

## UNRAVELING UNLAWFUL ENTRAPMENT

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## **I. Introduction**

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

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.<sup>4</sup> These opinions broke with the traditional view that it was legally irrelevant how the criminal was led to temptation.<sup>5</sup> Following

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<sup>1</sup> *Genesis* 3:13 (King James).

<sup>2</sup> *See* *Regina v. Holden*, 127 Eng. Rep. 1107 (Cr. Cas. Res. 1810) (bank agents solicit defendants to purchase forged notes); *Regina v. Titley*, Cox Crim. Cas. 526, 12 J.P. 776 (Cent. Crim. 1848) (undercover police officer convinces chemist to sell aborticide); *Regina v. Bickley*, 2 Crim. App. R. 53, 73 J.P. 239 (C.C.A. 1909) (same).

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

<sup>4</sup> *See* *Sorrels v. United States*, 287 U.S. 435 (1932); *United States v. Russell*, 411 U.S. 423 (1937); *Sherman v. United States*, 356 U.S. 435 (1958). *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. SAN. FRAN. 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.

<sup>5</sup> *See* Roiphe, *supra* note 4 at 270 (“No state or federal court recognized entrapment as a valid defense prior to 1870.”); WAYNE LAFAVE, CRIMINAL LAW, 450

the Supreme Court's lead, virtually every jurisdiction in the United States has adopted a version of the defense.<sup>6</sup> 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.<sup>7</sup>

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

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(2000 3d. ed.) ("[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 (1995 2d ed.).

<sup>6</sup> 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.

<sup>7</sup> 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 (Oak. 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. CARO. 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).

*“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.<sup>8</sup>

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<sup>8</sup> The three entrapment scenarios presented above are based on *Jacobson v. United States*, 112 S. Ct. 1535 (1992); *Kats v. Indiana*, 559 N.E.2d 348 (Ct. App. Ind. 1990), and *People v. Boalbey*, 493 N.E.2d 369 (App. Ct. Ill. 1986),

Why should Jacob, Ken and Rich now escape criminal sanctions? As a doctrinal matter, the government's role in the crimes, either as instigator or tempter, is the critical element triggering the operation of the defense. In order for a defendant to establish the entrapment defense, a government agent must be the tempter or inducer.<sup>9</sup> 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. Since punishment is generally considered appropriate for those who have manifested their dangerousness through blameworthy conduct prohibited by the criminal law, it seems equally appropriate for Steve, Ken and Rich. Finally, some police activities that arguably crime control are objectionable on public policy grounds. For example, unconstitutional searches and seizures,<sup>10</sup> even if morally unobjectionable when used against criminals,<sup>11</sup> are never permitted because they carry an unacceptable risk of being used against citizens who can rightly object to them. However, it is unclear on what basis other citizens could object to the type of actions employed against Jacob, Ken, and Rich, as persons should be able to resist the

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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.

<sup>9</sup> See MARCUS, THE ENTRAPMENT DEFENSE, *supra* note 5, §§ 4.02 & 5.10. A more detailed statement of the requirements of the entrapment defense is presented in Part II, *infra*.

<sup>10</sup> See U.S. CONST. AMEND. IV.

<sup>11</sup> 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).

temptations offered in those cases. Why then permit the plea of entrapment?

Entrapment has been described as a defense “buffeted by conflicting interpretations.”<sup>12</sup> This Article attempts to advance a new and superior interpretation by focusing on the relevancy of the entrapper’s governmental status. 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 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.<sup>13</sup> Commonly it is judicially created and lacks a statutory formulation.<sup>14</sup>

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<sup>12</sup> GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 542 (1978).

<sup>13</sup> In *Jacobson v. United States*, 503 U.S. 540 (1992), the Supreme Court reaffirmed its commitment to the subjective approach. *Id.* at 548-49. Most states have adopted the subjective approach. See MODEL PENAL CODE AND

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.<sup>15</sup> If he is unsuccessful, the defense fails. If the defendant is successful in carrying this burden, the burden shifts to the government to prove beyond a reasonable doubt that the defendant was “predisposed” to commit the crime.<sup>16</sup> If the government carries its burden, 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.”<sup>17</sup> It is clearly that inducement requires more than merely the furnishing of an opportunity for crime.<sup>18</sup> An offer to purchase drugs at market price, for example, is not an inducement.<sup>19</sup> Nor does inducement require that the government agent’s conduct caused the defendant to commit the crime; rather it merely requires that the conduct “could have caused an indisposed

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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.

<sup>14</sup> Federal courts, lacking the power to create either substantive criminal laws or defenses, have determined that, in enacting various criminal offense, 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 other common law defense (such as insanity and duress).” Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 247 (1976).

<sup>15</sup> *See* MARCUS, THE ENTRAPMENT DEFENSE, *supra* note 5, § 6.05. Some jurisdictions accept a lesser evidentiary showing. *Id.*

<sup>16</sup> *See id.* § 6.07.

<sup>17</sup> *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).

<sup>18</sup> *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. App. 1989).

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

person to commit the crime.”<sup>20</sup> Significantly, there is no formal requirement the inducement offered by the government rise to a particular level of persuasiveness or pressure.<sup>21</sup> For example, entrapment has been found 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.<sup>22</sup> Likewise, entrapment has been found based merely on repeated requests for narcotics by an acquaintance claiming to need them to assuage his addiction.<sup>23</sup> Rather than focusing on the conduct of the tempter, the requirement of inducement in practice seems to focus on the status of the tempter.<sup>24</sup> Only *government* inducement will qualify a defendant for entrapment.<sup>25</sup> Where the government has played no significant role, the question of a predisposition need not arise. The requirement of inducement acts as a gate-keeping measure for the real ball game in entrapment litigation: 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.<sup>26</sup> The question is whether, at that point, he was “ready and willing” to commit the crime “whenever the opportunity was afforded.”<sup>27</sup> 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

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<sup>20</sup> United States v. Kelly, 748 F.2d 691, 691 (D.C. Cir. 1984).

<sup>21</sup> 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)).

<sup>22</sup> See Sorrells v. United States, 287 U.S. 435, 439-40 (1932).

<sup>23</sup> See Sherman v. United States, 365 U.S.369, 370-71 (1958).

<sup>24</sup> See United States v. Borum, 584 F.2d 424, 427 (C.A.D.C.,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 agent.”).

<sup>25</sup> See MARCUS, THE ENTRAPMENT DEFENSE, *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.”)).

<sup>26</sup> See Jacobson, 500 U.S. at 549 (holding that predisposition must exist not only prior to inducement, but prior to government contact).

