CAUGHT RED-HANDED, BUT NOT GUILTY:
THE ENTRAPMENT DEFENSE AND CULPABILITY

by

Katherine L. Mockler

A Thesis Submitted to the Faculty of
The Wilkes Honors College
in Partial Fulfillment of the Requirements for the Degree of
Bachelor of Arts in Liberal Arts and Sciences
with a Concentration in Political Science

Wilkes Honors College of
Florida Atlantic University
Jupiter, Florida
April 2009
CAUGHT RED-HANDED, BUT NOT GUILTY: THE ENTRAPMENT DEFENSE AND CULPABILITY

by

Katherine L. Mockler

This thesis was prepared under the direction of the candidate’s thesis advisor, Dr. Mark Tunick, and has been approved by the members of her/his supervisory committee. It was submitted to the faculty of The Honors College and was accepted in partial fulfillment of the requirements for the degree of Bachelor of Arts in Liberal Arts and Sciences.

SUPERVISORY COMMITTEE:

____________________________
Dr. Mark Tunick

____________________________
Dr. Daniel White

____________________________
Dean, Wilkes Honors College

____________________________
Date
There is a debate among scholars regarding how courts should judge defendants caught in government decoy and sting operations. As a retributivist, I believe we should only punish those who are culpable. Following this assumption, I argue that courts should punish entrapped people if they are culpable and that the subjective test, which holds that a defendant is culpable if he was predisposed to commit the crime, should be the standard by which courts judge defendants who claim entrapment. The objective test, which focuses on the propriety of the government conduct, fails to accurately assess culpability because, under this test, the guilt of the defendant depends largely on what the average person would have done under the same circumstances. I also propose that if government conduct reached the level of outrageous, defendants found to be predisposed may claim that the government violated their right to due process.
ACKNOWLEDGMENTS

I would like to thank Dr. Mark Tunick for the tremendous help and advice he gave me in conducting and preparing this research paper. During my years at the Wilkes Honors College, his instruction has taught me how to think about law and philosophical issues. His passion for political theory strengthened my own desire to continue studying law in graduate school. I also thank Dr. Daniel White for his comments on this paper. I would also like to express my gratitude to my parents, Kenneth and Inger Mockler, for their continued support throughout my college years.
DEDICATION

I would like to dedicate this thesis to Kenneth, Inger, and Caroline Mockler and the people at the Wilkes Honors College, all of whom shaped me into who I am today.
TABLE OF CONTENTS

I. Introduction ......................................................................................................................... 1
   a. Culpability ......................................................................................................................... 13

II. Chapter I - Punishment ....................................................................................................... 16
   a. Utilitarianism ..................................................................................................................... 16
   b. Retributivism .................................................................................................................... 21

III. Chapter II - “Is the Entrapped Person Less Culpable?” ................................................. 27
   a. Character .......................................................................................................................... 28
   b. Moral Luck ....................................................................................................................... 40
   c. Private Entrapment .......................................................................................................... 44

IV. Chapter III - The Failure of the Objective Standard to Judge the Guilt ......................... 50
   a. The Objective Standard Depends Upon the Average Law-Abidingness of the General Community ..................................................................................................................... 50
      i. Scenario 1 – A Society Composed of Innocents ......................................................... 56
      ii. Scenario 2 – A Society Composed of the Predisposed ............................................. 58
      iii. Scenario 3 – A Society Composed of the Disposed .................................................... 59
   b. The Superiority of the Subjective Test ........................................................................... 64
   c. Limiting Overzealous Law Enforcement ........................................................................ 68
   d. Proposal ............................................................................................................................ 74

V. Conclusion ........................................................................................................................ 77

VI. Bibliography ...................................................................................................................... 79

TABLES

Table 1. Punishment Under the Objective Test ........................................................................ 56
Introduction

In the early 20th century, Congress and states passed laws that forbade immoral behavior, such as those against prostitution, drinking, and manufacturing alcohol. People who participate in these crimes do so willingly and voluntarily; hence, there are no victims. Furthermore, since these crimes typically occur in secret between willing participants, they are inherently difficult to enforce. In order to enforce these laws, police resort to undercover techniques, such as decoy and sting operations, aimed at catching people engaging in illegal activities. When implemented appropriately, undercover operations should catch people who would have committed the crime if they had been approached by a private individual. In other words, in an ideal world, undercover operations would catch true offenders, those who offend externally (in circumstances where the government is not involved in commission of a crime).1

In some undercover operations, called stings, the government pretends to be a criminal and either approaches a person or infiltrates a group conspiring to commit a crime. In these cases, the government attempts to catch criminals in the act and typically arrest criminals when they have completed a crime but before harm results. The extent of government involvement varies from case to case. Courts consider government involvement minimal in instances in which the government offers a person a general opportunity to buy drugs without substantial pressure. In some sting operations, however, government involvement reaches a substantial level, what Chief Justice Hughes might have deemed “abhorrent to the sense of justice.”2 In U.S. v. Twigg, the government provided facilities, equipment, technical knowledge, and necessary ingredients for the production of methamphetamine, also known as speed. Neville, one of the defendants, was responsible for raising capital and distributing the product. Twigg, the other defendant, only ran errands, such as buying groceries. The U.S. Third Circuit Court determined that

---

“governmental involvement in the criminal activities reached ‘a demonstrable level of outrageousness’ and acquitted the defendants despite Neville’s eagerness to participate in the crime and apparent predisposition. The most common definition of predisposition is that the defendant was ready and willing to commit the crime prior to the presentation of the criminal opportunity by the government.

In decoy operations, the government offers bait to tempt criminals to commit crimes. In these cases, the government plays the role of the victim. A classic example of a decoy operation is *Daniels v. State*, in which an officer posed as a weak drunkard with money positioned in his outer jacket pocket so that the bills were visible from across the street. At night, the officer stumbled along an alley near a casino where people had reported recent pickpocketing, waiting for a thief to approach him. The officer resisted when Daniels attempted to rob him, upon which Daniels shoved his hand into the officer’s face. The court determined that this was a proper police temptation and convicted Daniels. Another example of a decoy operation is *People v. Hamilton*, in which the court convicted Hamilton for attempting to become a pimp for a female agent posing as a prostitute. A further example is that of *State v. Guffrey*, in which the court ruled that defendants were not entrapped when they shot a dead stuffed deer which police had placed in the wilderness in order to catch off-season animal poachers.

The most problematic aspect of undercover operations is the danger that the government will manufacture a crime, meaning it will create a crime that would not have occurred otherwise. A government agent, like a private person who solicits a target to engage in criminal activity, must offer some kind of inducement, such as an opportunity to buy drugs, in order to entice a co-conspirator. Compared to private entities, police have greater ability to manipulate criminal

---

6 Not Reported in Cal.Rptr.3d (Cal. App. Dist. 2008), 5. This case may not be cited as precedent.
7 262 S.W. 2d 152 (Mo. App. 1953).
opportunities so as to make them extremely appealing. Judge Posner says it is not clear that we should blame a defendant who commits a crime, albeit willingly, when we cannot be certain whether the defendant would have been in a position to complete a criminal act absent police involvement. For example, in *U.S. v. Dion*, government agents offered to purchase feathers of legally protected eagles from residents of an impoverished Native American reservation in order to investigate the killing and selling of eagles. It is hard to imagine that such an opportunity would ever have presented itself were it not for efforts of the police. Government inducements may be so strong that “innocent” people (those who would not have committed a crime unless there was a government temptation) succumb to it. “When the offer is highly tempting and unrealistic (unlikely to be encountered in an actual situation), the operation becomes an integrity test to see if temptation can be resisted, rather than an investigation designed to apprehend wrongdoers.”

There is a fine line between asking, “Is [a person] corrupt?” and “Is he corruptible?” A person may not generally engage in criminal activity or desire to do so, but police may decide to take advantage of the target and trigger the target to break the law. Before I discuss the circumstances under which we should hold people enticed by the police legally responsible, it is helpful to review the origin of the entrapment defense and the two standards, the subjective and objective tests, courts use to judge whether a defendant should be convicted of his crime.

The risk that undercover operations will entrap an “innocent” person necessitates the availability of an entrapment defense. Unfortunately, there is no definitive standard that tells judges and juries how to judge defendants caught in sting and decoy operations because the Constitution is silent on the issue of entrapment. Before the Supreme Court formally created the

---

9 *U.S. v. Hollingsworth*, 27 F. 3d 1196 (7th Cir. 2002), 1200; “But for” the involvement of the government, the defendant would not have committed a crime. See Dworkin, 25 for a brief explanation of a “but for” argument.
10 762 F. 2d 647 (8th Cir. 1985), 677.
12 Marx, 11.
defense in *Sorrells v. U.S.*, “no well-established doctrine of justification or excuse warranted release of an entrapped defendant, and there were no legislative or common law grounds upon which to build an entrapment defense.” Unlike the judicially developed exclusionary rule of the Fourth Amendment, which forbids conviction of a defendant if the government uses evidence it obtained without a warrant to prosecute him, the fact that government agents lured or pressured the defendant to commit a crime does not automatically bar conviction. Proponents of the entrapment defense believe that it should exist in order to prevent unwarranted and inappropriate government interference in the lives of citizens whom the government has no reason to suspect of engaging in criminal activity. The framers of the Constitution certainly envisioned certain government abuses of power the framers wished to prevent in the new nation, such as warrantless searches. To assume the framers would have reproached certain types of undercover techniques designed to pressure someone into committing a crime is not a stretch of the imagination. The majority opinion in *Sorrells v. U.S.* chose to base its decision on legislative intent, meaning that the court did not believe legislators of the 18th amendment intended to convict persons who sell liquor under the circumstances and police pressure that Sorrells faced: “We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them.” Had the Supreme Court chosen to base its power to acquit Sorrells on its general supervisory powers over the executive rather than on legislative intent, it might have led to unjustified curtailment of police power in future entrapment cases. The Constitution is open to interpretation, and as laws evolve, it is necessary to maintain a certain degree of separation between government and its citizens in order to protect citizens from undue police interference.

---


14 *Sorrells*, 287 U.S. 453, 448.
Some writers have based the need to have an entrapment defense on the due process clause because the government violates justice when it punishes an unwary innocent who it beguiled.\textsuperscript{15} According to writers in favor of a due process basis for the entrapment defense, people should expect to be free from unjustified coercion by the state.\textsuperscript{16} In criminal cases, a defendant’s right to due process is violated when the government has ignored principles of fundamental fairness.\textsuperscript{17} The court’s option to acquit a defendant based on the ground that the government violated his right to due process in entrapment cases has appeared “only in the Court’s discussion of government overinvolvement.”\textsuperscript{18} In \textit{U.S. v. Russell}, the Supreme Court left open the possibility of barring conviction of a predisposed defendant if the government’s involvement resulted in a violation of the defendant’s right to due process: “We may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes.”\textsuperscript{19} Five different federal courts of appeals have expressly accepted the constitutional validity of the outrageous government conduct defense.\textsuperscript{20} An example of a case in which the Fourth District Court of Florida acquitted the defendant on due process grounds is \textit{Kelly v. State}, in which the police, in a sting operation, stepped beyond their power when they reconstituted cocaine into crack before selling it to Kelly within 1,000 feet of a school in a sting operation.\textsuperscript{21} The government’s alteration of cocaine into a crack, a substance which has greater penalties associated with its possession than cocaine, in order to charge the defendant with a more serious crime violated the defendant’s due process rights.

\textsuperscript{16} Carlson, 1055.
\textsuperscript{18} Abramson and Lindeman, 142.
\textsuperscript{19} Ibid. 432.
\textsuperscript{20} Lord, 511.
\textsuperscript{21} 593 So.2d 1060 (Fl. 4th Dist. Ct. App. 1992).
Courts have developed two tests (of which different courts employ variants) in order to
differentiate entrapment from proper police undercover operations. The Supreme Court first
articulated the subjective test in *Sorrells v. U.S.* in 1932.  
A government agent posing as a
tourist visited Sorrells’s home and befriended him in an effort to see whether Sorrells would sell
him liquor, which was illegal at the time. The agent asked Sorrells to supply him with liquor, to
which Sorrells replied he had none. Finally, after appealing to Sorrells’s friendship and sympathy
by reminiscing about their experiences in the same Division during World War I and soliciting
Sorrells three times to bring him liquor, Sorrells retrieved a bottle of whiskey from his home and
sold it to the agent for five dollars. Justice Hughes distinguished a predisposed defendant, which
the court defined as one who is ready and willing to commit a crime if presented with the
opportunity, from and a non-predisposed one, who would not have broken the law were it not for
government involvement. Sorrells was non-predisposed:

> It is clear that the evidence was sufficient to warrant a finding that the act
> for which defendant was prosecuted was instigated by the prohibition agent, that
> it was the creature of his purpose, that defendant had no previous disposition to
> commit it but was an industrious, law-abiding citizen, and that the agent lured
defendant, otherwise innocent, to its commission by repeated and persistent
> solicitation in which he succeeded by taking advantage of the sentiment aroused
> by reminiscences of their experiences as companions in arms in the World War.  

Additionally, the court formulated the idea that the government should not “implant in the mind
of an innocent person the disposition to commit the alleged offense and induce its commission.”
If the defendant “is placed in the attitude of having committed a crime which he did not intend to
commit,” the entrapment defense must succeed. If the court finds the government did indeed
entrap the defendant, “the government is stopped by sound public policy from prosecution
therefor.” The government bears the burden of proof to show that the defendant was

22 See *Sorrells*, 287 U.S. 435.
23 Ibid. 441.
24 Ibid. 442.
25 Ibid. 442.
predisposed. Therefore, the court implies that an entrapped person is one who committed a crime, but did not intend to do so until the government induced him.

*Sherman v. U.S.*, decided in 1958, also illustrates the strong effect an agent’s appeal to sympathy may have on a person with a weak ability to resist temptation.  

A Narcotics Bureau employed, Kalchinian, who was a heroin addict suffering from withdrawal symptoms and receiving treatment in Dr. Grossman’s office, to induce a person to sell narcotics. Kalchinian met Sherman, a fellow recovering heroin addict, in Dr. Grossman’s office, where he asked Sherman to sell him heroin on several different occasions. “Sherman shared his heroin with Kalchinian as a fellow addict, and without profit. There was no evidence that he was in the habit of dispensing heroin, any more than his habit of buying it illicitly for himself.”  

The court reversed Sherman’s conviction, stating that Sherman’s previous conviction nine years before was not sufficient to prove predisposition. The court also cited the lack of a profit motive, Sherman’s attempt to get treatment, and absence of drugs in Sherman’s apartment as evidence that Sherman was not predisposed.

In *Russell v. U.S.*, the government supplied the defendant with Phenyl-2-Propanone, an ingredient essential for manufacturing methamphetamine, also known as speed. This ingredient was especially difficult to obtain because government had asked chemical supply companies to cease manufacturing it in order to thwart illegal speed manufacturers. The majority determined that Russell “was an active participant in an illegal drug manufacturing enterprise which began before the Government agent appeared on the scene, and continued after the Government agent had left the scene. “He was, in the words of Sherman, supra, not an "unwary innocent," but an

---

28 *Sherman v. U.S.* 200 F.2d 880 (2nd Cir. 1952), 881.
29 Ibid. 883.
30 *Sherman*, 356 U.S. 369, 375.
31 Ibid. 376.
32 411 U.S. 423.
"unwary criminal." Despite the high degree of government involvement in the crime, the court found Russell to be predisposed and convicted him.

