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CLARIFYING ENTRAPMENT

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I. INTRODUCTION

The edges of the criminal law in the United States (and elsewhere, but we concentrate on the United States in this paper) are partially formed by various defenses that reflect in large part the frailty of human nature. The commands to forgo violence will not constrain a person at risk of his own existence, nor when loved ones are threatened, and some believe that it is right that they not attempt to do so. Mandates to respect the inviolability of personal property will not avail when bodily integrity is at stake, nor should they in the face of peril. And so on. These defenses recognize that virtually anyone can be induced to commit an otherwise illegal act when the ratio of potential benefit to potential harm (expected return, in the language of micro-economics) is high enough. So, too, with entrapment. Entrapment merely completes the picture of human motivation by including financial and emotional issues within the set of motivations that can lead to exculpation. At its deepest level, entrapment, like many other criminal defenses, thus simply recognizes that, as situations become increasingly skewed from the conventional, they become increasingly inadequate

* John Henry Wigmore Professor, Northwestern University School of Law. We have received very helpful comments on drafts of this paper from Judge Richard Posner, from Professors Dan Polsby, William Stuntz, Michael Seidman, Roger Park, and Jonathan Carlson, and from the attendees of the Belfast Conference on The Role of the Trial Judge in Criminal Proceedings.

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justifications for, and less accurate predictors of the utility of, criminal sanctions.

Yet, unlike most other criminal defenses, controversy over the very nature of entrapment continues unabated. As is well known, in a series of cases the Supreme Court created the defense. Perhaps the circumstances of its creation contributed to the confused state of the law today. When the Supreme Court in *Sorrells v. United States*¹ first recognized entrapment as a defense in federal criminal law, it struggled to find the authority to do so. As *Sorrells* was decided in 1932, one might have expected the Court to have found its authority in substantive due process. But the right to the entrapment defense, unlike the right to contract, was hardly a tradition in Anglo-American jurisprudence. Instead, the Court concluded that Congress in enacting the law in question did not intend for it to apply to the entrapped.² The concurring opinion of Justice Roberts argued that the defense should have been based on the supervisory powers of the court.³ Both *Sorrells*' opinions assumed that entrapment was self-explanatory and that it was wrong. Both failed to clearly delineate the contours of the defense, probably because the only issue in *Sorrells* was the Court's authority to permit the defense in the absence of a legislative or constitutional directive.⁴

The two tests in current use, born together in *Sorrells*, are generally called the objective and the subjective tests (although neither is inherently more objective—or subjective—than the other). Both formulations require that the crime be induced, or encouraged, by government agents. The subjective test asks, "Was the defendant predisposed to commit the crime when he

¹ 287 U.S. 435 (1932). Entrapment had previously been recognized by some lower federal courts, see, for example, *Butts v. United States*, 273 F. 35, 38 (8th Cir. 1921); *Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915), and by at least one Supreme Court dissent, *Casey v. United States*, 276 U.S. 413, 421 (1928) (Brandeis, J., dissenting). By 1955 almost every state had recognized the defense. Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 164 n.1 (1976).

² *Sorrells*, 287 U.S. at 448.

³ *Id.* at 457 (Roberts, J., concurring).

⁴ For an excellent discussion of this topic, see Jonathan C. Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 VA. L. REV. 1011 (1987).

was approached by the government agent," while the objective test asks, "Did the government's encouragement of crime exceed acceptable limits?" The subjective test, the test advanced by the *Sorrells* majority, has prevailed in federal criminal law; many states have adopted some version of the objective test.⁵ Controversy persists over many issues, in particular the relative advantages of the two tests, their respective meaning, and subsidiary issues, in particular why entrapment does not extend to entrapment by a private party.⁶

The controversy over entrapment has attracted much scholarly attention, and our collective understanding of the various issues has much advanced as a result. Of the many excellent analyses, three stand out as particularly penetrating: the articles by Professors Carlton and Park previously cited, and that of Professor Seidman.⁷ We build on those works, a general knowledge of which is assumed here, in an effort to clarify the nature of entrapment. We make the following points:

1. The controversy over the two versions of the test—the subjective and objective—is quite beside the point, because the two tests will virtually never lead to different results;

2. More than just beside the point, the controversy presupposes the existence of a fictional entity—predisposition. Because a necessary ingredient of the subjective version of the test does not exist, the test, rather plainly, cannot be applied in any way that allows useful propositions to be asserted about the existence of predisposition, except to assert its nonexistence. Because predisposition does not exist, no one is ever, under any circumstances, "predisposed" to commit the crime; or alternatively, everyone, under every conceivable circumstance, is predisposed to commit the crime. Such is the consequence of using false propositions in one's analysis, and in any event, the point is that "predisposition" cannot sort anyone from anyone else, and thus is useless as a tool designed for just that purpose.

⁵ See PAUL MARCUS, *THE ENTRAPMENT DEFENSE* 669-706 (1995).

⁶ See generally Park, *supra* note 1.

⁷ Louis Michael Seidman, *The Supreme Court, Entrapment, and our Criminal Justice Dilemma*, 1981 S. CT. REV. 111.

3. Something does usefully sort out individuals—whether they responded to real world, market level inducements.

4. The emphasis on market level inducements as the key to entrapment further clarifies whether entrapment should extend to private entrapment behavior—it should.

5. The market level inducements argument explains the cases, perhaps simply contingently so, but it explains them nonetheless.

We develop these five points in turn.

