ECONOMICS, CAUSATION, AND THE ENTRAPMENT DEFENSE

J. GREGORY DEIS*

Undercover operations are an essential component of effective law enforcement in combating certain types of crimes. But the extreme instances of government involvement in criminal enterprises raise significant policy concerns. Such tactics can lead to criminal activity that would not have otherwise occurred. Undercover operations are socially desirable only where they aid law enforcement in apprehending those persons who pose a current threat of crime to society. On the other hand, where undercover operations ensnare persons who would not have engaged in criminal activity absent the government's solicitation, government resources are squandered. Where no threat of harm exists, law enforcement has no legitimate interest. The entrapment defense is the judicial instrument created to address this possibility of government-manufactured crime.

In this note, the author explores the relationship between economic analysis and the entrapment defense, focusing on the entrapment defense in the federal courts. The note begins by examining the Supreme Court's treatment of the entrapment defense and argues that causation is the underlying principle driving the decisions of the Court. Next, the note develops an economic model for the defense, using principles derived from an examination of the cost-benefit analysis of the police and the cost-benefit analysis of the rational decisionmaker contemplating criminal activity. The economic model is then compared to the existing federal-court approach. The note then goes on to resolve a current split in the federal circuits relating to the concept of positional predisposition, using principles derived from the economic model. Finally, informed by economic analysis, the note proposes a sliding-scale approach to the entrapment defense, employable within the existing contours of the federal-court approach. In addition to the economic justification, the author finds support for this proposal in previous Supreme Court decisions.

"The function of law enforcement is the prevention and the apprehension of criminals. Manifestly that function does not include the manufacturing of crime."[1]

* *The author would like to thank Carlos Ball, Richard McAdams, and Thomas Ulen for helpful comments on earlier drafts of this note.*

1. Sherman v. United States, 356 U.S. 369, 372 (1958).

I. INTRODUCTION

The field of economics defines the function of criminal law as the minimization of the social costs created by crime.[2] The social costs of crime can be divided into two broad categories: (1) the harm imposed on individuals and (2) the private and public costs incurred in prevention efforts.[3] The undercover operation is one prevention mechanism used in the public sector.

In some undercover operations, the police either take part in or solicit persons to commit crimes. Certain crimes require these "encouragement"[4] tactics because of the difficulty of detection using normal police procedures. These detection difficulties arise because the transaction takes place privately between willing participants.[5] Examples of such crimes include prostitution, alcohol offenses, counterfeiting, price fixing, public corruption, and, perhaps most commonly, drug offenses.[6] On the one hand, *some* encouragement tactics can reduce social costs attributable to crime in both categories (harm imposed and prevention costs). On the other hand, societal resources are squandered where the government induces an individual who is *not* "predisposed"[7] to commit a crime.[8]

2. ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 443–44 (3d ed. 2000) ("Criminal law should minimize the social cost of crime, which equals the sum of the harm it causes and the costs of preventing it."). Although obvious, it should be noted that losses are not limited to the specific victim of the crime. Crime affects individuals in numerous ways, including: (1) property losses; (2) psychological costs to the victim and others in society; (3) price effects; (4) employment effects; and (5) tax effects. DARYL A. HELLMAN & NEIL O. ALPER, ECONOMICS OF CRIME 34 (4th ed. 1997).

3. *See* COOTER & ULEN, *supra* note 2, at 458; Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 181 (1968). Professor Becker's seminal work marked the beginning of the exploration of the relationship between economics and criminal law. Concerning the costs of crime, Becker observed: "'Optimal' decisions are interpreted to mean decisions that minimize the social loss in income from offenses. This loss is the sum of damages, costs of apprehension and conviction, and costs of carrying out the punishment imposed . . . ." *Id.* at 207.

4. This paper refers to "encouragement," rather than "lawful entrapment," which is a phrase courts frown upon. *See* United States v. Gardner, 516 F.2d 334, 347 (7th Cir. 1975); *cf.* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.2, at 420 (2d ed. 1986).

5. *See* LAFAVE & SCOTT, *supra* note 4, § 5.2, at 420.

6. *Id.* § 5.2(a), at 421; RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 7.3, at 255 (5th ed. 1998). One commentator observed that the criminalization of such acts gave rise to the use of undercover operations. Michael A. DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F. L. REV. 244, 250–51 (1967), *noted in* PAUL MARCUS, THE ENTRAPMENT DEFENSE 12 (2d ed. 1995).

> America in the late nineteenth and early twentieth centuries witnessed the coming of Comstockery, the Mann Act, the Harrison Drug Act, Prohibition and sumptuary legislation generally to a degree unheard of at common law . . . . The significance of all these new crimes is their inadaptability to a prosecutory scheme based on private complaint . . . .

Id.

7. In this note, the terms "predisposed" and "true offender" are used interchangeably. "Predisposed" is a term of art in entrapment doctrine, while "true offender" is a term of art in economic analysis. *See* Richard H. McAdams, An Economic Analysis of Entrapment 6 (June 1999) (unpublished manuscript, on file with the University of Illinois Law Review).

8. *Cf.* David J. Elbaz, Note, *The Troubling Entrapment Defense: How About an Economic Approach?*, 36 AM. CRIM. L. REV. 117, 119 (1999) ("[N]o societal benefits arise when government conduct gives a rational individual an *incentive* to commit a crime that he likely would have no incentive to commit under *ordinary circumstances*." (emphasis added)). More correctly, no "net" societal bene-

The predisposed person—the proper target for undercover operations—is defined as one who would have likely committed the same crime, without the government inducement, only in circumstances that would have made police detection more difficult and more costly.[9] The predisposed person poses a threat to society because of the likelihood he or she will engage in criminal activity, without government solicitation, under normal market conditions.[10] But police expenditures used to induce a non-predisposed person to commit a crime are socially undesirable. In cases where the government agent succeeds, the police have *caused* the commission of a crime that would not likely have occurred otherwise. "Police inducements that merely affect the *timing* and not the *level* of criminal activity are socially productive; those that increase the crime level are not."[11] The challenge for law enforcement then is to identify these predisposed persons.

The entrapment defense is the judicial instrument created to address this possibility of "government-manufactured" crime. The defense serves as a weeding-out mechanism, sorting out the predisposed from those individuals who would not have engaged in the criminal act absent the government inducement, thereby avoiding additional error costs.[12] In this fashion, the entrapment defense attempts to "draw a line 'that will permit the proper use of government resources to identify and prosecute the wrongdoer and at the same time serve as an instrument to prevent abuse of those resources.'"[13]

Professor Paul Marcus, one of the leading scholars on entrapment doctrine, describes the underlying rationale of the defense as follows: "[T]he federal government [should] not use its resources to increase the criminal population by inducing people to commit crimes who otherwise would not do so."[14] The person who would not engage in criminal activity unless induced by the government does not pose a threat to society.[15] Absent this threat of criminal activity, "[t]he criminal law has no proper

fit results from such activities. Certainly society would obtain some amount of general deterrence which would benefit society to some degree.

9. Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1220 (1985).

10. Paul Marcus, *Presenting, Back from the [Almost] Dead, the Entrapment Defense*, 47 FLA. L. REV. 205, 233 (1995). It has been argued that "[t]he most fruitful criterion of government inducements . . . to sort out those who have a plausible claim for exoneration is whether the inducements exceed[] real world market rates, which includes both financial and emotional markets." Ronald J. Allen et al., *Clarifying Entrapment*, 89 J. CRIM. L. & CRIMINOLOGY 407, 415 (1999).

11. Posner, *supra* note 9, at 1220 (emphasis added); *see also* Jacobson v. United States, 503 U.S. 540, 553–54 (1992) (noting that police resources are squandered where undercover operations result in "the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law").

12. Additional error costs are avoided in that individuals who do not pose a threat of harm to society are not punished.

13. MARCUS, *supra* note 6, § 2.07, at 65 (citing United States v. Jannotti, 673 F.2d 578, 612 (3d Cir. 1982) (Aldisert, J., dissenting)).

14. *Id.* § 1.06, at 18 n.52.

15. *Id.*

concern with [such a person], however evil his thoughts or deficient his character."[16]

Economists would agree with Professor Marcus that persons who would not likely commit a crime absent government inducement are not proper targets for undercover operations. But economists would cast the inquiry in terms of minimizing the costs of error.[17] As an illustration, Judge Posner offered the following justification for the entrapment defense:

> If the police entice someone to commit a crime who would not have done so without their blandishments, and then arrest him and he is prosecuted, convicted, and punished, law enforcement resources are squandered in the following sense: resources that could and should have been used in an effort to reduce the nation's unacceptably high crime rate are used instead in the entirely sterile activity of first inciting and then punishing a crime.[18]

Using this observation as a starting point, this note explores the relationship between economic analysis and the entrapment defense. In searching for the foundation of the entrapment defense, Part II examines the doctrinal evolution in the federal courts, specifically looking at several important Supreme Court decisions. This examination indicates that causation, or government-manufactured crime, is the principal concern underlying entrapment doctrine in the Supreme Court. In Part III, an economic model for the entrapment defense is developed after analyzing police undercover operations using basic cost-benefit analysis, in addition to considering the cost-benefit analysis of the rational decisionmaker contemplating criminal activity. Part III then compares the economic model to the federal court's subjective approach to entrapment and con-

16. *Id.*

17. This note merely explores how economic analysis can augment current entrapment doctrine. It is not an attempt to displace traditional liberal theory as the philosophical foundation for the entrapment defense. Liberal theory dictates that harmless persons remain free from government intrusion. *See* JOHN STUART MILL, ON LIBERTY 9 (Alburey Castell ed., AHM Publishing Corp. 1947) (1859) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."). Judge Posner recognized this point:

> The economist can explain [the entrapment defense] by noting that the expenditure of resources to punish a person who is not a threat to society is wasteful . . . . But the explanation is not entirely convincing, because courts do not usually concern themselves with the efficient allocation of law enforcement resources . . . . Liberal theory can plug the gap . . . . A person who will not commit a crime unless the government entices him to do so is harmless. The punishment of harmless people is wrong even if they have weak characters or harbor evil thoughts.

RICHARD A. POSNER, OVERCOMING LAW 27 (1995). Professor Marcus offered similar sentiments:

> The reason [entrapment] is a matter of judicial concern rather than of unreviewable prosecutorial discretion is not that the courts want to economize on the costs of running the criminal justice system—the responsibility for the efficient allocation of resources to criminal prosecution is lodged elsewhere in our governmental system—but because the proper use of the criminal law in a liberal society is to regulate potentially harmful conduct for the protection of society, rather than to purify the minds and to perfect character.

MARCUS, *supra* note 6, § 1.06, at 18 n.52; *cf.* Bennett L. Gershman, *Abscam, the Judiciary, and the Ethics of Entrapment*, 91 YALE L.J. 1565, 1584 (1982) (arguing random tests of virtue violate individual privacy and autonomy).

18. United States v. Kaminski, 703 F.2d 1004, 1010 (7th Cir. 1983) (Posner, J., concurring).

cludes that the federal-court approach is generally consistent with an economic approach to the entrapment defense.[19] Part III then analyzes the positional predisposition concept, a current conflict among the federal circuits, using the principles developed from the economic analysis section of the note. Finally, building on the principles developed from the economic analysis of undercover operations, Part IV proposes a sliding-scale approach to the entrapment defense. This proposal can be implemented within the contours of the existing federal court approach.

II. BACKGROUND

A. The Entrapment Defense in the Federal Courts

1. Origins of the Entrapment Defense

As one commentator noted, the concept of entrapment essentially originated with Eve in the Garden of Eden when she confessed, "the

19. This conclusion is interesting in light of the theory that the common law is descriptively economic. Numerous commentators have argued that there is an economic logic implicit in the common law. *See, e.g.*, POSNER, *supra* note 6, § 8.1, at 271; Richard A. Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 HOFSTRA L. REV. 775 (1981); John C. Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. LEGAL STUD. 393 (1978); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977). *But see* KIM LANE SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 3, 24–42 (1988); Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583 (1992). These commentators observed that, in surveying the judge-made law in a particular area, it is possible to extract the principal doctrines of that area of law, and then explain these doctrines in economic terms. POSNER, *supra* note 6, § 8.1, at 271.