In the cases discussed up to this point, the Supreme Court hinted at what it means to be predisposed but did not define it clearly. It is important to be clear about what precisely constitutes a predisposition. The central feature of predisposition is intent to commit a particular criminal act prior to police involvement. Predisposition is not the equivalent of a general disposition or character. Because this interpretation of predisposition does not involve character, it avoids the charge that the subjective test punishes people for their characters. In the case, *Jacobson, v. U.S.*, the Supreme Court added an intent component to the definition of predisposition and distinguished the predisposed person, who had the intent to commit the specific crime prior to the police temptation, from the disposed, who did not have intent to commit the specific crime. The federal government retrieved Jacobson’s name from a vendor who had sold him pornographic magazines two years ago, a time when purchasing pornographic material was legal. The agents solicited Jacobson to buy magazines containing pornographic pictures of teenage boys through the mail for two years, going so far as to claim to be an anticensorship organization, until Jacobson finally bought one magazine. After the purchase, agents searched Jacobson’s residence, where they found no pornographic material. The Court suggested that there is a difference between those who are predisposed, i.e. “ready and willing” to commit a crime, and what I shall term the disposed, that is, those who merely have a general inclination to act in a legally forbidden manner. Those with a general inclination, like Jacobson, may have a propensity to engage in what is termed illegal behavior, but choose not to act on these legally forbidden inclinations: “We simply conclude that proof that petitioner engaged in legal conduct and possessed certain generalized personal inclinations is not sufficient to prove beyond

---

33 Ibid. 436.
34 Ibid. 436.
35 *Sorrells*, 287 U.S. 453 hints at this view; however, many courts and writers do not hold this position.
37 Ibid. 550.
a reasonable doubt that he would have been predisposed to commit the crime charged
independent of the Government’s coaxing.” 38 Predisposition signifies a preparedness and intent
to act in a legally forbidden manner when the opportunity to do so presents itself. 39 The dissent
criticizes the majority opinion because it reads an intent requirement into predisposition, saying
that a defendant must now be both “predisposed to engage in the illegal conduct, here, receiving
photographs of minors engaged in sex, but also [be]…predisposed to break the law knowingly in
order to do so.” 40 A hypothetical example that illustrates this distinction is a person whose
greatest pleasure is inhaling cocaine. After this person served a prison sentence for possession of
narcotics, he avoids situations that would tempt him to use or buy cocaine in the future because
possession would put him at risk for a second sentence. He is disposed to use cocaine. However,
since this person does not intend to break the law by purchasing or using cocaine, he is not
predisposed. In Jacobson’s case, the government’s prolonged investigation and excessive
pestering of Jacobson provided evidence that Jacobson was not predisposed. 41 It is, however,
important to note that other courts do not always make a distinction between disposition and
predisposition. In U.S. v. Poehlman, 42 Poehlman was convicted for crossing state lines with
intent to have sex with minors. The only reason Poehlman crossed state lines was to meet
Sharon, an undercover cop with whom he had corresponded through electronic mail and desired a
romantic relationship. In their correspondence, Poehlman understood hints from Sharon to mean
that she would only be willing to have a relationship with him if he was a sexual teacher for her
young girls. “Even as his e-mails became more intimate and explicit-usually in response to
Sharon's constant hectoring for more details about Poehlman's lesson plans-he never gave any
indication that being a sexual mentor to the girls in any way fulfilled his preexisting fantasies.” 43

Using Jacobson v. U.S. as precedent, the court noted that what was important was “Poehlman's

38 Ibid. 552, FN3.
39 Dworkin, 29.
40 Jacobson, 503 U.S. 540, Dissenting justices, 559-60.
41 Ibid. 552.
42 217 F.3d. 692.
43 Ibid. 705.
state of mind prior to his contact with Sharon.”\textsuperscript{44} “The relevant time frame for assessing a defendant's disposition comes before he has any contact with government agents, which is doubtless why it's called predisposition.”\textsuperscript{45} The majority of the court said that Poehlman was not predisposed; hence, he was found not guilty. The Poehlman court used disposition and predisposition interchangeably. For this court, predisposition is simply one’s disposition prior to the police conduct, which is culpable. For me, however, predisposition equals intent, which makes it different from disposition. A predisposed defendant is culpable precisely because he intended to commit the specific crime, whereas a disposed defendant did not have intent and is therefore not culpable. Had the Poehlman court used the predisposition/disposition distinction that takes intent into account, it would have deemed Poehlman disposed, but not predisposed. On Since Poehlman was only disposed, he was entrapped and thus not guilty.

In order to determine predisposition (as it is used by most court majorities other than the Jacobson court), the court examines factors that are not usually admissible in determining guilt, such as past convictions and reputation. Courts examine a number of different factors that are relevant to the predisposition inquiry including excessive pressure or repeated inducement to cause the defendant to engage in the crime, the agent’s appeal to sympathy, pity, friendship of the defendant, exploitation of a defendant’s weakness (such as drug addiction or extreme poverty), an unwarranted length of investigation, an offer of a large amount of money, supply of a necessary ingredient for the manufacture of drugs, provision of technical knowledge for the manufacture of money laundering or drugs, character or reputation of the defendant, prior criminal convictions for the crime for which the defendant is currently charged, whether government initially suggested the criminal activity, and whether defendant engaged in crime for profit.\textsuperscript{46} Although

\textsuperscript{44} Ibid. 703.
\textsuperscript{45} Ibid. 703.
\textsuperscript{46} State v. J.D. W. 910 P.2d. (Ut. Ct. App. 1995), 1242; Anthony M. Dillof, “Unraveling Unlawful Entrapment,” The Journal of Criminal Law & Criminology 94, no.4 (2004), 834. It is important to note that courts that employ the objective test examine the nature and degree of the police inducement, as well. For the court using the objective test, the propriety of police conduct is crucial in judging a defendant’s guilt.
police conduct is a factor external to the defendant, an examination of the strength of the police inducement can provide the fact finder with insight into the defendant’s mental state. If for instance, the police had to resort to strong enticements to get the defendant to succumb, the fact finder might infer that the defendant was not predisposed. Gary Marx argues that the government investigation should be as “nonintrusive and noncoercive” as possible so as to determine guilt more readily. Following Marx’s line of reasoning, the lower the amount of pressure and temptation the police present, the more likely the defendant is guilty. In order to maximize chances that the police catch a true offender, Marx suggests that government investigations and temptations be as close to a real word setting as possible, police set up operations that allow for a high degree of self-selection on the part of the defendant to engage in the illegal act, and police use minimal deception to lure the target.

Despite the fact that the Supreme Court and most federal courts have adopted a subjective test similar to the one discussed, many state courts have opted to follow an objective test. Rather than examining the mental state of the defendant, the objective test focuses on the propriety of government conduct and inducements. Under this test, if it is likely that the government inducement in a specific case would have tempted a “normally law-abiding person,” the court acquits the defendant. Sometimes courts replace the phrase “normally law-abiding” with “average” person. In the sense that this test focuses on the propriety of police conduct rather than on the blameworthiness of the defendant, it is similar to the exclusionary rule that forbids use of evidence (even that which proves guilt) taken in violation of the Fourth amendment. Proponents of the objective test seek to limit aggressive police tactics that risk entrapping normally law-abiding people in an effort to curb overzealous law enforcement. Furthermore, some objective theorists are skeptical of using predisposition to judge a defendant’s

47 Marx, 93.
48 Ibid. 105.
guilt because they fear such a judgment will base punishment on a person’s criminal character, which our legal system does not permit;\textsuperscript{51} or because it is impossible to determine the mental state the defendant had prior to and during the undercover operation.\textsuperscript{52}

A case that illustrates the application of the objective standard is \textit{The People v. Tray Edward Watson}.\textsuperscript{53} In this case, police officers staged an elaborate sting operation in which they pretended to arrest a man, who was actually an undercover officer. The police drove away with the arrestee, leaving the arrestee’s vehicle behind. The police left the arrestee’s car unlocked with keys in the ignition and “conveyed the idea that detection was unlikely.”\textsuperscript{54} After Watson’s niece, who had seen the arrest from an apartment window, told him about the unlocked vehicle, Watson arrived at the parking lot and attempted to steal the car, upon which the police arrested him. The court declared that the police had done “nothing more than present to the general community a tempting opportunity to take the car.”\textsuperscript{55} It reasoned that the “person who steals when given the opportunity is an opportunistic thief, not a normally law-abiding person. Specifically, normally law-abiding persons do not take a car not belonging to them merely because it is unlocked with the keys in the ignition and it appears they will be caught.”\textsuperscript{56} So here, because police conduct was not deemed likely to entrap a normally law-abiding person, the government passed the objective test. Watson was convicted.

In \textit{State v. J.D.W.},\textsuperscript{57} Officer Wakefield, working undercover, solicited over 100 people in a public mall to buy marijuana. Eventually, J.D.W., a minor, agreed to meet with the officer in the parking lot in order to exchange money for the drugs. Applying the objective test, the court determined that “Wakefield did not engage in any activity that ‘would be effective to persuade an average person…to commit the offense,’” and added that Wakefield used the market rate to

\textsuperscript{51} Dworkin, 29; Dillof 833; Carlson, 1107; Joel Feinberg, \textit{Problems at the Roots of Law}, (NY: Oxford University Press, 2003), 59.
\textsuperscript{52} Allen et al., 412, 414.
\textsuperscript{53} 22 Cal. 4\textsuperscript{th} 220 (Sup. Ct. Ca., 2000).
\textsuperscript{54} Ibid. 224.
\textsuperscript{55} Ibid. 222.
\textsuperscript{56} Ibid. 222.
\textsuperscript{57} 910 P.2d 1242, 1244.
determine the price of the marijuana and did not make repeated requests or badger J.D.W. to buy the marijuana.\textsuperscript{58} Thus, the court convicted J.D.W.

CULPABILITY

So far I have discussed the development of the entrapment defense and it’s two variants, the subjective and objective tests, which approach the issue of guilt from different angles. The subjective test attempts to ascertain the intent of the defendant to commit the crime before the government approached him while the objective test examines the propriety of government conduct as it relates to the normally law-abiding person. When determining which factors or test is the best method for ascertaining a defendant’s guilt and subsequent punishment, it is important to consider the overall purpose of punishment in general. According to retributivism, one of two predominant theories of punishment, justice demands that we punish those who break the law because they are blameworthy. Culpability of the criminal, not other goals such as deterrence, ought to be the primary factor that determines whether we should punish someone. The competing philosophy of punishment, utilitarianism, states that we should only punish when doing so will increase social utility. Utility is usually increased if punishment will incapacitate or deter a dangerous criminal, rehabilitate the criminal, and deter other criminals from committing future crimes.\textsuperscript{59} Culpability does not typically influence utilitarian calculations. I shall defend retributivism and argue that we should only punish people who are culpable, rather than basing punishment upon utilitarian calculations. Accepting the fact that we should not ban undercover operations altogether since they serve an important function because they unearth criminal activity, it is important that we punish only culpable defendants and acquit people whose behavior was not culpable.

Typically, a person who commits a crime in our justice system is by definition guilty and usually deserves punishment. In most criminal cases, judges and jury must find that a defendant

\textsuperscript{58} Ibid. 1244.
had *mens rea*,\(^{60}\) which in the narrow sense means intent to commit a crime. In our justice system, we can only rightly hold people accountable for their actions if they were responsible for them. In order to be responsible, a person must have had both the requisite mental state, meaning he is capable of understanding the nature and consequences of his actions, and the intention to commit a crime. In cases in which a person committed a crime as a result of duress, we do not hold him blameworthy to the same degree as a person who intended to break the law. The person who kills in self defense does not do so with the primary goal of killing the attacker; rather, they do so in order to protect their own life. The notion that a person might not be responsible for a crime where external pressure diminished his free choice to act applies to undercover operations, as well. When government agents tempt a person to commit a crime, an agent’s inducements, rather than the will of the defendant, might have been the primary cause for the crime. If it is not clear that the defendant had intent to commit the crime, we cannot assign full responsibility for committing the crime to him. Culpability of defendants in entrapment cases, therefore, is not so clear-cut.

The state should not punish entrapped people because they are not culpable. The subjective test I advocate, which distinguishes predisposition from disposition on the basis of intent, determines culpability better than the objective test. The defendant who claims entrapment asserts that the state should not blame him for acting as he did and that punishment will not serve any good purpose. Examination of predisposition is a better method of determining culpability than the objective test because it focuses on a defendant’s intent to commit a crime. The subjective test is advantageous to the innocent defendant because he can introduce a greater number of facts about his character to demonstrate that he is not blameworthy.\(^{61}\) Judgments according to the objective test rest too heavily on a determination of what the “average law-abiding person” would have done in those circumstances. In making this determination, it is

\(^{60}\) *Mens rea* literally means “vicious will.”

\(^{61}\) Park, 170, 199, 219.
inevitable that the fact-finder will look at the behavior of the defendant (which is what the subjective test does) and perhaps introduce bias as to what the fact-finder personally believes to be a law-abiding person. Moreover, the “average” person is a vague concept that may vary depending on the moral composition of members of society. The subjective test avoids this ambiguity by judging defendants on a case-by-case basis and permits a multifactor analysis.

Because retributivism should be the guiding philosophy for punishment, courts should first decide whether the defendant deserves punishment at all by ascertaining whether he is culpable for the police induced crime. Court should assess culpability according to the subjective standard. The defendant is guilty if the prosecution has proved beyond a reasonable doubt that the defendant was predisposed, meaning he had intent, to commit the offense in question. Although predisposition is the standard by which we should judge the culpability of a defendant, its existence does not automatically validate punishment of a defendant. A predisposed defendant may assert that undercover police tactics reached such a level as to violate the defendant’s due process rights. If the judge or jury finds that police conduct was outrageous in a specific case, the court should follow the example of what courts do when they invoke the exclusionary rule (as it is applied in Fourth Amendment cases) and acquit the defendant on due process grounds. Acquittal on due process grounds does not mitigate the guilt of the defendant, but recognizes that the government violated his right to due process.

Chapter I

Punishment

Theories of punishment should guide the construction of the entrapment defense and our judgment as to when we should punish defendants caught in sting and decoy operations. Although our system of justice and punishment contains features of both utilitarianism and
retributivism, I shall argue that retributivism and the belief that we should punish people only if they are culpable ought to direct the goals and contours of the entrapment defense. In those instances in which government tempts or pressures citizens, punishment should only be imposed upon defendants who are blameworthy. Culpability is a prerequisite for punishment; however, its presence does not necessitate punishment. Culpability is difficult to assess in entrapment cases because defendants admit to having broken the law, but claim that they are entitled to the defense because the government caused them to commit the crime. Some defendants who are lured by the government are not blameworthy, and thus do not deserve punishment. In later chapters, I aim to elucidate the distinction between culpable and non-culpable defendants caught in sting operations. First, I will demonstrate that we should base punishment on retributive theory and culpability rather than utilitarianism.

A. UTILITARIANISM

Jeremy Bentham was one of the first philosophers to articulate utilitarian theory. He believed individuals and society should make decisions according to the likelihood that the decision will increase utility. In its most basic form, utility is the value of the benefits weighed against the cost of a specific action. In the context of the legal system, utility equates to the social value of an act, such as punishment in a single instance, or a legal practice, such as punishment for inchoate crimes. Predicted utility of an outcome (referring to the happiness of society) and not some other factor such as culpability, is the primary determinant of whether we should punish someone. Bentham refers to the actual criminal act (such as robbery) as “primary mischief” and labels the increased “danger” and “alarm” society suffers from the prospect of being a victim to a crime “secondary mischief.” Deterrence of the criminal and future crimes others might commit is a significant benefit of punishment: “Bentham, then, gives what is essentially a deterrence-
based justification of the infliction of punishment – we inflict punishment to deter future mischief – that is premised on the more general claim that mischief detracts from our happiness, and the increase of happiness should be the ultimate end of all ethical actions. Bentham justifies punishment by showing, not that it serves justice, but that it promotes the good.\textsuperscript{64} Despite the fact that Bentham places a premium on the value of deterrence, he does not argue that we should punish innocent people if it would augment social utility. Rather, he “implicitly accepts the weaker retributive principle that we must punish only for an offense.”\textsuperscript{65} Bentham insists that “we punish only when punishment will be efficacious,” which may mean that we do not punish some offenses.\textsuperscript{66}

Another important utilitarian reason for punishment is that the criminal will be incapacitated and rehabilitated. Theorists recognize that there may be no need to incapacitate or rehabilitate a person who is not truly dangerous or who cannot fully appreciate the consequences or illegality of his actions. The mentally insane and children are examples of persons who may not have a full capacity to understand the reasons underlying their punishment.\textsuperscript{67} Some philosophers would refrain from punishing a person (even if punishment would deter others) if that person has no reason to repent or is not dangerous.\textsuperscript{68} These philosophers would not force a non-predisposed person to undergo punishment and rehabilitation because a non-predisposed person was not in the habit of committing crimes in the past, is not likely to commit crimes in the future, and does not have much reason to reflect on his decision to commit a crime induced by the government.\textsuperscript{69} The non-predisposed person does not perceive that he had much power to resist the inducement when the government offered it.

\textsuperscript{64} Ibid. 72.
\textsuperscript{65} Tunick, 76.
\textsuperscript{66} Tunick, 76.
\textsuperscript{67} Tunick, 72.
\textsuperscript{69} McAdams, 128.
One category of utilitarianism is rule utilitarianism, which refers to the utility of following a general rule. When followed, these rules will result in the greatest good. An action is judged to be right if there is a greater utility in adhering to a rule requiring the action than in adhering to some other rule or none at all. Even if following the rule will lead to a decrease in utility in a particular instance, rule utilitarianism maintains that following the rule at all times will lead to greater utility overall. Would a rule utilitarian support an entrapment defense? A rule utilitarian might propose a rule that says, “Punish in all cases in which a person breaks the law.” Under this extreme scenario, everyone who breaks the law, including entrapped persons, must be punished; there are no exceptions. There would be no entrapment defense. On the contrary, there may be utility in having an entrapment defense. Another possible rule that a rule utilitarian might accept is to punish those who commit crimes unless the offender was entrapped. Not punishing an entrapped person has a host of benefits, including reduced cost to taxpayers because the offender is not in prison, restraining overzealous police conduct, decreased fear that one will be punished if entrapped, and preservation of personal autonomy to be free from government interference. Benefits that result from this kind of rule may be greater than benefits that ensue from a rule that says “punish all criminals.”

