

Entrapment Through the Lens of the *Actio Libera in Causa*

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I. Introduction

An undercover agent approaches a judge, pretending to be a litigant in a case the judge is going to be hearing soon. He offers the judge a bribe for deciding the case in his favor, and the judge takes it. It is actually the first time the judge has done such a thing, and he only did it because at that very moment he found himself in dire financial straits: Some unfortunate financial reversals have brought him to the verge of bankruptcy, and if he does declare bankruptcy he is sure to lose his judgeship as well—not to mention his reputation, the wife who is on the verge of deserting him anyway, and the ability to adequately provide for his severely handicapped adult son. All those personal calamities the hefty sum he is promised for throwing this high-stakes case is going to avert. When charged with bribery, he pleads the entrapment defense. Will he get it? He very well might. *Should* he get this kind of defense? Thereby hangs the problem of entrapment.

On the one hand, our gut tells us that he probably should. What an outrageous temptation for the government to confront him with in this moment of maximal vulnerability. On the other hand, if this had not been an undercover agent, but an actual litigant, he would be guilty, and bereft of any defense. Has anything changed, morally speaking, because he took the bribe from an undercover agent rather than an actual litigant? To be sure, depending on exactly how bribery is defined, it might turn what he did into an inchoate rather than a completed offense, since he did not actually end up throwing the case in return for the bribe, but other than that, it is hard to

see why the government's involvement in the case should redound in his favor, at least from the point of view giving him his just deserts.

Explaining why we should go with our gut here, rather than with what seems like the counsel of reason, has been the challenge countless legal scholars have tried to meet by offering their various rationales for the entrapment defense. Among the more recent ones are these:

(1) that the entrapment defense is meant to deter the government's strategically targeting particular people for political reasons. (Richard McAdams)

(2) that the entrapment defense is meant to give some limited (possibly unprincipled) room for a temptation defense in criminal law (Paul Hughes).

(3) that the entrapment defense is meant to deal with the distributive injustice of singling out a particular defendant, out of many others we could have picked, to serve as the government's vehicle of deterrence (Anthony Dillof).

(4) that the entrapment defense is a form of thought punishment (Jonathan Carlson, myself).

(5) that the entrapment defense is an instance of a legitimately mitigating circumstance being turned into an unwarrantedly complete defense (Michael Goerr).

And that's just a sample.

Each of these accounts of the entrapment defense does in fact tell us something true and enlightening about the defense. What I don't think any of them does is to give us the true *raison d'être* for it. That, I shall argue, is to be found by looking at entrapment through the lens of the

unjustly neglected legal phenomenon known as the *actio libera in causa*—unjustly neglected at least by Anglo-American jurisprudence, though not so elsewhere, most notably German criminal law scholarship, which has for several decades now paid it the attention it deserves, largely through the efforts of a single scholar, Joachim Hruschka, who breathed new life into this topic starting in the late 1960's.

II. The Two Dominant Approaches to the Actio Libera As Rationales for the Entrapment Defense

What exactly is the problem of the *actio libera in causa*? The term itself refers to actions “free in their origin”. It is actually short for a longer phrase *actio libera in causa sed non libera in actu*--actions free in their origin not but in their execution. The core cases are those in which someone contrives to commit a crime while being able to avail himself of one or another defense. He has himself hypnotized so that he is not, strictly speaking, committing an act when he kills someone. Or he contrives to create a situation of necessity in which he gets to liquidate a longstanding eye sore on the grounds that he needs to do so as a firebreak. Or he leaps into a situation of duress in which someone is likely to threaten him with unspeakable harm unless he commits something even worse. Or he provokes his intended victim into a bar fight so that he can then kill him in self-defense. Or he starts to drive his car, hoping to kill a nearby enemy during an epileptic seizure he senses is coming. A variation on these kinds of cases, in which the defendant not merely intends or expects, to be able to avail himself of a defense in the situation into which he is trying to maneuver himself, but in which he merely risks such a thing happening, is known as the *actio illicita in causa*.

Let's now consider what I am inclined to describe as the reigning, or at least the most widely accepted, view of these kinds of cases among Anglo-American criminal law scholars. It is the view most forcefully articulated by Michael Moore and Paul Robinson. A helpful case for these purposes is that of the defendant who drives down a narrow alleyway where a competitor has a store, to which he hopes to do some serious damage. He expects that there will be a throng of people gathered in front of the store, as there usually is, and that the only way he will have available to avoid crashing into them is to turn his car into the store window, thus damaging it right before a vitally important promotional event. The defendant then plans to invoke the defense of necessity for what he has done. Can he do that? Can he contrive to damage his competitor's store with impunity by contriving to do so under cover of necessity?

