Douglas Husak, "Desert, Proportionality, and the Seriousness of Drug Offences," in Andrew Ashworth and Martin Wasik (eds), *Fundamentals of Sentencing Theory* (Oxford: Clarendon Press, 1998), pp. 187-219.

accomplish a morally laudable end—the elimination of structural entrapment—through morally regrettable means—the infliction of disproportionate punishment. The moral life involves compromises, of course, and there could well be circumstances in which this was the all-things-considered right approach. But we should be sceptical of this approach as anything more than a lamentable, short-term solution. I doubt that the ideal response to unjust social policies that have criminogenic effects is to enact fresh unjust policies that undermine those criminogenic effects but leave the initial unjust social policies intact. A better response, if it is politically feasible, is instead to replace the unjust social policies with just ones.[66] And if it's not politically feasible, then we should at the very least recognize that getting tough on crime could well necessitate the *pro tanto* wrong of disproportionate punishment.

IV. Responding to Structural Entrapment

I have argued that one feature of ordinary entrapment that should unambiguously lead us to condemn it—its subversive character—should lead us to condemn certain criminogenic social policies, as well. I have outlined what is involved in diagnosing the phenomenon of structural entrapment, using a salient example to explain the kinds of considerations political theorists should consider in pursues their diagnoses. But what follows once an instance

[66] For discussion of the role of feasibility in normative political theory, see Holly Lawford-Smith, "Understanding Political Feasibility," *The Journal of Political Philosophy*, 21 (2013), 243-259.

of structural entrapment has been identified? What kinds of prescriptions follow this kind of diagnosis?

Firstly, the subversion-based account helps identify the right way to think about the perennially fraught matter of how to allocate blameworthiness in our public arguments. Consider again our example case. Citizens across the West have long been engaged in a standoff about how to think about urban violence, with rightists insisting upon criminals' own responsibility for wrongdoing and leftists insisting that we focus on crime's social genesis. The subversion-based account provides an intellectual resolution to this popular dispute by explaining why both sides are right: those who unleash mayhem on the streets of our inner cities are blameworthy for doing so, and we are blameworthy for negligently making them more likely to do so. Even though they act heinously, those murderers have a complaint against their government—a complaint that goes beyond the litany of illiberal and anti-egalitarian policies to which they have been subjected.

Secondly, consider the matter of how those who have been structurally entrapped should subsequently be treated. One significant result of my account is that whatever holds for ordinarily entrapped offenders should also hold, *mutatis mutandis*, for structurally entrapped offenders. Consider the popular idea that citizens entrapped by the police into committing crime ought not to be punished. As we saw earlier, one potential justification of that idea holds that the state lacks the *moral standing* to punish those it entraps. We can now see how that view would scale up: if the state forfeits its standing to punish those whom it has entrapped through a sting operation, then it forfeits its

standing to punish those whom it has entrapped through its unjust social structures. [67]

This radical result depends, of course, on the claim that the argument from loss of standing does, in fact, succeed in the micro-case. If it cannot succeed there, when the state entraps intentionally, then *a fortiori* it will not succeed in the negligent case of structural entrapment. It is beyond the scope of this essay to settle this vexed matter; nothing in my analysis of subversion necessitates the standing argument's success or failure. Certainly, the intuition that A lacks the standing to blame B for something that A himself encouraged or induced B to do is a powerful one. But powerful, too, is the intuition that certain dangerous offenders, albeit entrapped, should not walk free. That holds for the micro-case—think of those men lured into bombing synagogues from earlier—and perhaps even more strongly for the macro-case—think of rival gangsters who engage in a shootout across a crowded playground of innocent children. Only a comprehensive theory of criminal punishment can settle which of these intuitions should take precedence.[68] Current law often opts for a compromise in the case of ordinary entrapment, treating dangerous and non-dangerous offenders asymmetrically: namely, by letting the latter off the hook,

[67] The idea that the state lacks the standing to punish victims of its own injustice who commit crime is defended by R.A Duff, "Blame, Moral Standing, and the Legitimacy of the Criminal Trial," *Ratio*, 23 (2010): 123-40, on the grounds that justified blame presupposes an attitude of reciprocity, and by Victor Tadros, "Poverty and Criminal Responsibility," *Journal of Value Inquiry*, 43 (2009): 391-413, on the grounds that poverty-perpetuating states are complicit in the crimes of the poor. Duff briefly considers—and then dismisses—the idea that we should think of socially deprived offenders as tantamount to entrapped offenders; pp. 133ff.