Some theorists who adopt a utilitarian analysis of the entrapment defense discuss the effects of publicity of entrapment cases on deterrence. Publicizing proceedings of cases in which a defendant successfully raised the entrapment defense may increase the danger that criminals will learn about court prohibitions on police conduct and take greater precautions to avoid acting in ways that will indicate to the court that the offender was predisposed. Habitual criminals will be alert to the fact that certain kinds of police tactics, such as repeated offers, will diminish a finding of predisposition in court. Some examples of blanket prohibitions are that police may not 1) make repeated (three or more) offers, 2) appeal to friendship, 3) develop a

---

70 Carlson, 1055.  
71 Dillof, 868.  
72 Hay, 393; McAdams, 130.
romance with defendant, 4) a female officer may not initially offer her sexual services to catch a potential client for prostitution, or 5) offer ordinate financial gain.73 Furthermore, Hay notes that “professional crooks often feign reluctance when approached to do a “job” (precisely in order to ward off stings) before finally accepting the offer.74

One example of a utilitarian approach to entrapment is Allen et al.’s market test. The authors believe we should administer punishment if doing so will achieve the primary objectives of the criminal law, which are deterrence, incapacitation, and rehabilitation.75 These goals will only be accomplished if the offender caught in an undercover operation responded to a market-level inducement, such as the going street value for 100 grams of cocaine. Punishment of a person who accepts an extra-market offer (above or below market-level) will not achieve utilitarian goals of punishment. For these utilitarians, culpability is beside the point. They argue that there is no retributive justification or “culpability” reason to punish a person who accepts an extra-market inducement because this person did not cause or risk actual harm. Allen, et. al. criticize the use of predisposition, what they call a fictional entity, to differentiate the guilty from the innocent.76 The authors believe most people are disposed to commit crimes and that everyone has a price where the benefits of a crime outweigh the costs of going to prison that needs to be met in order for them to commit a crime. “The failure to take [the bait] is evidence of his price, but not of predisposition.”77 Allen et al. do not believe there is a moral difference between those who have a lower price and those who have a higher price. If a person does not accept a given bait, this does not entail that he is not predisposed, but rather that his price has simply not been met.78 What does sort out individuals is “whether they responded to real world, market level inducements.”79 Allen et al. conclude that the entrapment defense should be offered to those who

73 Park, 227.
74 Hay, 407.
75 Allen et. al., 415.
76 Ibid. 409.
77 Ibid. 415.
78 Ibid. 413.
79 Ibid. 410.
respond to above or below market-level inducements. They also argue that courts should consider whether a rational criminal would have acted as the government did. The authors say a rational criminal is not likely to repeatedly solicit a target. However, they do not explain how courts or the fact finder will determine whether the inducement was at the market level or how a rational criminal would act. Furthermore, the authors argue that fact finders, who bear responsibility in a trial for discerning the facts, have no “direct access to a defendant’s predisposition,” and that the judgment about predisposition “will be made by appraising how a reasonable person, like the fact finder presumably, would have behaved in the setting at hand.”

There is some version of the market-test implicit in the subjective test because courts already consider the degree of police inducement and rarity of the offer. The market test would allow the conviction of a person who agrees to commit a crime when the police make an offer that is only slightly below the market rate, but would never have been enticed by someone other than the government. While it may be useful to include a market-level analysis in the subjective test because it provides greater insight into defendant’s predisposition, courts should not consider it alone because it ignores other factors about the defendant, such as refusal after repeated solicitations. An experienced drug dealer, thinking he was fooling a naïve buyer (who is actually a government agent) into buying drugs at a high price, might respond to an extra-market government inducement eagerly. Even though the drug dealer is culpable, the market test would not permit a conviction. Allen et al., who subscribe to utilitarian principles of punishment, might argue that punishment in this case will not rehabilitate, incapacitate, or deter the drug dealer from continuing to sell drugs at market price. A retributivist, however, may still consider punishment just on the basis that the dealer intentionally sought to sell drugs, for which he deserves blame and punishment. The presence of an extra-market inducement should not automatically diminish culpability of the defendant; however, I propose that if the inducement is so rare that it is unlikely

---

80 Ibid. 412. This claim also applies to the objective test in that fact finders will have to judge how a “normally law-abiding” person would have behaved in the situation, which then determines whether the police inducement was appropriate.
to have appeared in the private sphere, courts should bar conviction of a culpable person on due process grounds. I shall discuss this matter in further detail in later chapters.

B. RETRIBUTIVISM

Theorists of the competing retributivist philosophy maintain that we should only punish those who are morally culpable. Justice demands that we punish those who are blameworthy, even if this will not achieve another goal such as deterrence, incapacitation, reform, or vengeance. Deontological retributivists, who represent one variant of retributivism, insist we punish, “not for any consequences, such as to deter future crimes, or to reform or incapacitate the criminal, but rather, for the sake of punishing, because punishing is in itself just or right-regardless of the good it may yield.”

Another retributive justification for punishment is social condemnation and vindication of the law. Feinberg and Hegel suggest that to call an action a wrong or a crime logically requires punishment for performing the act. The retributivist principle that Tunick defends “would have us punish all actions that society regards as worthy of its condemnation.”

We should punish those who break the law and are culpable because what vindicates the law. “A crime is an affront to the social morality articulated in criminal or public law.” Kant’s story of the diaspora from an island is an example of positive retributive principle, which states that society should punish all wrongs. Kant tells the tale of a community that is preparing to desert the island it inhabits. It has the option of killing the one man left on death row or simply leaving him alone to die on the island while the community leaves. Kant argues that justice and the law of the community demands that the criminal suffer his original death sentence.

Not all retributivists, however, adhere to a principle that demands such a result. Although Kant’s views may appear somewhat extreme, he still believes, like most retributivists, that we should not “punish people who do not intend to do wrong or who were not legally responsible, because these

81 Tunick, 95.
82 Ibid. 93.
83 Ibid. 118.
84 Ibid. 90.
85 Immanuel Kant, Metaphysik der Sitten, A196-97, B226-27 cited in Tunick, 100.
people do not deserve our condemnation or righteous anger.”\textsuperscript{86} The \textit{mens rea} requirement for many crimes in criminal law reflects the sentiment that we should punish only those who intended to do wrong. A retributivist judge might say that a person lacking intent need not be punished because where a wrong was done unintentionally, justice is not served by inflicting punishment.\textsuperscript{87} Although a utilitarian could also defend a \textit{mens rea} requirement on the grounds that punishing an offender for a crime he did not intend to commit will not deter the offender, a utilitarian justification for a \textit{mens rea} requirement is not as strong as the retributive one because, as Tunick suggests, punishment expresses blame.\textsuperscript{88} The primary reason for punishment is to express society’s blame for the wrongful act that was committed intentionally. Deterrence of the criminal is simply an additional benefit that may result from punishment. The essential feature of those who lack \textit{mens rea} is not that they cannot be deterred, but that they are not blameworthy. The requirement of intent is linked more closely with blame than deterrence. Although utilitarianism provides a valid justification for the \textit{mens rea} requirement, retributivism provides a better one because blame is of utmost importance in retributivist philosophy but plays only a minimal role in utilitarianism.

The just desert version of retributivism holds that desert must be present in order to consider punishing a person; however, desert does not necessitate punishment. It is crucial that courts ask whether there is moral reason strong enough to justify punishment in light of the fact that the police induced the defendant to act. Breaking the law does not require conviction. We should not punish those who are non-predisposed because they did not form the intent to commit the crime before the government presented them with the opportunity. There is a reason, however, to punish the predisposed, as articulated by Yaffe. The predisposed deserve punishment because their decision to commit the crime is a continuation of past deliberations of the illegality.

\textsuperscript{86} Ibid. 148.
\textsuperscript{87} Ibid. 181.
\textsuperscript{88} Ibid. 148.
of an act. Yaffe argues that “S deserves to be punished for C only if at some prior time, S was under legal pressure to grant the illegality of C reason-giving weight in his deliberations and decided to do C, despite those pressures.” In other words, a person only deserves to be punished if he had contemplated the consequences of performing a criminal act prior to the presentation of the criminal opportunity and decided to commit the crime nevertheless. Yaffe says that if we accept that an offender was non-predisposed, the offender might have rationally deliberated the illegality of an act but would not have chosen to act illegally had the government not approached him. We should express condemnation and apportion blame only on those who can be said to have voluntarily and intentionally committed a crime and are responsible for it. With regard to entrapped defendants, Roger Park writes, “it seems obvious that they [the entrapped] are less blameworthy…than the ordinary offender. Since they are less blameworthy, they are less deserving of retributive punishment.”

Von Hirsch says desert is a reason for punishment, but its presence does not necessarily mean we should punish. He places value on the improvement of society that results from deterrence, which may prevail over moral reasons not to punish someone. Tunick gives the true example of Leroy Strachan, an upstanding senior citizen who confessed to killing a police officer forty-three years previously. Von Hirsch would probably not punish Strachan because punishment is unlikely to have deterrence effects, even though Strachan deserves punishment. If he believes the non-predisposed person does not deserve punishment, von Hirsch would not punish him simply for the sake of deterrence. Griffin, another just deserts adherent, argues that “demerit is a moral reason for punishing” someone, but only if punishment will result in the

---

90 Ibid. 29.
91 Ibid. 33.
92 Park, 240.
94 Ibid. 106.
95 Ibid. 104.
offender’s “perception, guilt, and repentance.” Therefore, if the offender repents and reforms, there is no reason to punish him. It seems that Griffin would not punish the non-predisposed offender because this person has no reason to repent or be rehabilitated, other than the fact that he has a weak ability to resist temptation. Not having formed a strong ability to resist breaking the law when pressured by the police is not the equivalent of intentionally breaking the law without such pressure. It requires a stronger amount of will power to resist engaging in illegal activity when the government employs pressure and makes a crime seem attractive. Similar to Griffin, John Stuart Mill says that wherever there is guilt, punishment should not always be inflicted by way of retribution. Mill recognizes that it is not justified to argue that guilt and punishment are synonymous. Punishment is only just if it acts upon the will.

Douglas Husak, who, as a retributivist, agrees we should only punish the deserving, maintains that the value of punishment should outweigh its drawbacks, which include the cost, abuse, and error that are present in the practice of punishment. He argues that there should be an “extra-desert” component in addition to guilt that should be met in order to justify punishment. Crime reduction is the “most plausible candidate for this extra-desert component.” His central argument is that “symbolic values [like the condemnatory aspect of punishment] may help to offset the drawbacks of punishment, but only a significant degree of crime reduction by itself seems capable of outweighing them.” The goal of crime reduction may not be realized if the state punishes what Husak calls “nonpreventable” offenses. Nonpreventable offenses are those in which the offense is not particularly serious and the benefits of committing it so are great that very few people would resist it. He would only punish those who commit nonpreventable

96 Griffin, 259 quoted in Tunick, 105.
97 Ibid. 106.
99 Ibid. 458.
100 Husak, 461.
101 Ibid. 460.
offenses in proportion to the seriousness of the offense. Punishment of these offenses may reduce crime “indirectly, perhaps by increasing respect for law generally,” but Husak is skeptical of this possibility. Nevertheless, we might apply Husak’s position on punishment to entrapment. Crimes in which the bait is particularly tempting or the government offers a great deal of aid would probably be classified as nonpreventable offenses. When the government tempts and coerces a non-predisposed target, the commission of a crime on the part of the target becomes almost inevitable, as Yaffe suggests. If this is the case, Husak would probably not punish in entrapment cases because doing so will not result in deterrence because the government made the crime so attractive that it became a nonpreventable offense. This supposition, based on Husak’s argument, is a bit simplistic because it justifies foregoing punishment simply because people cannot resist benefits of crime. A determination that a punishment, or lack thereof, will not deter others should not override the moral demand to punish guilty offenders who had a free choice to commit their crime even if it was appealing. On my interpretation of predisposition and non-predisposition, what diminishes guilt is the fact that police intervened and caused the commission of a crime by a non-predisposed person. Though it may appear that a predisposed defendant could not resist the government opportunity, there was no effort to resist the temptation because, as a predisposed person, he intended to commit the crime. A finding of guilt should be required in order to justify punishment, but courts should not reduce or preclude punishment of a predisposed person simply because a crime might have appeared irresistible to innocents. Although entrapment cases represent a kind of unpreventable offense because a government induced crime might have been irresistible, we can still justify the punishment of some offenders (the predisposed) and not others (the non-predisposed and disposed). Both non-predisposed and disposed defendants who committed crimes failed to resist the temptation because the

---

102 Ibid. 462.
103 Yaffe, 34.
government coerced them; therefore, they are not culpable, and should not be punished for their crimes.

Legal punishment is a practice that has conflicting principles within it; however, I maintain that culpability and retributivism, as opposed to utilitarian considerations, should direct judgments as to whether we should have an entrapment defense and of what it should consist. A person must be morally blameworthy before we can even consider punishment. There should be an evaluation of the criminal’s intent and a moral reason for punishing a criminal other than a calculation of social happiness and deterring other people. I agree with Tunick, who says that we should apply the retributive principle as far as it can go in deciding whether or not to punish a criminal and the degree of punishment that the criminal deserves. Then, we can use utilitarian principles to determine the specifics of a punishment. Utilitarianism is more useful for determining the kind and duration of punishment, but should not be the underlying justification for it because it does not give substantial consideration as to whether a person is culpable and deserves punishment.

Thus, the theory of retributive punishment should determine the standards courts use to judge entrapment cases. Conviction in cases where the police attempted to induce a crime or set out bait should rest on the defendant’s moral blameworthiness. Predisposition, I will argue, is the best measure of a defendant’s culpability. Before doing so, it is necessary to explain in further detail why entrapped defendants are less culpable than those who commit crimes in the private sphere and the relationship between character and culpability.

Chapter II

“Is the Entrapped Person Less Culpable?”

---

104 Tunick, 171.
Character and intent play an important role in deciding the degree of responsibility we ought to attribute to an individual for an action. People have a moral obligation to develop good characters. Furthermore, people should try to develop a capacity to resist illegal or immoral temptations. Following this premise, people should take responsibility for their characters. Those who voluntarily will an outcome to occur and have free choice in their actions are morally responsible for their actions. The converse of this conjecture is that those who do not voluntarily intend an outcome to occur are morally blameworthy to a lesser extent than people who will an outcome to occur. Feinberg says that while a person (or his act) may be a causal factor that contributed to the outcome, which would mean he is at fault, he may not be the cause of the outcome. A person can only be blamed for harm if he or she is the primary cause of it. A number of writers agree that weak inducements indicate that a person was ready and willing to commit the crime and is largely responsible for it. Conversely, the stronger the inducement, the less likely the person is blameworthy. An entrapped person who is not predisposed is perhaps morally at fault since he committed a crime, but he is not morally blameworthy because his actions were unduly influenced by the police. Although a person who is simply morally at fault may deserve some sort of condemnation from society --perhaps being arrested and suffering through pretrial procedures suffice-- this person does not deserve punishment. Because character, intent, and motivations are important factors that propel people to commit crimes, they should be taken into account in entrapment cases.

A. CHARACTER AND CHOICE

---

105 Ibid. 206.
Before I discuss moral responsibility, it is necessary to consider whether people can be held responsible not only for their actions, but also for their characters, which, to a degree, produce actions. The connection between character and actions is especially relevant for ascribing responsibility in the subjective test, which considers a defendant’s character as part of the predisposition inquiry. While I do not deny that one can be responsible for one’s character, the focus of the entrapment defense should be on intent. One argument against a predisposition test (as it is usually interpreted) is that it punishes people for character instead of actions, which is wrong. Some, such as Robert Owen, argue that people are not responsible for their characters, which is a view I disagree with. While I do not deny that people are responsible for their characters, the primary focus of the entrapment defense should be intent. Under the subjective test I propose in which intent is the most important factor that determines culpability, character is important only in so far as it is one possible underlying cause of an intention that was freely chosen. People can only be culpable for intentions and actions that either their characters or will produced. From this, it follows that if an intention was produced or manipulated by an external force, it does not reflect a person’s character or will. The will is the same as one’s choosing agency and is separate from character. When character produces irrational desires, such as acting criminally, the will acts to restrain them. In restraining irrational desires, the will changes character for the better. In order to hold an enticed person accountable for his crime, he must have formed the intent to commit the particular crime prior to the police involvement. This intent, if it was formed without external interference or pressure from the police, reflects the defendant’s character. A predisposed person had such a character that caused him to form the intent to commit a crime. The predisposed person did not have a will that restrained his desires. A disposed person, unlike the predisposed person, had a will that enabled him to resist forming the intent to commit the crime until the police manipulated his will through inducements and pressure. Although the ultimate decision of a disposed person to commit a crime reflects the “bad” general tendencies a disposed person may have, we cannot hold this person responsible for
the crime because the decision was not the equivalent of a premeditated intent to commit the crime. The decision created by the police. Rather than say disposed people have bad characters, it is more accurate to say they have weak characters and wills to be law-abiding. People are responsible for their characters and for choices they make freely because they have a will, which enables them to shape their characters. People do have an ability to mold their characters, and it is important to develop good character.

