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Clarifying entrapment(2) argues that the predisposition concept described in entrapment cases is "useless" and a "falsehood." Its authors propose to clarify entrapment with a test based upon whether the tempter offered an above-market inducement.

The authors have a point about the predisposition concept, though their dramatic and exaggerated way of stating the point did not help me to understand it. Judicial definitions of entrapment do leave something to be desired. First, statements in some of the judicial opinions (and in the standard federal jury instruction(3)) could be interpreted to mean that a person is entrapped only when that person had *absolutely* no willingness to commit the crime.(4) Applied literally, that test would abolish the entrapment defense. Every defendant who admits doing the charged act and raises the entrapment defense must have had at least some willingness to commit crime in response to pressure and temptation. Second, statements in other judicial opinions suggest that the question is whether the government "implanted" the criminal design.(5) This planting metaphor could be interpreted to mean that entrapment occurs whenever the government is the but-for cause of the act charged in the indictment, a test that would be silly because it goes too far. It would mean that an agent's purchase of drugs would always constitute "entrapment" of the seller, regardless of other facts, because that particular sale would not have occurred without the agent's participation. Therefore, the authors argue, "no one is ever, under any circumstances, 'predisposed' to commit the crime; or alternatively, everyone, under every conceivable circumstance, is predisposed to commit the crime. . . . '[P]redisposition' cannot sort anyone from anyone else, and thus is useless as a tool designed for just that purpose."(6)

Fortunately, neither courts(7) nor jurors(8) interpret the law in such an unreasonable fashion. In fact, the opinion-writers might fairly ask for a kinder treatment of their words. Opinions that talk about the requirement of "unwillingness" obviously do not mean to state a requirement of absolute unwillingness; that notion is rebutted by the fact that those very opinions give the benefit of the defense to defendants who actually did yield to temptation. Opinions that talk about the prohibition on "implanting" a criminal design obviously do not mean that any inducement is illegal; that notion also is rebutted by reading the words in context.(9)

There is nothing inherently incoherent about the concept of "predisposition." The core word "disposition" is just another synonym for propensity or proclivity, a concept we find quite useful in making classifications for other purposes, such as deciding whom to call for the Thursday night poker game. The prefix "pre" in the legal word "predisposition" just serves to remind us that we should try to imagine the defendant's propensity prior to the corrupting influence of the government agent.

It seems to me that the entrapment cases that apply the concept of predisposition attempt to identify, from among persons who have committed crimes in response to government inducements, a subset of normally law-abiding persons who were not very likely to have committed the type of crime charged if left to their own devices.(10) The concept of predisposition is certainly not mathematically precise, but neither are other concepts that we use to describe culpable mental states.

The authors of *Clarifying Entrapment* seek to achieve their goal of clarification through

use of the concept of "real world, market level inducements."(11) They state that "the most fruitful criterion of government inducements we have been able to identify to sort out those who have a plausible claim for exoneration is whether the inducements exceeded real world market rates, which includes both financial and emotional markets."(12) The test is not "whether the agent played upon the defendant's sympathies," but rather "whether a rational criminal would have gone to such lengths . . . ."(13)

I have trouble imagining how this concept might be applied in the real world of trials. As the authors recognize, the incentives that one person gives another to commit a crime are seldom quantifiable in dollar terms.(14) Moreover, entrapment claims usually involve something other than an allegation that the government offered too much money. (In fact, agents have an incentive *not* to offer too much money, because to do so arouses suspicion.) Entrapment cases commonly involve claims that the agent badgered the defendant, appealed to sympathy, exploited friendship or love, or provided equipment and expertise.(15)

The authors also acknowledge that getting valid information about standard market price may be a problem.(16) They suggest, however, that information about illegal markets is available and that expert testimony might be employed to show the market price.(17) They note the existence of news stories about the street value of drugs -- hardly an example that inspires confidence, and at any rate one that is limited to dollar prices.(18) Apparently, the expert witnesses would testify about how much nagging and appeal to friendship, sympathy, group or family loyalty, etc., is the going rate in the relevant market. While this type of testimony is imaginable, I wonder how much of real value these experts would contribute when testifying about these hard-to-measure, non-fungible goods in specific cases with unique facts. To me, it would be better to avoid the cost and confusion of expert testimony and just give the jury the task of deciding whether a normally law-abiding person was led astray, not the task of deciding what a rational criminal would have offered. Jurors can use their own experience with imperfect but normally law-abiding persons to decide for themselves what would tempt a normally law-abiding person, whereas to decide what a rational criminal would offer in the type of transaction charged might indeed require the help of an expert. Even with that help, it would be a strange and unfamiliar task.

