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THE POLITICAL ECONOMY OF ENTRAPMENT

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INTRODUCTION

By the time she was eighteen, Amy Lively was drinking heavily.[1] At age twenty-one, after two detoxification programs and in the midst of a divorce, she was emotionally distraught and attempted suicide.[2] Weeks later, while attending an Alcoholics Anonymous/Narcotics Anonymous (AA/NA) meeting, she met a man, Koby Desai.[3] Lively found Desai "supportive and responsive to her emotional needs"[4] and later moved into his apartment.[5] Desai asked her to sell cocaine to a "friend"[6] and, on two

* Guy Raymond Jones Professor of Law, University of Illinois College of Law. The topic of entrapment is wonderfully perplexing and I have toiled on various drafts since 1998. Along the way, I learned much from the comments of Al Alschuler, Jack Balkin, Mary Anne Case, Dhammika Dharmapala, Margareth Etienne, Lee Fennell, Stan Fisher, Bernard Harcourt, Nuno Garoupa, Tom Ginsburg, Dave Haddock, Rick Hasen, Louis Kaplow, Hal Krent, Andy Leipold, Saul Levmore, Dan Markovits, Steve Marks, Anna Marshall, Tracey Meares, Mike Meurer, Michael Moore, Janice Nadler, Eric Posner, Mark Ramseyer, Eric Rasmusen, Declan Roche, Jackie Ross, Ken Simons, Steve Shavell, Henry Smith, Bill Stuntz, Tom Ulen, and the participants at faculty workshops at BU, Chicago, Cornell, Illinois, Loyola (Los Angeles), Northwestern, Rutgers-Camden, Texas, and Vanderbilt. In addition, I gained valuable insight from the Stanford and Yale Legal Theory workshops, the Harvard law and economics workshop, an economics workshop at Australian National University, a Harvard conference on the Economics of Law Enforcement, and annual meetings of the American Law & Economics Association and the Comparative Law & Economics Forum. For research assistance, I thank Valerie Demaret, Jim Hartman, Jordan Jonis, Stephanie Reinhart, Miriam Seirig, and Shyni Varghese.

[1] State v. Lively, 921 P.2d 1035, 1038 (Wash. 1996).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.* at 1038-39. Lively said the relationship was sexual; Desai said it was not and that Lively stayed in a separate bedroom. *Id.* at 1039.

[6] Although Desai testified that Lively first raised the possibility of selling cocaine, *id.* at 1039, nothing in the appellate decision suggests that he ever denied having requested that Lively to sell to his "friend."

occasions, she did. Unbeknownst to Lively, Desai was a confidential police informant and the man to whom she sold cocaine was one of his supervising officers. Desai had not targeted Lively for this operation based on any prior suspicion of her—she had no criminal record—nor had he suspected anyone at the AA/NA meeting he attended. As a court would later describe it, he was there with police approval "trolling for targets."[7] Though Desai at some point proposed marriage,[8] the relationship soured when, as planned, police arrested Lively and he testified against her. Lively was convicted of cocaine delivery and sentenced to prison. The Washington Supreme Court upheld the jury's decision to reject her claim of entrapment.[9]

The entrapment defense is the principal means by which state and federal courts regulate the government's use of undercover operations. Where it applies, the defense exempts from criminal liability individuals who were encouraged by an agent of the government to commit what would otherwise be an offense. There are different formulations of the defense, but the most common "subjective" test inquires whether the defendant is "predisposed" to commit the charged offense.[10] Lively sought to disprove predisposition by testifying that Desai raised the subject of selling cocaine only after their relationship was serious and that he pestered her about it repeatedly every day for two weeks.[11] The *Lively* court sustained the jury's decision to reject the defense because there was contrary evidence showing predisposition: Desai testified that she first proposed the transaction and that he did not need to pester her about it.[12] Thus, it was a jury question.[13]

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[7] *Id.* at 1046.

[8] Desai denied proposing marriage. *Id.* at 1039. Lively supported her contrary testimony with three witnesses who said she and Desai spoke of their plans to marry. *Id.* at 1038. For sentencing purposes the trial judge found that Desai had proposed marriage. *Id.* at 1043.

[9] *Id.* at 1044.

[10] *See* discussion *infra* Part I.

[11] *Id.* at 1039. Unlike most states, Washington places on the defendant the burden of proving entrapment by a preponderance of the evidence. *Id.* at 1043.

[12] *Id.* at 1039. The trial judge did not believe Desai, finding for sentencing purposes that he is "a clever, deceitful person" because he had passed thirty bad checks. *Id.* at 1043. Desai also admitted at trial to lying repeatedly at a defense deposition, saying that he was maintaining his cover and did not think he was under oath. *Id.* at 1039.

[13] For those who read footnotes, a reward: Notwithstanding her loss on entrapment, the Washington Supreme Court reversed her conviction on the ground that the undercover operation violated her due process rights. *Id.* at 1049. It would be erroneous, however, to view her victory as suggesting that courts rescue defendants whenever they disagree with a jury's rejection of the defense. Winning a due process challenge in this setting is about as likely as winning the lottery. The United States Supreme Court has never invalidated a conviction from an undercover operation on that ground. *Id.* at 1049 (Durham, C.J., dissenting). Most courts hold out the possibility that an undercover operation could violate due process, but only a few have ever used this route to invalidate a conviction. *See* PAUL

No doubt, some readers react to these facts with outrage, seeing a sting operation run amok, one presenting a strong case for judicial intervention. Many criminal law scholars would cite *Lively* as yet another reason to favor the so-called "objective" test of entrapment that a few jurisdictions use.[14] Because that formulation focuses only on the nature of the police tactic and not on the defendant's predisposition, Lively would probably have won such a defense. Yet, in this article, I hope to do more than compare the merits of one entrapment formulation to another. Until we know why we should regulate these operations *at all*, we cannot hope to know what doctrinal test is best.

Indeed, not everyone agrees that we should have any entrapment defense. Almost twenty-five years ago, in one of the most penetrating analyses of the doctrine, Michael Seidman declared that no judicial opinion or commentator had provided a satisfactory justification for the defense.[15] Seidman contended that the doctrine lacks any normative basis and is, indeed, incoherent except as a class privilege for those affluent enough to avoid most criminal temptations.[16] Illustrating the doctrine's apparent incoherence, Seidman noted that some commentators condemn the government for randomly selecting undercover targets while others condemn the government for just the opposite: the deliberate, non-random selection of targets.[17] More recently, Paul Robinson and John Darley questioned the defense, finding in their empirical work that the public would prefer to use entrapment as a mitigation rather than a defense.[18] In

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MARCUS, THE ENTRAPMENT DEFENSE 277-326 (3d ed. 2002). Apparently, *Lively* was the first such case in the Washington appellate courts. 921 P.2d at 1049 (Durham, C.J., dissenting). Some courts instead reject the possibility of such a defense. *See* United States v. Tucker, 28 F.3d 1420 (6th Cir. 1994); United States v. Miller, 891 F.2d 1265 (7th Cir. 1989) (Easterbrook, J., concurring). Thus, despite Lively's federal constitutional victory, a state entrapment defense remains the dominant legal regulation of undercover operations, and her loss of that defense illustrates how minimal the regulation is.

[14] *See* discussion *infra* Part I.

[15] Louis Michael Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111, 146-55.

[16] *See id.* at 155 ("As the sanctions become stiffer, their application must also be narrowed, because we are increasingly unwilling to risk imposition of such draconian measures against ourselves or people like us.").

[17] *See* Louis Michael Seidman, *ABSCAM and the Constitution*, 83 MICH. L. REV. 1199 (1985) (reviewing ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT (Gerard Caplan ed., 1983)). He contrasts Mark Moore's claim that efficient law enforcement requires having some suspicion of a person before targeting him for an undercover operation with Lawrence Sherman's claim that equitable law enforcement would give everyone in a group an equal chance of being targeted. *Id.* at 1200.

[18] *See* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY AND BLAME 152-55 (1995).

this article, I take these objections seriously and seek to determine whether one can answer these critics by identifying an analytically sound rationale for regulating undercover operations.

The controversy over entrapment is more important today than ever. First, the United States exports the tactic of undercover operations and the idea that judges should regulate them. When Seidman wrote, he cast doubt on the doctrine by noting that "the rest of civilized world manages to survive quite well without an entrapment defense."[19] True enough, but twenty-five years ago, most liberal democracies were so skeptical of undercover operations—particularly the idea that police may commit criminal acts as part of such operations—that there was not much need for a defense.[20] Over time, however, the United States persuaded other nations to use the tactic more aggressively, usually as part of international drug enforcement.[21] After accommodating American demands, several nations have embraced the need to regulate undercover operations judicially. These nations recognize not a criminal "defense" but the judicial power to stay prosecutions or exclude evidence as a remedy to unlawful operations.[22] Whatever the regulatory form, the initial normative question is whether there is a rationale for any judicial regulation of these tactics. The globalization of undercover operations heightens the importance of identifying any such rationale.

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[19] Seidman, *supra* note 15, at 112 n.4; *see also* ROBINSON & DARLEY, *supra* note 18, at 147 ("The entrapment defense is almost unique to the United States . . . .").

[20] Some nations do not formally exempt police agents from criminal liability for committing criminal acts as part of undercover operations. For example, in *Ridgeway v. The Queen*, (1995) 184 C.L.R 19, 36-40, 43 (Austl.), the High Court of Australia refused to adopt an entrapment defense, but excluded all evidence from the undercover operation because the police had themselves committed the crime of importing heroin. *See generally* Jacqueline E. Ross, *Impediments to Transnational Cooperation in Undercover Policing: A Comparative Study of the United States and Italy*, 52 AM. J. COMP. L. 569 (2004); Jacqueline E. Ross, *Dilemmas of Undercover Policing in Germany: The Troubled Quest for Legitimacy* (2005) (unpublished manuscript on file with author) [hereinafter Ross, *Dilemmas of Undercover Policing*].

[21] This point is a persistent theme in the contributions to UNDERCOVER: POLICE SURVEILLANCE IN COMPARATIVE PERSPECTIVE (Gary T. Marx & C. Fijnaut eds., 1995), concerning the nations of France, Germany, the Netherlands, Belgium, the United Kingdom, Iceland, Sweden, and Canada.

[22] *See, e.g.*, *Ridgeway*, 184 C.L.R. at 43 (exercising judicial power to exclude evidence); Mack v. The Queen, [1988] 2 S.C.R. 903, 905 (Can.) (recognizing power to stay proceedings); Police v. Lavalle, [1979] 1 N.Z.L.R. 45 (C.A.) (recognizing power to exclude evidence); Regina v. Loosely [2001] UKHL 53, [2001] 1 W.L.R. 2060 (U.K.), *available at* 2001 WL 1171942 (recognizing power to stay prosecution). Indeed, the European Court of Justice has held that Article 6 of the European Convention restricts the use of undercover agents. *See* Teixeira de Castro v. Portugal, Reports of Judgments and Decisions 1998-IV. *Teixeira de Castro* prompted the English House of Lords to make new law in *Ridgeway*.

In addition, American law enforcement is now in the process of deploying its most aggressive undercover tactics to combat terrorism.[23] For example, one of the more zealous techniques is to use the target as a "conduit" or "middleman" between two government agents, as where a confidential informant supplies the target the contraband that he then sells to an undercover agent.[24] Recently, the federal government used this tactic to obtain its highly touted terrorism conviction of Hemant Lakhani.[25] After Lakhani failed for a year to acquire the weapons he agreed to sell to an undercover agent, the F.B.I. had Russian undercover operatives make the sale to him.[26] Thus, as the law enforcement war on terror gains momentum, there is every reason to expect it to fund a new round of aggressive undercover operations. It is then all the more important to understand the normative basis, if any, for regulating these operations.

Critics might claim that the best regulation is *to completely prohibit* the tactic. Despite conventional wisdom, the case for prohibition is not trivial. Sting operations involve the government deceiving citizens for the purpose of encouraging them to commit crime. One may object in principle to the government's use of deception, its encouraging crime, or its use of deception for the purpose of encouraging crime. Even if certain circumstances justify permitting this governmental deception, recent scandals demonstrate in astonishing fashion how difficult it is to limit deception to those circumstances. In Boston, it recently came to light that

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[23] *See, e.g.*, Eric Lichtblau, *Trying to Thwart Possible Terrorists Quickly, F.B.I. Agents Are Often Playing Them*, N.Y. TIMES, May 30, 2005, at A10.

[24] *See, e.g.*, United States v. West, 511 F.2d 1083 (5th Cir. 1975); Tanner v. State, 566 So. 2d 1246 (Miss. 1990); *cf.* United States v. Russell, 411 U.S. 423 (1973) (rejecting defense where government agent supplied difficult-to-obtain essential ingredients of the drugs the target then manufactured and sold to the agent).

[25] President Bush stated the case is "a pretty good example of what we're doing in order to protect the American people." Petra Bartosiewicz, *I.O.U. One Terrorist*, HARPER'S MAG., Aug. 2005, at 48, 48.

[26] *Id.* at 48-49. Lakhani, a sixty-nine-year-old British businessman of Indian descent, agreed to sell missiles and a launcher to an agent posing as a terrorist interested in shooting down American passenger planes. Previously, Lakhani had mostly sold clothing, but was involved in one lawful arms sale of armored personnel carriers to Angola. In the sting, whenever the covert agent asked about a particular weapon, including a submarine, Lakhani claimed to be able to provide it. Yet there was no evidence that Lakhani had access to these weapons. *See id.*; Amy Klein, *Missile Seller Guilty of Aiding Terrorism*, N.J. RECORD, Apr. 28, 2005, at A1. When asked if Lakhani would have ever been able to buy missiles on his own, U.S. Attorney Christopher J. Christie admitted he didn't know and commented, "There are good people and bad people. Bad people do bad things. Bad people have to be punished." *This American Life: The Arms Trader* (Chicago Public Radio July 8, 2005). Lakhani was sentenced to forty-seven years in prison. John Sullivan, *British Businessman Sentenced in Terror Case*, N.Y. TIMES, Sept. 13, 2005, at B6.

F.B.I. agents protected a confidential informant by hiding his involvement in a murder and allowing innocent individuals to serve decades in prison for the crime.[27] In Tulia, Texas, a confidential informant fabricated undercover drug crimes that led to the arrest of 12% of the black population, with a substantial number sent to prison.[28]

Aside from scandals, undercover operations impose significant costs. A partial list includes the undermining of trust in a society permeated by police spies,[29] the corrupting influence that portraying criminals has on the police agents who carry it out,[30] the potential for violence erupting out of efforts to foment crime,[31] the exploitative recruiting of vulnerable

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[27] *See* J.M. Lawrence, *Mass. Pols Back Sweeping Probe of FBI-Mob Link*, BOSTON HERALD, Apr. 6, 2001, at 1; Limone v. United States, 336 F. Supp. 2d 18, 23-27 (D. Mass. 2004). In 1968, four men received life sentences for the 1965 murder of Deegan. Two died in prison. In 2000, newly released F.B.I. documents showed that two F.B.I. agents had known of the threat to kill Deegan weeks in advance but never warned him, that these agents' confidential informants posed the threat and committed the crime, and that the agents helped to conceal the truth to protect the informants. In 2001, a court vacated the convictions of the surviving defendants. The District Attorney declined to retry them. Associated Press, *Dead Inmate Exonerated In a Murder*, N.Y. TIMES, Nov. 5, 2004, at A24. For a related scandal, see Shelley Murphy, *Former Mob Boss Tells of Access to FBI*, BOSTON GLOBE, Feb. 13, 2004, at B5.

[28] *See* Jim Yardley, *The Heat Is on a Texas Town After the Arrests of 40 Blacks*, N.Y. TIMES, Oct. 7, 2000, at A1. Of the forty-three defendants prosecuted as a result of the sting operation, forty were black, though blacks constitute less than 10% of Tulia's population. *Id.* After jury convictions or guilty pleas, twenty-two were sent to prison and others received probation. *Id.* The informant, Coleman, had been trained by the Drug Enforcement Agency, *id.*, and was named Texas Lawman of the Year in 1999. Adam Liptak, *$5 Million Settlement Ends Case of Tainted Texas Sting*, N.Y. TIMES, Mar. 11, 2004, at A14. But Coleman was subsequently discredited and convicted of perjury for some of his testimony in these matters, prosecutors moved to overturn the drug convictions, the Texas Governor pardoned most of those convicted, and they later settled a civil suit for $5 million. *Id.*

[29] *See* GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 222-29 (1988); Sanford Levinson, *Under Cover: The Hidden Costs of Infiltration*, *in* ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT, *supra* note 17, at 43.

[30] *See* MARX, *supra* note 29, at 159-72. Ross calls this phenomenon—where undercover agents are themselves seduced into criminality—the "Donnie Brasco" problem, after the case memorialized in a 1997 film. Ross, *Dilemmas of Undercover Policing*, *supra* note 20.

[31] In 2000, Manhattan police undercover agents approached Patrick Dorismond and a friend and asked if they would sell marijuana. *See* William K. Rashbaum, *Accounts Diverge on What Led to Killing Outside Bar*, N.Y. TIMES, Mar. 22, 2000, at B6. Though the facts are disputed, a scuffle broke out and the undercover agents' partner shot Dorismond to death, though he was unarmed. *Id.* There are also "friendly fire" cases. *See, e.g.*, Clifford Krauss, *Subway Chaos: Officer Firing at Officer*, N.Y. TIMES, Aug. 24, 1994, at A1 (police shot black undercover officer four times); Robert D. McFadden, *Darkness and Disorder in Subway: Questions Swirl in Police Shooting*, N.Y. TIMES, Nov. 20, 1992, at A1 (police shot black undercover officer in the throat).

individuals into the dangerous life of a confidential informant,[32] and the public's loss of respect for state agents who engage in deception, betrayal, and the exploitation of human weakness.[33] One might particularly doubt the benefit of undercover operations if one questions, rather than assumes, the value of the prohibitions these operations seek to enforce. Undercover operations are frequently used to enforce "victimless" criminal prohibitions—particularly drug offenses—that are themselves contestable.

Notwithstanding these many concerns, in this article, I assume that we should not ban all "proactive" undercover operations. By proactive, I mean operations that exceed infiltration and observation and involve government agents covertly manipulating the appearance of criminal opportunities. Such agents manufacture criminal opportunities either by pretending to be a criminal confederate who encourages a crime or by pretending to be a potential victim who offers an easy target. The former operations are often called "stings" and the latter "decoys." I assume that we should not ban all such operations because their benefits sometimes justify their costs.[34]

I make this assumption for two reasons. First, I believe it is true. Particularly for crimes of bribery and terrorism, where the stakes are high and conventional methods appear least effective, it seems that the benefits of this investigative tool justify some use of it.[35] But, I readily admit that I do not have a decisive argument to convince skeptics, even for these crimes. A second reason is relevance. Covert operations will undoubtedly persist regardless of academic criticism, so an important issue is why and how to regulate them.

Thus, I seek a justification for regulating undercover operations *that is consistent with the decision to permit them.* The framing is important.

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[32] *See, e.g.*, Lee Sinclair & David L. Herbert, *The Use of Minors in Law Enforcement Undercover Operations*, 24 OHIO N.U. L. REV. 31 (1998); *Dateline NBC: In Over His Head; Mother of Murdered Teen-age Drug Informant Faults Police for Putting Her Son in Danger* (NBC television broadcast Oct. 12, 1998).

[33] Among other issues, the public is sometimes shocked by the extent to which covert agents preserve their cover by refusing to stop crimes. *See, e.g.*, Gary T. Marx, *Some Reflections on* Undercover*: Recent Developments and Enduring Issues*, 18 CRIME L. & SOC. CHANGE 193, 201 (1992) (reporting example where agent stood by while infiltrated group members committed rape).

[34] Implicit is an additional preliminary assumption: that the benefits of passive infiltration and observation exceed the costs—the chilling of trust and intimacy that are essential to economic and personal relationships.

[35] Part of my reasoning is that if we prohibited undercover operations, we would undoubtedly encourage greater use of other tactics—covert surveillance, deceptive interrogation, and coercion—that impose their own costs. *See* Jacqueline E. Ross, Book Note, *Tradeoffs in Undercover Investigations: A Comparative Perspective*, 69 U. CHI. L. REV. 1501, 1508-12 (2002).

Having discussed undercover operations with many people over the years, I believe it is cognitively difficult to separate the decision to permit any such operations from the narrower question of how to regulate the operations once we've decided to permit them. Thus, it may be a residual doubt about the unseemly deception and exploitation inherent in all proactive operations that explains intuitions favoring a broad entrapment defense, rather than a consistent theory for both permitting and regulating the operations. In this article, I seek such a theory. I reject many arguments for limiting the tactic, though I ultimately articulate a basis for significant regulation.[36]

The article proceeds as follows. Part I describes the entrapment defense. Part II critiques three possible justifications for the defense. The first two claim that punishing the entrapped does not serve the purposes of punishment, either retributive or utilitarian. The third proposes that the general need for institutional "side constraints" on governmental power includes the specific need for restrictions on undercover operations. Like Seidman, I find the stated rationales inadequate.

Part III offers two new rationales for the defense. I do not claim that there is some clever and wholly new theory. Instead, I reconstruct the existing institutional and utilitarian analyses and find that they explain the need for substantial regulation of undercover operations. Both arise because of problems of *agency*, that is, because the interests of police and prosecutors do not perfectly align with the public interest. I identify precisely why the power to conduct undercover operations is so politically threatening and why, absent regulation, police will use undercover operations wastefully, diverting resources from better uses. The two rationales allow us to answer Seidman's challenge—to explain why it is troubling when government selects undercover targets *either* randomly *or* deliberately. The analysis also reveals how existing formulations of the defense fail to serve the purposes of the defense. Part IV explores the right practical approach, asking what regulation best achieves the ends the theory identifies. Here, I discuss the virtues of an entrapment defense tailored to

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[36] By narrowing the focus to one police tactic and excluding the option of prohibition, I avoid certain interesting topics. First, I do not seek to identify the optimal set of police tactics for investigating crime, i.e., the best combination of surveillance, interrogation, coercion, and undercover work. In discussing covert operations, I take the constraints on other tactics as given. Second, though my theory has broader implications, I focus on the *state's* use of undercover operations in *criminal prosecutions*. Government also uses the operations to seize property under forfeiture statutes, *e.g.*, Zwak v. United States, 848 F.2d 1179 (11th Cir. 1988), and private citizens sting other private citizens, *e.g.*, Rodgers v. Peoples Gas, Light & Coke Co., 733 N.E.2d 835 (Ill. App. Ct. 2000) (employee sting). Except for commenting on the "private entrapment defense," *infra* Part III.C., I ignore these issues.

each crime, and alternatively describe how to improve the conventional one-size-fits-all entrapment defense.