John Stuart Mill believes that while external forces outside of our control may determine part of our character, we still have the capacity to shape it; therefore, we are responsible for our actions. For the most part, Mill rejects Fatalism, a philosophy that states that everything has an antecedent cause. Fatalism is based on the theory of Necessity, also called Determinism. According to Necessity, volitions and actions are necessary and inevitable.107 “If we knew a person thoroughly, and knew all the inducements that were acting upon him, we could foretell his conduct.”108 Consequently, “a man cannot help acting as he does; and it cannot be just that he should be punished for what he cannot help.”109 Some Necessitarians believe that education and circumstances shape character, but still believe that we can do nothing to prevent ourselves from feeling and acting in a particular way; therefore, since people are not accountable for their actions, we cannot punish them.110 The opposing theory, the Free Will Doctrine, states that the “will is not determined, like other phenomena by antecedents, but determines itself; that our volitions are not…the effects of causes, or at least have no causes which they uniformly and implicitly obey.”111 The Free Will Doctrine holds that we are responsible for our characters and that we have a moral obligation to improve them. Mill takes a position that falls between

108 Ibid. 837.
110 Ibid. 461.
Fatalism and the Free Will Doctrine; he is a compatibilist. He believes everything has an antecedent cause, but humans are agents in determining that cause. Necessity exists, but doesn’t imply Fatalism. We all believe that we could predict behavior if we knew everything about a person, but we also believe we could resist certain things that attempt to shape us. Mill argues that people do have a power to mold their character. When our habits are not too inveterate, we can make ourselves different. We can place ourselves under the influence of other circumstances.\(^{112}\) The feeling that we can modify our character is itself the feeling of moral freedom.\(^ {113}\) “A person feels morally free who feels that his habits or his temptations are not his masters, but he theirs.”\(^ {114}\) As we form habits, we gradually do not perform actions with regard to their pleasure or pain. The habit of willing is called purpose. “It is only when our purposes have become independent of the feelings of pain or pleasure from which they originally took their rise, that we are said to have a confirmed character.”\(^ {115}\) Being subject to punishment for committing a crime can help someone change their character. Mill believed we could only inflict punishment justly if punishment acts upon the will: “If punishment had no power of acting on the will, it would be illegitimate.”\(^ {116}\) We can only be punished if we are accountable for our actions.\(^ {117}\)

If we believe people are responsible for their characters and should develop their characters into ones that are morally good and law-abiding, then we can blame them for having the character they have and intentions that result from it. But in considering entrapment, we must ask whether we can blame a person with a good character who failed to exercise resolve in the face of a temptation to break the law. Dillof discusses the Limited Resources argument, which states that “persons cannot be expected to develop more than a reasonable degree of resistance to temptation” because people do not have time to develop all virtues to their fullest.\(^ {118}\) One cannot

\(^{112}\) Mill, Of Liberty, 840.
\(^{118}\) Dillof, 853.
be blamed for yielding to temptation if one has done all that reasonably should be done to “steel one’s character.” According to the Limited Resources argument, if people make the right choices leading up to the temptation, they cannot be blamed for acting wrongly by succumbing to a temptation when enticed. This argument is akin to the character theory of excuse, which states that we should only hold people responsible and liable for those wrongful acts that are truly representative of their characters. Dillof, however, rejects the Limited Resources argument, asserting that although those who are tempted by the government “might not be blamed for failing to develop character qualities to resist offers of the type needed to qualify for the defense, they may be blamed for failing to resist the offer itself.” There is no rotten social background defense, which is an excuse based on the reasoning that the defendant could not help committing the crime because he, through no fault of his own, has a bad character, which a corrupt or underprivileged background caused. Dillof maintains, “as a matter of morality, a person should not accept any enticement to wrongdoing, even if a person with a reasonably resistant character would accept.”

Choice theory, which recognizes the significant effect coercion can have on free choice and responsibility for actions, provides insight into entrapment cases. According to choice theory, an actor is not responsible for a choice that he did not make freely: “One is excused for the doing of a wrongful action because and only because at the moment of such action’s performance, one did not have the sufficient capacity or opportunity to make the choice to do otherwise.” Where these [normal] capacities and [fair] opportunities are absent, as they are in different ways in the varied cases of accident… coercion, insanity, etc., the moral protest is that it is morally wrong to punish because ‘he could not have helped it’ or ‘he could not have done

---

119 Ibid. 853.
120 Ibid. 853.
121 Michael Moore, Placing Blame, (Oxford University Press, 1997), 563.
122 Ibid. 856.
123 Ibid. 854.
124 Ibid. 855.
125 Moore, 548.
otherwise’ or ‘he had no real choice.’”\textsuperscript{126} An actor did not have a fair opportunity to make a free choice if that choice was subject to coercion. The same might be said regarding a defendant’s choice to commit a crime in an undercover operation where the police applied continuously greater pressure for the purpose of causing the target to commit a crime.\textsuperscript{127} Yaffe contends that this gradually increasing pressure “undermines the tempted’s culpability for compliance.”\textsuperscript{128} A person might have done all he could to avoid breaking the law, but may still succumb when the government lures him. A person’s choosing agency and character are mutually exclusive.\textsuperscript{129} Although a disposed person has a “bad” character in that it is weak, he has a will to act in a “good” manner by being law-abiding, and this good will is manipulated by government pressure. If the government pressured him, a person with weak will power should not be considered liable for his crime. Choice theory is important insofar as it explains why we should punish the predisposed but not the disposed, even though the predisposed and disposed have the same criminal characters. Those who are predisposed had the intent to commit a specific crime, and this choice to commit the crime was not caused by the government inducement. On the contrary, government coercion in sting operations unduly influences non-predisposed and disposed defendants’ abilities to make a free choice. Temptation can generate within disposed and non-predisposed people the intent to commit a crime.

The degree to which external conditions can diminish free choice also raises the question of how relevant a poor social background is to guilt and culpability. Should we hold individuals who live in a community where illegal activity is common to a lower standard of criminal liability than those who do not? A lower standard of liability implies that we should not expect people who have an impoverished background where law breaking is common to have developed the same level of resistance to breaking the law as people from more affluent backgrounds. Courts

\textsuperscript{127} Ibid. 34.
\textsuperscript{128} Yaffe, 40.
\textsuperscript{129} A possibility noted by Moore, 574.
have traditionally rejected the social background defense, saying that coming from a poor or degenerate community does not mitigate the defendant’s culpability. If people have some contact with a culture that recognizes ideals of morality and right and wrong and live under laws that police enforce, they should have attempted to develop their weak characters into stronger ones despite the fact that they live in a community where most people lack morals. Moreover, poor defendants had a free choice to do wrong if they did not face external pressure. Although the social background defense is not usually recognized in ordinary criminal cases, the court in *U.S. v. Dion* said that social background may be relevant in determining predisposition and culpability:

An “individual cannot claim that he was entrapped simply because he was poor and could not resist substantial sums of money to be made through criminal activity…However, in some cases, it may be that the unusual poverty of the defendant or other problems peculiar to the defendant must be considered in determining predisposition.” The court did not consider the poverty of the defendants to be a sufficient excuse for committing the crime; however, it did factor the poverty of the defendants into the predisposition inquiry. The court determined that the major reasons the Dions succumbed to the financial inducement to sell the illegal feathers was that they lived in such dire poverty that they could barely afford food and heat. The Dions would never have entered the illegal eagle feather trade were it not for the undercover agents. Social background, while it may explain why the defendant chose to commit a crime, should not constitute a defense in itself because even if people have not been instilled with good values or respect for the law, few people are so ignorant that they do not know that dealing drugs or stealing is illegal.

In *Doing and Deserving*, Joel Feinberg also says that people should be responsible for their characters. He presents a unique argument that people are not necessarily wholly to blame for the outcome of a voluntary action. Feinberg makes a distinction between moral fault and moral responsibility. Being morally at fault is not blameworthy, but being morally responsible is.

---

130 762 F.2d 674, 689.
He says we cannot hold an agent responsible unless his action was the cause. If his action was not the cause, but merely a causal factor, the agent is at fault. Feinberg gives the example of a scenario in which Hemo, a hemophiliac, insults Hotspur, who reacts by slapping Hemo. The blow happens to cause a small cut on Hemo’s face, who bleeds to death. A rough slap does not usually lead to death, and Hotspur did not intend to kill Hemo when he slapped him. In this case, the “harm is disproportionally greater than the fault,” and Hotspur cannot be blamed for Hemo’s death. A person can well be morally at fault in what he does without being morally responsible for some given harm, even when the harm would not have happened but for his “fault.” “The harm can be properly ascribed to him only when his “fault” is sufficiently “serious” and makes a sufficiently “important” contribution to the harm. Moral responsibility is difficult to assign even when the agent was the cause of harm because we cannot be certain of the extent to which his actions were fully voluntary. Cooperating factors, such as a physical illness, “dizziness,…motives of self-preservation, preservation of property, safeguarding of other rights, privileges, or interests of self or others,…[or] a mistake” may diminish voluntariness of an action. He argues that character is one of many competing forces and factors that cause a person to act.

Having a character of a certain sort is often a necessary condition for the forming of any particular intention and thus, in a sense, is a “contributor” to its coming into being….Since one’s character, then, is never a sufficient condition for one’s intentions, but only one of numerous cooperating factors, it follows that whether or not a person is (retrospectively) responsible for his intentions depends on how important a role his character played in their genesis – that is, on how truly representative they are of his character.

Character at a given moment (as opposed to character averaged over time) and external circumstances that are uncontrollable, such as a stomach disorder, a highly provocative insult,

---

131 Feinberg, *Doing and Deserving*, 201.
132 Ibid. 34.
133 Ibid. 213.
134 Ibid. 32.
135 Ibid. 149.
136 Ibid. 35.
one’s sensitivity to remarks, a disposition to anger, interact to produce an intention.\footnote{137} The question then is: do certain facts about the “self or character as a moral agent…[constitute] sufficiently important necessary conditions to warrant the ascription of a one-and-for-all, ‘absolute’ moral responsibility for the intention?”\footnote{138} According to Feinberg, we cannot hold a person morally accountable solely based on his character because mitigating circumstances may occur that produce a result that does not reflect the person’s actual character. The intention that is caused by external circumstances may even be alien to the person’s normal character. He says we must ask how representative a person’s intentions are of his character and judge responsibility based on this connection. To illustrate this, he says we should not put the fact that Jones drove 10 miles over the speed limit in order to get someone to the hospital on his driving record because the “circumstances were so special that his behavior did nothing to reveal his predominant tendencies.”\footnote{139} Feinberg is reluctant to assign punishment based solely on character because deciding the right amount of suffering would require “an assessment of the character of the offender as manifested throughout his whole life.”\footnote{140} Feinberg maintains that we should not examine character to determine guilt because it is both impossible and rational people, who have unique subjective judgments, might assign dissimilar sentences for the same criminal. He says an individuation of punishment, which would allow judges to impose different sentences for the same crime depending on the moral guilt or wickedness of the offender, as opposed to general rules of punishment, in which sentences are imposed depending on the severity of the crime without regard to the morality of the defendant, would be arbitrary if we take character into account.\footnote{141} He criticizes the use of the subjective test to determine culpability in entrapment cases.\footnote{142} Feinberg believes that if courts employ the subjective test, they punish a person for having a high susceptibility (disposition) to commit the crime, which he intuitively considers

\footnote{137} Ibid. 36.  
\footnote{138} Ibid. 36.  
\footnote{139} Ibid. 126.  
\footnote{140} Ibid. 116.  
\footnote{141} Ibid. 117.  
\footnote{142} Ibid. 74 FN22.
unjust. Feinberg concludes by saying that the punishment should fit the crime and be determined by the “amount of harm it generally causes and the degree to which people are disposed to commit it.” The purpose of punishment and policies society wishes to maintain should guide the degree of connection required between character and the harm caused, which means that society should determine the extent to which character must reflect the crime in order to apportion blame and subsequent punishment. Adopting this view of moral fault and blameworthiness, the entrapped may be morally at fault because he broke the law, but not morally responsible for the criminal act because the crime does not reflect the predominant tendencies or intent of the entrapped person.

Feinberg says that there must be a connection between character and harm caused in order to assign blame. If the government goads a non-predisposed person to commit a criminal act, the character of the non-predisposed person is not sufficiently connected to the crime. Something else, then, must have caused the crime. The most relevant cause of the crime was not the decision of the non-predisposed person simply because his decision was the last occurrence in a series of events that led to the crime. The most relevant cause of the crime may be traced back to the government’s inducement, which is a notion with which Feinberg would likely agree. Feinberg clarifies his conception of causes by challenging Hart and Honoré’s voluntary intervention principle, which states that “the free, deliberate and informed act or omission of a human being, intended to produce the consequence which is in fact produced, negatives causal connection.” The exceptions to the voluntary intervention principle are situations in which someone persuades, induces or entices (as opposed to merely advises or facilitates) another to do an act that causes harm, and those cases where one person’s negligence provides the opportunity

---

143 Ibid. 175.
144 Ibid. 118.
145 Ibid. 32.
for another party’s voluntary intervention.\textsuperscript{147} For Hart and Honoré, if an intervening cause is present, only the proximate causes ought to be considered when determining the blameworthiness of the person who caused a wrong. An intervening cause cancels out distal causes. For example, you cannot consider a criminal’s parents the cause for the crime simply because they gave birth to him. The criminal’s ultimate decision to commit a crime is the proximate cause, canceling the earlier “but for” causes. Consider an entrapment case in which the police entice a person to commit arson. Hart and Honoré would probably say that since the person voluntarily intervened to commit arson, this negates prior causes. Feinberg disagrees with Hart and Honoré’s argument regarding intervening causes. For Feinberg, causes are more fluid, in that an outcome may be caused by two things at once.\textsuperscript{148} It is the more relevant cause, which is not necessarily the intervening one, that we should focus on. “The more expectable human behavior is, whether voluntary or not, the less likely it is to “negative causal connection.”\textsuperscript{149} To illustrate this idea, Feinberg gives the example of a prisoner who stabs another man with a knife he found in a prison dining hall, where knives are never set on tables. “The laying of the table would be the abnormal event of great explanatory power, and the provision of the opportunity “the cause,” whereas in restaurants, where waiters normally lay out knives, the knife is not the cause of the stabbing.\textsuperscript{150} Only when we can trace the outcome back through to a voluntary act that does not, “in retrospect,” seem “highly extraordinary” that it intervened” may we attribute the cause to the voluntary act.\textsuperscript{151}

Feinberg is open to the possibility that the police inducement may be the relevant cause of the defendant’s voluntary actions in entrapment cases, and not the character or actions of the defendant. The subjective test aims to discover whether the most relevant cause of the crime was the predisposed defendant or police enticement. If the defendant is predisposed, the police

\textsuperscript{147} Feinberg, \textit{Doing and Deserving},153.  
\textsuperscript{148} Ibid. 162.  
\textsuperscript{149} Ibid. 166.  
\textsuperscript{150} Ibid. 166.  
\textsuperscript{151} Ibid. 167.
enticement, while an intervening cause, is not regarded as the most important cause. Given that the predisposed defendant had a preexisting intention to commit the crime, and the police merely provided the opportunity, the defendant’s actions are the cause. There may be exceptions to this rule, however. If a predisposed person lacks resources, technical knowledge, and facilities to commit a crime, the police are the relevant cause of crime. A scenario such as this is an example of due process violation and the defendant should not be held responsible. If the defendant is non-predisposed, we may consider the police the cause because they implanted the criminal intent into the defendant’s mind. Although Feinberg opposes the subjective test because he believes it punishes for character, his conception of causation provides a rationale for using the predisposition/disposition distinction I advocate. The subjective test I propose does not focus on character, but rather on intent, and thus avoids Feinberg’s criticism. In judging blameworthiness of defendants, it is helpful to conceptualize the defendant’s intent as being the most relevant cause. If the intent occurred as a result of the police inducement, the defendant is not culpable.