Two different explanations shed light on why common-law doctrines might tend towards efficiency: (1) a pragmatic judiciary and (2) the "evolutionary" theory. KENNETH G. DAU-SCHMIDT & THOMAS S. ULEN, LAW AND ECONOMICS ANTHOLOGY 501 (1998).

> [I]t may be that Judges either consciously or unconsciously tend to choose efficient doctrines. After all, the avoidance of waste appeals to common sense so that when distributional or other justice reasons do not present themselves or seem evenly balanced in a legal question, it might be natural for judges to choose the legal rule that avoids waste. [In addition,] there may be institutional or logical reasons why inefficient legal rules are litigated more often and with a larger commitment of resources by the party aggrieved by the rule. If this is so, inefficient legal rules would be more likely to be overturned than efficient rules and the Common Law would tend to "evolve" toward efficiency.

Id.

Whether economics is in fact a proper normative basis for judicial decisionmaking is a different question. *Compare* Guido Calabresi, *About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553, 556, 561–62 (1980) (arguing that judges could benefit from wealth maximization), *and* Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 504–06 (1980) (arguing that the common law does not further wealth redistribution), *with* Ronald Dworkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 8 HOFSTRA L. REV. 563 (1980) (arguing against economic efficiency as a normative basis from a philosophical perspective), *and* Cento G. Veljanovski, *Wealth Maximization, Law and Ethics—on the Limits of Economic Efficiency*, 1 INT'L REV. L. & ECON. 5 (1981) (examining the limits of economic efficiency as a normative principle in adjudication).

serpent beguiled me and I did eat."[20] Over time, it has become one of the most common issues presented in criminal appeals.[21] In the United States, the defense developed slowly, encountering resistance in the courts.[22] Beginning in the early twentieth century, state courts voiced concern for government involvement in crime in cases such as *Saunders v. People*,[23] and *O'Brien v. State*.[24] Although these state courts questioned the propriety of such police activities, few of these early state cases resulted in an acquittal for the defendant.[25]

Several early federal cases took a sympathetic view towards coercive police tactics.[26] It was not until 1915, however, that a federal court upheld an entrapment defense.[27]

In *Woo Wai v. United States*, the defendant was convicted of conspiring to bring illegal immigrants into the United States.[28] Beginning in October 1908, the government informant approached the defendant with a scheme for bringing Chinese aliens across the Mexican border into California.[29] The defendant persisted in refusing the agent's incessant offers for nearly eighteen months, but finally agreed to the plan in April 1910.[30] While recognizing that an entrapment defense was not proper where "the criminal intention to commit the offense had its origin in the mind of the defendant,"[31] the court noted that there was no "evidence that, prior to the time when the detective first approached Woo Wai, any of the defendants had ever been engaged in the unlawful importation of Chinese, or had ever committed or thought of committing any offense against the immigration laws."[32]

This emphasis on the "origin of intent" has continued in the federal courts.[33] Where the intent to engage in the criminal activity did not

20. Fred Warren Bennett, *From* Sorrells *to* Jacobson: *Reflections on Six Decades of Entrapment Law, and Related Defenses, in Federal Court*, 27 WAKE FOREST L. REV. 829, 831 (1992) (citing *Genesis* 3:13 (King James)).

21. In *Rivera v. State*, the dissent noted that "[e]ntrapment . . . has probably replaced ineffectiveness of defense counsel and challenged conduct of prosecutors as the most prevalent issue in current appeals." 846 P.2d 1, 11 n.6 (Wyo. 1993) (Urbigkit, J., dissenting).

22. *See generally* MARCUS, *supra* note 6, at 1–49 (discussing the history and development of the entrapment defense).

> The doctrine of entrapment was a relative late-comer to the federal courts, and its incipient growth was surrounded by confusion concerning both the elements necessary to constitute the defense and the theory on which the courts were to set aside a conviction where acts explicitly proscribed by criminal statutes had undoubtedly been performed by the defendant.

Lester B. Orfield, *The Defense of Entrapment in the Federal Courts*, 1967 DUKE L.J. 39, 39.

23. 38 Mich. 218 (1878).

24. 1879 WL 7510, at *1 (Tex. Ct. App. 1879).

25. MARCUS, *supra* note 6, § 1.03, at 8–9.

26. *Id.* at 9.

27. *Id.* at 10.

28. 223 F. 412 (9th Cir. 1915).

29. *Id.* at 413.

30. *Id.* at 413–14.

31. *Id.* at 415.

32. *Id.* at 414.

33. *See generally* MARCUS, *supra* note 6, § 1.03, at 11.

originate with the defendant, courts expressed concern that police activity was *causing*, rather than detecting, crime.

2. *The Supreme Court and the Entrapment Defense*

a. The Basic Principle Underlying the Entrapment Defense

"The conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents."[34] The Supreme Court has consistently noted that *creating* or *causing* crime is not a proper function of law enforcement. In *Casey v. United States*,[35] Justice Brandeis argued that it is improper for the government to "provoke or *create* a crime and then punish the criminal, its creature."[36] Chief Justice Hughes's opinion in *Sorrells v. United States* echoed Brandeis's sentiments: the government should not "'incite to and *create* crime for the sole purpose of prosecuting and punishing it.'"[37] In *Sherman v. United States*, the Court criticized the government agent's conduct, noting that the government is in the business of detecting, rather than creating or manufacturing, crime.[38] The Court held that where the offense is "'the product of the *creative* activity' of law-enforcement officials," the defendant has been entrapped.[39]

b. *Sorrells v. United States* Introduces the Concept of Predisposition

The Supreme Court first considered the entrapment defense in *Sorrells v. United States*.[40] In *Sorrells*, the defendant was charged with violating the National Prohibition Act after supplying intoxicating liquors to a government agent.[41] The government agent, posing as a tourist, visited the defendant's house accompanied by three friends of the defendant.[42] During the conversation, the agent informed the defendant that the two were members of the same Division during World War I, and asked the defendant if "one former war buddy would get liquor for another."[43] The defendant initially refused the agent's solicitation, but after the agent's fourth or fifth request, the defendant finally acquiesced.[44]

34. Lopez v. United States, 373 U.S. 427, 434 (1963).
35. 276 U.S. 413, 421–25 (1928) (Brandeis, J., dissenting).
36. *Id.* at 423 (emphasis added).
37. 287 U.S. 435, 444 (1932) (emphasis added) (quoting Butts v. United States, 273 F. 35, 38 (8th Cir. 1921)).
38. 356 U.S. 369, 372 (1958).
39. *Id.* at 372 (alteration in original) (quoting *Sorrells*, 287 U.S. at 451).
40. 287 U.S. at 435.
41. *Id.* at 438.
42. *Id.* at 439.
43. *Id.* at 439–40.
44. *Id.* at 440.

The Court acknowledged that "the Government merely afford[ing] opportunit[y] or facilities for the commission of the offense [would] not defeat the prosecution."[45] Merely providing an opportunity, without more, would not constitute inducement. But the Court questioned whether a criminal conviction could lie where the government "implant[ed] in the mind of an innocent person the disposition to commit the . . . offense and [then] induce[d] its commission in order . . . [to] prosecute [the defendant]."[46] The Court noted that "[t]here was no evidence that the defendant had ever possessed or sold any intoxicating liquor prior to the transaction in question,"[47] nor was there any other evidence of a previous disposition to engage in the criminal act.[48] The Court cited with approval *Butts v. United States*,[49] where the Eighth Circuit stated:

> "It is not [the] duty [of the police] to incite to and *create* crime for the sole purpose of prosecuting and punishing it . . . . [I]t is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and *evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it*."[50]

The Court reasoned that allowing a defendant to be criminally prosecuted in this case would be foreign to the purpose of the statute.[51] In order to avoid the injustice and absurdity of convicting a person who would not have committed the crime absent the government inducement, the Court reasoned that the spirit of the law should prevail over its literal text.[52] In grounding its holding on the notion of congressional intent, the Court stated:

> 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.[53]

The majority holding in *Sorrells* has come to be known as the "subjective" approach to entrapment. The federal courts continue to follow the subjective approach and it remains the majority rule in the state courts.[54]

45. *Id.* at 441.
46. *Id.* at 442.
47. *Id.* at 441.
48. *Id.*
49. 273 F. 35 (8th Cir. 1921).
50. *Sorrells*, 287 U.S. at 444 (emphasis added) (quoting *Butts*, 273 F. at 38).
51. *Id.*
52. *Id.* at 448.
53. *Id.* (emphasis added).
54. *See* LAFAVE & SCOTT, *supra* note 4, § 5.2(b), at 422.

The *Sorrells* opinion is important for several reasons. First, the Court stressed that there was no evidence the defendant ever engaged in the criminal act prior to being approached by the government agent.[55] Considered together with the defendant's persistent reluctance, the Court found no evidence of predisposition other than the defendant finally succumbing to the agent's solicitation.[56] Second, the agent's solicitation was not a mere opportunity.[57] The defendant was offered an opportunity "plus," which in the Court's view constituted inducement.[58] These two inquiries, predisposition and inducement, form the basis of the entrapment inquiry in the federal courts. Finally, language in *Sorrells* alluded to a causation-type analysis. The Court noted that entrapment lies where the defendant "'would [not] have been guilty of [the offense] if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.'"[59] In other words, if the defendant would not have engaged in the criminal act, but for the government inducement, the defendant has been entrapped. While inducement and predisposition were the concepts used by the Court, the basic inquiry was whether police conduct was causing crimes that would not have occurred otherwise.[60]

c. *Sherman v. United States*: The Predisposition Inquiry Subtly Shifts Closer to Focusing on Whether the Crime Would Have Otherwise Occurred, Rather than on the Defendant's State of Mind

Over twenty-five years later, the Court revisited the entrapment defense in *Sherman v. United States*.[61] In *Sherman*, the defendant and the government informant were both treated for substance abuse.[62] On repeated occasions, the defendant refused the agent's requests for the defendant to supply the agent with narcotics.[63] The agent continued his solicitations, attempting to invoke the defendant's sympathies by claiming that he was "not responding to treatment" and as a result was "suffering."[64] Finally, but only after this persistent course of badgering, the defendant acceded to the agent's requests.[65] The defendant was then charged with distributing narcotics in violation of federal law.[66]

55. *Sorrells*, 287 U.S. at 441.
56. *Id.* at 452.
57. *Id.*
58. *Id.*
59. *Id.* at 444 (quoting Butts v. United States, 273 F. 35, 38 (8th Cir. 1921)).
60. *Id.* at 451.
61. 356 U.S. 369 (1958).
62. *Id.* at 371.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 370.

In an opinion authored by Chief Justice Warren, the Court held that "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."[67] The Court, pointing to the number of requests that were necessary and the agent's resort to sympathy, found that the defendant was induced.[68] In considering the defendant's predisposition, the Court found no evidence that the defendant was involved in the drug trade at the time of the solicitation.[69] Although the government pointed to two previous narcotics convictions, the Court found that "a nine-year-old sales conviction and a five-year-old possession conviction are insufficient to prove [that the defendant] had a readiness to sell narcotics at the time [the government agent] approached him."[70] In upholding the entrapment defense, the Court noted that this was precisely the evil the entrapment defense was designed to combat.[71] "[T]he Government [may not] play[] on the weaknesses of an innocent party and beguile[] him into committing crimes *which he otherwise would not have attempted*."[72]

Sherman again demonstrates the Court's focus on whether the government conduct caused criminal activity. The Court stressed that "[e]ntrapment occurs only when the criminal conduct was 'the *product of* the creative activity' of law-enforcement officials."[73] In other words, the question was whether the government conduct in question produced a crime "*which [the defendant] . . . otherwise would not have attempted*."[74]

d. In Concurring Opinions, Justice Roberts in *Sorrells* and Justice Frankfurter in *Sherman* Advocated an Objective Approach to the Entrapment Defense

In *Sorrells*, Justice Roberts, joined by two other justices, concurred, arguing that the proper inquiry should focus exclusively on the conduct of the government agent—not the disposition of the defendant.[75] Justice Roberts felt that it was inappropriate to allow the government to rebut a claim of inducement by showing that "the officer guilty of incitement of the crime had reasonable cause to believe the defendant was a person

67. *Id.* at 372.
68. *Id.* at 373.
69. *Id.* at 375.
70. *Id.*
71. *Id.* at 376.
72. *Id.* (emphasis added).
73. *Id.* at 372 (citing *Sorrells*, 287 U.S. at 441, 451) (emphasis added) (citations omitted).
74. *Id.* at 376 (emphasis added) (footnote omitted).
75. *Sorrells*, 287 U.S. at 458–59. Justice Roberts also criticized the majority's reliance on the "fiction" of legislative intent:

> If we assume the defendant to have been a person of upright purposes, law abiding, and not prone to crime,—induced against his own will and better judgment to become the instrument of the criminal purpose of another,—his action, so induced, none the less falls within the letter of the law and renders him amenable to its penalties . . . . [H]is act, coupled with his intent to do the act, brings him within the definition of the law . . . .