I. THE ENTRAPMENT DEFENSE: AN OVERVIEW

In the United States, police at all levels of government make wide use of proactive undercover operations as part of their efforts to control crime.[37] A great many of these operations are simple and short, exemplified by the drug "buy and bust." When an individual replies to an offer to buy crack by reaching into his pocket for the requested amount or taking the money and pointing out the person holding the goods, there is no great controversy in convicting him as a drug dealer. But as we will see, many stings are more lengthy and elaborate, raising the possibility that they persuaded a law-abiding citizen to make her first foray into crime. Decoy operations are usually short, but often provide victims so tempting that they raise the same possibility. A classic case is the police officer posing as an unconscious inebriate with a wad of cash sticking out of his pocket.[38] These cases raise concern.

Although the Department of Justice regulates F.B.I. undercover operations by administrative guidelines,[39] most jurisdictions leave regulation entirely to the judiciary. A few other doctrines marginally affect undercover operations,[40] but entrapment is the main event. American courts

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[37] *See* MARX, *supra* note 29, at 1-15; Marx, *supra* note 33, at 193-98. Unfortunately, it is not always easy to locate exact numbers. The DOJ Office of Inspector General recently completed an audit of F.B.I. compliance with Attorney General Guidelines on undercover operations, but information about the number of operations is redacted in the publicly available report. *See* Office of Inspector Gen., Dep't of Justice, THE FEDERAL BUREAU OF INVESTIGATION'S COMPLIANCE WITH THE ATTORNEY GENERAL'S INVESTIGATIVE GUIDELINES 147, 148 (Sept. 2005), *available at* http://www.usdoj.gov/oig/special/0509/final.pdf [hereinafter OIG'S REPORT].

[38] There is an interesting and long line of such decoy cases from Nevada: see Daniels v. State, 110 P.3d 477 (2005); Miller v. State, 110 P.3d 53 (2005); DePasquale v. State, 757 P.2d 367 (1988); Sheriff v. Hawkins, 752 P.2d 769 (1988); Oliver v. State, 703 P.2d 869 (1985); Moreland v. State, 705 P.2d 160 (1985).

[39] *See* MARX, *supra* note 29, at 180-88. The most recent version is *The Attorney General's Guidelines on Federal Bureau of Investigation Undercover Operations* (May 30, 2002), *available at* http://www.usdoj.gov/olp/fbiundercover.pdf [hereinafter *AG Guidelines*]. Under these guidelines, a Special Agent in Charge can make the findings necessary to authorize ordinary undercover operations. *Id.* at 3-4. Operations involving certain "fiscal circumstances" require approval by F.B.I. Headquarters. *Id.* at 5. Operations involving certain "sensitive circumstances"—such as targeting government officials—require approval by Headquarters and an Undercover Review Committee, which includes designated DOJ Criminal Division attorneys. *Id.* at 6-9.

[40] The main alternative is Due Process, but while many courts say that it forbids outrageous undercover operations, few reverse convictions on that basis. *See* MARCUS,

started to recognize the need for such a defense in the late nineteenth century.[41] Even though most criminal enforcement occurs at the state level, the United States Supreme Court's rulings are instructive because federal officials took the lead in using undercover operations. When the Court took its first undercover cases, involving postal officials, it upheld the convictions.[42] In 1932, the Court first recognized the defense in *Sorrells v. United States*.[43] During prohibition, a police agent posing as a tourist gained Sorrells's trust by claiming to have served in the same military unit as Sorrells did in the First World War. The agent then repeatedly asked Sorrells to sell him liquor. Though he refused at first, Sorrells eventually left and returned with liquor, which he sold to the agent. The Court held that, on these facts, it was error not to submit the issue of an entrapment defense to the jury.[44]

With the Supreme Court's lead, state courts and legislatures embraced the entrapment defense.[45] It is difficult to summarize the complex law across American jurisdictions, but I offer a quick overview. Following federal precedent, most jurisdictions recognize a *subjective* entrapment test, which exculpates a defendant whose crime was (a) encouraged or "induced"

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supra note 13, at 277-326. There is a separate Due Process doctrine loosely called "entrapment" or "entrapment by estoppel," but it does not regulate undercover operations; it bars conviction for an act after *overt* government officials inform the defendant that the act does not constitute an offense. *See, e.g.*, Raley v. State, 360 U.S. 423, 426 (1959) (rejecting "an indefensible sort of entrapment by the state—convicting a citizen for exercising a privilege which the state had clearly told him was available to him."). Also, once the state initiates "formal adversary proceedings" against an individual, the Sixth Amendment restricts the government's ability to "deliberately elicit" incriminating statements from her. Massiah v. United States, 377 U.S. 201, 205-06 (1964). The doctrine requires a waiver of the right to counsel, but covert agents cannot ask for a waiver without blowing their cover. Nonetheless, the Sixth Amendment poses no such limits before formal proceedings begin; passive listening does not count as deliberate elicitation, Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986); and the rule is "offense specific," so it excludes deliberately elicited statements only in a trial for the *same offense* for which formal proceedings had commenced against the defendant when the statement was made, Texas v. Cobb, 532 U.S. 162, 164 (2001).

[41] Possibly the first case is *Woo Wai v. United States*, 223 F. 412, 415 (9th Cir. 1915) (immigration law). *See* Rebecca Roiphe, *The Serpent Beguiled Me: A History of the Entrapment Defense*, 33 SETON HALL L. REV. 257 (2003).

[42] *See* Goode v. United States, 159 U.S. 663, 673 (1895) (theft of mail); Grimm v. United States, 156 U.S. 604, 611 (1895) (mailing obscene materials).

[43] 287 U.S. 435, 452 (1932). The majority based the defense on statutory construction, reasoning that Congress could not have intended its criminal prohibitions to reach the behavior of entrapped defendants. *Id.* at 446.

[44] *Id.*

[45] The defense is now codified in twenty-six states. The statutes are collected in MARCUS, *supra* note 13, at 705-15. In the remaining states, the defense is a judicial creation, as it is in federal law.

by the government, if (b) the defendant was *not* "predisposed" to commit such crimes.[46] "Inducement" and "predisposition" are murky concepts. Inducement requires "something more" than creating a mere opportunity for the defendant to commit the crime. "An 'inducement' consists of an 'opportunity' *plus* something else—typically, excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, non-criminal type of motive."[47] The requirement of inducement clearly forecloses the defense when the government agent infiltrates a group and merely observes crime. But it also leaves open the possibility that some manipulation of opportunities will fall short of entrapment because the government's pressure was less than "excessive."

Undercover agents frequently encourage crime and the cases routinely turn on predisposition. Courts often define predisposition to mean the defendant was not reluctant to commit the crime.[48] A typical jury instruction describes predisposition as being "ready and willing to violate the law at the first opportunity."[49] The Supreme Court's second entrapment case, *Sherman v. United States*,[50] provides an example. An undercover agent posing as an addict first approached Sherman in a clinic treating addiction and later begged him for help in obtaining drugs while feigning symptoms of withdrawal. Sherman eventually relented, but the Court found insufficient evidence of predisposition as a matter of law because Sherman was reluctant to sell the drugs, gave in only because of concern for the agent's pain of withdrawal (rather than profit; he sold at cost), and the police found no narcotics in their subsequent search of his apartment.[51] The Court reached a similar conclusion in *Jacobson v. United States*,[52] its last word on entrapment. Undercover agents spent two years corresponding with Jacobson about sex, sending him many letters advocating sexual liberty with minors and the right to child pornography. When solicited, Jacobson promptly ordered such pornography, but when police searched his home, they found only the material they had sent him.[53] Again, the Court

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[46] *See id.* at 51-63.

[47] United States v. Gendron, 18 F.3d 955, 961 (1st Cir. 1994), *quoted with approval in* United States v. Poehlman, 217 F.3d 692, 701 (9th Cir. 2000).

[48] *See, e.g.*, United States v. Ulloa, 882 F.2d 41, 44 (2d Cir.1989).

[49] United States v. Kelly, 748 F.2d 691, 697 (D.C. Cir. 1984).

[50] 356 U.S. 369 (1958).

[51] *Id.* at 375.

[52] 503 U.S. 540 (1992); *see* Gabriel J. Chin, *The Story of* Jacobson v. United States: *Catching Criminals or Creating Crime?*, *in* CRIMINAL LAW STORIES (Robert Weisberg, ed.) (forthcoming).

[53] *Jacobson*, 503 U.S. at 540.

found insufficient evidence of predisposition (prior to the government's communications).[54]

By contrast, some American jurisdictions embrace an *objective* test for entrapment, that dispenses with the issue of predisposition.[55] Several adopt the language of Model Penal Code § 2.13, which provides a defense to a crime whenever the government's "methods of persuasion or inducement . . . create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." Other formulations refer to inducements that would persuade "an average"[56] or "normally law-abiding"[57] person to commit the crime. This standard aims to exculpate defendants who were subject to certain unreasonable police practices, without regard to their individual characteristics; that the inducement would tempt someone not "ready to commit it" or a generally law-abiding citizen condemns the practice even if the defendant is "ready to commit it" and is not generally law-abiding. Conversely, the subjective test aims to exculpate only "non-predisposed" actors whom the government induced to commit crime; predisposed actors do not gain the defense regardless of the strength of the government inducement.[58]

Commentators note that the objective and subjective tests are more alike in practice than they first appear.[59] In practice, the more important differences may be procedural. The jury decides application of the subjective test, but frequently the judge resolves claims under the objective test.[60] Also, to prove predisposition, prosecutors may introduce otherwise inadmissible evidence that the defendant possesses knowledge or abilities useful only for committing the offense, has committed similar offenses or acts in the past, or has a reputation for committing such offenses.[61] Substantively, the two tests can generate different outcomes. The most obvious difference is that, when the inducement is strong but there is

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[54] *Id.* at 554.

[55] The test was first suggested in minority opinions in *Sorrells* and *Sherman*. *See* Sorrells v. United States, 287 U.S. 435, 453 (1932) (Roberts, Brandeis, and Stone, JJ., dissenting in part); Sherman v. United States, 356 U.S. 369, 378 (1958) (Frankfurter, Douglas, Harlan, and Brennan, JJ., concurring in the result). About a dozen states employ an objective test. *See* MARCUS, *supra* note 13, at 43.

[56] *See, e.g.*, ALASKA STAT. § 11.81.450 (1962).

[57] *See, e.g.*, ARK. CODE ANN. § 5-2-209 (1987).

[58] A few jurisdictions use some kind of "hybrid" test combining subjective and objective elements in different ways. *See, e.g.*, State v. Rockhold, 476 A.2d 1236, 1239 (N.J. 1984) (conjunctive test); Bacca v. State, 742 P.2d 1043 (N.M. 1987) (disjunctive test).

[59] *See, e.g.*, Seidman, *supra* note 15, at 120.

[60] *See* WAYNE R. LAFAVE, CRIMINAL LAW 515-16 (4th ed. 2003).

[61] *Id.* at 513-15.

evidence of predisposition, as in *Lively*,[62] a defendant might win an entrapment defense under the objective test but lose under a subjective test.

The opposite case—losing the objective test but winning the subjective test—is more difficult, but possible. At least in the subjective test jurisdictions that frame the ultimate question as whether the defendant would have offended if the government had left him alone, it is possible a jury would find entrapment even though the government offer would not have tempted an average citizen. In these jurisdictions, courts hold that predisposition means not only willingness—the absence of reluctance—but also "readiness"—being positioned to commit the offense. The primary example is the money laundering case of *United States v. Hollingsworth*.[63] Though the defendants never exhibited reluctance to launder money, the court found it unlikely that a genuine criminal would ever have proposed such a transaction to the defendants, given their manifest inability to launder money.[64] Some courts reject this approach,[65] but where readiness is required and the temptation is modest, an "unready" defendant might win the subjective version of the defense but lose an objective version.

II. JUSTIFYING THE ENTRAPMENT DEFENSE: A CRITIQUE OF EXISTING THEORY

Criminal law theorists disagree about what rationale, if any, justifies the entrapment defense. Part of the reason for confusion may be that judicial opinions and scholarly articles are frequently distracted by issues other than the fundamental justification for the defense, such as the concern for whether courts should create such a defense without explicit legislative authorization and the choice between competing doctrinal formulations.[66] But these issues are subordinate to the question of whether the defense or other regulation is ultimately justified; moreover, it should be easier to resolve subordinate issues if we have an appealing normative foundation for

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[62] State v. Lively, 921 P.2d 1035 (Wash. 1996).

[63] 27 F.3d 1196 (7th Cir. 1994) (en banc).

[64] *Id.* at 1202 ("Whatever it takes to become an international money launderer, they did not have it."). Chief Judge Posner states that federal courts were in the process of reaching a consensus that predisposed meant merely willingness (in contrast to reluctance) when the Supreme Court decided *Jacobson v. United States*, 503 U.S. 540 (1992), which he interprets as adding a "positional" element. *See also* United States v. Poehlman, 217 F.3d 692, 701 (9th Cir. 2000) (requiring readiness).

[65] *See, e.g.*, United States v. Thickstun, 110 F.3d 1349 (8th Cir. 1997) (rejecting *Hollingsworth*'s interpretation of *Jacobson*).

[66] I do not discuss the question of whether courts should construct an entrapment defense in the absence of a specific statute creating one. I do discuss the best formulation of an entrapment defense, *infra* Part IV.

the defense. In this Part, I consider and critique the literature that seeks to justify the defense based on retributive theory, utilitarian theory, and political/institutional concerns. In each case, I do not claim that there is no possible way to use these approaches to justify the defense, only that no one has yet successfully articulated such a theory.

Let me begin, however, by noting a consensus that exists about how to describe the problem of entrapment. This consensus is only superficial, but it is useful for framing the issue. Despite different normative starting points, many courts and commentators make this common claim: *The state should not be allowed to punish an individual for committing a criminal act in an undercover operation that she does not commit outside of undercover operations.* In other words, the government should not cause otherwise law-abiding citizens to commit a crime and then punish them for it. I call this point the *"external offense principle"* because it focuses on whether the defendant commits the relevant sort of offense *outside* the undercover operation.

Statements of the principle are found in most writing on entrapment. In *Sorrells v. United States,* the Supreme Court stated that Congress did not intend that its statutes would permit government officials to "instigat[e] . . . an act on the part of persons *otherwise innocent* in order to lure them to its commission and to punish them."[67] The "otherwise innocent" language might be read in other ways,[68] but I agree with Jonathan Carlson that *Sorrells* here refers to the "core idea[] . . . that it is improper to impose criminal sanctions upon a person who would not have engaged in criminal conduct absent an effort by the government to induce such conduct."[69] In *Jacobson,* the Court stated, "When the Government's quest for convictions 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."[70]

The external offense principle pervades scholarly commentary as well. Many express the point in terms of causation, that the government should be allowed to alter the timing of crimes so it can more easily detect them,

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[67] 287 U.S. 435, 448 (1932).

[68] The alternative is actual innocence in the sense of lacking the required mental state or more broadly lacking blameworthiness. Both interpretations lead to confusion. First, I explain at *infra* Part II.A why entrapped individuals are blameworthy. Second, if the mental state were absent, that would be the grounds for defense, not entrapment.

[69] Jonathan C. Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 VA. L. REV. 1011, 1051 (1987).

[70] Jacobson v. United States, 503 U.S. 540, 553-54 (1992).

but not to *cause* additional crimes.[71] Gerald Dworkin explains, "The central moral concern with pro-active law enforcement techniques is that they manufacture or create crime in order that offenders be prosecuted and punished."[72] Carlson agrees that "it is offensive for the government to encourage, in order to prosecute, otherwise law-abiding persons."[73] Richard Posner says that undercover operations are not productive if "the police offer [an actor] such inducements as would persuade him to commit crimes that he would never commit in his ordinary environment."[74] Steve Shavell concurs, "[I]f parties would not ordinarily commit criminal acts, there is no behavior that needs to be deterred."[75]

In sum, theorists approaching entrapment from divergent perspectives articulate a similar goal for the defense: to prevent government from using undercover operations to convict an individual who does not otherwise offend. *But why not?* Here the consensus dissolves. Those who think the principle is justified disagree about whether the rationale is retributive, utilitarian, or institutional. In this Part, I find the existing articulation of all three rationales inadequate, except perhaps for justifying a "minimalist" defense no one advocates. Ultimately, though I argue for a broad entrapment defense in the next Part, I reject the validity of the external offense principle.

A. RETRIBUTIVE THEORY: THE BLAMEWORTHINESS OF THE ENTRAPPED

Under our current blaming practices, retributive theory is hard to square with the entrapment defense. The entrapped individual is

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[71] *See, e.g.*, J. Gregory Deis, *Economics, Causation, and the Entrapment Defense*, 2001 ILL. L. REV. 1207.

[72] Gerald Dworkin, *The Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime*, 4 LAW & PHIL. 17, 24 (1985); *see also id.* at 27 ("[T]here is the danger that one may not merely shift the scene of criminal activity but create crime that otherwise would not have occurred.").

[73] *See* Carlson, *supra* note 69, at 1051-52.

[74] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 255 (5th ed. 1998) ("Police inducements that merely affect the timing and not the level of criminal activity are socially productive; those that induce a higher level of such activity are not."). Posner also makes this point in judicial opinions. *See* United States v. Evans, 924 F.2d 714, 717 (7th Cir. 1991) (noting the key is whether "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."); United States v. Manzella, 791 F.2d 1263 (7th Cir. 1986) ("[I]f 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.").

[75] Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1256 (1985).

blameworthy because she voluntarily commits a wrongful act with the requisite mental state. Viewing the entrapped as innocent implies that the government's encouragement of crime excuses the undercover offender from blame. Several commentators have pointed out the flaw in this reasoning.[76] We often blame and punish individuals for giving in to temptations. In virtually any case of entrapment, we would blame the defendant for giving in to exactly the same encouragement were it provided by a sincere private individual (*i.e.*, one not acting on behalf of government).

Imagine two individuals each accept a bribe with the same degree of initial reluctance and the same belief that they are selling their official service to a sincere private buyer who has repeatedly offered an attractive price. Suppose that the only difference in the two cases is that, while the first bribe offeror is who he purports to be (a private citizen acting for his own behalf), the second is an undercover government agent (a police officer or informant working for the police). It is not clear how one can distinguish the two cases on grounds of blameworthiness. The defendants (1) do the same act with the same mental state, (2) in response to the same temptation or encouragement. The only difference is the source of the bribe—insincere government agent vs. sincere private individual. But there is no reason why this difference matters to blameworthiness. From the entrapped defendant's perspective, there was no difference in circumstance because she believed the source was genuinely private, that is, identical to the source for the other defendant.

If we cannot distinguish the two cases, then we must either blame both defendants or neither. Standard practice rules out the latter. It is no defense that one committed a crime that some private individual encouraged or made seem particularly appealing.[77] Indeed, we can see how

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[76] *See* Anthony M. Dillof, *Unraveling Unlawful Entrapment*, 94 J. CRIM. L. & CRIMINOLOGY 827, 829-30, 845-46 (2004); Andrew Altman & Steven Lee, *Legal Entrapment*, 12 PHIL. & PUB. AFFAIRS 51, 59 (1982) ("[T]he rationale for the entrapment defense cannot be the concern to distinguish between the culpable and the nonculpable."); Carlson, *supra* note 69, at 1037-44; Christopher D. Moore, *The Elusive Foundation of the Entrapment Defense*, 89 NW. U. L. REV. 1151 (1995) (arguing that the entrapment defense does not satisfy the requirements of an excuse); Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 237-39 (1982); Seidman, *supra* note 15, at 129-36. Many judicial opinions make the same point. *See, e.g.*, United States v. Russell, 411 U.S. 423, 442 (1973) (Stewart, J., dissenting); Sherman v. United States, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring); Grossman v. State, 457 P.2d 226, 229 (Alaska 1969).

[77] The point I am making is that there is no defense to succumbing to a sincere private request to commit a crime, no matter how tempting, nor to the presence of a genuinely tempting victim. Though less relevant, it is *also* the case that there is no defense to

unconventional this notion is by considering the closest available defense—duress. Duress requires that the defendant succumb to a certain kind of *threat*. The requirement of a threat rules out the defense for succumbing to attractive *offers*.[78] Because we routinely blame individuals for failing to refuse even the strongest non-threatening temptations to crime, there is then no reason not to blame individuals who gave into such temptations merely because they were, unknowingly, created by undercover agents.

It is, of course, possible that the "standard practice" is wrong. Many individuals have a strong intuition that those lured into crime by unusual situations presenting strong criminal temptations—Lively[79] for example—deserve less punishment than those who succumb to weaker and more ordinary temptations. Thus, it appears that temptation may mitigate blame.[80] If so, then there may come a point where the mitigation is so extreme that it should provide a complete defense. Though plausible, this retributive rationale would justify nothing like the current entrapment defense because there are so few individuals whom we would completely excuse from blame on this basis. Though we might not blame Lively, our current practice would never exonerate Sorrells[81] or Jacobson[82] if a sincere private party created the same criminal opportunity as the undercover agent created in those cases. Only very rarely would a successful entrapment claimant be beyond blame, given current practice.[83] My goal is to

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succumbing to an *insincere* private individual proposing a crime for the purpose of exposing the recipient to criminal liability. This point is expressed by stating that "[t]here is no defense of private entrapment." United States v. Hollingsworth, 27 F.3d 1196, 1203 (7th Cir. 1994) (en banc); *see also* Holloway v. United States, 432 F.2d 775, 776 (10th Cir. 1970); Carbajal-Portillo v. United States, 396 F.2d 944, 948 (9th Cir. 1968); Grossman v. State, 457 P.2d 226, 229 (Alaska 1969). Some scholars have argued for a private entrapment defense. *See* LEO KATZ, BAD ACTS AND GUILTY MINDS 159 (1987); Ronald J. Allen, Melissa Luttrell & Anne Kreeger, *Clarifying Entrapment*, 89 J. CRIM. L. & CRIMINOLOGY 407, 420-21 (1999). I argue to the contrary *infra* at Part III.C.

[78] *See* Seidman, *supra* note 15, at 13-34. On the conventional view, offers work to expand the offeree's choices; threats contract choices. Dillof, *supra* note 76, at 849-52, considers and rejects a rationale for the entrapment defense based on an analogy to duress.

[79] *See* State v. Lively, 921 P.2d 1035, 1038 (Wash. 1996), discussed in the introduction.

[80] *See* Joel Feinberg, *Instigating the Unpredisposed: Bad Luck in Law and Life*, in MODALITY, MORALITY, AND BELIEF 152, 160 (Walter Sinnott-Armstrong, ed., 1995) ("[T]he greater the amount of pressure required to move a person [to offend], the stronger must have been her disposition *not* to commit the crime, and . . . the stronger the disposition not to perform the criminal act, the greater the mitigation of guilt for performing it at another party's initiative.").

[81] *See* 287 U.S. 435, 452 (1932), discussed in Part I.

[82] *See* Jacobson v. United States, 503 U.S. 540 (1992), discussed in Part I.