Like Feinberg, Judge Richard Posner recognized that the most relevant cause for a crime in entrapment cases may be the governmental provision of a criminal opportunity rather than predisposition. In *U.S. v. Hollingsworth* Judge Posner articulated the positional element of a subjective test, which stresses the significance of the government’s provision of an extraordinary criminal opportunity. In the case, Pickard, along with Hollingsworth, decided to become an international financer. Rothrock, a U.S. customs agent who suspected the existence of a possible money laundering operation, was the only person who responded to the Pickard’s newspaper advertisement that solicited customers for his new banking enterprise. Pickard accepted $200,000 from Rothrock, who said the money came from profits obtained from guns that had been smuggled to South Africa. Pickard seemed to know that Rothrock’s scheme was illegal because he realized they should hide this transaction from the government. Posner interpreted the “ready”

---

152 27 F.3d 1196.
component of the subjective test to require that the defendant be in a position, with regard to having experience or acquaintances, to commit the crime without the government’s involvement:

Predisposition is not a purely mental state, the state of being willing to swallow the government’s bait. It has positional as well as dispositional force…The defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so; only then does a sting or other arranged crime take a dangerous person out of circulation.\(^{153}\)

Posner concluded that no real criminal would have done business with Pickard and Hollingsworth because neither had “training, contracts, aptitude, or experience.”\(^{154}\) In this case, even though there is evidence of Pickard’s and Hollingsworth’s predisposition because they showed enthusiasm to commit the crime, their predisposition is not the proximate cause because they lacked the ability and resources to commit the crime independently. Rothrock’s response and aid to the defendants enabled the crime to come to fruition. The court found the defendants not guilty.

Rothrock needed to apply only a small amount of pressure in order to get Pickard to act criminally because Pickard was a willing participant. Feinberg calls the amount of inducement required to cause a person to act criminally “triggering.”\(^ {155}\) Everyone has a threshold that needs to be reached in order to cause a person to commit a crime. Feinberg writes that if a person has a high threshold, much coaxing will have to be done to trigger a person to act in a certain way. We would hesitate to call such an action “fully voluntary – all the more so when the triggered disposition itself was implanted by the instigator through indoctrination, hypnotic suggestion, or other direct and prolonged manipulative techniques.”\(^ {155}\) Correspondingly, given that a person has a low threshold, a weaker trigger makes us less reluctant to regard the act as voluntary.\(^ {156}\) This relates directly to entrapment cases in that a great amount of police inducement is necessary to

\(^{153}\) Ibid. 1200.
\(^{154}\) Ibid. 1200.
\(^{155}\) Feinberg, Doing and Deserving, 171.
\(^{156}\) Ibid. 171.
tempt a non-predisposed person to commit a crime, whereas a smaller amount is necessary to tempt a predisposed person to act. “If our own threshold requirements are carefully observed, if there is no jarring and abrupt change in the course of our natural bent, then it seems to me to do no violence to common sense for us to claim the act as our own, even though its causal initiation be located in the external world.”\footnote{157} In judging entrapment cases, we would first find something in the person that can be reasonably linked to and identified as the primary cause for the harm. If the enticement was not too great, we would be more likely to regard the defendant’s actions as voluntary; therefore, we can determine whether the defendant himself was responsible for the crime more readily.\footnote{158} “The law rightly refuses to accept as an excuse the claim that another party made a criminal act seem so attractive an idea that a person could not resist its appeal.”\footnote{159} Thus, Feinberg would probably punish only defendants whose actions were both voluntary and the relevant cause for the crime.

B. MORAL LUCK

With regard to entrapment, Feinberg makes a persuasive case that the predisposed who succumb to a government inducement and the predisposed who succumb to a private enticement are morally equal, an argument he bases on his explanation of moral luck. According to Feinberg’s theory of moral luck, we should hold people responsible for acting as they did as opposed to for the resultant harm caused. In the criminal law, the element of luck, which introduces arbitrariness into criminal proceedings, could be removed if the causal requirement (the outcome) was eliminated.\footnote{160} He clarifies his theory by saying “the word moral goes with our dispositions...while the word luck goes with our circumstances.”\footnote{161} A person is not “unlucky,” however, in having the wrongful disposition in the first place.\footnote{162} Feinberg would treat attempts

\footnotetext[157]{Ibid. 172.}
\footnotetext[158]{Ibid. 171.}
\footnotetext[159]{Feinberg, \textit{Problems at the Roots}, 62.}
\footnotetext[160]{Ibid. 67.}
\footnotetext[161]{Ibid. 71.}
\footnotetext[162]{Ibid. 73.}
and crimes the same;\textsuperscript{163} attempts include “conscious and unconscious risk creation,…all instances of endangering, threatening, attempting to take, taking, and risking another person’s life.”\textsuperscript{164}

While I agree with Feinberg’s conception of the culpability of a predisposed defendant who succumbs to government and private enticements, I disagree with his contention that culpability does not vary depending on the outcome. An example Feinberg and Leo Katz\textsuperscript{165} discuss is that of the assassin whose bullet missed his target because a fly landed on his nose and the assassin whose bullet killed the target. Feinberg thinks both are equally morally culpable, while Katz believes the successful assassin is more “wicked” because his actions resulted in murder. Another example Feinberg gives to illustrate moral luck is that of a mother who negligently leaves her baby in the tub with the water running while she runs downstairs.\textsuperscript{166} If the mother finds that baby drowned upon returning to the bathroom, she would be legally responsible for murder. But suppose the mother finds the baby is still alive. It may have been the case that the baby survived because the water in the tub flowed at an angle such that the baby, due to his positioning in the tub, was still able to breathe. In this case, she would not be legally responsible. Feinberg argues that because the mother acted the same in both scenarios, the outcome, that of the baby living or dying, which is a matter of luck, should have no bearing on the moral quality of the mother’s actions or her subsequent punishment.\textsuperscript{167} Contrary to Feinberg, I think there is a good reason that we punish defendants who completed crimes more severely than those who attempted crimes. The assassins both may be morally at fault, but the successful assassin is more culpable and deserves punishment because he is responsible for murder. The fact that people die or live makes a difference with regard to the murderer’s or attempted murderers’ culpability. The successful assassin completed his crime and the balance of life, good, and bad actions in the universe have been altered because he broke the law and took a life. Katz makes an extensive

\textsuperscript{163} Ibid. 78.
\textsuperscript{164} Ibid. 80.
\textsuperscript{166} Feinberg, \textit{Problems at the Roots}, 68.
\textsuperscript{167} Ibid. 68.
argument to show that events outside of one’s control can improve or harm an actor’s moral position. If government were to punish murder and attempted murder equally people’s thoughts would not be safe from prosecution. If we called all rare uncontrollable circumstances, such as a flying landing, luck, we would have to punish those who attempt murder and those who complete a murder the same because we believe them to be equal morally. We would have to punish someone who attempted to purchase pornography, but didn’t have access to it, the same as someone who did have resources to buy pornography and did so. If, after the attempted murder fails, the assassin decides to reform himself and never attempts to kill another person in his life, we should not punish him for having had attempted murder in the past. Even though the successful and unsuccessful assassins were morally equal at the time when each pulled the trigger, the unsuccessful murder should not be punished. Although moral luck does not affect culpability, it should affect the punishment.

Feinberg’s belief that moral blameworthiness is equal for attempts and completed crimes applies to entrapment cases. Governmentally induced crimes have been compared to attempts because no actual harm results. Harm does not result because the government preempts it. On the contrary, if a private entity had enticed a person to commit a crime, harm does result. The fact that the government instead of a private entity happened to entice a person is a matter of luck. Because Feinberg considers the fact that a predisposed person was enticed by the government or a private entity to be matter of luck, he deduces that we may hold predisposed offenders in either instance equally morally accountable for their actions. The predisposed person who happens to be triggered by a government inducement compared to the predisposed who is lucky not to have this happen are equal morally:

…there appears to be no significant difference between the person highly predisposed to crime who is induced to act and the person highly predisposed who never finds his inducer. The locus of moral culpability in each is the predisposition, and what distinguishes the two is mere luck; for it is not to the credit of the one that he performed no criminal act if it was only an accident that

---

168 Katz, 811.
he was never brought across the criminal threshold. Furthermore, the predisposed criminal is no less guilty for being induced to act by a policeman in a disguise than thousands of others of like disposition who are induced by private persons.\footnote{Ibid. 176.}

However, as Feinberg argues, the identity of the enticer can affect whether the state can rightfully punish him. Feinberg defends a government entrapment defense while rejecting a private entrapment defense on political grounds.\footnote{Feinberg, \textit{Problems at the Roots}, 75.} “If the police have the power randomly to intervene in people’s lives just to determine whether they have wrongful predispositions, then we are all subject to a great danger from those who are supposed to be our protectors.”\footnote{Ibid. 76.} Externalities, such as the luck of having government approach a person and pressure him to commit a crime, can have a bearing on culpability.

The political argument that we should offer an entrapment defense to governmentally enticed people but deny an entrapment defense to privately enticed individuals is true for rare temptations, as well. We should punish someone who succumbs to a rare private temptation, but should not punish someone who succumbs to a rare government temptation even if the person is culpable. Consider the example of the governmentally created opportunity in \textit{People v. Watson}.\footnote{\textit{22 Cal.} 4\textsuperscript{th} 220.} Watson took advantage of the apparently “safe” situation to steal the car because he thought the police would not catch him. Moreover, because the police did not coax Watson, but simply provided an opportunity to steal the vehicle, they did not impede his free choice. It is not clear that the government’s actions even amount to an “invitation,” because the arrestee never relinquished ownership of the vehicle. Had Watson stolen a privately owned vehicle, he would have no entrapment defense available to him at trial. Because Watson formed the intent to steal a vehicle without pressure from the police and it is a matter of luck that he stole the decoy police vehicle rather than a privately owned one, he is culpable to the same degree as a predisposed person who steals a privately owned unlocked vehicle. But the fact that the defendant had a
small probability of encountering the same enticement that the government presented under real
world circumstances should affect whether the state may punish him. The government should not
tempt its citizens with highly tempting rare criminal offers. If the criminal opportunity is so rare
that the misconduct of the government is outrageous, we should bar punishment of a predisposed
criminal. If the court applied this rule to *People v. Watson* and decided that the police conduct
was outrageous, it would acquit Watson even if he was predisposed.

C. PRIVATE ENTRAPMENT

One of the major quandaries of having an entrapment defense when the government
provokes a person is that the same defense does not exist for persons enticed by private entities.
Academics have provided numerous reasons for why the entrapment defense should be extended
to people enticed by the government but not by private entities. One reason is that there would
be a “great danger of collusion and false claims.” It is very difficult to determine the facts in
private enticement cases and differentiate them from average criminal transactions. One party’s
word is usually pitted against another. When government is the enticer, it must admit that it set
up the crime or posed as a criminal. Facts are more reliable and more easily discerned. Private
enticers may lie under oath or simply say they used legitimate techniques of influence to strike a
deal or discover criminal activity (such as selling trade secrets). In the real world, a person must
not rule out the possibility of deceit on the part of others whom he or she trusts, and the person is
naïve who trusts all. Moreover, government agents have no personal benefit from inducing the
commission of a crime, contrary to most private entities. The primary goal of most private
entities is a personal benefit, not the commission of a crime by the target. Because the end of
government undercover operations is to see whether a person will commit a crime, government
enticement creates greater risk that the target will face undue pressure to commit the crime. The

---

173 See Duff, 252. It is hypocritical for the government to prosecute someone it induces. Government
inducement should serve as a bar to trial.
174 Ibid. 141.
government may be willing to spend additional time and resources to convince an unwilling
participant to commit a crime, whereas a private party would not be as willing to do so.
Additionally, Park mentions that the goal of limiting overzealous law enforcement and preserving
respect for the criminal justice system will not be served by acquitting defendants entrapped by
private persons.175 Although people should be wary of those who try to tempt them to commit
crimes, the power of the government to do so is typically stronger than that of a private person
because it has greater resources.176 Yaffe says tracking, which refers to the government’s ability
to control the level and circumstances of the inducement and continually apply greater pressure,
is an important part of government inducement that differentiates it from private enticement. In
this sense, the entrapped person is in a trap because he will eventually succumb when, as Allen et
al. would say, his price has been met. Government does not provide an idle temptation.177 It’s
primary purpose is to induce the commission of a crime. “Undercover operations give the police
the power to control the fortuity of legal compliance: the power to make scarce 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.”178 The government can continuously apply greater pressure and provide
stronger temptations if the first temptation fails. On the other hand, private parties do not
necessarily care that the enticed act criminally, only that the enticed act to the private party’s
benefit.179 Although Yaffe believes people who commit crimes are culpable most of the time, he
also says that government tracking of the defendant’s performance of an illegal act makes the
act’s illegality more subject to what he calls the canceling effect in the defendant’s
deliberations.”180 The canceling effect comes into play if the possible outcomes of the act a
person is considering are inevitable. The canceling effect refers to the canceling of a need to

175 Ibid. 142.
176 McAdams, 153.
177 Yaffe, 33.
178 McAdams, 153.
179 Ibid. 38.
180 Yaffe, 34.
grant all possible acts one is considering reason-giving weight in deliberation.\textsuperscript{181} When the feature of an action, such as a consequence of action, is subject to the canceling effect, an agent cannot be said to have brought the punishment for that act upon himself.\textsuperscript{182} The fact that the government tracks defendants makes the defendant’s action subject to the canceling effect. However, in the unusual instance that a private party tracks its target, the target’s actions are not subject to the canceling effect. Therefore, the target who is not tracked is more deserving of punishment than one who is tracked.\textsuperscript{183}

Despite the fact that there are reasons against formally recognizing an entrapment defense in private cases, courts may develop a private enticement defense that is distinct from the government entrapment defense to acquit a guilty defendant who appears to have been privately entrapped. In a remarkable case, \textit{Topolewski v. State}, decided in 1906, the Wisconsin Supreme Court ruled that the defendant, though guilty, had been privately entrapped.\textsuperscript{184} Topolewski asked Dolan to help him steal meat from Plankinton Packing Company. Dolan, who had been discharged from the company, secretly told the company about Topolewski’s plan. Mr. Layer, head of the wholesale department, facilitated the transaction. Mr. Layer told the platform boss that Topolewski would come to the platform, as was customary, for a pick-up. Topolewski came to the platform, pretending to be a customer, and picked up the four barrels of meat as planned.

\begin{quote}
It will be noted that the plan for depriving the packing company of its property originated with the accused, but that it was wholly impracticable of accomplishment without the property being placed on the loading platform and the accused not being interfered with when he attempted to take it…Dolan did not expressly consent nor did the agreement he had with the packing company authorize him to do so, to the misappropriation of the property.\textsuperscript{185}
\end{quote}

Judge Marshall, who wrote the opinion, believes it is important that Mr. Layer, who acted on behalf of the packing company and facilitated the commission of the crime by supervising the

\begin{footnotes}
\footnote{\textsuperscript{181} Ibid. 27.}
\footnote{\textsuperscript{182} Ibid. 28.}
\footnote{\textsuperscript{183} Ibid. 39.}
\footnote{\textsuperscript{184} \textit{State v. Topolewski} 109 N.W. 1037 (Sup. Ct. Wi. 1906).}
\footnote{\textsuperscript{185} \textit{Topolewski} 109 N.W. 1037, 1039.}
\end{footnotes}
packing of the four barrels of meat, consented to the appropriation. He looked to *Rex v. Egginton*, a private entrapment case, as precedent:

A servant had informed his master that he had been solicited to aid in robbing the latter’s house. At the master’s discretion the servant opened the house, and gave the would-be thieves access thereto and took them to the place where the intended subject of the larceny had been laid in order that they might take it… the court held that the crime of larceny was complete, because there was no direction to the servant to deliver the property to the intruders or consent to their taking it…[The intruders’ were neither induced to commit the crime, nor was any act essential to the offense done by any one but themselves…The master and servant remained “passive…without sacrificing the element of trespass or nonconsent.”