Id. at 456.

disposed to commit the offense."[76] He reasoned that such a rule would allow the police free reign against persons guilty of previous transgressions.[77] In addition, he pointed to the dangers inherent in allowing the type of evidence generally used to prove predisposition.[78] According to Justice Roberts, this would allow the conviction to turn on the "prior reputation or some former act or acts of the defendant," rather than commission of the act charged in the indictment.[79]

Likewise, in *Sherman*, four justices, led by Justice Frankfurter, concurred, arguing for an objective approach which would focus exclusively on the reasonableness of the police methods employed.[80] "Permissible police activity does not vary according to the particular defendant concerned . . . ."[81] Justice Frankfurter reiterated the concerns of Justice Roberts in *Sorrells*, pointing to the danger of prejudice where evidence of the defendant's disposition, in the form of a reputation for criminal activities, is allowed into evidence at trial.[82] The *Sherman* majority coun-

76. *Id.* at 458.

77. *Id.* at 458–59. The result in *Sherman* seems to argue against Justice Roberts's free-reign argument. Although the defendant in *Sherman* had previously been convicted of both possessing and selling narcotics, the Court nonetheless upheld the defendant's entrapment defense. *Sherman*, 356 U.S. at 373. The Court stressed that these previous convictions did not demonstrate a present readiness to engage in narcotics distribution. *Id.* at 375–76. In addition, the Supreme Court later recognized the possibility of an "outrageous government conduct" defense under the Due Process Clause. *See* United States v. Russell, 411 U.S. 423, 431–32 (1973). This defense cannot be defeated by the prosecutor demonstrating the defendant's predisposition. *See id.*

78. *Sorrells*, 287 U.S. at 458.

79. *Id.* at 459. While Justice Roberts was no doubt correct that predisposition evidence can be prejudicial to the defendant, the actus reus elements are generally not in dispute where a defendant claims entrapment. In other words, the commission of the crime is generally not in dispute—the question is whether punishment is nonetheless justified.

80. *Sherman*, 356 U.S. at 382. Justice Frankfurter again attacked the "sheer fiction" of the legislative intent justification espoused by the majorities in both *Sorrells* and *Sherman*, pointing to the fact that, if the inducement offered in either case had originated from a private person, as opposed to a government actor, an entrapment defense would not lie. *Id.* at 379. "The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced." *Id.* at 380.

81. *Id.* at 383. This, however, is clearly not the case. For example, under the Fourth Amendment, all persons have the right to be free from unreasonable searches and seizures. But what is reasonable depends on the knowledge possessed by the police concerning the particular individual. Reasonable suspicion or probable cause provide the police with justification for a more intrusive encounter with an individual.

Justice Frankfurter, however, seemed to be concerned with prior criminals, and that such "status" might be used to justify incessant police targeting. This concern is undoubtedly legitimate. "[T]o permit the use against a previously convicted person of police measures not permitted against the rest of society is to fix a permanent status of criminality on these persons against the hopes of enlightened penology." MODEL PENAL CODE § 2.13 cmt. 3 (1980). But this only highlights the importance of defining predisposition as the likelihood of crime, rather than as mere willingness, or previous transgressions, or even the harboring of "evil" thoughts. Both *Sherman*, 356 U.S. at 375, where the defendant had been twice convicted of drug infractions, and *Jacobson v. United States*, 503 U.S. 540, 543 (1992), where the defendant had previously viewed the illegal materials (although at a time when such viewing was legal), indicate that predisposition is not being defined in this unacceptable manner.

82. *Sherman*, 356 U.S. at 382.

tered that the reformulation offered by Justice Roberts would place an obvious difficulty on the prosecution.[83]

The Roberts-Frankfurter approach to the entrapment defense has come to be known as the "objective" approach.[84] The objective approach to entrapment is reflected in the Model Penal Code formulation of the defense,[85] and is "favored by a majority of commentators,"[86] although it has been consistently rejected by a majority of the Supreme Court.

e. *United States v. Russell* Demonstrates the Importance of the Inducement in Relation to the Predisposition of the Defendant

United States v. Russell[87] was the Court's next opportunity to consider the entrapment defense. In *Russell*, the government agent supplied the defendant with phenyl-2-propanone, a necessary ingredient in the manufacture of methamphetamine.[88] The supplied ingredient was difficult to obtain, although legal to sell and possess, and the record demonstrated the defendant's ability to obtain the ingredient both before and after the transaction with the government agent.[89] The defendant was convicted on several counts of manufacturing methamphetamine.[90]

The Court of Appeals reversed the defendant's conviction on an expanded concept of the entrapment defense, holding that the entrapment defense "mandate[s] dismissal of a criminal prosecution whenever the court determines that there has been 'an intolerable degree of governmental participation in the criminal enterprise.'"[91] The Supreme Court reversed, however, reaffirming the subjective approach to entrapment.[92] The entrapment defense was not proper because the defendant

83. *Id.* at 377. Judge Learned Hand, in the first appeal of *Sherman*, noted: "[I]t would seem probable that, if there were no reply [to the claim of inducement], it would be impossible ever to secure convictions of any offences which consist of transactions that are carried out in secret." United States v. Sherman, 200 F.2d 880, 882 (2d Cir. 1953).

84. LAFAVE & SCOTT, *supra* note 4, § 5.2(c), at 423.

85. *See* MODEL PENAL CODE § 2.13 (1980).

86. LAFAVE & SCOTT, *supra* note 4, § 5.2(c), at 423.

87. 411 U.S. 423 (1973).

88. *Id.* at 426.

89. *Id.* at 425–26. At their initial meeting, the defendant told the agent he had been manufacturing the illicit drug for the past seven months, and gave the agent a bag containing methamphetamine which he represented as being produced "from 'the last batch we made.'" *Id.* at 425. In addition, a search of the defendant's house produced an additional bottle of phenyl-2-propanone, not supplied by the agent. *Id.* at 426.

90. *Id.* at 427.

91. *Id.* The court of appeals noted that the Due Process Clause furnished an alternative ground for reversing the defendant's conviction, based again on the unacceptable level of government involvement in the criminal activity. *Id.* at 428.

92. *See id.* at 423. The Court acknowledged that it might "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 to obtain a conviction." *Id.* at 431–32. The law enforcement tactics in question, however, stopped far short of implicating the notions of fundamental fairness embedded in the Fifth Amendment. *Id.* at 432.

was demonstrably predisposed.[93] There was evidence that the defendant manufactured the illicit drug for the seven months prior to being approached by the government agent.[94]

Four justices dissented in *Russell*, again arguing for an objective approach.[95] The *Russell* dissent demonstrates the confusion engendered by the references in *Sorrells* and *Sherman* to the "otherwise innocent" defendant.[96] "The very fact that he has committed an act that Congress has determined to be illegal demonstrates conclusively that he is not innocent of the offense."[97] Accordingly, the dissent argued, the purpose of the entrapment defense cannot be to protect the "otherwise innocent," but rather, "it must be to prohibit unlawful governmental activity in instigating crime."[98]

Although the majority's referral to the "otherwise innocent" is perhaps unfortunate,[99] the meaning conveyed is not difficult to understand. Persons who are entrapped are not "innocent," but rather, they are *otherwise* innocent. In other words, government conduct has caused a crime that would not have been committed *otherwise*. Persons that would refrain from criminal activity absent governmental inducement do not pose a threat to society. Because they do not pose a threat, punishment is inappropriate. The fact that the actus reus was committed does not end the inquiry where the crime was committed in response to government solicitation. Courts must ask whether it is likely that crime would have otherwise been committed.

The *Russell* dissent went on to query: "If the chemical was so easily available elsewhere, then why did not the agent simply wait until the [defendant] had himself obtained the ingredients and produced the drug, and then buy it from him?"[100] Then Justice Rehnquist's rejoinder on this point is an important observation:

> The illicit manufacture of drugs is not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise. In order to obtain convictions for illegally manufacturing drugs, the gathering of evidence of past unlawful conduct frequently proves to be an all but impossible task. Thus in drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a

93. *Id.*
94. *Id.* at 425.
95. *See id.* at 423.
96. *Id.* at 442.
97. *Id.*
98. *Id.*
99. Marcus, *supra* note 10, at 233; *see, e.g.*, Sherman v. United States, 356 U.S. 369, 372 (1958) ("Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations."); Sorrells v. United States, 287 U.S. 435, 442 (1932) (referring to government conduct that might "implant in the mind of an innocent person the disposition to commit the alleged offense").
100. *Russell*, 411 U.S. at 448–49 (Stewart, J., dissenting).

> recognized and permissible means of investigation; if that be so, then the supply of some item of value that the drug ring requires must, as a general rule, also be permissible. *For an agent will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them*.[101]

This observation recognizes that in order to infiltrate criminal drug rings, it is inevitable that, in some instances, an agent will be required to go beyond offering a mere opportunity and be forced to become involved to some degree in the criminal conspiracy. The reasonableness of this deviation must be judged while considering the knowledge possessed by the government agent concerning the particular target.

Russell is significant in several respects. First, the facts of *Russell* suggest the importance of considering the government activity in the context of the particular person targeted. Had the agent in *Russell* supplied the difficult-to-obtain chemical to a person not currently involved in the manufacture of methamphetamine, the Court would have been faced with a different question. But that was not the case. The defendant was involved in an ongoing criminal conspiracy. This logic suggests that the level of inducement cannot be considered in isolation, as the objective approach advocates. The fact that the target was already involved in the manufacture of the illicit drug, and was already able to obtain the chemical supplied,[102] assures the Court that the agent in *Russell* did not cause a crime to occur that would not have occurred otherwise. Although such conduct could pose a risk if used against a person not already engaged in the manufacture of methamphetamine, when used against this particular defendant no such risk arose. Second, the facts of *Russell* also point to a sliding-scale approach to entrapment, allowing for greater government involvement when there is evidence that the target is engaged or is likely to engage in criminal activity without first being solicited by the government. Finally, *Russell* illustrates that one of the most important factors in determining whether the police conduct at issue was reasonable is the information possessed by the police concerning the particular target.

f. *Jacobson v. United States* Signals the Court's Full Shift Toward a Causation-Type Approach to Entrapment

The most recent Supreme Court decision involving the entrapment doctrine, *Jacobson v. United States*,[103] involved an undercover operation

101. *Id.* at 432 (emphasis added).

102. The record disclose[d] that although the propanone was difficult to obtain, it was by no means impossible. The defendants admitted making the drug both before and after those batches made with the propanone supplied by [the agent]. [The agent] testified that he saw an empty bottle labeled phenyl-2-propanone on his first visit to the laboratory on December 7, 1969. And when the laboratory was searched pursuant to a search warrant on January 10, 1970, two additional bottles labeled phenyl-2-propanone were seized, [bottles not supplied by the agent].

Id. at 431.

