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UNRAVELING UNLAWFUL ENTRAPMENT

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I. INTRODUCTION

Entrapment is as old as a pleasant garden, a forbidden fruit, and a subtle snake. “The serpent beguiled me, and I did eat,” pleaded Eve in response to an accusing Lord God.¹ Early English cases report instances of citizens being lured into crime so they might be apprehended.² Nineteenth century American cases similarly record examples of persons tempted to illegality for the purpose of subjecting them to criminal sanctions.³ Entrapment as a social phenomenon has long been with us.

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¹ *Genesis* 3:13 (King James). The theme of entrapment is explicit in Milton’s chronicling of the fall of man. Milton describes the plans of the envious fallen angels to bring Man into God’s disfavor by tempting him to transgress. See JOHN MILTON, *PARADISE LOST*, bk. 2, ll. 361-69 (1667).

² See *Rex v. Bickley*, 2 Crim. App. R. 53, 73 J.P. 239 (C.C.A. 1909) (undercover police officer convinces chemist to sell aborticide); *Regina v. Titley*, 14 Cox Crim. Cas. 502 (Cent. Crim. Ct. 1880) (same); *Rex v. Holden*, 127 Eng. Rep. 1107 (Cr. Cas. Res. 1810) (bank agents solicit defendants to purchase forged notes).

³ See *People v. Mills*, 70 N.E. 786 (N.Y. 1904) (undercover police officer provides indictments for defendant to steal); *Bd. of Commr’s v. Backus*, 29 How. Pr. 33 (N.Y. Sup. Ct. 1864) (defendant sells liquor without a license to police agents and then is sued for penalty); *President of the Town of St. Charles v. O’Mailey*, 18 Ill 407 (1857) (same).

In contrast, entrapment as a legal defense is of relatively recent mint. Under the defense, a person may not be convicted of a crime if he has been encouraged to commit it by a government agent under the appropriate circumstances. The doctrine's genesis is generally traced to a series of United States Supreme Court opinions starting in the 1930s.⁴ These opinions broke with the traditional view that it was legally irrelevant how the criminal was led to temptation.⁵ Following the Supreme Court's lead, virtually every jurisdiction in the United States has adopted a version of the defense.⁶ Based on its brief history and wide reception, entrapment has strong claim to being the newest inductee into the criminal law's pantheon of defenses.⁷

The fact that entrapment was for so long unrecognized as grounds for exoneration suggests that its rationale is not obvious. Indeed, a moment's

⁴ See *United States v. Russell*, 411 U.S. 423 (1973); *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932). Cf. *Casey v. United States*, 276 U.S. 413, 421-25 (1928) (Brandeis, J. dissenting) (willing to recognize defense). These cases, of course, were not without harbingers. In the 1920s, lower courts had occasionally grasped and applied the underlying principles of entrapment as a defense. See Rebecca Roiphe, *The Serpent Beguiled Me: A History of the Entrapment Defense*, 33 SETON HALL L. REV. 257, 278-85 (2003); see also Michael A. DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F. L. REV. 243, 248 (1967) (identifying *Saunders v. People*, 38 Mich. 218 (1878), as earlier United States entrapment case). Nevertheless, the United States Supreme Court, in the decisions cited above, stamped it with an unassailable seal of approval and put the defense on the national map.

⁵ See Roiphe, *supra* note 4, at 271 ("No state or federal court recognized entrapment as a valid defense prior to 1870."); WAYNE LAFAYE, *CRIMINAL LAW*, 450 (3d. ed. 2000) ("[A]s a historical matter, the traditional response of the law was that there were no limits upon the degree of temptation to which law enforcement officers and their agents could subject those under investigation."). To this day, the defense of entrapment is generally not recognized in England. See PAUL MARCUS, *THE ENTRAPMENT DEFENSE* 2 (2d ed. 1995).

⁶ See MODEL PENAL CODE AND COMMENTARIES § 2.13 cmt. at 407 (Official Draft and Revised Comments 1985) ("[T]he defense of entrapment has been almost universally recognized in the United States."). Twenty-five states have adopted entrapment statutes. See MARCUS, *supra* note 5, ch. 12 (listing statutes). The remaining states and the federal system have judicially-created entrapment defenses.

⁷ Though widely discussed, the battered woman syndrome defense is not well-established. While expert testimony concerning the psychological aspects of abusive relationships is usually admissible, see *Bechtel v. State*, 840 P.2d 1 (Okla. Crim. App. 1992) (collecting cases from other jurisdictions), it is not clear that battered woman syndrome is properly described as a "new" defense. Some suggest it is best conceived of as a subcategory of self-defense, see Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 207 (2002), and others suggest it is best conceived of as a subcategory of duress. See Laurie Kratky Dore, *Downward Adjustment and the Slippery Slope: The Use of Duress in the Defense of Battered Offenders*, 56 OHIO ST. L.J. 665 (1995).

consideration reveals the defense to be positively perplexing. Consider these scenarios:

Jacob is a 56-year-old farmer. He orders by mail a magazine of photographs of nude boys at a time when such materials could be legally ordered. Subsequently, over a two-and-a-half year period, he receives unsolicited mailing from five organizations such as "The American Hedonist Society," which purport to oppose censorship of pornography and support sexual freedom. Although Jacob does not place an order for child pornography with one such organization that contacts him through the mail, through a second he orders a magazine entitled "Boys Who Love Boys." Jacob is subsequently arrested for possessing sexually explicit depictions of children.

Ken is desperately in need of money. He approaches Rocky for a loan. Rocky refuses, but convinces Ken, who has no history of drug use, to join a drug transaction. Ken and Rocky drive to a highway intersection where they meet Willy. Willy gives Ken \$300. Willy and Ken agree to meet later that day to complete the transaction. Ken reluctantly accepts a bag containing three grams of cocaine from Rocky. Rocky, Ken and Willy later meet in a parking lot. When Ken gives Willy the bag, he is arrested and charged with dealing in cocaine.

Rich runs an ongoing yard sale. One day at the yard sale, he is approached by Dale. Dale offers him \$200 worth of food stamps for an electric typewriter. When Rich declines, Dale asks him if he would be interested in purchasing the food stamps. Rich, who enjoys bartering, offers Dale \$30, and they shortly agree on \$35. Next month, Rich is again approached by Dale, and Rich agrees to buy \$870 worth of food stamps for \$140. Rich is charged with unauthorized use of food stamps.

On these facts, Jacob, Ken and Rich will almost certainly be guilty as charged and face significant periods of incarceration. Indeed, their cases might be considered all too common examples of how persons come to step over the line into illegality and become first-time offenders. Now, however, add the facts that (1) the organizations that contacted Jacob were fictitious ones created by a unit within the Postal Service; (2) Rocky is an informant and Willy is an undercover police officer, and (3) Dale is an undercover police officer. With these additional facts, Jacob, Ken, and Rich will very likely be able to establish the entrapment defense and avoid all liability.⁸

Why should Jacob, Ken and Rich now escape criminal sanctions? As a doctrinal matter, the government's role in the crimes is the critical element triggering the operation of the defense. In order for a defendant to

⁸ The three entrapment scenarios presented above are based on *Jacobson v. United States*, 503 U.S. 540 (1992), *Kats v. Indiana*, 559 N.E.2d 348 (Ind. Ct. App. 1990), and *People v. Boalbey*, 493 N.E.2d 369 (Ill. App. Ct. 1986), respectively. In all three cases, entrapment was found to be established as a matter of law. Entrapment as a matter of law is a very demanding standard, appropriate only where the existence of entrapment is indisputable. The scenarios above, consequently, represent clear cases of entrapment.

establish the entrapment defense, a government agent must be the tempter or inducer.⁹ This fact, however, appears to have no bearing on the personal blameworthiness of Jacob, Ken and Rich. After all, as far as they knew, they were dealing with private citizens. Subjectively they appear to share the same culpable states of mind as their hypothetical counterparts who correctly believed they were dealing with private citizens and who would be convicted. In both the actual and hypothetical cases, the temptations should have been resisted. Likewise, it appears that Jacob, Ken and Rich are no less dangerous to society by virtue of the government's role in their crimes. Their dispositions to crime are equally well confirmed regardless of whether those they are interacting with are employed by the government or are private citizens. Punishment is generally considered appropriate for those who have manifested their dangerousness through blameworthy conduct prohibited by the criminal law. Punishment therefore seems appropriate for Jacob, Ken and Rich. To be sure, some police activities that target the blameworthy and dangerous persons are objectionable on public policy grounds. For example, unconstitutional searches and seizures,¹⁰ even if in principle unobjectionable when used against criminals,¹¹ are never permitted because they carry an unacceptable risk of being used against innocent citizens who can rightly object to them. However, it is unclear what risks are posed to innocent citizens by the type of actions employed against Jacob, Ken and Rich as innocent citizens do not act in morally culpable ways. Why then permit the plea of entrapment?

Entrapment has been described as a defense "buffeted by conflicting interpretations."¹² This Article attempts to advance a new and superior interpretation by focusing on the relevancy of the entrapper's governmental status. In this manner, the puzzle of entrapment can be neatly unraveled. First, the article presents the basic contours of the doctrine. Second, it reviews a variety of theories of entrapment and exposes their shortcomings as explanations for why the entrapped should be exonerated. Third, the Article introduces and defends a new theory of entrapment—entrapment as unfairness. According to this theory, entrapment is neither an excuse, a

⁹ See MARCUS, *supra* note 5, §§ 4.02, 5.10. A more detailed statement of the requirements of the entrapment defense is presented in Part II, *infra*.

¹⁰ See U.S. CONST. amend. IV.

¹¹ Persons, it might be argued, as a matter of morality forfeit rights to privacy and liberty upon engaging in culpable illegal conduct. This fact appears dimly recognized in the constitutional doctrine that a person has no legitimate privacy interest in the nondisclosure of illegal activity. See *United States v. Jacobsen*, 466 U.S. 109, 122-24 (1984) (holding use of field test to identify substance as cocaine not a search).

¹² GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 542 (1978).

justification, nor a public policy defense, as those categories have traditionally been understood. Rather, entrapment is fatally unfair to its target in the following sense: *For society to impose criminal sanctions on an entrapped person would be to place on her a disproportionate share of the cost of general crime prevention and control, violating the well-established norm of distributive justice that, to the extent possible, the cost of an activity should be shared among all its beneficiaries.* After elaborating this thesis, the Article considers and responds to a number of potential objections to entrapment as unfairness. Finally, the Article applies the theory to a number of current controversies concerning entrapment.

II. THE LAW OF ENTRAPMENT

Any exposition of the law of entrapment must begin with the fact that the doctrine has two versions. The first version is the subjective version; the second is the objective version. As discussed below, although they are distinct in structure and content, they overlap significantly in application.

A. BASICS OF THE SUBJECTIVE VERSION

The subjective version of the entrapment defense is followed in the federal courts and in a substantial majority of the states.¹³ Commonly it is judicially created and lacks a statutory formulation.¹⁴

The subjective version of the defense has a two-part structure. In most courts employing the subjective version, a defendant wishing to assert entrapment must first establish by a preponderance of the evidence that a government agent "induced" him to commit the crime he is charged with.¹⁵ If he is unsuccessful, the defense fails. If the defendant is successful in carrying this burden of proof, the burden shifts to the government to prove

¹³ In *Jacobson v. United States*, the Supreme Court reaffirmed its commitment to the subjective approach. 503 U.S. 540, 548-49 (1992). Most states have adopted the subjective approach. See MODEL PENAL CODE AND COMMENTARIES, *supra* note 6, § 409 n.9 (providing examples). Only about a dozen states have opted for the alternative objective approach. See *infra* note 41.

¹⁴ Federal courts, lacking the power to create either substantive criminal laws or defenses, have determined that, in enacting various criminal offense statutes, Congress intended that those entrapped not be convicted. See *Sorrells v. United States*, 287 U.S. 435, 446-48 (1932). As Park notes, whatever the plausibility of this determination with respect to early statutes used to prosecute the entrapped, "there is nothing extraordinary in assuming that Congress intends its [latter] enactments to be subject to the entrapment defense, just as they are subject to other common law defenses (such as insanity and duress)." Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 247 (1976).

¹⁵ See MARCUS, *supra* note 5, § 6.05. Some jurisdictions accept a lesser evidentiary showing. *Id.*

beyond a reasonable doubt that the defendant was "predisposed" to commit the crime.¹⁶ If the government carries its burden of proof demonstrating predisposition, the defense fails. However, if at this point the government fails to prove beyond a reasonable doubt that the induced defendant was predisposed, the defense succeeds and the defendant is acquitted on the ground of entrapment.

In practice, it is relatively easy for the defendant to satisfy the first part of the test. "Inducement" has been defined expansively as "soliciting, proposing, initiating, broaching or suggesting the commission of the offense charged."¹⁷ It is clear that inducement requires more than merely the furnishing of an opportunity for crime.¹⁸ An offer to purchase drugs at market price, for example, is not an inducement.¹⁹ Nevertheless, inducement does not require that the government agent's conduct caused the defendant to commit the crime. It will suffice that the conduct "could have caused an indisposed person to commit the crime."²⁰ Significantly, there is no formal requirement that the inducement offered by the government rise to a particular level of force, persuasiveness or pressure.²¹ For example, entrapment has been found as a matter of law where a 1930s prohibition agent, after establishing that he and the defendant had served in the same army division, merely made repeated requests for illegal liquor to the defendant.²² Likewise, entrapment has been found as a matter of law based merely on repeated requests for narcotics by an acquaintance claiming to need them to assuage his addiction.²³ Rather than focusing on the conduct of the tempter, the requirement of inducement in practice seems to focus on the status of the tempter.²⁴ Only *government* inducement will

¹⁶ See *id.* § 6.07.

¹⁷ *United States v. Sherman*, 200 F.2d 880, 883 (2d Cir. 1952) (Hand, J.). Accord *United States v. Dunn*, 779 F.2d 157, 158 (2d Cir. 1985).

¹⁸ See *United States v. Bibbey*, 735 F.2d 619, 621-22 (1st Cir. 1984); *United States v. Randolph*, 738 F.2d 244 (8th Cir. 1984); *State v. Kotwitz*, 549 So.2d 351, 357 (La. Ct. App. 1989).

¹⁹ See, e.g., *Ruggs v. State*, 601 So.2d 508, 511 (Ala. Crim. App. 1992).

²⁰ *United States v. Kelly*, 748 F.2d 691, 691 (D.C. Cir. 1984).

²¹ *United States v. Licursi*, 525 F.2d 1164, 1168 (2d Cir. 1975) (inducement involves only "the Government's initiation of the crime and not . . . the degree of pressure exerted") (citing *United States v. Riley*, 363 F.2d 955, 958 (2d Cir. 1966)).

²² See *Sorrrells v. United States*, 287 U.S. 435, 439-40 (1932).

²³ See *Sherman v. United States*, 365 U.S. 369, 370-71 (1958).

²⁴ See *United States v. Borum*, 584 F.2d 424, 427 (D.C. Cir. 1978) ("While predisposition is the key issue, it does not totally subsume the question of inducement, for separate consideration of the inducement issue illuminates one critical, additional element of the entrapment defense: instigation of the criminal act by government agents.").

qualify a defendant for entrapment.²⁵ Where the government has played no significant role, the question of a predisposition does not arise. The requirement of inducement acts as a gate-keeping measure for the real ball game in the subjective version of the entrapment defense: the question of a predisposition.

Whether a person is predisposed is based on the person's disposition prior to his first contact with government agents.²⁶ The question is whether, at that point, he was "ready and willing" to commit the crime "whenever the opportunity was afforded."²⁷ Such a query is unusual. Traditionally, the criminal law has shied away from the direct inquiry whether a person is predisposed to criminality. It has been thought that findings of a criminal predisposition, that is, propensity for crime before any crime has been attempted, could not be made with sufficient reliability to warrant the imprisonment of those so identified.²⁸ Dangerous people, of course, must be identified and incapacitated. Yet rather than predicating liability on a predisposition alone, the criminal law has favored the establishment of inchoate offenses, such as attempt and conspiracy. Liability for these offenses requires a finding of criminal intent.²⁹ Intent implies a conscious state of mind,³⁰ rather than merely a disposition, which is simply a tendency or potential to respond to a stimulus should that stimulus arise. Furthermore, inchoate offenses generally include an "overt act" requirement to supplement and bolster the finding of criminal intent.³¹ Entrapment thus presents a stark exception to the general reluctance to inquire directly about criminal propensity.

The existence of a predisposition is in most cases a question of fact for the jury. In reviewing jury findings of a predisposition, courts have identified a number of factors relevant to whether a predisposition to the offense charge existed: (1) the character or reputation of the defendant,

²⁵ See MARCUS, *supra* note 5, § 8.03 (citing, *inter alia*, United States v. Manzella, 791 F.2d 1263, 1269 (7th Cir. 1986) ("There is no defense of private entrapment.")).

²⁶ See Jacobson v. United States, 503 U.S. 540, 549 (1992), (holding that predisposition must exist not only prior to inducement, but prior to government contact).

²⁷ *Id.*

²⁸ See MODEL PENAL CODE: SENTENCING REPORT 32 (Apr. 11, 2003) ("Much research on selective incapacitation has been performed since 1962, and the brunt of the findings is that it is difficult to predict future serious criminal behavior with acceptable levels of accuracy.").

²⁹ See MODEL PENAL CODE §§ 5.01(1), 5.03(1) & (b); LAFAVE, *supra* note 5, §§ 11.3, 12.2(3).

³⁰ See MODEL PENAL CODE § 2.02(2)(a) & (b); LAFAVE, *supra* note 5, § 5.2.

³¹ MODEL PENAL CODE §§ 5.01(2) (requiring act that strongly corroborates actor's criminal intent), 5.03(5) (requiring overt act for conspiracy unless conspiracy to engage in felony of first or second degree); LAFAVE, *supra* note 5, §§ 11.4, 12.2.

including any prior criminal record; (2) whether the government initially suggested the criminal activity; (3) whether the defendant engaged in the crime for profit; (4) the nature of the government inducement; and, most importantly, (5) whether the defendant expressed reluctance to commit the crime which had to be overcome through repeated government inducement.³²

Although theoretically distinct, inquiries into the existence of inducement and predisposition in practice often overlap. Factors (2), (4) and (5) relate directly to possible actions of the government in encouraging the crime. This overlap should be no surprise. The entrapment defense is commonly raised in circumstances where the defendant has indisputably committed a criminal act.³³ This act itself implies the existence of a predisposition since in the great majority of cases, those who commit criminal acts were disposed to do so. The government in effect relies on an overt act after the inducement to demonstrate predisposition at the time of the inducement.³⁴ The strength of such an inference naturally varies inversely with the strength of the inducement. The weaker the inducement, the greater the need to posit a predisposition to crime to explain the defendant's act, and so the stronger the inference to predisposition.³⁵ Therefore, while there is no formal requirement that the inducement be particularly powerful in order to establish the defense, only where it is strong will the defendant be able to avoid the inference of predisposition, defeating his entrapment claim.

Other issues concerning the scope of the defense have not been clearly resolved. For example, should a defendant be entitled to the defense in cases where he desired to commit the offense charged, but where, but for the government's involvement, it is clear that he would not have? For example, D wants to counterfeit money, but is completely without the resources to do so before government agents supply D with the necessary

³² *United States v. Smith*, 802 F.2d 1119, 1125 (9th Cir. 1986).

³³ In order to raise the entrapment defense, a defendant need not concede prima facie liability. *Mathews v. United States*, 485 U.S. 58, 64-66 (1988). Nevertheless, because of the government's first-hand involvement in the events leading to the arrest, the evidence that the defendant engaged in prohibited conduct is usually strong and often uncontested.

³⁴ See *Kadis v. United States*, 373 F.2d 370, 373 (1st Cir. 1967); *Harrison v. State*, 442 A.2d 1377, 1379-80 (Del. 1982) (explaining the relevancy of defendant's response to inducement to predisposition); *Park*, *supra* note 14, at 200.

³⁵ See *Jacobson v. United States*, 503 U.S. 540, 550 (1992) (stating that in typical case, defense is of little use because "the ready commission of the criminal act amply demonstrates the defendant's predisposition").

equipment.³⁶ Likewise, should the defendant be considered predisposed to a criminal act if he has some identifiable desire to engage in it, but has deeply embedded character traits that would, but for government action, have constrained him from engaging in the act?³⁷ Finally, how similar must be the crime actually committed and the crime intended? For example, if it is found that the defendant planned to sell one quantity or type of contraband on a particular occasion to a particular class of person, and was induced to sell a very/somewhat/slightly different quantity or type of contraband on another occasion to a person of another class, should he be entitled to the entrapment defense?³⁸ Like most criminal law defenses, the scope of entrapment is not completely settled.