Judge Marshall distinguishes the non-entrapper, like the master in *Rex v. Egginton*, who “merely set[s] a trap to catch a would-be criminal” and who neither consents to nor removes the element of trespass, and the entrapper who consents and voluntarily allows the would-be criminal to trespass. In other words, there is a difference between the enticer who passively allows a criminal to perpetrate a crime and the entrapper who aids in or encourages a crime. The majority reasoned that when Mr. Layer and the platform boss, as agents of the packing company, made the delivery to Topolewski, they treated the accused as “having a right to take the property.” In doing so, the company’s agents thereby prevented the appropriation of the company’s property as “being characterized by any element of trespass.” The company’s agents essentially acted as accomplices to the crime. The fact that the crime originated with Topolewski and that Topolewski had a guilty purpose and mind does not negate the removal of the elements of trespass and nonconsent on the part of the company’s agents. One might argue in this case that Dolan and Mr. Layer acted as agents of the state because they attempted to seek to redress Topolewski’s crime by bringing him to trial. This is an erroneous argument, however, because the agents did not act on behalf of the government by facilitating the crime. If he considered government entrapment, Judge Marshall would probably limit conviction in government

---

187 *Topolewski* 109 N.W. 1037, 1040.
188 Ibid. 1041.
189 Ibid. 1040.
entrapment cases to a small number of crimes in which the police are simply left to the role of observer. He would not condone active police participation in crimes such as those in which the police act as buyer or seller of drugs, as in _U.S. v. Russell, U.S. v. Hampton, or State v. J.D.W._

The judge’s reasoning in _Topolewski v. State_ provides us with insight as to how to judge government solicitations to private people. Judge Marshall rightfully claims there is an element of consent to crimes. He also says people have a right not to have their property trespassed against. The nonconsent of the victim is an important aspect of private entrapment cases. If a private person entices a target to commit a crime but the enticer still does not offer consent, punishment of the target is warranted. Although the majority in that case focused on the impropriety of the packing company’s facilitation of the theft, it still recognized that the defendant was culpable, and the majority said that had it not been for the absence of trespass and nonconsent, the case might have been differently decided. The type of reasoning Judge Marshall used to judge the private case should be kept separate from the entrapment defense. Because of the significant differences between the cases of the government entrapper and the private entrapper outlined above, the two categories of entrapment ought to remain legally distinct. The standards of nonconsent and trespass are too loose to be the sole standard by which to judge government entrapment cases; however, whether the government was passive or active is helpful in determining predisposition. If the offender first approached the government agent without provocation, meaning there was self-selection on the part of the offender, it is more likely that the offender was predisposed. Simply because the government is active rather than passive does not entail that that the defendant should be acquitted. When government makes an offer to a target to buy drugs or commit illegal activity, it opens the door to and invites the target to partake in the illegal activity. This invitation, however, should not equate to nonconsent and facilitation, which would require acquittal according to Marshall. We should not acquit a defendant who had intent simply because the government did not consent to the crime. Provided that the government

conduct is not outrageous, we should punish those who had intent. If the government facilitates the crime’s commission, like the packing company did in *State v. Topolewski*, it is partially liable for the crime, but, based on the retributivist argument I have developed above, the defendant is still guilty if his free choice was not diminished.\footnote{191}

I maintain that the defendant’s culpability is a requisite element for punishment, and that non-predisposed people are not culpable because their actions were not the most relevant cause for the crime. A defendant is guilty whose free choice and intent to commit the crime was not compromised by the police. However, even a judgment that the defendant is predisposed does not necessarily entail that he deserves punishment. A defendant who had intent to commit a specific crime, i.e. he was predisposed, deserves punishment, whereas a disposed, who lacked intent prior to the government temptation, does not deserve punishment. If government conduct is deemed outrageous, it does not diminish or erase the culpability of the defendant. Rather, outrageous conduct should be considered as a separate secondary matter judged after and apart from the culpability of the defendant. Outrageous government conduct serves as a bar to what would otherwise be just punishment, which is similar to the “bar to trial” notion Duff explains.\footnote{192}

But in the next section, I shall argue that the propriety of the government’s conduct, when it is assessed without regard to predisposition of the defendant as it is in the objective test, should not be the sole method by which courts judge defendant’s guilt.

**Chapter III**

*The Failure of the Objective Standard to Judge the Guilty*

A. THE OBJECTIVE TEST DEPENDS ON THE AVERAGE LAW-ABIDINGNESS OF THE GENERAL COMMUNITY

Thus far, I have defended the view that punishment must be based on culpability and that the entrapment defense must evaluate the culpability of the defendant, which is a function of that

\footnote{191} 130 Wis. 244.  
\footnote{192} Duff, 245.
person’s predisposition. There should be a strong connection between the defendant’s choice (if it was made freely) and the crime if we are to assign blame. The entrapment defense must distinguish those who had intent to commit the specific crime without police inducement (the predisposed) from those who lacked intent (the disposed). The predisposed/disposed distinction is critical because we should punish only those who intended to commit the crime and not those who merely have a “criminal” character and no intent to break the law. To illustrate the level of intent the subjective test should require, suppose police entice Dan to buy two grams of heroin from Bill, an undercover cop. To punish Dan for buying heroin, he should have had the intent to buy not just any kind of drug, but heroin, specifically, from any person who approaches him in an area where drug transactions are not uncommon. If Dan had the intent to buy marijuana but not heroin he should not be punished. Similarly, if Dan formed the intent to buy heroin only after meeting Bill, he should not be punished. Intent must have existed prior to the involvement of the police. Additionally, in order to fairly say the defendant had intent, it must be true that he reasonably expected the criminal opportunity to appear prior to the police temptation. When the police provide a weak inducement, that is, they do no more than present a market-level offer in a setting where such an offer is not rare, or set up a decoy operation where the target must take the initiative and approach the decoy. In such circumstances, the triers of fact can infer a defendant’s intent with greater accuracy. For instance, if the defendant approaches a decoy, such as an officer posing as a prostitute, in a setting where the placement of such a decoy is not considered rare, the trier of fact can reasonably infer that the defendant had intent to commit the crime. Therefore, when the police inducement is minimal, most defendants will be found to be predisposed because only a small trigger was required to get the defendant to break the law. The police would not have needed to resort to strong inducements if the defendant was predisposed. It is more difficult to infer intent when the inducement is modest or strong. If police make an above or below market inducement or do more than make an offer, such as pestering, making repeated solicitations, facilitating illegal operations by providing technical knowledge or materials, it may
produce within the defendant the intent to commit a crime. If the police made more than an offer, the fact finder’s conjecture about the defendant’s intent is more likely to be erroneous because the court cannot make a relatively accurate judgment as to when the intent arose. If there is a reasonable doubt about the defendant’s intent to commit the crime for which he is charged, the state should not punish him. The reason I do not propose an absolute rule, such as “If the inducement is strong, acquit the defendant in all circumstances” is that the police might have evidence that the defendant had intent. For instance, the police might discover ongoing criminal activity and aid in its completion even though the criminals would have been able to commit the crime had it not been for the police. If evidence demonstrates the defendant had intent to commit the particular crime, courts should convict the defendant if the level of the inducement is not outrageous.

Courts must look carefully at both the level of the police inducement and other circumstances and facts about the defendant; a defendant’s reputation, prior convictions for the same crime for which he is charged in the present case, recent arrests, eagerness of response, performance of criminal acts without difficulty or out of a profit motive, subsequent engagement in similar conduct, and strength of inducement will bear on the predisposition inquiry. Examination of character is still an important consideration in discovering intent. One case in particular illustrates why character and factors about the defendant are still important. In U.S. v. Dion, the agents made a simple offer to the community to purchase eagle feathers and neither pestered nor negotiated with the defendants. Even though the defendants approached the government first, which might suggest predisposition, it was crucial for the trier of fact that the primary motivation for the Dions was to make money they desperately needed, they had no prior record or reputation for selling eagle feathers, and approached the government a long time after the agents first made the offer. A different defendant, Primeaux, was pronounced predisposed

because he approached the agents days after they arrived and the agents had heard that Primeaux was in the business of selling eagle feathers. Despite the fact that the level of the inducement was essentially the same for both defendants, Primeaux was found to be predisposed and the Dions were not. Triers of fact should only take facts about the defendant into account if they provide a strong indication that he lacked intent. However, if there is no indication that the defendant had intent to commit the crime other than a “bad” character, fact finders should not use character alone to prove predisposition. The fact that Primeaux was a named as alleged supplier by a Navaho medicine man before the agents met him and was ready and willing to sell feathers as soon as the agents arrived suggests he had intent. Primeaux’s character alone, however, should not be the justification for the finding of intent. Character is only one component of the predisposition equation.

Admittedly courts and triers of fact can never be one-hundred percent certain what the defendant’s state of mind was at the time of the crime because 1) we cannot go back in time and 2) people can never know the contents of another person’s mind. The finding of predisposition will be more accurate if this examination is done by assessing government conduct. Supposedly, the subjective test in its purest form excludes an assessment of propriety of police conduct and focuses solely on the defendant. Such a test, however, would be akin to a verdict based on character alone. A pure subjective test would probably heavily weigh factors that concern only the defendant, like past activities, reputation, or technical knowledge. The other factors including profit motive, number of solicitations, length of the investigation, have a bearing on predisposition, as the Supreme Court and other federal courts that employ the subjective test have said. The characteristics of the police operation are relevant and necessary because the defendant’s reactions to the government agent(s) indicate his state of mind. “It is meaningless to speak of ‘disposition’ in the sense of ‘tendency’ without assessing the strength of the inducement

\[194\] Park says the subjective test inevitably uses elements of the objective test in order to uncover the state of mind of the defendant (200).
producing the tendency.” It is appropriate that government conduct have some bearing on culpability because it is another tool by which courts can infer the state of mind of the defendant. An increase in the strength, time, and/or number or rarity of offers or opportunities on the part of the police may alter or unduly influence the defendant’s thoughts, formation of the intent, and motivation to commit the crime. Because we are trying to discover when this intent and source of the motivation to commit the crime occurred, it is necessary to look at the events and conversations that transpired between the defendant and the police and the progression of the undercover operation. We must look to see whether the government’s influence or the defendant’s voluntary actions were the relevant cause for the crime. If courts only used reputation, past convictions, or technical knowledge to judge a defendant without examining the role the police conduct had in shaping the defendant’s behavior, the judge or jury may pass a different verdict than would have resulted had the court assessed the defendant’s reaction to the police. The defendant’s culpability, based on intent and predisposition, and partially determined by scrutinizing police conduct, should be the focal point of the entrapment defense.

Inclusion of objective factors that take police conduct into consideration in the subjective test does not automatically make the test objective. Objective theorists contend that a subjective test that scrutinizes police conduct to ascertain predisposition, and subsequently guilt, is essentially the objective test in disguise. The argument usually takes the following form: The determination of predisposition is impossible without examining elements of police conduct, and stronger inducements indicate that the defendant was not predisposed. Therefore, the subjective test is similar to the objective test for which strong inducements indicate that a normally law-abiding person would have succumbed, thereby resulting in acquittal of the defendant. Indeed, if the subjective test examined government conduct to see what the average person would have done, it would be a hybrid between the subjective and objective tests. The subjective test I

advocate, however, does not assess government conduct in order to see whether the conduct would have tempted the average person (as this raises problems), but rather scrutinizes police conduct only insofar as it helps the fact finder discern what is not directly observable – the defendant’s intent to commit the particular crime. As long as the court examines police inducement solely for the purposes of discovering intent, and not to see what the average person would have done, the test is subjective.

Although I advocate a subjective test that has objective elements while recognizing that the difference between the objective and subjective tests is overstated, I maintain that the focus of the test in entrapment cases should be the culpability of the defendant, which is determined by intent, and not police conduct. The subjective test is the best way to assess culpability because it focuses on the intent of the defendant. On the contrary, the objective test apportions blame indirectly upon the defendant. It asks not whether the defendant is blameworthy, but rather whether the police conduct is blameworthy. Only if police conduct was likely to induce the hypothetical “normally law-abiding person,” which is a condition of the undercover operation that signifies the defendant behaved in an appropriate and expected and exculpatory manner in reaction to the police, does the court proclaim the defendant not guilty. This is a roundabout way of judging guilt. I am not criticizing the use of police conduct as a tool for determining guilt. On the contrary, I condone and recommend that it should bear on culpability in the subjective test. But, I am critical of the objective test’s method of judging guilt. Culpability of the defendant, not propriety of police conduct, ought to be the foremost issue before the judge/jury and the overarching question of the entrapment test.

The subjective standard I propose is preferable to the objective test because it aims to identify whether the defendant had intent to commit the crime, i.e. whether he was predisposed. I will now explore one implication of this argument: that we should reject the objective test insofar as it relies on the abstract notion of the “average law abiding person” to judge the rightfulfulness and appropriateness of the defendant’s reactions to the government’s temptation.
According to the objective test, if the average law-abiding person would have responded in a manner similar to that of the defendant, the defendant is not guilty. The objective standard ignores intent. Moreover, the definition of the average person may depend on the moral makeup of the majority of society’s members. Gary Marx notes that police undertake investigations under the assumption that the world is divided between criminals and non-criminals.\textsuperscript{196} Contrary to this assumption, I believe there are many people who fall somewhere between the category of criminal and non-criminal. These people may have criminal tendencies but choose not to act on them. There is no way to gauge or know the moral composition or ability to resist criminal activity of the majority of society’s members. Whether society is composed of non-predisposed innocents (those who broke the law only because police engendered within them the intent to break the law), the disposed, or predisposed criminals may influence what courts and fact finders deem the “average” person during the application of the objective test, which may subsequently affect what kinds of inducements are permissible in the future.

Unlike the objective standard, the subjective test does not rely on assumptions about the law-abidingness of the general population to ascertain the defendant’s guilt. Although the subjective test does take into consideration external factors beyond the defendant’s subjective state of mind, such as the interactions between the police and the defendant, its primary focus is on the defendant’s intent. The subjective test, because it bases guilt on the intent of the defendant as opposed to the notion of the “average” person, will ideally produce the same verdict no matter whether society is composed mostly of non-predisposed, disposed, or predisposed people. I will examine the objective standard in three scenarios, each of which corresponds to a society composed of either the innocent, disposed, or predisposed, in order to show that it does not accurately identify the culpable. In all of these cases, predisposition, which looks at intent, rather than police conduct, is the best guide to determining culpability. The following table is a

\textsuperscript{196} Marx, 124.
summary of the conclusions I draw regarding punishment according to the objective test and may be useful to reference.

Was the government inducement likely to lure the average law-abiding person?  
Yes—Acquit  
No—Convict

Table 1. **Punishment Under the Objective Test.** This table shows that punishment under the objective test will vary depending on the intent and criminal characters of the majority of society’s members.  

<table>
<thead>
<tr>
<th>Strength of Inducement</th>
<th>Scenario 1 – the nonpredisposed</th>
<th>Scenario 2 – predisposed</th>
<th>Scenario 3 – disposed, weak characters</th>
</tr>
</thead>
<tbody>
<tr>
<td>Weak</td>
<td>conviction</td>
<td>acquittal</td>
<td>acquittal</td>
</tr>
<tr>
<td>Modest</td>
<td>conviction</td>
<td>acquittal</td>
<td>acquittal</td>
</tr>
<tr>
<td>Strong</td>
<td>acquittal</td>
<td>acquittal</td>
<td>acquittal</td>
</tr>
</tbody>
</table>

Table 1. **Punishment Under the Objective Test.** This table shows that punishment under the objective test will vary depending on the intent and criminal characters of the majority of society’s members.  

**SCENARIO 1 – A SOCIETY COMPOSED OF INNOCENTS**

In this scenario, most people have strong characters and are law-abiding. The majority of courts seem to accept this model of society because they assume the majority of people follow the law. Most members of society are not opportunistic criminals (using the court’s language in *People v. Watson*) and refuse modest inducements. These people are not likely to succumb even to above market inducements because they respect the law and follow it. However, there is still the danger that an agent will exert enough influence or appeal to trust, friendship, romance, or the desire for material gain to such an extent that the person with a strong character will succumb.

---

The objective test does not distinguish the predisposed from the disposed. However, studying punishment under the objective test according to these distinctions provides a ground for comparison with the subjective test. These results are based on the assumption that courts will recognize, for example, that the average person in Scenario 2 is predisposed. Who the average person is, in turn, would affect the answer to the question, “Would the average person succumb to the police inducement?”

“Opportunistic criminal” is a term employed by the court in *Watson*, 22 Cal. 4th 220.
Even strong-willed law-abiding people are susceptible to strong inducements that play on emotions.

If courts apply the objective test, the average person will be someone who follows the law, has a strong character, and has an ability to resist temptation to break the law. It is likely that weak and modest inducements will not tempt those with strong characters. So, anyone was tempted, we can infer, was predisposed. Most objective theorists would probably still permit conviction in simple decoy cases since normally law-abiding persons are not likely to succumb to ordinary criminal opportunities that are not likely to result in substantial gain. A normally law-abiding person would probably determine that the risk associated with being convicted for a relatively minor crime does not outweigh the benefits of the crime. Therefore, courts applying the objective test would probably permit weak and modest inducements because the average law-abiding person, who is non-predisposed, would not succumb to these temptations. With regard to strong inducements, the danger still exists that especially strong inducements will tempt law-abiding people. If the fact finder recognizes that strong inducements present this danger, it will not permit conviction under the objective standard in cases where police employ strong inducements. Since it is usually easier for the defendant to successfully claim entrapment under the objective standard compared to the subjective standard when the temptation is strong because a defendant need only point to the police conduct without needing to convince a judge or jury that one is not predisposed, some true offenders or those considered predisposed under the subjective standard would be freed under the objective standard. Cases in which the police employ strong temptations may result in acquittal of someone who is a true criminal or who would be considered predisposed according to the subjective standard. The objective test may give the true offender an unfair advantage because he can use the objective test as an excuse for his illegal behavior. Proponents of the objective standard are willing to accept this cost as necessary to the end of ensuring that police misconduct is penalized.
SCENARIO 2 – A SOCIETY COMPOSED OF THE PREDISPOSED

In this scenario, society is ridden with criminals. The majority of individuals in this society commit a variety of crimes without getting caught and intend to commit future crimes if presented with the opportunity. If police present an average criminal opportunity of any sort to a randomly selected individual in this society, it is highly likely that the target had the intent to commit this specific crime before the police became involved. It is possible that even legislators, for instance, pretend to support moral laws while, in actuality, they accept bribes and commit fraud like other criminals. If the majority of people were simply disposed, they would not have formed the intent to commit a specific crime until the police presented the opportunity.

