duct.[1048] Where conduct is not in and of itself blameworthy, however, a criminal statute may not impose a legal duty without notice.[1049]

The question of notice has also arisen in the context of "judge-made" law. Although the Ex Post Facto Clause forbids retroactive application of state and federal criminal laws, no such explicit restriction applies to the courts. Thus, when a state court abrogated the common law rule that a victim must die within a "year and a day" in order for homicide charges to be brought in *Rogers v. Tennessee*,[1050] the question arose whether such rule could be applied to acts occurring before the court's decision. The dissent argued vigorously that unlike the traditional common law practice of adapting legal principles to fit new fact situations, the court's decision was an outright reversal of existing law. Under this reasoning, the new "law" could not be applied retrospectively. The majority held, however, that only those holdings which were "unexpected and indefensible by reference to the law which had been express prior to the conduct in issue"[1051] could not be applied retroactively. The relatively archaic nature of "year and a day rule," its abandonment by most jurisdictions, and its inapplicability to modern times were all cited as reasons that the defendant had fair warning of the possible abrogation of the common law rule.

Entrapment.—Certain criminal offenses, because they are consensual actions taken between and among willing parties, present police with difficult investigative problems.[1052] Thus, in order to deter such criminal behavior, police agents may "encourage" persons to engage in criminal behavior, such as selling narcotics or contra-

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[1048] *E.g.*, Boyce Motor Lines v. United States, 342 U.S. 337 (1952); Colautti v. Franklin, 439 U.S. 379, 395 (1979). *Cf.* Screws v. United States, 325 U.S. 91, 101–03 (1945) (plurality opinion). The Court have even done so when the statute did not explicitly include such a *mens rea* requirement. *E.g.*, Morissette v. United States, 342 U.S. 246 (1952).

[1049] *See*, *e.g.*, Lambert v. California, 355 U.S. 225 (1957) (invalidating a municipal code that made it a crime for anyone who had ever been convicted of a felony to remain in the city for more than five days without registering.). In *Lambert*, the Court emphasized that the act of being in the city was not itself blameworthy, holding that the failure to register was quite "unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." "Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community." Id. at 228, 229–30.

[1050] 532 U.S. 451 (2001).

[1051] Bouie v. City of Columbia, 378 U.S. 347, 354 (1964).

[1052] Some of that difficulty may be alleviated through electronic and other surveillance, which is covered by the search and seizure provisions of the Fourth Amendment, or informers may be used, which also has constitutional implications.