[83] Note that ROBINSON & DARLEY, *supra* note 18, at 152-55, study public understandings of blame and find more support for entrapment as a mitigation than a defense.

determine whether a more-than-minimalist entrapment defense is consistent with our other criminal law commitments. For the retributivist, it appears the answer is no.

I should consider, however, the contrary argument of Roger Park.[84] Park claims that our practice of punishing those who give in to private encouragements to crime does not prove that such individuals are blameworthy. Instead, he says that we do not give a defense to non-blameworthy individuals who give in to private temptation because of the danger of contrived defenses. With a private temptation defense, one member of a conspiracy could falsely but persuasively claim to have unduly tempted the others, relieving them of liability and dramatically lowering the expected punishment for group crimes.[85] But, Park says, there is a far smaller danger when government itself is the tempter because, by controlling the situation, government can guarantee the acquisition of evidence that proves whether or not the temptation was too great.

Again, I believe our existing commitments contradict Park's claim. Poverty, peer pressure, and personal weakness are common reasons that individuals fail to resist criminal temptations; the exploitation of personal relationships is a routine part of conspiracies. To say that these circumstances render individuals blameless suggests that we convict masses of "innocent" individuals every day. Yet retributive theory requires blame to justify punishment. To foreclose the private temptation defense altogether for evidentiary reasons (rather than, say, shifting the burden of proof) makes no more retributive sense than to eliminate insanity or self-defense because they can occasionally be faked. In particular, members of a conspiracy could fake a duress defense by claiming that one member threatened the rest, but we deal with that problem with various limitations, not by eliminating the defense entirely. The better explanation for the absence of the temptation defense is that we actually do blame competent adults who give in to such temptations (even if not as much as those who were not so tempted).[86] Similarly, we should blame the entrapped.[87]

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[84] Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 241-42 (1976).

[85] *See id.*

[86] *See* ROBINSON & DARLEY, *supra* note 18, at 154 (finding that most survey respondents would find entrapped individuals guilty but consider the facts of entrapment to mitigate the offense and justify a lower punishment); Altman & Lee, *supra* note 76, at 58-59 (1982) (noting that most individuals would blame public officials for accepting a bribe even if very large and offered repeatedly).

[87] Dillof, *supra* note 76, at 853-56, also considers and rejects a "limited resources" rationale for excusing individuals for failing to develop the character necessary to resist significant criminal temptations.

Finally, consider a technical point by Carlson. He defends the entrapment defense by contending that the acts committed in an undercover operation may fail to be *wrongful*.[88] On many retributivist accounts, we can only blame an individual for wrongful conduct and conduct is wrongful only when it harms or risks harming the socially recognized interests of others. Yet, Carlson claims that, in many undercover operations, "the actual crime that the government seeks to punish . . . is so completely under the control of the government that there is neither any actual invasion of a protected legal interest, nor any genuine threat to the interests that the law in question protects."[89]

Even granting his premises, Carlson's contention is unpersuasive. Note initially that Carlson selects the narrowest possible conceptual level at which to judge whether the defendant's conduct poses a risk of harm: the specific circumstances of the defendant's behavior. But one might adopt a broader level of generality: that the defendant's conduct is wrongful if it *ordinarily* risks harming the recognized interests of others (or, alternatively, that the conduct would cause or risk harm given the defendant's subjective perspective[90]). Under this view, government observation and control might be seen as a mere fortuity, which does not affect the risk ordinarily posed by the conduct. If so, then undercover conduct is wrongful if the same conduct is wrongful outside undercover operations. Which level of generality is appropriate? I only note that the implications of Carlson's narrow view are inconsistent with existing practice. His argument entails that there can be no wrongful conduct when the government, or some other party intent on preventing crime, is in firm control of the behavioral environment, thus eliminating the risk of harm. For example, government agents sometimes "stake out" and entirely control an environment even when there is no undercover operation.[91] The logic of Carlson's position is

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[88] Carlson, *supra* note 69, at 1059-67.

[89] *Id.* at 1061.

[90] Dillof, *supra* note 76, at 843-44, criticizes Carlson for ignoring this form of "subjective retributivism."

[91] Similarly, potential victims may be aware of a criminal attempt and take actions to render its completion impossible. Thus, Carlson's claim that acts encouraged in undercover operations are not "wrongful" undermines the basis for attempt liability whenever the effort at crime is doomed to fail. In a later section, Carlson draws his own parallel between undercover acts and attempt, claiming "punishing encouraged conduct should be treated as a form of inchoate liability that the entrapment rule seeks to restrict within sensible boundaries." *Id.* at 1075. Carlson's theory is that the entrapment defense tries to determine whether the defendant is dangerous much like modern attempt doctrine. *Id.* at 1075-82. That approach seems to concede the need for a utilitarian, not a retributive justification. In any event, modern attempt law aims to base liability on acts that *ordinarily* demonstrate

that the acts committed in these situations cannot be wrongful (or blameworthy) because, narrowly viewed, the actors pose no real threat.[92] To the contrary, our normal practice is to ask about the *ordinary* dangers posed by the type of conduct at issue, judged a higher level of generality than the facts of the particular case. Judged accordingly, otherwise criminal acts in undercover operations are wrongful, and therefore deserve blame.[93]

In conclusion, let me repeat that it is possible that our current blaming practices are, at some deep level, wrong. But if so, the problem requires rethinking far more than the entrapment defense.[94] The question I address is whether we can give a normative account of the defense that is mostly consistent with existing commitments. Given our ordinary practices of blame, those who commit otherwise criminal acts in undercover operations are blameworthy for doing so.[95]

B. UTILITARIAN ANALYSIS: A NEED TO AVOID POINTLESS PUNISHMENT

There are many costs and benefits to undercover operations, but it is difficult to imagine any simple tabulation as justifying an entrapment defense. The defense seems more useful as a means of encouraging police to avoid particular tactics, so the justification needs to be tied to the undesirability of certain tactics. There is such an approach, an economic distinction between desirable and undesirable undercover tactics. To describe it, I introduce some terminology. The external offense principle asks *would this defendant commit this sort of offense outside of undercover*

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dangerousness, not on proof beyond a reasonable doubt that the particular defendant is dangerous.

[92] More generally, there are many crimes that prohibit behavior that does not in every case cause or risk harm even outside of a controlled environment. To the crimes of operating a motor vehicle without a license, it is no defense to the safest driver on the road.

[93] There is another problem. Police sometimes do not control the environment of an operation sufficiently to prevent all risk. One example is a sting where a covert agent poses as a "fence" who buys stolen goods. Because the operation lasts for months and some theft victims are never identified, it may encourage thefts that cause real harm. *See* Kenneth Weiner et al., *Stinging the Detroit Criminal*, IV POLICE & LAW ENFORCEMENT 283, 290 (1987). Carlson's argument implies that the acts in *these* undercover operations are wrongful because they risk harming the interests of others. It seems odd (and to create odd incentives) that an individual is blameworthy when caught in risky or disorganized undercover operations but not in safe and well-managed ones.

[94] *See* Seidman, *supra* note 15, at 132.

[95] Even though retributive theory does not require a defense, on some version it permits one. Those retributivists who see blame only as necessary to justify punishment would permit a defense. Those who see a moral obligation to punish the blameworthy would rule out the defense.

operations? If we answer this question affirmatively, then I call the defendant a *true offender.* If she does not commit this sort of offense except in undercover operations, I call her a *false offender.* If this dichotomy seems suspect, let me say now that I eventually question it. But the terminology merely tracks the frequently expressed idea that I labeled the external offense principle. That idea claims that the state is justified in punishing those who would otherwise offend—"true offenders"—but not those who would not—"false offenders." The economic justification for the defense is a claim that, though the punishment of true offenders produces desirable consequences, the punishment of false offenders does not.

Richard Posner, Steve Shavell, and Bruce Hay have each made this claim.[96] They each begin with the utilitarian premise that, absent a social benefit, punishment is a needless, indefensible act. If the offender would not otherwise commit the crime, then there is no benefit to having the state first induce that crime in an undercover operation and then punish her for it. Posner makes the point by turning the question around and asking why it is ever desirable for government to encourage a crime. Posner answers that undercover operations are sometimes the cheapest means of detecting *ongoing* criminal activity.[97] When police find it difficult to prove criminal charges using conventional investigative tactics, they will often find it cheaper to induce the individual to commit a crime in the presence of police. The purpose of undercover operations, therefore, is to apprehend existing offenders. That purpose is not served when the apprehended individual is a non-offender, who, for some reason, commits the criminal act only in an undercover operation. Thus, the entrapment defense ensures that police use undercover operations in a way that is consistent with their purpose, by ensuring that the individual otherwise offends. The defense prevents the state from needlessly punishing (what I call) false offenders.

By contrast, some commentators claim that utilitarianism is not consistent with the defense. Though the primary purpose of this Part is to critique existing theory, I first extend economic theory to defend it against extant criticisms. Because I eventually rely on an economic approach, it is important to answer outstanding objections. Nonetheless, I follow by offering my own critique.

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[96] *See* POSNER, *supra* note 74, at 255; Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1220 (1985); Shavell, *supra* note 75, at 1256-57; Bruce Hay, *Sting Operations, Undercover Agents, and Entrapment*, 70 MO. L. REV. 398-99 (2005); *cf.* Brian L. Goff & Robert D. Tollison, *Using (Im)perfect Markets to Catch Criminals*, 21 J. ECON. BEHAV. & ORG. 31, 40 (1993) (discussing how entrapment might "be erected around an estimate of the elasticity of demand in the [criminal] market").

[97] Posner, *supra* note 96, at 1220.

1. Entrapment and Economics: A Reply to Existing Criticism

The objections to the economic theory are that there are crime prevention benefits from punishing anyone who offends in an undercover operation, even the "entrapped," and that there is no reason for courts, rather than police, to decide how best to structure undercover operations. I consider and reject each criticism in turn.

a. Crime Prevention Benefits

Punishing false offenders obviously does not produce individual crime prevention. That is, if the individual will not offend when "left to [her] own devices,"[98] then there is no need to specifically deter, incapacitate, or rehabilitate her. Creating and then punishing a false offender cannot decrease the amount of the crime she will commit because, by definition, she will commit none.

The less obvious argument concerns general deterrence. Some claim that punishing the entrapped will increase the perceived probability of detection. Seidman says, "[E]ven if the entrapped defendant is not dangerous, his incarceration may nonetheless reduce crime by deterring others."[99] Dillof agrees, "*Any* convictions, even those of the nondisposed, advance the cause of general deterrence."[100] If so, then it is not necessarily wasteful to punish the entrapped.

I take this criticism to claim that there is a deterrence benefit to punishing false offenders.[101] With one exception, the critics' view is erroneous.[102] The exception is that, when law enforcement directs undercover operations against a particular criminal population *for the first time* (*e.g.*, the first terrorist sting), convicting even a false offender could

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[98] United States v. Jacobsen, 503 U.S. 540, 553-54 (1992).

[99] Seidman, *supra* note 15, at 141; *see id.* ("Potential criminals who know that police are utilizing an entrapment policy will realize that there is a greater risk that they will be apprehended and so will be less tempted to commit crime.").

[100] *See* Dillof, *supra* note 76, at 862 (emphasis added); *see also id.* at 858-59 ("[I]t is hard to doubt that punishing more will deter more"). Carlson, *supra* note 69, at 1069, agrees: "The courts' blanket endorsement of encouragement [of crime] would enhance the law's deterrent force . . . ."

[101] In my own critique *infra* at Part II.B.2.b, where I reject the distinction between true and false offenders, I introduce a middle category—probabilistic offenders—and claim that their punishment does enhance deterrence. It is possible one could then partially reconcile my view with that of Seidman, Dillof, and Carlson, if most "entrapped" offenders are probabilistic rather than false. Nonetheless, it is important to see why punishing false offenders is utterly wasteful.

[102] It is similar to the erroneous idea that punishing the innocent will *generally* promote deterrence. *See* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1269 n.745 (2001).

publicize the new tactic and enhance deterrence. Even if the convicted offender is false, unapprehended true offenders will now realize the government has shifted into such tactics, thus raising their perceived probability of detection. But that advantage is small and fleeting. Apprehending true offenders *also* publicizes a new operation and, in any event, once the tactic is familiar, there is no publicity benefit from apprehending false offenders.[103] In the long run, individuals care only about the probability of their own detection, which they judge from the probability of detecting the class of individuals like themselves.[104] Ongoing true offenders care about the probability of detecting ongoing offenders. That probability is not affected by the punishment of false offenders, which therefore does not improve deterrence.

To illustrate, consider a stylized example. Assume an equilibrium, created with conventional law enforcement and no undercover operations, in which 100 individuals commit one particular crime per year, ten of whom are apprehended and incarcerated, while an additional ten offenders are added each year to replace them (coming from a new cohort of young adults or prior offenders released from prison). The probability of detection is 10%.[105] Now suppose we introduce undercover operations that each year catch an additional six individuals per year, three of whom are ongoing, true offenders and three of whom are false offenders who do not commit the offense outside an undercover operation. From the perspective of the ongoing offenders, there is no difference in punishing all six individuals (as would occur with no entrapment defense) and punishing only the three who were previously committing the offense (as would occur with an ideal entrapment defense). In either case, the actual probability that a true offender will be apprehended is now 13%.[106]

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[103] Thus, the publicity advantage cannot apply to the vast run of undercover operations in the world today—for drug crimes, money laundering, bribery, etc.—because it is already well-known that federal and state governments use undercover tactics to detect these crimes.

[104] More precisely, for a person contemplating a criminal act, the relevant probability of detection is one informed by all variables that influence her detection. For example, if the probability of detecting burglary consistently varies with whether it occurs in the day or night, it would make sense for professional burglars to care only about the probability of detection for the type of burglary they commit.

[105] One need not suppose that criminals consciously calculate or precisely know the probability in order to imagine that its magnitude influences their behavior, as considerable evidence demonstrates. *See, e.g.*, Steven D. Levitt & Thomas J. Miles, *Empirical Study of Criminal Punishment*, in HANDBOOK OF LAW & ECONOMICS (A. Mitchell Polinsky & Steven Shavell eds., 2006) (forthcoming).

[106] Punishing false offenders does affect the deterrence of those *not* currently offending. But because these offenders already have a negative expected value for offending—they are already deterred—this added deterrence is valueless.

The key is that, as long as the undercover tactic consistently apprehends some false offenders, the true offender discounts the future threat of such tactics by the proportion of false offenders they apprehend. If we alter the hypothetical so that *all six* individuals newly apprehended by undercover tactics are false, then these tactics exert no influence on the true offender's perceived probability. The detection rate remains at 10%. Conversely, if all six are true offenders, then the probability of detecting true offenders is now 16/100 or 16%. The probability is higher because the results are now undiluted by the apprehension of false offenders. Punishing false offenders—non-offenders outside of undercover operations—does not aid deterrence.

The contrary idea—that society enhances deterrence by convicting false offenders—arises only by assuming that true offenders will continuously make a particular mistake: they will perceive false offenders as true. In the original hypothetical (with three false offenders), true offenders might now imagine that all sixteen apprehended offenders are "true" and that the probability of detection is now 16/100 or 16%.[107] Mistakes of this sort are possible, but so are other mistakes this analysis ignores. For instance, *true offenders might conversely perceive that true offenders caught in undercover operations are false.* In the original hypothetical, the observers might believe all six apprehended individuals are false offenders. If so, then true offenders continue to perceive a 10% probability of detection even though the actual probability is 13%. Thus, assuming one kind of mistake, we gain deterrence from punishing false offenders, but assuming another kind of mistake we gain *no* deterrence from punishing *true* offenders. Seidman and Dillof offer no evidence or argument for their assumption that the former mistakes will occur instead of the latter.

When one considers all possible mistakes, the conventional economic assumption is that they will balance each other out. Some offenders *over*estimate the percentage of apprehended individuals who are true offenders, others *under*estimate the percentage, and the *average* offender's estimate is correct. Alternatively, behavioral economists identify biases that cause errors to be systematically skewed rather than evenly distributed around the true value. In the behavioral literature, the relevant bias appears to be optimism,[108] which would cause existing offenders to believe that

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[107] Or they might believe that the number of offenses has increased to 103 per year, and that the detection rate is 16/103 or 15.5%.

[108] *See, e.g.*, Christine M. Jolls, *On Law Enforcement with Boundedly Rational Agents*, *in* THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR (Francesco Parisi & Vernon Smith eds.,

their ability to elude apprehension is greater than it really is. In the context of sting operations, overconfidence means that the *average* offender systematically underestimates the percentage of apprehended individuals who are true offenders.[109] Equivalently, true offenders are likely to err by believing some true offenders are false, while correctly identifying false offenders as false. If so, punishing false offenders will, as before, generate no deterrent benefits.

b. Institutional Competence

Another objection to the economic theory is that we should not trust courts to make complex policy judgments concerning undercover operations. Police have better information than courts about the effect of various tactics. Seidman states, "The efficiency argument explains why a sensible police department might want to forgo an entrapment strategy in some cases, but not why we should have a formal, judicially enforced doctrine incorporating that judgment."[110] Even if conviction of false offenders is undesirable, perhaps judicial oversight of police is not worth the costs. This is an important objection that has not previously been given adequate attention.

Police are, of course, imperfectly motivated agents. The principal/agent problem, much discussed in private law, is of even greater importance in criminal law because the agents—such as police and prosecutors—are public employees free from the discipline of market pressure.[111] Though police are subject to some political pressure, these place only minimal constraints on the actions of police detectives who run undercover operations.[112]

2004); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1091-95 (2000).

[109] More concretely, undercover operations require that the police succeed in deceiving the target. A professional/recidivist criminal might overestimate the ability of other such true offenders to "sniff out" an undercover operation, thus overestimating the number of false offenders.

[110] Seidman, *supra* note 15, at 143; *see also* KATZ, *supra* note 77, at 158 ("It is unlikely that the police would pursue entrapment activities beyond the point at which, on the margin, the [costs and benefits] balance each other out."); Seidman, *supra* note 15, at 144 ("[O]ne would expect the police themselves to be motivated to use scarce resources in a manner that maximizes the number of criminals apprehended.").

[111] See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 300-01 (1983); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 549-50 (2001).

[112] Of course, if legislatures or chief executives were themselves ideally motivated, they would independently act to prevent police from apprehending false (or as I later term them

Of course, despite agency problems, we defer many policy issues to the police (e.g., how to deploy patrol officers) because judicial oversight is thought to be worse. The agency cost point, however, is not merely that the public fails to motivate police to allocate crime-fighting resources in an optimal way. Instead, the problem is that the public has motivated police to go *too far* in using undercover operations, absent an entrapment defense or other regulation. Police bureaucracies respond generally to intense political pressure for crime control by trying to create incentives for individual officers to control crime. An incentive requires some measure of job performance and, for the detective, a common criterion is her "clearance rate," the rate at which she solves a case by making an arrest of the suspected perpetrator.[113] The value placed on clearance rates carries over to motivate officers to value arrests even when—as in most proactive

"low value") offenders. The need for judicial regulation arises from the failure of these other governmental branches. Explaining this failure is complex, requiring a general theory of the principal/agent problems involved in criminal justice. For now, I note only that the public is, like other principals, inattentive and uninformed. As a result, public pressure for crime control generates stronger incentives for politicians to *appear* "tough on crime" than to ensure the most effective use of crime-fighting resources. For purposes of re-election, politicians usually create the right appearance by leaving the police unregulated. *See* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYR. L. REV. 1079 (1993); Stuntz, *supra* note 111.

Consider two possible exceptions. First, about half the states codify the entrapment defense. *See* MARCUS, *supra* note 13, at 705-43. But rather than providing regulation that obviates the need for judicial regulation, these state legislatures embrace open-ended statutory language that does little more than to authorize judicial regulation. Second, the U.S. Attorney General has established guidelines for F.B.I. undercover operations. *See AG Guidelines*, *supra* note 39. Some of these provisions plausibly address the concerns raised by the economic rationale, especially Section V.B(4), which requires either (i) that there is a "reasonable indication" that the targeted individual has engaged, is engaging, or will engage in the illegal activity proposed or (ii) that the opportunity created is "structured" so that any individuals "drawn" or "brought" to the opportunity are "predisposed" to commit that crime. *Id.* at 16. I use a similar two-tiered approach in proposing my own formulation of entrapment in Part IV.B *infra*. For present purposes, however, there is little reason to believe these guidelines reflect the absence of an agency problem. The guidelines first arose in 1976, well after the Supreme Court created the entrapment defense and seem responsive to that judicial innovation. *See* OIG'S REPORT, *supra* note 37, at 36. Moreover, the recent audit by the DOJ's Office of Inspector General, while examining the F.B.I.'s compliance with other regulations, provides no analysis of compliance with the particular regulations aimed at avoiding entrapment. *Id.* at 137-68.

[113] To sharpen the point, contrast it with two alternatives. First, society might ideally motivate police to maximize the public interest in crime control. That is the point I have just argued against in the text. Second, pessimistically, society might fail to motivate them at all, so that they fail to put forth any effort whatsoever. This is obviously false. The truth certainly lies between these extreme possibilities.

undercover operations—there is no previously reported crime to "clear." In short, bureaucratic incentives motivate arrests.

A pessimist might claim that the police bureaucracies motivate officers to maximize arrests without regard to the evidence of guilt. But it is implausible to think that the typical detective acts this way. Clearance rates are sometimes defined by whether a prosecutor charges the person arrested.[114] Even where police "clear" a case merely by arrest, detectives must care whether the person arrested was the perpetrator, or they would just arrest anyone, and all "clearance rates" would be 100%. Surely, most detectives maximize some conception of a *good* arrest. The police conception undoubtedly differs from the technical requirements of law, but it is hard to believe that the police understanding of a valid arrest is entirely immune to legal requirements. If prosecutors always refuse to bring certain kinds of cases, it is unlikely that the police would forever ignore this reality and continue to believe this type of arrest was a "good" one.[115]

Here, then, is the problem. Without an entrapment defense, the arrest of a false offender *is* a "good" arrest; it will even produce a conviction.[116] Absent the defense, police seeking to maximize "good" arrests will structure undercover operations so as to maximize the number of individuals who accept the created opportunity, even if that includes many false offenders. In deciding how tempting to make the criminal opportunity, police will almost always favor "more" to "less." The only reasons not to offer the maximal temptation are the possibility of costs borne by police (*e.g.*, the time to create a romantic relationship with the target) and the chance that the target will recognize an excessively tempting offer as a sting operation. Frequently, however, it is no more costly to

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[114] This is how federal statistics define clearance of a case. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl.4.19 n. (2003), *available at* http://www.albany.edu/sourcebook/pdf/t419.pdf.

[115] This point does not contradict the claim that the suppression of evidence obtained in violation of Fourth Amendment rights may not deter such violations. *See, e.g.*, Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 368-71. First, violating the Fourth Amendment frequently does not prevent a conviction. Evidence obtained by a violation is often admitted because of standing requirements and good faith and inevitable discovery exceptions. Even with suppression, other evidence may secure a conviction. Second, police have many motives for searches and seizures other than conviction (*e.g.*, disrupting attempts, destroying contraband, harassment), but the primary motive for undercover operations is to produce an arrest.