B. BASICS OF THE OBJECTIVE VERSION

The objective version of the defense is simpler in structure than the subjective version. The sole and central issue is simply whether the government's conduct created a substantial risk that such an offense would be committed by "persons other than those who are ready to commit it"³⁹ or alternatively, by "normally law-abiding persons."⁴⁰ These formulations of the defense, found respectively in the Model Penal Code and the Brown Draft of a New Federal Criminal Code, have been the basis for entrapment defenses adopted by decision or statute in about a dozen states.⁴¹

³⁶ See *infra* text accompanying notes 208-12.

³⁷ This issue is raised in *Jacobson*, 503 U.S. at 559-60 (suggesting that government's overcoming a person's tendency to respect the law should not be equated with creating predisposition).

³⁸ In federal court, the jury is asked whether the crime the defendant was predisposed to commit was "of the character" actually committed. *Park*, *supra* note 14, at 176. Beyond that, one scholar has commented, the matter is considered "quintessential[ly] [a] jury issue." *Park*, *supra* note 14, at 178.

³⁹ MODEL PENAL CODE § 2.13(1)(b) (1962).

⁴⁰ STAFF OF NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 95th Cong., FINAL REPORT ON PROPOSED NEW FEDERAL CRIMINAL CODE § 702 (1971).

⁴¹ MARCUS, *supra* note 5, at 169; see, e.g., Ark. Code Ann. § 5-2-209 (2004) ("Entrapment occurs when a . . . [law enforcement officer] . . . induces the commission of an offense by using persuasion or other means likely to cause normally law-abiding persons to commit the offense."); Utah Code Ann. § 76-2-303 (2004) ("Entrapment occurs when a law enforcement officer . . . induces the commission of an offense . . . by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it."). In addition, a defense based on outrageous governmental conduct in instigating criminal activity exists under the Due Process Clause. See MARCUS, *supra* note 5, at 265-318. This defense resembles the objective version of entrapment insofar as it can be established based solely on governmental conduct; the defendant's disposition is irrelevant. *Id.* at 291. The primary difference between the two is that in order to establish the Due Process defense, a much greater degree of control, entanglement, and overreaching must be

In contrast to the subjective version of the defense, the defendant's characteristics, including any predisposition to crime, are irrelevant. The focus of the inquiry is how the police conduct at issue may affect a member of the public in the abstract, not the defendant in particular.⁴² Of course, it is necessary for the defendant to show that the police conduct actually targeted him or might have caused the conduct.⁴³ For example, there still would be liability for criminal conduct occurring before the improper police conduct.⁴⁴ Examples of government conduct found to have violated the objective standard include appealing to a close personal relationship with the defendant,⁴⁵ forming a sexual relationship with the defendant,⁴⁶ and offering excessive amounts of money.⁴⁷

There is also a significant procedural difference between the two versions of the defense. Unlike the subjective test, the objective test is typically a matter for the court, not the jury, to apply, with the defendant shouldering the burden of proving entrapment by a preponderance of the evidence.⁴⁸

shown. See Kenneth M. Lord, *Entrapment and Due Process: Moving Toward a Dual System of Defenses*, 25 FLA. ST. U. L. REV. 463, 505 (1998). Because Due Process entrapment claims are subsumed by the objective version of the entrapment defense, they present no novel issues, and shall not be discussed specifically by this Article.

⁴² It may be argued that even standard objective formulation does not allow for the acquittal of a defendant who was dead set on committing the offense. The Model Penal Code, for example, defines "unlawful entrapment" as conduct by which an officer "induces or encourages another person" to commit the charged offense. MODEL PENAL CODE § 2.13(1). "Induces" suggests a causal relation between the action of the police and the criminal conduct of the defendant. A person who was going to engage in conduct anyway might not be said to be induced to it. If inducement was required, a relatively weak subjective component would be included in the MPC test. "Encourages," the other term employed, however, does not necessarily imply a causal relation. Encouragement to act may be given to a person who does not need it because she was going to act anyway. If encouragement by the police is all that is necessary, the MPC formulation is wholly objective.

⁴³ See *People v. Crawford*, 372 N.W.2d 550, 552 (Mich. Ct. App. 1985).

⁴⁴ See *Anchorage v. Flanagan*, 649 P.2d 957, 960 (Alaska Ct. App. 1982).

⁴⁵ See, e.g., *Dial v. Florida*, 799 So. 2d 407, 409-10 (Fla. Dist. Ct. App. 2001); *People v. Soper*, 226 N.W.2d 691, 692 (Mich. Ct. App. 1975); *State v. Kamrud*, 611 P.2d 188, 192 (Mont. 1980); *Commonwealth v. Lucci*, 662 A.2d 1, 8-9 (Pa. Super. Ct. 1995).

⁴⁶ *People v. Wisneski*, 292 N.W.2d 196, 199 (Mich. Ct. App. 1980).

⁴⁷ See, e.g., *Grossman v. State*, 457 P.2d 226, 230 (Alaska 1969).

⁴⁸ See MODEL PENAL CODE § 2.13(2) (1962); MARCUS, *supra* note 5, at 85 n.20, 183. The objective test is essentially a test of the propriety of police conduct. Advocates of the objective test thus placed it in the hands of the courts on the ground that, while juries properly judged defendants, only courts should judge the police. See *United States v. Sorrells*, 287 U.S. 435, 457 (1932) (Roberts, J., dissenting).

A common problem arises in applying the objective version of entrapment. In order to determine the effect of the government's conduct on hypothetical persons who are not ready to commit the offense (or on hypothetical law-abiding citizens), the court must decide what features the hypothetical person has. For example, where a recovering drug addict claims she was entrapped, should the court consider the effect of the government conduct on an ordinary person who is not ready to commit the crime, or on a recovering drug addict who is not ready to commit the crime? The choice may make a difference in the outcome of the test. A recovering drug addict may be likely to respond to certain government encouragement to possess drugs where a person who was not addicted might not be likely to when faced with the same conduct.⁴⁹ In other contexts where the behavior of a hypothetical person is relevant to determining the defendant's liability, the Model Penal Code has opted for partial relativization by asking what an average person "in the actor's situation" would do.⁵⁰ Such a formulation would be broad enough to allow, but not require, the jury to consider the effect of the government's conduct on those who have an above-average disposition toward crime, such as drug users, even if they are not ready to commit the offense.

C. RELATION OF THE SUBJECTIVE AND OBJECTIVE VERSIONS

At this stage, subjective and objective versions of the entrapment defense may be usefully compared. On the formal level, both versions have a critical hypothetical component. Under the subjective version, the prosecution may be required to establish the defendant's criminal disposition. To assert a person, *P*, has a disposition to do *X* is to assert that if certain hypothetical conditions existed, *P* would do *X*. Under the objective test, the defendant must show the effect of the police conduct on a hypothetical law-abiding actor. The critical questions of each version of the defense neatly compare as follows:

Subjective — Would the crime have likely occurred if the defendant had been placed in a hypothetical set of circumstances without the police agent's excessive encouragement toward crime?

⁴⁹ See Park, *supra* note 14, at 204 ("An agent's knowledge that his target has a weakness for a vice crime but is currently abstaining is surely a fact that merits consideration when assessing the agent's conduct.").

⁵⁰ See MODEL PENAL CODE §§ 210.3(1)(b), 2.02(2)(d) (manslaughter and negligent conduct).

Objective — Would the crime have likely occurred if the police agent had been placed in a hypothetical set of circumstances without the defendant's excessive inclination toward crime?

The tests are the mirror images of each other.

Turning to the application of the tests, there are two potential categories of cases where the objective and subjective versions of entrapment may diverge. The first is cases where the defendant is entitled to only the subjective version of the defense. Such cases may arise because the subjective version formally does not require the high level of encouragement required by the objective test (encouragement sufficient to affect an average citizen)—just inducement without predisposition. Thus, there might be perpetrators found to be subjected to only minimal encouragement (and hence ineligible for the objective defense) yet still be subject to inducement and also nondisposed (hence entitled to the subjective defense). Accordingly, Professor Park has written that “[f]ederal law is more favorable to nondisposed defendants who succumbed to inducements not sufficiently compelling to be deemed improper [under the objective standard].”⁵¹

The potential class of defendants favored by the subjective version, however, is likely very small. In order to be eligible for the subjective version of the test, a person must not be predisposed to commit the crime. If the nondisposed are defined as those not ready and willing to commit the crime, there will be no defendants who qualify for the subjective version unless they were exposed to an inducement powerful enough to create a risk for those not otherwise ready and willing. They would then qualify for the objective version as well. This convergence of the tests follows from the subjective version's tendency, discussed earlier,⁵² to require a strong inducement to avoid the inference—fatal to defendant's claim—of predisposition.

For example, in *United States v. Jacobson*,⁵³ the Supreme Court found that, as a matter of law, the defendant had established the entrapment defense in its subjective version. The defendant had been induced to order child pornography as a result of an elaborate government sting operation. The defendant had never purchased child pornography previously. Only after a two and a half year campaign involving mailings from five fictitious organizations and a bogus pen pal did the defendant place his order.⁵⁴ On

⁵¹ Park, *supra* note 14, at 199.

⁵² See *supra* text accompanying note 35.

⁵³ 503 U.S. 540 (1992).

⁵⁴ *Id.* at 542-47.

these facts, the Supreme Court concluded that the prosecution had failed to establish beyond a reasonable doubt that the defendant was predisposed to violating the Child Protection Act of 1984, which criminalizes the knowing receipt through the mails of a "visual depiction [that] involves the use of a minor engaging in sexually explicit conduct."⁵⁵ Now imagine that subsequently United States Congress adopts the objective version of the entrapment defense and, shortly thereafter, the FBI employs similar tactics against a person with a provable predisposition to possess child pornography. The defendant in this hypothetical case should be able to establish the entrapment defense in its new objective form. In order to demonstrate that the FBI's conduct "creates a substantial risk that such an offense would be committed by persons other than those ready to commit it,"⁵⁶ the defendant would need only cite *Jacobson*, where a person found to be nondisposed to commit the offense actually did commit it. If the class of law-abiding citizens subsumes the class of nondisposed persons, satisfaction of the subjective test should entail the satisfaction of the objective test. The objective test's placement of the burden of proof on the defendant, compared to the subjective test's placement on the government of the critical predisposition issue, would then account for cases satisfying the subjective test only.⁵⁷

The second class of cases where the two tests potentially divide comprises those cases where the defendant would succeed under the objective test but fail under the subjective test. In such cases, the government agent's conduct would be judged sufficient to induce a nondisposed person, and so entitle the defendant to acquittal under the objective version, but the defendant herself would be judged predisposed, and hence not qualify for the subjective test.

This too may be a small class of cases. Professor Seidman believes that it will be because the conduct alleged to be entrapment may be described in a manner that minimizes the possibility that a person not ready and willing might be induced by such conduct.⁵⁸ For example, the agent's conduct may be described as "offering a tremendous amount of money to a person strongly suspected of imminent criminal activity." If such a description is permitted, then despite the strength of the inducement, there is little chance that that very act would cause an innocent person to commit a crime since the inducement definitionally was not likely to be directed at

⁵⁵ 18 U.S.C. § 2252(a)(2)(A) (1984).

⁵⁶ See *supra* text accompanying notes 39-40 and 48.

⁵⁷ See *supra* text accompanying notes 16 and 48.

⁵⁸ See Louis Michael Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111, 119-20 (1981).

such a person.⁵⁹ There is some support for this interpretation of the objective test.⁶⁰ Under such an interpretation, the only cases where the objective version would result in acquittal where the subjective would not would be cases where the government inducement was directed at a person thought to be nondisposed, but in fact the person was predisposed. As discussed below, these “lucky hit” cases—cases where the police unknowingly entrap a criminally disposed person—may be few.

Professor Allen also thinks that practically there will be few cases in which the objective version provides a defense, but the subjective version would not.⁶¹ Allen argues that the inquiries under both tests will in practice be similar. Where the fact-finder concludes that the inducement was sufficient to cause an average person to act (hence qualifying the defendant under the objective test), the fact-finder would likely have found the defendant nondisposed (hence entitling any induced defendant to the subjective defense) because it lacks evidence of criminality absent improper encouragement.⁶² In other words, the excessive inducement directed at a predisposed person deprives the prosecution of the critical inference of criminal act to criminal predisposition. The excessive inducement is an alternative plausible explanation of the criminal act. Likewise, where the fact-finder concludes that the defendant was predisposed (hence disqualifying the defendant from the subjective defense), it would likely not have found the inducement to be entrapment under the objective test because there is no evidence of the effect of the test on an average person.⁶³

While these points have weight, they likely go too far. Consider Allen’s argument that cases satisfying the objective test will satisfy the subjective test. While the most salient evidence of predisposition may be responding to a low level inducement, evidence such as past or subsequent

⁵⁹ *Id.*

⁶⁰ Park agrees and writes, “[t]he substantiality of the risk created cannot be assessed without considering the surrounding circumstances, including facts about the target that were known to the agent.” Park, *supra* note 14, at 205-08 (discussing *Grossman v. State*, 457 P.2d 226, 229 (Alaska 1969) (prior conduct of selling relevant to whether police conduct was acceptable under objective test) and *People v. Turner*, 210 N.W.2d 336, 338 (Mich. 1973) (defendant’s statements about heroine relevant to determining whether police conduct was acceptable under objective test)).

⁶¹ See Ronald J. Allen, *Clarifying Entrapment*, 89 J. CRIM. L. & CRIMINOLOGY 407, 412-13 (1999).

⁶² See *id.* Contrast this claim—that a strong enough inducement to establish the objective version of the defense will usually satisfy the subjective version—with my earlier inverse claim—that the satisfaction of the subjective version will usually involve a strong inducement. See *supra* text accompanying note 35.

⁶³ Allen, *supra* note 61, at 412-13.

criminal acts could support a finding of predisposition even in cases of high inducement.⁶⁴ For example, in *Posner v. United States*,⁶⁵ the government was permitted to introduce evidence that defendant had attempted to buy drugs three and a half months after the crime he was charged with committing.⁶⁶ Such evidence can be quite probative of predisposition. Thus it is conceivable that even where a defendant had been induced by very powerful persuasion (hence entitled to the objective defense), she could be found predisposed (hence not entitled to the subjective defense).

There is a more mundane reason why there will be few cases that establish objective entrapment, but not subjective entrapment. Objective entrapment requires a high level of persuasiveness, such as an appeal from a close friend; subjective entrapment occurs when a nondisposed person is subject to an inducement. It will be rare that high levels of persuasion (qualifying for objective entrapment) will be directed against predisposed persons (ineligible for subjective entrapment). Simply put, the use of such high levels would be overkill. Because the defendant is predisposed, lower levels would suffice to induce the criminal conduct necessary for conviction. Furthermore, lower levels would be less likely to arouse the suspicions of the target that he was being entrapped. For example, offering unusually high amounts of money for drugs may suggest an ulterior purpose. Finally, lower levels would be more useful in obtaining a conviction because they would not mask critical evidence of predisposition. The police could only be expected to use such unnecessarily strong inducements where they mistakenly think their target is nondisposed, but to their surprise, he is predisposed. These lucky hit cases will be rare if only because persons predisposed to particular crime are relatively rare in the general population.

In sum, the most common cases of entrapment, under either version, will be when the police use (A) generally compelling inducements against (B) nondisposed persons. Under the subjective version, (B) is required, and assuming (B), (A) will usually be needed for the inducement to result in the defendant's acting criminally in the first place. Under the objective version, (A) is required and usually there will be (B), for why else bother with (A)? The Article's analysis of entrapment will therefore concentrate on cases with compelling inducements turned against nondisposed persons. These cases represent the lion's share of entrapment cases under either version.

⁶⁴ Evidence of such acts is admissible in federal court to establish predisposition. Fed. R. Evid. 404(b).

⁶⁵ 865 F.2d 654 (5th Cir. 1989).

⁶⁶ *Id.* at 657-58.

III. STANDARD THEORIES OF ENTRAPMENT

This Article began examining the problematic nature of the entrapment defense. It pointed out that the success of the defense turned on the status of the tempting party: If private party, conviction; if government agent, acquittal. Yet the significance of the status of the tempting party was not readily apparent. Why should cases of "private entrapment" be treated differently from cases of "government entrapment?"⁶⁷ This Part of the Article canvasses the standard theories of entrapment. These theories may be divided into retributivist, utilitarian, civil rights, and autonomy theories. Each theory may be understood, in part, as an attempt to give significance to the status of the tempter. As discussed below, each theory is open to serious challenge.

A. ENTRAPMENT AND RETRIBUTIVISM

Retributivism is a theory about punishment. Many believe retributivist concerns underlie the criminal law.⁶⁸ Briefly stated, retributivists believe that the imposition of criminal sanctions is justified to the extent the sanctions are deserved.⁶⁹ A retributivist theory of the entrapment defense

⁶⁷ As used in this Article, "private entrapment" refers to conduct, circumstances, and responses thereto involving a private party such that if that party were a government agent, then under the law of the jurisdiction, the defendant would be able to establish the entrapment defense. For example, if in an objective jurisdiction, a nondisposed person is enticed into crime by a private individual offering an inducement an ordinary citizen would be unlikely to resist, that person would be privately entrapped. Private entrapment does not require that the entrapping individual act with the purpose or hope that the entrapped individual will be prosecuted because this is not a general requirement of entrapment under standard formulations. If the mailings sent in *Jacobson v. United States*, 503 U.S. 540 (1992); see *supra* text accompanying notes 7-8, had been sent by state law enforcement agents merely in an attempt to infiltrate an imagined child pornography network, Jacobson's claim in the subsequent federal prosecution should have been affected.

⁶⁸ See MODEL PENAL CODE: SENTENCING REPORT at 36-41 (April 11, 2003) (endorsing a theory of form of retributivism which allows the consideration of utilitarian factors to resolve retributive uncertainty); David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. Rev. 1623, 1623 (1992) (claiming that retributivism "has enjoyed in recent years so vigorous a revival that it can fairly be regarded today as the leading philosophical justification of the institution of criminal punishment"); see also CAL. PENAL CODE § 1170(a)(1) (West 2003) ("The Legislature finds and declares that the purpose of imprisonment for crime is punishment."). Although currently enjoying popularity, retributivism is not without its critics. See Russell Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 Nw. U. L. Rev. 843 (2002).

⁶⁹ Joel Feinberg, *The Classic Debate*, in PHILOSOPHY OF LAW 727, 727-29 (Joel Feinberg & Jules Coleman eds., 6th ed. 2000); FLETCHER, *supra* note 12, at 459-60; MICHAEL MOORE, PLACING BLAME 87 (1997).

would justify the defense on the ground that those who are entrapped do not deserve the harsh treatment that attends conviction. Although there are many varieties of retributivism,⁷⁰ retributivists generally analyze desert as a function of the gravity of the wrongdoing at issue and the actor's culpability for that wrong.⁷¹ Logically then, a retributivist theory of entrapment would maintain that the defense is sound because the entrapped party has done no wrong or, alternatively, is not to blame for the wrong done. These retributivist approaches to entrapment are considered in turn.

1. Wrongdoing-Based Theories of Entrapment

Professor Carlson pursues the first approach. He advances the view that the entrapment defense is valid from a retributivist perspective because "the assumption of wrongfulness must fail in most instances of government involvement."⁷² Carlson equates wrongful conduct with conduct that harms or threatens protected social interests. In contrast to cases of private entrapment, Carlson observes, cases of government entrapment are initiated, directed, monitored, and orchestrated by the police. The government inevitably will step in to make the arrest before the crime can be consummated. Thus, in contrast to cases of private entrapment, there is virtually no chance that any social interest will be harmed, and so, Carlson argues, from a retributive perspective, punishment is not deserved.⁷³

Carlson takes too narrow a view of retributivism. Although Carlson considers one variation—contract retributivism—he fails to consider another, subjective retributivism. According to subjective retributivism, the wrongfulness of a person's conduct is to be evaluated from the epistemic position of the actor, that is, what the actor thought he was doing.⁷⁴ The dispute between subjective retributivists and objective retributivists (those

⁷⁰ One basic distinction between retributivist theories is the distinction between strong and weak brands of retributivism. Strong brands assert that desert is a sufficient condition of punishment; weak brands assert it is merely a necessary condition. See Christopher, *supra* note 68, at 865-66. Because the Article's discussion of retributivism equally applies to both versions, the distinction shall be ignored.

⁷¹ See FLETCHER, *supra* note 12, at 461; MOORE, *supra* note 69, at 168.