103. 503 U.S. 540 (1992).

spanning two-and-a-half years.[104] Prior to being targeted by the government, the defendant had purchased two magazines depicting "nude preteen and teenage boys."[105] The magazines were legal at the time of the purchase, but Congress subsequently passed the Child Protection Act of 1984, which criminalized the receipt of such materials through the mail.[106] Then ensued the government's solicitation involving "repeated efforts by two Government agencies, through five fictitious organizations and a bogus pen pal, to explore [the defendant's] willingness to break the . . . law by ordering sexually explicit photographs of children through the mail."[107] The defendant was convicted in 1987 after ordering materials from one of the fictitious organizations created by the government as part of the sting.[108]

Justice White emphasized that the "prosecution must prove . . . that the defendant was disposed to commit the criminal act *prior to being approached by Government agents*."[109] At the same time, Justice White noted, had the agents merely offered the defendant an opportunity to purchase child pornography through the mails and the defendant availed himself of the opportunity without hesitation, an entrapment instruction would not likely have been warranted.[110] But the government's twenty-six month campaign could not be characterized as a mere opportunity.[111] Evidence that the defendant was "ready and willing" to *illegally* order the materials came only after the agents excited the defendant's interest and exerted substantial pressure on him to order and read the materials.[112] "When the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen *who, if left to his own devices, likely would have never run afoul of the law*, the courts should intervene."[113] In dissent, Justice O'Connor argued that the majority had added a reasonable suspicion requirement for government sting operations.[114]

3. The Federal Entrapment Defense Today

Federal courts continue to approach the entrapment defense under the two-step approach of inducement and predisposition. The defendant

104. *Id.* at 543. Professor Marcus referred to the government's operation in *Jacobson* as "relentless." MARCUS, *supra* note 6, § 1.11, at 36.

105. *Jacobson*, 503 U.S. at 542–43.

106. *Id.* at 543.

107. *Id.*

108. *Id.* at 542.

109. *Id.* at 549 (emphasis added) (citing United States v. Whoie, 925 F.2d 1481, 1483–84 (D.C. Cir. 1991)). Inducement was not an issue in *Jacobson*—"[t]he Government [did] not dispute that it induced [the defendant] to commit the crime." *Id.* at 549 n.2.

110. *Id.* at 550 (citing Matthews v. United States, 485 U.S. 58, 66 (1988)).

111. *Id.*

112. *Id.* at 553.

113. *Id.* at 553–54 (emphasis added).

114. *Id.* at 556 (O'Connor, J., dissenting).

bears the burden of proving inducement and, when successful, the burden then shifts to the prosecution to prove the defendant was predisposed.

a. Inducement

Under modern entrapment doctrine, the federal courts of appeals define inducement as government conduct that creates a substantial risk of an otherwise law-abiding individual committing a crime.[115] But the government merely offering an opportunity does not suffice.[116] "An 'inducement' consists of an 'opportunity' plus something else . . . ."[117] That "something else" might consist of "persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship."[118]

b. Predisposition

i. The Focus Is Now the Likelihood of Criminal Activity Rather Than Mere Willingness

Prior to *Jacobson*:

> [federal] courts of appeals had been drifting towards the view . . . that the defense of entrapment must fail in any case in which the defendant is "willing," in the sense of being psychologically prepared, to commit the crime for which he is being prosecuted, even if it is plain that he would not have engaged in criminal activity unless inveigled or assisted by the government.[119]

Since *Jacobson*, however, the federal courts have retreated from this exclusive focus on the defendant's state of mind or willingness to commit the crime.[120] Post-*Jacobson*, it is clear that the target's mere willingness, or absence of reluctance, to engage in the crime is insufficient evidence of predisposition. In considering predisposition, courts must now determine whether the defendant is one who "likely would have never run afoul of the law" absent the government inducement.[121]

115. United States v. Poehlman, 217 F.3d 692, 698 (9th Cir. 2000) (citing United States v. Davis, 36 F.3d 1424, 1430 (9th Cir. 1994)). Similarly, Chief Judge Breyer noted that inducement occurs where the government agent's conduct "create[s] a substantial risk that such an offense will be committed by persons other than those willing to commit it." United States v. Gendron, 18 F.3d 955, 962 (1st Cir. 1994) (citing MODEL PENAL CODE § 2.13(1)(b)).

116. *Gendron*, 18 F.3d at 961.

117. *Id.*

118. *Poehlman*, 217 F.3d at 698.

119. United States v. Hollingsworth, 27 F.3d 1196, 1198 (7th Cir. 1994); *cf.* United States v. Evans, 924 F.2d 714, 717 (7th Cir. 1991) (noting that "inordinate willingness to participate in criminal activity, must be the key inquiry"); United States v. Kaminski, 703 F.2d 1004, 1008 (7th Cir. 1983) ("[T]he most important factor . . . is whether the defendant evidenced reluctance to engage in criminal activity . . . .").

120. Marcus, *supra* note 10, at 219.

121. Jacobson v. United States, 503 U.S. 540, 553–54 (1992).

ii. Post-*Jacobson*, the Federal Circuits Are Split on the Question of Positional Predisposition

Since *Jacobson*, a split has developed in the federal courts of appeals as to whether the government is required to prove "positional predisposition," in addition to "psychological preparedness."[122] In other words, the question is whether the government, under the predisposition inquiry, must prove that the target was not only willing, but *able* to commit the crime. The concern would not arise in many garden-variety undercover operations, but might be applicable in a more intricate operation, such as a money-laundering scheme.[123] The debate apparently stems from *Jacobson*'s reference to the "otherwise law-abiding citizen who, *if left to his own devices*, likely would have never run afoul of the law."[124]

iii. While Reasonable Suspicion Is Not Required, *Jacobson* May Encourage Law Enforcement to Obtain Evidence Similar to Reasonable Suspicion Prior to Targeting an Individual

In *Jacobson*, Justice White emphasized that the "prosecution must prove . . . that the defendant was disposed to commit the criminal act *prior to being approached by Government agents*."[125] While Justice O'Connor read this language as requiring reasonable suspicion for government sting operations,[126] the federal courts of appeals have not interpreted *Jacobson* in this expansive fashion.[127] Query, however, whether the *effect* of *Jacobson* might be to induce the government to obtain some level of suspicion prior to targeting an individual in order to avoid any possibility of acquittal based on an entrapment defense. For example, consider the following advisement published in a recent FBI bulletin:

> [A]ll law enforcement officers should consider the following three points before conducting undercover investigations. First, while reasonable suspicion is not legally necessary to initiate an undercover investigation, officers should nonetheless be prepared to articulate a legitimate law enforcement purpose for beginning such investigation. Second, law enforcement officers should, to the extent possible, avoid using persistent or coercive techniques, and instead, merely create an opportunity or provide facilities for the tar-

122. *Compare Hollingsworth*, 27 F.3d at 1199–1200 (requiring positional predisposition), *with* United States v. Thickstun, 110 F.3d 1394, 1397–98 (9th Cir. 1997) (rejecting the positional predisposition requirement).

123. *See Hollingsworth*, 27 F.3d at 1198.

124. *Jacobson*, 503 U.S. at 553–54 (emphasis added).

125. *Id.* at 549 (emphasis added).

126. *Id.* at 556 (O'Connor, J., dissenting).

127. Marcus, *supra* note 10, at 219 n.6; *see, e.g.*, United States v. Aibejeris, 28 F.3d 97, 99 (11th Cir. 1994); United States v. Harvey, 991 F.2d 981, 992 (2d Cir. 1993); United States v. Kussmaul, 987 F.2d 345, 349 (6th Cir. 1993).

> get to commit a crime. Third, officers should document and be prepared to articulate factors demonstrating a defendant was disposed to commit the criminal act prior to government conduct.[128]

This seems to indicate that federal law enforcement officials are indeed considering the harm posed by a potential target prior to instigating a sting operation.

III. ANALYSIS

A. The Federal Courts' Approach to Entrapment

Commentators have long criticized the federal court approach to entrapment, arguing that the doctrine lacked any coherent rationale.[129] But in surveying the Supreme Court opinions in the area of entrapment, a consistent theme does emerge—causation.[130] "[T]he entrapment defense is available under th[e] [subjective] approach only to those who would not have committed the crime *but for* the Government's inducements."[131]

In *Sorrells*, the Court noted that the government should not "incite to and *create* crime for the sole purpose of prosecuting and punishing it."[132] Under *Sorrells*, if the defendant "would [not] have been guilty of

128. Thomas V. Kukura, *Undercover Investigations and the Entrapment Defense*, FBI LAW ENFORCEMENT BULL., Apr. 1993, at 27, 32. It is interesting to note, however, that even prior to *Jacobson*, the Attorney General's internal guidelines on FBI undercover operations essentially required reasonable suspicion or some other assurance that the target was likely predisposed. The guidelines provide that no individual should be targeted unless:

> (a) [T]here is a reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type; *or*
>
> (b) The opportunity for illegal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity.

Jacobson, 503 U.S. at 549 n.2 (citing the Attorney General's Guidelines on FBI Undercover Operations (Dec. 31, 1980)).

It is also noteworthy that William H. Webster, then director of the FBI, explicitly endorsed a reasonable suspicion requirement for undercover operations undertaken by the Justice Department:

> [O]ne of the basic standards for initiating an operation or for making a change in direction or a change in focus, which is one of the sore points we have observed in these various operations, currently appears in the Attorney General's Guidelines on Criminal Investigations, and that is that there must be facts or circumstances that reasonably indicate that a Federal criminal violation of the type to be investigated has occurred, is occurring, or is likely to occur. In other words, a reasonable cause provision.

Jacobson v. United States, 916 F.2d 467, 473 n.1 (8th Cir. 1990) (Heaney, J., dissenting).

129. For a discussion of the various critiques, see Orfield, *supra* note 22, at 53–58; Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 240–47 (1976). For a specific critique, see Louis Michael Seidman, *The Supreme Court, Entrapment, and our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111.

130. *Cf.* Marcus, *supra* note 10, at 234 (arguing that the better approach to entrapment employs the notion of causation); Orfield, *supra* note 22, at 50 ("In the absence of proof that the crime was causally related to the inducement, the defendant is in no position to claim that the undesirable government action unfairly affected *him*.").

131. United States v. Russell, 411 U.S. 423, 440 (1973) (Stewart, J., dissenting) (emphasis added).

132. Sorrells v. United States, 287 U.S. 435, 444 (1932) (emphasis added) (citations omitted).

[the offense] if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it," the defendant was entrapped.[133] In other words, if the defendant would not have committed the crime but for the government inducement, an entrapment defense should prevail.

Sherman similarly focused on whether government conduct caused crime.[134] The Court stressed that "[e]ntrapment occurs only when the criminal conduct was 'the *product of* the creative activity' of law-enforcement officials."[135] Where the government conduct in question produced a crime "*which . . . otherwise would not have [been] attempted*," the defendant was entrapped.[136]

Language in *Jacobson* demonstrates that the Court is moving closer to explicitly recognizing causation as the basic principle underlying the entrapment defense. Justice White noted that "[w]hen the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen *who, if left to his own devices, likely would have never run afoul of the law*, the courts should intervene."[137] Again, the basic inquiry is whether the defendant would have likely committed the crime absent—or but for—the government inducement.

Although the Court still approaches entrapment under the traditional questions of inducement and predisposition, causation appears to be the underlying inquiry driving the analysis. But courts, of course, cannot determine with certainty whether the government conduct did in fact cause the criminal conduct in question. Rather, the courts can only ask whether it is *likely* that the defendant would have engaged in the criminal activity absent the police inducement.

B. Economic Analysis of the Entrapment Defense

Judge Posner suggests that "'entrapment' is merely the name we give to a particularly unproductive use of law enforcement resources, which our system properly condemns."[138] Police resources should be

133. *Id.* at 444–45 (emphasis added) (citations omitted).

134. Sherman v. United States, 356 U.S. 369, 372 (1958).

135. *Id.* Justice Frankfurter made a similar argument in his concurring opinion: "The power of government is abused . . . when employed to *promote rather than detect* crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law." *Id.* at 384 (Frankfurter, J., concurring) (emphasis added).