As the reigning view has it, we should analyze these cases as follows. There are two pivotal points in time to consider here. The moment at which the defendant chooses to crash into the store window instead of the cluster of people and the earlier moment at which the defendant embarked on this scheme, basically the moment at which he started to drive. About the moment at which he makes his final decision to swerve into the shop window the reigning view would say that it was a blameless decision because it was indeed justified by necessity. The fact that the defendant contrived for necessity to happen has, as this view has it, no relevance here. But consider next the earlier moment at which he began to drive, planning for things to unfold in the way in which they in fact did. At that moment, the reigning view says, he intentionally inaugurated a chain of events eventuating in the destruction of his competitor's property. And when he inaugurated that chain of events he did so without being under any sort of necessity. He can therefore be blamed for taking, at that moment, the action of causing damage to his

competitors and for doing so without having any kind of defensible reason for doing so. Hence he is guilty of the crime of intentionally destroying another's person's property.

This is a very beguiling way of thinking about the *actio libera* phenomenon. To see just how beguiling, it helps to think about another case. Imagine the defendant arranges to have himself thrown out of a window, with the intended result of landing on his victim's head and killing him. He defends on the ground that when he killed his victim he was not engaged in a voluntary act. It was gravity that propelled him onto his victim's head. Here now the reigning view seems to have exactly the right answer: "When you landed on your victim, you were indeed not engaged in any voluntary act, and therefore we do not blame you for what you then 'did.' But when you contrived to have yourself thrown out of the window, you were also engaged in a fully voluntary act. And for that act, which did in fact cause your victim's death, we have no problem blaming you."

Now let us transpose the argument being made here into the setting of an entrapment case. Let us focus on the government's decision to imprison someone. Ordinarily, we say that the government is justified in doing so only if it has good reasons—i.e. the prisoner committed a crime, which has been proved in court. What the reigning approach to the *actio libera* suggests is that this is not the end of the matter. We should also focus on an earlier point in time, at which the government inaugurated the process that led to the defendant's imprisonment. Let us do precisely that in a case in which the government sent an undercover agent to approach a potentially corrupt judge. If we merely look at the moment at which the government decides to jail the judge, because he has been proven to have taken a bribe, we would of course conclude that the government is not doing anything wrong. But if we follow the suggestion of the reigning

approach to the *actio libera* and look at the earlier moment in time when the government chose to send the undercover agent to this judge, we are then able to say that at that moment it decided to inaugurate a process that led to the defendant's imprisonment, but did so without any good reason. He had not, after all, done anything wrong yet. To be sure, it wanted to achieve deterrence, but it is not supposed to single out innocent people for this purpose. It therefore seems that following the logic of the reigning approach the government is acting wrongfully, which is precisely what the entrapment defense would say—and which wrongfulness it seeks to rectify by ordering the defendant released.

In other words, we could think of the decision to put someone in prison as analogous to the decision to turn the car away from the cluster of potential victims and onto the shop window. We know that the person who does so can still be guilty of intentionally destroying property on account of the decision he took much earlier, which put him into the position of having to turn his car away from the crowd and onto the shop window, because that decision was taken without there being anything warranting a necessity defense. Similarly, we might say that the government can still be doing something wrong at the earlier moment in time when it chooses to inaugurate the causal process that leads to someone's imprisonment, since at that time it does not have available as a defense the reason which later on justifies the decision to imprison the defendant.

I suspect many people will balk at this analogy. And they should. When one puts it the way I just did, it invites us to conclude, I think, that there is something wrong with the reigning approach to the *actio libera*, if it can generate such a strange view regarding what the government is doing when it triggers the causal process resulting in someone's imprisonment. But while I do in fact think that the reigning approach has significant weaknesses, its power to

support and illuminate the entrapment defense must not be undersold. Let me therefore try to restate it in a slightly different way.

Let us consider a different type of *actio libera* case than the one we have considered so far. I am thinking of the situation in which X enters a bar, tells Y that he has been having an affair with his wife, and all manner of similarly upsetting things, and when Y finally can't contain himself any longer and tries to pummel X, X casually whips out his gun and shoots him—in other words, the case in which the defendant provokes his victim into an attack, which he then defends again by killing him. Provocation of this sort is of course a kind of entrapment, and the law of self-defense usually strips the provoker of his right to invoke self-defense. The reigning approach seems to make sense of what the law does in a reasonably persuasive way: The defendant was in fact acting in self-defense at the moment at which he killed the person trying to kill him. But he was not acting in self-defense when he started the whole process that eventuated in his victim's death, that is, when he started to goad him, because at that point of course he was not yet under attack, and therefore cannot claim self-defense for engaging in the voluntary act of goading which caused the victim's death. Which is why, according to the reigning approach, he is guilty of homicide.