⁷² Jonathon C. Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 VA. L. REV. 1011, 1063 (1987).

⁷³ *Id.*

⁷⁴ For the distinction between subjective (or culpability/intent-based theories) and objective (or harm/wrongdoing-based theories) retributivism, see Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 74-76 (1990), and Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237, 237 (1994) (distinguishing culpability and wrongdoing as independent bases of desert).

who believe that the wrongfulness of conduct is to be judged based on what actually occurred) is far from settled.⁷⁵ Subjective retributivists have a strong claim to giving the superior account of punishment for unsuccessful attempts, a universal feature of modern criminal law. A person who attempts a crime believes that her conduct creates a risk of the crime being completed. The subjectivist explains such a person deserved to be punished based on her acting on such belief. In contrast, objective retributivists must struggle to defend the claim that in such cases of unsuccessful attempts the person's conduct was objectively wrongful. Often the riskiness of the person's conduct is appealed to. From a God's eye point of view, where all facts are taken into account, however, the risk that an unsuccessful attempt would succeed was zero. The ascription of risk is relative to a vantage point with limited access to the facts. Any other vantage point than God's, where all the facts are known, however, appears morally arbitrary. Thus, objective retributivism founders on the shoals of unsuccessful attempts.⁷⁶ Subjectivism in turn can be criticized on the ground that it fails to account for the common intuition that unsuccessful attempts should be punished less than completed ones. Nevertheless, in light of the weaknesses of its competitor, it is at least a viable form of retributivism. From at least the perspective of subjective retributivism, those governmentally entrapped deserve punishment just like other morally culpable defendants who fail to commit the crimes they intended.

⁷⁵ Compare Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It*, 37 ARIZ. L. REV. 117, 119 (1995) (arguing that uncompleted attempts and completed crimes should be treated similarly), and Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 684-86 (1994) (same); with Leo Katz, *Why the Successful Assassin Is More Wicked than the Unsuccessful One*, 88 CAL. L. REV. 791, 795 (2000), and MOORE, *supra* note 69, at 191-247 (arguing results are relevant to desert).

⁷⁶ See Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. LEGAL ISSUES 1, 17-21 (1994) (attacking the risk account of wrong-doing on these grounds). Antony Duff, in a leading work on the law of criminal attempts, takes the position that criminal attempts constitute attacks, which even when unsuccessful, are objectively wrongful. See R.A. DUFF, *CRIMINAL ATTEMPTS* 221 (1996). It is unclear, however, how Duff sustains his claim that attacks are inevitably harmful. *Id.* at 368. For example, a bullet fired which narrowly misses its victim and falls undetected into the sea may be considered an attack from the perspective of a hypothetical reasonable observer. See *id.* at 82. However, such an occurrence would not appear to be harmful in any sense that would support punishment under any reasonably full-blooded version of objective retributivism.

2. Culpability-Based Theories of Entrapment

Most retributive theories of entrapment focus on retributivism's culpability requirement. Such theories explain the defense on the ground that those entrapped are not blameworthy. Such a theory may be imputed to the United States Supreme Court, which has repeatedly described those entrapped as "innocents."⁷⁷ In retributivist terms, innocence negates the blameworthiness required for punishment. Likewise commentators supporting the subjective version of entrapment defense have taken the position that defendants should not be held liable because they are not blameworthy. In a much cited article, Professor Park argues for the superiority of the subjective version of the entrapment defense.⁷⁸ In the course of the article, he examines various possible justifications of the entrapment defense. According to Park's theory, the defense is justified because those who are entrapped do not meet the retributivist requirements for punishment. To Park, "it seems obvious that they are less blameworthy . . . than the ordinary offender. Since they are less blameworthy, they are less deserving of retributive punishment."⁷⁹

a. Culpability and the Problem of Private Entrapment

An initial objection to this theory is that it seems inconsistent with the fact that the criminal law provides no defense to persons in cases of private entrapment. It is commonly assumed that those who are governmentally entrapped and those who are privately entrapped equally deserve punishment.⁸⁰ Retributivists believe that an individual's culpability for risky or harmful conduct is based on his subjective attitude toward the risk or harm. For example, in the absence of an excuse or justification, a person who desires to cause the harm is culpable for it. Call this the subjectivity of

⁷⁷ See *Jacobson v. United States*, 112 S.Ct. 1535, 1547 (1992) (defense available if jury determines defendant just "innocent dupe"); *Sherman v. United States*, 356 U.S. 369, 372 (1958) (distinguishing between "unwary innocent" and "unwary criminal"); *Sorrells v. United States*, 287 U.S. 435, 442 (1932) (finding where disposition to crime is implanted in mind of "innocent person").

⁷⁸ See Park, *supra* note 14.

⁷⁹ *Id.* at 240. Park also identifies lack of dangerousness of those entrapped as a ground for the defense. *Id.* The majority of his discussion, however, emphasizes lack of blameworthiness. *Id.* at 242 (arguing defense "properly concerned with culpability"); *id.* at 239 (asserting "injustice" of convicting "nondisposed persons"); *id.* at 265 (noting his theory seeks to "excuse" entrapped).

⁸⁰ See, e.g., MODEL PENAL CODE AND COMMENTARIES § 2.13 cmt. at 406 ("Defendants who are aided, solicited, deceived or persuaded by police officials stand in the same moral position as those who are aided, solicited, deceived or persuaded by other persons. . .").

culpability principle.⁸¹ Invariably, individuals who are entrapped by government agents, like individuals who are entrapped by private parties, believe that the person offering the inducement is a private party. Governmentally and privately entrapped individuals share the same subjective beliefs about the circumstances surrounding their illegal conduct, and therefore, all things equal, are equally culpable. Yet private entrapment is no defense. This fact implies that the privately entrapped person is culpable for his conduct, and, based on the subjectivity of culpability principle, that the governmentally entrapped person is culpable too.

Park is keenly aware of the above argument and the challenge it poses to his position.⁸² Rather than attempting to distinguish cases of government and private entrapment based on considerations of culpability, Park adopts an ingenious strategy. Conceding that those privately entrapped are nonculpable just like those governmentally entrapped, Park argues that “rules intended to excuse nonculpable persons from criminal liability must sometimes be limited in scope because of the danger of contrived defenses.”⁸³ Park analogizes to the mistake of law defense. Although those who are misled by private parties regarding to law seem no less culpable than those who are misled by public officials, the law—arguably justifiably—only extends the defense to the latter group. The reason for this limitation is that courts are afraid that otherwise there would be too many cases of persons successfully presenting a false entrapment claim to the jury or engaging in criminal conduct in the hope they will be able to do so.⁸⁴ Likewise, Park argues, even though those privately entrapped are not culpable, the law properly does not allow them to assert the entrapment

⁸¹ In limited circumstances, the criminal law will hold a person liable for harms that the actor lacked a subjective attitude toward. A person may be liable for negligence homicide if she causes a death where she failed to be aware her conduct risked the life of another and a reasonable person would have been aware of that risk. *See* MODEL PENAL CODE § 210.4. A person’s culpability for negligence, however, is still strictly a function of subjective factors such as the defendant’s awareness of evidence or circumstances that should have led her to appreciate the risk. *See id.* § 2.02(2)(d) (determination of negligence turns on the “circumstances known” to the actor).

⁸² In contrast to Park, Carlson believes the governmentally entrapped are morally culpable. Running Park’s argument in reverse, Carlson believes this result is necessary because otherwise the privately entrapped would be equally entitled to the defense. Carlson, *supra* note 72, at 1038. Seidman also makes this argument. *See* Seidman, *supra* note 58, at 132 (“We know that there is no generally held normative principle precluding punishment of defendants succumbing to even very attractive inducements, because a defendant offered such an inducement by a private person has no defense to the resulting charge.”).

⁸³ Park, *supra* note 14, at 241.

⁸⁴ *See* MODEL PENAL CODE AND COMMENTARIES § 2.04 cmt. at 280.

defense. To do so would create an unacceptably high risk of abuse in the form of collusion and false claims.

Park's argument is open to challenge. The criminal law is deeply committed to punishing only those who deserve punishment, at least where significant penalties are involved. Retributive limits on punishment are not so easily overridden by speculative claims that recognizing those limits in cases of private entrapment will lead to abuse. The limitation of the mistake of law defense to those who have been misled by public officials is not universally accepted.⁸⁵ Furthermore, to the extent it is accepted, the limitation need not be understood as an example of policy-based concerns of defense abuse trumping valid retributive limits. As a general matter, those who rely on the misrepresentation of public officials are in fact less culpable than those who rely on the misrepresentations of private parties. It is more reasonable to rely on the representations of those legally charged with stating the law because they are usually more knowledgeable. Those who rely on the representation of private parties, know, or should know, they are doing so at their own risk. There is at least a significant subjective difference between those who rely on private and government statements of the law. This difference, rather than public policy concerns, can account for limitation of the mistake of law defense. Accordingly, it is far from clear that the government-agent limitation of the entrapment defense can satisfactorily be explained based on policy-based concerns of abuse.⁸⁶

The difficulty with Park's position, however, runs deeper. Park never attempts to defend what he takes to be the "obvious"⁸⁷ fact that those who are entrapped (governmentally or privately) are nonculpable. Consider a person who is either not predisposed to crime and yet yields to a necessarily powerful temptation (under the subjective version) or who is subjected to a temptation that even a reasonable person might well yield to (under the objective version). Is there any reason to believe that this

⁸⁵ See N.J. Stat. Ann. § 2C:2-4(c)(3) (West 1995) (extending defense to any person who "diligently pursues all means available to ascertain the meaning and application of the offense to his conduct and honestly and in good faith concludes his conduct is not an offense in circumstances in which a law-abiding and prudent person would also so conclude").

⁸⁶ Park, *supra* note 14, at 241. Park also argues that limiting the defense to those governmentally entrapped is justified because of other policy-related concerns that distinguish cases of government and private entrapment, such as possible wasteful use of police resources and the chilling effect on political activity. *Id.* at 242-43. These other public-policy rationales are addressed *infra* Parts III.B-C.

⁸⁷ Park, *supra* note 14, at 240.

person, who has deliberately chosen wrongly,⁸⁸ should not be considered nonculpable? Although intuitions differ sharply on the question,⁸⁹ commentators have given it insufficient attention.⁹⁰ At best, the question is controversial, especially when considered in the context of the most difficult case: the enticement of a person of ordinary resistance.

Below the Article considers two potentially attractive arguments for the position that those who are entrapped are not culpable: the first based on an analogy to duress, the second based on considerations of the practical limits of character. Although the arguments are ultimately rejected, their *prima facie* appeal may explain why some courts and commentators, such

⁸⁸ There is no requirement under either version of the entrapment defense that the defendant's ability to reason was somehow overcome by the offer, so that the defendant acted "in the heat of passion," or, more relevantly, the heat of greed.

⁸⁹ Fletcher, for example, apparently disagrees with Park, in contrast, asserting in his discussion of entrapment that "succumbing to temptation is a paradigm case of blameworthy conduct." FLETCHER, *supra* note 12, at 542. Professor Park takes the opposite position that there is "no accepted notion of culpability applicable to a person" who is entrapped. Allen, *supra* note 61, at 416. Little argument, however, is provided to support these claims.

⁹⁰ Although Carlson considers the issue, his analysis is not satisfactory. Carlson, *contra* Park, believes that the entrapped are morally culpable. He begins with the premise that in subjective entrapment jurisdictions, the law correctly ascribes culpability to a *predisposed* person who is induced to crime. According to Carlson, if a predisposed person is blameworthy, so should be the nondisposed person who responds to the same inducement. After all, Carlson reasons, in contrast to the predisposed who are naturally susceptible to inducements (such as the pedophile), the nondisposed have no excuse for yielding to a given temptation. Carlson, *supra* note 72, at 1038.

Carlson rejects any attempt to elevate the nondisposed over the predisposed due to the latter's arguable moral inferiority for being predisposed to crime. Carlson writes that "[b]lame in the criminal law is not normally assessed through an examination of the actor's underlying character or criminal propensities." *Id.* at 1041. Accordingly, Carlson believes that just as it would be inconsistent with the criminal law's narrow focus to convict based on propensity alone, e.g., sexual attraction to children, so it would be inconsistent to excuse the entrapped on the ground of their lack of propensity. Carlson's characterization of the criminal law's approach to culpability, however, is only partially correct. The determination of *prima facie* culpability is an extremely narrow inquiry. Offense definitions usually only require a showing of intent or recklessness, two discrete subjective mental states that must exist concurrently with the conduct. Excuses, however, traditionally allow for a much broader inquiry. They allow the defendant an opportunity to show that, for one reason or another, his case is an exception to the broad rules of thumb for culpability established by the offense definitions. Although the criminal law is concerned in the first instance with whether the definition of the offense has been satisfied, it is, as Carlson ultimately acknowledges, *id.* at 1042 n.115, concerned at bottom with quality of character and virtue. The general lack of criminal propensities of the entrapped should not be bracketed off when assessing their culpability. It should, at least potentially, be available to find them not blameworthy.

as Park, have taken the position that those qualifying for the entrapment defense should not be blamed for engaging in criminal acts.

b. Culpability and Duress

The first argument for the nonculpability of the entrapped is based on an analogy between entrapment and duress. It proceeds as follows:

Argument from Duress

Persons who engage in prohibited conduct as a result of significant threats are entitled to the defense of duress. Depending on the jurisdiction, significant threats are threats of serious bodily injury or threats a person of reasonable firmness would not be able to resist. The duress defense is best construed an excuse defense, that is, it is grounded on the principle that the actor is not culpable for his act because he did not have a fair opportunity to not engage in it. There was no fair opportunity because of the significant sanction that was being faced.

Likewise, persons who engage in prohibited conduct as a result of a significant offer (whether made by a government agent or private party) should be found nonculpable and be entitled to a defense. Here a "significant offer" might mean an offer of equivalent value to not being seriously harmed or of a magnitude that a person of reasonable firmness would not be able to resist. Because of the attractiveness of the offer, there was no fair opportunity to resist. Acquittal based on the defendant's nonculpability is therefore warranted.⁹¹

The Argument from Duress rests on the initial premise that the persons subject to duress are not liable because they lacked a fair opportunity to act lawfully. This premise is somewhat controversial.⁹² Accepting it for the

⁹¹ The preceding argument for nonculpability provides a straightforward account of why a nondisposed person does not deserve to be punished: in light of the magnitude of the offer, he is not blameworthy. The argument, however, appears less successful in explaining why a predisposed person deserves to be acquitted, as he would be under the objective version of the defense. Nevertheless, it may be extended by adding the following premise: A person is only culpable for an act if he engaged in it as a result of a character flaw, where "as a result" implies the flaw was a but-for cause of the act. This premise is plausible, at least on character theories of culpability which ground desert in the manifestation of bad character. See, e.g. FLETCHER, *supra* note 12, at 800 (recommending character theory); George Vuoos, *Background, Responsibility, and Excuse*, 96 YALE L.J. 1661 (1987) (same); Michael D. Bayles, *Character, Purpose and Criminal Responsibility*, 1 LAW & PHIL. 5 (1982) (same). Where a predisposed actor had responded to enticements strong enough to overcome the resistance of a law-abiding citizen, the actor's bad character cannot be inferred from his conduct—a nondisposed person would have acted similarly. Thus, if the Duress Argument is sound for nondisposed actors, it may also account on retributivist grounds for the acquittal of predisposed actors under the objective version of entrapment. In any case, as argued earlier, see *supra* text accompanying notes 58-65, most defendants who qualify for the objective version will in fact be nondisposed.

⁹² Professor LaFave takes the view that the duress is not an excuse defense based on lack of fair opportunity to comply with the law, but a justification defense based on the necessity

sake of argument, we may focus on the more interesting question whether the argument correctly equates acting based on threats and offers. Threats and offers clearly have much in common. Both threats and offers provide reasons that potentially bear powerfully on a person's decisions by making a change in the actor's utility dependent on her choice regarding a course of action.

Nevertheless, threats and offers are clearly distinguishable. In his discussion of entrapment, Professor Seidman explains the distinction is that offers expand the range of choices, while threats contract the range of choices.⁹³ Construed literally, this distinction appears dubious. While threats make one option (not engaging in the requested conduct) less attractive, it is still an option. Furthermore, even if this distinction is accepted as a matter of definition, it is unclear why it should make a moral difference. Seidman suggests the morally critical fact is that one has a right not to be threatened, but not a right to be free of an offer.⁹⁴ As a matter of rights, this may be so. But why should this moral distinction between the permissibility of threats and offers carry over to the response to them? In his analysis of the offer/threat distinction, Seidman considers confrontations between homeowners and burglars.⁹⁵ Seidman points out that homeowners may legally avoid harm by resisting burglars, but burglars may not legally realize a benefit by taking from homeowners. Homeowners are facing the threat of losing goods; burglars are facing the enticement of gaining goods. Although they both may face the same attraction to the same material goods

of the defendant's conduct to avoid the comparatively great threatened harm. See LAFAVE, *supra* note 5, at 473-74. His view is supported by the common law formulation of the defense, which requires a serious threat and does not extend to murder. See *id.* at 474. Professor Dressler takes the opposite view, asserting that duress is an excuse for engaging in even unjustified criminal acts. Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1359-60 (1989). His view is supported by the Model Penal Code formulation of the defense which would allow a jury to grant the defense even in cases of justified conduct, for example the defendant's killing of two to save himself. See MODEL PENAL CODE § 2.09 (permitting defense for where "a person of reasonable firmness in [the defendant's] situation would have been unable to resist [the threat]"). To the extent that duress is really a justification, it cannot provide a useful analogy to understand entrapment. There may be cases where yielding to a threat is justified in the sense of yielding being the lesser evil. If a person faces death if he does not aid a plan to embezzle \$10,000, his aiding would be justified. It is, however, difficult to imagine cases whether an enticed person could argue justification. The advantage of the offer could hardly offset the harm of the offense. A person would not be offered \$20,000 to aid a plan to embezzle \$10,000.

⁹³ See Seidman, *supra* note 58, at 133.

⁹⁴ See *id.* at 134.

⁹⁵ See *id.* at 133.

of the homeowner, only the burglar will be liable for acts to secure those goods. Seidman explains this asymmetry on the ground that homeowners face a threat of loss while burglars experience merely the opportunity for gain.⁹⁶ This asymmetry, however, does not support or explain a general distinction between those who respond to threats and those who respond to offers. Homeowners may use force to defend their property because such action is justified; burglars may not use force against the homeowner to acquire property because such action is not justified. The law's right-based distinction between homeowners and burglars (who confront equally compelling motivations) therefore does not explain or illuminate the distinction being those wrongdoers who act because of a threat and those who act because of an offer. Seidman's analysis of entrapment as an expansion of options seems to be conceptually accurate, but lacks the normative punch necessary to refute the Argument from Duress's equating of duress and entrapment.

An alternative basis for morally distinguishing the effect of threats and offers is made by the philosopher Robert Nozick. Nozick suggests that the critical difference between threats and offers is that one would always choose to be made an offer—it can never hurt to have the option—but not choose to be subjected to threat. Approving, at least implicitly, the offer that led to the action, one should be held responsible for the action no matter how compelling the offer.⁹⁷ Being the recipient of an offer, no matter how overpoweringly tempting, one can no more defeat accountability, Nozick might argue, than acting based on a hypnotic suggestion that the person requested to have implanted in him. In contrast, the threat was unwelcome. If encountering it could have been avoided, it would have been. Because one lacked a fair opportunity to avoid the threat, one may have lacked a fair opportunity to avoid complying with the threat. Thus the target of a threat, unlike the target of an offer, has a valid excuse for his wrongdoing.

The difficulty with Nozick's argument is that it just pushes the problem back a level. Nozick's analysis focuses not only on the choice between the act and the consequence of not acting, but the hypothetical choice between whether to have the choice or not. It is true that if asked whether we would want an offer involving a potential benefit, we would choose to have the offer, while we would not choose to be exposed to a

⁹⁶ *Id.*

⁹⁷ Robert Nozick, *Coercion*, in *PHILOSOPHY, SCIENCE AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL* 440 (Sidney Morgenbesser et al. eds., 1969). For a detailed conceptual analysis of the concept of coercion, the reader is directed to Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 *LEGAL THEORY* 45 (2002).

threat. But this is only because we are informed that the offer will be attractive and we anticipate that we might accept it. If we cannot be blamed for not refusing an extremely attractive offer itself, we cannot be blamed for hypothetically choosing to be made such an offer. It is the same attraction to the ultimate benefit that motivates both choices. If we cannot be faulted for yielding to powerful threats because these, in appealing to our self-interest, deny us a fair opportunity to resist, then we cannot be faulted for yielding to equally compelling offers on the ground that these offers were "welcomed." We had no more a fair opportunity to find the offers unwelcome in the first place than to resist them once made.