<sup>27</sup> *Id.*

crime before any crime has been attempted, could not be made with sufficient reliability to warrant the imprisonment of those so identified.<sup>28</sup> 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.<sup>29</sup> Intent implies a conscious state of mind,<sup>30</sup> rather than merely a disposition, which is simply a tendency, or potential, to respond to a stimulus. Furthermore, inchoate offenses generally include an “overt act” requirement to supplement and bolster the finding of criminal intent.<sup>31</sup> Entrapment thus presents a stark exception to the general reluctance to inquire directly about a 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 predispositions to the offense charge existed: (1) the character or reputation of the defendant, 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.<sup>32</sup>

Although theoretically distinct, in practice inquiries into the existence of inducement and predisposition 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

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<sup>28</sup> See AMERICAN LAW INSTITUTE, MODEL PENAL CODE: SENTENCING REPORT at 32 (April 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.”)

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

<sup>30</sup> See MODEL PENAL CODE § 2.02(2)(a) & (b); LAFAVE, CRIMINAL LAW § 5.2.

<sup>31</sup> See 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, CRIMINAL LAW, *supra* note 5, §§ 11.4, 12.2.

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

entrapment defense is commonly raised in circumstances where the defendant has indisputably committed a criminal act.<sup>33</sup> This act itself implies the existence of a predisposition since in most 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.<sup>34</sup> 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 the stronger the inference to predisposition.<sup>35</sup> 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 to predisposition, defeating his 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 equipment.<sup>36</sup> 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?<sup>37</sup> Finally, how similar must be the crime actually

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<sup>33</sup> In order to raise the entrapment defense, a defendant need not concede prima facie liability. *Mathews v. United States*, 485 U.S. 58 (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.

<sup>34</sup> See *Harrison v. State*, 442 A.2d 1377, 1379-80 (Del. 1982) (court explains relevancy of defendant's response to inducement to predisposition.) *Kadis v. United States*, 373 F.2d 370, 373 (1st Cir. 1967). See Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 200 (1976).

<sup>35</sup> See *Jacobson*, 503 U.S. at 550 (stating in typical case, defense of little use because "the ready commission of the criminal act amply demonstrates the defendant's predisposition").

<sup>36</sup> See text accompanying notes 203-207, *infra*.

<sup>37</sup> 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 equating with creating predisposition).

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?<sup>38</sup>

### **B. Basics of the Objective Version**

The objective version of the defense is simpler in structure than the subjective version. The central issue is simply whether the government's conduct creates a substantial risk that such an offense will be would be committed by "persons other than those ready to commit it"<sup>39</sup> or alternatively, by "normally law-abiding citizens."<sup>40</sup> 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.<sup>41</sup> In such jurisdictions, the defendant bears the burden of establishing by a preponderance of the evidence the existence of the substantial risk.

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

<sup>39</sup> MODEL PENAL CODE § 2.13(2).

<sup>40</sup> Final Report of the National Commission on Reform of Federal Criminal Laws, Proposed New Federal Criminal Code § 702 (1971).

<sup>41</sup> MARCUS, THE ENTRAPMENT DEFENSE, *supra* note 5 at 169. *See, e.g.*, Ark. Code Ann. § 5-2-209 (1987) ("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 ("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, THE ENTRAPMENT DEFENSE, *supra* note 5, ch. 7. 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 show. *See* Kenneth M. Lord, *Entrapment and Due Process: Moving Toward a Dual System of Defenses*, FLA. ST. U. L. REV.

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.<sup>42</sup> Of course, it is necessary for the defendant to show that the police conduct actually targeted him or might have caused the conduct.<sup>43</sup> For example, there still would be liability for criminal conduct occurring before the improper police conduct.<sup>44</sup> Examples of government conduct found to have violated the objective standard include appealing to a close personal relationship with the defendant,<sup>45</sup> forming a sexual relationship with the defendant,<sup>46</sup> and offering excessive amounts of money.<sup>47</sup> 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 proof.<sup>48</sup>

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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.

<sup>42</sup> It may be argued that even standard objective formulation does not allow of 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. *Id.* at § 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.

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

<sup>44</sup> See *Municipality of Anchorage v. Flanagan*, 649 P.2d 956 (Alaska. App. 1982).

<sup>45</sup> See, e.g., *Commonwealth v. Lucci*, 662 A.2d 1 (Sup. Ct. Pa. 1995); *Dial v. Florida*, 799 So.2d 407 (Ct. App. Fla. 2001); *Michigan v. Soper*, 226 N.W.2d 691 (Ct. App. Mich. 1975); *Montana v. Kamrud*, 611 P.2d 188 (Mont. 1980).

<sup>46</sup> *People v. Wisneski*, 292 N.W.2d 196 (Mich. App. 1980).

<sup>47</sup> See, e.g., *Grossman v. State*, 457 P.2d 226, 230 (Ala. 1969).

<sup>48</sup> See MARCUS, *THE ENTRAPMENT DEFENSE*, *supra* note 5, at 85 n.20, 183; M.P.C. § 2.13(2). 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

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 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 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.<sup>49</sup> 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.<sup>50</sup> 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 obtained, *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:

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the ground that, while juries properly judged defendants, only courts should judge the police. *See* United States v. Sorrells, 287 U.S. at 457 (Roberts, J., dissenting).

<sup>49</sup> *See* Park, *The Entrapment Controversy*, *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.")

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

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?*

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 version 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 not eligible for the objective defense) yet still be subject to inducement and also nonpredisposed (hence entitled to the subjective defense). Accordingly, Professor Park has written, “Federal law is more favorable to nondisposed defendants who succumbed to inducements not sufficiently compelling to be deemed improper [under the objective standard].”<sup>51</sup>

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 nonpredisposed 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

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<sup>51</sup> Park, *The Entrapment Controversy*, *supra* note 14, at 199.

version's tendency, discussed earlier,<sup>52</sup> to require a strong inducement to avoid the inference—fatal to defendant's claim—of predisposition.

For example, in *United States v. Jacobson*,<sup>53</sup> 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.<sup>54</sup> On 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.”<sup>55</sup> 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 disposition 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,” the defendant would need only cite *Jacobson*, where a person found to be nonpredisposed to commit the offense actually did. If the class of law-abiding citizens subsumes the class of nonpredisposed persons, satisfaction of the subsection 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.<sup>56</sup>

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

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<sup>52</sup> See text accompanying note 35, *supra*.

<sup>53</sup> 503 U.S.540 (1992).

<sup>54</sup> *Id.* at 542-47.