II. THE NONEXISTENT PRACTICAL DISTINCTION BETWEEN THE SUBJECTIVE AND OBJECTIVE TESTS FOR ENTRAPMENT

If there were such a thing as “predisposition,” the two current tests for entrapment theoretically could reach different results. A “non-predisposed” individual could accept an inducement insufficient under the objective test. Alternatively, the police could direct a scheme violative of the objective test against a person already predisposed. Professor Seidman has argued that these theoretical possibilities are quite unlikely ever to materialize. He is right, but we wish to make two corrections to his analysis:

First, Professor Seidman asserts that:

[S]o long as one equates “predisposition” with a readiness to commit crime, no definition of “predisposition” can be complete without an articulation of the level of inducement to which a “predisposed” defendant would respond. Furthermore, the “predisposed” cannot be distinguished from the “nondisposed” without focusing on the propriety of the government’s conduct—the very factor that the subjective approach professes to ignore. This is true because a defendant who responds favorably to a “proper” inducement has thereby conclusively demonstrated that he is disposed to crime when such an inducement is offered. It would seem, then, that so long as government agents restrict themselves to “proper” inducements, they run no risk of violating the entrapment rules.⁸

The error here is in the implicit assertion that the level of inducement is the only possible evidence of “predisposition.” If

⁸ *Id.* at 118-19 (internal footnotes omitted).

such a thing exists, there is no reason to believe that other forms of evidence, such as statements of the defendant and so on, may not exist to establish it, or its absence. The situation clearly is relevant to inferring mental states, but it is not, as Professor Seidman argues, "conclusive."

Second, Professor Seidman asserts that:

[T]he objective test in theory avoids analysis of the defendant's predisposition and focuses, instead, exclusively on the propriety of the inducement. That question, in turn, is determined by the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime. But plainly that likelihood depends in large measure on the group to whom the inducement is targeted. 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 is, therefore, presumably permissible. Thus, in most cases, both the objective and subjective approaches would permit an inducement, so long as the defendant is predisposed. The two approaches would reach different results only in the rare case where the police reasonably, but incorrectly, believe the defendant to be predisposed at the time the inducement is offered.⁹

That inducement and predisposition are related is correct, but, again assuming there is such a thing as predisposition, this argument does not quite capture their relationship. The central issue of the objective test is the appropriateness of the level of inducement, not to whom it is directed. Professor Seidman's argument is equivalent to the argument that excessive force can be used to coerce a truthful confession from a guilty suspect, as there is no risk that a wrongful conviction will result. In both cases, the activity of the police is independent of the state of the defendant, even if predictions as to how people in general would react to specific levels of inducement determines in part the appropriateness of inducements.¹⁰

⁹ Id. at 119-20 (internal footnotes omitted).

¹⁰ Professor Seidman, in his very helpful comments on our paper, points out that our argument is valid only to the extent that over-the-top police behavior is a wrong in and of itself. We agree, and that is what we are assuming at this point in the paper. We are doing so because that is how we read the cases on the "objective" test. This section, remember, is demonstrating the practical insignificance of the difference be-

Professor Seidman's arguments thus do not quite establish the practical insignificance of the distinction between the two tests, but another consideration does, one that captures the pragmatic relationship between levels of inducement and "predisposition." In all cases, a third party fact finder—judge or jury—will be determining predisposition and appropriateness of inducements. The obvious measure of the appropriateness of inducements is how "innocent, nonpredisposed" individuals would behave. What is shocking about over-the-top police behavior is its capacity to induce "innocent" people to commit illegal acts, but "innocent" must in turn refer to the person's predisposition to commit those acts. But, the fact finder will have no direct access to the individual's actual predisposition, and thus can largely only speculate how a reasonable person (which probably will reduce largely to the fact finder herself) would behave. The epistemological setting is thus that typically the most cogent test of the appropriateness of levels of inducement (that we can think of, at any rate) is its likely effect on reasonable, nonpredisposed individuals. Consequently, the "objective test" requires reference to the state of predisposition of reasonable individuals, if not the defendant himself.

We now run essentially the same argument through the subjective test. Again, fact finders will not have direct access to a defendant's predisposition, which we have been assuming is a state of mind or perhaps a statement of character. As Professor Seidman suggests, the most salient evidence will be what this person did in the actual setting, judged, however, by the third party decision maker. But, that judgment again typically will be made by appraising how a reasonable person, like the fact finder presumably, would have behaved in the setting at hand. This, though, is exactly the same question that the fact finder must consider in applying the objective test. Thus, in both cases, the fact finder will generally, although admittedly perhaps not always, be asking precisely the same question, which estab-

tween the two tests even if it is assumed, as it turns out is false, that some entity known as "predisposition" exists.

lishes the practical insignificance of the distinction between the two tests.¹¹

III. THE CONTROVERSY OVER THE TESTS FOR ENTRAPMENT PRESUPPOSES THE EXISTENCE OF A FICTIONAL ENTITY— PREDISPOSITION

There is a deeper difficulty with the controversy over the two tests for entrapment. The controversy is premised on the existence of a real something—state of mind, character, whatever—that is referred to as “predisposition.” This assumption is false. We assume that there are a few people who would not commit any criminal acts no matter what the provocation or enticement. We will not refer further to such saintly, or misguided, individuals. Everyone else, we assume, has a price. That price may be quite high, for example because a person puts a high value on her good name, but it exists. If this assumption is true, then everyone except saints is predisposed to commit crimes. But, that in turn means that “predisposition” cannot usefully distinguish anyone from anyone else. The only salient question is whether a person’s price has been met, not whether he has one, since by hypothesis everyone but the saintly does.

The real point is that talk of “predisposition” is meaningless and commits an existential fallacy. A person who takes the bait has had his price met; a person who does not, has not. But, the person who does not take the bait almost surely would take a higher, even if greatly higher, bait. The failure to take this one is evidence of his price, but not of predisposition.¹²

The discussion in the cases of whether the defendant was a willing participant, and whether the government implanted the criminal design in the defendant or created the crime¹³ verge on

¹¹ There are well known procedural differences between the two tests, but these are contingent. See Park, *supra* note 1. Thus, we ignore them.