[116] Of course, if prosecutors were optimally motivated, they would on their own decide never to prosecute individuals apprehended in undercover operations that would tempt false offenders, even in the absence of an entrapment defense. Prosecutors might thereby redefine "good" arrests and control police. But prosecutors are not so ideally motivated. They seem instead to maximize convictions and/or their trial win rate. If so, then absent an entrapment defense or other regulation, prosecutors will seek to convict false offenders.

make a criminal opportunity more attractive, as by naming a better exchange price or inventing a reason to believe the risks of detection are unusually low. Though the risk that a savvy criminal will recognize an offer is "too good to be true" may exert some discipline on police, it may also lead to a worst case scenario, where police make unrealistically attractive offers because many naive false offenders—but *only* false offenders—will accept them. One wonders, for example, if Lively would have been more wary of Desai had she actually been in the business of selling cocaine.[117]

There are two more specific problems. First, in complex stings, where the police must invest time to cultivate the target's trust, they will have an incentive to keep increasing the temptation if the target initially resists. Even if the police start by offering a modest temptation to crime, if it takes a month to set up the sting and propose the transaction, they will often expect greater returns from quickly increasing the temptation to the same target than from starting over with a new target. Second, police often supervise confidential informants in stings, thus creating a second level of agency costs. Especially when those informants earn cash or leniency for the arrests they produce (as Desai in *Lively*), they have no incentive to care whether the target is a true or false offender.[118]

An entrapment defense or other regulation may improve matters. First, because the defense will probably influence what the police count as a "good" arrest, they will respond by structuring operations to defeat the defense. This is especially true in the jurisdictions where prosecutors are involved in setting up undercover operations. Second, even if the defense has no effect on the undercover operation, it prevents the conviction of false offenders whose punishment serves no utilitarian ends. In sum, the case for strong deference to police is weak. Courts may serve a useful monitoring function in this context, just as they do in other police contexts (*e.g.*, search and seizure) and for other bureaucracies (*e.g.*, administrative agencies).

2. *A New Critique of the Economic Rationale*

The economic rationale seems to allow one to view entrapment, especially the subjective test, as structurally similar to other defenses,

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[117] *See* State v. Lively, 921 P.2d 1035 (Wash. 1996), discussed in the introduction.

[118] *See, e.g.*, Susan S. Kuo, *Official Indiscretions: Considering Sex Bargains with Government Informants*, 38 U.C. DAVIS L. REV. 1643 (2005). After 1990s scandals involving F.B.I. informants, *see supra* note 27, the Justice Department sought to tighten regulatory control. Yet a 2005 audit found "significant problems" in the F.B.I.'s compliance with DOJ guidelines, including compliance errors in 87% of the reviewed informant files. *See* OIG'S REPORT, *supra* note 37, at 7-8.

despite the absence of a retributive rationale. If punishing false offenders does not generate utilitarian benefits while punishing true offenders does, and if the entrapment defense focuses on facts that distinguish true from false offenders, then entrapment doctrine determines whether there is a utilitarian justification for punishing the defendant. If so, then we can understand why, despite the defendant's apparent blameworthiness, the false offender who will not otherwise offend is, in a sense, "innocent."

As natural or attractive as this view may be, I believe it is wrong. The entrapment defense is not coherent when viewed as an effort to determine whether particular defendants are, in any sense, "innocent," nor even to determine whether a particular defendant's punishment will generate utilitarian benefits. Here, I critique the standard economic rationale with alternative arguments: there is a severe difficulty in distinguishing true from false offenders in a particular case without incurring the costs undercover operations are supposed to avoid; and the dichotomy between true and false offenders is illusory.

a. The Challenge of Proving the External Offense

The standard economic rationale—there is no benefit from punishing someone who would not offend outside an undercover operation—has an odd evidentiary implication. To view entrapment doctrine as a means of separating true from false offenders implies that we are actually punishing the defendant for an act that she does outside the undercover operation and using the undercover act merely as *evidence* of that offense. To make this point clear, call the individual's criminal conduct *in* an undercover operation the "internal act" and the individual's criminal conduct *outside* of undercover operations the "external act."[119] Assume that the culpable mental state exists in either case. On the one hand, proving the external act by itself justifies punishment. On the other hand, the economic rationale says that the internal act justifies punishment *only* if we also believe the defendant otherwise commits the external act, *not* if the defendant is externally law-abiding. Thus, the external act is necessary and sufficient to justify punishment, but the internal act is neither necessary nor sufficient.

[119] For ease of exposition, I assume here that an external offense is one a true offender *has* committed outside the undercover operation, though in the next section I consider how the analysis applies to those who have not but *will* commit the offense outside the undercover operation. The argument in this section—the difficulty of proving an external offense—would only be stronger if external offense includes *future* offenses of the same type.

The relevance of the internal act is only that it provides evidence of the external act,[120] which is always the basis for criminal punishment.

This implication requires defending. In most jurisdictions, the government bears the ultimate burden of disproving entrapment *beyond a reasonable doubt*.[121] Yet the jury is never told that the government must prove beyond a reasonable doubt that the defendant committed an external criminal act. Even in jurisdictions that place the burden of proof on the defendant, it is odd that the prosecution is relieved of proving the external act beyond a reasonable doubt, when she would have that burden in any case not involving an undercover operation. In any event, the point is not merely about the burden of proof. In undercover cases, we never frame the *ultimate* issue for the fact-finder as whether the defendant has committed the crime outside the undercover operation. And if we did, we would have severe difficulty in most cases allowing the jury to reach this conclusion because the matter would remain so speculative (just when and where did the external act occur?).

One might respond that government can always introduce *additional evidence*, along with the defendant's undercover acts, to demonstrate that the defendant has committed an external offense at a particular time and place. Yet here we also meet serious objection. The need for additional evidence to prove the external offense may easily defeat the entire purpose of the undercover operation. Undercover operations are initially justified by a *lack* of information about whether the defendant is currently offending. If we could already prove which individuals were current offenders, we would not need the undercover operation. *Yet this fact is apparently the very thing we need to know to avoid convicting false offenders.* We need additional information to distinguish true from false offenders, but requiring too much information defeats the purpose of undercover operations, which is to detect criminality more cheaply than conventional methods.

Perhaps there is a way to thread this needle. The prosecutor might combine the evidence of the defendant's internal offense with relatively cheap additional evidence of the defendant's external offense. One might view the predisposition inquiry as requiring that the jury receive additional evidence of the defendant's external offending beyond the mere fact of an internal offense. Together, the evidence might prove an external offense

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[120] As a concrete example, if we convict a person of felony "distribution of narcotics" based on her act of selling cocaine to an undercover police agent at 5:12 p.m. on June 1, this evidentiary view says that we can justify punishing this individual only if we *therefore believe* that she sold narcotics at some point other than at 5:12 p.m. on June 1, to someone not an undercover agent (for which she has not already been convicted).

[121] LAFAVE, *supra* note 60, at 517.

beyond a reasonable doubt more cheaply than would conventional investigative techniques.

I remain skeptical. I offer a numerical example to justify my skepticism. The appropriate statistical construct for this analysis is Bayesian probability.[122] Bayesian analysis contrasts one's *prior* subjective beliefs about the probability of an event with an *updated* belief that incorporates new information. In this context, one begins with a prior estimate of the probability that the targeted individual has committed an external offense. If there is no reason to suspect a given individual at the outset—the police selected her by chance—then one's prior is equal to the proportion of the general population (from which the police selected the defendant) that commits the offense, the *base rate* of crime in this population. The undercover operation is then an experiment that provides new information: that the targeted individual accepts the undercover inducement makes it more likely that she is a true offender. The strength of belief-updating will depend on the false positive rate—the conditional probability that one will accept the undercover inducement, given that one does *not* otherwise commit the offense—and the false negative rate—the conditional probability that one will reject the undercover inducement, given that one *does* otherwise commit the offense.[123] The fact finder thus decides the probability that the individual offends externally, given that she offended internally. At this point, if we are not convinced beyond a reasonable doubt, we can seek additional evidence of external guilt. The strength of the inference from the undercover offense tells us just how much more evidence we need to convict. In subjective test terms, it tells us how high a bar to set for deciding someone is predisposed.

Now for the example. If police select the target by chance (as both entrapment tests and the economic theory permit), then our prior estimate is the base rate—the percentage of the population who commit the crime in question. The problem—sometimes termed the "false positive paradox"[124]—arises when the "base rate" is low, which will normally be the

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[122] I thank Andrew Bloch for first drawing my attention to the relevance of Bayesian updating to undercover operations at a 1998 Harvard Law and Economics workshop. Bruce Hay, *supra* note 96, also uses a Bayesian framework, though his analysis differs considerably.

[123] Obviously, I borrowed from this terminology when I introduced the terms "false offender" and "true offender," which correspond, respectively, to false positive and true positive. The other two possible outcomes are a "false non-offender"—one who fails to commit a criminal act in the undercover operation but otherwise does offend and a "true non-offender"—one who fails to commit a criminal act in the undercover operation and otherwise does not offend.

[124] LARRY GONICK & WOOLLCOTT SMITH, THE CARTOON GUIDE TO STATISTICS 49 (1993).

case for serious crimes. Suppose the base rate for the crime is one in 1000. Suppose that the false positive rate is 5%, which seems acceptably low. For simplicity, suppose that the false negative rate (the probability of an ongoing offender not accepting the undercover offer) is zero. The expected result of 1000 operations is as follows: the one true offender in the group accepts the police inducement; the police also offer the inducement to 999 non-offenders, 5% of whom—or fifty—accept. Thus, of those accepting the undercover inducement, only one of fifty-one—less than 2%—are true positives; *98% of the positives are false positives.* One might think the police are using a successful undercover tactic if there is only a 5% chance that an otherwise law-abiding citizen will accept the government's inducement. But if the base rate of criminality is low, as will be true if police select targets randomly, then most of the targets in the undercover operations are otherwise law-abiding. As a result, *almost everyone* who does accept the inducement is a false offender.[125]

Given this outcome, one needs *very substantial* additional evidence of external offending in order to conclude by conventional levels of certainty that the person has offended externally.[126] By contrast, the objective test for entrapment would allow conviction without any additional evidence. Given how low the false positive rate is in the example, the inducement obviously does not tempt the average citizen. So the undercover offenders will lose

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[125] The problem is severe as long as the prior probability is low. Suppose the false positive rate is *fifty times lower* than the previous example—1 in 1000 or 0.1%—and all else is the same. The results of 1000 undercover operations are still bleak: on average, for every true positive that accepts the inducement one false positive will also accept. Thus, with an extremely low false positive rate, 50% of those accepting the undercover inducement are false positives. Unless the false positive rate is zero or perhaps trivially above zero, a low base rate means that the acceptance of the undercover inducement is not, by itself, sufficient evidence to prove beyond a reasonable doubt that the individual is a true offender.

This "false positive paradox" is not actually paradoxical. When the base rate is low, it means that most of the population consists of negatives. As a result, the number of positives who can test positive is necessarily low, but the false positive rate is multiplied by a large number of negatives.

[126] I made the point assuming random targeting, but the result would occur if we assume the police begin with evidence of suspicion: given a false positive rate of 5%, one must raise the prior estimate of offending (from the base rate) very significantly to ensure that the undercover offense is sufficient to prove external offending beyond a reasonable doubt. One needs very substantial evidence to lower the base rate significantly. For example, suppose additional evidence raises the prior estimate of offending fifty-fold from the base rate of 0.001 to 0.05. Running 1000 operations now yields 50 true offenders and 47.5 false offenders, so that the probability that an undercover offender is true is only slightly better than chance. Raising the prior estimate further to 0.5 will probably suffice because 1000 undercover operations yield 500 true offenders and only 25 false offenders; over 95% of offenders are true. But one might guess that the evidence required to raise the prior from 0.001 to 0.5 is substantial and costly.

the objective entrapment defense in some jurisdictions even though most are false. One can then see the subjective test's predisposition element as coming to the rescue by requiring additional evidence. The good news is that it is cheap to prove predisposition—one need only point to the defendant's absence of reluctance or prior conviction for the same offense. Because it is cheap, undercover operations may remain cheaper than alternative investigative tactics. The bad news is predisposition is very weak evidence of external offending. No one really thinks that the absence of reluctance, for example, does much to prove an actual external offense. Indeed, the U.S. Attorney who convicted Lakhani for selling missiles to F.B.I. undercover agents posing as terrorists conceded that he did not know whether Lakhani could have ever acquired missiles to sell on his own (without the help of other undercover agents from Russian intelligence).[127] If the prosecutor cannot even say it is probable that the defendant would have ever committed a similar offense, then obviously he would not claim to have proved an external offense beyond a reasonable doubt.

To return to the main point: though we never really know the false positive rate, the entrapment defense seems necessary to many people because they think it is more than utterly trivial. If so, then we probably cannot conclude beyond a reasonable doubt that the defendant is a true offender unless the government had *substantial* additional evidence of her guilt, much more than predisposition requires. We could still interpret the economic theory as justifying an entrapment defense, but one that requires far more evidence of external offending. *Yet the more the additional evidence we require, the less likely it is that an undercover operation will prove a cheaper means of apprehending offenders.* I do not claim to have proved, in a deductive sense, that the problem is insolvable, but there is reason to be pessimistic. In sum, the evidentiary oddity of the economic view—that we are actually prosecuting the defendant for crimes committed outside the undercover operation—is matched by the likelihood that it renders undercover operations impractical.

b. The Problem of Scarce Opportunities and "Probabilistic" Offenders

There is a second problem. The Posner/Shavell/Hay rationale distinguishes between true and false offenders—my terms for their conceptual categories of those who do and do not commit offenses outside undercover operations. On closer inspection, this dichotomy is illusory.[128]

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[127] *See This American Life: The Arms Trader*, *supra* note 26.

[128] It is possible that these authors did not intend a simple dichotomy, though their analysis implies one. *See, e.g.*, Posner, *supra* note 96, at 1220 (undercover operations make economic sense if "the defendant would have committed the same crime . . . if he had not

There is a middle category of "probabilistic offenders" who will in the future commit the offense outside an undercover operation with a probability less than one. We gain individual prevention and general deterrence from punishing probabilistic offenders. Not only must the theory account for this more realistic view of offenders, it is possible that, for some crimes, there are no false offenders—because everyone who offends in the undercover operation will offend externally with some positive probability.

The dichotomy between true and false offenders begins to dissolve when we ask precisely *when* a true offender would otherwise offend. One possibility is that the true offender is someone who has *already committed* the same kind of offense (but not been apprehended and punished for it) at the time of the undercover operation. A second possibility is that a true offender is someone who *either* has already committed the same kind of offense *or* will do so in the future. I believe it is clear that the economic rationale implicitly assumes the broader understanding of the true offender, one that includes the individual who merely might offend in the future.

Where there is zero benefit from punishing a false offender, there is some benefit from punishing a *probabilistic* offender who may commit an offense in the future. Most obviously, there may be incapacitation benefits. For example, preventing ten individuals from committing a crime when each was only 50% likely to commit it will prevent an expected five crimes.[129] Moreover, we enhance deterrence. The main reason that individuals are probabilistic offenders[130] is that they will commit an offense only if they encounter an unusually attractive opportunity. Some people might never launder or counterfeit money, for example, unless they encounter a scarce "golden opportunity" to make a quick fortune from the crime.[131] In these settings, the probability of one's offending depends on the probability of encountering the scarce opportunity. If an undercover

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fallen into the police trap" but not if "the police go further and induce him to commit crimes that he would *never* commit in his ordinary environment.") (emphasis added). Perhaps the reference to "ordinary environment" encompasses the probabilistic analysis that follows. If so, then what follows is merely a more careful elaboration of the existing analysis.

[129] Some will be understandably troubled by the utility of punishing people for what they will do, rather than what they have done. But with undercover operations, the formal act requirement is satisfied: we punish only those who voluntarily commit criminal *acts* in undercover operations. We rule out punishment when those acts fail to provide a sufficient basis for believing either that the individual has already committed an external offense *or will in the future*. *See infra*, Part II.C.2 where I critique an institutional rationale for the defense based on the act requirement.

[130] Below, at Part III.A.1, I offer a more detailed and formal discussion of this point.

[131] *See, e.g.*, United States v. Hollingsworth, 27 F.3d 1196, 1199 (7th Cir. 1994) (en banc) (regarding money-laundering and the hypothetical it posed regarding counterfeiting).

operation causes an individual to offend by supplying her such a scarce opportunity, punishing her will aid deterrence of such opportunistic crimes. By contrast, if we grant a defense whenever the police offer such a golden opportunity, then anyone who receives one will know that she could not be punished if the offer came from an undercover agent. Knowing this, she can safely treat any such offer as genuine. Thus, punishing the individual in these operations contributes to deterrence in those cases where individuals actually encounter such special criminal opportunities.

Thus, punishment is entirely pointless only if directed to individuals who have not and will not, with any probability, commit the offense. The point is damaging to the economic rationale because it is possible that everyone who offends in an undercover operation is either a true or a probabilistic offender. At least for some crimes (*e.g.*, employee pilfering, insurance fraud,[132] medicinal marijuana sales), it is possible that almost anyone would commit the crime under scarce but possible conditions, so there are no false offenders to protect. Put differently, think now of what it means to be a false offender. Across all possible contingencies that can arise for this individual other than undercover operations, even contingencies that radically curtail her non-criminal opportunities and radically expand her criminal opportunities, this person will not commit this offense. If so, we may now wonder if an entrapment defense is actually necessary to protect false offenders.

Nonetheless, if we want to ensure that government cannot convict even a single false offender, then we would still need an entrapment defense. But the economic rationale now justifies only the narrowest defense. If the only economic objection is to the punishment of people who do not and will not ever otherwise offend—that is, if it makes sense to permit the punishment of probabilistic (as well as true) offenders—then it should be sufficient merely to forbid the police from manipulating opportunities in ways that *cannot* occur in the "real" world. Thus, economic theory may justify what I will term *the minimalist entrapment defense*, one that limits the government to offering temptations that occur outside undercover operations, forbidding the creation of opportunities that have zero probability of occurring externally. That is virtually no entrapment defense at all; it is far narrower than the ones in existence in American jurisdictions.[133]

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[132] *See* THOMAS GABOR, EVERYBODY DOES IT! 73-97 (1994).

[133] For example, the criminal offers in each of the Supreme Court cases on entrapment, including the ones where the Court found entrapment as a matter of law, all surely exist outside of undercover operations.

In sum, the economic rationale faces alternative objections. First, if there is a real danger of apprehending false offenders in undercover operations, it is not clear how one can distinguish true from false offenders without incurring costs that render the undercover operation impractical. Second, because there are benefits to punishing probabilistic offenders, there may be almost no risk of apprehending in undercover operations those whose punishment would generate no benefit.

C. INSTITUTIONAL CONCERNS: A POLITICAL NEED FOR SIDE CONSTRAINTS ON LAW ENFORCEMENT

In criminal law scholarship, the conflict between retributive and utilitarian theory sometimes obscures the importance of a different set of concerns: how to design institutions that will best accomplish whatever ends punishment appropriately serves.[134] The institutional concern potentially includes both a concern for procedural fairness and a need to design institutions with checks and balances that prevent private misappropriation of government power. For both concerns, the familiar starting point is to recognize that the strongest power the government wields against its citizens is the power to arrest, take property without compensation, incarcerate, and execute, that is, the power of criminal law enforcement. Many constitutional rights and common law doctrines aim to cabin this power[135]; a standard concern in liberal theory is how to prevent government officials from abusing discretionary power to enforce criminal law.

Institutional interests therefore offer a third possible means of justifying the entrapment defense, by focusing on the propriety of governmental action rather than the purposes of punishment. Unfortunately, there is often an unilluminating circularity in the

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[134] Although utilitarians believe that one should consider all consequences of punishment, modern economic utilitarians focus their criminal law analysis almost exclusively on the purposes of punishment, that is, on evaluating rules by whether they enhance or degrade criminal deterrence and incapacitation. Similarly, though many retributivists agree that society can legitimately consider other factors in deciding whether to punish the blameworthy (blame being necessary but not sufficient), most retributivists nonetheless seek to tie criminal law doctrine tightly to a theory of blame, with only occasional thought to the other factors that legitimately matter.

[135] Examples include the clauses prohibiting Bills of Attainder and Ex Post Facto laws; the interpretation of the due process clause proscribing excessively vague criminal statutes, judicial interpretations that unforeseeably enlarge their scope, and vindictive prosecution; the principal of legality (requiring legislative definition of crime) and the act requirement. All plausibly serve to confine official discretion to tolerable levels, even though they sometimes forbid punishment of the blameworthy or dangerous. *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985).

condemnation of "improper" tactics, a tendency to say that the entrapment defense exists to prevent misconduct and then to declare that the undercover operation in a particular case was misconduct for the reason that it "entrapped" the defendant.[136] To understand the difficulty, we should return to a point made about the retributive theory. In the case of private encouragement of crime, not only do we *blame* the individual who succumbs to the encouragements, we also treat as *legitimate* the use of government power to punish the individual who succumbs. We are willing to give government the power to punish individuals who give in to temptation, even great temptation, as long as the temptation is not offered by government.

The question is whether it matters that government itself is the source of the temptation. The difference might matter for at least two reasons. First, one might say that the individuals who the government persuades to commit crime are being treated *unfairly*. Second, one might say that society should not entrust officials with the unregulated *power* to encourage and then punish crime, given the risk that officials will target political enemies or unpopular scapegoats. The first institutional concern is deontological; the latter is utilitarian. Each claim, however, faces serious obstacles. As with a retributive theory, I do not claim that it would be impossible to construct an institutional justification for the entrapment defense (as, indeed, I attempt to do in Part III), but only that existing analyses fail.

1. A Critique of the Fairness Theory

One means of grounding the entrapment defense in fairness is to say, as some cases do, that the government "overbears the will" of the defendant.[137] If the defendant's will is "overborne" by the government, then punishment for the resulting act is arguably unfair. The problem with this argument is obvious. We would punish the individual for giving in to the exact same criminal temptation were it offered by a genuinely private individual. If an individual retains free will in the latter case, there is no reason to think otherwise when government offers the temptation.

Alternatively, some claim that it is unfair for government to provide a criminal temptation to an individual who would never otherwise encounter

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[136] *See* Carlson, *supra* note 69, at 1019. "The argument that the defense is necessary to deter police misconduct . . . seems to be based upon little more than a tautological claim that encouragement is bad because it 'falls below standards, to which common feelings respond, for the proper use of governmental power.'" *Id.* (quoting Sherman v. United States, 356 U.S. 369, 382 (1958) (Frankfurter, J., concurring)).