If courts apply the objective test in this scenario, triers of fact will determine that all inducements will tempt the “average” person because most people are criminals. No police inducement would be acceptable. If all police inducements are valid, the entrapment defense based on an objective analysis such as this would acquit any defendant who could show that the government used some kind of inducement.

If we lived in a society that corresponded to Scenario 2, I would agree with McAdams’ proposition that police only target persons suspected of currently engaging in criminal activity. Police should not target people simply because they have been convicted in the past. Police activity will probably apprehend many true criminals if it employs weak or modest inducements. If it employs strong inducements, the few innocent people in scenario 2 might succumb, so these should not be permitted. From a utilitarian perspective, the goal of deterrence may succeed if criminals become more wary of undercover operations. On the other hand, it is also possible that the criminal community will band together to avoid detection by educating themselves with regard to police techniques that courts generally prohibit. Rehabilitation of the criminal, which is a goal for some utilitarians and retributivists, may not succeed if the criminal returns to a

199 McAdams, 179.
community that pressures him to engage in crime. Punishment would have to be severe to have a
deterrent effect on the criminal majority.

Because criminals have infiltrated all realms of society in this scenario, including the
triers of fact, it is safer to use the subjective test to judge entrapment cases because it introduces
less speculation and error into the fact finding process and judgment. In this scenario, it is
necessary that the jury has a large amount of influence over the verdict and fact finding process in
order to introduce a number of perspectives into deliberations so that one juror or fact finder’s
personal opinion and bias does not have an effect on the verdict.

SCENARIO 3 – A SOCIETY COMPOSED OF THE DISPOSED

In this scenario, most people have weak characters but try to follow the law. Following
either test in this scenario is problematic in cases in which a person, who may have done all he
can to reform himself but still has a weak character, succumbs to a strong government
inducement. There is a danger that police will entrap people who, though they may have had a
general inclination to engage in behavior characterized as criminal, would never have had the
opportunity or intent to commit a crime absent police involvement. Allen et. al. say it is possible
that everyone has a price that needs to be met in order for them to commit a crime they never
planned on committing, whether it is an above market inducement or the belief they will not be
caught.\textsuperscript{200} Examples that illustrate Allen et. al.’s notions are \textit{U.S. v. Sherman},\textsuperscript{201} in which
Sherman demonstrated a weak ability to resist helping a fellow addict; \textit{Jacobson v. U.S.},\textsuperscript{202} in which Jacobson had a general tendency to view prurient material but did not break the law until
government agents pressured him; and \textit{U.S. v. Poehlman},\textsuperscript{203} where Poehlman had such a strong
desire to have a romance with Sharon, the undercover agent, that he became willing to have sex
with her children, though he had no intent to do so prior to the agent’s inducements. In these

\textsuperscript{200} Allen et. al., 413.
\textsuperscript{201} Ibid.
\textsuperscript{202} Jacobson 504 U.S. 540.
\textsuperscript{203} Poehlman 217 F.3d 692.
three cases, the accused did not plan to commit the crime if the opportunity arose; the only reason he committed the crime is that he had a weak ability to resist the temptation. Character and self-control compose disposition, or an average tendency, to act in a certain illegal manner, but one is not culpable for one’s character alone, unless coupled with the intent to act illegally. These people may have done everything in their power, such as attending a drug rehabilitation program, to resist breaking the law by avoiding situations that would tempt them. It only takes a small enticement to tempt a disposed person to commit a crime. It is not fair that the police would trick, tempt, or play on the weaknesses of a disposed person who was not anxiously awaiting the right opportunity to commit a crime. Evidence that suggests Poehlman was not ready to commit a crime include that fact that he had no reason to suspect contact with Sharon would lead to illegal activity, he was more interested in developing a relationship with her than having sex with her children, and he did not immediately understand the sexual connotation of Sharon’s seemingly innocent hints.

If courts apply the objective test, the fact-finder would probably determine that the “average” person, who is disposed, would respond to strong, modest, and sometimes weak inducements. The reason the table says “conviction (maybe)” under scenario 3 is that courts may decide that only some weak inducements are permissible in that they would not tempt the average person. If courts decide that certain weak temptations are permissible, such as decoys, the court risks unjustly convicting disposed defendants who succumbed to the temptation. It is unjust for the government to instill intent to commit a crime in a disposed person, who had lacked intent and then punish him for it. If most types of inducements are likely to tempt the average person, most defendants will be acquitted. Courts may rule that all types of police temptations are not permissible because even weak ones present the danger that a disposed person will succumb, in which case many guilty offenders will be acquitted. There also exists the possibility that the fact finder is himself disposed, in which case he would probably determine that all inducements are

204 Jacobson 503 U.S. 540.
likely to tempt innocent people. If courts disallow all degrees of inducement in a majority of cases, police may decide not to waste further resources on sting and decoy operations. Undercover operations may eventually be limited to decoys and those in which police act as passive observers. Having limited undercover techniques may hamper law enforcement to such an extent that many true criminals will never be apprehended. Therefore, depending on the fact finder’s interpretation of an inducement’s strength and whether the fact finder is himself disposed, the court risks either acquitting true criminals or punishing innocent disposed people.

Disposed people will be acquitted in cases where the subjective test is applied correctly. Disposed people were innocent until the police enticed them to commit a crime. Strong and modest inducements will usually indicate that a defendant was not predisposed. Depending on how weak a person’s character is, he may succumb to a weak temptation or opportunity. Determination of culpability is difficult when inducements are weak because there is the danger that disposition will be mistaken for predisposition. It is necessary to examine the extent of police conduct and the defendant’s character in order to determine whether the defendant had formed the intent to commit the crime in question before the government approached him. In this scenario, more so than scenarios 1 and 2, conviction that results from a sting operation targeted at a society composed of disposed persons is equivalent to punishment for a “criminal” character. Since a disposed defendant lacked intent, it is reasonable to assume that he was not willing to risk punishment associated with a crime before the police offered him the opportunity. Applying undercover techniques against the disposed will not serve to root out crime because these people never intended to commit a crime.

Police can avoid luring and entrapping disposed defendants with weak characters if police operations permit a high degree of self-selection on the part of the would-be criminal. There is a high degree of self-selection on the part of the defendant if the defendant approaches the undercover cop or decoy and if there was no prior pressure or coaxing of the defendant by
This is quite similar to Judge Marshall’s reasoning because he too would probably convict a defendant only if the defendant completed a crime without assistance from the entrapping party. When the criminal’s actions are voluntary and the police inducement is not the most relevant cause, this establishes a stronger causal connection between the defendant’s intent and responsibility for a crime.

A positional component may be an appropriate part of a subjective test in this scenario. If police offer an opportunity that the disposed defendant would rarely, if ever, encounter in the real world, it would not be fair to tempt him. This person is not culpable because he did all he could to avoid such temptations, for example, by moving from a city to a rural area where he would rarely encounter these temptations. One might ask whether a disposed person who already lives in a rural area because he was born there also actively avoids temptation. Simply because a person was born in and lives in a particular geographic location, such as a rural area where such temptations are rare, it does not mean that he actively avoids temptations. Geography might be a matter of luck and although it would not be fair to tempt any disposed person, whether he is from the city or a rural town, one defendant should not be treated more leniently simply because he lives in a certain location. What should matter in court is whether the defendant intended to commit the specific crime the police presented to him. According to a utilitarian account, this person does not pose a threat to social morals that the law attempts to uphold. This person does not need to be rehabilitated or incapacitated because the government set-up was an isolated incident. Individual deterrence accomplished through punishment will not rehabilitate the criminal. Incapacitation has no end because the criminal is not a threat to society or the law. If society follows this model, I do not believe we should hold someone culpable when the government presents the accused with an opportunity that the defendant otherwise would probably not have faced.

---

205 Marx, 105.
In the instance that the majority of society is disposed, courts should apply the subjective test rather than the objective test because the judge and jury consider factors other than simply the strength of the government inducement. The subjective test permits facts about the defendant’s intent and tendencies into the inquiry, which provides the judge and jury with greater insight into the defendant. Because the subjective test allows evidence about character and distinguishes disposition from predisposition, it is more likely than the objective test to discover true criminals. It appears that the objective test is likely to allow only some weak inducements or none at all if it considers the “average” person to be the predisposed person.

I have examined the objective test according to three scenarios that correspond to the moral composition of society and shown that if courts base guilt and subsequent punishment solely on the objective standard, punishment may be imposed differently depending on the scenario. For example, a predisposed defendant will be convicted if society corresponds to scenario 1 or 3, but acquitted if society corresponds to scenario 2. If a disposed defendant succumbed to a modest inducement, he would be acquitted in scenario 3, but convicted in scenario 1. Since the objective test might result in punishments in some scenarios and not others, this is a reason in itself to reject the objective standard. Culpability should not rest on speculation about the “average person,” but rather on whether the defendant intended to commit a crime. Who the average person is and subsequent punishment depends on the law-abidingness of the general community, which is information we cannot accurately estimate. Because the objective standard depends on conjecture about the “average person,” it is more likely that deliberations and the fact-finding process will be subject to error. Whether the average person would have succumbed also depends upon the fact finder’s intuition. I acknowledge that the fact finder may have some discretion under the subjective standard as well, but this discretion is still less than that available under the objective test. The fact finder who judges predisposition is limited to making reasonable inferences about the defendant based on the government’s and defendant’s testimonies in court. He must examine the strength of the inducement as well as the readiness, preparedness,
reluctance, and motivations of the defendant. Inferences about the predisposition, and thus culpability of the defendant, do not rely on speculations about some abstract entity (the average person) that is not involved in the case. “Evidence about predisposition will be of a more reliable nature.”

Therefore, the subjective test is better suited to discovering whether the defendant is culpable, meaning he had intent.

B. THE SUPERIORITY OF THE SUBJECTIVE TEST

The facts examined in the subjective test, in contrast to the objective test, are more concrete than the abstract concept of the average person examined in the objective test. During questioning, witnesses, the prosecution, and the defense can provide information about factors such as the interaction between the police and the defendant, defendant’s reputation, etc. The factors considered during the subjective test inquiry are less subject to conjecture and speculation than is the notion of the “average person.” Different jurisdictions might define the standards in the objective test differently. One state may look at police conduct in relation to the “average” person, while another might use the “normally law-abiding” person, while yet another might use “innocent” person. In this chapter I analyzed the objective test that uses the “average” person standard. I will now consider an objective test that uses “innocent person.” In scenario 2 where the majority of society is predisposed, the fact finder would have to be a law-abiding person in order to imagine whether the innocent would succumb in the case in question. If the fact finder were a law-abiding person, courts would probably not permit conviction in cases where the police employed a strong inducement. However, if the fact-finder was a lucky criminal who has not been caught, like the majority of society, he might speculate as to whether an innocent person might succumb. He might assume truly innocent people, like saints, would not succumb to any temptations. This would result in conviction in nearly all cases. On the other hand, the fact finder could introduce his own beliefs into the fact-finding process in order to impose his own

---

206 Park, 223.
political ideology and morals into the criminal justice system and cause acquittal of a person he
deems innocent. For instance, if the fact finder is a criminal and holds little regard for the law, he
will probably not hesitate to administer his own sense of justice. He might decide that an
“innocent” person would succumb to a modest inducement, thereby resulting in acquittal of a
guilty defendant who the fact finder believes should be acquitted. If the court determines that
modest inducements may tempt an innocent person, it risks acquitting many true criminals.
(However, this might be desired in order to prevent prisons from becoming crowded.) It is also
possible that the fact finder’s personal beliefs could affect the finding of predisposition in a court
that applies the subjective test. However, the subjective test gives the fact finder less leeway for
subjective opinion because more factors used to judge guilt are factual.

The definition of “would have tempted” in the objective person standard is also vague
regardless of the scenario. It is possible to imagine that an innocent person would succumb to
weak, modest, or strong inducements depending on the circumstances of the sting operation.
Some people are saintly, and would never commit a crime under any amount of pressure. Other
innocent people are easily swayed by appeals to friendship or may suffer from a weak ability to
resist temptation on a rare occasion. Similarly, even if triers of fact are law-abiding people, they
may still have different conceptions of what is a weak or modest inducement. The objective test
is not a reliable measure of guilt or innocence unless the court provides an explicit definition of
who the “average law-abiding” person is and which inducements are likely to tempt him. Only
time and the development of case law will resolve uncertainties about the objective test if
legislators do not act.

I have analyzed and critiqued the objective test in detail. I shall now discuss some criticisms
of the subjective test. Objective test proponents argue that evidence used in the subjective test,
such as defendant’s reputation, should not be permitted in court because this evidence is
otherwise inadmissible and may be prejudicial for juries. They also may oppose punishing people for their characters instead of their actions. Additionally, they argue that it is unfair that the defendant must either forego the entrapment defense or, if he does claim entrapment, open the inquiry of his guilt to otherwise inadmissible evidence, such as character and prior convictions. Objective theorists agree somewhat with Carlson in that they believe an inquiry into predisposition results in punishing someone for their susceptibility to commit a crime. The subjective standard is vague because a fact finder can never know the inner workings of the defendant’s mind at the time of the crime. They also point out that, more often than not, the judge and jury find that the defendant was predisposed. The objective test is supposedly better for the defendant because he does not make available hearsay evidence about his character or prior convictions. The defendant need only prove that the government’s actions were likely to lure a law-abiding person. Objective theorists contend that since the objective test will result in the same verdict as the subjective test in most cases, the objective test should be used because it does not introduce prejudicial evidence. Park attempts to rebut objective theorists’ claims by attempting to show that verdicts will not always be the same for the objective and subjective tests. The objective test can lead to the acquittal of a guilty person. Objective theorists may be willing to accept this outcome if they believe it is more important to restrain overzealous police conduct than to give someone the punishment he deserves. Objective theorists say it is worse to wrongly convict innocents mistakenly found to be predisposed under the subjective test. It is unjust to punish innocent people, but I believe the risk is small because the subjective test allows the court to take many factors about the defendant into consideration. Finally, objective theorists argue that the subjective standard may fail to recognize that the police acted unfairly or outrageously.

207 See Johnson, 413 Footnotes 145 and 146.
209 Park, 199.
210 McAdams, 118.
Against claims of objective theorists, I believe that courts that use the subjective test do consider the gravity of the fact that the government might have caused the crime to come to fruition. Courts not only recognize that certain elements of government involvement indicate the defendant’s lack of predisposition, but also that government actions can reach the level of outrageous, which would violate the defendant’s right to due process. The subjective test that distinguishes predisposition from disposition judges the guilt of a person based on his intention to commit a crime. Applied correctly, a careful examination of the government’s actions and the defendant’s character will reveal those defendants who had intent and those who did not. When the court considers factors such as character, past convictions, the defendant’s motives, etc., the subjective test provides the non-predisposed defendant with a greater arsenal of tools to prove his innocence. Johnson, who argues in favor of the subjective test, offers an interesting rebuttal against critics’ claims regarding use of prior criminal acts to prove predisposition:

There is a fine distinction between using prior criminal acts to prove that the defendant acted in conformity with his character and using such acts to show a predisposition to commit the crime. As the Court explained in *U.S. v. Burkley*, the government may properly introduce evidence of the defendant’s prior criminal acts to show that defendant had a propensity to commit such crimes when a defendant raises an entrapment defense, but such evidence is inadmissible if the government attempts to use it to prove that the defendant committed the charged offense as a result of his propensity.211

Using prior criminal acts to show disposition is impermissible. Prior criminal acts may only be used to support a claim about the defendant’s character, not to show that he was predisposed to commit the specific crime. I am not suggesting that only one of the factors examined in the subjective test is sufficient to prove predisposition. Factors should be considered as a whole and courts should only pass a guilty verdict if predisposition has been proven beyond a reasonable doubt. Many critics of the subjective test argue that the objective is better precisely because there is a greater likelihood that it will prevent the conviction of the innocent. Contrary to this claim, there is just as much, if not greater chance that an innocent will be freed under the subjective

211 Johnson, 394.
Examination of predisposition would help a truly non-disposed defendant. We have already seen that the court distinguishes the general inclination to engage in an act from predisposition (intent) to commit a crime. Why should we not trust the court to examine predisposition this closely in the future? Perhaps the objective test would allow greater efficiency in the criminal justice system by establishing case law that defines what the average law-abiding person would do in a given situation. However, the utilitarian consideration of efficiency should not be the primary factor in determining what the best method is for ascertaining guilt. The subjective test forces the judge and jury to closely examine the defendant’s character as well as surrounding circumstances, such as the extent of the police temptation.