¹² Professor Seidman may share this view. See Seidman, *supra* note 7, at 118. We have difficulty sorting out the ontological and the epistemological in his argument. We are reading him as making an epistemological point; if he is making an ontological one, we would seem to be in agreement on the nonexistence of “predisposition.”

¹³ See, e.g., *United States v. Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994) (en banc); Seidman, *supra* note 7, at 117-19.

the silly. The defendant is always "willing" (otherwise there would be no need to rely on entrapment—duress would do) and to our knowledge, the government has never physically opened the brain of a defendant and "implanted" anything. Perhaps the government implants criminal designs psychologically, but again, if so, it is always so for the government always plays a causal role in the act. In all cases of police involvement, and thus of potential entrapment, the act would not have occurred as it did but for the involvement of the police—a tautology if ever there were one. Nor does the objective test avoid this point, just because it pragmatically operates upon the assumption of the existence of predisposition as a real thing. Without predisposition as a sorting mechanism, the objective test is rootless.

The imagery in the entrapment cases of the government actively creating a criminal design or being part of the causal links underlying an act obviously cannot distinguish any cases, because they will always be true. Thus all cases of police involvement would either be cases of entrapment or no entrapment—no criterion permitting distinctions emerges from this analysis.

There are other possibilities, however. Entrapment could mean, but does not in the cases so far as we can tell, something about character or about whether a person has already committed acts analogous to the one he is now charged with. The former falls under the weight of the general disinclination to punish for character alone (but we return to this point below); the latter is of little practical significance, for if we know this person has committed similar acts in the past, little is to be gained from entrapping him now. We can just prosecute based on our knowledge of his previous behavior. If insufficient evidence exists to prosecute him for those previous acts (they cannot be established beyond reasonable doubt), catching him in a scheme now is to punish him for his character.

IV. SOMETHING DOES USEFULLY SORT OUT INDIVIDUALS— WHETHER THEY RESPONDED TO MARKET LEVEL INDUCEMENTS

There are illegal as well as legal markets, legal and illegal exchange and exchange rates, real world and extra-real world

incentives. The most fruitful criterion of government inducements we have been able to identify to sort out those who have a plausible claim for exoneration is whether the inducements exceeded real world market rates, which includes both financial and emotional markets.¹⁴ If so, quite convincing claims for exoneration can be made; if not, only weak claims can.

We assume, without regard to philosophical niceties, that the primary relevant objectives of the criminal law are to deter (general and specific), to incapacitate, and to rehabilitate (it is pointless to discuss retribution in this context).¹⁵ None of these objectives is likely to be accomplished by the punishment of an individual who accepted an extra-market inducement to act. The concern of deterrence surely is to reduce the occurrence of criminal acts in the world we actually inhabit, not some hypothetically different one.¹⁶ That a person responds to extra-

¹⁴ For an implicit equating of "predisposition" with the market test, see Chief Judge Posner's opinion in *United States v. Evans*:

All this suggests a certain semantic disarray. But when we go behind words to policy, we can see that something like predisposition, in the sense of inordinate willingness to participate in criminal activity, must be the key inquiry, though as a verbal matter it could be folded into inducement viewed as the government's really having *caused*, in some rich sense, the criminal activity to occur, as distinct from merely providing a convenient occasion for it to occur. The centrality of predisposition can be seen by considering the purpose of the doctrine of entrapment. It is to prevent the police from turning a law-abiding person into a criminal. A law-abiding person is one who resists the temptations, which abound in our society today, to commit crimes. Such a person can be induced to commit a crime only by grave threats, by fraud (the police might persuade him that the act they want him to commit is not criminal), or, in the usual case in which entrapment is pleaded, by extraordinary promises—the sorts of promises that would blind the ordinary person to his legal duties. . . . So if the police offered a derelict \$100,000 to commit a minor crime that he wouldn't have dreamed of committing for the usual gain that such a crime could be expected to yield, and he accepted the offer and committed the crime, that would be entrapment.

United States v. Evans, 924 F.2d 714, 717 (7th Cir. 1991)(emphasis in original)(citations omitted).

¹⁵ See generally Carlson, *supra* note 4.

¹⁶ As Professor Seidman helpfully points out, some theorists have speculated that punishing acts taken with above market inducements may lead to benefits in the real world. It is possible, of course, but sufficiently doubtful to not trouble us greatly. Briefly, these arguments, and the reasons we are not troubled, are:

1. Any defense may reduce deterrence because of a criminal's belief that he will be able to convince a fact finder that it applies to him. As there are numerous defenses, the question here would be the marginal increase from entrapment. If the defendant irrationally believed in his obfuscating power, that marginal increase must

market prices is uninformative of how he will respond to market prices, and thus is uninformative on the justification for incapacitation.¹⁷ A person who accepts extra-market prices provides evidence that indeed virtually everybody has a price, but not that this person is in need of rehabilitation, given the world we actually inhabit. The point generalized is that criminal acts occur in the real world, not an artificial one, and behavior in an artificial world is largely uninformative of behavior in this one.

Obversely, if a person responded to market rates, all arguments about the purpose of punishment run through: deterrence of this person and similarly situated ones is plausible, the person has demonstrated the willingness to behave in an anti-social fashion in this world, and he has demonstrated that his utility function is in need of correction (rehabilitation).

Professor Seidman disagrees, and asserts that “[t]here is no culpability reason to acquit a defendant simply because he responded to an inducement unlikely to be replicated and there-

surely be small, as other defenses would still exist allowing smoke to be manufactured. If the criminal is rational, the question does not arise for the most part. Finally, it is unclear how this would work in the entrapment context in any event. A criminal who harbors the thoughts necessary for this argument to work would seemingly be aware that the inducement is an almost sure sign of governmental involvement, and thus not take the bait.