<sup>55</sup> 18 U.S.C. § 2252(a)(2)(A) (1984).

<sup>56</sup> See text accompanying notes 16 and 48., *supra*.

government agent's conduct would be judged sufficient to induce a nonpredisposed 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. For example, the agent's conduct may be described as "offering a huge 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, because the inducement definitionally was likely to be not directed at such a person.<sup>57</sup> There is some support for this interpretation of the objective test.<sup>58</sup> 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 nonpredisposed, but in fact it was a predisposed person. 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. 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

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<sup>57</sup> Seidman states, "So long as the police direct their attention toward only those likely to be predisposed, the risk of entrapment, objectively considered, is small, and the inducement, therefore, presumably permissible." Louis Michael Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1982 SUP. CT. REV.119-20.

<sup>58</sup> Park agrees and writes, "The 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, *The Entrapment Controversy*, *supra* note 14, at 205, 205-08 (discussing *Grossman v. Alaska*, 457 P.2d 226, 229 (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 (1973) (defendant's statements about heroine relevant to determining whether police conduct was acceptable under objective test)).

would likely have found the defendant nonpredisposed (hence entitling any induced defendant to the subjective defense) because it lacks evidence of criminality absent improper encouragement.<sup>59</sup> 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 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.<sup>60</sup>

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 criminal acts could support a finding of predisposition even in cases of high inducement.<sup>61</sup> For example, in *Posner v. United States*,<sup>62</sup> 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.<sup>63</sup> Such evidence can be quite probative of predisposition. Thus it is conceivable that even a defendant could be found predisposed (hence not entitled to the subjective defense) where he had been induced by very powerful persuasion (hence entitled to the objective 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 nonpredisposed 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.

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<sup>59</sup> Ronald J. Allen, *Clarifying Entrapment*, 89 J. CRIM. L. & CRIMINOLOGY 407, 412-13 (1999).

<sup>60</sup> *Id.*

<sup>61</sup> Evidence of such acts is admissible in federal court to establish predisposition. Fed. R. Evid. § 404(b).

<sup>62</sup> 865 F.2d 654, 657-58 (5th Cir. 1989).

<sup>63</sup> See *United States v. Posner*, 865 F.2d 654, 657-58 (5th Cir. 1989).

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 usually high amounts of money for drugs may suggest an ulterior purpose. Finally, lower levels would be more useful 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 nonpredisposed, 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) nonpredisposed 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 nonpredisposed persons. These cases represent the lion's share of entrapment cases under either version.

### **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?”<sup>64</sup> 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.<sup>65</sup> Briefly stated,

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<sup>64</sup> 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 nonpredisposed person is enticed into crime by a private individual offering a 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*, 503 U.S. 540, *see* text accompanying notes 7-8, *supra*, 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.

<sup>65</sup> *See* AMERICAN LAW INSTITUTE, 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).

retributivists believe that the imposing of criminal sanctions is justified to the extent the sanctions are deserved.<sup>66</sup> A retributivist theory of the entrapment defense 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,<sup>67</sup> retributivists generally analyze desert as a function of the gravity of the wrongdoing at issue and the actor's culpability for that wrong.<sup>68</sup> 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**

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.”<sup>69</sup> 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.<sup>70</sup>

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<sup>66</sup> FLETCHER, *RETHINKING CRIMINAL LAW*, *supra* note 12 at 459-60; MICHAEL MOORE, *PLACING BLAME* 87 (1997); Joel Feinberg, *The Classic Debate*, in *PHILOSOPHY OF LAW* 727, 726-29 (Joel Feinberg & Jules Coleman eds., 6th ed. 2000).

<sup>67</sup> 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, *Deterring Retributivism*, *supra* note 65 at 865-66. Because the Article's discussion of retributivism equally applies to both versions, the distinction shall be ignored.

<sup>68</sup> See FLETCHER, *RETHINKING CRIMINAL LAW*, *supra* note 12 at 461, MOORE, *PLACING BLAME*, *supra* note 66, at 168.

<sup>69</sup> Jonathon C. Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, *VA. L. REV.* 1011, 1063 (1987).

<sup>70</sup> *Id.*

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.<sup>71</sup> The dispute between subjective retributivists and objective retributivists (those who believe that the wrongfulness of conduct is to be judged based on what actually occurred) is far from settled.<sup>72</sup> 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 his conduct creates a risk of the crime being completed. The subjectivist explains he deserved to be punished based on that belief. In contrast, objective retributivists must struggle to defend the claim that in such cases 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.<sup>73</sup> Subjectivism in turn can be criticized on the ground that it fails to account for the common intuition that unsuccessful attempts should be

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<sup>71</sup> For the distinction between subjective (or culpability/intent \_based theories) and objective (or harm/wrongdoing \_based theories) of retributivism, see Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 74\_76 (1991); Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES, 237 (1994) (distinguishing culpability and wrongdoing as independent bases of desert).

<sup>72</sup> 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); Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 684\_86 (1994) (same); and MOORE, PLACING BLAME, *supra* note 66, ch. 5 (arguing results are relevant to desert) ; Leo Katz, *Why the Successful Assassin Is More Wicked Than the Unsuccessful One*, 88 CAL. L. REV. 791 (2000) (same).

<sup>73</sup> 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).

punished less than completed ones. Nevertheless, in light of the weaknesses of its competitor, it is at least a viable form of retributivism. From the perspective of subjective retributivism, those governmentally entrapped deserve punishment just like other morally culpable defendants who fail to commit the crimes they intended.

## **2. Culpability-Based Theories**

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."<sup>74</sup> In retributivist terms, their 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. 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."<sup>75</sup>

**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

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<sup>74</sup> See *Jacobson v. United States*, 112 S.Ct. 1535, 1547 (1992) (defense available where 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").

<sup>75</sup> Park, *The Entrapment Controversy*, *supra* note 14, at 240. Park also identifies as a ground for the defense lack of dangerousness of those entrapped. *Id.* The majority of his discussion, however, emphasizes lack of blameworthiness. *Id.* at 242 (arguing defense "properly concerned with culpability"); *id.* at 239 (asserting "[i]njustice" of convicting nonpredisposed persons"); *id.* at 265 (noting his theory seeks to "excuse" entrapped).

equally deserve punishment.<sup>76</sup> 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 culpability principle.<sup>77</sup> 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.<sup>78</sup> Rather than attempting to distinguishing cases of government and private entrapment based on considerations of culpability, Park adopts an ingenious strategy. Conceding that those

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<sup>76</sup> 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 . . .”).

<sup>77</sup> 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.).