If we think of governmental entrapment as being analogous to this specific instance of the *actio libera in causa*, then the reigning approach continues to seem plausible even if transplanted into the entrapment context. Just as that approach would lead us to conclude that the person who entraps his victim into attacking him is not entitled to claim self-defense for then killing him, the government is not entitled to claim that it is acting rightly when it imprisons someone whom it

provoked, through its undercover agent, into committing the crime for which it then imprisons him.

There is a second approach to the *actio libera* that can also lend support to the entrapment defense. Many seem inclined to think of it as just another way of stating the reigning approach, but to me it seems quite distinct. According to this alternative approach, we should think of the person who contrives to create a certain defense for himself, as essentially two actors, an “early self” and a “later self,” who act in complicity with each other. And if we do so, the argument runs, we can then see why the defendant who contrives a defense should not get the benefit of it. To make this more concrete, let us imagine someone who persuades a friend to drive down that narrow alleyway, where he happens to know his competitor’s shop is located. He does not tell the friend anything about the shop window or the likely cluster of people in front of it. The driver, then, as predicted, swerves to avoid hitting the people and damages the store. We would have no trouble saying that the person who instigated this is guilty under what complicity theory calls “perpetration by means”, when he utilized an innocent intermediary to inflict damage on the competitor’s store, notwithstanding the fact that the innocent intermediary is innocent.

Carried over to the entrapment setting, this means we think about the government as first acting the part of the instigator of the crime and later on that of the punisher. When acting out the first part, the “early self,” the government is using its “later self,” the punisher, as an innocent intermediary by which to inflict punishment on the victim. Thus although the government cannot be blamed for what it does in its capacity as punisher, because it has a valid defense for inflicting punishment (the defendant did commit a crime), it can be blamed for what it does in its capacity as instigator, because it has no valid defense for causing the as yet innocent defendant to

be imprisoned. Even if it pursued the laudable aim of trying to increase deterrence by launching a sting operation, it was doing so by imprisoning innocent people—people who had not committed a crime when the government inaugurated the chain of events that ended up putting them in jail. But the way to rectify the government’s unjustifiably putting an innocent man in jail is presumably to prohibit it from doing so, which is what the entrapment defense does.

Let’s take stock where we are now. By thinking about entrapment as a species of the *actio libera in causa* phenomenon, we were able apply to it the standard argument for disallowing cases of contrived defense, which in this case became arguments for disallowing the government any defense to its action—that of imprisoning the defendant in a crime into which it entrapped. We have thus arrived at a very different rationale for the entrapment defense than the ones usually offered.

III. Objections to the Two Dominant Actio Libera Approaches Turned Into Critiques of the Entrapment Defense

But we have gained quite a bit more than just another rationale for the entrapment defense. Let us see why.

The reigning approach to the *actio libera in causa* is far from uncontroversial, at least once one looks beyond Anglo-American scholarship. It has many problems which a number of German scholars have pointed out with great care, and upon which others—Claire Finkelstein and myself in a joint piece of a while ago--have elaborated and expanded. Let me spell out that critique. Once we have done so, we can then see what happens to that critique when we transpose it into the setting of entrapment. It will constitute an important, but hardly conclusive,

counterargument to the rationalization of entrapment we have offered so far, and will allow us to see more clearly why the arguments pro and con the entrapment defense seem intuitively so in the balance.

Let us return to the reigning view of the *actio libera*—the suggestion that contrived defenses don't work once we focus on the right moment in time in the defendant's course of action. One difficulty with this view arises out of the actus reus requirement for many kinds of crimes. Consider the actus reus of rape, intercourse. Suppose the defendant contrives to arrange that he will have intercourse with his victim without realizing that she is not consenting. He plans to do so by getting sufficiently drunk that he is unaware of whether she is consenting or not. Under the reigning approach we would have to say that he is still guilty of rape because although at the moment at which he had intercourse he was unaware of whether his partner was consenting, at the moment at which he inaugurated the chain of events resulting in nonconsensual intercourse he was at least reckless about whether (indeed probably had the intention that) nonconsensual intercourse would occur. The difficulty is that the act of causing oneself to have intercourse is not the same as the act of having intercourse. Morally and legally they are likely to be viewed quite differently. And so it is not clear that the reigning approach gets to the desired result.