Is there then no satisfying response to the Argument from Duress's equating threats with equally compelling offers? I suggest the normative basis for the distinction begins with Nozick's and Seidman's observations that, as a general matter, we are adverse to receiving threats and have the right not to be threatened. Where a person is unlawfully threatened, we properly feel sorry for the targeted person because he is in a position in which he should not have to be. This feeling of compassion then is manifested by generously granting the threat's target an exemption from the usual punishment that follows from his unjustified yielding to the threat. Leniency toward the coerced is, if not strictly deserved, at least an appropriate act of charity. In contrast, the person who yields to an offer, something generally advantageous, has no claim to sympathy.⁹⁸ The reason the yielding to threats, but not offers, is excusable may also be tied to the idea that society has failed the one threatened. Society seeks to protect persons from unlawful threats. Having itself failed to protect the target of the threat from the threat, society should not, as a matter of equity, punish the person for yielding to the threat. This equitable theory of the duress defense might be a strange form of payback, but it has some intuitive resonance.⁹⁹ If it is correct, it constitutes a more persuasive refutation of the Argument from Duress than those previously offered.

⁹⁸ While enticements to crime are legally prohibited, they are not considered a wrong against the person solicited, but a wrong against the would-be victim of the solicited crimes. The target of a solicitation, whether accepted or not, cannot bring a tort claim against the person making the offer alleging that he was harmed by the offer.

⁹⁹ See Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CALIF. L. REV. 871, 884-86 (1976) (justifying the right of unlawful aggression along these lines).

c. Culpability and Character Development

Here is a second possible argument why those who are entrapped, whether privately or governmentally, are not morally blameworthy and so should not be punished.

Argument from Limited Resources

As a general matter, the criminal law excuses individuals who have made a reasonable effort to comply with the law. For example, persons who engage in prohibited conduct because they have made a reasonable mistake of fact are not culpable. An actor will not be criminally liable for shooting a person if the actor reasonably believed that he was either shooting a scarecrow or reasonably believed the victim was unlawfully attacking him with lethal force. The law does not demand omniscience. Likewise, the law does not demand “old heads on young shoulders”¹⁰⁰ and will take the youth of a defendant into account when judging the reasonableness of his conduct. Finally, the law does not demand heroism. Under the duress defense, a person will not be held liable for committing a crime because of undue pressure.

The reason for granting these excuses turns on the fact that we bear some responsibility for developing our characters and abilities. Choosing the type of person we will be is not as easy as choosing an action of a specific occasion. Nevertheless, as we go through life, we make innumerable micro-decisions concerning how we will develop our characters and abilities. Excuses reflect the law’s recognition that even if we make all the appropriate decisions regarding development, we will still be limited, fallible and imperfect. This is so if only because there must be some trade-offs among virtues. There are many virtues worth developing: prudence, self-discipline, courage, tolerance, sensitivity, judgment, loyalty, etc. Not all can be developed to the maximum extent. The opportunity cost of reading an inspiring biography of Ghandi may be foregoing a training session for a marathon run, a morning at church, or time with one’s children. The greater development of some virtues some will result in lesser development of others. Once we have made the correct decision concerning the degree to develop various virtues, we should not be blamed for the resultant limitation of other virtues

In light of this theory of excuses, those who yield to offers of the type necessary to establish the entrapment defense—those strong enough either to induce the nondisposed (under the subjective version) or to overcome the resistance of a law-abiding citizen (under the objective version)—should be considered blameless. Persons cannot be expected to develop more than a reasonable degree of resistance to temptation. In particular, expending too much effort at developing this virtue might result in the development of a character that was stodgy, stoic, distant, or lacking in appreciation of the world’s offerings. One cannot be blamed for yielding to temptation where one has done all that reasonably should be done to steel one’s character. While the decision to accept the enticement may be wrong,

¹⁰⁰ Director of Public Prosecutions v. Camplin, House of Lords, 2 W.L.R. 679, 685 (1978).

the lifestyle decisions that produced it may be right. Appropriate action at this more abstract level of decision-making excuses the actor's conduct.

This argument, though attractive in theory, likely goes too far. Doubtless we must take responsibility for developing our characters,¹⁰¹ or at least failing to change our character flaws,¹⁰² and, through no fault of our own, some virtues will be less well developed than they might have been had more effort been made. Nevertheless, if relative to a given situation they are deficient, we cannot disown the deficiency on the ground we did our best to develop our characters given what we had to work with. We cannot blame our bad choices on our characters because, for better or worse, we *are* our characters.¹⁰³ There is no characterless metaphysical ego that we can identify ourselves with in order to distance ourselves from our character. To assert so would be equivalent to claiming that "you" could have been born to different parents at a completely different time and place. Character, as much as parents and circumstances of birth, is constitutive of self-identity. This conceptual fact has moral implications. Just as you cannot legitimately blame your mother for not bearing "you" ten years later with a different father, regardless of the objective fault of her decision, so you cannot blame your character for your decisions regardless of the objective fault of your character. From the fact that we, as mortals, possess limited virtue only follows that we, as mortals, must sometimes be blameworthy for the wrongful acts that manifest this limit.

This view of character underlies much of the criminal law. For example, there is no rotten social background defense.¹⁰⁴ Lack of social

¹⁰¹ See ARISTOTLE, *NICOMACHEAN ETHICS*, bk.III, ch.5., translated in *THE BASIC WORKS OF ARISTOTLE* (Richard McKeon ed., 1941) (discussing a person's power to develop virtues or vices and so at least partial responsibility for character); see also TERENCE IRWIN, *ARISTOTLE'S FIRST PRINCIPLES* § 182, at 344 (1988) (interpreting this chapter of Aristotle); Kyron Huigens, *Nietzsche and Aretaic Legal Theory*, 24 *CARDOZO L. REV.* 563, 575 (2003); Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 *UCLA L. REV.* 1511 (1992).

¹⁰² See ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 396 (1981) (arguing that even if a person may sometimes not be blamed for acquiring a character defect, he may be blamed for failing to cure it).

¹⁰³ See Michael S. Moore, *Choice, Character, and Excuse*, 7 *SOC. PHIL. & POL.* 29, 50 (1990) (making point in context of claim that persons not responsible for character because of causal determinism).

¹⁰⁴ See *United States v. Alexander*, 471 F.2d 923, 959 (D.C. Cir. 1973) (upholding instruction that jury should not be concerned with whether the defendant had "a rotten social background"). See generally Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 *LAW & INEQ.* 9 (1985).

resources does not excuse bad character. The best of us may become corrupted if unlucky enough. Indeed, the corruption of the innocent by the environment must happen all the time, unless we believe that some people are intrinsically or congenitally evil. This is one aspect of moral luck. We take responsibility for who we are, even if it is not our fault for who we are.¹⁰⁵

An analogy from the law of homicide also may be illuminating. The criminal law imposes liability for negligently causing the death of another person. The existence of criminal negligence is determined by considering whether a reasonable person in the defendant's situation would have been aware of the risk associated with her conduct and acted otherwise.¹⁰⁶ If so, it will not do to argue that instances of negligence are inevitable even in reasonable persons. For example, if Jake becomes distracted while driving at the end of a cross-country drive and hits and kills a pedestrian whom he would have seen and avoided but for his criminal negligence, Jake cannot avoid liability by showing that he drove exceptionally well the rest of the trip, pointing out that even good drivers like him occasionally suffer lapses of attention. Even reasonable people act unreasonably at times, and when they (we) do, they (we) must pay the price. The yielding to temptation of a nondisposed person to an excessive temptation is analogous to the rare, but inevitable, negligent act of even a person who is reasonably attentive and careful. The only difference is the type of mens rea—intent rather than mere negligence. Being nondisposed, i.e., reasonably resistant to temptation, may bar liability, but it does not do so because being nondisposed implies being nonculpable in a particular instance. As a matter of morality, a person should not accept any enticement to wrongdoing, even if a person with a reasonably resistant character would accept. Accordingly, the Lack of Resources Argument for excusing some prima facie culpable choices will not fly.

To summarize the argument thus far: Retributivism offers a possible, but ultimately unpersuasive, justification for the exoneration of those governmentally entrapped. Though those entrapped rarely cause social harm, they have committed wrongdoing, at least in the sense they have acted with the intent to engage in acts believed harmful to the community. Furthermore, they have acted culpably. Unlike those who have responded to threats and may invoke the duress defense, they have responded to

¹⁰⁵ Both Bernard Williams and Thomas Nagel refer to the fact that some aspects of our character are beyond our control as "constitutive luck." See Bernard Williams, *Moral Luck*, in *MORAL LUCK: PHILOSOPHICAL PAPERS* 20 (1981); Thomas Nagel, *Moral Luck*, in *MORTAL QUESTIONS* 28 (1979).

¹⁰⁶ See MODEL PENAL CODE §§ 2.02(2)(d), 210.4; LAFAVE, *supra* note 5, § 15.4.

circumstances that society was not generally obliged to shield them from and are owed no dispensation. Furthermore, though they might not be blamed for failing to develop character qualities to resist offers of the type needed to qualify for the defense, they may be blamed for failing to resist the offer itself. Accordingly, if the entrapment defense is to be justified, it must be so on nonretributivist grounds.

B. ENTRAPMENT AND UTILITARIANISM

This section considers whether the entrapment defense is justified from a utilitarian perspective. According to utilitarianism, the correct act is the one that maximizes the good.¹⁰⁷ The good may be measured in terms of happiness, pleasure, utility, wealth, or welfare, depending on the brand of utilitarianism.¹⁰⁸ Maximizing social welfare requires considering the costs and benefits of a course of action. With respect to punishment, reducing crime is the principal benefit offered. Punishment reduces crimes by incapacitating, rehabilitating, and deterring those who would commit crimes, as well as communicating and inculcating norms of appropriate conduct.¹⁰⁹ The costs associated with punishment include the costs of apprehending, adjudicating and incarcerating those to be punished, as well as any lost productivity of those punished and the adverse effects on family and friends. From a utilitarian perspective, then, punishing the entrapped is justified only if these benefits, as a general matter, outweigh these costs.

Approaching entrapment from a utilitarian perspective is not novel. Professor Allen, for example, takes a law and economics perspective on the entrapment defense.¹¹⁰ Allen focuses on the subjective version of the defense. For Allen, the central issue to be examined in evaluating the defense is the meaning of "predisposition." Allen believes that virtually everybody has some propensity to crime because everybody has a price. If a person's price is met, his propensity will manifest itself in action.¹¹¹ The only way to give the term "predisposition" content so that it indicates a

¹⁰⁷ JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 12-13 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1789).

¹⁰⁸ See Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 69 *FORD. L. REV.* 2087, 2108 (2001).

¹⁰⁹ See FREDRICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* 46 (1999).

¹¹⁰ See Allen, *supra* note 61. Law-and-economics is an outgrowth of utilitarianism applied to legal studies. See RICHARD A. POSNER, *THE ECONOMIC ANALYSIS OF LAW* (5th ed. 1998).

¹¹¹ Allen, *supra* note 61, at 413.

meaningful distinction among those with some propensity to crime, Allen believes, is to define "predisposition" in terms of a propensity to respond to a particular price.¹¹² But what should that price be? Allen thinks that currently prevailing price in the market of criminal behavior is the appropriate price to use when defining "predisposition" for the purpose of the entrapment doctrine.¹¹³ The market price of criminal behavior is how much a person in the real world would have to be paid to commit a crime. Allen here adopts the economist's expansive view of payments, which can include emotional as well as financial or psychological gain. The price to commit the crime of distribution of narcotics may be the street price of the narcotics, the receipt or peer approval, sexual satisfaction, discharge of a moral debt, or career advancement.¹¹⁴

From Allen's perspective, the exoneration of those falling within the entrapment defense is easily explained. If a nondisposed person commits a crime, it means that he has accepted an offer that is above the market level. Accepting such an offer, however, tells nothing about the likelihood that a person would respond to lesser inducements, such as those at or below the market level, which the person might realistically encounter.¹¹⁵ Therefore, there is no reason to believe that those who are entrapped are in need of rehabilitation, incapacitation, or deterrence.

1. Utilitarianism and the Problem of the Private Entrapment

Allen's argument for the acquittal of the entrapped applies with equal force to cases of government and private entrapment. A defendant's accepting of an above-market criminal solicitation does not indicate a real-world propensity to crime whether the offer was made to a government agent or private citizen.¹¹⁶ Allen, however, is not embarrassed by this implication of his theory. According to Allen, cases of private entrapment will be highly unlikely. To overpay the market price is, in Allen's view, tantamount to a charitable donation.¹¹⁷ In any event, to the extent that Allen's theory is inconsistent with positive law in recommending the

¹¹² *Id.*

¹¹³ *See id.* at 415 ("The most fruitful criterion of government inducements we have been able to identify to sort out those who have a plausible claim for exoneration is whether the inducements exceeded real world market rates . . .").

¹¹⁴ *See id.* (referring to both "financial and emotional" markets).

¹¹⁵ *See id.* at 415-16. Carlson similarly opines that "if the [defendant's] act was encouraged by the government its utility as a predictor of danger may reasonably be called into question." Carlson, *supra* note 72, at 1071.

¹¹⁶ Allen, *supra* note 61, at 420.

¹¹⁷ *Id.* at 421.

acquittal of a privately entrapped person, the theory may be construed as a normative one recommending the entrapment defense be expanded to shield even privately entrapped nondisposed individuals.

Allen's account of the entrapment defense is questionable. As discussed below, government entrapment would result in palpable benefits; the cost would not be prohibitive.

2. *The Benefits of Entrapment and Conviction*

Contrary to Allen's claims, there are benefits associated with convicting the entrapped. The weak point in Allen's analysis of entrapment is his discussion of deterrence. Theorists distinguish between general specific deterrence—the deterrence of the punished person who learns the hard way that crime does not pay—and general deterrence—the deterrence of the members of the general population who learn the lesson through observation of examples. Admittedly, little utility is achieved through deterring a nondisposed person who has been induced to crime on one occasion. Although engaging in criminal conduct once may undermine a person's habitual respect for law, being apprehended and charged, or at least caught in the act, should be an adverse enough experience to reinforce the norm against law breaking.

Allen, however, undervalues the general deterrence effects of punishing those who are entrapped, either governmentally or privately. First, the nondisposed become aware that even their normal level of resistance to temptation may not be enough to avoid criminal liability. Although it will be rare that a nondisposed person has occasion to engage in crime, it does happen. Consider the following case:

Russ is a 46-year-old state trooper who lives with his wife and daughter. While on duty, he is approached by Lucy, an undercover officer. Lucy is young, attractive, dressed in cut-off jeans and t-shirt. Eventually, the two start talking about "partying," and each admit to getting high. Russ tells her in general terms he has access to drugs. Over a period of a year, they meet a handful of times, Lucy requesting Russ obtain drugs for her, and Russ putting her off or telling her where she can get them herself. They kiss on occasion, and present themselves in public as a couple. Russ develops a romantic interest in Lucy. Russ suggests to Lucy that she move to his town and that he will pay half of the rent. Lucy continually chides Russ for not coming through with marijuana as he says he will. On one occasion, in response to her chiding, he buys \$10 worth of marijuana which they smoke together. On a later occasion he offers to obtain more, but does not. Russ is charged with unlawful delivery of marijuana and criminal conspiracy.¹¹⁸

¹¹⁸ Cf. *Commonwealth v. Thompson*, 484 A.2d 159 (Pa. Super. Ct. 1984) (recounting similar facts).

Russ would probably be considered nondisposed and be able to establish entrapment if Lucy worked for the police.¹¹⁹ Convicting Russ, regardless whether Lucy worked for the police, would plausibly deter other older, professional men who might identify with him. Seeing Russ taken to jail, they might think, "There but for the grace of God go I" and redouble their conviction not to become involved in drugs (or younger women for that matter).

Second, cases of governmental entrapment, the core controversial cases, may have a significant deterrence effect on the predisposed. Entrapping and convicting a nondisposed individual would send an enormously powerful message that government is aggressively enforcing a given prohibition. Consider, for example, the facts of *Jacobson v. United States*.¹²⁰ The defendant had purchased child pornography only after a lengthy and elaborate undercover government campaign of enticement.¹²¹ If he had been convicted, those disposed to purchase child pornography, as well as those disposed to produce it, would have reasonably inferred that no one is safe from being targeted by a government sting operation. The government's commitment to expending resources to fight child pornography would be dramatically and memorably demonstrated. Or, as Seidman has observed, "the few well-publicized cases of Arab sheiks who turned out to be FBI agents are likely to make members of Congress think twice before accepting a bribe."¹²² Indeed, the apparent irrationality of prosecuting even a person who presents little potential threat may attest to the government's retributivist commitment to punishing crime wherever and whenever it occurs.¹²³ The rationality of the government's engaging in an act which, considered discreetly, appears irrational, has been recognized in other contexts.¹²⁴

¹¹⁹ In fact, in *Thompson, see id.*, the issue of predisposition was not reached by the court because it applied the objective test. If the question whether Russ was predisposed had been considered, he likely would not have been found predisposed because of his long record of failing to deliver despite his promises.

¹²⁰ 503 U.S. 543 (1992).

¹²¹ See *supra* text accompanying note 8.

¹²² Seidman, *supra* note 58, at 142.

¹²³ See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. REV. 453, 454 (1997) (recognizing the utilitarian value of retributivist policy in criminal law).

¹²⁴ See THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 18-19 (1960) (applying considerations of strategic irrationality to nuclear deterrence); see also Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191, 1195 n.9 (1994) ("If one wants to be a rational deterrer of others' threatening acts, one may have to become irrational.").

3. *The Costs of Convicting the Entrapped*

As discussed earlier, utilitarians must consider the costs, as well as the benefits, of any proposed course of conduct. Conviction of the governmentally entrapped obviously imposes costs on society, such as court costs and the cost of incarceration. Many of these costs, however, are no different from the ones associated with the conviction of the privately entrapped. These costs are not thought to be prohibitively high, as demonstrated by the fact that the privately entrapped may not invoke the entrapment defense. Are there costs unique to cases of government entrapment which might justify the defense? This section addresses arguments that there is a significant difference between those privately and those governmentally entrapped that justifies recognizing the entrapment defense for the latter.

The Model Penal Code justifies the entrapment defense based on the costs that government entrapment imposes on society. According to the Commentaries, probably the most important consideration supporting the defense is "the injury to the reputation of the law enforcement institutions that follows the employment of methods shocking to the moral standards of the community."¹²⁵ Since the methods of the police, not the defendant's subjective mental state, are the focus of the inquiry, the Commentaries support the objective version of the defense.¹²⁶ Those entrapped should be acquitted, the Commentaries imply, not because they have a moral right to be, but because acquitting them will remove the incentive of police to engage in conduct that harms their own reputation. If people do not respect the police, criminality will be fostered in the long run, contrary to the aims of traditional utilitarianism. The entrapment defense is therefore similar to the Fourth Amendment exclusionary rule. Both are doctrines serving as prophylactic devices to inhibit future police conduct.¹²⁷

The Model Penal Code's theory rests on a number of problematic assumptions. First is the assumption that entrapment harms the reputation

¹²⁵ MODEL PENAL CODE AND COMMENTARIES, *supra* note 6, § 2.13 cmt. at 406. See also *Sherman v. United States*, 356 U.S. 369, 380 (1958) ("transcending value at stake" is "public confidence in the fair and honorable administration of justice") (Frankfurter, J., concurring).

¹²⁶ MODEL PENAL CODE § 2.13 (defense available when a government agent induces a person to engage in criminal conduct through "methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons other than those ready to commit it").

¹²⁷ See *United States v. Calandra*, 414 U.S. 338, 348 (1974) (characterizing exclusionary rule as judicially created remedy designed to safeguard rights through deterrence, rather than a personal constitutional right of the party aggrieved).

of the police. The Commentaries state, "In spite of the defendant's moral guilt in committing the crime, he will enlist much popular sympathy if he has acted because of shocking police inducement."¹²⁸ This is empirically doubtful. As the drafters admit elsewhere, the public has never shown great sympathy for those who are morally guilty.¹²⁹ This general truth has been accepted in the context of the Fourth Amendment. The Fourth Amendment right against unreasonable searches and seizures is primarily enforced through the exclusionary rule,¹³⁰ rather than civil damage actions. The public, it is thought, would be strongly averse to recognizing the claims of a criminal and would have much greater sympathies for the police.¹³¹ In the context of the Fourth Amendment, the police misconduct is starker because a legally recognized interest—the interest in privacy—is violated. In contrast, there is no right, constitutional or statutory, against being entrapped. It is difficult to think that a substantial segment of the public would lose respect for the police for apprehending a person who voluntarily purchased child pornography or dealt in drugs. This is especially true in those cases under the objective version where the defendant was predisposed to the crimes. In cases of nondisposed defendants, the most common reaction, as suggested earlier, would be an increased wariness and resolve to avoid such situations where one might be entrapped.