<sup>78</sup> 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, *The Act Requirement and the Foundations of the Entrapment Defense*, *supra* note 69, at 1038. Seidman also makes this argument. See Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, *supra* note 57, 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.”).

privately entrapped are nonculpable just like those governmentally entrapped, Park argues that “[R]ules intended to excuse nonculpable persons from criminal liability must sometimes be limited in scope because of the danger of contrived defenses.”<sup>79</sup> 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.<sup>80</sup> Likewise, Park argues, even though those privately entrapped are not culpable, the law properly does not allow them to assert the entrapment 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.<sup>81</sup> 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

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<sup>79</sup> Park, *The Entrapment Controversy*, *supra* note 5, at 241.

<sup>80</sup> See MODEL PENAL CODE AND COMMENTARIES § 2.04, ctm. at 280.

<sup>81</sup> 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").

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.<sup>82</sup>

The difficulty with Park's position, however, runs deeper. Park never attempts to defend what he takes to be the "obvious"<sup>83</sup> 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 person, who has deliberately chosen wrongly,<sup>84</sup> should not be considered nonculpable? Although intuitions differ sharply on the question,<sup>85</sup> commentators have given it insufficient attention.<sup>86</sup> At

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<sup>82</sup> Park, *The Entrapment Controversy*, *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 chilling effect on political activity. *Id.* at 242-43. These other public-policy rationales are addressed *infra*, §§ III.B-C.

<sup>83</sup> Park, *The Entrapment Controversy*, *supra* note 14, at 240.

<sup>84</sup> 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.

<sup>85</sup> Fletcher, for example, apparently disagrees with Park, asserting in his discussion of entrapment that "succumbing to temptation is a paradigm case of blameworthy conduct." FLETCHER, *RETHINKING CRIMINAL LAW*, *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, *Clarifying Entrapment*, *supra* note 59, at 416. Little argument, however, is provided to support these claims.

<sup>86</sup> 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 nonpredisposed 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 nonpredisposed have no excuse for yielding to a given temptation. Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, *supra* note 69, at 1038.

Carlson rejects any attempt to elevate the nonpredisposed over the predisposed due to the latter's arguable moral inferiority for being predisposed to crime. Carlson

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 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

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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.

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.<sup>87</sup>

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.<sup>88</sup>

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<sup>87</sup> The preceding argument for nonculpability provides a straightforward account of why a nonpredisposed 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, *RETHINKING CRIMINAL LAW* *supra* note 12, at 800 (recommending character theory), George Vuoso, *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 nonpredisposed person would have acted similarly. Thus, if the Duress Argument is sound for nonpredisposed 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 in earlier, see text accompanying notes 57-63, *supra*, most defendants who qualify for the objective version will in fact be nonpredisposed.

<sup>88</sup> 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

Accepting it for the 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.<sup>89</sup> 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.<sup>90</sup> 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,

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on the necessity of the defendant's conduct to avoid the comparatively great threatened harm. See LAFAYE, *CRIMINAL LAW*, *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 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. 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 where 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 \$20,00 to aid a plan to embezzle \$10,000.

<sup>89</sup> See Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, *supra* note 57, at 133.

<sup>90</sup> See *id.* at 134.

Seidman considers confrontations between homeowners and burglars.<sup>91</sup> 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 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.<sup>92</sup> 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—if 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.<sup>93</sup> 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

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<sup>91</sup> See *id* at 133.

<sup>92</sup> *Id.*

<sup>93</sup> Robert Nozick, *Coercion*, in *PHILOSOPHY, SCIENCE AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL* 440 (Sidney Morgenbesser et al. eds., 1969).

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 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 of yielding to threats and 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 he should not have to be in. 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.<sup>94</sup> The reason the yielding to threats, but not offers, is excusable may also be tied to the idea that

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<sup>94</sup> 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.

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 pay-back, but it has some intuitive resonance.<sup>95</sup> If it is correct, it constitutes a more persuasive refutation of the Argument from Duress than those previously offered.

**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”<sup>96</sup> 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

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<sup>95</sup> Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CALIF. L. REV. 871, 884-86 (1976).

<sup>96</sup> Director of Public Prosecutions v. Camplin, House of Lords, 2 All Eng.Rep. 68, 2 W.L.R. 679 (1978).

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 nonpredisposed (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, 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,<sup>97</sup> or at least failing to change our character flaws,<sup>98</sup> 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.<sup>99</sup> 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 merit of her decision, so you cannot blame your character for your decisions regardless of its objective merit of your character. From the fact that we, as mortals, possess limited virtue only follows that we, as mortals, must sometimes be blameworthy for our wrongful acts manifesting this limit.

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<sup>97</sup> 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 *CARZ. L. REV.* 563, 575 (2003). Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 *U.C.L.A. L. REV.* 1511 (1992).

<sup>98</sup> 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).

<sup>99</sup> 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).

This view of character underlies much of the criminal law. For example, there is no rotten social background defense.<sup>100</sup> Lack of social 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.<sup>101</sup>

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.<sup>102</sup> 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 nonpredisposed 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 nonpredisposed, i.e., reasonably resistant to temptation, may bar liability, but it does not do so because being nonpredisposed implies being nonculpable in a particular instance. As a matter of morals, a person should not accept

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<sup>100</sup> 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 AND INEQUALITY* 9 (1985).

<sup>101</sup> 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).

<sup>102</sup> See *MODEL PENAL CODE* §§ 2.02(2)(d), 210.4; LAFAVE, *CRIMINAL LAW*, *supra* note 5, § 15.4.

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 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.<sup>103</sup> The good may be measured in terms of happiness, pleasure, utility, wealth, or welfare, depending on the brand of utilitarianism.<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup> The only way to give the term “predisposition” content so that it indicates a 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. But what should that price be? Allen thinks that currently prevailing price in the market of criminal behavior is the

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<sup>103</sup> 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).

<sup>104</sup> See Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 69 *FORD. L. REV.* 2087, 2108 (2001).

<sup>105</sup> See FREDRICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* 46 (1999).

<sup>106</sup> See Allen, *Clarifying Entrapment*, *supra* note 59. Law-and-economics is an outgrowth of utilitarianism applied to legal studies. See RICHARD A. POSNER, *THE ECONOMIC ANALYSIS OF LAW* (5th ed. 1998).