136. *Id.* at 376 (emphasis added) (footnote omitted).

137. Jacobson v. United States, 503 U.S. 540, 553–54 (1992) (emphasis added).

138. United States v. Kaminski, 703 F.2d 1004, 1010 (7th Cir. 1983) (Posner, J., concurring). Another paradigm for conceptualizing all law enforcement is the government selling its protective services to its citizenry in exchange for the tax dollars collected. *Cf.* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 204 (1981) (suggesting that government-established law enforcement "internaliz[es]" the economic loss created by offenses against private citizens). The question then becomes whether the entrapment strategy employed is something that those protected would be willing to purchase.

used to detect crime—not to cause or produce crime.[139] Law enforcement resources are efficiently used where undercover operations target society's true offenders—those persons who would have committed the crime solicited absent the government inducement.[140] But where the target would not have committed the crime but for the government inducement, government resources have been misused in inducing the crime. In addition, because such persons do not pose a threat of harm to society, further error costs would be incurred by sanctioning the individual. As a result, under an economic approach, the defendant should be able to successfully raise the entrapment defense.

The critical question, similar to a causation approach to entrapment, becomes whether the target would have likely engaged in criminal activity absent the government inducement. Accordingly, in determining whether a defendant was entrapped, courts should inquire into whether there is evidence indicating the probability that the target was in fact a true offender. Examining the cost-benefit analysis from the police perspective will flesh out the importance of focusing on the probability that the target is a true offender.

1. The Cost-Benefit Analysis of Police-Conducted Undercover Operations Demonstrates the Importance of Considering the Probability That the Target Would Have Engaged in the Criminal Activity Involved Absent Police Inducement

Under general economic principles, undercover practices are economically justified when the expected societal benefits outweigh the expected societal costs.[141] The initial step in the inquiry, therefore, must be to define these costs and benefits.

a. The Costs

There are a number of societal costs involved in police undercover operations. First and foremost, there is the danger of convicting individuals who would likely not have committed any crime but for government encouragement. These error costs include both the costs of the sanction to the individual, and the costs to society in imposing the sanction.[142] Second, there are the costs involved in setting up the "sting," or the artificial criminal setting. In addition to these setup costs, there is the

139. *See Kaminski*, 703 F.2d at 1010. This is in accord with the traditional notion of causation in the criminal law. *See* Marcus, *supra* note 10, at 234.

140. Posner, *supra* note 9, at 1220. The terms "true offender," and "false offender" or "false positive" originated with Professor McAdams in his work on entrapment. *See* McAdams, *supra* note 7, at 1, 5, 9.

141. *Cf.* COOTER & ULEN, *supra* note 2, at 443. For a general overview of the optimum allocation of criminal justice resources, see HELLMAN & ALPER, *supra* note 2, at 69–98.

142. The additional cost of trials which result in acquittals based on entrapment would be included here as well.

opportunity cost involved. "[W]hen officers are engaged in persuading citizens to commit criminal acts, they are [necessarily] absent from their proper task of apprehending those offenders who act without such encouragement."[143] Finally, there is the damage to the reputation of law enforcement agencies, which can result in citizen distrust and lead to less community willingness to aid the police in their crime prevention and apprehension efforts.[144] Such injury occurs where the government employs "methods shocking to the moral standards of the community."[145] As Judge Aldisert of the Third Circuit so eloquently put it, such tactics represent a "sword that is plunged into the body of trust between a people and their government. That body can withstand only so many wounds before its life will be no more."[146]

b. The Benefits

Undercover operations also offer society a number of benefits that must be balanced against these costs. First, encouragement techniques result in "harmless" crimes.[147] Encouragement tactics allow the police to apprehend the perpetrator without allowing the underlying criminal act to impose externalities on third parties. Take, for example, an undercover drug sale. If the drugs purchased by the agent are subsequently destroyed, the criminal's act was harmless in that neither the potential purchaser nor innocent third parties were "victimized" as a result of the drug exchange.[148] Second, prevention costs are reduced. As Judge Posner recognized, it is generally less costly for law enforcement to catch the criminal in an arranged setup, as compared to conventional methods of

143. MODEL PENAL CODE § 2.13 cmt. 1 (1985).

144. *Cf. id.* Such costs are explicitly considered when the Immigration and Naturalization Service considers whether or not to employ undercover operations. *See* Lenni B. Benson, *By Hook or by Crook: Exploring the Legality of an INS Sting Operation*, 31 SAN DIEGO L. REV. 813, 827–28 (1994).

> In evaluating the benefits of the operation, the Committee is charged with examining its cost and other relevant factors including: the risk of harm to employees; the risk of financial loss to private individuals and businesses; the risk of liability and loss to the government; the *risk of harm to reputation*; the risk of harm to private or confidential relationships; the risk of invasion of privacy; the degree to which undercover employees might "entrap" a subject; and the "suitability" of the activity contemplated.

Id. (emphasis added) (discussing the Attorney General's Guidelines for INS Undercover Operations).

145. MODEL PENAL CODE § 2.13 cmt. 1 (1985).

146. United States v. Jannotti, 673 F.2d 578, 623 (3d Cir. 1982) (Aldisert, J., dissenting).

147. *See* Posner, *supra* note 9, at 1220.

148. *See* POSNER, *supra* note 6, at 255. Admittedly, some would argue that all crimes for which entrapment strategies are employed are "harmless" because they involve two willing participants (both criminals). Reasonable minds, however, could disagree on whether, in certain situations, the purchaser is to some extent being victimized. Regardless, Judge Posner's point seems to be that, in this controlled sale, the purchase of the illegal substance does not lead to subsequent crime (crimes committed while under the influence) because the drugs are immediately destroyed. Further, where the government poses as the buyer, the controlled sale can also avoid the crime that is oftentimes committed prior to a drug purchase (the purchaser committing theft to pay for the drugs).

apprehension.[149] Finally, there are likely deterrence benefits that accrue to society as a result of such tactics.[150]

c. An Economic Model for Undercover Operations

The following equation represents the cost-benefit analysis of the police. An undercover operation is cost justified if the expected benefits exceed the expected costs where:

- Expected cost = $((1 - p) * P) + O + S$
- Expected benefit = $(p * (H + X)) + D$

TABLE 1
DEFINITION OF VARIABLES

Variable	Definition
p	Probability the person is a true offender
P	Cost to society and individual where a false offender is induced to commit a crime[151]
O	Setup cost and opportunity cost for law enforcement in arranging the sting
S	Costs associated with the stigma on police for practicing encouragement
H	Harm prevented
X	Cost savings compared to conventional methods
D	Deterrence benefit

What emerges from the above equations is that the probability that the target is a true offender drives the cost-benefit analysis for the police.[152] By increasing the probability that the target is a true offender, the

149. *Id.*

150. *See* Seidman, *supra* note 129, at 141. As an illustration, "the few well-publicized cases of Arab sheikhs who turned out to be FBI agents are likely to make members of Congress think twice before accepting a bribe." *Id.* at 142.

151. "False offender" will be the term used to denote persons that are not true offenders, as defined *supra*. *See* McAdams, *supra* note 7, at 1, 5, 9.

152. The following explanation should illustrate the point. On the expected benefit side of the equation, the harm avoided and the savings in apprehension costs are directly proportional to the probability that the individual is a true offender. Where that probability is high, the government's expected benefit, reflected in harm avoided and apprehension costs saved, is also high. On the other hand, the expected cost side of the equation represents the costs of convicting nonpredisposed persons, or false offenders, which includes the cost of the sanction to the individual improperly targeted, in addition to the resources expended in apprehending the individual and imposing the sanction. This cost to the individual target, a significant part of the social cost, is inversely proportional to the prob-

police minimize the potential costs of error in undercover operations.[153] It is also significant to note that greater police involvement in the defendant's criminal activity (reflected in terms of the opportunity cost to the police) results in a higher probability requirement for the operation to be cost justified. This requirement also follows, however, from a common sense observation. Generally, the greater the police involvement in the defendant's scheme, the less certain society can be that the target really would have committed the crime absent government inducement. In order to counter this uncertainty, the police should be required to possess a higher certainty that the targeted individual is in fact a true offender for longer term operations.

ability that the individual is a true offender. Where it is probable that the individual is a true offender, this expected cost is low.

This model does not purport to be a workable solution for determining whether to set up a sting operation. The police certainly cannot be expected to sit down and determine the equilibrium point of their law enforcement expenditures. But the relationship between the probability of the target being a true offender and error costs for the police is significant to recognize. Focusing on the sanction brings to light the potential error costs and should reinforce the importance of having some preexisting knowledge about the target prior to exposing him or her to the inducement.

153. The objective approach to entrapment rejects focusing on the probability that the target is a true offender. Under the objective test, the inquiry is whether the government inducement is such that there is a substantial risk that otherwise law-abiding citizens might engage in criminal activity. In other words, the relevant probability is the likelihood that persons who are not true offenders will respond to the inducement.

Professor McAdams argues that there is a problem in focusing exclusively on the activities of the police for certain types of undercover operations. *See* McAdams, *supra* note 7, at 8–11. Using base-rate analysis, Professor McAdams highlights the importance of considering the probability of the persons exposed to the police inducement being true offenders. *See id.* The following example will illustrate the point.

For the hypothetical, assume a garden variety drug buy sting operation, where the government agent is posing as the buyer. First, assume the government constructs a scheme where 95% of the time, persons that respond to the inducement are true offenders. In other words, assuming 5% is not a "substantial risk," the operation would meet the requirements of the objective test. Assume further that, in the underlying population where the sting is to be employed, 5% of the population are true offenders—in this case drug dealers. What is the probability that the individual induced to commit the crime was a true offender given the efficacy or accuracy of the scheme and the number of true offenders in the underlying population? At first glance, some people might be tempted to answer 95%. But this is incorrect. In reality, the probability the person is a true offender is only 50%. Why this result? The probability is driven by the percentage of true offenders in the underlying population, which in this case is 5%. These numbers demonstrate what is known as the "base-rate fallacy."

It is interesting to note how a requirement of reasonable suspicion, or some level of ex ante knowledge, affects the above analysis. For instance, assume that prior to targeting an individual in the drug buy sting, the government was required to have reasonable suspicion that the individual was currently engaged in or preparing to engage in the distribution of narcotics. Assume that the required threshold reasonable suspicion standard was a 30% likelihood that the targeted individual was a true offender. How does this affect the probability of entrapping an otherwise law-abiding citizen? Assuming the same scheme, where 95% of the time the person that responds to the inducement is a true offender, and implementing the 30% likelihood reasonable suspicion standard for targeted individuals, the probability that individuals who respond to the inducement are in fact true offenders is now 89%. As the above analysis demonstrates, requiring a reasonable suspicion standard for individuals targeted in government undercover operations significantly lowers the probability of entrapping false offenders. For an operation demonstrating how a reasonable suspicion standard could have effectively been used, see *Field Hearing on Postal Inspection Service Drug Sting Operation: Hearing Before the House Comm. on Post Office & Civil Serv.*, 103d Cong. (1994).

d. Summary

Two important points should be clear after examining the cost-benefit analysis of the police. First, it is important to consider the probability that the target of an undercover operation is a true offender in determining whether a particular undercover operation is cost justified. By increasing this probability, the potential error costs are minimized. Second, the cost-benefit analysis of the police suggests a sliding-scale approach to the entrapment defense. In long term operations where government involvement is greater, the police may be required to possess a higher certainty that the target is a true offender in order to lessen potential error costs.

2. The Cost-Benefit Analysis of the Target Demonstrates the Importance of Examining the Character of the Police Inducement

In addition to the probability that the target is a true offender, the character of the police inducement should also be considered.[154] Judge Kozinski of the Ninth Circuit recently noted:

> [T]he government induces a crime when it creates a *special incentive* for the defendant to commit the crime. This incentive can consist of anything that materially alters the balance of risks and rewards bearing on defendant's decision whether to commit the offense, so as to increase the likelihood that he will engage in the particular criminal conduct.[155]

But what constitutes a "special," as compared to an ordinary, incentive? Economics would argue that the inducement offered by the government, and the character of the government involvement, should be compared to the normal criminal enterprises in the market.[156] The government inducement should parallel normal market conditions as closely as possible[157] in order to avoid inducing persons who do not pose a threat of criminal activity under the incentives and conditions currently in the market. As Judge Kozinski recognized, this analysis is based upon the cost-benefit analysis performed by the rational decisionmaker contemplating criminal activity.