[137] *See, e.g.*, United States v. Ambrose, 483 F.2d 742, 746 (6th Cir. 1973).

one. As Leo Katz puts it, everyone "is entitled to his turn at the wheel of fortune. If he is lucky, he will never be faced with a situation in which his criminal disposition surfaces. Entrapment is a way of rigging the wheel."[138] This point is rhetorically appealing, but merely reformulates the external offense principle. Just as that principle is not self-justifying, it is not transparent why it is unfair for government to intentionally change the criminal temptations one faces. To the contrary, the claim that government manipulation of temptation is unfair seems to imply that the status quo distribution of temptation is fair. Yet exposure to criminal temptations is frequently arbitrary, a matter of *luck*. Many people avoid committing crime only because they fortuitously never face the temptation to do so, without any exercise of virtue or intent. Children of the affluent may never be asked to join a criminal organization that steals cars or sells cocaine, while those born into poverty face constant encouragement in those directions. Some individuals never encounter a "golden" opportunity to become rich stealing from their employer, insurance company, or bank, while others do. If the current distribution of criminal temptation is arbitrary, why should we recognize any right to complain about government changing it?

Some defendants might argue on behalf of the current distribution by saying they *intentionally* distanced themselves from criminal temptation, as by the careful selection of a neighborhood, job, or recreational venue. This is the best case I can imagine for giving weight to the status quo distribution. But, even here, the claim fails. Criminal law stills punishes an individual who, by bad luck, is exposed to temptation despite her efforts to avoid it. If a drug addict enters a drug rehabilitation program and cuts her ties to friends who still use drugs, she has no defense if another "rehab" patient (not an undercover agent) proposes a drug venture and she succumbs.[139]

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[138] KATZ, *supra* note 77, at 160-61. I consider Katz's main argument—concerning the act requirement—*infra*, Part II.C.2; *see also* Dworkin, *supra* note 72. Dworkin says that our scheme of punishment is a "choosing system" in which we allow individuals to "self-select[] themselves" for punishment by choosing not to comply with the law. *Id.* at 30-31. He contends that it is not only "unfair to the citizen to be invited to do that which the law forbids him to do," but that "it is conceptually incoherent." *Id.* at 32. As to fairness, he neglects to consider that even when government encourages crime, just as when genuinely private citizens encourage crime short of duress, we can still consider the person so encouraged to "self-select" for punishment by choosing to commit the encouraged act. As for coherence, because government may legitimately seek the *end* of decreasing criminal acts, and if—as Dworkin concedes—undercover operations are a *means* toward that end, then they are surely coherent in any important sense.

[139] One might try to distinguish the above analysis on the grounds that the government manipulation of criminal opportunities is intentional. Yet there is no "private" entrapment

Moreover, if we did care about achieving a fair distribution of criminal temptations, the commitment would not produce anything like the current entrapment defense. Fairness would plausibly require that government ameliorate the arbitrariness of criminal temptations by *equalizing* them. If some teenagers avoid temptation only because they were born into affluence, perhaps fairness obligates the government either to remove the temptation from the poor or to create it for the affluent. The only defense this theory permits is one that prevents government from distributing temptation in the wrong direction, further away from the equality ideal. That the defendant would not otherwise offend would be irrelevant if the only reason is that the defendant would fortuitously avoid a temptation others encounter. I doubt this fairness argument as well, but it shows the difficulty of justifying the defense.

Anthony Dillof, however, proposes a different theory, based on the distributive justice norm that "to the extent possible, the cost of an activity should be shared among all its beneficiaries."[140] The problem is that entrapment places on an individual "a disproportionate share of the cost of general crime prevention," much as if the government paid for police activities by taxing only a handful of citizens.[141] The state should instead choose either to target everyone in undercover operations or to target only some fair subset, such as ongoing offenders or the predisposed. Having forgone the former strategy, fairness requires the latter.[142]

Regrettably, I view criminal law as being almost entirely indifferent to this fairness concern. A fundamental element of our existing commitments is the unfettered discretion that police and prosecutors have to decline enforcement and the parallel refusal to recognize a defense of failing to prosecute other offenders.[143] Dillof concedes that police and prosecutors routinely enforce criminal statutes by selecting from a pool of violators (*e.g.*, speeders and those caught in tax audits) and by targeting high profile offenders. I would add that unequal burdening infects even the way legislatures define crimes. For example, the ban on marijuana, as applied to its medical uses, burdens some grievously and others not at all. Military desertion is a crime that burdens the few to benefit the many. The rich and the poor are equally prohibited from trespassing under bridges, but only the

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defense when private individuals intentionally lure another individual into crime in order to expose her to prosecution. *See* sources cited *supra* note 77.

[140] Dillof, *supra* note 76, at 831.

[141] *Id.* at 831, 876.

[142] *Id.* at 878.

[143] *See* Oyler v. Boles, 368 U.S. 448, 456 (1962) ("[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.").

poor suffer the burden. Perhaps it is normatively desirable, but embracing Dillof's theory would seem to demand a radical transformation of criminal justice.

Dillof's responses are, in my view, unpersuasive. First, he says that conventional police tactics involve less selectivity than undercover operations. He notes that police apprehend about twenty percent of external offenders, but only a tiny percent of the nondisposed are entrapped.[144] Note that the twenty percent rate is the average for eight index crimes.[145] Clearance rates vary by crime and can be particularly low for non-index crimes, like drug offenses, that go mostly unreported (precisely when undercover operations are most useful). However low the rate, the key is that criminal law gives the offender no defense. Indeed, the Supreme Court once upheld the validity of prosecuting seventeen of an estimated 674,000 criminal non-registrants for the draft,[146] a prosecution rate of .003%.

Dillof also claims that undercover operations that entrap the nondisposed are "unfair by design" whereas conventional police techniques under-enforce the law as an "unavoidable side effect" of resource constraints.[147] His argument is that police would apprehend all external offenders "if they could" but, even without resource constraints, would have no interest in entrapping all nondisposed offenders.[148] However, police do not necessarily intend to apprehend *any* nondisposed individuals in undercover operations; it may be only an unavoidable side effect of the tactic. Moreover, William Stuntz argues persuasively that "the pathological politics of criminal law" drive legislatures to enact over-broad and overlapping criminal statutes with the intent that police and prosecutors will drastically under-enforce them.[149] For such offenses, the fact that we burden only the few is also "by design."[150]

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[144] Dillof, *supra* note 76, at 884.

[145] See FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 2001, at 220 (2002).

[146] Wayte v. United States, 470 U.S. 598, 604 & nn.3-4 (1985).

[147] Dillof, *supra* note 76, at 885-86.

[148] *Id.* at 886 & n.201.

[149] *See* Stuntz, *supra* note 111. Examples include the crimes of negligent assault, negligent endangerment, and the "intangible rights" theory of fraud. *Id.* at 516-19. Dillof, *supra* note 76, at 878, says that if the government ever chose to entrap all nondisposed offenders, it would be forced to lower the penalties for the offense. Similarly, if the police ever literally enforced the broad crimes Stuntz discusses, the legislatures would be forced to narrow them.

[150] Finally, Dillof contends that conventional law enforcement is *necessary* to prevent crime, whereas undercover operations, though "cost-effective," are not. Dillof, *supra* note 76, at 884-85. But for most crimes, *no single tactic*, in isolation, is strictly "necessary." For drug enforcement or bribery, it would be hard to say, for example, that police patrols,

In the end, criminal doctrine fails to reflect the fairness concerns Dillof advocates. Existing commitments seem to exclude fairness as a rationale for regulating undercover operations.

2. *A Critique of the Power Allocation Objection*

Now turn to the power allocation argument. As with the economic theory, this source of the problem here is the principal/agent problem, but the risk is not just wasted resources, but the loss of liberty that results when government officials wield the power to punish political enemies and unpopular minorities. We need to know, however, why the manipulation of criminal opportunities represents a uniquely dangerous power. Carlson offers perhaps the best account, though I contend that he still falls short of the mark.

Carlson begins with the criminal law "act requirement."[151] We require a voluntary act as a predicate for criminal liability, barring punishment for mere thoughts and propensities, and for involuntary acts, though that is defined quite narrowly to mean mostly bodily movements not produced by mental effort.[152] One reason for the act requirement is the political danger of giving government officials the power to punish individuals for thoughts or propensities.[153] Limiting crimes to acts provides a clearer line of where government power ends. As Herbert Packer put it, the act requirement provides a *locus poenitentiae*, "a point of no return beyond which external constraints may be imposed but before which the individual is free . . . ."[154]

Carlson contends that the police encouragement of crime undermines the act requirement.[155] He says that the act requirement "guarantees a reasonable chance to avoid criminal penalties."[156] By contrast, he claims, undercover operations fail to give "an individual full freedom to comply with the law, and thereby [fail to] respect[] the individual's autonomy and ability to avoid crime."[157] He concludes that the act requirement implies a

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electronic surveillance, or interrogations were individually necessary. If any one tactic is necessary to combat these crimes, it is as likely to be undercover operations as anything else.

[151] *See* Carlson, *supra* note 69.

[152] *See, e.g.*, MODEL PENAL CODE § 2.01(2) (1962).

[153] *See* John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1371 (1979).

[154] HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 75 (1968).

[155] *See* Carlson, *supra* note 69.

[156] *Id.* at 1083.

[157] *Id.* at 1086. Similarly, KATZ, *supra* note 77, at 155-64, states, "If I happen to know that you, generally a very law-abiding citizen, will under some very special concatenation of circumstances commit a criminal act, and I delude you into thinking that those circumstances have come about, am I not punishing you for your disposition?" I would say not. Whenever

very expansive entrapment defense, one that would ordinarily not permit the government to punish an individual for encouraged conduct unless she "initiated" the criminal act.[158]

Carlson's analysis may justify an entrapment defense, but one far narrower than he imagines. Let's begin with the same comparison as before. Exactly why does it not "undermine" the act requirement to allow the government to punish the person who was privately encouraged into crime by a "sincere" criminal? For example, when *B* encourages *A* to exploit some once-in-a-lifetime opportunity to steal from her employer, we do not think it is a dangerous power or a denial of individual autonomy to let the government punish *B* for succumbing to this temptation. Why? Here is the ordinary way to explain the legitimacy of this liability: *A* acted voluntarily and without duress, and therefore *chose* to cross over the line defined by the act requirement. Put differently, we treat *A* as having had the power to say "no" to the criminal opportunity. Thus, the act requirement still provides a zone of freedom by requiring an act which the defendant chooses to perform.

Let me repeat that I realize that the fundamental assumptions of criminal liability—like the defendant's ability to choose differently—are contestable. My point is not that they are right, but to ask if they permit an entrapment defense. Given current conceptions of individual responsibility, then, the problem with Carlson's argument is that *A has exactly the same power to say "no" to a given criminal opportunity when it is offered by an undercover agent.* The act requirement is fully functional (as much as it ever is) as long as the government offers only those temptations that already exist in the world and for which we already punish the individuals who succumb. We still do not punish individuals for mere thoughts or propensities. We have redistributed criminal opportunities, but we have not even moved the conduct line, much less abandoned the requirement of conduct.

Carlson's argument might still justify a very limited entrapment defense, one that forbids a government agent from creating temptations to crime *beyond anything that exists in the "real" world.* Allowing the government to exceed the best market offer does not literally undermine the voluntary act requirement, because voluntariness is defined so narrowly. But one might claim that this standard definition of voluntariness "works" if the only temptations that individuals have to resist are equivalent to actual

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you commit a crime, it is because circumstances have arisen in which it is your disposition is to offend. However the circumstances arise, we punish you for *acting* in accordance with your dispositions, not merely for having them.

[158] Carlson, *supra* note 69, at 1096.

ones, not anything that a government agent can dream up. Allowing the government to encourage crime more strongly than any private actor does really might render the act requirement insufficiently protective of individual freedom. Thus, a concern for the proper allocation of power may, just like economic theory, justify *the minimalist entrapment defense*, one that limits the government to offering the kind of temptation that otherwise exist in the world.

Thus, I conclude that existing rationales fail to justify any but the most minimal of defenses. Perhaps, as Michael Seidman suggested almost a quarter century ago, the entrapment defense is nothing more than an example of class privilege.

III. RECONSTRUCTING A THEORY OF ENTRAPMENT: POLITICAL AND ECONOMIC RATIONALES FOR REGULATING UNDERCOVER OPERATIONS

In this Part, I seek to reconstruct the political/institutional and economic rationales for regulating undercover operations. I do not view the entrapment defense as a means of evaluating the individual defendant. Instead, I claim that any defense makes sense only as a broad regulation that seeks in the aggregate to minimize the political risk from granting government the power to encourage crime and to maximize the crime prevention benefits of this investment in law enforcement. Part A considers a new institutional/political rationale and Part B revisits the economic rationale. Finally, Part C discusses some implications of the two rationales.

A. RE-EXAMINING THE INSTITUTIONAL LOGIC OF THE DEFENSE: A NEW UNDERSTANDING OF THE POLITICAL DANGERS OF UNDERCOVER OPERATIONS

In this Part, I claim that a concern for the allocation of power justifies a strong entrapment defense that does more than forbid government from offering temptations greater than ever otherwise exist. What I seek to provide is an exact explanation of the political danger of the undercover tactic, the ways that the power to tempt others may be misappropriated by governmental actors. The political threat has always been appreciated but never, I contend, adequately explained.

I begin by describing in greater detail the existence of probabilistic offenders, who arise because of the scarcity of criminal opportunities and fluctuating preferences. I then explain the danger in giving government the power to control the number and timing of otherwise scarce opportunities. It is this: given scarcity, government can manipulate opportunities to make it *highly likely* that an individual will commit undercover offenses despite the fact that she is otherwise *highly unlikely* to offend.

1. *Scarce Opportunities and Fluctuating Preferences: The Fortuity of Legal Compliance*

If an individual's preferences and opportunities were fixed, then she would routinely make the same decision about crime—to offend or not. She would, in other words, be either a true or false offender. Probabilistic offenders exist because preferences and opportunities fluctuate. An individual who does not currently offend may do so when her lawful opportunities contract and/or her criminal opportunities expand, the latter occurring when she encounters a scarce but attractive criminal opportunity. In addition, individual preferences may change over time. Thus, there is great fortuity to an individual's legal compliance.

To explain, I offer a slightly more complex model for the decision to offend. An individual commits a crime when the expected benefits (b) exceed the expected costs, which (assuming risk neutrality) are equal to the product of the probability of detection (p) times the formal and informal sanctions if detected (s), plus the other expected costs of crime (c), that is, when $b > ps + c$.[159] Let us focus on the common context for undercover operations, which is black market crimes. When the crime is one of selling (*e.g.*, drugs, arson services, official favors), the individual's benefit from crime is the exchange price. Thus, she must receive a price at least as large as her perceived costs of crime, which constitute her reservation price for committing the offense. An individual offends when the illegal market's equilibrium price rises above her reservation price.[160]

Now consider the source of probabilistic offenders. The primary cause is a change in an individual's opportunities. Of greatest importance, criminal opportunities can be scarce in at least five ways. *First*, the opportunity itself may be rare. For example, given the risks of punishment for bribing public officials, there might be few bribe offers made in a given time period, even to those willing to accept such offers. If so, those willing to accept bribes are probabilistic offenders; the probability of their offending is equal to the probability of their receiving one of the scarce offers. *Second*, even if the criminal offer is not scarce, there might be very few such offers made under circumstances where the risk of detection is, or

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[159] A more complex model would account for many additional factors. For example, one might want to account for risk aversion, behavioral biases, and the discounting of future costs and benefits.

[160] Conversely, for crimes of buying, the exchange price (EP) is part of the other costs of crime. The reservation price is an amount no more than the difference in the benefit and all *other* costs of crime, so an individual offends only when $EP < b - ps - c$ (where c here excludes EP). The individual's reservation price is the maximum exchange price she will tolerate and still commit the offense. An individual commits a crime of buying when the illegal market's equilibrium price falls below the individual's reservation price.

appears to be, low. For example, suppose workers are usually deterred from hacking into their employer's bank accounts and transferring funds to themselves but are willing to commit the crime in the highly unusual case where they stumble upon the access codes. These are probabilistic offenders. *Third*, the price may be scarce. Black markets for illegal goods and services have high search costs, so that we expect a distribution of prices around the mean, rather than a single price at which all trades occur. Those willing to accept *only* an above-mean price are probabilistic.

Fourth, there may be scarce benefits from crime, such as the opportunity to preserve or enhance a personal, romantic, or sexual relationship. A person might turn down criminal offers of any monetary price that ever occur in the market, but accept them in the highly unusual case where one is asked to offend by a person whose relationship one greatly values. An example might be Lively,[161] who plausibly would not have sold cocaine for any reason other than the preservation of a romantic relationship.[162] Similarly, even though Sorrells had just met the undercover agent to whom he sold alcohol, he too might not have done so except for the fact that he was doing a favor for someone he thought was a former comrade-in-arms.[163]

Fifth, there may be scarce opportunities to commit crime in circumstances where informal sanctions—guilt or shame—are minimized. A person might turn down criminal offers of any price that occurs in the market, but accept them in the unusual case where there is a plausible and scarce moral rationalization for it. In *Sherman v. United States*,[164] for example, the defendant might have refused to acquire and supply heroin in any circumstance except when asked by a person who seems to be suffering painful withdrawal symptoms. In two of the ABSCAM cases, it is possible that two politicians accepted bribes only because the undercover operative promised that their refusal would block construction plans that would

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[161] *See* State v. Lively, 921 P.2d 1035, 1038 (Wash. 1996), discussed in the introduction.

[162] The exploitation of such relationships is not as rare as one might expect. *See, e.g.*, United States v. Poehlman, 217 F.3d 692 (9th Cir. 2000) (discussing entrapment claim to sex crime involving children where defendant's initial interest was a relationship with the adult woman portrayed on-line by the undercover agent who proposed the crime); United States v. Moseley, 496 F.2d 1012 (5th Cir. 1974) (discussing entrapment claim where defendant claimed to have sexual relationship with undercover informant who induced him to sell heroin to an undercover agent); Labensky v. County of Nassau, 6 F. Supp. 2d 161 (E.D.N.Y. 1998) (discussing entrapment claim where male undercover informant developed close friendship with female defendant over a period of several months). *See generally* Kuo, *supra* note 118.

[163] *See* Sorrells v. United States, 287 U.S. 435, 452 (1932).

[164] 356 U.S. 369 (1958).

benefit the politicians' constituents.[165] If so, these were probabilistic offenders.

In addition to scarce criminal opportunities, a person's willingness to offend will change with fluctuations in her lawful opportunities. For example, the value a person places on the proceeds from selling contraband will vary with changes in the individual's lawful opportunities for generating income. An individual unwilling to take a criminal offer at time one may be willing to take the same offer at time two because in the interim the individual loses her job.

Finally, holding opportunities constant, an individual might be a probabilistic offender because her preferences change. From a psychological standpoint, short-term changes in mood and emotion can affect moral reasoning,[166] which can influence the decision to commit a crime. From an economic standpoint, an individual's decision to offend depends on her willingness to take risks (exchanging a high probability of a criminal gain for a low probability of sanctions) and the degree to which she values the future (when sanctions may be imposed) compared to the present (when she reaps the benefits of crime). Emotion and mood may affect both risk-taking and future-orientation.[167] As another example, many crimes require trust between multiple parties and one's willingness to trust others may depend on mood or emotion.[168] In all cases, one's probability of offending is equal to the probability that one obtains a criminal opportunity, scarce in any dimension, during a time in which her mood favors accepting the opportunity.

With this understanding of probabilistic offenders, we can now better understand the extent of the power government officials wield when they control undercover operations.

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[165] *See* MARX, *supra* note 29, at 131-32; *see also* United States v. Sullivan, 919 F.2d 1403, 1419 & n.21 (10th Cir. 1990) (discussing need for entrapment instruction when undercover agent told defendant she was suicidal and needed money desperately).

[166] *See, e.g.*, Jeremy A. Blumenthal, *Does Mood Influence Moral Judgment? An Empirical Test with Legal and Policy Implications*, 29 LAW & PSYCHOL. REV. 1 (2005); Fataneh Zarinpoush et al., *The Effects of Happiness and Sadness on Moral Reasoning*, 29 J. MORAL EDUC. 397 (2000).

[167] Robert Cooter offers a formal model in which mood changes cause an individual's preferences for risk and futurity to fluctuate over time, so that an individual who usually resists criminal temptations will on occasion lapse into crime. *See* Robert D. Cooter, *Lapses, Conflict, and Akrasia in Torts and Crimes: Towards an Economic Theory of the Will*, 11 INT'L REV. L. & ECON. 149 (1991).

[168] *Cf.* Michael Kosfeld et al., *Oxytocin Increases Trust in Humans*, 435 NATURE 673 (2005).

2. *The Power of Undercover Operations: Manipulating the Fortuity of Legal Compliance*

I previously discounted other commentators' concerns about the political dangers of undercover operations by observing that an individual can refuse an offer to commit a crime. If this ability to refuse a criminal offer is sufficient to justify punishment when the offer comes from a sincere private party, why is it insufficient when the offer comes from an undercover police agent? Now we are in a position to see the answer.

Undercover operations give the police the power to control the fortuity of legal compliance: the power to make scarce criminal opportunities plentiful, the power to control the timing of criminal opportunities, and the power to repeatedly offer opportunities so as to maximize the probability of finding the target at the time when she is most willing to offend. An example of all three manipulations is *Lively*: the opportunity was scarce because it appeared that selling cocaine was important to maintaining a romantic relationship; the timing was during Lively's divorce and soon after her suicide attempt; some evidence suggested that the informant Desai made repeated efforts to persuade Lively to do it.[169] All three circumstances occur in the real world. Yet without limiting the police power to manipulate the fortuities of offending, undercover operations represent a politically dangerous amount of power. Government officials could easily use this power to target their political enemies and convenient scapegoats.

To be specific, a key danger is the power of repetition. The probability that the police induce an individual to offend depends not only on the scarcity of the opportunity they create, but *on the number of times they supply it.* Offering more opportunities creates a greater probability of catching the person at a time when her reservation price (as a seller) is low enough to accept the undercover offer. If police may repeatedly offer to the same probabilistic offender a high inducement that occurs only infrequently, they can make it *highly likely* that individuals will commit undercover offenses despite the fact that they are otherwise *highly unlikely* to offend. The police can create circumstances in which a nearly harmless individual will almost certainly offend in an undercover operation, even if they limit their offers to the highest levels that exist in the actual markets.