In any event, when considering the effects of entrapment on crime control, the question is not how governmental entrapment would be viewed by the majority of citizens who have little propensity to commit crime regardless of their respect or lack of respect for the police, but by those on the borderline of criminality. That group likely already has little respect for the police. Compared with police conduct such as brutality and racism which affects and disaffects them regularly, entrapment of the nondisposed likely would have little marginal impact on this group's respect for the law.

¹²⁸ MODEL PENAL CODE AND COMMENTARIES, *supra* note 6, § 2.13 cmt. at 407.

¹²⁹ In its discussion of the entrapment defense, the Commentaries explain why the court, rather than a jury, should determine whether the requirements of defense are met: "[T]he rights of persons accused are little understood or respected in the community at large. Juries are apt to give great latitude to the police, at least in relation to an otherwise guilty defendant." *Id.* at 418.

¹³⁰ See U.S. CONST. amend. IV; *Weeks v. United States*, 232 U.S. 383 (1914) (establishing the inadmissibility of evidence seized in violation of the Fourth Amendment).

¹³¹ See *Office of Legal Policy, U.S. Dep't of Justice, Truth in Criminal Justice Series, Report No. 2, Report to the Attorney General on the Search and Seizure Exclusionary Rule* (1986), reprinted in 22 U. MICH. J.L. REFORM 573, 627 (1989) (identifying juries' sympathy with police, not criminals, as a basis of failure to enforce the Fourth amendment through civil actions).

This analysis is bolstered by the conduct of the police themselves. It seems highly implausible that the police would engage in entrapment if it had the effect of harming their reputation. The police have a strong incentive and ability to monitor the public's perception of them and a strong incentive to act in ways to protect their reputation. It can reasonably be inferred from the existence of entrapment that the police—the group with the most at stake—do not consider it injurious to their reputation. It is particularly dubious that the police would engage in entrapment if it led to greater lawlessness because it undermined the public's respect for law. In contrast, checks are needed on the types of unlawful searches police engage in because those clearly prevent crime. The cost to privacy incurred by unlawful police searches is an externality of the conduct. Cost in terms of reputation and lawlessness are internalized even without an entrapment doctrine. Accordingly, these costs do not provide a viable explanation of the defense.

4. *The Net Value of Entrapment*

Quantifying the net effects of any proposed rule of law has always been the bane of utilitarianism. Still, as a broad proposition, it is hard to doubt that punishing more will deter more. Such an effect is particularly important in the prevention of so-called victimless crimes, such as narcotics trafficking and prostitution, where traditional law-enforcement techniques are less effective. Any convictions, even those of the nondisposed, advance the cause of general deterrence. Furthermore, the police have an inherent interest in not expending resources where there will be no net reduction in crimes. It may therefore be presumed that the police would only engage in entrapment where they had reason to believe significant deterrence would result.¹³² From the perspective of utilitarianism, punishing the entrapped is presumptively defensible.

Admittedly, there may be a segment among the nondisposed who react as the Model Penal Code Commentaries predict and view the practice of government entrapment as "unsavory." This would not be surprising given the prevalence of the entrapment defense. However, a satisfactory theory of entrapment cannot rest on this public perception. Where a practice is inappropriate, the public often senses this on an intuitive level. The task of a theory of entrapment is to articulate a valid basis for this intuition. Thus,

¹³² See Seidman, *supra* note 58, at 144 ("[T]o the extent that entrapment doctrine rests on efficiency grounds, one would expect the police themselves to be motivated to use scarce resources in a manner that maximizes the number of criminals apprehended.").

the story of the Model Penal Code that governmental entrapment is viewed by (at least some of) the public as unsavory is likely correct. However, it cannot be the whole story of entrapment.

C. ENTRAPMENT AND CIVIL RIGHTS

The civil rights theory of entrapment is a prophylactic theory. According to this theory, there is nothing objectionable in theory about the government's entrapping a person; in the typical case, entrapment acts as a general deterrent of would-be criminals at an acceptable cost and in a manner consistent with desert-based constraints on punishment. Proponents of the civil rights theory of entrapment, however, assert that entrapment carries the potential for significant abuse. It has been claimed that "[p]ermitt[ing] conviction of nondisposed persons who have been led astray by police may . . . have a chilling effect upon exercise of political freedoms"¹³³ and that "use of *agents provocateurs* to obtain evidence against individuals by inducing and participating in criminal acts is a feared tool of government oppression."¹³⁴ Entrapment, it is charged, might be used against those the government disagrees with, undermining the basic civil right of participation in the political process. Furthermore, there is no practical way to eliminate this possibility of political targeting short of establishing an entrapment defense applicable to all governmentally entrapped. Thus, the defense is arguably needed as a prophylactic to eliminate the acceptable risk of the government's turning political enemies into criminals.

As a theory of the historical basis for the entrapment defense, the civil rights theory may seem attractive. The entrapment defense is "virtually unique to the criminal jurisprudence of the United States."¹³⁵ Perhaps its recognition in the United States is related to this country's unique tradition of respect for civil rights and protection of the political process. The framers of the Constitution were clearly concerned about the government's power to make people into criminals. The purpose of the Bill of Attainder and the Ex Post Facto clauses was to make sure this power was not abused.¹³⁶ Bills of attainder and ex post facto laws are objectionable

¹³³ Park, *supra* note 14, at 243; see also MODEL PENAL CODE AND COMMENTARIES, *supra* note 6, § 2.13 cmt. at 406 (observing entrapment "can easily be employed as the expression of personal malice on the part of a police officer").

¹³⁴ Carlson, *supra* note 72, at 1012. Carlson also opines absent the entrapment defense, "the government may attempt to induce nearly anyone, exercising easily corruptible discretion in choosing targets, without respect for the principle of nondiscretionary law enforcement . . ." *Id.* at 1089.

¹³⁵ FLETCHER, *supra* note 12, at 541.

¹³⁶ See Akhil Reed Amar, *The Supreme Court 1999 Term Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 101 (2000) (noting that singling out known persons

because they make liability depend on facts—identity and past acts—that a person has no reasonable chance to avoid. The use of inducements powerful enough to qualify as entrapment accomplishes the same objectionable result through executive, as opposed to legislative, action. The entrapment defense thus might be thought to have grown out of the same political tradition that produced the Bill of Attainder and Ex Post Facto clauses.¹³⁷ Furthermore, unlike government entrapment, private entrapment does not implicate political process concerns. In contrast to government entrapment, the potential for one group of private citizens to entrap members of an opposing group is counterbalanced by the latter group's equal ability. Thus, the civil rights theory of entrapment provides a solution to the question why government, but not private entrapment, is a defense.

Two forceful objections may be advanced against the civil rights theory of entrapment. The first objection is that the potential for abuse of entrapment is more theoretical rather than practical. There is no record of entrapment's having been employed as a weapon against those the government disfavors.¹³⁸ Although public figures who are caught in government sting operations commonly cry that they have been targeted by their political enemies, such claims rarely have merit. For example, in ABSCAM, probably the most notorious example of government agents ensnaring political figures, duped middlemen who volunteered names of politicians they thought might be open to dealings with "Arab sheiks."¹³⁹ The targets of the investigation were selected based on this information

for hostile treatment is the obvious concern of the Ex Post Facto and Bill of Attainder clauses.).

¹³⁷ This historical hypothesis, however, is not supported by the case law. The seminal Supreme Court entrapment cases, *see supra* note 4, contain not a hint of the theory that concern for civil rights and political process underlies the entrapment defense. In contrast, the Supreme Court has given at least passing acknowledgment to the view that the purpose of the Fourth Amendment's protection of privacy is to ensure the integrity of the political system. *See Smith v. Maryland*, 442 U.S. 735, 751 (1979) (Marshall, J., dissenting) (noting in connection to challenge to government's recording of telephone numbers that "individuals, including members of unpopular political organizations or journalists with confidential sources, may legitimately wish to avoid disclosure of their personal contacts.").

¹³⁸ *See Park, supra* note 14, at 237-38 ("Studies of police behavior have turned up evidence of corruption, brutality, and violations of constitutional rights, but have not found comparable evidence of entrapment.").

¹³⁹ *See* S. REP. NO. 97-682, at 16 (1982); *see also* Irvin B. Nathan, *ABSCAM: A Fair and Effective Method for Fighting Public Corruption*, in *ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT* 1, 5-9 (Gerald M. Caplan, ed., 1983) (describing operation of ABSCAM investigation). ABSCAM gets its name from Abdul Enterprises, the fictitious corporation created by the FBI for its sting operation.

rather than political affiliation. Former Mayor of Washington, D.C., Marion Barry was charged with three felony and ten misdemeanor counts of violating federal drug laws, and was convicted on one of the latter after he smoked crack cocaine with a police agent.¹⁴⁰ Although Barry alleged that he was unfairly targeted by a police investigation,¹⁴¹ evidence of his frequent drug use, perjury, and corruption made him an appropriate subject of investigation.¹⁴² Of course the absence of cases of entrapment for political purposes may be explained by the existence of the entrapment defense, which would render such tactics void. However, the existence of a legal doctrine annulling the effects of police conduct rarely is completely effective in eliminating the conduct where the police are motivated to engage in the conduct. This should not be surprising. Where the only sanction applied to the government is to return it to the status quo ante, there is no reason for the government not to engage in the conduct based on the hope that conduct will not be correctly identified and redressed. The legion of cases identifying violations of the Fourth Amendment despite the exclusionary rule is ample proof of this theory. Lack of politically-motivated entrapment cases likely reflects lack of interest in using entrapment in that manner, as much as the belief that in some cases, the defense would preclude conviction.

Nor should it be surprising that the government lacks interest in using entrapment as a political tool. In practice, the government has more effective ways of oppressing its opponents if it wished to. If convictions are desired, the government has the simple expedient of planting evidence and engaging in perjury. Of course in theory, if there were no entrapment defense, entrapment would have the advantage for the government of guaranteeing conviction. Evidence planting and perjury may be detected. Yet entrapment requires a high degree of subtlety and precision. Too weak an enticement and it will not be attractive to a nondisposed target; too high will cause the target to be suspicious. Evidence planting and perjury is a much more practical alternative and so undermine a prosecution. As the recent events in Tulia, Texas demonstrate, it is the technique of choice for obtaining convictions of members of disfavored groups.¹⁴³

¹⁴⁰ B. Drummond Ayres, Jr., *Barry Guilty on One Drug Count, Mistrial is Declared on Felonies*, N.Y. TIMES, Aug. 11, 1990, at A1.

¹⁴¹ B. Drummond Ayers, Jr., *Calling His Conviction Part of a Racist Plot, Barry Starts a Six-Month Prison Term*, N.Y. TIMES, Oct. 27, 1991, at A16.

¹⁴² See Stuart Taylor, Jr., *The Barry Sting*, in THE AMERICAN LAWYER 3, 3 (Oct. 1990) (describing Barry as a person “[a]ny good prosecutor would have wanted to nail”).

¹⁴³ In Tulia, Texas, Thomas Coleman, a lone undercover police officer with little background in law enforcement, engineered the arrest of forty-six African-Americans on drug charges, resulting in the thirty-eight convictions with prison sentences ranging from

Furthermore, the incarceration of political opponents is often an unnecessary goal for a government seeking to suppress opposition. The entrapment defense does not create a legal right not to be entrapped. Rather, it only creates a defense to criminal liability where the police have exercised their legal power to entrap. The defense therefore removes the incentive to entrap only from government agents who seek to convict their enemies. Those in government who wish to suppress opposition, however, may be able to achieve their goal without the conviction of their target. A politician's career may easily be destroyed by the publication that he yielded to a temptation, even if he was not predisposed to so act and even if it is a temptation that a law-abiding citizen might accept.¹⁴⁴ As argued earlier, yielding to temptation should be regarded as moral failure, even if it is a common failure.¹⁴⁵ This point is sharper when applied to public figures and leaders, who are inevitably held to a higher standard by the average citizen. Finally, in its bag of dirty tricks, the government has techniques such as harassment, infiltration, monitoring, and smear campaigns. These have a proven track-record.¹⁴⁶ With strategies such as these, who needs entrapment?

twenty to ninety years. In the eleven cases that went to trial, all the defendants were found guilty based entirely on Coleman's perjured testimony. Lee Hockstader, *Texas to Toss Drug Convictions Against 38 People; Prosecutor Concedes 'Travesty of Justice'*, WASH. POST, Apr. 2, 2003, at A3.

¹⁴⁴ From 1968 to 1978, thirty-eight percent of United States congressmen charged with bribery or moral violations failed to be re-elected. John G. Peters & Susan Welch, *The Effects of Charges of Corruption on Voting Behavior in Congressional Elections*, 74 AM. POL. SCI. REV. 697, 702 (1980). Marion Barry was acquitted of most of the charges based on his smoking crack cocaine with a government agent. Despite his success in court, Barry did not seek to be re-elected as the mayor of Washington D.C. See Taylor, *supra* note 137.

¹⁴⁵ See *supra* Parts III.A.2.b-c.

¹⁴⁶ Martin Luther King, Jr. is perhaps the best-know example of a target of government initiated smear campaign. Through the use of wire taps, bugs, and informants, the Federal Bureau of Investigation likely compiled over a million pages on the activities of King and his associates. The F.B.I. fabricated tapes, disseminated scandalous disinformation, intimidated supporters, and disrupted fund raising activities. See GERALD D. MCKNIGHT, *THE LAST CRUSADE: MARTIN LUTHER KING, JR., THE FBI, AND THE POOR PEOPLE'S CAMPAIGN* 5-6, 26-27 (1998). The F.B.I. also conducted "counterintelligence" activities designed to destroy the reputations and careers of those suspected of being communists. See KENNETH O'REILLY, *HOOVER AND THE UN-AMERICANS: THE FBI, HUAC, AND THE RED MENACE* 200-14 (1983) (noting that the FBI's COINTELPRO program carried out over 2000 disruptive actions). For examples of partisan political intelligence gathered by wiretaps and other means during the Nixon Administration, the reader is referred to the Senate's *Intelligence Activities and the Rights of Americans: Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, S. REP. NO. 94-755, at bk. II, 235-37 (1976).

Second, it is doubtful that the entrapment defense is needed to guard against abusive use of persuasive techniques. The Equal Protection Clause forbids prosecutors from using race or religion as selection criterion when determining whom to prosecute.¹⁴⁷ Prosecuting a person based on his opposition to government policies or political views also is unconstitutional, violating either the First Amendment or the Equal Protection Clause.¹⁴⁸ There is no reason to distinguish the constitutionality of selective prosecution on one hand and selective investigation/entrapment on the other.¹⁴⁹ If established, it should constitute a Fourteenth Amendment violation. Admittedly, it is difficult to satisfy the proof requirements in analogous cases of selective prosecution.¹⁵⁰ It might therefore be argued that the selective prosecution defense is an insufficient response to the threat of selective entrapment. The difficulty in establishing the selective prosecution defense, however, just reflects the considered judgment that, without a sufficient showing, it is too costly to society to require the prosecution to respond to charges that the decision to prosecute was improperly motivated.¹⁵¹ The entrapment defense is not a reasonable solution to the problem of improperly motivated targeting of a person because it permits even those who were not improperly targeted to assert the claim if there is some evidence the requirements of the defense are satisfied. A more sensible solution to the problem of improperly motivated investigation would be to lower the standard of proof in selection. The entrapment defense, construed as a device to prevent the possibility of politically motivated entrapment, therefore cannot be justified.

¹⁴⁷ *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979); *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

¹⁴⁸ *See, e.g., United States v. Crowthers*, 456 F.2d 1074, 1080 (4th Cir. 1972) (permitting discovery on claim by war protestors that prosecution was intended to inhibit the expression of viewpoint). *See also* WAYNE LAFAVE ET AL., *CRIMINAL PROCEDURE* 682 (3d ed. 2000) (noting that political activity or membership in a political party has been held an impermissible ground for selection for prosecution).

¹⁴⁹ *See Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (racially motivated enforcement of facially neutral law violates Equal Protection Clause).

¹⁵⁰ In *Armstrong*, 517 U.S. at 458, the Supreme Court considered the claims of Black defendant indicted for selling cocaine that they were selectively prosecuted based on their race. Denying their claims, the Court held before being entitled to discovery on the issue, a defendant must produce credible evidence that similarly situated defendants of other races could have been prosecuted. *Id.* at 470. Furthermore, assuming this threshold can be met, in order to prevail on a selective prosecution claim, defendant must establish by clear and convincing evidence that the prosecution had a discriminatory effect and purpose. *Id.* at 465.

¹⁵¹ *See id.* at 468 (identifying costs in refuting claim of selective prosecution as diversion of prosecutorial resources and possible of disclosure of prosecutorial strategy).

D. ENTRAPMENT AND AUTONOMY

The civil rights theory of entrapment was based on the notion that a potentially useful tool of law enforcement was fatally flawed by the possibility of misuse. In contrast, the personal autonomy theory maintains that entrapment is intrinsically wrong. According to this theory, the core wrong of entrapment cannot be explained in terms of violating the traditional limitations retributivism imposes on the government's power to punish. Instead appeal must be made to a distinct and independent norm: the principle of personal autonomy. Because entrapment violates this principle, an entrapped person should not be criminally liable.

Professor Carlson advocates the personal autonomy theory of entrapment. Carlson believes that entrapment can be understood in light of the criminal law's act requirement. Common wisdom has it that an "act" is required for criminal liability.¹⁵² Carlson agrees with Herbert Packer that the act requirement protects the "'capacity of the individual human being to live his life in a reasonable freedom from socially imposed external constraints' by defining a point of no return beyond which [such] external constraints may be imposed."¹⁵³ In this manner, "[t]he act requirement shields 'people's thoughts and emotions . . . personality patterns and character structures' from government scrutiny, and protects personal autonomy."¹⁵⁴ In other words, requiring an act for liability ensures that persons will have a safe harbor—thoughts alone and most omissions—which they may occupy with complete security and freedom from government interference.

The same respect for personal autonomy, Carlson believes, underlies the entrapment defense. Carlson writes: "When the government encourages crime, it directly and prematurely infringes on the realm that the act requirement is designed to protect from government intervention; the government uses its power to affect an individual's choices and behavior before the individual has done anything to warrant an invasion of his autonomy."¹⁵⁵ On this basis, Carlson concludes:

¹⁵² See LAFAVE, *supra* note 5, § 3.2(b). Here, "acts," include breaches of legal duties, though action or omission, regardless of whether a bodily movement is involved. *Id.*; but cf. Douglas Husak, *Does Criminal Liability Require an Act?*, in *PHILOSOPHY AND THE CRIMINAL LAW: PRINCIPLE AND CRITIQUE* 91 (Antony Duff ed., 1998) (challenging common wisdom that the criminal law contains a nonvacuous act requirement).

¹⁵³ Carlson, *supra* note 72, at 1083 (quoting HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 75 (1968)).

¹⁵⁴ *Id.* at 1083.

¹⁵⁵ *Id.* at 1084 (footnotes omitted).

The most objectionable feature of encouragement . . . is that the government, by using encouragement, is no longer in a neutral position vis-à-vis its citizens and the choice that they make. Rather than giving an individual full freedom to comply with the law, and thereby respecting the individual's autonomy and ability to avoid crime, by offering the encouragement the government tries . . . to persuade the individual to violate the law. By manipulating the array of choices facing the individual, encouragement saps the individual's ability to resist crime and to avoid punishment. . . . [Encouragement] circumvents [the act requirement's] restraint on the state's intrusive powers.¹⁵⁶

Carlson identifies a disquieting aspect to entrapment. The point might be made by an analogy to a defendant's creating the conditions of his own defense. As a general principle of criminal law, a defense is unavailable if the actor has created the conditions necessary for establishing it in order to avoid liability.¹⁵⁷ Although this principle is not recognized in its general form, many defenses include qualifications consistent with this principle. For example, intoxication may be a defense to certain crimes, but not when it is self-induced for the purpose of avoiding liability.¹⁵⁸ Likewise, defense of duress is unavailable when the actor has unreasonably exposed himself to the situation of duress.¹⁵⁹ These instances show that the law will not let its prohibitions be circumvented by strategic conduct by a defendant who has created the condition of his own defense. In this light, entrapment might be characterized as the government's creating the conditions of the defendant's liability. Rather than waiting for the person to autonomously breach the rules, the government acts strategically in violation of established limitations of personal autonomy. As Carlson writes: "[E]ncouragement is clearly intended to circumvent, not honor, the act requirement's core principle that a criminal sanction will be imposed only in response to past criminal behavior."¹⁶⁰

The critical issue in evaluating Carlson's personal autonomy theory of the entrapment defense is whether entrapment is an illegitimate impingement upon autonomy and individual freedom. There is, of course, no general right to be free of government influence until the point where one commits a criminal act. Arguably the primary purpose of the criminal law is to establish an incentive system to strongly influence the choices people make and to guide their conduct. Deterring a person from an immoral act is surely a legitimate interference with an individual's decision-

¹⁵⁶ *Id.* at 1086-87 (footnote omitted).