154. This portion of the note builds on the analysis in two previous articles that considered the economics of inducements. *See* Allen et al., *supra* note 10; *see also* Elbaz, *supra* note 8.

155. United States v. Poehlman, 217 F.3d 692, 698 (9th Cir. 2000) (emphasis added).

156. Indeed, if the character of the inducement is similar to the ordinary market, and the police simply offered the target an opportunity to commit the crime without more, the inducement can be a strong indication of the probability the target was in fact a true offender. *See* Seidman, *supra* note 129, at 119 ("It would seem, then, that so long as government agents restrict themselves to 'proper' inducements, they run no risk of violating the entrapment rules."). Although the two inquiries are related, they should still be analyzed separately. *See infra* text contained in note 177.

157. Allen et al., *supra* note 10, at 415.

a. An Economic Model for the Rational Decisionmaker Contemplating Criminal Activity

What happens where the police, rather than "simulating the target's normal criminal opportunities," offer the target inducements such that the target now has an incentive to commit a crime she would not otherwise commit?[158] A "rational actor will commit a crime only if the expected utility [or benefit] to him exceeds the expected costs of engaging in the activity."[159] The following model represents the rational decisionmaker's cost-benefit analysis.

The rational actor will commit the crime only when the expected benefit exceeds the expected cost, where:

- Expected cost = $(p * (S + T)) + O$[160]
- Expected benefit = $(1 - p) * (P + N)$[161]

TABLE 2
DEFINITION OF VARIABLES[162]

Variable	Definition
p	Subjective probability of apprehension
S	Sanction faced if convicted
T	Costs associated with the stigma that attaches to criminals
O	Opportunity costs of the time spent engaging in the offense
N	Non-pecuniary gains from act
P	Pecuniary gains from act

As this model demonstrates, there are two primary ways in which the government can induce individuals, who would not commit crime under normal market conditions, to commit a crime. The government can either (1) offer extraordinary (above-market) benefits (N & P),[163] or (2) lower the individual's subjective probability of conviction (p).[164]

158. POSNER, *supra* note 6, § 7.3, at 255.

159. Elbaz, *supra* note 8, at 134. *See generally* Becker, *supra* note 3, at 176; Morgan O. Reynolds, *The Economics of Criminal Activity* (1973), *reprinted in* RALPH ANDREANO & JOHN J. SIEGFRIED, THE ECONOMICS OF CRIME 27–69 (1980).

160. Elbaz, *supra* note 8, at 135.

161. *See id.*

162. The information contained in this table is taken from *The Troubling Entrapment Defense: How About an Economic Approach?* and converted to tabular format. *Id.* at 134–35.

163. *Id.* at 137. For example, "if the police offered a derelict $100,000 to commit a minor crime that he wouldn't have dreamed of committing for the usual gain that such a crime could be expected to

To illustrate the problem of extraordinary benefits, take as an example the purchase of marijuana. Suppose the market rate for a certain quantity of marijuana is $100. At this rate, only a certain percentage of the population is willing to take the risk involved in selling marijuana in exchange for the benefits offered by the market. But what happens if the government begins to offer $150 for the same quantity of marijuana? Presumably, because the incentives have been increased, certain individuals who would not have engaged in criminal activity at the previously existing price levels will now have an incentive to do so. But does it make sense to sanction these individuals? Do these persons threaten harm to society?

Such inducements may demonstrate that every person has his or her price.[165] But the government is not a tester of virtue. Nor should the government be concerned with each citizen's price. Rather, the government's only legitimate concern is with those individuals who are currently engaging in, or are preparing to engage in, criminal activity at the "going rate."[166] The fact that individuals are willing to engage in criminal activity at prices above the current market rate does not pose a threat to society until the prices do in fact reach those levels.[167]

The individual's subjective probability of conviction also affects his or her decision to commit a crime.[168] "With a high probability of conviction, the actor must accept nearly the full costs of the sanctions and weigh them against any expected benefits."[169] On the other hand, "[w]ith a lower probability of conviction, the actor discounts the costs of the sanction before weighing them against expected benefits."[170] An individual's subjective probability of conviction is lowered when a government agent makes efforts to befriend and earn the trust of the individual.[171] "Having a competent co-conspirator may certainly affect one's judge-

yield, and he accepted the offer and committed the crime, that would be entrapment." United States v. Evans, 924 F.2d 714, 717 (7th Cir. 1991).

164. Elbaz, *supra* note 8, at 138–39.

165. "A person who takes the bait has had his price met; a person who does not, has not. But, the person who does not take the bait almost surely would take a higher, even if greatly higher, bait." Allen et al., *supra* note 10, at 413.

166. *Id.* at 415.

167. *Id.* Compare an analogous situation in entrapment sentencing: what happens in a reverse sting operation (agent posing as seller) when the government sells the defendant a quantity of drugs at well below market prices—a quantity he or she would not be able to afford at existing prices? The United States Sentencing Commission addressed this situation in a comment:

> If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.

U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, cmt. n.15 (2000).

168. Elbaz, *supra* note 8, at 138.

169. *Id.*

170. *Id.*

171. *Id.* at 141.

ment about a potential criminal enterprise."[172] The government could take further steps and provide "the meeting place and the instrumentalities of the crime."[173] When the government's involvement has risen to such levels, "there is little question that the actor's subjective probability of conviction will decrease."[174]

b. Summary

In looking at the cost-benefit analysis of the target, it becomes clear that courts should consider the character of the inducement and the tactics employed by the government agent. While the effect of the level of inducement or conduct of the government on the target may be difficult to quantify, intuitively the model is satisfying. Where there is evidence that the government inducement was extraordinary (exceedingly above the market), or that government efforts likely lowered the target's subjective probability of apprehension significantly, doubts arise as to whether the target would in fact have committed the crime absent the government inducement.

3. Summary: Economics and the Entrapment Defense

a. Contribution of Economic Analysis

By examining the cost-benefit analysis of the police, economic analysis demonstrates the importance of considering the probability that targets of undercover operations are true offenders. By increasing this probability, police can minimize error costs. In addition, by considering the cost-benefit analysis of the target, economic analysis illustrates the importance of examining the character of the inducement. This analysis suggests that government inducements should model normal market conditions as closely as possible.[175] Finally, the cost-benefit analysis of the police suggests a sliding-scale approach to the entrapment defense. In long term operations where government involvement is great, or in cases of extraordinary inducements, the police may be required to possess a higher certainty that the target is a true offender in order to minimize potential error costs.

b. An Economic Model for the Entrapment Defense

Economics suggests a sliding-scale approach to entrapment is appropriate. The police should be required to possess a higher amount of certainty that the target is, in fact, a true offender in operations where ei-

172. *Id.*
173. *Id.*
174. *Id.*
175. Allen et al., *supra* note 10, at 415.

ther (1) the inducement does not closely parallel normal market conditions or (2) the police involvement extends over a longer duration of time or where the solicitation is particularly intense. Essentially, the question is the extent to which the police solicitation at issue deviated from the individual's ordinary criminal opportunities.

Therefore, courts should initially consider the character of the police involvement in the criminal activity in addition to the inducement offered. The inducement inquiry will determine the government's burden in proffering additional evidence indicating the likelihood that the defendant would have engaged in the criminal activity solicited absent the government inducement. If government involvement in the criminal activity was minimal, and the character of the inducement paralleled normal market conditions, the defendant's response to the government solicitation provides strong evidence that the defendant was likely to commit the crime absent the government inducement. In such a case, the government's burden under the predisposition inquiry is slight.[176]

On the other hand, where the government inducement did not mirror market conditions, or where the government solicitation extended over a longer duration of time, the government's burden in proving predisposition is heightened.[177] This increased burden is due to the uncertainty attendant to a target's response to an inducement that could likely induce an otherwise law-abiding citizen to commit a crime.

176. If the government's solicitation mirrored normal market conditions, it could be argued that the target's response indicates conclusively that he or she would have likely committed the crime absent the police solicitation. But this argument overlooks the possibility that the target might be so situated that the likelihood of being exposed to any solicitations would be de minimis. In such a case, the target would be *willing*, but not *able*. *Cf.* United States v. Hollingsworth, 27 F.3d 1196, 1200 (7th Cir. 1994). When the government makes it possible for the target to commit a crime that she would not have been able to commit absent the government's help, the government is causing crime to occur, and hence, the target should successfully be able to raise the entrapment defense.

177. As opposed to heightening the prosecution's burden, Professor Allen and his coauthors argue that where the inducement did not mirror normal market conditions, the defendant has per se been entrapped (similar to the objective approach, simply defining inducement in economic terms). Allen et al., *supra* note 10, at 415–20. But *Russell* demonstrates the inadequacy of this approach. In *Russell*, the government agent supplied the defendant with an indispensable ingredient in the manufacture of methamphetamine. United States v. Russell, 411 U.S. 423, 426 (1973). Although the chemical may have been difficult for the general public to obtain (i.e., it was not readily available in the market), the record demonstrated the defendant's ability to obtain the chemical from other sources both before and after the transaction with the government agent. *See id.* at 425–26. Under Professor Allen's approach, the defendant in *Russell* was presumably entrapped because, under normal market conditions, the general public would have a difficult time obtaining the required chemical. But does this fact, market scarcity, demonstrate that the government agents were causing a crime that would not have otherwise occurred in the case of the defendant in *Russell*? The fact that the defendant was able to obtain the chemical, both before and after the police solicitation, provides assurance that the police conduct in *Russell* was not creating or causing a crime to occur. And as the majority noted, such involvement was required in order for the government agent to infiltrate the defendant's ongoing illicit drug manufacturing scheme. *Id.* at 432; *see also infra* notes 208–10 and accompanying text.

C. Comparing the Economic Model to the Federal Court Approach

In surveying the case law, the federal courts' subjective approach to entrapment is consistent with the economic model in three primary ways. First, the definition of predisposition in the federal courts has shifted towards a causation-type inquiry, consistent with the focus on the probability of the target being a true offender under economic analysis. Second, the federal courts' two-step inquiry, focusing on both the government inducement and the target's predisposition, is consistent with the economic model. The cost-benefit analysis of the police illustrates the importance of the predisposition inquiry, while the cost-benefit analysis of the target demonstrates the need to scrutinize the character of the inducement. Finally, the fact that the predisposition requirement, as currently defined, may encourage law enforcement to obtain reasonable suspicion prior to targeting an individual is consistent with the *ex ante* approach used in economic analysis when considering whether an undercover operation is cost justified.

1. The Definition of Predisposition Has Tended Towards the Economic Model

a. Predisposition in the Federal Courts

Various types of evidence are used in the federal courts to prove predisposition. Some of the most common include: (1) the defendant's willingness or reluctance in response to the inducement;[178] (2) the defendant's ability to perform the criminal act;[179] (3) the defendant's prior bad acts and reputation,[180] and whether the defendant was involved in an existing course of criminal conduct;[181] (4) whether the defendant initially suggested the criminal activity;[182] and, finally, (5) the nature of the inducement by the government.[183]

As discussed, prior to *Jacobson*, the defendant's willingness to engage in the criminal activity was generally sufficient to defeat an entrapment defense in the federal courts.[184] But the facts and language of *Jacobson* demonstrate a shift in focus. As Justice O'Connor noted in her dissent, the defendant evinced no reluctance to view or purchase the prohibited materials.[185] If willingness alone was the test, there could be no doubt that Jacobson was predisposed.[186] The majority, however,

178. MARCUS, *supra* note 6, § 4.15.
179. *Id.* § 4.16.
180. *Id.* §§ 4.17–.18.
181. United States v. Dion, 762 F.2d 674, 687–88 (6th Cir. 1985).
182. United States v. Navarro, 737 F.2d 625, 635 (7th Cir. 1984).
183. *Id.*
184. *See supra* notes 118–20 and accompanying text.
185. Jacobson v. United States, 503 U.S. 540, 554 (1992) (O'Connor, J., dissenting).
186. *See* United States v. Poehlman, 217 F.3d 692, 703 (9th Cir. 2000).

pointed out that it took repeated contacts from the government, spanning over twenty-six months, before the defendant finally ordered the prohibited materials.[187] Although the defendant did not show any reluctance at the time of purchase, the government was unable to prove that the defendant was disposed prior to first being approached by the government.[188] Absent such proof, it was not clear whether the government's twenty-six month campaign implanted in the defendant's mind the disposition to commit the criminal act.[189] In other words, the Court could not be certain that the government solicitation involved had not caused the criminal conduct in question.