<sup>107</sup> See Allen, *Clarifying Entrapment*, *supra* note 59, at 413.

appropriate price to use when defining “predisposition” for the purpose of the entrapment doctrine.<sup>108</sup> 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 economists 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.<sup>109</sup>

From Allen’s perspective, the exoneration of those falling within the entrapment defense is easily explained. If a nonpredisposed 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.<sup>110</sup> 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.<sup>111</sup> 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.<sup>112</sup> In any event, to the extent that Allens’ theory is inconsistent with positive law in recommending the acquittal of a privately entrapped person, the theory may be construed as a normative one recommending

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<sup>108</sup> 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 exceeds real world market rates . . .”).

<sup>109</sup> See *id.* at 415 (referring to both “financial and emotional” markets)..

<sup>110</sup> See *id.* Carlson similarly opines that “if the defendant was encouraged by the government its utility as a predictor of danger may reasonably be called into question.” Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, *supra* note 69, at 1071.

<sup>111</sup> Allen, *Clarifying Entrapment*, *supra* note 59, at 420.

<sup>112</sup> *Id.* at 421.

the entrapment defense be expanded to shield even privately entrapped nonpredisposed 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 nonpredisposed 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 nonpredisposed 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 nonpredisposed 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 he 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 her 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.*<sup>113</sup>

Russ would probably be considered nonpredisposed and be able to establish entrapment if Lucy worked for the police.<sup>114</sup> 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 nonpredisposed 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*.<sup>115</sup> The defendant had purchased child pornography only after a lengthy and elaborate undercover government campaign of enticement.<sup>116</sup> 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

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<sup>113</sup> Cf. *Commonwealth v. Thompson*, 484 A.2d 159 (Sup. Ct. Pa. 1984) (recounting similar facts).

<sup>114</sup> In fact, the issue of predisposition was not reached by the Court because it applied the objective test. See *id.* If the question whether Russ was predisposed had been considered, he likely would not have found predisposed because of his long record of failing to deliver despite his promises.

<sup>115</sup> 112 S. Ct. 1535 (1992).

<sup>116</sup> See text accompany note 8, *supra*.

bribe.”<sup>117</sup> 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.<sup>118</sup> The rationality of the government’s engaging in an act which, considered discreetly, appears irrational, has been recognized in other contexts.<sup>119</sup>

### **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 imposed 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.”<sup>120</sup> Since the methods of the police, not the defendant’s subjective mental state, are

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<sup>117</sup> See Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, *supra* note 57, at 142.

<sup>118</sup> See Paul 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).

<sup>119</sup> See Thomas C. Schelling, *The Strategy of Conflict* 18\_19 (1960) (applying considerations of strategic irrationality to nuclear deterrence); see also Larry Alexander, *The Deceptive Nature of Rules*, 142 *U. Penn. L. Rev.* 1191, n.9 1195 (1994) (“If one wants to be a rational deterrer of others’ threatening acts, one may have to become irrational.”).

<sup>120</sup> MODEL PENAL CODE AND COMMENTARIES, *supra* note 6, § 2.13 cmt. at 406. See also, *Sherman v. United States*, 365 U.S. 435, 380 (1958) (“transcending value at stake” is “public confidence in the fair and honorable administration of justice”) (Frankfurter, J. concurring).

the focus of the inquiry, the Commentaries support the objective version of the defense.<sup>121</sup> 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.<sup>122</sup>

The Model Penal Code's theory rests on a number of problematic assumptions. First is the assumption that entrapment harms the reputation 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 conduct."<sup>123</sup> This is empirically doubtful. As the drafters admit elsewhere, the public has never shown great sympathy for those who are morally guilty.<sup>124</sup> 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,<sup>125</sup> 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.<sup>126</sup>

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<sup>121</sup> Model Penal Code § 2.13 (defense available when a government agent induces a person to engage in criminal conduct through "inducements that create a substantial risk that such an offense will be committed by persons other than those ready to commit it.").

<sup>122</sup> See *United States v. Calandra*, 414 U.S. 338 (1974) (characterizing exclusionary rule as judicially created remedy to designed to safeguard rights through deterrence, rather than a personal constitutional right of the party aggrieved).

<sup>123</sup> MODEL PENAL CODE AND COMMENTARIES, *supra* note 6, § 2.13 cmt. at 407.

<sup>124</sup> In its discussion of the entrapment defense, the Commentaries explain why the court, rather jury, should determine whether the requirements of defense are met: "[T]he rights of persons accused are little understood or respected by 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.

<sup>125</sup> See U.S. CONST. amend. IV; *Weeks v. United States*, 232 U.S. 383 (1918) (establishing the inadmissibility of evidence seized in violation of the Fourth Amendment).

<sup>126</sup> 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*

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 nonpredisposed 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 nonpredisposed likely would have little marginal impact on this group's respect for the law.

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.

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*Exclusionary Rule* (1986), reprinted in 22 U. MICH. J.L. REF. 573 (1989) (identifying juries sympathy with police, not criminals, as a basis of failure to enforce the Fourth amendment through civil actions).

#### **4. 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 nonpredisposed, 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.<sup>127</sup> From the perspective of utilitarianism, punishing the entrapped is presumptively defensible.

Admittedly, there may be a segment among the nonpredisposed 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, 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]ermitting conviction of

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<sup>127</sup> See Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, *supra* note 57, at 144 (“To 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.”).

nondisposed persons who have been led astray by police may . . . have a chilling effect upon exercise of political freedoms”<sup>128</sup> 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.”<sup>129</sup> 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.”<sup>130</sup> 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.<sup>131</sup> Bills of attainder and ex post facto laws are objectionable 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 qualifying as entrapment accomplishes the same objectionable result through executive, as opposed to legislative, action. The entrapment defense thus might be

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<sup>128</sup> Park, *The Entrapment Controversy*, *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 the officer”).

<sup>129</sup> Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, *supra* note 69, at 1012. Carlson also opines absent the entrapment defense, “[t]he 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.

<sup>130</sup> FLETCHER, *RETHINKING CRIMINAL LAW*, *supra* note 12, at 541.

<sup>131</sup> See Akhil Reed Amar, *The Supreme Court 1999 Term Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 102 (2000) (noting that the singling out known persons for hostile treatment is the obvious concern of the Ex Post Facto and Bill of Attainder clauses.)

thought to have grown out of the same political tradition that produced the Bill of Attainder and Ex Post Facto clauses.<sup>132</sup> 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.<sup>133</sup> 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."<sup>134</sup> The targets of the investigation were selected based on this information 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,

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<sup>132</sup> 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 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, 752 (1979) (Marshall, J., dissenting) (noting in connection challenge to government's recording of telephone numbers "individuals, including members of unpopular political organizations or journalists with confidential sources, may legitimately wish to avoid disclosure of their personal contacts.").