2. Knowledge that the government is offering extra-market inducements will cause people to steer clear of the line. To the contrary, it will cause people to respect the line and reduce the deterrent efficacy of governmental efforts by signaling reliably who government agents are. The comparison, remember, is between two worlds, one possessing extra-market government inducements and one not.

3. The market may be unclear, and thus high bids may be encountered. True, but if high bids are encountered in the real world as a natural occurrence, in our view it is not entrapment to offer such bids precisely because they may be encountered in the real world.

¹⁷ As Judge Posner argued in *United States v. Manzella*, 791 F.2d 1263, 1269 (7th Cir. 1986):

The significance of this qualification is that if the inducement merely affects the timing of the offense—inducing the criminal to commit it at a time and in a place where the government can easily apprehend him and make a case against him—punishing the criminal will, or at least may, reduce the crime rate, by taking out of circulation a person who, had he not been caught, would have committed the same crime, only in different circumstances, making it harder to catch him. But if the inducement was so great that it tempted the person to commit a crime that he would not otherwise have committed, punishing him will not reduce the crime rate; it will merely deflect law enforcement into the sterile channel of causing criminal activity and then prosecuting the same activity.

fore posed little danger. The culpability question is not whether the defendant is likely to commit a crime, but why he is likely to commit it.”¹⁸ The term “culpability” is undefined here, however. If it refers to a justification for punishment for deterrence, incapacitative, or rehabilitative purposes, the argument is in error, as demonstrated above. If it refers to retributive concepts, it is also in error, since the induced defendant obviously commits no “wrong” against another person in the sense that term is usually employed, as Professor Carlson has demonstrated.¹⁹ There is, thus, no accepted notion of culpability applicable to a person who accepts an extra-market inducement, and thus no “culpability” reason that we can see for punishing such person.²⁰

The market test also answers the second of Professor Seidman’s concerns:

I suspect that this fear of the government’s power to create criminals provides the ultimate answer to the entrapment puzzle. It is not an obvious answer, however. It will not do to claim that entrapment is necessary to prevent the executive from engaging in selective application of the criminal sanction, because within broad limits, we tolerate precisely this risk when the universe of potential criminals consists solely of persons acting without government inducement. When the government

¹⁸ Seidman, *supra* note 7, at 136 (emphasis omitted).

¹⁹ Which is precisely Professor Carlson’s concern. Carlson, *supra* note 4, at 1059-66. Professor Seidman remarked to us that individuals are frequently punished for inchoate crimes such as attempts, and that retributivists have no difficulty with this. Indeed, he points out that one problem for some retributivists is justifying the difference in punishment for attempts and consummated crimes where the attempt is fortuitously unsuccessful, a point made many years ago by one of our co-authors. Ronald J. Allen, *Retribution in a Modern Penal Law: The Principle of Aggravated Harm*, 25 BUFFALO L. REV. 1 (1975). The question here, though, is the slightly different one of a retributive justification for an act causing no actual harm and that would not have occurred in the real world. It is difficult for us to see a cogent retributivist justification in light of these conditions.

²⁰ Later in his paper, Professor Seidman returns to the point, asserting that “it makes some sense to acquit defendants who succumb only to very large or attractive inducements which are either unlikely to be replicated or likely to cause the average person to succumb.” Seidman, *supra* note 7, at 142. He rejects this because it is unclear to him “how . . . the court [is] to measure the social cost of a particular enforcement decision against the cost of the crime it is designed to combat.” *Id.* at 143. However, there is no necessary connection between these two points. The problem is not just waste of law enforcement resources, although that is a problem; the problem in addition is the justification for penalizing a particular act. As we are trying to show, the market test gives the best solution to that problem.

chooses which shoplifters, pickpockets, and drug users to prosecute and to jail, we regularly rely upon political checks to guard against abuse. Why do these checks become suddenly inadequate when the class of potential criminals is broader?²¹

The answer is quite simple. It is the difference between allocating limited resources to enforce the law against sets of individuals who are committing criminal acts in the real world, as compared to investing those resources to induce individuals to commit acts that they would not commit in the real world.

However, there are three difficulties:

First, markets do not always have uniform prices. True, and the best that can be done is to require that the fact finder be convinced that the inducement did not exceed the market rate, whatever the variability of price in the relevant market may be. Given what is at stake, our preference would be for proof beyond a reasonable doubt.

Second, would proving the market involve difficult proof questions? Perhaps so, but not insurmountable ones. Information about illegal markets exists—as reflected by the news reports of “drugs with a street value of . . .” Presumably police agencies engaging in inducing activity know the structure of the markets they are dealing with, and could provide expert testimony. Moreover, a requirement of presenting such information may act as a salutary constraint on police behavior, a tax on “flying blind,” as it were. And last, the proof questions must be compared to those under the present tests. The subjective test requires literally proof of the nonexistent, which is hardly an

²¹ *Id.* at 146 (internal footnotes omitted). Professor Seidman returns to the theme later in his paper, with this series of questions, which seem to us to have quite clear answers: “Is it not possible that defendants succumbing to certain temptations seem less culpable because we can imagine persons with our life styles making a similar choice?” *Id.* at 151. Exactly so, and as our life styles are not criminal in the real world, we can see no reason to encourage the creation of artificial conditions merely to permit punishment to be imposed. “Is not our fear of government power to make criminal really a fear that it will make the wrong people criminals?” *Id.* Again, exactly so—it will make “criminal” those who are not and would not become criminals in the real world. “Is not entrapment doctrine simply a means of regaining our distance from those suffering punishment so that we can avoid the politically impossible task of self-condemnation?” *Id.* No. We do not commit crimes in the real world, others do. That is the crucial distinction.

obviously superior alternative, and the objective test is entirely rootless, unless it is a badly articulated surrogate for the market test.