C. LIMITING OVERZEALOUS LAW ENFORCEMENT

It is unjust to punish people enticed by the police if they are not culpable. However, the apprehension and punishment of people caught in government undercover operation may be unjust for other reasons. Writers have advanced political arguments against undercover operations where police induce people to commit crimes and then punish them for those crimes. Even Feinberg, who recognizes the importance of culpability, argues that we should offer the entrapment defense to governmentally, but not privately, enticed individuals because there is a danger that random government interference in the lives of its citizens will threaten individual liberties and breed mistrust. The value in limiting overzealous law enforcement may outweigh reasons to punish a culpable defendant.

There may be no moral difference between those who are privately entrapped and those who are entrapped by the government. When the government employs tactics in order to induce commission of a crime, it departs to a greater extent from its role as a protector of the innocent and upholder of the law. Although citizens ought to respect and obey the law, it is more common and generally expected that non-government agents will manipulate others for selfish ends.

---

212 Park, 199, 218.
Innocent people take risks when they develop relationships with private entities and those who may entrap them. Innocent people should not have to face the same risk from the government. Carlson says citizens should have a fair opportunity to comply with the law.\textsuperscript{214} Government should be restricted from invading the private sphere when doing so may encroach on the rights of citizens. The fact that the target does not know his entrapper is the government as opposed to a private individual does not affect culpability \textit{per se}. Although the identity of the enticer should not bear on an offender’s culpability, it may matter with respect to whether the government may legitimately punish the offender. When the government is the enticing party, it is both the enticer and the punisher, whereas when a private party entices, it is not the same entity that administers justice. It appears unjust that the same party that entices a person be the same as the one who punishes that person when he succumbs.\textsuperscript{215} Duff says entrapment should be more or less a procedural defense. He says that the court cannot property call a culpable person who commits a crime during a sting operation to trial to answer this charge of wrongdoing because the government was involved in the commission of the crime. “Whilst the mere fact that they are, unknown to him, police officers cannot render him less culpable than he would have been had the inducers been, as he thought, private citizens…The point is rather that the hypocrisy and moral inconsistency involved in a polity prosecuting someone for a crime that its officials induced, in order to be able to prosecute this person, renders the trial illegitimate.”\textsuperscript{216} Duff does not even consider culpability of the defendant. For him, the fact that the government was the enticer is a sufficient ground to release the defendant.

Feinberg, at the end of his chapter on entrapment in \textit{Problems at the Roots of Law}, argues that there are political reasons to limit government, but not private, enticers. Feinberg is wary of police inducements that target randomly selected citizens because these operations create

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{214} Carlson, 1060 FN 170.
\item \textsuperscript{215} Dillof, 883.
\item \textsuperscript{216} Duff, 252.
\end{enumerate}
\end{footnotesize}
artificial circumstances that would not otherwise have arisen. Feinberg agrees with Dworkin, who believes that when the police solicit crime without suspicion, it is a “tester of virtue, not a detector of crime.” The purpose of the state is to maintain order and preserve rights and the integrity of its citizens. If government were to test citizens by way of attempting to entice them to commit crimes they had no intent to commit and then punish them for such crimes, it would breed a society mistrustful of others and endangers privacy. Our society was founded not on principles that allow the government to control and have power over its citizens, like Big Brother, but rather to function as a body that redresses violations of rights after they have been committed. Feinberg echoes the fear of Carlson and Dillof, who say that random police intervention in citizens’ lives without sufficient cause will threaten personal autonomy. “There is a conflict between maximizing autonomy and promoting fundamental human goods such as security of possessions, personal integrity and opportunity.” Feinberg does seem to maintain that sting and decoy operations have social value if police tempt those who are suspected to have a low threshold or are predisposed. Although writers who are mistrustful of granting the government police powers to entice and then punish citizens make a valid point, there is still value in capturing true criminals for crimes that are otherwise largely undetectable. Park suggests, “since the government has control over the circumstances of the inducement, it can try to have a credible person present or otherwise develop proof that no undue pressure was applied.” As with other rights, such as those embodied in the Fourth amendment, courts will have to adopt a test that safeguards the entrapped from overzealous law enforcement. “Use by the police of overreaching inducements against non-disposed persons is a matter of greater social concern than the use of such

217 Feinberg, Problems at the Roots, 75.
218 Dworkin, 33.
219 Tunick, discussion.
220 Ibid. 30.
221 Park, 242.
inducements against predisposed persons." The entrapment standard must draw the line between good police work and undercover operations that create criminals.

Although Anthony Dillof recognizes the importance of not punishing non-predisposed people, he bases his argument for allowing an entrapment defense on notions of fairness concerning undercover operations. Dillof attacks the unfairness he believes to be inherent in sanctioning entrapped people who were unlucky enough to be caught in undercover government operations. Dillof advances a theory of distributive justice based on the fairness principle, which states that a government practice that imposes burdens for a general social good is fair only if the burdens are imposed generally among those expected to benefit from the practice. He contends that it is unfair to impose a sanction on entrapped people because they bear a disproportionate share of the cost of general crime prevention and control. Entrapment is unfair because it happens to very few people, whereas standard police practices apprehend approximately twenty percent of criminals. It is unfair to use techniques that may entrap a member of a law-abiding class, a group that the police have no intent to prosecute because these people do not pose a threat to the law. While Although Dillof presents a strong argument that the entrapment defense corrects for unfairness created by undercover operations, the theoretical basis for his argument is flawed. The fairness argument is based on the assumption that there is a collective responsibility for crime prevention. This assumption opposes the individual responsibility and culpability assumption that underlies the political liberalism. The culpability of, or availability of a defense for a defendant caught in a sting operation should not depend on the extent to which a particular law enforcement practice unfairly burdens a segment of society. Entrapment is no different than the Internal Revenue Service randomly selecting citizens to check for fraud, which may inevitably result in catching a person who made an innocent mistake in their paperwork.

---

222 Ibid. 243.
223 Dillof, 874.
224 Ibid. 884.
225 Ibid. 891.
226 I would like to credit Dr. Daniel White for articulating this assumption.
Undercover operations are necessary because they root out crime. If it so happens that the government lured an innocent person, this person should have the option of claiming entrapment because he is not culpable, not because he was subjected to an unfair police practice. Decoy operations that have a high degree of self-selection on the part of the criminal and present average bait (meaning either that the opportunity is likely to occur outside government involvement or is a market-level offer) seem especially harmless in that there is a small likelihood that they will risk catching “innocent” offenders, those who would not have committed the crime but for the government inducement. In criticizing Dillof, McAdams notes that the fact that police apprehend non-predisposed individuals (perhaps accidentally) may only be an unavoidable side effect. McAdams ends his discussion by noting that the criminal law system does not reflect fairness of the sort Dillof advocates. Fairness should not be a rationale justifying the entrapment defense.

For Carlson, the issue is not that sanctioning enticed people is unfair, but rather that enticed people do not commit actual harm. He claims that in order to punish someone for a crime, a person must not only have committed an act but also caused some kind of harm in doing so. He also contends that in sting and decoy operations, unlike normal crimes, government entrapment is usually completely under the government’s control, and there is neither an actual invasion of a protected legal interest, nor a genuine threat to the interests that the law in question protects. “Entrapment doctrine must address…the fact that encouragement renders the criminal act largely useless as a basis for retributive or preventive punishment. An encouraged act is, in most cases, not likely to be harmful and it typically cannot, without more, prove that the actor is significantly dangerous.” He believes the law should deal with harm doers, not with those whose wrongful conduct consists solely of a failure to comply with the law when tempted by government. The act requirement, which makes it necessary for a person to actually commit

227 McAdams, 146.
228 Ibid. 145, 146.
229 Carlson, 1061, 1097.
230 Ibid. 1092.
231 Ibid. 1063.
an offense to be held legally accountable, preserves a “sphere of personal autonomy in which the
individual can think and act without fear that the state’s criminal processes will be deployed
against him.”232 Otherwise, Carlson maintains, we could punish people based on their thoughts.
Self-selection is also important for Carlson: “Government-encouraged criminal conduct will not
be punished unless either a) the encouraged conduct injured or seriously threatened to injure the
interests protected by the law in question, or b) the defendant initiated the criminal act or
transaction in response to an opportunity to commit the crime which was neither uncommon nor
excessive.”233 Carlson’s principle would not permit the government to initiate any particular
criminal activity or propose a criminal design.

Carlson’s argument fails to appreciate the possibility that the offender apprehended
through an undercover operation may pose a true threat to society, especially if the offender is a
habitual criminal who commits crimes outside of the government operation, an important facet of
McAdams’ argument. Aside from the fact that McAdams takes a utilitarian approach to
entrapment and focuses on efficiency of police operations in catching criminals who are external
offenders, McAdams makes a good point we need to look at the ordinary dangers posed by the
kind of crime the police are trying to induce.234 If an undercover female police officer takes a jog
through a park at night in order to lure a man who has allegedly been raping female runners, it is
right that we punish the suspected rapist who attempted to grab her even though the police
apprehend the rapist before he commits a vile crime. With respect to decoy operations,
culpability should not depend on whether the defendant caused actual harm, in the sense Carlson
conceives it. Culpability should depend on whether the defendant had intent.

D. PROPOSAL

---

232 Ibid. 1055.
233 Ibid. 1099.
234 McAdams 125, 126.
Even if the defendant had intent to commit a specific crime, outrageous government inducements are problematic. If the government facilitates a crime to such an extent that the defendant becomes a passive assistant, it has overstepped its bounds. I propose that if the government employs tactics that go beyond what is considered acceptable and appropriate to catch a criminal, what we may consider outrageous, courts should give predisposed defendants the option of claiming that the government violated their due process rights. The court should examine culpability before it assesses due process claims.

In the event that a person committed a crime as a result of enticement by the government, the court should first discover whether the defendant is predisposed by applying the subjective test. A defendant must be morally blameworthy, meaning he intended to commit the crime prior to the police inducement, in order to deserve punishment at all. Then, even if the defendant has been found to be predisposed, an outrageous degree of police involvement may negate reasons to punish him (despite the fact that he is still culpable). This is not to say that government conduct is unrelated to culpability. An assessment of government conduct is important for determining whether the defendant was predisposed. Judged alone, however, government conduct cannot provide us with an accurate portrait of the defendant’s state of mind and intent to commit the crime prior to the involvement of the government. Conditions that may suggest a violation of a defendant’s due process rights include:

(A) The government made more than an offer, i.e. it facilitated the commission of a crime by providing a necessary ingredient for manufacture of drugs, or was both the purchaser and seller.

(B) The government presents a rare opportunity that is very unlikely to occur in real life or offers an obvious extra-market inducement. If the government simply offers to sell drugs at market-value, it has not infringed on due process rights. Because, as I argued previously, it is

---

235 See, e.g., Russell 411 U.S. 423.
236 See, e.g., Hampton 425 U.S. 484.
difficult to determine what the criminal market rate is and what a rational criminal would do, the inducement would have to clearly be above or below estimated market values.

When government agents offer to buy or sell drugs at a discounted rate, it does so in order to increase the chance that they will apprehend and punish someone who did not have intent or is not a true criminal. Most of the time, conditions A and B will indicate that a defendant was not predisposed during the subjective test inquiry. If the subjective test fails to find that a predisposed defendant was in fact predisposed, a guilty person will be unjustly acquitted. Having this second due process standard serves as a check to the error that may occur during application of the subjective test, and it ensures an innocent person who succumbs to especially strong temptations is not unjustly punished. The due process standard will also protect both non-predisposed and predisposed from being punished for a crime for which the government was largely responsible. Even if the defendant was clearly predisposed, the court should grant acquittal if it determines that the police conduct was outrageous. A government action may count as outrageous if the agents do a majority of the work in a criminal operation while the defendant is no more than a willing participant. For example, imagine that a police agent overheard Todd, a 16 year old, say in a restaurant that he planned to manufacture crack as soon as he obtained facilities, ingredients, and technical knowledge. The agent approaches him at a later date and provides him with these resources so that he can arrest Todd for manufacturing crack. Even though Todd had intent, the agent’s actions were outrageous, and the court should acquit Todd on due process grounds. We should still permit the government some leeway by allowing weak inducements because it does have in sight the noble goal of apprehending true criminals. With regard to undercover operations in general, I recommend that if police expend a large of amount of resources on discovering criminal activity, it should only target average crimes, pursue people suspected of criminal activity, offer market-level inducements; it should not track defendants, and refrain from engaging in fishing expeditions. Additionally, police should not target someone simply because he or she has had prior convictions. The government should, as Marx asserts,
limit its goal to discovering criminals, not making criminals. Police should offer real-world inducements and act as a rational criminal would when employing reverse sting or decoy operations and act as “noncoercive[ly]” as possible.\textsuperscript{237}

Conclusion

Because government agents, in some undercover operations, unduly influence a target to act criminally, it is appropriate to have an entrapment defense. The basis for my argument that

\textsuperscript{237} Marx, 95.
courts should apply the subjective test rather than the objective test is grounded in retributivism. Retributivists believe punishment should be imposed upon only upon those who deserve it. Justice requires that we punish someone who acted wrongly. We should not punish the disposed or non-predisposed because these people did not form the intent to commit the crime until the government pressured them. When the government pressures a person who lacked intent and would not otherwise have committed a crime, this goading compromises the target’s free choice. Therefore, this person is not morally culpable and does not deserve punishment. In contrast, if the defendant was predisposed and committed a crime where there is no evidence of outrageous police misconduct, we should punish him. Predisposed defendants are culpable because the police did not create or affect their blameworthy intent to commit a crime. The criticism that punishment for predisposition is essentially punishment for character and speculation about future behavior no longer applies to the subjective test I advocate, in which predisposition is defined as intent. Although character is part of my subjective test, character is only scrutinized in so far as it indicates intent.

Because intent to do wrong is important when apportioning blame, the subjective test I advocate, which takes intent into account, is better suited than the objective test for determining responsibility and culpability of the defendant. The subjective test focuses on the defendant’s predisposition to commit the crime, whereas the objective test judges the guilt of the defendant according to whether or not a hypothetical innocent person would have been tempted to engage in the crime. Although objective theorists claim the inquiry of predisposition is subject to error and speculation, I have shown how guilt judged according to the objective test can vary according to the level of law-abidingness of the community and the fact finder. Because we cannot know how the majority of society’s seemingly law-abiding citizens would have reacted to the police temptations, the objective test should not be used to assess guilt. Although the objective test is flawed, I recognize the objective theorist’s fear that punishment for a crime induced by the police is essentially punishment for character and future crimes because we cannot be sure that the
defendant would have been enticed by a private actor. In order to minimize the risk of unjustly punishing someone under the subjective test, I advocate that courts make available to predisposed defendants a second defense based on due process. The due process standard should serve as a kind of alternative to the objective test and allay the fears of objective proponents because it examines the propriety of police conduct separately from predisposition, serves as a check to error that might occur during the subjective test fact finding process. The due process standard will also protect citizens from unwarranted and outrageous government conduct whose sole purpose is to induce the commission of a crime in order to punish someone. The predisposed defendant can claim that the government violated his right to due process if he believes government misconduct reached an unacceptable level. If his claim that the government violated his right to due process succeeds, he should not be punished. The entrapment defense must develop so as to protect the innocent without the cost of freeing the guilty.

Bibliography

BOOKS AND ARTICLES


CASES

Daniels v. State. 121 Nev. 101 No. 42545 Supreme Court of Nevada (2005).


People v. Hamilton Not Reported in Cal.Rptr.3d, 2008 WL 683556

Cal.App. 2 Dist.,2008.March 14, 2008 (Approx. 4 pages)


State v. Guffey 262 S.W.2d 152 Missouri Appeals Court (1953).

State v. Topolewski 130 Wis. 244 109 N.W. 1037 Supreme Court of Wisconsin (1906).


U.S. v. Sherman 200 F.2d 880 No. 29 Docket 22392. 2nd Circuit Court of Appeals (1952).

U.S. v. Sherman 200 F.2d 880 No. 29 Docket 22392. 2nd Circuit Court of Appeals (1952).