After *Jacobson*, it is clear that the determinative inquiry is whether the undercover operation has resulted in the "apprehension of an otherwise law-abiding citizen *who, if left to his own devices, likely would have never run afoul of the law*."[190] The defendant's willingness is no longer sufficient to prove predisposition, but rather, courts must assess the likelihood that the defendant would have committed the criminal act absent the government inducement. Professor Marcus noted this change in focus:

> [T]he notion of predisposition is now properly placed in context. Courts should not merely ask whether the defendant was an enthusiastic participant; instead, the inquiry should be whether, *without the government involvement*, the defendant likely would have committed the crime in the foreseeable future. This distinction may seem subtle, but it is crucial. By examining government conduct, courts now look at the likelihood of criminal behavior as opposed to the eagerness of the defendant in responding to the solicitation.[191]

It is curious that the federal courts of appeals pre-*Jacobson* strayed towards primarily focusing on the defendant's state of mind, as opposed to the "likelihood of crime" paradigm applied in *Jacobson*. Since *Sorrells*, the Court has been concerned with whether the crime would have *otherwise* occurred, or whether instead the government conduct involved *created* the crime charged. *Sorrells* asked whether the defendant would have been guilty of the crime solicited absent the police inducement,[192] while noting that the government should not "incite to and *create* crime for the sole purpose of prosecuting and punishing it."[193] Similarly, *Sherman* asked whether the government conduct in question

187. *Jacobson*, 503 U.S. at 550.

188. *Id.* at 554.

189. It is important to note that the Court differentiated between a disposition to view preteen nude photographs and a disposition to order such materials through the mail in violation of the law. *Id.* at 551.

190. *Id.* at 553–54 (emphasis added). "[C]ourts now look at the likelihood of criminal behavior as opposed to the eagerness of the defendant in responding to the solicitation." Marcus, *supra* note 10, at 230.

191. Marcus, *supra* note 10, at 230.

192. Sorrells v. United States, 287 U.S. 435, 451 (1935).

193. *Id.* at 444 (emphasis added).

produced a crime "which [the target] otherwise would not have attempted," while noting that where the offense is "'the *product of* the creative activity' of law-enforcement officials," the defendant has been entrapped.[194]

Professor Marcus suggests that part of the problem might be the federal courts' unfortunate references to the "'*law abiding* citizen' and the '*innocent*' person."[195] Casting the inquiry in such terms tends to divert courts from the true inquiry, which is to determine whether the defendant would have likely resisted the ordinary temptations present in society that encourage persons to commit crimes.[196] In other words, despite the defendant's apparent willingness, would the defendant have likely committed the crime absent government inducement?[197] "[C]riminal punishment is not to be for a guilty mind, but only for a guilty action or at least a probability of such an action."[198]

b. Comparing the Federal Court Approach to the Economic Model

This definition of predisposition is consistent with the principles developed using economic analysis. Considering the cost-benefit analysis of the police, it is apparent that the single most important factor in determining whether an undercover operation is proper is the probability that the target is a true offender. By increasing this probability, the police can minimize error costs. Accordingly, an economic approach to entrapment would force courts to assess the likelihood that the target would have engaged in criminal activity absent police inducement. This approach is nearly identical to Justice White's question in *Jacobson*—whether the defendant is "an otherwise law-abiding citizen *who, if left to his own devices, likely would have never run afoul of the law*."[199]

194. Sherman v. United States, 356 U.S. 369, 372, 376 (1958) (emphasis added).

195. Marcus, *supra* note 10, at 233 (emphasis added) (citations omitted). *See, e.g.*, *Sherman*, 356 U.S. at 372 ("Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations."); *Sorrells*, 287 U.S. at 442 (referring to government conduct that might "implant in the mind of an innocent person the disposition to commit the alleged offense").

196. Marcus, *supra* note 10, at 233–34 (citing United States v. Evans, 924 F.2d 714, 717 (7th Cir. 1991); *Sherman*, 356 U.S. at 376).

197. *Id.*

198. *Id.* at 233.

199. Jacobson v. United States, 503 U.S. 540, 553–54 (1992) (emphasis added).

2. *The Supreme Court's Persistent Refusal to Focus Exclusively on the Police Conduct Judged by an Objective Standard Is Consistent with the Economic Model*

a. The Supreme Court Has Consistently Rejected the Objective Approach

Under the Roberts-Frankfurter model, or the objective approach to entrapment, a court must ask whether the tactics employed by the police were reasonable.[200] The defendant demonstrates unreasonableness, and hence entrapment, by establishing that "the methods of persuasion directed toward him, if utilized again, present a substantial risk that otherwise honest, law-abiding citizens may at some time be ensnared."[201]

The objective approach to entrapment has consistently been rejected by the Supreme Court. Although the federal courts do examine the reasonableness of the police conduct involved, in contrast to the analysis performed under the objective approach, they further inquire as to whether the defendant would have likely engaged in the criminal activity absent the government conduct involved. In addition, the reasonableness of the government conduct involved may depend on the knowledge of the police concerning the particular target.

Russell demonstrates the inadequacy of focusing exclusively on the conduct of the police. In *Russell*, the government agent supplied the defendant with an ingredient necessary for the manufacture of methamphetamine.[202] The ingredient was difficult to obtain, although legal to sell and possess, and the record demonstrated the defendant's ability to obtain the ingredient both before and after the transaction with the government agent.[203]

Had the agent in *Russell* supplied the difficult-to-obtain chemical to a person not currently involved in the manufacture of methamphetamine, the Court would have been faced with a different question. In *Russell*, however, the defendant was involved in an ongoing criminal conspiracy.[204] This logic suggests that the level of inducement cannot be considered in isolation, as the objective approach advocates. The fact that the target was already involved in the manufacture of the illicit drug, and was in fact already able to obtain the chemical supplied, assured the Court that the agent in *Russell* did not cause a crime to occur that would not have occurred otherwise. Although such conduct could pose a risk if used against a person not already engaged in the manufacture of

200. *See* MARCUS, *supra* note 6, § 5.05, at 182.

201. Commonwealth v. McGuire, 488 A.2d 1144, 1149 (Pa. Super. Ct. 1985). *See generally* MARCUS, *supra* note 6, § 5.05, at 182.

202. United States v. Russell, 411 U.S. 423, 425 (1973).

203. *Id.* at 425–26.

204. *Id.* at 425.

methamphetamine, when used against this particular defendant, no such risk arose.

Then-Justice Rehnquist also pointed out why such government conduct is necessary in some instances. In order to infiltrate criminal drug rings, it is inevitable that an agent will be required to go beyond offering a mere opportunity and be forced to become involved to some degree in the criminal conspiracy.[205] "[A]n agent will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them."[206] These observations from *Russell* illustrate that one of the most important factors in determining whether the police conduct at issue was reasonable is the information possessed by the police concerning the particular target.

b. Comparing the Federal Court Approach to the Economic Model

The economic model is in accord with the objective test regarding the question of whether the character of the inducement should be considered. The cost-benefit analysis of the target of an undercover operation illustrates the importance of considering the character of the police inducement. This analysis suggests that government inducements should model normal market conditions as closely as possible.[207]

Economic analysis also demonstrates the inadequacy of focusing exclusively on the character of the inducement. By examining the cost-benefit analysis of the police, economics recognizes the importance of considering the probability that targets of undercover operations are true offenders. By increasing this probability, police minimize potential error costs. Indeed, the probability that the target is a true offender is the single most important factor in considering whether a government undercover operation is cost justified.[208] By continuing to look at both the character of the inducement *and* the likelihood the target would have engaged in criminal conduct absent the government inducement, the federal court approach to entrapment is consistent with the approach dictated by economics.

205. *Id.* at 432.

206. *Id.*

207. *See supra* notes 151–74 and accompanying text.

208. On this note, if the objective test was to incorporate what the police knew about the target in assessing whether the operation was reasonable, the test would be more consistent with the economic approach to entrapment. *See* Seidman, *supra* note 129, at 119 n.31 (citations omitted) (noting that "reasonable suspicion of target's predisposition helps to justify officer's conduct under objective test"). This is not the general rule, however, under the objective test.

3. The Fact That Law Enforcement May Be Encouraged to Obtain Reasonable Suspicion Prior to Targeting an Individual Is Consistent with the Economic Model

a. Current Trend in Federal Undercover Operations

In *Jacobson*, Justice White noted that the "prosecution must prove . . . that the defendant was disposed to commit the criminal act *prior to being approached by Government agents*."[209] Although the courts of appeals have not read this language as *requiring* reasonable suspicion for undercover operations, the effect of this hurdle may be to encourage law enforcement to refrain from targeting an individual absent information similar to reasonable suspicion. The recent FBI bulletin, discussed earlier, supports this speculation. That bulletin stated:

> [W]hile reasonable suspicion is not legally necessary to initiate an undercover investigation, officers should nonetheless be prepared to articulate a legitimate law enforcement purpose for beginning such an investigation . . . . [In addition,] officers should document and be prepared to articulate the factors demonstrating a defendant was disposed to commit the criminal act prior to Government conduct.[210]

This bulletin seems to indicate that federal agents, prior to commencing an undercover operation, are indeed considering whether the target could likely be proven predisposed in a court of law, in order to avoid an acquittal based on the entrapment defense.

b. Comparison to the Economic Model

Economics demonstrates that the probability the target is a true offender drives the cost-benefit analysis for the police.[211] This probability is used to quantify the "potential harm" to be addressed with the undercover operation. Where there is a high probability that the target is a true offender, the benefits increase (a true threat of harm will be eradicated), and the potential error costs decrease (the operation is not inducing a person that is not a true offender to commit a crime).

But in order to perform this analysis, the police must know this probability *ex ante*, prior to targeting the individual. Under an economic view, the current trend in federal undercover operations of having agents assess predisposition prior to instigating a sting represents good policy. In this way, government agents will be encouraged to consider the potential harm, and to determine whether this potential harm justifies targeting a particular individual.

209. Jacobson v. United States, 503 U.S. 540, 549 (1992) (emphasis added).
210. Kukura, *supra* note 128, at 27.
211. *See supra* notes 141–52 and accompanying text.

D. Should the Federal Courts Require Positional Predisposition?

1. The Conflict in the Federal Circuits

As discussed in Part III, a split has developed in the federal circuits regarding whether positional predisposition is required in addition to psychological preparedness, or psychological predisposition. The positional predisposition concept was first raised in *United States v. Hollingsworth*.[212] In *Hollingsworth*, the defendants were charged with money laundering.[213] Although the defendants were willing participants in the agent's scheme, the court noted that the defendants would not have been able to enter the money-laundering business absent the agent's help. The court noted:

> [T]o get into the international money-laundering business you need underworld contacts, financial acumen or assets, access to foreign banks or bankers, or other assets. [The defendants] had none. . . . Even if they had wanted to go into money laundering before they met [the agent]—and there is no evidence that they did—the likelihood that they could have done so was remote. They were objectively harmless.[214]

In other words, due to the defendants "positioning," they were incapable of engaging in the criminal activity, and thus, were "objectively harmless."[215] Because the crime could not have been committed absent the police involvement, the court held that the defendants had been entrapped.[216] The Seventh Circuit based its holding on the rationale of *Jacobson*,[217] where Justice White noted: "When the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen *who, if left to his own devices, likely would have never run afoul of the law*, the courts should intervene."[218]

The Ninth Circuit, however, reached an opposite conclusion, rejecting the idea that *Jacobson* requires "positional predisposition."[219] Setting aside the question of which court correctly interpreted *Jacobson*, does the positional predisposition requirement make sense?[220] Is positional predisposition consistent with the economic approach? Which interpretation is more consistent with the causation rationale underlying the Supreme Court's entrapment decisions?