The test of whether a "rational criminal" would offer the allegedly above-market inducement will be hard to apply fairly in situations in which the agent has monopoly power and thus is able to offer something that costs almost nothing to the agent but is extremely valuable to the target. For example, how would the test be applied when the target does something "out of character" because of a romantic infatuation with a government agent? Surely the jury shouldn't ignore the extraordinary situational pressures simply because a rational self-interested criminal would choose to take advantage of a vulnerable target if placed in the same situation. Were that the case, misuse of friendship, family relationship or love would almost never be grounds for a finding of entrapment, because rational criminals use those tools freely.

The authors' analysis of the *Sherman* case doesn't allay my fears. The authors conclude that "Under the market test, the issue would not be whether the agent played upon the defendant's sympathies; rather, it would be whether a rational criminal would have gone

to such lengths to persuade him to change his mind. Applying the test to the facts of *Sherman*, the answer is no. . . . [I]t is unlikely that he would have been unable to secure drugs from another source over the period involved in *Sherman* or that he would persist in the manner that he did. He raised the emotional stakes too high; it is highly unlikely that a rational criminal would behave this way."(19) Apparently the authors are willing to tolerate appeals to sympathy and friendship, however much they might affect a situationally vulnerable target who is normally a law-abiding person, so long as a rational criminal, free of constraints of conscience, would find it in his self-interest to behave the same way.

The authors' opinion that no rational criminal would act the way that the informer did in *Sherman* leaves me wondering why a rational *informer*would behave that way, rather than taking the easy course and pursuing other targets. Perhaps this is an example of the economic inefficiency of government? My guess is that the informer had plenty of time on his hands and that he was just as happy to interact with Mr. Sherman as to do anything else. If so, a real addict who was actually trying to get drugs from Mr. Sherman -- in other words, a rational criminal -- might be just as willing to plead and fawn. After all, Mr. Sherman ultimately made nonprofit drug purchases as a favor for his supposed friend.(20) A rational criminal who guessed at Mr. Sherman's willingness to do favors for friends might well find that it made economic sense to befriend Mr. Sherman and spend a lot of time with him. In fact, a rational criminal might be even more motivated to pursue Mr. Sherman than the informer was, because the rational criminal could also be pursuing the good of establishing a real friendship, whereas Mr. Sherman's tempter was just setting up an elaborate act of treachery. All in all, it seems to me that the traditional predisposition test provides better guidance to *Sherman's* result than the authors' "market level inducement" test.

The authors apply their market concept in arguing that private entrapment should be a defense(21) -- that is, entrapment should be a defense even when no government agent is involved in giving the inducement. In doing so, they suggest that above-market offers are likely to be quite rare in private entrapment cases -- why would a private actor want to pay more than the market price? It seems to me that if one accepts the premise that extra-market inducements will be very rare, "equivalent to a charitable contribution,"(22) then that's a reason for reaching a result that is the opposite of that urged by the authors -- the result of *not* recognizing a private person entrapment defense. Under that premise, the private person entrapment cases would arise in practice when a defendant with no legitimate defense seized upon entrapment in desperation -- for example, in a case in which there was a sale of drugs to an agent on videotape, marked money found on the defendant, and the defendant faced minimum mandatory sentence with no possibility of a plea bargain. It's easy enough for the defendant to testify that somebody other than the agent offered above-market inducements (or perhaps even to get an accomplice who has nothing to lose to testify that the accomplice offered such inducements). And it's harder for the government to meet that evidence when the government agent need not be involved in making the inducement.

That brings me to a more fundamental point -- that the authors treat facts as if they came neatly packaged as they do in appellate opinions, when of course facts don't show up that way. Facts are messy in entrapment cases because the defendants exaggerate the

inducements and the government minimizes them. In jury trials, entrapment is almost always an issue for the jury because of factual conflicts. So the merits of a proposal like the "rational criminal" test can't be assessed without asking how it would work in a jury system.