Third, the market test would allow the first time offender to be convicted, and to that extent is punishment for character. True, but incomplete. All entrapment in an important sense involves punishment for character. It almost invariably involves governmental activity whose explicit purpose is social hygiene—to clear the streets of individuals who have and will commit crimes—and is usually targeted at types of criminality that cannot easily be prosecuted in other ways, normally because of the absence of complaining witnesses. This point may be sufficient to condemn all governmental involvement in criminal acts, a point we pursue no further. If governmental involvement is to continue, the market test is by far a better criterion to employ than the present incoherent reliance on predisposition, for it identifies reliably those who are and are likely to be involved in criminality under real conditions. Even a first time offender who accepts the market rate for an act is very likely to have that opportunity at some time, and thus to take it.

Our test is a modification of that originally proposed by Professor Carlson. Rightly concerned about the diminished significance of the act requirement in inducement situations, Professor Carlson's test was designed to ensure that the goals of the act requirement are satisfied:

Government-encouraged criminal conduct will not be punished unless either: a) the encouraged conduct injured or seriously threatened to injure the interests protected by the law in question, or b) the defendant initiated the criminal act or transaction in response to an opportunity to commit the crime which was neither uncommon nor excessive.²²

Part b limits the government to providing an opportunity for the target to initiate a criminal transaction; it is barred from initiating the transaction itself.

Professor Carlson's concerns are well taken, and his test for the most part persuasive. Its only difficulties are considerable

²² Carlson, *supra* note 4 at 1099-1100 (emphasis omitted).

ambiguity in operation, and that it prohibits too much. It requires distinguishing between creating an opportunity, which the government can do, and initiating the act, which the government cannot do. How this line is drawn is quite unclear. In addition, it is not the formal act of initiation that deprives government induced acts of their justificatory or explanatory power; it is, as we argued above, that they sometimes exceed the market rate, and thus are not explanatory of how the individual would act in the real world. The market test, which as we say is a modification of Professor Carlson's original proposal, captures this point.

V. PRIVATE ENTRAPMENT

Although the precedent is thin, the conventional view is that the entrapment defense does not extend to private entrapment.²³ This controversy is further proof of the conceptual disarray caused by the fiction of predisposition. The market test clarifies the matter. If a person responds to an extra-market price, no reliable inferences about that person can be made, except that he, like most of us, has a price. The source of the extra-market price is of no relevance to this inferential relationship, and thus no distinctions should be drawn between private and government inducements.

Chief Judge Posner, following the conventional arguments, recently concluded to the contrary:

There is no defense of private entrapment. A person hired to commit a crime cannot defend on the ground that the hirer offered him so much money that it broke down his resistance. Such a plea is actually an argument for a heavier sentence, in order to offset the inducement. The severe punishments that Congress has imposed for violation of the federal drug laws may reflect the profitability of drug trafficking: the more profitable a crime, the more costly must the punishment be to the criminal in order to deter him from committing it.²⁴

²³ Seidman, *supra* note 7, at 128 n.66.

²⁴ United States v. Hollingsworth, 27 F.3d 1196, 1203 (7th Cir. 1994) (en banc) (citations omitted).

Although we are a bit diffident about correcting the economics of Judge Posner, we respectfully suggest that he has conflated two different points here. The first is whether the penalties are sufficient, given what the market is, and this is the real point his comments address. The second is whether the inducement actually given in the case is within the parameters of what one reasonably would find in the real world. If it is not, the response by the defendant yields no insight as to the acceptability of punishment. Being extra-market, it is highly unlikely to be repeated or encountered again by this defendant or anyone else, and thus is not adequate to ground criminal sanctions. We should also mention that, with respect to private parties, the probability of extra-market inducements is surely quite low. Why would they exceed the market, an act equivalent to a charitable contribution? Surely the standard answer must be as a scam or a setup. In any such case, the person running the scam may evidence need of punishment, but essentially nothing is learned about the pigeon.

The alternative, of course, is that the market theory explains why private entrapment does not exist: If a private party offers an inducement, that determines the relevant market. Perhaps we compromise our discipline here, but we find this unhelpful. It does not permit exoneration of an individual who would never have committed a criminal act but for the outlandish offer of another. It also neglects that mistakes about the market can be made. Moreover, permitting the induced individual a defense does not exonerate the inducer. To the extent an "extra-market" inducement is made by a private party, the anti-social risks lie primarily with the one making the offer, who presumably always will be subject to some form of liability (e.g., attempt, solicitation). In any event, perhaps this point demonstrates a certain inconsistency in our argument, but we prefer to be sensible about the matter.

VI. THE MARKET LEVEL INDUCEMENTS ARGUMENT EXPLAINS THE CASES, PERHAPS SIMPLY CONTINGENTLY SO, BUT IT EXPLAINS THEM NONETHELESS.

The Supreme Court's entrapment cases are somewhat of a mess. This is not surprising, for they are premised on a fiction. Interestingly, though, the market test is quite consistent with the results in the cases, although it bears no relationship to their rhetoric. It also explains and justifies the controversial decision of the Seventh Circuit in *United States v. Hollingsworth*,²⁵ recognizing a "positional" component to entrapment. We demonstrate this consistency here, although we do not argue that ours is a positive theory in any significant sense, although perhaps it is.