To illustrate, suppose that (1) the probability that A will receive a very high bribe in a year is 0.1%; (2) the conditional probability A will accept the very high bribe when offered is 20% (because of variation in lawful opportunities or mood); and (3) the probability A will accept anything lower

[169] State v. Lively, 921 P.2d 1035, 1036 (Wash. 1996).

than the very high bribe is 0%. As a result, the probability that *A* will accept a bribe during a year is .02% and A's expected number of offenses during fifty years (before and after which the probability is, say, zero) is only .01. *Nonetheless, the police can cause A to take one bribe, on average,* by offering her the very high bribe on five separate occasions.[170] Perhaps the more relevant fact is that the probability of *A*'s offending at least once during any of the five undercover operations is now 67%.[171] By offering the best market opportunity repeatedly, the police can make it substantially likely that an individual we would ordinarily call law-abiding will offend, increasing the probability from a probability of .02% to a probability of 67%! Bear in mind that these numbers assume the government has no information from which it could predict *when A* would be most likely to offend. But if *A*'s reservation price fluctuates with observable factors, (*e.g.*, financial distress,[172] addiction, or intoxication[173]) then the government would not need as many tries to generate the same high probability that *A* will offend.[174]

A primary purpose of institutional restraints on government is to prevent this kind of raw power. Outside of undercover operations, where government does not control the criminal opportunity, its power is limited to punishing the few individuals who happen to receive scarce offers, repeated or not, and then succumb.[175] Giving the government the power to

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[170] Each high price offer produces .2 expected offenses so that five offers produce one expected offense.

[171] Each time she is offered the high inducement, her chance of rejecting it is .8. Her chance of rejecting it five consecutive times is (.8 x .8 x .8 x.8 x .8) = .33. Thus, her chance of not rejecting it all five times is .67.

[172] For example, the F.B.I. targeted John DeLorean for a drug sting when he was on the verge of a bankruptcy in which he would lose his car company. *See* MARX, *supra* note 29, at 10; *see also* United States v. Kessee, 992 F.2d 1001, 1003 (9th Cir. 1993) (discussing entrapment where defendant claimed he had lost his job and needed money for food and rent during undercover operation).

[173] *See, e.g.*, United States v. Harris, 997 F.2d 812 (10th Cir. 1993) (upholding conviction for arranging a cocaine sale where undercover agents paid the defendant, an addict, with cocaine instead of cash).

[174] This analysis is conservative in that it assumes that people are generally free of the problems of impulsiveness, except in special circumstances like intoxication. Yet the literature on bounded rationality includes a large component on the problem of impulsiveness or "time inconsistent preferences," which may make individuals generally susceptible to being seduced to act against their long term interest. *See, e.g.*, GEORGE AINSLIE, BREAKDOWN OF WILL (2001); TIME AND DECISION: ECONOMIC AND PSYCHOLOGICAL PERSPECTIVES ON INTERTEMPORAL CHOICE (George Loewenstein, Daniel Read & Roy F. Baumeister eds., 2003).

[175] This distinction answers Dillof, *supra* note 76, at 867, who says, "There is no reason to distinguish the constitutionality of selective prosecution on the one hand and selective investigation/entrapment on the other." To the contrary, as shown above, the dangers of

control the criminal opportunity will, for some crimes, allow it to select a potentially large part of the population that it can then induce into crime. The formal ability to refuse criminal opportunities is no longer sufficient to prevent arbitrary government action. In effect, if undercover operations are unregulated, government officials have the ability to impose serious criminal sanctions on almost anyone they want.[176]

Seidman objects to this kind of argument by claiming that government officials already possess the power to arbitrarily select and punish individuals at will.[177] This is a serious point. Most obviously, when it comes to many minor crimes, especially traffic offenses, enforcement is a matter of selecting a few individuals to punish for what virtually everyone does. Over the decades since Seidman wrote, the tendency of legislatures to

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arbitrary and discriminatory law enforcement are distinctly greater when the government need not wait for the defendant to offend. Of course, one could try to address the problem through a reformulated selective prosecution doctrine for this context, but I reject that solution at *infra* text accompanying note 189.

[176] Diloff, *supra* note 76, at 864, objects to this "civil rights" rationale for entrapment, stating: "There is no record of entrapment's having been employed as a weapon against those the government disfavors." He acknowledges that the current entrapment defense might account for this record, but counters that the police are probably not deterred by the defense because it only requires restoration of the "status quo ante" rather than punishment. *Id.* at 865. To the contrary, however, the law enforcement official who targets a political enemy runs a risk that the public will see the targeting for what it is and punish the relevant incumbents electorally. Without the entrapment defense, the risk that such targeting will "backfire" is very low because the public cannot discern law enforcement motive and every politically adverse defendant will claim to be a political victim. With the defense, however, there is a much greater risk the jury will acquit in cases of political targeting, which would give the defendant greater credibility in attacking the political motivations of incumbent officials. So the defense serves as a significant barrier to political abuse.

Moreover, Diloff's observation that there is no known case of political abuse may only illustrate the difficulty of discovering the police motive for targeting an individual. Given a similar difficulty with proving discriminatory intent, the federal courts have apparently discovered only one case of racially selective prosecution in the past hundred years. *See* Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605, 615-16 (1998) (stating that since *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the only federal case dismissing a criminal charge on such grounds is *People v. Ochoa*, 212 Cal. Rptr. 4 (Cal. Ct. App. 1985)). In any event, there are some suspicious undercover operations, such as the F.B.I.'s 1983 effort to ensnare the politically controversial Al Sharpton in a drug sale. *See, e.g.*, Marc Santora, *Sharpton Says F.B.I. Tape of Drug Offer Distorts Truth*, N.Y. TIMES, Jul. 24, 2002, at A19. Sharpton refused, but the surveillance videotape surfaced in 2002 during Sharpton's run for the Democratic Presidential nomination. *Id.* The scandal over the operation in Tulia, Texas, *see supra* note 28, raises the possibility of racial targeting, as does a recent operation in Georgia that netted many Indian immigrants. *See* Kate Zernike, *Cultural and Language Differences Are Complicating Drug Sting in Georgia*, N.Y. TIMES, Aug. 4, 2005, at A16.

[177] *See* Seidman, *supra* note 15, at 146.

enact over-broad offenses has given prosecutors increasing discretion for more serious crimes as well.[178]

Nonetheless, we have not quite reached the point where prosecutors and police possess so much discretion that it is no longer worth worrying about giving them more. For serious offenses, there is less enforcement discretion both because it is more difficult to prove that a random American has committed a serious crime and more difficult for law enforcement to resist the political pressure to prosecute everyone known to have committed a serious offense. Thus, if government officials with limited resources decide to "target" an unpopular individual, they can easily convict him of traffic offenses and other minor crimes, but not of crimes equivalent to accepting a bribe or selling cocaine. By contrast, the power to manipulate criminal opportunities in undercover operations may induce the commission of the very kind of serious offenses that carry a real threat of significant incarceration.

In any event, limiting discretion remains a basic institutional commitment, motivating various other doctrines.[179] If police already possess so much discretion that it would not matter if we gave them more, then we must rethink much more than the entrapment defense.

B. RE-EXAMINING THE ECONOMIC LOGIC OF THE DEFENSE: THE "PROXY" CRIME IDEA AND A MORE COMPLEX BALANCING

In Part II, I objected to the economic theory of entrapment for two reasons. I first accepted the premises of the argument—that the purpose of the defense is to exculpate false offenders—and observed that it is extremely difficult to determine whether the undercover offender is false unless the government incurs investigative costs the undercover operation is supposed to avoid. Second, I challenged the argument's premise by identifying a large category of probabilistic offenders whose punishment creates some positive benefit.

This section answers each objection, though in reverse order. First, I defend the premise of the economic rationale: that we need to regulate undercover operations to avoid an acute waste of law enforcement resources. The benefit of apprehending and punishing probabilistic offenders varies widely, but police have insufficient incentives to account for these differences. Second, I recast the purpose of undercover operations. I conclude that we should not try to determine whether the

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[178] *See* Stuntz, *supra* note 111.

[179] *E.g.*, the principle of legality, act requirement, and vagueness doctrine, all serve this purpose. *See* PACKER, *supra* note 154; Jeffries, *supra* note 135.

defendant is an "otherwise law-abiding citizen who, if left to his own devices, likely would never have run afoul of the law."[180] We will rarely know in any precise way or beyond a reasonable doubt whether the defendant is such a person, and it is not worth the cost of trying to find out in each case. We should instead ask whether a particular tactic will, in the aggregate, yield many nearly harmless, low-risk offenders, in which case the entrapment defense should bar convictions from such tactics.

1. Reconstructing the Economic Rationale: A Collective Cost/Benefit Analysis

The existence of probabilistic offenders does not eliminate the likelihood that police will waste resources on unproductive operations. Even though there is *some* benefit to punishing probabilistic offenders, society has a greater need to apprehend and punish true offenders than probabilistic offenders, and within the latter category, a stronger need to punish those whose probability of offense is close to one ("high risk probabilistic offenders") than to punish those whose probability of offense is close to zero ("low risk probabilistic offenders"). Like the punishment of false offenders, punishing probabilistic offenders who are extremely unlikely to offend—whose reservation price for crime is *almost* always higher than any offer they receive—is extraordinarily wasteful. The analysis becomes messier, but there are two reasons to believe that the costs will very frequently outweigh the benefits.

First, when we talk of probabilistic offenders, we include individuals whose probability of offense is so low that the mere costs of their apprehension and punishment exceed any benefit. Suppose the probability that *A* will commit crime *X* this year is one in a hundred thousand (because the odds of *A* receiving an extremely scarce offer at the time she would accept it are so low). There are *some* individual prevention benefits from her punishment if it would drive the probability of her offending down from .00001 to 0. Punishment may also uniquely raise the level of general deterrence for those in her situation. Although such people commit very few crimes (100,000 such individuals commit, on average, one crime per year), their deterrence is not *entirely* valueless. But we can easily imagine that the deterrence and incapacitation benefits just described are far smaller than the cost of running the undercover operation that apprehends her and the costs of her incarceration, to herself as well as the state.[181]

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[180] Jacobson v. United States, 503 U.S. 540, 553-54 (1992).

[181] Economists tend to count the costs of punishment to the criminal in their analyses, though there are some dissenters from this practice. In the entrapment case, it certainly seems appropriate to demand that the total benefits to punishment exceed the total costs.

Second, law enforcement resources being scarce, resources used to apprehend low-risk probabilistic offenders are wastefully diverted from apprehending true and high-risk probabilistic offenders. Punishing the former buys far less deterrence or incapacitation than punishing the latter. For both reasons, and because police incentives are skewed, it makes sense to bar conviction of those who take an undercover inducement they would be extraordinarily unlikely to receive in the real world, even if there is some small, positive probability that they would.

To illustrate, assume police choose between an undercover operation that offers extremely attractive inducements that rarely occur and yields twenty arrests per day and an operation that offers ordinary inducements that frequently occur and yields one arrest per day. The police will choose the former operation, which apprehends many low-risk probabilistic offenders, while the latter would yield one true or high-risk offender.

When given the twenty offenders, the prosecutor can choose not to prosecute, which means the police resources were wasted. Or she could choose to prosecute all twenty, which means she diverts resources from other prosecutions, and for nineteen of the cases, the diversion is almost certainly wasteful. The same is true of punishment resources if incarceration is involved. Sending all twenty offenders to prison may require either that we do not incarcerate more dangerous offenders for that time, or that we incarcerate each of the twenty for 1/20th of the time we could incarcerate the one high value offender if she were the only offender. Either choice diverts punishment resources away from their best use.[182]

In sum, the mere fact that there are benefits to punishing a probabilistic offender does not mean that those benefits exceed the costs. Instead, we have reason to worry that police will prefer tactics that yield high numbers of low value arrests to tactics that yield low numbers of high value arrests. An entrapment defense or other regulation may offset the agency problems that cause police to waste scarce resources "stinging" false or low risk probabilistic offenders.

2. *"Proxy" Offenses and Undercover Operations*

To address my other criticism—about the difficulty of proving the defendant is a true (or a high-risk probabilistic) offender beyond a reasonable doubt—we must further revise the economic theory. Here I introduce the idea of a "proxy" crime to argue that we should focus on the

[182] An ideally motivated prosecutor might want to select among the twenty cases, prosecuting only the one true offender. But she may be unable to tell which one of the twenty is worth prosecuting. Even when she can, the police resources rounding up nineteen are wasted.

general strength of the correlation between internal and external acts, not the harm caused or danger posed by a particular defendant.

a. The Theory of "Proxy" Crime

Economic theory views criminal law as serving to prevent behavior that causes net social harm. The theory applies most readily when the prohibited behavior is defined as including the social harm to be prevented. The crime of homicide, for example, requires the element "death of another." Most crimes, however, define behaviors that only risk harm. Common law larceny need not cause harm because the taken property may be returned without being missed or damaged, but given the mental state required (intent to permanently deprive another of her property), it usually does.

By contrast, some crimes prohibit behavior that neither causes nor inherently risks harm. For example, in some states, the crime of electronic eavesdropping bars the recording of oral communications without the consent of all parties to them,[183] as where one party to a conversation records it without the consent of other participants. But one does not inevitably risk harm by recording a conversation without consent. The recording itself does not violate the privacy of another when the recorder participated in the conversation and knows what was said. And because the statute does not require an intent to use the recording in any particular way, one cannot say the recording inherently risks harm. Even if the recorder discloses the recording, if the content is banal, it still risks no harm. Finally, when the non-consensual recording contains damaging information, the state could reach the risky behavior by banning only the disclosure, the intent to disclose, or the threat to disclose the recording. The crime reaches this behavior, but it is also criminalizes the recording itself with no such intent—a combination of act and mental state that does not itself risk harm.

Many crimes have this feature.[184] I call them "proxy" crimes because the behavior prohibited, while not inherently risking harm, stands in for

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[183] *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/14-2 (West 2005).

[184] Consider two federal examples. First, the law compels certain individuals to report transactions involving more than $10,000 in cash and authorizes prison for knowing violations. *See* 18 U.S.C. § 1960 (2000). Though the report may prompt government to discover an underlying crime (e.g., drug dealing or tax fraud) the failure to report does not inevitably risk harm to law enforcement. Sometimes individuals use cash for innocent reasons and sometimes the government is already tracking an individual's money. Second, the law prohibits felons from possessing firearms. *See id.* § 922(g). Putting aside the unlikely possibility that Congress believed ex-felons were more likely to have firearm accidents, the apparent aim of this offense is to prevent felons from committing crimes with guns, but it is no defense to possess a gun without the intent to offend.

behavior that does risk harm.[185] Indeed, frequently the origin of a proxy crime is a modification of a pre-existing offense where the defined conduct did inherently risk harm. The legislature decides, however, that it is difficult for a prosecutor to prove all the elements of the standard crime, so they remove certain hard-to-prove elements, including the ones that produced a necessary risk of harm.[186] The result is a prophylactic crime, that bars conduct that neither causes nor risks harm but is correlated with other conduct that is harmful or risky.

We can understand better the utilitarian logic of the proxy offense in the context of another example. Many states prohibit driving a motor vehicle while there is an open or unsealed container of alcohol in the passenger area.[187] The driver is guilty even if she is completely sober, has not consumed any of the "possessed" alcohol, and lacks the intent to consume any alcohol. The driver is guilty even though a passenger holds the can of beer and intends to consume it entirely. Given that mere access to alcohol does not inherently risk harm, why punish it?

Retributivists would probably not punish this behavior, but utilitarian balancing may justify doing so. The prohibition will decrease the presence of open alcohol containers in cars. *Some* of the alcohol in those containers would have been consumed by the drivers. *Some* of those drivers would have become intoxicated. Thus, the statute decreases drunk driving and ultimately the harm of accidents. The precise benefit of the open container ban is the ability to generate this risk reduction more cheaply (or to generate incrementally more reduction for the same cost) than occurs when the legislature relies only on more vigorous enforcement of the drunk driving ban. *The key is that an open container does not itself prove the drunk driving offense beyond a reasonable doubt.* If it did, there would be no advantage to the new law because, whenever the police found an open container, the state could convict for drunk driving (which would also deter

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[185] Jeremy Bentham used the term "presumed offenses." *See Principles of the Penal Code*, book 4, chap. 15, *in* THE THEORY OF LEGISLATION 425-27 (Richard Hildreth from Etienne Dumont trans., C.K. Ogden, ed., (1931)). For an excellent discussion and more examples, see FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 224-32 (2003).

[186] *See* Stuntz, *supra* note 111, at 519-23, 529-33.

[187] U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 104-05 (2002) lists forty-two states with open container laws. *See, e.g.*, IOWA CODE ANN. § 321.284 (West 2005) ("A driver of a motor vehicle upon a public street or highway shall not possess in the passenger area of the motor vehicle an open or unsealed bottle, can, jar, or other receptacle containing an alcoholic beverage."); ME. REV. STAT. ANN. tit. 29-A, § 2112-A(2) (2005) ("The operator of a vehicle on a public way is in violation of this section if the operator or a passenger in the passenger area of the vehicle: A. Consumes alcohol; or B. Possesses an open alcoholic beverage container.").

open container possession). The advantage of the proxy approach is precisely that, while there is a correlation between the harmful act (drunk driving) and the proxy (driving with open container), it is *not* so strong as to be beyond a reasonable doubt. The cost of the law is the forgone value that individuals place on carrying open containers.[188] Quite possibly, the benefits exceed the costs.

The proxy approach shows that there is no connection between burdens of proof and the probability of the harm the law is meant to prevent. The criminal elements the legislature defines must be proved beyond a reasonable doubt, but the legislature's judgment that the criminal conduct is correlated with harm or risk need not be proved by any such standard. The prosecutor need *not* prove beyond a reasonable doubt or by any other standard that by virtue of the open container the driver risked a traffic accident, would have become intoxicated while driving, or would have consumed any alcohol. The open container is only dangerous when combined with other driver intent or conduct—to consume alcohol and keep driving—but the legislature defines the crime to omit those additional elements.

One might ask: for a proxy crime, why is there not a defense of being one of the individuals to whom the correlation does not apply? Why not allow a *harmlessness* defense to the open container law, whereby a defendant driver claims that he was not in danger of becoming legally intoxicated? The answer is that this requires the government to undertake the expense of proving the very fact the proxy offense is supposed to obviate. One might think the solution is to put the burden of proof on the defendant (assuming that is constitutionally permissible). But even there, the state will have to incur the expense of investigating and refuting the defendant's evidence. The defendant may easily raise the defense by testifying that she was not consuming alcohol from the open container, or was consuming it but was in no danger of becoming intoxicated, or was perhaps nearly intoxicated but was just about to arrive at her destination. The whole point of a proxy crime is to avoid having to rebut these sorts of claims.

Again, I am not trying to prove this sort of prohibition is ultimately justified, but only to note that this proxy structure is common to criminal statutes and to point out a possible utilitarian justification. To deter certain harmful conduct, the legislature defines as criminal some broad set of conduct that is easily proved but not inherently risky because the benefits of

[188] That cost is obviously small. It consists of the cost of deferring consumption, as by abandoning poured drinks when one decides to ride in a car or abandoning a car ride when one decides to pour a drink.

deterring the subset of behavior that *is* risky outweighs the costs of deterring the subset that is not.

b. Using the Proxy Concept to Explain Entrapment

The proxy analysis helps to explain both the logic of undercover operations and of an entrapment defense. First, the reason for the tactic: we punish individuals for undercover offenses because doing so contributes in a general way to crime prevention—deterring external offenses and incapacitating external offenders—*not* because we believe a particular undercover offender has externally offended beyond a reasonable doubt. Recall that there would be no need for a proxy crime if the act defining the crime (*e.g.*, access to an open container) proved a more serious crime (*e.g.*, drunk driving) beyond a reasonable doubt. Similarly, there is no need for the undercover act, by itself or with other evidence, to prove an external offense beyond a reasonable doubt. If it did, there would be no need to punish an internal offense because we could punish for the external one. Instead, there is a net benefit from many undercover operations merely because *some* apprehended individuals are true or high-risk offenders and the operation facilitates their deterrence and incapacitation.

Second, we nonetheless require some regulation of undercover operations, such as the entrapment defense. Just as the value of a proxy offense depends on the strength of the overall correlation between the proxy act and an act that inherently causes or risks harm, the value of a particular undercover operation depends on the strength of the overall correlation between the internal and external offense. Because of a principal-agent problem, police will frequently prefer undercover tactics with a weak correlation that yield many arrests (because the manufactured temptation is great) to tactics with a strong correlation that yield few arrests (because the manufactured temptation is realistic). Thus, the entrapment defense is a means of re-motivating police towards more productive undercover tactics, avoiding the waste of less productive tactics.

To understand both points, consider a thought experiment. Suppose that the legislature initially proclaims that its criminal prohibitions do *not* apply to acts committed in undercover operations and forbids the police from engaging in such operations.[189] Thus, if unauthorized undercover operations occur, the defendant's internal acts are not crimes. Against this no-undercover baseline, suppose the legislature later decides to make

[189] As soon as the police first attempt an undercover operation, suppose the legislature enacts a statute that says something like the following: "Unless otherwise stated, all provisions defining crimes require the acts to be committed without the encouragement or participation of agents acting for the government in an undercover operation."

exceptions, authorizing specific undercover operations for specific crimes where conventional law enforcement is failing. Because current criminal statutes do not apply to acts in undercover operations, the legislature enacts parallel provisions prohibiting individuals from committing certain acts in the authorized undercover operations (and authorizing punishment which may or may not be the same as for the external offense). For example, the legislature enacts a law authorizing police, *under specified parameters*, to offer bribes to public officials and making it a crime to accept a bribe in those authorized operations.

In this setting, consider our two normative questions. First, what justifies the legislative decision to expand criminal liability to include acts committed in authorized undercover operations? The answer is *not* that the undercover offender externally offends beyond a reasonable doubt. Instead, the legislature concludes that, in the parameters it specifies, there is a net benefit from running undercover operations and punishing internal offenders. The size of the crime prevention benefit depends on how many of the undercover offenders are true, high-risk, low-risk, or false. Ideally, the legislature enacts the new provisions because these benefits exceed the costs.

The second question is whether we should recognize any exceptions to the new criminal liability for offenses in authorized undercover operations. Should we, for example, create a defense that exculpates a defendant who would not have accepted a bribe outside of an undercover operation? As matters are stated in the thought experiment, the answer is no. If the legislature has authorized only specific undercover operations, has correctly defined the operational parameters so as to account for the problem of false and low-risk offenders, and the police have stayed within these parameters, then it will not make sense to litigate in each case whether the defendant would otherwise offend. If the legislature decides to punish, say, "the act of accepting a bribe of ordinary size offered no more than twice by a stranger in exchange for influencing a significant official decision," and the prosecution proves beyond a reasonable doubt that the defendant accepted a bribe under these circumstances, that is the end of the matter.

Posner, Shavell, and Hay are correct to say that we do not generate any useful deterrence or incapacitation when we punish a false offender.[190] But that is just like saying that we do not generate crime prevention benefits when the individual with an open alcohol container in her car would not have become legally intoxicated while driving. The proxy strategy directs us away from such case-by-case judgments. As long as the legislature

[190] *See* Hay, *supra* note 96; Posner, *supra* note 96; Shavell, *supra* note 75.

made the appropriate utilitarian calculation in allowing the undercover operations the police actually used, then there is no need for individual reconsideration.[191] There need be no "harmlessness" defense. This is definitely the sharp edge of utilitarian thinking about criminal law—sacrificing the few for the good of the many[192]—but, again, my point is that the objections to it are not unique to undercover operations.