---

212. 27 F.3d 1196 (7th Cir. 1994).
213. *Id.* at 1198.
214. *Id.* at 1202.
215. *Id.*
216. *Id.* at 1204.
217. *Id.* at 1198 (citing Jacobson v. United States, 503 U.S. 540 (1992)).
218. *Jacobson*, 503 U.S. at 553–54 (emphasis added).
219. United States v. Thickstun, 110 F.3d 1394, 1398 (9th Cir. 1997).
220. This note does not consider which side should bear the burden of proving positional predisposition. The Seventh Circuit in *Hollingsworth* placed the burden on the prosecution. *See* 27 F.3d at 1200. One could argue, however, that the concept is closely analogous to the concept of impossibility and that the better approach would be to place the burden on the defendant.

2. Positional Predisposition Is Consistent with Economic Analysis

Economic analysis suggests that the positional predisposition requirement represents sound policy. As discussed in Part II, the probability that the target is a true offender drives the cost-benefit analysis for the police. Where this probability is high, it is likely that the particular undercover operation is cost justified. On the other hand, where the probability is low, expected error costs are high, and the individual is not likely a proper target for law enforcement. As should be obvious, where positional predisposition is disproved (in other words, where it is most likely impossible that the defendant could have committed the criminal act absent the assistance of the police) the probability of the defendant being a true offender is extremely low—most likely approaching zero in a case such as *Hollingsworth*—and, as a result, the undercover operation is not economically justifiable. Accordingly, under an economic view, the defendant should be able to successfully argue that he or she was entrapped.

3. Positional Predisposition Is Also Consistent with the Supreme Court's Focus on Causation

As previously discussed, causation has been the underlying principle in the Supreme Court's treatment of the entrapment defense.[221] "[T]he entrapment defense is available [in federal court] only to those who would not have committed the crime *but for* the Government's inducements."[222] This test is clearly met in a case where the defendant lacks positional predisposition. Where the defendant, due to her positioning, is completely unable to engage in the criminal activity solicited absent the government's inducement, by definition the government is inducing a crime that could not occur but for its intervention. The following twist on the facts of *Russell*, noted by the dissent, illustrates the point:

> It cannot be doubted that if phenyl-2-propanone had been *wholly unobtainable* from other sources, the agent's undercover offer to supply it to the respondent in return for part of the illicit methamphetamine produced therewith—an offer initiated and carried out by the agent for the purpose of prosecuting the respondent for producing methamphetamine—would be precisely the type of governmental conduct that constitutes entrapment under any definition. For the agent's conduct in that situation would make possible the commission of an otherwise totally impossible crime, and, I should suppose, would thus be a textbook example of instigating the commission of a criminal offense in order to prosecute someone for committing it.[223]

221. *See* discussion *supra* Part III.A.
222. United States v. Russell, 411 U.S. 423, 440 (1973) (emphasis added).
223. *Id.* at 448 (Stewart, J., dissenting) (emphasis added).

This hypothetical would be a "textbook example" of entrapment because the criminal conduct in question would have been *impossible* but for the government supplying the *otherwise wholly unobtainable* and required ingredient. In such a case, government agents are in fact causing crime to occur that would not be possible otherwise.

IV. RECOMMENDATION: INCORPORATING THE PRINCIPLES FROM THE ECONOMIC MODEL INTO THE FEDERAL COURT APPROACH TO ENTRAPMENT

A. Economic Analysis Suggests a Sliding-Scale Approach to the Entrapment Defense

1. The Sliding-Scale Approach Under the Economic Model

In considering the cost-benefit analysis from the police perspective in Part III.B, it was apparent that by increasing the probability that the target is a true offender, the police minimize the costs of error in undercover operations. In general, expected costs of error rise with the level of government involvement in the target's criminal enterprise. Greater police involvement can also undermine society's certainty that the target would in fact have committed the crime absent government inducement. Similar uncertainty could also arise where the government's inducement exceeds normal market conditions.

To counter this uncertainty, economics requires that the police possess a higher degree of certainty that the targeted individual is in fact a true offender. In other words, economic analysis suggests, focusing on the cost-benefit analysis from the perspective of the police, that the greater the police involvement in the criminal enterprise, the higher the degree of certitude (that the target is a true offender) required from the police.[224] As a result, the sliding-scale approach to entrapment is likely to be most relevant in long-term government operations such as the undercover operation in *Jacobson*.[225]

2. The Sliding-Scale Approach Is Supported by Russell *and* Jacobson*, and Could Be Implemented Within the Contours of the Current Approach in the Federal Courts*

This sliding-scale approach could be implemented within the existing structure of the entrapment defense in the federal courts. Under the

224. Courts should also keep this sliding scale in mind when looking at the character of the inducement and the intensity of the solicitation.

225. *Cf.* Marcus, *supra* note 10, at 245 ("With long-term investigations, intensive operations, or tremendous incentives to commit crime being offered, government investigators ought to be able to point to more than a willingness, or even an eagerness, on the part of the defendant to participate in the crime.").

entrapment doctrine, the greater the inducement, the greater the prosecution's burden should be in proving predisposition.[226] In addition to the economic justification, the facts and language in *Jacobson* and *Russell* provide further support for this sliding-scale approach.

In *Jacobson*, the government involvement was too great when considered in conjunction with the evidence of the defendant's predisposition.[227] But there was certainly evidence that the defendant was predisposed. As Justice O'Connor noted in dissent, the defendant never once resisted the government's solicitations.[228] In addition, the defendant had previously ordered, through the mail, a magazine depicting young teenage boys engaging sexual conduct, albeit at a time when receipt of such materials was not illegal.[229] Despite this evidence, the Court concluded that the defendant was entrapped.[230] Although the Court mentioned the agent's resort to use of First Amendment propaganda against censorship in encouraging the defendant to break the law, the Court's focus was on the fact that the government's campaign continued for twenty-six months.[231] Despite Jacobson's willingness, the Court found it highly improbable that Jacobson would have ordered such materials, absent the government operation.[232] "A farmer in Nebraska, his access to child pornography was limited. As far as the government was aware, over the period of more than two years in which it was playing cat and mouse with him he did not receive any other solicitations to buy pornography."[233] The facts of *Jacobson* suggest that for long-term undercover operations, the government is required to possess a higher degree of certainty regarding the defendant's predisposition. The required level of predisposition evidence must be sufficient to overcome concerns that a prolonged and intense solicitation, such as that involved in *Jacobson*, might cause a crime to occur that would not have otherwise been committed.

Russell also supports a sliding-scale approach to entrapment. In *Russell*, the government agent supplied an indispensable and difficult-to-obtain ingredient for the manufacture of methamphetamine, going far

226. Although no federal court has explicitly applied a sliding-scale approach to entrapment, several cases have alluded to it. *See, e.g.*, United States v. Hollingsworth, 27 F.3d 1196, 1200 (7th Cir. 1994) (noting "the greater the inducement, the weaker the inference that in yielding to it the defendant demonstrated that he was predisposed to commit the crime in question"); United States v. Jannotti, 673 F.2d 578, 619–20 (3d Cir. 1982) (Aldisert, J., dissenting) ("The greater the inducement, the heavier the government's burden of proving predisposition."); United States v. Watson, 489 F.2d 504, 511 (3d Cir. 1973) (recognizing that "the stronger the inducement, the more likely that any resulting criminal conduct of the defendant was due to the inducement rather than the defendant's own predisposition").

227. Jacobson v. United States, 503 U.S. 540, 550 (1992).

228. *Id.* at 554 (O'Connor, J., dissenting).

229. *Id.* at 550–51.

230. *Id.* at 554.

231. *Id.* at 550.

232. *Id.*

233. United States v. Hollingsworth, 27 F.3d 1196, 1199 (7th Cir. 1994) (citing Jacobson v. United States, 503 U.S. 540, 546–47 (1992)).

beyond providing a mere opportunity and becoming intricately involved in the defendant's criminal activity.[234] But as the majority noted, such involvement was required in order for the government agent to infiltrate the defendant's ongoing illicit drug-manufacturing scheme.[235] How else could the government get an "insider" into this group of current lawbreakers?[236] On the other hand, if the government supplied this difficult-to-obtain ingredient to a person not currently involved in the manufacture of the illegal drug, the analysis would be different. In that case, the government might be making it possible for the target to commit a crime that he *could not* commit absent the government's help. This suggests that greater government involvement may be justified, so long as the police are certain that the target is currently engaging in, or preparing to engage in, the crime solicited. Absent this information, however, the conduct at issue could be creating a risk of causing crime. As a result, the level of inducement that is proper is directly related to the knowledge the police possess about the target. In other words, predisposition and inducement must be considered together.

V. CONCLUSION

Undercover operations are an indispensable tool for effective law enforcement. As noted in *Russell*, "many crimes, especially so-called victimless crimes, could not otherwise be detected."[237] But police inducements that increase the *level* of crime in our society, rather than merely affecting the timing, are socially unproductive.[238] Unless a person presents a threat of harm to society, "[t]he criminal law has no proper concern with him, however evil his thoughts or deficient his character."[239]

In *Jacobson*, the government agents spent twenty-six months soliciting the defendant, a Nebraska farmer caring for his elderly father, to purchase magazines depicting child pornography.[240] In *Sherman*, the defendant was targeted in a treatment program where he was attempting to overcome his drug addiction.[241] Judge Kozinski of the Ninth Circuit recently expressed frustration with these types of police solicitations: "There is surely enough real crime in our society that it is unnecessary for our law enforcement officials to spend months luring an obviously lonely and confused individual to cross the line between fantasy and criminality."[242]

234. United States v. Russell, 411 U.S. 423, 425–26 (1973).
235. *Id.* at 432.
236. *Cf.* MODEL PENAL CODE § 2.13 cmt. 1 (1985).
237. 411 U.S. at 445 (Stewart, J., dissenting).
238. Posner, *supra* note 9, at 1220.
239. MARCUS, *supra* note 6, § 1.06, at 18 n.52.
240. 503 U.S. 540, 542–43 (1992).
241. 356 U.S. 369, 371 (1958).
242. United States v. Poehlman, 217 F.3d 692, 705 (9th Cir. 2000).

This note attempts to develop a more coherent approach to the entrapment defense. First, in considering the Supreme Court decisions on entrapment, it is clear that causation is the underlying principle in the Court's treatment of the defense. The Court's concern has consistently been whether the crime would have occurred but for the police inducement. Second, in considering the economics of undercover operations, it is apparent that potential error costs rise where the police target individuals without possessing information indicating that the target is predisposed to engage in illegal activity. This danger is especially prevalent in long-term operations such as that involved in *Jacobson*. As a result, the single most important inquiry in an entrapment case is the likelihood that the defendant would have engaged in the criminal activity absent the government inducement. At the same time, courts should consider the character of the police inducement. The importance of this inquiry is highlighted by examining the cost-benefit analysis of the rational decisionmaker contemplating criminal activity. Finally, informed by economics, consideration of these analyses leads to the conclusion that a sliding-scale approach to the entrapment defense is appropriate.

The proposed approach recognizes and highlights the relationship between the inducement and the target's predisposition—a relationship that is sometimes confounded in the federal courts. The court's inquiry is thereby simplified and clarified. The essential question facing the court is whether the crime solicited would have been committed *but for* the government inducement. In this determination, courts should consider the character of the inducement and the extent of the police involvement in the criminal enterprise, in addition to evidence indicating the likelihood that the defendant would have engaged in the criminal activity absent the government solicitation. In making this inquiry, courts must be cognizant of the interplay between the two prongs of the analysis, never losing sight of the overarching theme of causation.