A. SYMPATHETIC AGENTS

The first Supreme Court cases to recognize the entrapment defense involved agents who played upon the sympathies of apparently unsophisticated targets.²⁶ In *Sorrells v. United States*,²⁷ the agent had served in the same Army division as Sorrells during World War One. On the basis of this connection, over the course of several hours, the agent made several requests that the target supply him with liquor, which Sorrells refused to do. After considerable reminiscing about war-time experiences, Sorrells supplied the agent with a half-gallon of liquor, in violation of the National Prohibition Act.²⁸ In *Sherman v. United States*,²⁹ the agent, a recovering addict, befriended Sherman while both were undergoing treatment for a heroin addiction. Convinced that the agent was not responding to the treatment, and moved by his apparent suffering, Sherman agreed to supply him with heroin, in violation of federal narcotics laws, at no profit to himself.³⁰

²⁵ *United States v. Hollingsworth*, 27 F.3d 1196, 1203 (7th Cir. 1994) (en banc).

²⁶ In order, they were *Sorrells v. United States*, 287 U.S. 435, 439-40 (1935), and *Sherman v. United States*, 356 U.S. 369, 372 (1958).

²⁷ 287 U.S. 435 (1935).

²⁸ *Id.* at 439-41.

²⁹ 356 U.S. 369 (1958). Chief Justice Warren wrote for the majority; Justice Frankfurter concurred, joined by Justices Douglas, Harlan, and Brennan.

³⁰ *Id.* at 371.

The majority in *Sorrells* did not find entrapment as a matter of law, merely remanding the case for a new trial with instructions to the jury that entrapment would lie if Sorrells had not been predisposed to sell illegal liquor.³¹ The majority in *Sherman*, on the other hand, while agreeing that entrapment is generally an issue for the jury, found that Sherman had been entrapped as a matter of law.³² The concurrences in both cases would have found entrapment as a matter of law based on the application of an objective-type test.³³

People often play upon one another's sympathies and weaknesses. A rational (that is, naturally occurring) criminal, working well within the market, might very easily present himself as a sympathetic character in order to persuade a target to cooperate with him. Under the market test, then, a police agent is allowed to do the same. However, rational criminals would not repeatedly solicit individuals who have made it clear that they are not interested, nor would they invest a great deal of time to persuade someone to become a drug dealer when sellers of street drugs are ubiquitous. Under the market test, the issue would not be whether the agent played upon the defendant's sympathies; rather, it would be whether a rational criminal would have gone to such lengths to persuade him to change his mind.

Applying the test to the facts of *Sherman*, the answer is no. Although an actual addict would be likely to turn to another addict, or to a recovering addict, as a source of drugs, it is unlikely that he would be unable to secure drugs from another source over the period involved in *Sherman* or that he would persist in the manner that he did. He raised the emotional stakes too high; it is highly unlikely that a rational criminal would behave this way.

Under the market test, Sorrells was probably also entrapped, although it is a closer question, as the Court recognized. As the Court put it:

³¹ *Sorrells*, 287 U.S. at 452.

³² *Sherman*, 356 U.S. at 373, 375-77.

³³ *Id.* at 378, 383-84 (Frankfurter, J., concurring); *Sorrells*, 287 U.S. at 457, 459 (Roberts, J., concurring).

[The] defendant had no previous disposition to commit [the offense] but was an industrious, law-abiding citizen, and . . . the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War.³⁴

Perhaps it is plausible that a rational criminal would behave this way. If so, Sorrells should have been convicted; if not, he should have been acquitted.

B. SUPPLYING CONTRABAND

The next major Supreme Court entrapment cases involved agents supplying an essential ingredient to the target in order to facilitate the target's production of an illegal item. The dissents in these cases would have found the defendant to have been entrapped either under the objective test,³⁵ or under due process.³⁶ The majorities found no entrapment on the basis of the defendants' predisposition.³⁷ The market test would find entrapment in these cases only if the ingredient supplied by the agents, whether contraband or not, was so difficult to obtain that neither the target nor a bona fide criminal interacting with the target would have been able to supply it.

In *Russell v. United States*, a government agent solicited Russell and several co-defendants to manufacture and supply him with methamphetamine, in violation of federal narcotics laws.³⁸ The government agent offered to provide the defendants with phenyl-2-propanone, an ingredient essential to the manufacture

³⁴ *Sorrells*, 287 U.S. at 441.

³⁵ See *United States v. Russell*, 411 U.S. 423, 436 (1973) (Douglas, J., dissenting); *id.* at 441, 450 (Stewart, J., dissenting); *Hampton v. United States*, 425 U.S. 484, 497 (1976) (Brennan, J., dissenting).

³⁶ *Hampton*, 425 U.S. at 497, 500 (Brennan, J., dissenting).

³⁷ In order they were *Russell*, 411 U.S. at 432-36; *Hampton*, 425 U.S. at 488-90 (plurality opinion) (rejecting the due process defense); *id.* at 491, 491-93 (Powell, J., concurring) (leaving open the possibility of a due process or furnishing contraband defense but holding that the defenses would not apply to the facts of the case).

³⁸ *Russell*, 411 U.S. at 426 (1973).

of methamphetamine.³⁹ Phenyl-2-propanone was not itself contraband, but was difficult to obtain since several sources of supply had stopped selling the chemical at the request of the Bureau of Narcotics and Dangerous Drugs.⁴⁰ The evidence indicated, however, that Russell and his compatriots were able to obtain it both before and after the agent supplied it to them.⁴¹ Because the critical question was whether a criminal who might have interacted with the defendant could have obtained the ingredient in order to supply it to him, Russell was not entrapped, for he was able to obtain phenyl-2-propanone himself.⁴²

In *Hampton v. United States*, the petitioner claimed undercover agents had supplied him with heroin which he then sold, at a profit, to other undercover agents.⁴³ A majority of Supreme Court justices held that any due process defense was not applicable to such facts, and that, due to his conceded predisposition, he had not been entrapped under the subjective test.⁴⁴ A plurality went further and held that no due process defense was applicable to claims of entrapment.⁴⁵ The dissent argued that under either the objective test or on due process principles, the indictment ought to be dismissed. It proposed a test whereby "conviction is barred as a matter of law where the subject of the criminal charge is the sale of contraband provided to the defendant by a government agent."⁴⁶

The facts considered by the Supreme Court were an amalgam of the evidence at trial, relying in part on testimony by the defendant and in part on contradictory testimony by agents of

³⁹ *Id.* at 425.