We can now understand better, however, our present need for an entrapment defense or other regulation. Contrary to the thought experiment, legislatures have neither defined specific circumstances in which police may use the undercover tactic nor defined crimes specific to the circumstances of undercover offending. Legislatures have failed to set specific limits on undercover tactics, much less to specify what tactics are permitted for what offenses. As a result, the only way we have to test the utilitarian benefits of an undercover operation is through a general, ex post regulation—the entrapment defense. At a minimum, we need the entrapment defense to ensure, not that each defendant is a true or high-risk offender, but that the internal acts are, in general, sufficiently correlated with external acts that the benefits of punishing internal acts exceed the costs.

In sum, once we reformulate the economic rationale, we have, along with the political rationale, a second justification for the entrapment defense. The economic function is to correct a principal-agent problem that would otherwise waste resources on unproductive operations likely to apprehend and punish false and low-risk probabilistic offenders.

C. THE EXPLANATORY STRENGTH OF THE TWO RATIONALES

As a final test of these theories, we should examine how they stand up to the critique of existing literature I provided in Part II. The reconstructed rationales for the entrapment defense, political and economic, answer my

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[191] To make the analogy to proxy offenses complete, legislatures that punish a driver's access to open containers of alcohol in the passenger area also specify exemptions to which the legislature believes the proxy analysis is no longer persuasive. For example, Maine allows open containers of alcohol in the passenger area if it is possessed and consumed by a passenger "in the living quarters of a motor home" or a limousine. *See, e.g.*, ME. REV. STAT. ANN. tit. 29A § 2112-A(3) (2005). Outside of such specified exceptions, the legislature intends the prohibition to apply without regard to the actual risk of harm the defendant posed.

[192] Interestingly, however, this utilitarian balancing does not necessarily offend retributivism. For reasons stated above, those who offend in undercover operations are blameworthy. For retributivists who view blame as necessary to but not requiring punishment, we may choose not to punish for consequential reasons, and the entrapment defense merely screens out those defendants whose punishment is least likely to produce a desirable result.

earlier critique and explain much about the broad parameters of the defense. Initially, the economic and political theories avoid the main objection to a retributive or institutional fairness theory. Recall that the latter are unable to explain why we have a defense for yielding to criminal temptations created by police undercover agents but not those created by sincere private criminals. The economic and political rationales justify the distinction. It is only in the undercover operation that police and other government officials can abuse political power and waste public resources. Moreover, the law already supplies a strong disincentive to private citizens who sincerely propose criminal transactions—punishment for solicitation and conspiracy, as well as complicity in the encouraged offense. But, as explained above, the law otherwise gives insufficient incentive to government agents to limit undercover encouragement of crime; the entrapment defense improves matters by removing the law enforcement gain from overzealous or wasteful sting operations.[193]

The economic and political rationales also explain some overlooked but fundamental parameters of the entrapment defense. Note that, in addition to the two categories of criminal offers just discussed—those proposed by (1) sincere private citizens and (2) insincere government agents—there are two other possibilities: (3) a government official acting on his own behalf makes a sincere criminal offer and (4) an insincere private citizen makes a criminal offer to an individual she seeks to entrap and expose to criminal liability. For a fairness theory that turns on the public/private distinction—identifying unfairness whenever *public* officials greatly alter one's criminal temptations—the implication is the need to extend the entrapment defense to *any* governmental offer, even sincere ones. For a fairness theory that turns on the insincerity of the criminal tempter—identifying unfairness whenever the unusually attractive criminal offer is *intended* to bring criminal sanctions against the target—the implication is the need to extend the defense to *any* insincere offer, even private ones. Yet, as a matter of positive law, there is no defense in either case. Private citizens who conspire with government officials actually engaged in crime have no special "blame the government" defense. And there is no "private entrapment defense" for a defendant encouraged into crime by a private citizen intending to expose her to criminal liability.[194]

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[193] In addition, unlike the fairness theories I critiqued, the political and economic rationales do not imply that the status quo distribution of criminal temptations is fair. *See supra* Part II.C.1.

[194] *See* sources cited *supra* note 77.

The political and economic theories justify these results.[195] The economic rationale is not implicated except when government officials expend public resources on sting operations. These resources are not employed if government officials are committing actual crimes nor if private parties run their own sting operations. The political rationale is implicated only when government actors who wield other great power also wield the power to tempt their enemies without themselves facing criminal sanctions. Government actors proposing actual crimes do face criminal sanctions.[196] Private actors running sting operations do not pose the same political dangers as public officials. In addition, to the extent we want to deter private sting operations, we usually do so by imposing criminal liability on private parties who encourage crimes (via solicitation, conspiracy, and complicity).

Finally, although there is a scholarly elegance to theories that explain a legal doctrine with a single function, there is at least one virtue in explaining entrapment doctrine with two. Together, the political and economic rationales answer one of Seidman's criticisms of entrapment. He observes that different critics inconsistently complain both about the government's random targeting of individuals and its deliberate selection of targets. Rather than being evidence of the doctrine's incoherence, however, these opposing criticisms are evidence of entrapment's dual justifications. Deliberate targeting presents the danger of political abuse, that government officials are inappropriately motivated to destroy the life of the individual targeted. Random targeting presents the risk of wasted resources, given the false positive paradox discussed above.[197] Neither outcome is inevitable:

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[195] Thus, I disagree with Allen, Luttrell & Kreeger, *supra* note 77, at 420-21, who argue for creating a private entrapment defense. They claim that there is no benefit to punishing someone who accepts an "extra-market" inducement. But if a private individual offers an above-average inducement, it is, *by definition*, part of the market. *See id.* at 421 (recognizing but dismissing this point). As explained *supra* in Part II.B.2.b, in black markets, scarce opportunities arise at particularly attractive prices; failing to punish these crimes would undermine deterrence.

[196] An entrapment defense would undermine this deterrent by making it easier for government criminals to find private accomplices who would enjoy the defense. Moreover, the private actors government officials usually conspire with are their friends and we do not worry about officials abusing political power to harm their friends.

[197] *See supra* text accompanying notes 124-25. The problem is that, even if the false positive rate is quite low, the false positive paradox shows that many or most of those apprehended may be false offenders. Of course, this concern is lessened by the proxy analysis discussed *supra* Part III.B.2. That reasoning suggests why we may want to convict the individual of the internal offense even though we do not believe beyond a reasonable doubt that they have committed an external offense. Nonetheless, we require some correlation between the internal and external offense and there remains reason to worry that

deliberate targeting is politically unobjectionable when officials act for good reasons; random targeting is productive when officials use sufficiently modest inducements. Thus, an entrapment defense (or other regulation) should leave room for both random and deliberate targeting. But each form of targeting does raise *one* of the two concerns that motivate the defense, so there is nothing incoherent in worrying about both.

In sum, we need the entrapment defense or some equivalent regulation. The next Part recommends particular doctrinal formulations derived from the above analysis.

IV. HOW TO REGULATE TEMPTATION OPERATIONS: NEW CONCEPTS OF ENTRAPMENT

Given the economic and political theories, how should we regulate undercover operations? There are many possibilities. First best is presumably some institutional solution to the agency problems that underlie both concerns with undercover operations. In keeping with the tenor of the normative discussion, however, I assume the existence of the basic structure of police and prosecutorial bureaucracy. I therefore explore the parameters of judicial regulation, primarily the issue of how courts can identify unproductive or politically threatening operations. I recommend that courts block prosecutions founded on such operations by granting an entrapment defense or, as is done elsewhere, by enjoining prosecution or excluding evidence of the undercover offense.[198] I do not comment on the choice among these mechanisms,[199] but address only the central question of how to distinguish good from bad undercover operations. For ease of exposition, I refer to the means of blocking a prosecution as a "defense," though that should always be understood to include the alternatives of enjoining prosecution or excluding evidence.

I offer two answers. Part A sketches a stark departure from the existing approach: that we define the entrapment defense on a crime-by-crime basis. This regulatory form would tie the legal doctrine most closely to the economic and political rationales, but I discuss it only briefly because it is complex and, as a practical matter, less likely to influence policy. In

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police will pursue unproductive operations where the correlation is too low. Random targeting heightens this concern.

[198] *See supra* notes 20-22.

[199] An important issue is whether the judge or jury applies the doctrine I describe below. If the jury should do so, then the choice of mechanism matters because the jury could decide only the issue of a criminal defense. However, because the economic and political concerns transcend the individual case, it seems to me that judges are the more appropriate decision-maker, in which case any of the three mechanisms works.

Part B, I return to the conventional, if second (or third) best approach, a one-size-fits-all-crimes entrapment defense.

A. BRIEF NOTES ON A RADICAL ALTERNATIVE: CRIME-SPECIFIC ENTRAPMENT DEFENSES

Academic discussion of entrapment assumes that the best doctrinal formulation is uniform across crimes. It is obvious that the proper *application* of an ideal doctrine may vary by crime, but almost no one advocates that the *definition* of entrapment should depend on the crime. Yet the first thing to note about the economic and political rationales is that they raise different concerns for different crimes.

Consider first the political rationale—the need to deny government officials the power to induce political enemies and unpopular individuals to offend.[200] Not every crime presents this danger. Almost everyone would resist any offer involving sex with young children, so that undercover operations involving this crime are not useful for "setting up" particular individuals. The political threat arises most clearly for crimes that a large majority of the population would commit if repeatedly offered an especially attractive inducement. Identifying such crimes is an intensely empirical issue, but I speculate that they include employee pilferage, insurance fraud, failure to return lost property, copyright violations, knowingly passing counterfeit bills, knowingly selling legal goods in exchange for drug proceeds, and the illegal distribution of prescription painkillers or medicinal marijuana. If my judgment appears misanthropic, consider that an "especially attractive inducement" includes creating situations where the crime appears necessary to preserve a romantic relationship (*e.g.*, *Lively*[201]) or to prevent the suffering of others (*e.g.*, *Sherman*[202]), as well as cases where the apparent victim seems highly unsympathetic (*e.g.*, a heartless insurance company).

There may also be a political danger to undercover operations involving crimes that only a small minority would ever commit, if there are many such crimes and the police can identify which crimes are tempting to which individuals. The concern here is that "everybody has their weakness." If government officials can readily ascertain an individual's "weakness" and match it to a particular offense, they may be able to induce nearly any individual into crime even without using crimes that most individuals would commit. When states enforced a large set of sex

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[200] See *supra* Part III.A.

[201] State v. Lively, 921 P.2d 1035, 1035 (Wash. 1996).

[202] Sherman v. United States, 356 U.S. 369, 369 (1958).

crimes—against fornication, adultery, prostitution, statutory rape, sodomy, obscenity, and contraception—this was a plausible scenario. I am less certain whether it remains plausible today, though it might. For example, with the proliferation of regulatory offenses, police may be able to induce most members of a given industry or occupation to commit crimes concerning that industry or occupation.[203]

In any event, I seek only to show that the strength of the political rationale for regulating undercover operations varies by crime. The same is true of the economic rationale. Initially, to turn the point around, the economic justification for undercover operations varies by crime. There is a greater law enforcement need to use sting operations or any effective tactic for serious crimes (*e.g.*, terrorism) than for less serious crimes (*e.g.*, pick-pocketing). Holding severity of crime constant, there is also a greater need for the undercover tactic to investigate crimes that tend not to generate complaints from victims and witnesses (*e.g.*, bribery and drug sales) than for crimes that tend to generate such complaints (*e.g.*, burglary and assault). Where there is great need for undercover tactics, the entrapment defense is more costly.

Holding constant the law enforcement need, the efficiency of particular undercover operations depends on several factors, the primary one being the elasticity of demand for certain crimes.[204] If raising the net benefits for crime by ten percent greatly increases the number of individuals willing to offend, then the demand is (at this point) highly elastic; if raising the net benefits by the same amount has almost no effect on the number of individuals willing to offend, then the demand is highly inelastic. Highly (in)elastic demand means that there is greater (lower) risk of apprehending low-risk offenders. To illustrate, consider the category of true non-offenders—individuals who decline to offend in the undercover operation and will not offend with any probability outside the undercover operation. Other things equal, the greater the proportion of true non-offenders in the population, the less the need for judicial regulation. If almost everyone is a true non-offender, then there is a natural limit to the possible wastefulness of an undercover operation. For example, police cannot tempt more than a very few into crimes involving sex with young children. There remains a risk of apprehending low-value offenders—pedophiles who would otherwise probably resist acting on their sexual desires (*e.g.*, possibly

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[203] In particular, there are many criminal statutes regulating the "occupation" of politicians. There may be some political danger that officials could target politicians they oppose with undercover operations involving technical violations of campaign finance and gift regulations.

[204] *See* Goff & Tollison, *supra* note 96, at 40.

Jacobson[205])—but the risk is necessarily smaller than for criminal opportunities that tempt a larger part of the population. By contrast, when almost everyone would commit the crime under circumstances that may occur, as might be true of the tempting crimes listed above (failure to return lost property, copyright violations, illegal distribution of marijuana for medicinal purposes, etc.), then there are few, if any, true non-offenders. Here, the economic need for judicial regulation is greatest.

Second, holding constant the law enforcement need and the elasticity of demand, the efficiency of undercover operations depends on the proportion of a given crime committed by recidivists. The greater the amount of external crime committed by ongoing offenders, the lower the productivity of apprehending probabilistic offenders and the greater the need for judicial regulation. Some crimes—*e.g.*, arson-for-hire, counterfeiting, money laundering—are probably committed almost entirely by recidivist professionals, that is, true offenders. Other crimes or criminal contexts—*e.g.*, accepting an unsolicited bribe, embezzlement, statutory rape—might be opportunistic, that is, committed mostly by probabilistic offenders who encounter scarce criminal opportunities. If recidivists commit most of the crimes, then there is a sharp drop-off in the social returns of punishment as one moves from a true offender to a probabilistic offender, and therefore a greater benefit from a doctrine that minimizes the punishment of anyone but true offenders. By contrast, if most crimes of a certain sort are committed by non-recidivist, probabilistic offenders, then their punishment is more productive. In general, for recidivist/professional (opportunistic) crimes, there is a sharp (shallow) drop-off in the social returns of punishment as one moves from true to high-risk to low-risk probabilistic offenders and therefore a greater (lesser) return from an entrapment defense that makes fine-grained distinctions between the temptations the government offered in the undercover operation.

Finally, holding constant the above variables, the ideal judicial regulation depends on whether the undercover operation occurs in a "thick" or "thin" criminal market. The best regulation will define a permissible range of undercover offers based on the offers that exist in the external criminal market. If the external criminal market involves lots of transactions per time period—*e.g.*, illegal drugs or gun sales—it will be relatively easy to identify the prices and quantities at which trades typically occur. By contrast, in a thin criminal market—e.g., judicial bribery—it will be much more costly to identify the standard rate for such transactions. The permissible range of undercover offers should depend on how costly it is to

[205] 503 U.S. 540 (1992), discussed *supra* in Part I.

identify the external range of criminal opportunities. One might also want to allocate the burden of proof in undercover cases with this cost in mind.

I previously proposed a thought experiment in which undercover operations are forbidden except where the legislature explicitly authorizes them. To ensure that the undercover operations it authorizes are productive, the legislature would *either* state the narrow conditions under which it granted undercover authority to police *or* grant them general undercover authority while defining the conditions of an exception in which prosecution is barred. If, counter-factually, the legislature granted authorization only under specified conditions, the present point is that those conditions should vary crime by crime. If, closer to reality, the legislature grants general undercover authority subject to exceptions, those exceptions should vary by crime. Given the American approach, the entrapment defense should be defined for each crime for which police are authorized to use undercover operations.

Implementing this crime-specific solution is complex and intensely empirical. Given space limitations, I only briefly illustrate what a tailored analysis might entail. First, some crimes or specific temptations might threaten the political rationale because they would tempt such a large part of the population. An example of such a crime might be a copyright violation, the failure to return lost or misdirected property, or the knowing sale of legal goods in exchange for drug proceeds.[206] Even when a particular crime is not tempting to most individuals, a particular kind of temptation might make it so, as where a person is asked to procure an illegal drug for someone who apparently will use it to alleviate her suffering (as in *Sherman*) or in order to maintain a romantic relationship (as in *Lively*). Indeed, even if the criminal opportunity is not usually tempting to a great many people, the government might be able induce most people if it offers the opportunity repeatedly (on separate occasions) or times the opportunities to coincide with periods of temporary vulnerability, such as bankruptcy or intoxication. The tailoring approach might therefore prohibit any convictions based on undercover operations for these crimes, offering these specific kinds of temptations, or timing temptations in these specific ways.

Where the political rationale is not at issue, the economic analysis differs by crime. Consider arson-for-hire and money laundering for drug sellers (which probably tempt only a small part of the population and therefore do not pose the political concern). To begin, these are serious

[206] See 18 U.S.C.A. § 1956, at issue in *United States v. Jensen*, 69 F.3d 906 (8th Cir. 1995), where undercover agents bought a car with cash they told the dealer came from drug sales.

crimes that pose difficulties for conventional investigative tools (because frequently the only witnesses are perpetrators). I do not know what the elasticity of demand is, but I agree with the implicit assumption of Judge Posner's *Hollingsworth* opinion[207] that money laundering presents real potential for luring (what I have termed) low-risk probabilistic offenders who are exceedingly unlikely to offend externally. Moreover, it seems highly likely that most arson-for-hire and money laundering crimes are committed by recidivist professionals, so there is a substantial risk that apprehending probabilistic offenders is wasteful. Finally, there appears to be a fairly thick market for these services, so that it would not be too costly for the government to determine what the ordinary market opportunities are. Given these factors, it seems sensible to permit undercover operations for these crimes but to condition conviction stringently on the government's proving that it offered only ordinary market opportunities.

By contrast, consider judicial bribery. This too is a serious crime for which conventional investigative tools are limited. The elasticity of demand is an intensely empirical question, but I would guess that it is relatively inelastic—that almost any judge who would refuse the ordinary bribe would also refuse a bribe that was ten percent larger. Indeed, I would guess that most judges who would reject a standard bribe offer would reject one ten times as large. Moreover, although there are some jurisdictions where bribes are expected and paid in almost every case, I imagine that there are a great many American jurisdictions in which judicial bribe offers are rare. In these cases, bribe-taking is an "opportunistic" crime, meaning most of the crimes are committed by individuals who do not offend in a given time period. Finally, at least in such jurisdictions, the market for bribes is thin and therefore it is costly for the government to prove that it has offered only a standard bribe. Given these factors, it seems imperative to run undercover operations for this crime and appropriate to condition conviction only loosely on whether the offer was the kind of opportunity that occasionally occurs in the real world (perhaps by putting the burden on the defendant to prove otherwise). Of course, this regulation could still be conditioned on the limitations described above that forbid, for example, the government's leveraging romantic relationships, as when a lover offers the bribe.

As a final example, consider decoy operations that offer attractive victims for pickpockets (as where undercover agents pose as being passed out drunk with cash hanging from a pocket).[208] Relatively speaking, pick-pocketing is not a serious offense. And because there are often witnesses to

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[207] 27 F.3d 1196 (7th Cir. 1994) (en banc), discussed *supra* Part I.

[208] *See, e.g.*, the Nevada line of cases, *supra* note 38.

this crime other than perpetrators—particularly, victims—there is no reason to discount the effectiveness of conventional investigative techniques. I would guess that the demand is relatively elastic in the sense that there are many people who would not pick-pocket in conditions of an ordinary probability of detection but would do so when the probability appears much lower because there is an isolated and unconscious victim. Finally, I would guess that most pick-pocketing is done by professional recidivists. The market for this crime may be thin, but because the police are using a decoy rather than a sting, they are likely to have easy access to the relevant information: the characteristics of actual *victims* of the crime. Given these factors, these decoy operations seem presumptively wasteful, as if police tired of chasing the professionals and sought some cheap and easy arrests. For this crime, we might want to ban such operations entirely or permit them only when the government can demonstrate that the undercover decoy victim closely mimicked the actual victims of recent crimes in the same area (as an elderly woman walking alone through a park).

This discussion only illustrates the kind of tailored analysis that best serves the political and economic rationales for an entrapment defense. Though tentative, the examples help to show why intuitions about entrapment swing wildly from one crime to another. Given the very different levels of scrutiny appropriate to different contexts, it is no wonder that there is difficulty achieving consensus on a one-size-fits-all entrapment defense. Nonetheless, it is to this conventional approach I now turn.

B. REFORMULATING THE CONVENTIONAL APPROACH: AN IMPROVED UNITARY ENTRAPMENT DEFENSE

The conventional entrapment defense is unitary—one size fits all crimes. This approach is necessarily second best, being too broad in some circumstances and too narrow in others. To construct the best unitary defense given the economic and political rationales, I separately discuss the appropriate doctrine for each rationale, and then propose the best defense given both. I also compare my proposed unitary defense to the existing formulations.

As a preliminary matter, recall that the normative analysis above applies only to pro-active undercover operations, by which I mean those where government manipulates criminal opportunities to make them appear more favorable.[209] When the government does not manipulate opportunities, but only infiltrates and passively observes, the political and

[209] Covert agents manipulate opportunities either by posing as a confederate to the crime—a "sting"—or by posing as a potential victim—a "decoy."

economic rationales require no defense. Recall also that I assumed that the pre-existing literature justified a minimalist defense that prohibited the government from creating criminal opportunities better than any that exist in the real world. The question is what more to require.

1. Formulating an Entrapment Defense to Prevent Political Abuse

We might solve the problem of political misuse of undercover operations by inquiring into the motives of the officials who directed the operation or the resulting prosecution. Once we ruled out improper motivation—no official targeted an enemy or scapegoat—there would be no political rationale for a defense. Because intent is easily concealed, however, the doctrine of selective prosecution is notoriously ineffective.[210] It appears more promising to base a test on objective facts, identifying situations where discretion is most easily abused rather than proof that it was abused in the particular case. That approach is consistent with other institutional side-constraints on criminal law enforcement (*e.g.*, the vagueness doctrine and most Fourth Amendment law).

The objective factors that make undercover operations politically dangerous are (1) the scarcity of criminal opportunities and (2) the repetition and/or calculated timing of offers. Most obviously, there is a risk of political abuse when the opportunities offered are so scarce that they would tempt a large majority of people. Existing formulations of the objective test address this factor reasonably well by asking whether the undercover inducement would be likely to tempt an "average" or "normally law-abiding" person.[211] Of course, to answer this question adequately, one must consider all the dimensions by which the offer may be scarce, as discussed above.[212] Existing formulations of the subjective test also provide some protection against political abuse. Even though predisposition is fairly easily proved, the defense creates some risk that anyone targeted for political reasons will gain an acquittal, after which their claim to be the victim of a political vendetta may be credible.