¹⁵⁷ See Paul Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985).

¹⁵⁸ See LAFAYE, *supra* note 5, § 9.5(g) at 480-81; MODEL PENAL CODE § 2.08 (1962).

¹⁵⁹ See LAFAYE, *supra* note 5, § 9.7(b) nn. 39-40; MODEL PENAL CODE § 2.09(2).

¹⁶⁰ Carlson, *supra* note 72, at 1053.

making. Furthermore, the government may sometimes encourage people to engage in conduct that it believes is not in their objective interest. The government may encourage people to spend their limited resources on lottery tickets or to enlist in the armed forces where they risk death on the battle field. More to the point, the government may take measures that push people toward crime. The government may incarcerate a person knowing that his exposure to other criminals will increase the chance of his recidivism,¹⁶¹ or adopt economic policies that predictably increase the unemployment rate, reducing people to poverty that “drives” them into crime. The government may even directly offer strong incentives to engage in a specific criminal act to those who are predisposed (under the subjective version of entrapment) or, at least, lesser incentives (under the objective version) to criminal conduct. These measures are permissible, even though the government is very often not, in Carlson’s language, in “neutral position vis-à-vis its citizens and the choice that they make.” In these cases, the government typically hopes the bait will be taken. Acceptable practices, therefore display this “most objectionable feature.”

Given that some impingement upon personal autonomy is acceptable, the question is whether it is plausible to assert that entrapment should be a defense because of the degree of interference. Is the line that separates permissible from impermissible impingements from the perspective of personal autonomy roughly the line between entrapment and inducements not amounting to entrapment? It is difficult to answer this question because Carlson’s discussion sheds little light on the line between permissible and impermissible impingements on personal autonomy. One obvious place to draw the line with respect to governmental influence of decision-making is at the point where the actor’s decision to engage in crime ceases to be autonomous—where the actor is not to blame for the decision. The government’s brainwashing of a person to commit a crime would undoubtedly be an improper interference with autonomy, justifying exoneration to deter future brainwashing. As argued previously, however, a person who is entrapped is still fully culpable for his conduct.¹⁶² Being enticed to crime by an appealing offer is not analogous to brainwashing precisely because we believe a person should be able to resist such pressures. This culpability implies that decision to engage in criminal

¹⁶¹ See Joan Petersilia, et al., *Prison Versus Probation in California—Implications for Crime and Offender Recidivism*, 150 PRACTICING L. INST. 105 (1989) (1,022-person study prepared for the Department of Justice indicating that, compared to probation, imprisonment increases the rate of recidivism among felons).

¹⁶² See *supra* Part II.A.2.

conduct in light of the inducement was autonomous. Contrary to Carlson's claim, even entrapped persons have "full freedom to comply with the law." Given culpability, there is little room to argue that an entrapped person's autonomy was improperly interfered with.

Finally, Carlson's theory only offers a partial solution to the problem of why the entrapment defense does not apply to cases of private entrapment. An explanation might begin with the following reasonable point: recognizing the defense when a government agent engages in what amounts to improper interference is justified because the defense eliminates the incentive to interfere; in contrast, because few private persons who convince others to engage in crime do it so that the other may be arrested and convicted, recognizing the defense in cases of private entrapment would have no deterrent effect on private entrappers. Nevertheless, if private entrapment, like government entrapment, constituted an improper interference with a person's decision-making (that is, a wrong to the person entrapped), one would expect either criminal liability over and above accomplice liability or civil liability in the form of a tort claim in order to deter such private activity. Neither exists. There is neither a crime nor tort of entrapping (over and above accomplice liability). Without further elaboration, Carlson's theory does not account for the government actor aspect of the entrapment defense.

IV. ENTRAPMENT AS UNFAIRNESS

This section of the Article presents a new theory of entrapment. Like the civil rights theory and the personal autonomy theory of the previous section, the theory of this section asserts that punishment is not necessarily justified if it merely satisfies the requirements of traditional utilitarianism and retributivism. Rather, according to this theory, in addition to meeting these requirements, punishment must be imposed fairly—a condition elaborated and applied to entrapment below.

A. UNFAIRNESS EXPLAINED

As a conceptual matter, justice is a principle for guiding, or a standard for assessing, for the conduct of persons or institutions. It has been described as the first goal of social institutions.¹⁶³ Justice purports to trump, or at least constrain, the government's pursuit of other ends, such as

¹⁶³ See JOHN RAWLS, *A THEORY OF JUSTICE* 3 (1971); see also *THE FEDERALIST* NO. 51, at 358 (James Madison) (Benjamin Fletcher Wright ed., 1961) ("Justice is the end of government. It is the end of civil society.").

advancing the general welfare.¹⁶⁴ Despite its significance, justice is not a unitary concept. Norms of corrective and commutative justice, for example, are based on different intuitions about what is morally appropriate and apply in different, although sometimes overlapping, contexts.¹⁶⁵ Justice has many branches, or aspects.

In the context of the criminal law, justice is usually thought of in terms of retributive justice.¹⁶⁶ Although there are many conceptions of retributivism, they all justify harsh treatment of an actor as an intrinsically morally appropriate or permissible response to actor's wrongful conduct toward his victim.¹⁶⁷ For punishment to be just, there must be the appropriate relation between the person to be punished and the actual or potential victim. For this reason, retributive justice might fall within the general category of "interactive justice."¹⁶⁸ Some theorists also assert that the concept of punishment involves a third entity: an authority to establish the rules and to exact the punishment.¹⁶⁹ With respect to criminal justice, that entity would be the government. In any case, whether retributive justice is thought of as involving a two-place relation of wrongdoer and victim, or a three-place relation among wrongdoer, victim and government,

¹⁶⁴ See RAWLS, *supra* note 163, at 3-4; MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 3, 14 (1982).

¹⁶⁵ See GEORGE P. FLETCHER, *BASIC CONCEPTS OF LEGAL THOUGHT* 80 (1996) (describing corrective justice as responding to disturbances of initially just distributions and commutative as responding to inequality that might result in exchanging goods). The basic categories of justice can be traced back to the works of Aristotle. See Aristotle, *Nicomachean Ethics*, in *THE BASIC WORKS OF ARISTOTLE* bk. V, chs. 2-5 (Richard McKeon ed., Sir W. David Ross trans. 1941).

¹⁶⁶ See, e.g., MOORE, *supra* note 69, Part I (arguing criminal law best understood as embodying retributive justice norm); Dolinko, *supra* note 68 (claiming that retributivism "has enjoyed in recent years so vigorous a revival that it can fairly be regarded today as the leading philosophical justification of the institution of criminal punishment").

¹⁶⁷ Some offenses, such as prostitution, are sometimes described as "victimless." Upon further inspection, however, victimless crimes are thought to actually or potentially interfere with an interest of society, such as the interest in public morals or health and safety. It is difficult to imagine an actual offense that cannot be justified along these lines. Furthermore, social interests may be analyzed in terms of the interests of the person, actual or future, that comprise society. See generally JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* (1984) (following John Stuart Mill in asserting that criminal prohibitions are justified only insofar as they protect legitimate interests of others).

¹⁶⁸ See Richard W. Wright, *The Principles of Justice*, 75 *NOTRE DAME L. REV.* 1859, 1883 (2000) (dividing forms of justice into "interactive" and "distributive").

¹⁶⁹ See H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, in *PUNISHMENT AND RESPONSIBILITY* 5 (1968).

retributive justice focuses narrowly on a relatively limited number of entities as they interact on a particular occasion.

In contrast, distributive justice has a much wider focus. Distributive justice relates to how benefits and burdens attendant to membership or participation in a collective group, such as a community or nation, should be allocated across that group.¹⁷⁰ An example of a theory of distributive justice is Rawls's difference principle. According to this principle, a social system will be deemed just to the extent its institutions maximize the welfare of the least well-off members of society, that is, raises the tail end of the wealth distribution curve.¹⁷¹ This principle is a principle of distributive justice because what one person is due under it is in part a function of what others are due under it. Whether it is distributively just to levy a tax on the wealthy or to grant the wealthy a tax cut depends on the effect of the levy or cut on the poor. In contrast, the principle that social institutions should impose burdens that reflect the wrongful conduct of each member of the society would be a principle that sounds in retributive justice. Burdens for every person are defined independently. Tort claims have been evaluated against principles of distributive justice.¹⁷² With limited exceptions,¹⁷³ however, considerations of distributive justice have not been thought relevant in the context of criminal justice. Fairness, as explained below, is an aspect of distributive justice.

The meaning of fairness is not well-settled. It is a term acknowledged to have many senses.¹⁷⁴ Legal doctrines of fair use, fair play, fair warning, and fair dealing, for example, all rest on slightly different sets of policy

¹⁷⁰ See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 166-67 (1980).

¹⁷¹ See RAWLS, *supra* note 163, at 75-80.

¹⁷² See JULES L. COLEMAN, *RISKS AND WRONGS* 350-54 (1992) (justifying corrective aspects of tort law in part as preserving second-best distributions of resources); Alan L. Calnan, *Distributive and Corrective Justice Issues in Contemporary Tobacco Litigation*, 27 *SW. U. L. REV.* 577, 613-22, 633-41 (1998) (considering whether regulatory controls and tort actions against tobacco companies were consistent with resource allocations based on risk and need); see also FINNIS, *supra* note 170, at 180-81 (discussing distributive justice norms in personal injury litigation).

¹⁷³ See Alon Harel & Gideon Parchomovsky, *On Hate and Equality*, 109 *YALE L.J.* 507, 509 (1999) (arguing that bias crimes unfairly distribute cost of crime occurrence on minorities); Sherry F. Colb, *Crying Murder When A Woman Refuses a C-Section: The Disturbing Implications of a Utah Prosecution*, FindLaw's Legal Commentary, at <http://writ.news.findlaw.com/colb/20040316.html> (Mar. 16, 2004) (arguing that traditional duty-to-aid rules, if applied to women carrying fetuses, unfairly burden women).

¹⁷⁴ See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 *HARV. L. REV.* 961, 1004 n.84 (2001) (noting "fairness has many different meanings, some of which stand apart from, and are opposed to, individuals' well-being"); Philip Giordano, *Invoking Law as a Basis for Identity in Cyberspace*, 1998 *STAN. TECH. L. REV.* 1, ¶ 69 (1998) ("Fairness' has many meanings in the real world.").

concerns and moral considerations. Because it has no rigid definition, it is not unfair to press “fairness” into service again. For the purpose of this Article, “fairness” shall be defined by reference to the following principle:

Fairness Principle

A government practice imposing burdens in order to achieve a general social good is fair only if the burdens are imposed pursuant to a policy to allocate such burdens generally among those expected to benefit from the practice.

A government practice is unfair, and hence presumptively improper, if it violates this principle.¹⁷⁵ The principle here is stated with a degree of abstractness to permit different conceptions of what allocation policies are fair. For example, under one conception of fairness, fairness would require highways—a general social good—to be paid for by a fixed tax on all drivers; under another conception, by tolls, a method that would result in some drivers paying more than others. The fairness principle is obviously a matter of distributive justice because it concerns the assigning of burdens associated with the advancement of the common good. The burden shouldered by one person will be in part a function of the burden shouldered by others.

The notion of fairness defined above should have an air of familiarity to it. Fairness is the principle that underlies much of the Takings Clause jurisprudence. The Takings Clause forbids the government from taking private property for public use unless just compensation is paid. Thus, for example, absent payment, the government may not simply seize the property of a single landowner and convert that property into a public park. A court might explain that one person should not have to bear the burden of providing a benefit to be enjoyed by all.¹⁷⁶ Rather than singling out one person to bear the entire burden, the government could have caused the

¹⁷⁵ The “presumptively” qualifier is added to allow for the operation of competing moral principles. An unfair practice might be acceptable if, for example, it was necessary to avoid cataclysmic consequences. See *supra* text accompanying notes 95-96.

¹⁷⁶ See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (stating that one of the principal purposes of the Takings Clause is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”); see also *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 836 n.4 (1987) (noting that if the plaintiffs “were being singled out to bear the burden of California’s attempt to remedy these problems . . . the State’s action, even if otherwise valid, might violate . . . the incorporated Takings Clause . . .”); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 605 (2d ed. 1988) (“[T]he just compensation requirement [of the Takings Clause] appears to express a limit on government’s power to isolate particular individuals for sacrifice to the general good.”).

burden to be shared more widely through a tax increase to pay compensation to the evicted landowner. Accordingly, under the terminology of this Article, the government's appropriation of the property without compensation would be regarded as unfair. Likewise, regulatory restrictions not consistent with fairness seem objectionable. If the government were to require owners of only Fords to equip their cars with special pollution control devices, Ford owners could legitimately complain that the cost of improved air quality was unfairly, hence improperly, being placed on their shoulders. Bills of Attainder, which imposed criminal sanctions on specifically identified individuals, are prohibited by the Constitution.¹⁷⁷ A Bill of Attainder would be paradigmatically unfair because the burden it imposes is not generally allocated under any interpretation of "fairness."¹⁷⁸

B. ENTRAPMENT AND UNFAIRNESS

The principle of fairness readily applies to matters of crime prevention. To take a well-known example, even facing an unsolved series of high-profile crimes, the government should not frame an innocent person. Such an action might be justified on utilitarian grounds because it would convince would-be criminals of the effectiveness of the police, dissipate public anxiety, and deter vigilantism.¹⁷⁹ The result has traditionally been explained on the ground that framing an innocent person offends retributive justice.¹⁸⁰ The impropriety of framing an innocent person, however, may also be explained by reference to the principle of fairness. "Why," the framed person might ask, "should I be the one selected to be framed? I am just one of the much larger group of persons who have no culpable connection to the crime. Why has the burden been placed on my

¹⁷⁷ U.S. CONST. art. I, § 9, cl. 3, § 10, cl. 1.

¹⁷⁸ See Akhil Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 221 (1996) (noting that bills of attainder offend, *inter alia*, rule of law notions of generality).

¹⁷⁹ It has been disputed whether utilitarianism would justify the framing of a innocent person in the real world. See, e.g., Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and the Punishment of the Innocent* 32 RUTGERS L.J. 115, 132-46 (2000); John Rawls, *Two Concepts of Rules*, 44 PHIL. REV. 3, 11-12 (1955). Nevertheless, there is no doubt that as a conceptual matter utilitarianism might justify such action.

¹⁸⁰ See H.J. McCloskey, *A Non-Utilitarian Approach to Punishment*, 9 INQUIRY 249 (1965); H.J. McCloskey, *An Examination of Restricted Utilitarianism*, 66 PHIL. REV. 466 (1957). Retributivism requires the appropriate relation between subject of punishment and an actual or potential victim in order for punishment to be justified. The punishment of a person who has been framed by the government would be considered unjust because the requisite causal or culpable relation between the defendant and the victim is absent. See *supra* text accompanying note 71.

shoulders?" The moral arbitrariness of the police's swooping down on an innocent person and stigmatizing him as a criminal is a second reason why the practice is so intuitively disagreeable.

Furthermore, there are intuitively objectionable matters relating to crime prevention that cannot be explained by appeal to retributive justice. Consider a case where all police activities are funded by a special tax. If the local government arbitrarily selected a single member of the community and imposed the entire tax burden on him, this action would not offend principles of retributive justice. Imposing the disproportionate tax would not be a matter of punishment without culpability, and contrary to retributivism, because it would not be a matter of punishment in the first place. Punishment typically, perhaps inherently, involves stigmatization or condemnation.¹⁸¹ Although it is disagreeable to be taxed, it is neither stigmatizing nor condemnatory. Culpability, which is a requisite for punishment, is not a requirement for taxation. Yet such a tax would violate the fairness principle. A tax to fund the police is most appropriately levied on the community as a whole because all in the community potentially benefit from the protection provided by the police.¹⁸² Although the need to raise the tax revenue may be great, there is no reason why the burden could not be spread more generally through an increase in income or sales taxes. To impose the whole tax on one person would be to make him shoulder a disproportionate part of the burden of subsidizing police activities and make him the target of arbitrary government action. The same analysis would apply if the government seized one person's house and converted it to the local police station without paying just compensation to the house owner. This would be a clear violation of the Takings Clause.

The analysis of entrapment from the perspective of fairness flows quickly from these examples. Expressed baldly, entrapment is analogous to the random selection of a person to be taxed to support police activities or the appropriation of a person's home to serve as a police station. The analogy has four aspects to it. First, entrapping a person produces a social benefit enjoyed by all—increased crime prevention. As discussed

¹⁸¹ See JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 98 (1970) ("[P]unishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority . . . or of those 'in whose name' the punishment is inflicted."); Joel Feinberg, *The Expressive Function of Punishment*, 49 *MONIST* 397 (1965), reprinted in *DOING AND DESERVING* 95, 100-01 (1970).

¹⁸² The tax might be applied progressively on the reasonable assumption that progressive taxation is consistent with distributive justice.

previously, the entrapping of a person may serve to deter generally those would-be criminals in doubt of the government's resources, commitment and capability to root out potential evil. The conviction of an entrapped person thus advances the general social goal of crime prevention like an increase in police patrols funded by a disproportionate tax or a better outfitted police station located in a citizen's former home.

Second, the nature of the burden imposed is similar. Being targeted for entrapment is not in itself stigmatizing. A person who is entrapped is, under the subjective version of entrapment, by definition a law-abiding citizen, or at least, under the objective version, not necessarily a person ready and willing to commit a crime. Being targeted for entrapment is thus not akin to being punished. Accordingly, it is not something that requires culpability. Nevertheless, being targeted for entrapment is potentially burdensome because of the consequences. It is like being subjected to a tax or a taking that, while not punitive, is still oppressive. The only difference is that, rather than money or property, however, it is liberty that is being unjustly appropriated.

Third, those selected for entrapment are arbitrary members of a larger group. Often it will just be the play of chance that will cause a person to be targeted for entrapment. There may be many with attenuated connections to crime who could be lured into it. It will just be bad luck that a police informant who has an incentive to entrap happens to know the individual, or that among the many susceptible individuals known by the informant, he chooses to pursue one in particular. Likewise, it may be pure coincidence that an undercover police officer posing as a prostitute approaches one driver stopped at a stop sign to solicit money for sex rather than another driver.¹⁸³ There may be numerous persons who would be willing to buy \$870 worth of food stamps for \$140. When one such person is selected to be induced to crime because he happens to be running an ongoing yard sale, the selection is essentially arbitrary.¹⁸⁴ In *Jacobson*, the Supreme Court downplayed the defendant's initial ordering of a lawful publication of nude youths, finding that it only indicated "a generic inclination to act within a broad range, not all of which is criminal."¹⁸⁵ Many people have such a generic inclination. In this light, *Jacobson's* selection as a target for encouragement was without justification. As a general matter, because the entrapment defense typically arises in cases of persons who are not

¹⁸³ See *Ferge v. State*, 764 N.E.2d 268, 271-72 (Ind. Ct. App. 2002) (finding entrapment as a matter of law on similar facts).

¹⁸⁴ See *People v. Boabley*, 493 N.E.2d 369 (Ill. App. 3d Dist. 1986) (finding entrapment as a matter of law under similar facts).

¹⁸⁵ See *Jacobson v. United States*, 112 S. Ct. 1535, 1541 (1992).

predisposed to crime,¹⁸⁶ their selection from the general populace of nondisposed persons entails arbitrariness.

Fourth, there will usually be more equitable alternatives available for spreading the burden of increasing deterrence. An increase in general deterrence can usually be achieved through increasing patrol or other traditional reactive law enforcement activities. These increased activities can be funded through general taxation of the population. Thus, rather than being concentrated on an arbitrarily chosen member of the populace, the populace as a whole will bear the burden necessary to achieve a generally lower rate of crime. Alternatively, and perhaps more controversially, increased deterrence could also be achieved in a second more equitable way: launching an exponentially more aggressive and wide-spread campaign of entrapment. In such a hypothetical world, the complete exoneration of those entrapped would not be justified under the unfairness theory because the burden would not have been disproportionately imposed. This conclusion, however, is not tantamount to the approval of entrapment. Because a wide-spread campaign of entrapment would entail the increased likelihood of being entrapped, the penalties for the offenses induced could be decreased proportionately without a net loss deterrence. Those entrapped, while not being able to claim they were treated unfairly, would enjoy at least a substantial mitigation of their penalty. A *defacto* entrapment defense would exist.