<sup>133</sup> *See Park, The Entrapment Controversy, 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.").

<sup>134</sup> *See* Final Report of the Select Comm. To Study Undercover Activities of Components of the Department of Justice, S. Rep. No. 682, 97th Cong., 2d Sess. 682-99 at 16 (1982); *See also* Irvin B. Nathan, *ABSCAM: A Fair and Effective Method for Fighting Public Corruption* 6-9, printed in *ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT* (Gerald M. Caplan, ed., 1983) (describing operation of ABSCAM investigation).

and was convicted on one of the latter after he smoked crack cocaine with a police agent.<sup>135</sup> Although Barry alleged that he was unfairly targeted by a police investigation,<sup>136</sup> evidence of his frequent drug use, perjury, and corruption made him an appropriate subject of investigation.<sup>137</sup> 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 sanctioned 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 of 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. As the recent events in Tulia, Texas demonstrate,

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<sup>135</sup> B. Drummond Ayres, Jr., *Barry Guilty on One Drug Count, Mistrial is Declared on Felonies*, N.Y. TIMES, Aug. 11, 1990, at A1.

<sup>136</sup> 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, as A16.

<sup>137</sup> See Stuart Taylor, Jr. *The Barry Sting*, THE AMERICAN LAWYER 3, 3 (October 1990) (describing Barry as a person “[a]ny good prosecutor would have wanted to nail”).

it is the technique of choice for obtaining convictions of members of disfavored groups.<sup>138</sup>

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.<sup>139</sup> As argued earlier, yielding to temptation should be regarded as moral failure, even if it a common failure.<sup>140</sup> 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.<sup>141</sup> With strategies such as these, who needs entrapment?

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<sup>138</sup> In Tulia, Texas, Thomas Coleman, a lone undercover police officer with little background in law enforcement, engineered the arrest on drug charges of 46 African-Americans, resulting in the 38 convictions with prison sentences ranging from 20 to 90 years. In the 11 cases the went to trial, all the defendants were found guilty based entirely on Coleman's perjured testimony. Lee Hockstader, *Washington Post*, April 2, 2003, at A3.

<sup>139</sup> From 1968 to 1978, forty-eight percent of United States congressmen charged with bribery or moral violations failed to be re-elected. Peters & Welch, *The Effects of Charges or 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 Stuart Taylor, Jr. *The Barry Sting*, THE AMERICAN LAWYER 3 (October 1990).

<sup>140</sup> See *supra* § III.2.b-c.

<sup>141</sup> 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 fake tapes, disseminated scandalous disinformation, intimidated supporters, and disrupted fund raising activities. See GERALD D. MCKNIGHT. THE LAST CRUSADE: MARTIN

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.<sup>142</sup> 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.<sup>143</sup> There is no reason to distinguish the constitutionality of selective prosecution on one hand and selective investigation/entrapment on the other.<sup>144</sup> If established, it should constitute a Fourteenth Amendment violation. Admittedly, it is difficult to satisfy the proof requirements in analogous cases of selective prosecution.<sup>145</sup> 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

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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 (noting 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 *Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities and the Rights of Americans*, S. Rep. No. 755, 94th Cong., 2d Sess., bk. II, at 235-37 (1976).

<sup>142</sup> United States v. Armstrong, 517 U.S. 456 (1996); United States v. Batchelder, 442 U.S. 114 (1979); Oylar v. Boles, 368 U.S. 448 (1962).

<sup>143</sup> See, e.g., United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972) (permitting discovery on claim by war protestors that prosecution was intended to inhibit the expression of viewpoint). See also WAYNE LAFAYE, 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).

<sup>144</sup> See Yick Wo v. Hopkins, 118 U.S. 356 (1986) (racially motivated enforcement of facially neutral law violates Equal Protection Clause).

<sup>145</sup> In United States v. Armstrong, 517 U.S. 456, 465 (1996), 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.

sufficient showing, it is too costly to society to require the prosecution to respond to charges that the decision to prosecute was improperly motivated.<sup>146</sup> 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.

#### **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. It is well established that an "act" is required for criminal liability.<sup>147</sup> 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

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<sup>146</sup> See *id.* at 468 (identifying costs in refuting claim of selective prosecution as diversion of prosecutorial resources and possible of disclosure of prosecutorial strategy).

<sup>147</sup> See LAFAVE, CRIMINAL LAW, *supra* note 5, § 3.2(b). Here "acts," include breaches of legal duties, though action or omission, regardless whether a bodily movement is involved. *Id.*

which [such] external constraints may be imposed.”<sup>148</sup> In this manner, “[t]he acts requirement shields ‘people’s thoughts and emotions . . . , personality patterns and character structures’ from government scrutiny, and protects personal autonomy.”<sup>149</sup> 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 choice and behavior before the individual has done anything to warrant an invasion of his autonomy.<sup>150</sup>

On this basis, Carlson concludes:

The most objectionable feature of encouragement . . . is that the government, by using encouragement, is no longer in a neutral position vis-a-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

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<sup>148</sup> Carlson, *The Act Requirement and the Foundation of the Entrapment Defense*, *supra* note 69, at 1083 (quoting HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 75 (1968)).

<sup>149</sup> *See id.* at 1083.

<sup>150</sup> *See id.* at 1084 (footnotes omitted).

requirement's] restraint on the state's intrusive powers.<sup>151</sup>

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.<sup>152</sup> 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.<sup>153</sup> Likewise, defense of duress is unavailable when the actor has unreasonably exposed himself to the situation of duress.<sup>154</sup> 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."<sup>155</sup>

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

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<sup>151</sup> See *id.* at 1086-87 (footnote omitted).

<sup>152</sup> 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).

<sup>153</sup> See LAFAVE, CRIMINAL LAW, *supra* note 5, § 9.5(g) at 480-81; Model Penal Code § 2.08.

<sup>154</sup> See LAFAVE, CRIMINAL LAW, *supra* note 5, § 9.7(b) nn. 39-40; Model Penal Code § 2.08.

<sup>155</sup> Carlson, *The Act Requirement and the Foundation of the Entrapment Defense*, *supra* note 69, at 1053.

interference with an individual's decision 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,<sup>156</sup> 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-a-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 with 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

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<sup>156</sup> 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).

conduct.<sup>157</sup> 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 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.

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<sup>157</sup> See *supra* § II.A.2.

### **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.<sup>158</sup> Justice purports to trump, or at least constrain, the government's pursuit of other ends, such as advancing the general welfare.<sup>159</sup> 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.<sup>160</sup> Justice has many branches, or aspects.