If we transpose this into the setting of entrapment, this problem has only mild traction. If we seek to blame the government for unjustifiably imprisoning the defendant because, at the moment at which, it sent an undercover agent after him, it did not have a justification for imprisoning him, we need, according to the reigning approach, to be able to say that causing someone to be imprisoned is the same as imprisoning him. Arguably the two are not so different

from each other, at least not as different as having intercourse is from causing oneself to have intercourse. And so it looks as though this particular objection to the reigning approach to the *actio libera* poses less of a problem in the context of entrapment.

But if we take a closer look, matters start to look more problematic. For the government to be guilty of wrongfully causing its victim's imprisonment, it must cause that result *proximately*. Now consider in detail the the *actio libera* case that is the model for the entrapment argument—the case in which the defendant provokes his intended victim into attacking him, so that he can then kill him in self-defense. The reigning approach would seek to impose liability on the defendant on the ground that he caused the victim's death, and that the moment at which this causal process started, namely the time at which the provocation began, he was not himself under attack and cannot therefore claim self-defense as a defense. There is however a problem about saying that the defendant's provocative conduct proximately caused the victim's death, because one has reason to worry that the victim's reaction to the provocation was an intervening cause. That is, someone might say that the victim's reaction was a voluntary act of the sort that is deemed to break the chain of proximate causation. To be sure, ordinarily the chain of proximate causation is deemed to be broken chiefly when someone deliberately takes an action that is intended to bring about the ultimate victim's death. That was obviously not the case here, since the intervening actions of the victim were not intended to bring about the victim's death. (He did not commit suicide.) On the other hand, the requirement often interpreted far more loosely, and under one of those loser interpretations he could well try to insist that he did break the chain of proximate causation.

The analogous problem in the entrapment context then arises if we ask whether the government can be said to have proximately caused the defendant's imprisonment. Only in that case can it be blamed for doing so. Now, to be sure, it did send an undercover agent his way. But the victim then had to commit a crime in response to the undercover agent's tempting behavior. And *that behavior* arguably breaks the chain of causation. To be sure, the defendant's actions in committing the crime were not intended to bring about his imprisonment, and for that reason this is not an unequivocal instance of an intervening cause, but it is close enough to be worrisome.

A further objection to the reigning approach to the *actio libera* has to do with *mens rea*. The defendant who contrives to create a defense under cover of which he aims to commit a crime does not simply intend to commit a crime; he intends to commit a crime under cover of a defense. And that arguably changes his *mens rea* from blameworthy to not. The defendant who provokes his victim into attacking him is not simply aiming to kill his victim. He is aiming to kill his victim in self-defense. But since having the intention of killing someone in self-defense is arguably a perfectly innocent intention, unlike the intention to kill him pure and simple, it is not clear that this defendant has the kind of guilty mind we require for conviction.

Joachim Hruschka gives an example that drives home this point with special force. Suppose a man goes into a store and buys something, which he then destroys. Let's suppose that was his aim all along--to buy something and destroy it (maybe a car from a car dealer, which he then destroys in the course of a demolition derby). Under the reigning approach, it seems we are brought to the conclusion that he is guilty of the wrongful destruction of property because at the time that he caused the chain of events that eventuated in the object's destruction he did not yet have a defense available. But that makes no sense. He only planned to destroy an object that he

had first acquired, which is perfectly innocent. In other words, if we redescribe what he is doing so as to include the circumstance that renders it innocent, there is nothing wrong with what he causes himself to be doing. If we are persuaded by this, we should then say more generally about the reigning approach that if we only redescribe most of what the reigning approach condemns we will find that we have no problem with the conduct.

There is of course a close analogue to this in the entrapment setting. The government does not simply intend to imprison someone. It intends to imprison him, if he first commits a crime. And the undercover agent is sent out to find out whether that condition can be met. Put this way, the government's aim starts to look irreproachable.

Yet a further problem with the reigning approach to the *actio libera* has to do with attempts. Suppose the defendant gets himself so intoxicated that he is able to kill without realizing what he is doing. Under the reigning approach, it is hard to avoid the conclusion that by the time he achieved the desired state of intoxication, and probably well before then, he had engaged in at least the attempt to kill, because what his body is doing after he has gotten drunk is the equivalent to a bullet in flight. That's why, according to the reigning approach, he cannot be held liable for anything he does during that time. But that means that he is guilty of an attempt at a counterintuitively early stage of wrongdoing. All he has done is to get drunk, and nothing more!