Entrapment as unfairness may be understood in light of the philosopher Gerald Dworkin's views on entrapment. Dworkin sees in entrapment a type of conceptual incoherence.¹⁸⁷ On one hand, the law is a system of sanctions providing citizens with reasons to obey it; on the other hand, agents of the government are providing reasons to breach it. Nevertheless, Dworkin recognizes that:

It is not always incoherent to invite someone to do the very act which one is trying to get them to avoid doing. Consider a parent trying to teach a child not to touch a stove. In the case of a particularly recalcitrant child the most effect technique might be to encourage the child to touch the stove in one's presence. The slight pain now will teach the child to avoid the greater pain later.¹⁸⁸

Dworkin then remarks:

¹⁸⁶ Lack of predisposition is a formal requirement of the subsection version of the defense, *see supra* note 16, and a common feature of cases satisfying the objective version., *see supra* text accompanying note 65.

¹⁸⁷ *See* Gerald Dworkin, *The Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime*, 4 *LAW AND PHIL.* 17, 32 (1985).

¹⁸⁸ *Id.* at 32-33.

But this is surely not the model being used by the police. They are interested in deterring others or in punishing guilty people. The end being served is not that of the person being invited to commit the crime.¹⁸⁹

Dworkin's claim that entrapment is conceptually incoherent thus reduces to the point that the end entrapment serves is that of the general welfare, not the person entrapped. This objection has a Kantian ring to it: one person is being used for the benefit of others rather than being treated an end himself.¹⁹⁰ But it is implausible to maintain that one should never be used for the benefit of others. In any progressive tax system that funds general services, the wealthy are taxed for the good of the poor. More to the point, we might imagine a school for recalcitrant children where it is common that one child is selected and invited to engage in the forbidden behavior (taunting an aggressive animal, eating too much ice cream, neglecting to study for an examination) so that a lesson might be learned by his peers. The practices of such a school would not be more objectionable than Dworkin's example of the child encouraged to touch the hot stove for his own benefit. Over time, the burden of being made an example might be broadly shared by the children of the school. Thus, over the long run, those who enjoy the benefit of a system would share the costs of it. Despite the fact that persons are being used as means to an end (at least if every instance is considered discretely), a school's adopting of such a practice is not intuitively objectionable.¹⁹¹ To the extent that burdens are fairly shared, using a person for the benefit of others seems acceptable. The problem with entrapment is exactly that this sharing of burdens does not occur.

In sum, government entrapment defense is offensive because it places significant burdens on a small, arbitrary segment of the law-abiding public. This result is inherent in the practice. The segment entrapped must be small because no society can function if most of its members are incarcerated at any given point. As discussed earlier, it is conceivable that a society might

¹⁸⁹ *Id.* at 32.

¹⁹⁰ IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 429 (Lewis White Beck trans., Bobbs-Merrill Company 1959) (describing the categorical imperative as the requirement "to treat humanity, whether in your own person or in that of another, always as an end and never as a means only").

¹⁹¹ I do not view it as morally relevant that in Dworkin's example, the "sanction," a finger burn, is the natural consequence of the act sought to be deterred and, in the case of entrapment, the sanction is imposed by the authority eliciting the conduct. For a sanction to be effective a deterrent, it must be understood as an automatic consequence of the prohibited act, rather than conditioned upon its utility as a sanction. See THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 18-19 (Harvard University 1960) (discussing precommitment as a rational strategy in case of conflict); see also Larry Alexander, *The Deceptive Nature of Rules* 142 U. PA. L. REV. 1191, 1195 (1994) ("If one wants to be a rational deterrent of others' threatening acts, one may have to become irrational.").

widely apply some extremely minor sanctions to individuals who are entrapped. Such a society would be analogous to the school imagined above and would be consistent with fairness. But this society would amount to one with a functional entrapment defense because no significant penalties would be imposed in cases of entrapment. Furthermore, there could not be a campaign of entrapment against all potential perpetrators of an offense, such as cannibalism, where that class is very limited. Seeking to induce all such potential perpetrators might not be impractical. It would, however, not constitute entrapment because entrapment generally involves tempting those who are not predisposed with inducements that would be likely to persuade the average citizen.¹⁹² A small set of potential offenders would likely be found predisposed or susceptible to relatively mild inducements. Accordingly, in any plausible society lacking a functional entrapment defense, entrapment, as currently employed, will violate the fairness principle.

C. POSSIBLE OBJECTIONS

This section of the Article considers possible objections to the unfairness theory of entrapment. As discussed, entrapment offends the fairness principle. The general form of the objections to the unfairness theory of entrapment is that the fairness principle is itself implausible. According to these objections, intuitively acceptable practices violate it. Therefore the principle must be rejected, at least in its unqualified form.

1. Unfairness and the Problem of Private Entrapment

This Article began by asking why should the law distinguish government and private entrapment. Any theory of entrapment that seeks to explain the existing contours of the defense (as opposed to radically reforming the defense), should show why convicting the privately entrapped is acceptable, as well as showing why the convicting of the governmentally entrapped is not.

The fairness principle, it might be charged, goes too far because under it, the conviction of privately entrapped persons is unfair, and hence unjust. Imagine this case:

Susan has no criminal record. She works at a fast food restaurant. She takes hydrocodone, a pain medication for a physical ailment. Her supervisor knows of her use. The supervisor claims to have a friend who is very sick and needs the medication. When Susan offers to give the friend her medication, the supervisor

¹⁹² See *supra* discussion concluding Part II.

suggests Susan needs the money and she convinces her to accept a payment of \$5.00 per tablet. Susan sells the friend some medication, and after continued pressuring from her supervisor does it again. She is arrested and charged with sale of the hydrocodone.

If Susan's supervisor is a police informant and the "friend" a detective, Susan would likely be able to establish entrapment as a matter of law.¹⁹³ Susan could validly complain that she had been treated unfairly. After all, there are likely many people in like circumstances who are similarly susceptible to inducements Susan was subjected to. To convict her but not others would be to place a disproportionate share on the burden of deterring drug trafficking on her shoulders. Would Susan have a similarly valid complaint of being treated unfairly if the supervisor and friend were not government agents? From her perspective of the defendant it "feels" the same whether he has been entrapped by the government or another citizen. In both cases, she has been arbitrarily selected from an equally susceptible group and, as a result, faces a significant loss of freedom.

It is morally significant that, in cases of private entrapment, the government is not responsible for the arbitrary selection. Rather than arbitrarily selecting an individual, the government in convicting a privately entrapped person is merely acting on the general principle that all persons who have culpably committed wrong should be punished. The fairness principle, in this respect, is like many common principles of morality and law that distinguish between:

- (1) Acting in an improper manner M which results in a harm H being imposed on person P, and,
- (2) Imposing a harm H on person P as a result of another's acting in an improper manner M.

The former is *prima facie* impermissible; the latter permissible.¹⁹⁴ For example, it would be unjust for a landlord to enter P's apartment without permission, burn the money P was planning on using to pay the rent, and then evict P for failure to pay rent. However, if a third party destroyed P's money, the landlord may treat P like any other indigent person and justly evict P for failure to pay rent. Because the landlord in the latter

¹⁹³ See *Dial v. Florida*, 799 So. 2d 407 (Fla. Dist. Ct. App. 2001) (finding entrapment as a matter of law under similar facts).

¹⁹⁴ Principles such as the one above are described as deontological or, perhaps more accurately, agent-relative. See Michael Moore, *Victims and Retribution, A Reply to Professor Fletcher*, 3 *BUFF. CRIM. L. REV.* 65, 70 (1999) (discussing concepts). A common example is the obligation to keep promises. We are morally obliged to keep the promises we make. However, we are not obliged to help others keep their promises, nor alleviate the consequences of promises others have broken. In this way deontological/agent-relative principles differ from consequentialist/maximizing principles such as utilitarianism.

hypothetical did not cause P to become indigent, the landlord may abide by his general practice of evicting those who fail to pay their rent. Under principles of corrective justice, the landlord is responsible for correcting only the results of his own wrongdoing, for example, by excusing P from paying one month's rent. Likewise, to take an example from positive law, the Equal Protection Clause prohibits the government from denying a person employment based on her race. If a person, however, has suffered private employment discrimination resulting in her lacking significant job experience, the government can refuse to hire the person based on her lack of experience.¹⁹⁵ From the perspective of the wronged individual, it feels the same: objectionable treatment (theft, discrimination) resulting in a relative disadvantage (eviction, unemployment). The difference is whether the entity in a position to alleviate the disadvantage or cause an additional one is the entity responsible for the initial mistreatment. Only where that is the case can the person validly complain about the entity's action. Because in cases of private entrapment the government was not responsible for the arbitrary selection, it may follow its general policy of punishing culpable wrongdoers.

Taxation provides a particularly germane example. It is unfair and improper for the government to select a person to be taxed based on a morally arbitrary characteristic, for example, being seated at the end of a bar in a local nightclub. However, it is neither unfair nor improper for the government to impose a tax based on a morally relevant characteristic, such as net income. This is true even if it is morally arbitrary that a person happens to possess that characteristic, for example, by winning a large promotion prize based on a random drawing. Likewise, it is unfair and improper for the government to target for entrapment the person who happens to be seated at the end of bar in a local nightclub, while it is acceptable to prosecute and convict someone who others have arbitrarily selected, perhaps through location at a nightclub, to have the morally relevant characteristic of criminal culpability, for example through private entrapment. The following chart compares the previous three hypotheticals:

¹⁹⁵ A plaintiff must show a discriminatory purpose to establish an Equal Protection claim. See *Washington v. Davis*, 426 U.S. 229, 240 (1976) (announcing "the basic equal protection principle that invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose"). In *Davis*, the Supreme Court permitted the use of a police department application test that blacks failed at a disproportionate rate because of their weak language skills. The fact that this low skill level was likely the effect of attending substandard segregated schools, and hence, reinforced the effects of past discrimination, did not influence the Court. See *TRIBE*, *supra* note 176, at 1511 (criticizing decision).

Table 1
Comparison of Hypotheticals

Entity Arbitrarily Selecting	Criterion of Selection	Entity Imposing Burden	Burden Imposed	Moral Status of Imposing Burden
Private Party	Lottery Number	Government	Tax	Fair
Private Party	Location at Nightclub	Government	Incarceration	Fair
Government	Location at Nightclub	Government	Incarceration	Unfair

As indicated, imposing a disadvantage is only unfair when the entity imposing it is responsible for the initial arbitrary selection.

2. Fairness and General Law Enforcement Activity

A second possible objection to the fairness theory of entrapment is that the fairness principle, if valid, would bar much police activity and many convictions that are both clearly legal and intuitively acceptable.

Consider, for example, the arbitrary decision of the police to patrol one among many neighborhoods one evening, resulting in the apprehension of a burglar. Undoubtedly, there are many other burglars equally deserving of arrest and conviction who are not arrested. Can the apprehended burglar argue that convicting him would be unfair? After all, although he has not been personally selected from all other burglars to be apprehended, the bottom line is the same. Because standard reactive crime detection practices are not completely effective, he, as one among many situated burglars, will have to bear a disproportionate burden of advancing general deterrence. Likewise, consider encouragement of criminal conduct by the police that does not rise to the level of entrapment. It is well established that there is no entrapment if a police officer simply approaches a person—even without probable cause—and offers to buy a quantity of illegal

narcotics at their street price.¹⁹⁶ Such police conduct, to be distinguished from inducements powerful enough to support a finding of entrapment, may be called "opportunity providing." Yet, so goes the objection, would not convicting the defendant who has seized the opportunity provided for crime violate the fairness principle? After all, there are undoubtedly many drug dealers who would have accepted the offer and he has been forced to bear a burden which should be more fairly distributed.

In response to the objection based on standard reactive crime detection practices, such as patrolling one among many areas, it may be replied that these practices do not create a disproportionate burden on those they apprehend to the extent that entrapment does. The proportion of criminals who are currently apprehended through standard police practices is approximately twenty percent.¹⁹⁷ In contrast, the proportion of nondisposed person who are entrapped is vanishingly small. Like most moral principles, unfairness is a matter of degree. To be entrapped is many times more unfair than to be apprehended through standard reactive crime detection practices.

A second distinction may be drawn between entrapment and standard reactive crime detection practices which, as discussed above, fail to spread the burden of crime control across the population of all criminals. The fairness principle is a principle of justice. Justice, however, need not be conceived in absolutist terms as a value carrying infinite weight. With due deference to Kant,¹⁹⁸ to refuse to commit the slightest injustice in order, say, to alleviate the suffering of mankind, bespeaks a lack of perspective. While principles of justice may be reformulated and qualified to preserve their formal superiority over considerations of welfare, some degree of accommodation with other values, however that accommodation is conceptualized, must be admitted. Entrapping and convicting a high percentage of the population through a widespread campaign of entrapment

¹⁹⁶ Under the subjective version of entrapment, if the offer is accepted, the defendant's predisposition will be established. *See* *State v. Duncan*, 330 S.E.2d 481, 487-88 (N.C. Ct. App. 1985) ("Predisposition may be shown by a defendant's ready compliance, acquiesce in, or willingness to cooperate in the criminal plan where the police merely afforded the defendant an opportunity to commit the crime."). Under the objective version, the conduct of the police would not be found sufficient to induce a law-abiding citizen to sell drugs. *See* *People v. Crawford*, 372 N.W.2d 550, 553 (Mich. Ct. App. 1985) ("[M]ere requests to sell contraband, even repeated request, are not conduct likely, when objectively considered, to induce the commission of the crime by a person not ready and willing to commit it.").

¹⁹⁷ *See* FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 2001, 220 (2002).

¹⁹⁸ *Cf.* IMMANUEL KANT, METAPHYSICAL FIRST PRINCIPLES OF THE DOCTRINE OF RIGHT, in *THE METAPHYSICS OF MORALS* 141 (Mary Gregor trans., Cambridge University Press 1991) ("[I]f justice goes, there is no longer any value in men's living on the earth.").

(without any mitigation of penalties), while eliminating unfairness, is not a realistic option for society. Likewise, abandoning standard reactive crime detection practices, such as police patrols, while also eliminating unfairness, is not a realistic option for society. Such practices are necessary if crime is to be deterred and society protected.¹⁹⁹ In contrast, entrapment, although a cost-effective means of preventing crime,²⁰⁰ is not a necessary means. Other techniques more consistent with the demands of fairness, including undercover investigation and encouragement not amounting to entrapment, will suffice to achieve a reasonable level of crime control. Thus, not only is the injustice of entrapment relatively severe, it is also relatively lacking in justification.

A third, and perhaps the most important, distinction between entrapment and other law-enforcement activities, such as opportunity providing, is that entrapment is a practice that is unfair by design. Both entrapment and other police enforcement activities distribute burdens disproportionately to varying degrees. The goal of other forms of police activity, however, is to be as effective and far-ranging as possible. Although it may be arbitrary which streets the police choose to patrol, and so which burglars are arrested, the police would patrol all the streets and apprehend all burglars if they could. Burglars both deserve to be punished and their incarceration would prevent them from committing further crimes. Likewise, while it may be arbitrary which drug dealers are caught by a police sting operation that provides opportunities for crime, such operations are designed to apprehend as many drug dealers as possible and it is regrettable that through such operations not all drug dealers are apprehended. For this reason, the unfairness of these practices is analogous to the unjustness of other aspects of the criminal justice system. Persons who are not liable are sometimes convicted. Although convicting such persons is unjust, it is merely a regrettable, and not a fatal, feature of the criminal adjudication system. In contrast, an adjudication system *designed* with the purpose of convicting those not liable would be deeply disturbing.

¹⁹⁹ Indeed, it could be argued that the Fairness Principle requires that penal sanctions at the heart of our criminal justice system never be imposed. After all, such sanctions will fall almost entirely on criminals, while criminals and the innocent alike benefit from the increased security resulting from operation of the criminal justice system. A partial reply to this argument is that the innocent, through taxes and self-restraint, bear some of the costs associated with our criminal justice system. A more complete reply, however, recognizes that the Fairness principle does not preclude the operation of other principles of justice. Punishing the innocent would violate norms of retributive justice. The Fairness Principle is satisfied if among those beneficiaries otherwise eligible to be burdened, the burden is distributed equally.

²⁰⁰ See *supra* Parts III.B.2-4.

The moral distinction between wrongs done by design and those that are merely unavoidable side effects has a long and respected lineage.²⁰¹

Like an adjudication system designed to convict the innocent, the practice of entrapment breaches the norms of justice by design. Even if it were possible to entrap widely enough to spread equitably the burden of conviction among the nondisposed, the state would not want to engage in such a practice. As discussed, entrapment is justified as a general deterrent. It is thus inherently a matter of using the few as examples for the many. If many were to be entrapped through a wide-spread and ongoing campaign of entrapment, it would demonstrate entrapment's failure to deter, rather than its success. A program to deter those already incarcerated would make no sense. The practice of entrapment therefore will be designed to burden the few among many who would benefit from it, thereby offending the principle of fairness.

3. *Specific Counter-Examples*

This section looks at specific police activities that may seem to violate the fairness principle. The validity of these activities may appear to imply that the fairness principle is overbroad and should be rejected. This implication is illusory.

a. Speeding

It is a common practice for the police to stop only a very small percentage of motorists who drive above the speed limit. General deterrence is the principal justification of the practice. As with entrapment, the police do not desire to ticket all speeders. Can those stopped complain of unfairness?

Two considerations mitigate the *prima facie* unfairness of the practice. First, police in fact do not usually swoop down on an arbitrary speeder and ticket her. Common experience indicates that the great majority of highway

²⁰¹ This distinction is frequently referred to as the Doctrine of Double Effect, and usually traced back to Thomas Aquinas. See THOMAS AQUINAS, *SUMMA THEOLOGICA*, II-II, Q.64, art. 7 (Marcus Lefebure ed., Blackfriars 1975). A typical example illustrating the operation of this doctrine is that it is morally permissible to bomb a munitions factory to hasten the end of a war, even if it is foreseen that civilians will inevitably be killed by errant bombs. It is not, however, morally permissible to drop bombs on civilians in order to hasten the end of the war by breaking the morale of the enemy. See Gerald Dworkin, *Intention, Foreseeability, and Responsibility*, in *RESPONSIBILITY, CHARACTER AND THE EMOTIONS* 338, 339 (Ferdinand Schoeman ed., 1987); Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, 18 *PHIL. & PUB. AFF.*, 334, 334 n.3 (1989).

speeders exceed the speed limit by less than twenty-five percent. These drivers do not pose a substantial risk because their speed is relatively near the limit. Furthermore, because a substantial number of drivers drive in this range, each individual driver, traveling with the pace of traffic generally, is not increasing the risk nearly as much as if only a few exceeded the speed limit. In light of these facts, the common practice of patrol officers is to stop only those who speed “excessively.” Their choice is not arbitrary, but limited to a group, reckless speeders, whom the police would like to apprehend generally. In contrast, the police would not like to apprehend generally those persons targeted for entrapment. Second, the penalty associated with speeding violations is *de minimis* compared to the penal sanctions associated with the crimes the entrapment defense normally applies to. Any unfairness is mitigated proportionately. If the police randomly pulled over one among many drivers traveling 5-10 miles over the speed limit on a state highway and, as a result, significant penalties were imposed, the practice would become intuitively objectionable.

b. Tax Audits

Another example of a “random” law enforcement technique used primarily for deterrence is tax audits. Tax audits fall within the category of necessary evils, that is, cases where the practice serves some important social function and this function cannot be achieved through a means that spreads the burden more equitably. It is functionally impossible to inspect carefully the hundreds of millions of tax returns filed each year. Maintaining compliance with the income tax is an indispensable social goal. Although most persons undoubtedly now file their proper returns not based on the fear of being audited, but because of their commitment and belief in the legitimacy of the taxation scheme, wide-spread cheating would in time undermine the perceived legitimacy of the scheme. If that tipping point is ever reached, the income tax would have to be abandoned. Accordingly, in contrast to entrapment, some disproportional burdening of individuals is necessary.

c. High-Profile Prosecutions

Finally, the not uncommon prosecutorial practice of targeting high-profile or celebrity figures is consistent with the fairness principle. Prosecutors have brought charges against professional athletes, media personalities, and politicians in cases where they may not have proceeded

against members of the general public.²⁰² These decisions may be based on the notion that, in terms of deterrence, such prosecutions provide “a bigger bang for the buck.” A high-profile defendant might therefore claim that she has been unfairly targeted, arguing that because other arrestees would not have been prosecuted, or granted lighter sentences, she is being made to shoulder a disproportionate burden of the cost of crime prevention. This argument has an air of plausibility. Prosecutors sometimes deny the premise that they treat defendants based on their notoriety,²⁰³ likely concerned that otherwise the public may perceive them as acting unfairly. Targeting high-profile figures for prosecution, however, may be analogized to the progressive income tax. Requiring all who earn a high income to pay a high tax is arguably consistent with distributive justice because (a) there is a good reason why those who earn more should pay proportionately more, e.g., they can afford it, or they have benefited more from society; and (b) the policy is applied generally across all members of a given high income bracket. Likewise, targeting high-profile defendants can be justified based on a greater-deterrence rationale where such a policy is applied consistently to all high-profile defendants. As noted earlier, the fairness principle, like any principle of justice, may admit different interpretations consistent with its broad terms.²⁰⁴

Entrapment, however, may not be defended along these lines. As a rule, the police do not attempt to entrap all members of a given group, even

²⁰² See Vikram David Amar, *The Many Ways to Prove Discrimination*, 14 HASTINGS WOMEN'S L.J. 171, 178 n.13 (2003) (noting that the Securities and Exchange Commission uses high-profile prosecutions to ensure more general compliance); Michael A. Simons, *Prosecutorial Discretion and Prosecutorial Guidelines*, 75 N.Y.U. L. REV. 893, 954 n.281 (citing cases against sports figures brought because of their deterrence value); see also Harriet Chiang, *Starr Would Find It Difficult To Prove Perjury by Clinton*, S.F. CHRON., Sept. 18 1998, at A5 (discussing perjury investigation of Bill Clinton; noting “when someone is charged solely with perjury, it often involves a high-profile figure”); Mark Helm, *Ex-Prosecutors Say Clinton Held to Tougher Standard; Perjury Convictions Common, GOP Argues*, TIMES-PICAYUNE (New Orleans, La.) Dec. 10, 1998, at A10; Arianna Huffington, *O.J., Bill and the Perjury Plague*, N.Y. POST, July 21, 1998, at 25 (arguing to deter perjury “it is so critical that the nation’s two highest-profile alleged perjury cases—those of O.J. Simpson and Bill Clinton—are pursued to their respective ends”); Erin McClam, *Martha Stewart Guilty of All Counts*, CHATTANOOGA TIMES FREE PRESS (Tenn.) Mar. 6, 2004, at A1 (describing conviction of Martha Stewart; noting her “supporters claim she was being targeted because of her celebrity status”).