A reconceptualization cannot clarify entrapment unless it can be implemented with an understandable jury instruction. It would be helpful if the authors spelled out the market level test a bit more and provided a jury instruction. Then one could test the instruction in mock trial experiments.(23) My guess is that jurors would have a hard time understanding and applying the market inducement concept and that they would reach results much like those reached under other instructions.

My comments have been directed mainly at administrability. Let's suppose that the market inducement test could be articulated and administered without any special difficulty. Would it be a good test? The test might be operationalized in many different ways, and I have a hard time imagining how it would be applied in cases involving anything other than excessive money offers. But the language used by the authors suggests that, when nonmonetary inducements are under scrutiny, the test would be whether a rational criminal placed in the same situation would find that it was in his self-interest to use the inducement offered by the agent.(24) If so, the test would be unfair in cases in which targeted appeals to love, friendship, family or sympathy have an extraordinary effect upon a normally law-abiding but vulnerable target.

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2. Ronald J. Allen, Melissa Luttrell, and Anne Kreeger, *Clarifying Entrapment,* Int'l Commentary on Evidence (Aug. 6, 1998) <http://www.law.qub.ac.uk/ice/papers/entrap1.html> (hereinafter "Allen, Luttrell & Kreeger").

3. "A person is entrapped when that person has no previous intent or disposition or willingness to commit the crime charged and is induced or persuaded by law enforcement officers (or by their agents) to commit the offense."

Devitt & Blackmar, Fed. Jury Prac. & Instr. § 19.04 (1992).

4. *See, e.g.*, Sherman v. United States, 356 U.S. 369, 370 (1958) (issue in entrapment case was "whether the informer had convinced an otherwise unwilling person to commit a criminal act or whether the [defendant] was already predisposed to commit the act . . . "); Matthews v. United States, 485 U.S. 58, 63 (1988) (one element of the entrapment defense is "lack of predisposition on the part of the defendant . . . ").

5. Sorrells v. United States, 287 U.S. 435, 442 (1932).

6. Allen, Luttrell & Kreeger, text accompanying their footnote 9.

7. *See* Sorrells, 287 U.S. at 441-42; Sherman, 356 U.S. at 375-76; United States v. Jacobson, 503 U.S. 540, 553-54 (1992).

8. *See* Eugene Borgida and Roger C. Park, *The Entrapment Defense: Juror Comprehension and Decision Making*, 12 Law & Human Behavior 19, 30 Table 2 (1988) (In a study of juror comprehension of judicial instructions used in entrapment cases, verdicts of subjects who were asked to focus on the predisposition of the defendant ("the subjective test") varied depending on the strength of the evidence).

9. Sorrells, 287 U.S. at 441-42 (" . . . the fact that . . . the Government . . . afford[s] opportunities or facilities for the commission of the offense does not defeat the prosecution. . . . A different question is presented when the criminal design originates with . . . the Government . . . ").

10. Jacobson, 503 U.S. at 553-54 ("When the Government's quest for convictions leads to the apprehension of an otherwise law abiding citizen, who, if left to his own devices, likely would never have run afoul of the law, the courts should intervene.")

11. Allen, Luttrell & Kreeger, text accompanying their footnote 9.

12. *Id.* at their footnote 16.

13. *Id.* at text following their footnote 35.

14. *Id.* at their footnote 16.

15. *See, e.g.*, Sherman, 356 U.S. at 373; Sorrells, 287 U.S. at 440.

16. In fact, at one point they even suggest that the difficulty is a virtue; problems of proof will deter entrapment on the street because the prosecution won't be able to prove its case at trial. Allen, Luttrell & Kreeger, text following their footnote 23. But the authors give no reason for preferring false negatives to false positives, or for believing that the prosecution deserves burdens greater than those already imposed by the reasonable doubt standard.

17. *Id.*

18. *Id.*

19. *Id.* at text following their footnote 35.

20. Sherman, 356 U.S. at 371.

21. Allen, Luttrell & Kreeger, at text following their footnote 25.

22. *Id.* at text following their footnote 26.

23. For examples of studies on juror comprehension of various entrapment instructions, *see generally*, Borgida & Park, *supra* note -- and Dean Morier, Eugene Borgida and Roger C. Park, *Improving Juror Comprehension of Judicial Instructions on the Entrapment Defense*, 26 J. applied Soc. Pschol. 1838 (1996).

24. Allen, Luttrell & Kreeger, at text following their footnote 35.