In the context of the criminal law, justice is usually thought of in terms of retributive justice.<sup>161</sup> 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.<sup>162</sup> For punishment to be just, there must be the appropriate relation between the person to be

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<sup>158</sup> See JOHN RAWLS, *A THEORY OF JUSTICE* 3 (2d ed. 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.").

<sup>159</sup> See RAWLS, *A THEORY OF JUSTICE*, *supra* note 158, at 3-4; MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 3, 14 (1982).

<sup>160</sup> See GEORGE P. FLETCHER, *BASIC CONCEPTS OF LEGAL THOUGHT* 80-81 (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*, bk. V, chs. 2-5, in 9 THE BASIC WORKS OF ARISTOTLE (Richard McKeon ed., Sir W. David Ross trans. 1941).

<sup>161</sup> See, e.g., MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW*, *supra* note 66, Part I (1997) (arguing criminal law best understood as embodying retributive justice norm); 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").

<sup>162</sup> 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 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).

punished and the actual or potential victim. For this reason, retributive justice might fall within the general category of “interactive justice.”<sup>163</sup> Some theorists also assert that the concept of punishment involves a third entity: an authority to establish the rules and to exact the punishment.<sup>164</sup> 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, 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.<sup>165</sup> 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.<sup>166</sup> 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.<sup>167</sup> With

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<sup>163</sup> See Richard W. Wright, *The Principles of Justice*, 75 NOTRE DAME L. REV. 1859, 1883 (2000) (dividing forms of justice into “interactive” and “distributive”).

<sup>164</sup> See H.L.A. Hart, Prolegomenon to the Principles of Punishment, in PUNISHMENT AND RESPONSIBILITY 5 (1968).

<sup>165</sup> See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 166-67 (1980).

<sup>166</sup> See RAWLS, A THEORY OF JUSTICE, *supra* note 158, at 75-80.

<sup>167</sup> 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,

limited exceptions,<sup>168</sup> 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.<sup>169</sup> Legal doctrines of fair use, fair play, fair warning, and fair dealing, for example, all rest on slightly different sets of policy 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 improper, if it violates this principle. 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, 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

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NATURAL LAW AND NATURAL RIGHTS, *supra* note 165, at 180-181 (discussing distributive justice norms in personal injury litigation).

<sup>168</sup> See 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> (March 18, 2004) (arguing traditional duty-to-aid rules, if applied women carrying fetuses, unfairly burden women); Alon Harel and Gideon Parchomovsky, *On Hate and Equality*, 109 YALE L. J. 507 (1999) (arguing that bias crimes unfairly distribute cost of crime occurrence on minorities).

<sup>169</sup> See Louis Kaplow and Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1003 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.”).

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 to it of familiarity. 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.<sup>170</sup> Rather than singling out one person to bear the entire burden, the government could have caused the 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.<sup>171</sup> A Bill of Attainder would be paradigmatically unfair because the burden it imposes is not generally allocated under any interpretation of "fairness."<sup>172</sup>

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<sup>170</sup> 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. California Coastal Com'n*, 483 U.S. 825, 836 n.4 (U.S.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 either the incorporated Takings Clause . . ."); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 605 (2d 1988) ("[T]he just compensation requirement [of the Takings Clause] appears to express a limit on the government's power to isolate particular individuals for sacrifice for the general good.").

<sup>171</sup> U.S. CONST. art. I, § 9, cl. 3, § 10, cl 1.

<sup>172</sup> See Akhil Amar, *Atainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 235 (1996) (noting that bills of attainder offend, inter alia, rule of law notions of generality).

### **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.<sup>173</sup> The result has traditionally been explained on the ground that framing an innocent person offends retributive justice.<sup>174</sup> 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 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

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<sup>173</sup> It has been disputed whether utilitarianism would justify the framing of a innocent person in the real world. See, e.g., Guyora Bender, *Framed: Utilitarianism and the Punishment of the Innocent* 32 RUTGERS L. REV. 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.

<sup>174</sup> 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). As noted *supra* text accompanying note 68, 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.

inherently, involves stigmatization or condemnation.<sup>175</sup> 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.<sup>176</sup> 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 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.

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<sup>175</sup> 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*, *id.*

<sup>176</sup> The tax might be applied progressively on the reasonable assumption that progressive taxation is consistent with distributive justice.

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.<sup>177</sup> 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.<sup>178</sup> 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."<sup>179</sup> 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

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<sup>177</sup> See *Ferge v. State* 764 N.E.2d 268 (Ind. App. 2002) (finding entrapment as a matter of law on similar facts).

<sup>178</sup> See *People v. Boabley*, 493 N.E.2d 369 (App. Ill. 1986) (finding entrapment as a matter of law under similar facts).

<sup>179</sup> See *Jacobson v. United States*, 112 S. Ct. 1535, 1541 (1992).

persons who are not predisposed to crime,<sup>180</sup> their selection from the general populace of nonpredisposed 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, in order to achieve the desired level of deterrence, the penalty for those entrapped could be made correspondingly light. 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.<sup>181</sup> 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

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<sup>180</sup> Lack of predisposition is a formal requirement of the subjection version of the defense, *see supra* note 16, and a common feature of cases satisfying the objective version., *see text accompanying note 63, supra*.

<sup>181</sup> *See* Gerald Dworkin, *The Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime*, 4 LAW AND PHIL. 17, 32 (1985).

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.<sup>182</sup>

Dworkin then remarks:

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.<sup>183</sup>

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.<sup>184</sup> 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 bear the cost of the system would enjoy the benefit 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. 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.

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<sup>182</sup> *Id.* at 32-33.

<sup>183</sup> *Id.* at 32.

<sup>184</sup> IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 429 (L. Beck trans. 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").

In sum, government entrapment in the absence of the 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 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. Accordingly, in any plausible society lacking a functional entrapment defense, entrapment 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*

*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.<sup>185</sup> 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.<sup>186</sup> For example, it would be unjust for a landlord to enter P's apartment

<sup>185</sup> See *Dial v. Florida*, 799 So.2d 407 (Ct. App. Fla. 2001) (finding entrapment as a matter of law under similar facts).

<sup>186</sup> Principles such as the one above are described as deontological or, perhaps more accurately, agent-relative. See Michael Moore, *Victims and Retribution*, A

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 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.<sup>187</sup> 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

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*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.

<sup>187</sup> A plaintiff must show 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* LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 170, at 1511 (criticizing decision).