⁴⁰ *Id.* at 426-27.

⁴¹ *Id.* at 425-27.

⁴² *Id.* at 431-32.

⁴³ *Hampton v. United States*, 425 U.S. 484, 487 (1976).

⁴⁴ *Id.* at 489-90 (plurality opinion); *id.* at 491-92 (Powell, J., concurring).

⁴⁵ *Id.* at 488-89 (plurality opinion). The concurrence objected to the plurality reaching the question of the very existence of a due process entrapment defense, since the majority was agreed that such a defense, if it existed, would not apply to the petitioner. The concurrence preferred, therefore, to leave open the question of whether due process principles could ever apply to government encouragement. *Id.* at 491-93 (Powell, J., concurring).

⁴⁶ *Id.* at 500 (Brennan, J., dissenting).

the government.⁴⁷ The scenario the Court considered was one where an undercover agent both offers to supply contraband to the target and offers to find buyers for that contraband. Under the market test the issue is whether any rational criminal would do this, and the answer is probably yes. Just as any wholesaler might set up a distributor and help him initially to find customers, so might a drug dealer. Under the market test, then, Hampton was not entrapped.

However, it is unlikely that a rational criminal would provide initially unwilling targets with everything necessary to the commission of the crime. In *Greene v. United States*, for example, the court found entrapment when a government agent offered to supply the target with a still, a site, equipment, a phony still operator, and sugar for the production of moonshine, and kept the operation in business for several years.⁴⁸ The market probably would not permit several years of manufacturing liquor at a loss. Under that test, then, the court was correct to find that the defendants were entrapped.

C. ELABORATE SCHEMES

The most recent Supreme Court entrapment case was *United States v. Jacobson*, in which two government agencies for several years inundated Jacobson with mailings and solicitations to purchase child pornography before he finally succumbed to the encouragement and bought some illegal materials.⁴⁹

This case raises many interesting questions. The Supreme Court analyzed the facts of *Jacobson* from the perspective of predisposition under the subjective test.⁵⁰ Under the market test, by contrast, the issue would be whether a rational criminal, at-

⁴⁷ The defendant claimed that a government informer had proposed selling counterfeit heroin, which the government agent then supplied and arranged for the two to sell to undercover agents. The Court found that the jury, in order to convict, must have disbelieved Hampton's claim that he was unaware that the substance he sold was in fact heroin. It considered, then, whether Hampton would be entitled to a modified entrapment instruction had an agent agreed to supply him with heroin and then arranged to find buyers for it. *Id.* at 487 (plurality opinion).

⁴⁸ 454 F.2d 783, 786-87 (9th Cir. 1971).

⁴⁹ 503 U.S. 540, 540-48 (1992).

⁵⁰ *Id.* at 549. See discussion *supra*, text accompanying note 4.

tempting to find purchasers of contraband and to avoid detection by the government, would have solicited Jacobson in a manner similar to that used by the government.

In order to persuade Jacobson to purchase contraband reading material, the government did not simply solicit Jacobson to do so. Rather, an elaborate scheme was implemented. Jacobson was invited to join organizations ostensibly dedicated to repealing current laws concerning the possession of child pornography. He was also sent phony sexual taste surveys inviting him to reveal his preferences for, among other things, types of pornography. After several years of such stuff, Jacobson purchased contraband pornography.⁵¹ The Supreme Court, in analyzing these facts, held that Jacobson had not been shown to have been predisposed to purchase this contraband at the time the government initiated its sting operation, although he was predisposed to do so by the time he committed the crime for which he was charged. Holding that it is entrapment for the government to cause a person to be predisposed to commit the illegal act which it then encourages him to commit, the majority concluded that Jacobson had been entrapped.⁵² Whatever that may mean.

Under the market test, the issue in *Jacobson* is whether an actual distributor of child pornography would have engaged in a solicitation scheme at all analogous to that used by the government. No rational criminal would have directed such a mail campaign at someone in Jacobson's position. Although we do not know the pornography market, we assume it is similar to other markets, and it seems unlikely that a distributor of contraband reading material would be able to develop potential customers for several years before actually soliciting them to purchase its product. Yet this is essentially what the government did in *Jacobson*. Hence under the rational criminal test Jacobson was entrapped.

⁵¹ *Id.* at 547.

⁵² *Id.* at 548, 550, 553-54; *see also id.* at 556-57 (O'Connor, J., dissenting).

D. POSITION

The most controversial recent case is *United States v. Hollingsworth*.⁵³ Chief Judge Posner, writing for a bare majority, concluded that the Supreme Court in *Jacobson* had added a “positional” element to the concept of predisposition in federal entrapment law: “The defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so[.]”⁵⁴ Otherwise, however quickly he snapped up the government’s bait, however slight the government’s inducement, he was not predisposed.