[68] Expressivist theorists, for whom punishment is essentially a matter of communicating condemnation to wrongdoers, are likely to hesitate at punishing entrapped offenders, whereas those who ground punishment in the duties of offenders to compensate or apologize to their victims are likely to insist that such duties are not dissolved by entrapment.

but not the former.[69] My point is simply this: whatever we end up believing about the micro-case, we should be broadly prepared to embrace its implications for the structural case, too.[70]

Even if we end up concluding that the state should still punish subverted offenders—something that my analysis does not preclude—it hardly follows that those offenders lack a complaint against their state: it has, after all, violated its duty not to subvert their sense of justice. Indeed, one powerful payoff of the subversion-based view is that *all* subverted agents have a complaint, *qua* subverted agents, whether or not they acquiesce to subversive pressures and ultimately commit crime. As Elijah Anderson describes it, most people in urban ghettos are simply trying to live their lives by mainstream, or "decent," values.[71] But they, too, have been subjected to pressures and pressures, and while they have withstood them, they nevertheless have grounds to complain.[72]

A third implication is this. My project here is one of non-ideal theory—helping citizens and officials decide what they have reason to do in the face of injustice—and it is commonly believed that, in non-ideal theory, it is more

[69] This approach is recommended by the U.S. Model Penal Code, Article 2, Section 2.13, Part 3. Perhaps a compromise between these intuitions is, in fact, the right result. Tadros, for example, is sympathetic to the idea that unjust states do wrong when they punish victims of their own injustice, but they also do wrong when they *refrain* from punishing them (because they thereby fail to prevent future crimes); see his "Poverty and Criminal Responsibility," *Journal of Value Inquiry* 43, (2009): 391-413, pp. 412-413. He is not, however, discussing this with reference to entrapment, but it has instructive implications.

[70] I say "broadly" because there may, of course, be some important differences, traceable to the intentionality/negligence distinction. One reason we might proscribe punishment of entrapped offenders in the ordinary case is to disincentivize conviction-hungry police from engaging in it, since it would be prove pointless. But since legislatures tend not to enact unjust social policies *for the purpose* of inducing crime, it is unlikely that proscribing punishment in that case would be similarly effective.

[71] Anderson, *Code of the Street*.

[72] Even those in such neighborhoods whose probabilities were unaffected can be regarded as victims of "attempted subversion."

important to eliminate more "grievous" injustices first.[73] Now it is commonly supposed that socioeconomic injustice, while serious, is less grievous than violations of basic liberties.[74] This suggests that we ought to focus our energy on preventing and remedying violations of basic liberties, only secondarily turning our attention to comparatively less important matters of socioeconomic injustice. If I am right, however, that prevailing socioeconomic injustices are subversive, this makes them significantly morally worse than we initially believed. We have stronger reasons to abolish the unjust policies that I have discussed than we otherwise might have had. They should, in virtue of their subversive status, command a higher priority on the schedule of injustices that we ought to be committed to eliminating in our efforts as citizens. The most important way for democracies to respond to structural entrapment is, then, to stop perpetrating it.

[73] Rawls, *A Theory of Justice*, p. 214. For instructive discussion on this point, see A. John Simmons, "Ideal and Nonideal Theory," *Philosophy & Public Affairs*, 38 (2010): 5-36, pp. 18ff.
[74] Rawls, *A Theory of Justice*, pp. 214ff.