Analogously, one might ask this about entrapment: Are we prepared to find that the government has incurred significant blameworthiness when it has merely sent an undercover

agent to the target and nothing more? Should it at that point really be regarded as guilty of attempting to wrongfully imprison someone?

But the most fundamental objection to the reigning view is surely this: All rules have the character that they spell out certain conditions under which a certain kind of conduct is either mandated or prohibited. It is this feature of rules that makes it possible to circumvent a rule by forestalling the conditions that trigger the mandate or prohibition. It seems unlikely to be true, though this is precisely what the reigning view would seem to imply, that in nearly all situations in which one has a hand in bringing about the triggering conditions for a mandate or a prohibition one should be treated as a rule-breaker. Taken to its logical conclusion, the reigning view would seem to imply that the person who cashes a check in a bank, should be guilty of bank robbery because he removed money under what he contrived to be exculpatory conditions.

A variant of this more fundamental objection too can be made against the entrapment defense. The government's actions, and its failure to take certain actions, are always in some way instrumental in someone's committing or not committing a crime. If the government had acted differently than it did, he would not have committed the crime he did. If the government had not put money into the safe the defendant broke into, he would not have been able to steal it. According to the reigning approach, in all these cases the government is guilty of falsely imprisoning the defendant because at the moment at which it created the condition that then triggered his behavior--at least if they were aware of the possibility that he might break into the safe—it did not have a justification for creating those conditions.

Somewhat analogous objections can be registered to the alternative approach to the reigning one I sketched out, the so-called perpetration-by-means approach. Recall that according to the perpetration-by-means approach we say about someone who contrives to create the conditions of his own defense that when he acts as the contriver he is the instigating accomplice of his later self, which acts, as it were, the part of the principal actually carrying out the crime. In other words, we split the actor's actions into two parts, performed by his Early Self in collaboration with his Later Self, and point to the fact that although the Later Self has a defense, the Earlier Self does not, which is why we can hold the Earlier Self liable for using the Later Self as an innocent means for committing a crime.

A major difficulty with this approach arises when one thinks about it in the context of contrived self defense. Can we really say that the Earlier Self that provoked the victim into attacking the defendant was an accomplice of the Later Self that then actually killed the victim. Suppose we think about the Earlier Self and the Later Self as quite literally two different people. If Person A tells person B to go to a location where A expects B to encounter C and get into a scuffle with him, as a result of which C dies, it is far from clear that we would want to hold Person A liable. If we are dependent on this analogy to justify liability in provocation self-defense cases, it certainly doesn't give us the desired answer.

Something similar happens when we think of the entrapping government as really consisting of different actors. Suppose we think about the person who dispatches an undercover agent to tempt a judge to act corruptly as being the instigator, and the person who actually prosecutes and punishes the defendant—the punisher--as being the innocent intermediary, and suppose further we think about the situation in the light of the previous self-defense example. If

the instigator and the punisher are conceived as being very distinct from each other, even if both are government employees, the interaction between the defendant judge (the target of the undercover operation) and those members of law enforcement who will deal with him upon his arrest starts to have the feel of the interaction between B and C in our previous example. That will be especially true if the punishers don't know anything about the instigators' actions at the time that they arrest the corrupt judge. The fact that the judge was "set up" does not in that case seem to disinhibit us all that strongly from punishing him. Our feelings change however once we think of the punishers as being in some sense "the same" as the instigator, just as our feelings changed in the previous self-defense scenario. The analogy to an innocent intermediary thus once again does not give us what we want from it, namely a good basis for granting the defendant an entrapment defense.

IV. Conclusion and Implications

If one considers the entrapment defense as being a particular instance of the *actio libera in causa*, it helps explain our inconclusive to-ing and fro-ing as to its legitimacy, because such to-ing and fro-ing is what characterizes the *actio libera in causa*, for the reasons sketched out.

But it also helps explain the vexing issue of why entrapment is a defense to governmental but not private action. The answer to that issue is that we are dealing with a misperception. Actually private entrapment, as illustrated by provocation self-defense, and governmental entrapment are treated analogously provided one knows what to look for. Situations in which the motivations of a private entraper are exactly like those of the government are treated in exactly the same way. But that way does not mean that the provoked individual necessarily gets a

defense. Rather it means that the entrapper is deprived of a defense he might have to his actions. In the case of self-defense, he loses the self-defense defense, and in the case of the government, it loses the defense it is usually able to make for putting someone in jail, namely that he deserved it.