Less obvious is the danger posed by the repetition of offers or the timing of offers during a moment of predictable but temporary weakness (*e.g.*, intoxication, bankruptcy, or emotional distress). Repetition and timing intensify the problem of scarce opportunities. If the criminal opportunity is abundant—as it is in some places for the crimes of soliciting prostitution or buying cocaine—then police repetition and timing don't

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[210] *See, e.g.*, McAdams, *supra* note 176.

[211] *See supra* Part I.

[212] *See supra* Part III.A.1.

matter much (because citizens are constantly tempted anyway). But, as explained above, a somewhat scarce offer is far more likely to induce criminality when it is repeated or deliberately timed. Existing formulations of the subjective test address the repetition factor indirectly by asking whether the individual was immediately willing to offend. Jurisdictions employing the subjective test may do a better job of attending to these facts than those employing the objective test. But the ultimate issue properly framed is not subjective; it is whether the government engaged in repeated or timed targeting of scarce offers in a way that would make them tempting to most individuals.

Thus, the political rationale points to a defense that limits the criminal opportunities police can create to those that would *not*, even when repeated or timed as the police did in the particular case, induce most citizens to offend. Because the best approach tailors the defense to the crime, this unitary test is, of course, under- and overinclusive. It is underinclusive if government officials can readily ascertain any individual's "weakness" and match it to a particular offense, in which case they could induce nearly anyone into crime even without using crimes that most individuals would commit. It is overinclusive if there is a certain crime nearly everyone commits and yet there is an evenhanded effort to enforce the law. An example is corruption. Suppose there is a jurisdiction in which virtually every public official takes bribes and virtually every private citizen gives bribes. If the jurisdiction is ever to move from the high corruption equilibrium to a low corruption equilibrium, it may require undercover operations that offer inducements everyone will (initially) accept.[213] Notwithstanding these problems, if we seek a unitary test, then the one just described is the best I can imagine for solving the political problem of undercover operations.

2. *Formulating An Entrapment Defense to Avoid Wasteful Law Enforcement*

Given their motivation, police will prefer undercover tactics that yield high numbers of low-value arrests to tactics that yield low numbers of high-value arrests. More precisely, the above analysis identified two ways in which the structure of undercover operations can be wasteful. First, operations that create highly scarce criminal opportunities will apprehend many low-risk probabilistic and false offenders. Second, the false positive paradox analysis revealed that even more moderate temptations (with low false positive rates) will, if offered randomly, apprehend mostly low value

[213] I thank Susan Rose-Ackerman for bringing this example to my attention.

offenders. How should we formulate a unitary doctrine to address these problems?

For the most part, solving the first problem solves the second. If undercover tactics are somewhat costly to police and police can lawfully create only modestly attractive criminal opportunities, they will usually choose not to offer them randomly. Given that most people will refuse modest inducements, random selection is costly for police because it requires a great many operations to produce one arrest. Thus, if the entrapment defense limits the attractiveness of criminal opportunities, the police will usually have an incentive to target only those individuals whom they already reasonably suspect of offending. So the best unitary defense should primarily limit the inducements the police can offer.

To some extent, the subjective and objective entrapment rules already give some incentive to police to limit the attractiveness of the criminal opportunities they create. The objective test does so directly, though some jurisdictions set the bar very high—proscribing only those inducements that would tempt an ordinary or law-abiding citizen. One might imagine that there are some temptations to crime large enough to lure some false or low-risk individuals to offend but still small enough not to lure most people to offend. The subjective test limits the inducements indirectly, because the fact-finder is less likely to view the defendant as predisposed if the only evidence is immediate willingness to accept an extremely scarce and attractive criminal opportunity. Here, I consider how to improve on the existing approaches.

a. Defining the Safe Harbor of Ordinary and Average Inducements

What rule defines the *optimal* limits to criminal temptations, given the constraints created by a unitary definition of entrapment? The right starting point is the proposal by Ron Allen, Melissa Luttrell, and Anne Kreeger ("ALK") to grant an entrapment defense if "the inducements exceeded real world market rates."[214] Though market rates may seem *necessarily* correct, the best unitary solution might be something else, depending on the tradeoffs in false positives and false negatives. On the one hand, perhaps most people do not even know what the profit margins are for various crimes and will never find out. A sting operation at market rates might then cause them to learn of the possible profit margins for the first time and then to commit crime internally they would never have committed externally. If so, the ideal entrapment test might require slightly below-average market

[214] Allen, Luttrell, & Kreeger, *supra* note 77, at 415.

inducements to raise the probability that any offender is high-value.[215] On the other hand, it might be the case that almost anyone who refuses to commit a crime at the prevailing market rate would also refuse to commit the crime at a price that is twenty percent better than the market rate. If so, the ideal unitary test would allow slightly above-market rates because such operations decrease false negatives far more than they increase false positives. In the end, it is difficult to evaluate these offsetting arguments with available information, so the ALK proposal seems like the right starting point. Under that proposal, if police stick to market limits, there is no need for additional evidence that the defendant offends externally. There is no further inquiry into "predisposition."

There is, however, an ambiguity in the ALK proposal: whether the government is permitted to offer any real world market rates or only ordinary or average market rates. The former possibility—permitting the police to offer even the rarest real world criminal opportunity found in the market—is the same as the "minimal" entrapment defense I argued against. The alternative interpretation—to permit the police to offer only ordinary and average criminal opportunities—better serves the economic rationale (and is probably what ALK intend). But the normative analysis above suggests the need for two modifications, giving greater clarity to what is meant by ordinary or average.

First, I use the term "ordinary" in addition to "average" because we need to consider not only how a criminal offer's magnitude compares to the magnitude of other such real world offers, but how frequently such offers occur. The economic rationale raises greater concerns when the

[215] One might also want to require below-market prices to offset certain activity-level effects of undercover operations. First, when a target refuses an undercover criminal opportunity, it is possible that the operation causes her to revise downward her estimate of the probability of detection. For example, when a target receives an offer to launder money through her commercial enterprise, the undercover agent's willingness to propose the crime may make it seem that it is more common and harder to detect than she previously believed. Thus, it is possible that an undercover offer she refuses might nonetheless make her more likely to offend externally in the future, if her circumstances change (such as having her lawful opportunities contract). Second, undercover operations cause criminal organizations to test the loyalty of potential members by demanding that they commit a crime, thus demonstrating that they are not undercover operatives. An increase in undercover operations might increase the number or severity of the "loyalty" crimes committed. Because these two activity level effects occur in response to the number of undercover operations, rather than their structure, an entrapment defense is not generally useful for addressing them. Nonetheless, one might effectively "tax" undercover operations by limiting the police to offering below-market prices, which would lower the effectiveness of the operations and thereby lower the number of times police use them. If one can solve the agency problems, there are far better solutions, but otherwise this offers a reason to deviate downward from the ALK market test.

government is offering scarce rather than standard, readily-available opportunities. The more scarce the opportunity, the greater the chance that government is wasting law enforcement resources. The police should be permitted the "safe harbor" of creating *ordinary and average* criminal opportunities. The fact-finder's determination whether the offer was ordinary should focus on all relevant dimensions: the material gain from the crime, the non-material gain (*e.g.*, maintaining personal or romantic relationships), the probability of detection, the apparent moral rationalization for offending, etc.[216]

There is a second important nuance to determining ordinary opportunities. For many markets, the quality of the illegal good or service varies and criminal buyers will therefore *not* offer the same price to every seller. If one wishes to avoid waste, the police must offer to an individual no more than the price *she* can obtain in the market, given the quality of good or service she can provide. An example is arson-for-hire. When a building owner wants to burn his building in order to collect insurance, she seeks a professional arsonist who will make the fire look accidental. She will not offer the price the professional charges, nor possibly any price, to an amateur who lacks the necessary knowledge, skills, and reputation. The price that is "average and ordinary" for an arsonist is not "average and ordinary" for anyone else. If police offer a random homeless person $1,000 to burn a building, that is entrapment even if the average arsonist charges $1,000. The police should offer no more than what the defendant could obtain in the criminal market *given her skill and reputation.*[217]

To decide this issue, the fact-finder must consider evidence currently relevant only under the subjective test concerning the defendant's knowledge, skill, and reputation for committing the crime in question. The evidence is being used differently here—the focus is whether the opportunity the police created is ordinary, not whether the defendant is predisposed. To some degree, this inquiry requires some costly defendant-

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[216] There is a potential problem applying this test in a thin market: even if the police create an average criminal opportunity, it may be that any opportunity is rare because they occur so infrequently. If there is one bribe offered per year and its size is $5,000, then $5,000 is average, but it is scarce rather than ordinary. Nonetheless, I propose that the police always be allowed to make an offer, even if the fact of the offer is scarce. The "ordinary" standard then requires that all other variables are ordinary in addition to average.

[217] One can read *United States v. Hollingsworth* to introduce exactly this consideration within the subjective test by defining predisposition to include "readiness." Readiness may mean that one possesses the skill or reputation needed to attract the offered price. 27 F.3d 1196 (7th Cir. 1994). Money laundering is a service where quality matters and the court essentially found that the defendants were offered the "going rate" for a service they lacked the skill to provide.

by-defendant analysis. Nonetheless, asking about the defendant's specialized knowledge and skills, or reputation, are far less speculative and difficult than asking whether the defendant offends externally.[218]

b. Requiring Prior Suspicion for Extraordinary Inducements

ALK strictly limit the police to market level inducements. Although "average and ordinary" inducements should be a "safe harbor" for law enforcement, I do not believe the right normative analysis rules out offering anything more. Offering ordinary opportunities necessarily generates false negatives, as some individuals will turn down the undercover offer of an ordinary opportunity even though they are at high risk to accept extraordinary opportunities that will come their way. One wants to permit the state to offer extraordinary opportunities, but somehow to minimize the number of false or low-risk offenders who are apprehended.

I see no way to prove that one imperfect unitary solution here is better than another. My suggestion, however, is to permit extraordinary inducements, but only based on prior suspicion of external offending. So, the police have the choice of (1) creating ordinary criminal opportunities without any proof of prior suspicion nor any subsequent proof of predisposition, or (2) creating extraordinary criminal opportunities (not so great as to threaten the political rationale) based on some prior suspicion of the targeted individual. I will go a step further and recommend that the evidence for prior suspicion be independently evaluated prior to the undercover operation. A familiar means of implementing these suggestions would be via concepts in Fourth Amendment law—reasonable suspicion[219] and a warrant[220]—though there might be other doctrinal vehicles.

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[218] In any event, this entire inquiry is not necessary in many undercover operations. In a "thick" black market for drugs or firearms, every seller may command the standard price. Similarly, for bribery, the only special "skill" the prosecutor needs to prove is that the defendant is a public official who can bestow official favors.

[219] The standard is elaborated in the progeny of *Terry v. Ohio*, 392 U.S. 1 (1968). Others have recommended that "reasonable suspicion" be required for all undercover operations, whether or not the inducement is ordinary. *See, e.g.*, Maura Whelan, *Lead Us Not into (Unwarranted) Temptation: A Proposal to Replace the Entrapment Defense with a Reasonable Suspicion Requirement*, 133 U. PA. L. REV. 1193 (1985) and the panel opinion in *United States v. Jacobson*, 893 F.2d 999, 1000 (8th Cir. 1990) ("[T]he government must have reasonable suspicion based on articulable facts before initiating an undercover operation . . . ."), *vacated* 916 F.2d 467 (en banc) (1990). For criticism of this proposal, see Philip B. Heymann, *Understanding Criminal Investigations*, 22 HARV. J. LEGIS. 315, 330-34 (1985).

[220] Obviously, warrants authorizing searches and seizures under the Fourth Amendment require probable cause, whereas investigatory stops, frisks, and other measures requiring

Here are the reasons for thinking that a prior suspicion standard is the best unitary regulation of those undercover operations that stray beyond ordinary and average inducements. First, we have to worry that the creation of extraordinary criminal opportunities will cause false or low risk individuals to offend. This problem is particularly acute if we relieve the government of providing any additional information that the defendant offends externally (as I propose for ordinary and average inducements). Recall the prior discussion of the false positive paradox.[221] I gave an example where the police randomly targeted individuals where the base rate of crime was one in a thousand and showed that, even with a low false positive rate (5%), most internal offenders were false offenders. Once we permit the police to offer scarce, extraordinary criminal opportunities, we not only increase the false positive rate, but also increase the incentive for the police to engage in random targeting. That is, the police will sometimes expect such low returns from randomly selecting targets for ordinary inducements that they will choose on their own to target only those for whom they have reasonable suspicion. But because extraordinary inducements increase the expected yield of arrests, the police might no longer seek suspicion on their own, even though it is more important given the expected increase in the false positive rate. Hence, I propose requiring advanced suspicion in this circumstance.

Second, the purpose of a warrant or other ex ante independent review[222] is to avoid the excessive deference that is likely to occur once it is known that the suspect offended in the undercover operation. A hindsight "bias" could be purely political—it is more costly for a government official to decide *after* the undercover offense that the police lacked appropriate suspicion because the public is then more likely to object that the official is "letting the guilty go free." There is also the well established possibility of a cognitive hindsight bias.[223] To this I would add the "fundamental attribution error," a cognitive bias once described as "the most robust and

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reasonable suspicion require no warrant. But as the Fourth Amendment does not itself constrain undercover operations, I am free to borrow its elements in this novel manner.

[221] *See supra* Part II.B.2.a.

[222] The Department of Justice has an Undercover Review Committee that must approve F.B.I. undercover operations involving certain "sensitive circumstances," such as the targeting of a government official. *See AG Guidelines*, *supra* note 39. Although some prosecutorial committees of this sort would operate as rubber stamps, that is neither a necessary outcome nor necessarily different than the behavior of some magistrates in approving warrants.

[223] *See, e.g.*, Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998); Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005).

repeatable finding in social psychology."[224] People tend to attribute the behavior of another to her preferences or attitudes to a greater degree than is logically warranted, and conversely, to under-attribute another's behavior to her situational constraints.[225] Thus, after the target has offended in the undercover operation, fact-finders will tend to over-attribute that behavior to the person's willingness to offend rather than the undercover temptation. If so, then believing the defendant is predisposed to commit this kind of offense would seem to make the hindsight bias more likely in judging whether the prior suspicion the police had was sufficient. It is not just that the basis of the police officers' prior suspicion seems to have correctly predicted the defendant's behavior in the undercover operation, but that it seems to have correctly predicted what kind of person the defendant is.

Finally, note what this heightened standard still permits. Even if the police target individuals with extraordinary criminal opportunities without prior suspicion, the state always remains free to charge the defendant with external offenses. Undercover offending will almost always create probable cause to believe the individual offends externally, which would justify searches for evidence of external crimes.[226] Often, the target who agrees to sell illegal drugs or weapons in an undercover operation has a car trunk or basement full of contraband. With this evidence, the state can prove external crimes and has no great need to punish for internal ones. So the question is what to do when there was no reason to suspect the target before the undercover operation, the police create extraordinary opportunities, and the evidence acquired after the operations fails to prove an external offense beyond a reasonable doubt. I suggest that the entrapment defense then bar conviction for the internal offense.

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[224] E. E. JONES, INTERPERSONAL PERCEPTION 138 (1990). *See also* Miller, D. T. & D. A. Prentice, *The Construction of Social Norms and Standards*, *in* SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES 799, 803 (E. T. Higgins & A. W. Kruglanski eds., 1996) (emphasizing the "enormous support" the finding has received in varied settings over three decades of research).

[225] "When people observe behavior, they often conclude that the person who performed the behavior was *predisposed* to do so—that the person's behavior corresponds to the person's unique dispositions—and they draw such conclusions even when a logical analysis suggests they should not." D.T. Gilbert & P. S. Malone, *The Correspondence Bias*, 117 PSYCH. BULL. 21 (1995) (emphasis added).

[226] *See* Labensky v. County of Nassau, 6 F. Supp. 2d 161 (E.D.N.Y. 1998). Even though the prosecutor ultimately dismissed the indictment because of the strength of the entrapment defense, the court found probable cause for arrest and dismissed claims for false arrest and false imprisonment. *Id.* at 177; *cf.* Jacqueline E. Ross, *Valuing Inside Knowledge: Police Infiltration as a Problem for the Law of Evidence*, 79 CHI-KENT L.REV. 1111 (2004).

3. *A Proposed Entrapment Test Given Both Rationales*

When we combine the above analysis to create a defense that serves both the political and economic functions, the result is the following test. First, the threshold that triggers the defense is a proactive operation in which government manipulated the apparent criminal opportunities (not mere passive observation). Second, an actor who offends in a proactive undercover operation is entitled to a defense (or to have the conviction enjoined or evidence excluded) if the undercover opportunity, by virtue of its scarcity, repetition, and/or timing, is more than otherwise ever exists externally (the minimalist test) or would tempt a majority of individuals (the political concern). Third, an actor is also entitled to a defense, even though the opportunity exists externally and would not tempt most individuals, if (a) the opportunity was *not* ordinary and average and (b) prior to the operation, no judicial officer (or other appropriate official) found that the police had reasonable suspicion to believe the defendant had committed or was committing the same sort of offense.[227] In the margin, I offer statutory language that could implement this three-part test.[228]

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[227] After first drafting this proposal, I discovered a similar approach in the Attorney General Guidelines that govern F.B.I. undercover operations. *See AG Guidelines*, *supra* note 39. Section V.B(4) requires that

> [o]ne of the following limitations is met:
>
> (i) There is a reasonable indication that the subject is engaging, has engaged, or is likely to engage in the illegal activity proposed or in similar illegal conduct; or
>
> (ii) The opportunity for illegal activity has been structured so that there is reason to believe that any persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal conduct.

Id. at 16. The "reasonable indication" requirement of paragraph (i) is obviously similar to my proposal for "reasonable suspicion." Though there is no mention here of proving that suspicion to a magistrate or other independent body prior to the undercover operation, it is worth noting that there are some "sensitive circumstances" (such as the targeting of government officials) in which the AG Guidelines require advanced approval by an Undercover Review Committee staffed in part by DOJ attorneys (who presumably are not personally prosecuting the individuals apprehended in undercover operations they approve). *Id.* at 6-8. Paragraph (ii) says nothing about how one ascertains that the undercover operation is "structured" to attract only the predisposed, but one can view my proposal as providing the relevant detail by requiring that the criminal opportunity be "ordinary and average." Because the OIG'S REPORT, *supra* note 37, does not review compliance with this provision, I do not know whether the F.B.I. complies with it; in any event, paragraph (ii) is currently too vague. But the formulation in the alternative—individualized suspicion *or* a sufficiently structured opportunity—supports the basic approach I advocate.

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> Entrapment is an affirmative defense. A public law enforcement official or an agent acting in cooperation with such an official perpetrates an entrapment if, in an undercover operation for the

Note that I am intentionally hedging on the all-important question of the burden of proof. There is nothing in the theory that gives a definite answer to whom should bear the burden of proving some or all of the elements of the defense. This is exactly the sort of issue that cries out for crime-by-crime analysis, if only to consider the severity of the crime. One might be more inclined, for example, to put the burden on the defendant in a terrorism or bribery case than in a prostitution or pick-pocketing case. In any event, I leave this matter unresolved and focus on what the elements are rather than who must prove them.

We can now also see what is wrong with other approaches. First, the subjective test does not sufficiently protect against the political threat or economic waste. If the defendant accepts the offer on the first opportunity, she will likely lose the defense even if its scarcity would tempt most of the population. If the offer is not tempting to most but still extraordinary, she will lose the defense by failing to resist the offer sufficiently, even if the police wasted resources by randomly targeting with no pre-existing suspicion. Second, for the same reason, the objective test in some jurisdictions does not sufficiently protect against economic waste: the police are allowed to offer an extraordinary opportunities randomly, as long as they would not tempt most law abiding citizens. Finally, some commentators and courts have proposed requiring reasonable suspicion for all undercover operations.[229] But where the government offers merely "ordinary and average" opportunities, there is no reason to require prior suspicion. The ordinary should remain a safe harbor.

To illustrate how the test works, consider two cases. The defense would bar criminal liability in *Lively*.[230] There is a reasonable argument

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purpose of obtaining evidence of the commission of an offense, he creates apparent criminal opportunities that an actor accepts, and:

(1) the apparent criminal opportunities were greater than any occurring outside of undercover operations; or

(2) when considering the number of times the opportunity was made apparent to the actor, the apparent criminal opportunities would tempt most ordinarily law-abiding citizens into offending; or

(3) the criminal opportunities were made apparent during a foreseeable, infrequent, and temporary interval in which the actor lacked the substantial capacity to conform his conduct to the requirements of law; or

(4) the apparent criminal opportunities were greater than ordinary and average given the actor's knowledge, skill, and reputation, and were made apparent to the actor before the official demonstrated to a magistrate that he had reasonable suspicion that the actor had committed similar offenses.

[229] *See, e.g.*, Whelan, *supra* note 219.

[230] State v. Lively, 921 P.2d 1035 (Wash. 1996).

that the government created circumstances and timed the opportunities in such a way that a majority of citizens would commit this crime—selling small quantities of cocaine, soon after attempting suicide, to a friend of a lover for no profit in order to preserve the romantic relationship. But putting aside that point, the opportunity was clearly extraordinary—given the relationship the government agent created—while the police had no prior suspicion of Lively to justify their actions. In the terrorism case of Lakhani,[231] it is clear that most people would not, under any circumstances short of considerable duress, agree to sell missiles to a terrorist intent on shooting down civilian planes. It is also clear, however, that the government created an extraordinary opportunity by offering a large profit for the sale, waiting patiently for a year during which Lakhani failed to acquire the weapon, and then arranging for another government to supply Lakhani the armaments he could not acquire. The issue would then turn on whether the government reasonably suspected Lakhani to begin with, a point on which they would probably win. Perhaps the legality of a terrorist operation should not depend on such matters, given the stakes, but any one-size-fits-all defense will fail to accommodate the special interests of particular investigations.

CONCLUSION

This article offers new perspectives on the justifications for the entrapment defense. The central idea is that the defense regulates proactive undercover operations by which police manipulate the appearance of criminal opportunities. To date, no one has offered a persuasive rationale for the defense based on retributive theory or an institutional concern for fairness. I am doubtful such a theory is workable. By contrast, though I criticize the existing political and economic theories, I reconstruct them to justify the defense. The political rationale arises from the ability of undercover operations to manipulate the fortuity of legal compliance. As a result there is an institutional need to limit the power of government officials who control undercover operations, to prevent them from being able to target political enemies or unpopular scapegoats. The economic rationale arises from the need to correct the principal-agent problem that drives police to prefer undercover tactics that yield high numbers of low-value arrests to tactics that yield low numbers of high-value arrests. We avoid the waste of scarce law enforcement resources by a defense that re-orients police motivation, ensuring that internal offending remains sufficiently correlated with external offending. These rationales point to the

[231] *See supra* notes 25-26 and accompanying text.

desirability of tailoring a specific entrapment defense to each crime, but I also describe a unitary entrapment defense that will best serve the functions of the defense.