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 caused to have the morally relevant characteristic of criminal culpability, for example through private entrapment. The following chart compares the previous three hypotheticals:

<b>Entity Arbitrarily Selecting</b>	<b>Criterion of Selection</b>	<b>Entity Imposing Burden</b>	<b>Burden Imposed</b>	<b>Moral Status of Imposing Burden</b>
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 others

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.<sup>188</sup> 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.<sup>189</sup> In contrast, the proportion of nonpredisposed 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

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<sup>188</sup> 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, 488 (N.C. 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. 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.”).

<sup>189</sup> See FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 2001, 220 (2002).

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,<sup>190</sup> 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 (without any mitigation of penalties), while eliminating fairness, 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. In contrast, entrapment, although a cost-effective means of preventing crime,<sup>191</sup> 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 which provides opportunities for crime, such operations are designed to apprehend as many drug dealers as possible and it is regrettable that

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<sup>190</sup> Cf. IMMANUEL KANT, METAPHYSICAL FIRST PRINCIPLES OF THE DOCTRINE OF RIGHT, in THE METAPHYSICS OF MORALS 141 (Mary Gregor trans., 1991) ("if justice goes, there is no longer any value in men's living on the earth.").

<sup>191</sup> See *supra* §§ III.b.2-4.

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. The moral distinction between wrongs done by design and those that are merely unavoidable side effects has a long and respected lineage.<sup>192</sup>

Like an adjudication system designed to convict the innocent, the practice of entrapment breaches the norms of justice by design. Even if it were feasible to entrap widely enough to spread equitably the burden of conviction among the nonpredisposed, it would not be desirable. 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. Furthermore, as discussed above, entrapping and imposing significant penalties through a wide-spread campaign of entrapment is not a realistic option for society. Because the practice of entrapment is designed to burden the few from the many who potentially benefit from it, it violates the fairness principle.

### **3. Specific Counter-Examples**

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

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<sup>192</sup> 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).

**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 be 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 speeders exceed the speed limit by less than 25%. 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. These 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.<sup>193</sup> 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 others 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,<sup>194</sup> 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

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<sup>193</sup> 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, 964 n.281 (citing cases against sports figures brought because of their deterrence value). See also Erin McClam, *Martha Stewart Guilty of All Counts*, *Chattanooga Times Free Press* (Tennessee) March 6, 2004, at A1 (describing conviction of Martha Stewart; noting her “supporters claim she was being targeted because of her celebrity status.”); Harriet Chiang, *Starr Would Find It Difficult To Prove Perjury by Clinton*, *San Francisco Chronicle*, 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.”); Arianna Huffington, *O.J., Bill and the Perjury Plague*, *New York 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.”); Mark Helm, *Ex-Prosecutors Say Clinton Held to Tougher Standard; Perjury Convictions Common, GOP Argues*, *Times-Picayune* (New Orleans, LA) December 10, 1998, at A10.

<sup>194</sup> 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.”).

earn more should pay proportionately more, e.g., they can afford it, or they have benefitted 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.<sup>195</sup>

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 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.*<sup>196</sup>

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

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<sup>195</sup> See *supra* text accompanying note 95.

<sup>196</sup> See *Kats v. Indiana*, 559 N.E.2d 348 (Ct. Apps. Ind. 1990) (presenting similar facts).

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 cases actually brought will come out the same way under either version.<sup>197</sup> 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*

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<sup>197</sup> See section II.C. *supra*.

*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.<sup>198</sup> On these facts, does the fairness principle permit conviction consistent with the objective version or require exoneration consistent with the subjective version?

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

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<sup>198</sup> See *Hawaii v. Powell*, 68 P.2d 266 (1986). See also *Cruz v. Florida*, 465 So.2d 516 (1985) (use of drunk decoy satisfies objective test as matter of law); *Sheriff, Washoe County v. Hawkins*, 752 P.2d 769 (Nevada 1988) (same). But see *People v. Walker*, 615 P.2d 57 (Colorado 1980) (rejecting entrapment defense on similar facts).

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, that 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.<sup>199</sup>

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.<sup>200</sup> Any other conclusion would be “inequitable.”<sup>201</sup>

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. Applying this principle to entrapment, the predisposed defendant should be convicted despite the fact that he happened to be

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<sup>199</sup> This also problem 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. Anthony M. Dillof, *Unraveling Unknowing Justification*, 77 *Notre Dame L. Rev.* 1547 (2002); Russell L. Christopher, *Unknowing Justification and the Logical Necessity of the Dadson Principle in Self-Defense*, 15 *OXFORD J. LEG. STUDIES* 228 (1995); Paul Robinson, *Competing Theories of Justification: Deeds v. Reasons*, in *HARM AND CULPABILITY* 45 (A.P. Simester and A.T.H. Smith, 1996); Robert F. Schopp, *Justification Defenses and Just Convictions*, 24 *PAC. L.J.* 1233, 1267-82 (1993).

<sup>200</sup> See *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362 (1995).

<sup>201</sup> *Id.*

ensnared in a practice which, as a general matter, produces unfair results.<sup>202</sup> 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 nonpredisposed 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

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<sup>202</sup> Design aside, in cases of objectively entrapped predisposed defendants, the disproportionality of the burden is not as great as in the cases of nonpredisposed defendants. First, there are many more nonpredisposed to crime than predisposed. Second, among this larger group, there are many fewer who potentially bear the burden of conviction. Among the nonpredisposed, 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 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 nonpredisposed potentially burdened by entrapment is much less than that of the predisposed.

exactly what 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 and to commit the crime should an opportunity present itself.<sup>203</sup> 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.<sup>204</sup> 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.<sup>205</sup>

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

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<sup>203</sup> See *United States v. Thicksun*, 110 F.3d 1394 (9th Cir. 1997).

<sup>204</sup> See *United States v. Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994); *U.S. v. Knox*, 112 F.3d 802, 808 (5th Cir. 1997) (agreeing with *Hollingsworth*).

<sup>205</sup> *United States v. Hollingsworth*, 27 F.3d 1196, 1199 (7th Cir. 1994).

entrapment defense? The Supreme Court has yet to address the issue.<sup>206</sup>

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

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<sup>206</sup> In *United States v. Jacobson*, 503 U.S.540 (1992), the Court's most recent entrapment case, the Court stated, "When 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 *Jacobson* 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 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.

practice fail to consistently achieve the ideals they were designed to achieve.<sup>207</sup>

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 appositional 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?<sup>208</sup> The fairness theory would reject this result. From the perspective of fairness, Frank is in the same position as the individual in Posner, 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.

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<sup>207</sup> See text accompanying note 193 *supra*.

<sup>208</sup> 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. *Id.* at 559.

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 nonpredisposed 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 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.