The *Hollingsworth* defendants were an orthodontist (Pickard) and a businessman/farmer (Hollingsworth). In 1988, the two decided to become international financiers, although neither had training, contacts, or experience in international banking. They formed a Virgin Islands corporation that obtained two foreign banking licenses, one Grenadan. In 1990, having failed to attract a single customer, the corporation decided to sell its Grenadan license to raise capital. Pickard placed an advertisement in *USA Today*.⁵⁵ On the same day, U.S. customs agent J. Thomas Rothrock attended a seminar on money laundering. Knowing that foreign banks are sometimes used for money laundering, Rothrock saw the ad and “assumed that someone who wanted to sell one would possibly be interested in money laundering.”⁵⁶

Rothrock (the only respondent to the ad) contacted Pickard, who offered a variety of lawful financial services as well as two illegal banking schemes—one involving depositing the money overseas, and the other, for which he was later charged, an illegal “structuring” scheme, wherein a large sum of money is divided among several banks to avoid federal reporting requirements. Pickard later retracted the offer to deposit the

⁵³ 27 F.3d 1196 (7th Cir. 1994) (en Banc).

⁵⁴ *Id.* at 1200.

⁵⁵ *Id.*

⁵⁶ *Id.*

money overseas, noting that it would be illegal. He may not have realized that the structuring scheme was also illegal.⁵⁷

Five and a half months later, when Pickard's business was on the verge of collapsing, Rothrock contacted Pickard again, arranging for several money laundering transactions. Rothrock told Pickard that the cash came from the smuggling of guns to South Africa. On one occasion Hollingsworth also received sting money from Rothrock.

The court held that the defendants were entrapped as a matter of law because they were not predisposed to commit the crime when contacted by the government. The court recognized that, under the then prevailing understanding of the word in the courts of appeals, "predisposition" simply meant "willingness." However, the court found that this definition could not be reconciled with the Supreme Court's decision in *Jacobson*, for, "had the Court in *Jacobson* believed that the legal concept of predisposition is exhausted in the demonstrated willingness of the defendant to commit the crime without threats or promises by the government, then *Jacobson* was predisposed He never resisted."⁵⁸

The court relied heavily on the Supreme Court's definition of entrapment in *Jacobson* as "the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would never have run afoul of the law."⁵⁹ "That was *Jacobson*," stated the court, for "[h]owever impure his thoughts, he was law abiding. A farmer in Nebraska, his access to child pornography was limited."⁶⁰ Since the defendants, left to their own devices, would also never have run afoul of the law, the *Hollingsworth* court found them to have been entrapped.⁶¹ "Pickard and Hollingsworth had no prayer of becoming money launderers without the government's aid."⁶² The court noted that it would have arrived at a different result if the defendants had con-

⁵⁷ *Id.*

⁵⁸ *Id.* at 1199.

⁵⁹ *Id.* (citing *United States v. Jacobson*, 503 U.S. 540, 553-54 (1992)).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 1202.

trolled an up-and-running bank.⁶³ In such a case, it would have been reasonably likely that real criminals would have approached them to launder money.⁶⁴

Under the market test, the defendants were entrapped, for almost but not quite the reason given by Chief Judge Posner: markets have positional attributes, and therefore entrapment does. The defendants did not have access to the relevant market, and there was no reasonable prospect of their gaining it. Thus, the agent's interactions with them failed to provide information about their behavior in the real world. As Judge Posner noted, the result would be different if the defendants had been the owners of an up-and-running bank.

The difficulty with analyses like this is their potentially ad hoc nature. That is why we began this section by disclaiming any strong arguments about the consistency of the cases with the market test. Nonetheless, the cases can be fitted within the theory with reasonable ease. By contrast, the existing theories do not provide explanations at all, but simply comprise conclusory rhetoric tacked on to recitations of the facts. We take this as further support for the market test.

Lastly, Professor Seidman has argued that "Entrapment doctrine . . . is . . . representative of the adaptive mechanisms to which we have resorted in order to maintain a criminal justice system without an adequate theory of blame."⁶⁵ We may very well lack an adequate theory of blame, but that is not the cause of the confusion over entrapment. Individuals who are induced to commit crimes at extra-market rates do not commit the harms forbidden by the criminal law. It is not the sale of drugs

⁶³ *Id.*

⁶⁴ *Id.* The Fifth Circuit explicitly adopted the *Hollingsworth* majority's reasoning in *United States v. Knox*, 112 F.3d 802, 808 (5th Cir. 1997), *cert. denied* 118 S. Ct. 616 (1997). The Ninth Circuit has rejected *Hollingsworth's* positional requirement. *United States v. Thickstun*, 110 F.3d 1394, 1398 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 305 (1997). The *Thickstun* court read *Jacobson*, not as creating a positional requirement, but as applying established law. *Id.* at 1398. Without explicitly doing so, the Fourth and Sixth Circuits, in unpublished opinions, also apparently rejected *Hollingsworth*. *United States v. Santos*, 64 F.3d 661 (4th Cir. 1995) (unpublished table decision); *United States v. Zaia*, 35 F.3d 567 (6th Cir. 1994) (unpublished table decision).

⁶⁵ Seidman, *supra* note 7, at 151.

that is the problem, for example. It is instead sale as part of a system of manufacturing and distribution that leads to specific harms, from addiction and violence to dead brain cells and bodies. A person who sells at extra-market rates pursuant to an inducement plan is not contributing to the distribution and use of drugs.⁶⁶ When individuals are induced to commit acts, and those acts actually cause specific harm, such as in cases of violence, entrapment is not available,⁶⁷ which rather plainly confirms our point. Such persons are “blameworthy” even if induced. Entrapment is largely about human frailty in the context of markets—monetary and emotional; it is about the corrupting effect of riches beyond one’s reasonable expectations. Quite to the contrary of Professor Seidman’s point, it is about the limits of social hygienic practices that are not premised on the blameworthiness of particular acts, whatever the character may be of the individuals swept into the net.

⁶⁶ Regardless of who does the inducing. Private parties will not offer extra-market prices unless something else is going on than mere participation in the market.

⁶⁷ Carlson, *supra* note 4, at 1067.