²⁰³ See REUTERS, *Colo. Prosecutor Mulls Charges Against Kobe Bryant*, (July 7, 2003) (“In deciding whether to file charges, the same standards apply to Mr. Bryant as apply in every other sexual assault case,” Hurlbert said. “I will treat this case just like I treat any other sex assault case.”).

²⁰⁴ See *supra* text accompanying note 99.

if the group is defined narrowly, in a manner analogous to “high income persons.” Consider the following, not atypical, case of entrapment.

*Ken is desperately in need of money. He approaches Rocky, a confidential police informant, for a loan. Rocky refuses, but convinces Ken, who has no history of drug use, to join a drug transaction. Ken and Rocky drive to a highway intersection where they meet Willy, an undercover police officer. Willy gives Ken \$300. Willy and Ken agree to meet later that day to complete the transaction. Ken reluctantly accepts a bag containing 3 grams of cocaine from Rocky. Rocky, Ken and Willy later meet in a parking lot. When Ken gives Willy the bag, he is arrested and charged with dealing in cocaine. On appeal of his conviction, Ken is found not to be predisposed as a matter of law and exonerated based on the entrapment defense.*²⁰⁵

Many people like Ken are in desperate financial straits. Many undoubtedly could be pressed against their better judgment into playing an insignificant role in a minor drug transaction. The police have no general interest in entrapping all such persons. Ken, although having no history of drug use, admittedly had some contact with unsavory characters such as Rocky. This much might be inferred from Ken’s approaching Rocky for a loan. Even if Ken’s class is defined even more narrowly as “persons in financial need, short on prudence, and familiar with unsavory characters,” it is doubtful the police were operating according to a practice designed to entrap most of the members of this class. Rather, they were only trying to entrap those who had the misfortune of approaching Rocky. It no less offends justice to entrap only the members of the “class” that happen to know Rocky than it would be to impose a particularly high tax on those with high incomes who happened to know Rocky. Thus, the prima facie validity of various law enforcement practices does not undermine the fairness principle as an explanation for the unjustness of entrapment.

D. DOCTRINAL IMPLICATIONS

A theory of entrapment should explain the major contours of the defense, such as the distinction between governmental and private entrapment. The preceding sections have attempted to meet that goal. A theory of entrapment ideally should also be able to recommend solutions to open doctrinal issues. That is the work of this section.

1. Subjective v. Objective Theories

An open issue in the area of entrapment is the dispute between the subjective and objective versions of the defense. As argued earlier, most

²⁰⁵ See *Kats v. Indiana*, 559 N.E.2d 348 (Ind. Ct. App. 1990) (presenting similar facts).

cases actually brought will come out the same way under either version.²⁰⁶ For this reason, it was methodologically acceptable to formulate a theory of entrapment without reference to the distinction between the versions. Nevertheless, having developed and defended the entrapment as unfairness theory, it is appropriate to inquire which version of the defense is more consistent with it.

The inquiry should focus on those rare cases where the subjective and objective versions produce different outcomes. These may be referred to as cases of the objectively entrapped predisposed defendant. For example:

Larry is a professional pickpocket. He owes \$100 dollars to a bookie and must pay the debt the next day. Broke, he leaves his home late one evening to go to a crowded bus terminal to ply his trade. Larry has frequently been successful at the terminal, but on a number of occasions, he has been arrested. Just outside of the terminal, Larry sees a man lying on his side in a fetal position with a paper bag containing a beer bottle in one hand. The man is a police officer feigning drunkenness as part of a decoy operation. A wallet protrudes from the rear pocket of his jeans. Bills sticking out of the wallet can be easily seen. Larry walks by the apparently helpless drunkard. He then turns back and steals the wallet. Two officers witnessing the theft spring from cover and apprehend him. Larry is charged with theft.

If these events occurred in a jurisdiction following the subjective version of the entrapment defense, Larry would be out of luck. While he might be able to establish that he was induced to commit the theft, the government likely would be able to carry its burden of proving that Larry was predisposed. Larry needs money immediately. He has a criminal record of engaging in similar crimes at the same location. Larry did not hesitate in taking the wallet. In contrast, if these events occurred in a jurisdiction following the objective version of the entrapment defense, Larry would likely be able to avoid conviction. Courts have held on similar facts that, as a matter of law, the drunk decoy operation created a substantial risk that theft would be committed by persons other than those ready to commit it, thereby satisfying the requirements of the objective test.²⁰⁷ On these facts, does the fairness principle permit conviction consistent with the objective version or require exoneration consistent with the subjective version?

²⁰⁶ See *supra* Part II.C..

²⁰⁷ See *Hawaii v. Powell*, 726 P.2d 266 (Haw. 1986); see also *Cruz v. Florida*, 465 So. 2d 516 (Fla. 1985) (use of drunk decoy satisfies objective test as matter of law); *Sheriff, Washoe County v. Hawkins*, 752 P.2d 769 (Nev. 1988) (same). But see *People v. Walker*, 615 P.2d 57 (Colo. App. 1980) (rejecting entrapment defense on similar facts).

Arguments based on the fairness principle may be advanced in support of either resolution. On one hand, Larry can claim he has been treated unfairly because he has been subjected to an unfair police practice. Using decoys is unfair because it typically results in the apprehension of an arbitrary member of a large, generally law-abiding class that the police have no wish or intent to prosecute generally. On the other hand, the government can argue that it is fair to convict Larry because it would, if it could, convict all similarly predisposed pickpockets. The dilemma here is one manifestation of the general problem of how the law should treat parties, such as the police, who have acted in a manner that is objectionable in theory, but which, due to unforeseen circumstances, results in an otherwise acceptable outcome, such as the apprehension of a predisposed defendant.²⁰⁸

A reasonably close analogy is presented by “after-acquired evidence” cases that arise in the employment law context. In the typical after-acquired evidence case, a member of a minority group is fired from a job and sues. In the course of litigation, the plaintiff is able to establish that he was fired based on unlawful discriminatory grounds, but evidence is also discovered that shows that he committed predischarge conduct that would have justified his firing in the first place. The minority member can claim he was subjected to an unfair practice (discriminatory discharge) and the employer can claim that the firing of an employee who engaged in misconduct is not unfair. Courts have resolved after-acquired evidence cases, holding that the employer may proceed in the light of the newly acquired evidence to deny reinstatement and deny damages from the point where the evidence was acquired.²⁰⁹ Any other conclusion would be “inequitable.”²¹⁰

There seems no reason why the dispute concerning the objectively entrapped predisposed defendants should be resolved differently than one concerning wayward employees who have suffered discrimination.

²⁰⁸ This problem also arises in the context of persons who engage in conduct prohibited according to an offense definition, unaware that they are doing so under circumstances that would uncontroversially establish a justification defense if they were aware of them. Known as the problem of “unknowing justification,” this issue has attracted the attention of a number of criminal law theorists, including the Author. See, e.g., Russell L. Christopher, *Unknowing Justification and the Logical Necessity of the Dadson Principle in Self-Defense*, 15 OXFORD J. LEG. STUDIES 229 (1995); Anthony M. Dillof, *Unraveling Unknowing Justification*, 77 NOTRE DAME L. REV. 1547 (2002); Paul Robinson, *Competing Theories of Justification: Deeds v. Reasons*, in HARM AND CULPABILITY 45 (A.P. Simester and A.T.H. Smith, Clarendon Press 1996); Robert F. Schopp, *Justification Defenses and Just Convictions*, 24 PAC. L.J. 1233, 1267-82 (1993).

²⁰⁹ See *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362 (1995).

²¹⁰ *Id.*

Applying this principle to entrapment, the predisposed defendant should be convicted despite the fact that he happened to be ensnared in a practice which, as a general matter, produces unfair results.²¹¹ It is not unfair to convict persons like Larry because the government would, if it could, convict all the members of his class (predisposed pickpockets). The government, we might say, is not acting unfairly *to him* in prosecuting. This point may be more clear if we imagine the less likely scenario that the government is aware that Larry is on his way to the bus terminal to pick a pocket, but for various reasons decides it would be preferable to catch Larry through the use of a decoy that might ensnare even a generally law-abiding citizen. Such a tactic, it is submitted, is not intuitively objectionable.

The case for the subjective version of entrapment, however, is not open and shut. A prophylactic argument can be made for the objective version of the defense. Under the subjective version, a defendant must be acquitted unless it can be demonstrated that he was predisposed. It might be thought that juries will be overly eager to find predisposition in the face of actual criminal conduct and so fail to acquit a nondisposed person pursuant to the entrapment defense. The objective version of the defense would eliminate such instances of erroneous conviction. If the number of these erroneous convictions is expected to be greater than the relatively few number of cases where the objective and subjective versions diverge, these convictions can be eliminated at a relatively low cost. The adoption of the objective version of entrapment, though overbroad, would then be defensible.

2. *Positional Predisposition*

A second doctrinal conflict lies within the ranks of adherents to the subjective version of entrapment. Courts in subjective jurisdictions are split on the meaning of "predisposition." Generally speaking, under the subjective approach, where a defendant has been induced to commit a crime, he is entitled to an entrapment defense unless the government can establish that he was predisposed to commit the offense. But exactly what

²¹¹ Design aside, in cases of objectively entrapped predisposed defendants, the disproportionality of the burden is not as great as in the cases of nondisposed defendants. First, there are many more nondisposed to crime than predisposed. Second, among this larger group, there are many fewer who potentially bear the burden of conviction. Among the nondisposed, this lesser group is only those who have been exposed to usually high inducements. In contrast, many of the predisposed will commit crimes and be apprehended, either as a result of inducements not rising to entrapment or through the usual mechanism of police apprehension after commission of the crime. Consequently, the relative percentage of nondisposed potentially burdened by entrapment is much less than that of the predisposed.

is it to be predisposed? The Ninth Circuit has concluded that a “predisposition” refers to a mental state or a characterological propensity, roughly equal to being ready to commit the crime should an opportunity present itself.²¹² In contrast, the Seventh Circuit, in an opinion by Judge Posner, and the Fifth Circuit, have taken the position that “predisposition” includes a positional component.²¹³ Under this interpretation of predisposition, a defendant would only be predisposed if, absent government involvement, he both was ready and willing to commit the crime (the mental component) and was so positioned that he would likely have committed it (the positional component).

An example offered by Judge Posner nicely illustrates the added requirement of the positional interpretation. Posner writes:

Suppose the government went to someone and asked him whether he would like to make money as a counterfeiter, and the reply was, “Sure, but I don’t know anything about counterfeiting.” Suppose the government then bought him a printer, paper, and ink, showed him how to make the counterfeit money, hired a staff for him, and got everything set up so that all he had to do was press a button to print the money; and then offered him \$10,000 for some quantity of counterfeit bills.²¹⁴

The individual approached by the government clearly possessed the mental state sufficient to be found predisposed; when presented with the opportunity, he seized it with little prompting. The individual, however, was not positionally predisposed because, absent the involvement of a government agent, it is doubtful he ever would have been in a position to move from his desire to counterfeit to actual counterfeiting. In light of this fact, should the individual be considered “predisposed” for the purpose of the subjective version of the entrapment defense? The Supreme Court has yet to address the issue.²¹⁵

²¹² See *United States v. Thickstun*, 110 F.3d 1394 (9th Cir. 1997).

²¹³ See *United States v. Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994); *United States v. Knox*, 112 F.3d 802, 808 (5th Cir. 1997) (agreeing with *Hollingsworth*).

²¹⁴ *Hollingsworth*, 27 F.3d at 1199.

²¹⁵ In *United States v. Jacobson*, 503 U.S. 540 (1992), the Court’s most recent entrapment case, the Court stated that “[w]hen the Government’s quest for conviction leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would never have run afoul of the law, the courts should intervene.” *Id.* at 553-54. Literally construed, this statement is broad enough to admit a positional component. The facts of *Jacobson*, however, do not require such an interpretation. The court concluded that Jacobson was not predisposed. There was no showing, however, that child pornography was otherwise unavailable over the Internet or otherwise. Rather, the Court emphasized the government’s role in piquing and legitimating Jacobson’s interest in child pornography—implying that Jacobs lacked the mental component of predisposition. Furthermore, language in older Supreme Court opinions stresses that the purpose of the entrapment defense is to protect the “unwary innocent.” See *United States v. Sorrells*, 287 U.S. 435, 451 (1932). This

The fairness theory of entrapment would support the requirement of a positional component to predisposition. It would thus favor extending the defense to those who would likely never have been in a position to have committed the charged offense absent the government's providing that opportunity even if they were otherwise willing to commit the offense. Under the fairness theory, willingness to commit an offense is not, in itself, a decisive factor permitting entrapment and conviction. Many "law-abiding" people, under the appropriate circumstances, might be willing to commit a crime, particularly one without an identifiable victim. It is fair to speculate that many people, for example, might trade on insider information if they believed the chances of detection were minimal and the financial gain realized, or loss to be avoided, was sizable. For the government to arbitrarily select and entrap one among many such persons would be unfair. Rather, under the fairness theory, the critical factor is the likelihood, all things considered, that the person would commit the offense. If a person is likely to commit a crime, then entrapping and convicting those like him to protect the public is a course of action the government would like to engage in generally. Although the government in fact may not be able to do so, this limitation no more renders the practice unacceptable than other social institutions which in practice fail to consistently achieve the ideals they were designed to achieve.²¹⁶

A similar analysis applies to the question whether a person should be considered predisposed if he has a substantial desire or inclination to engage in the criminal conduct at issue, but that desire or inclination is kept in check by a stronger oppositional one. For example, imagine Frank, a person who has always dreamed of being a counterfeiter, and has access to all the necessary equipment. Frank, however, also has an overriding fear of being apprehended for counterfeiting. Accordingly, Frank foregoes the opportunity to counterfeit until he is approached by undercover agents who convince him that he can proceed without detection. Should we say that Frank was predisposed and thus not entitled to the entrapment defense?²¹⁷ The fairness theory would reject this result. From the perspective of fairness, Frank is in the same position as the individual in Posner's

language is inconsistent with the positional interpretation. It is difficult to describe persons who desire to commit crimes, such as the individual in Posner's hypothetical, as innocent.

²¹⁶ See *supra* text accompanying note 193.

²¹⁷ This issue is raised in *Jacobson v. United States*, where the dissent argued that the Court's finding that Jacobson had a predisposition to view photographs of preteen sex should, without more, defeat Jacobson's entrapment claim. 503 U.S. at 559 (O'Connor, J., dissenting).

hypothetical. While both have a desire to engage in crime, without government involvement it is unlikely that either would have. The government is not interested in apprehending all of those held in check based on fear of apprehension or other defeasible psychological constraints on criminal desires. Even though he has a desire to be a counterfeiter, it is unfair to make him the target of a practice that is designed to use the few for the benefit of the many.

SUMMARY AND CONCLUSION

The norms of justice constrain governmental efforts to advance the common good. Retributive justice requires that an actor be morally culpable for causing or risking harm to another before the state may disadvantage the actor in a significant and stigmatizing way. Distributive justice requires that the benefit and burdens of the joint enterprise of society be appropriately shared among its members. This Article has urged that the domains of these two sets of norms are not mutually exclusive, one beginning where the other leaves off. Rather they may overlap in various contexts, operating in a simultaneous and complementary fashion to restrain the state.

Case in point is entrapment. In order to justly punish persons who have been entrapped, it must be that they are culpable for their unlawful acts. This Article has argued that they are, even in cases where they have faced temptations that even a reasonable person might yield to. There is no excuse for freely choosing to do wrong. Even though reasonable persons cannot be blamed for their limited resistance to temptation, they can be blamed when those limits are exceeded and wrongdoing results. Rather than foundering on norms of retributive justice, entrapment founders on the norms of distributive justice. Most persons entrapped within the legal definition of entrapment are nondisposed to crime, and so are not dangerous enough to justify entrapping pursuant to a general practice. From a utilitarian perspective, entrapment is justified not because it incapacitates, but because it can deter generally. Deterrence however is inherently a matter of using few for the benefit of the many who might otherwise be victims of crimes or subjects of criminal sanctions. Entrapping the many would make no sense. Thus, entrapment, as a practice, is designed to disadvantage only a limited number of the population who are similarly situated with respect to dangerousness, deterrent value, and other relevant features. In this respect, entrapment is similar to the conversion of an arbitrarily selected person's home to a police station for the benefit of the community as a whole. The goal of crime prevention is advanced, but the cost is not properly shared over the relevant class. This is unfair to the

person entrapped. The defense of entrapment exists to prevent exactly such unfairness.

Conceiving of the entrapment defense as a response to the problem of unfairness unravels one of the core puzzles of the entrapment defense: why it is limited to cases where a government agent, rather than a private party, encourages the defendant. A person is neither more responsible nor more dangerous if, unbeknownst to him, his tempter worked for the government. Indeed, the deterrent effect of convicting a person entrapped by the government might be greater than if the inducer were a private party. Convicting a person governmentally entrapped demonstrates the state's commitment to aggressively rooting out potential criminals and punishing the culpable. Nor does government entrapment present a significant threat to civil rights. A government intent on suppressing dissent has many more practical means than entrapment, and the defense of entrapment is not the only means to avoid conviction in such cases. The key to the governmental/private inducer distinction is the agent-relative nature of the fairness principle. Fairness bars the state from arbitrarily selecting a class member for burdening, while the state may impose burdens based on the arbitrary selection of a class member by others. In this respect, fairness is like other principles of justice, such as corrective justice, which requires the correcting of only the wrongs imposed by the agent, while allowing wrongs imposed by others to be disregarded.

Explicating the entrapment defense in terms of unfairness suggests directions for the entrapment doctrine to develop. However, regardless whether these suggestions are adopted, bringing to bear considerations of moral and political philosophy, as well as insights and analogies from other areas of law, serves to better mark the defense's present position and to illuminate its future path. If criminal law does not look outward, beyond its scholastic boundaries, if it does not look deeper, beneath its case law articulation, then criminal law is fated to become entrapped in its own doctrinal mazes.