ENTRAPMENT AND TERRORISM

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Abstract: Antiterrorism is a national priority and undercover sting operations are a main antiterrorism tool. As our legal system's primary device for regulating undercover stings, the scope and vigor of the entrapment defense will impact the effectiveness of antiterrorism stings. The federal courts follow the subjective test of entrapment, focusing on whether the defendant was predisposed to commit the crime, or if rather the government induced the defendant to breach a legal norm. This Article argues that given the difficulty of preventing terrorist acts and the civil liberties implications of intrusive surveillance—the alternative to stings—there should be a rebuttable presumption that anyone who provides material support to terrorism was predisposed to do so. This Article argues that terrorism is such a heinous crime that it is unlikely the government could induce someone to support such criminals unless the person was one of the few predisposed to do so.

INTRODUCTION

An increase in antiterrorism activities by the government will presumably lead to a subsequent increase in cases involving the entrapment defense.[1] Terror cells or conspiracies are necessarily clandestine.

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[1] *See, e.g.*, United States v. Lakhani, 480 F.3d 171, 178–80 (3d Cir. 2007); United States v. Nettles, 476 F.3d 508, 517 (7th Cir. 2007); United States v. Hale, 448 F.3d 971, 989 (7th Cir. 2006); United States v. Rahman, 189 F.3d 88, 142 (2d Cir. 1999); United States v. Polk, 118 F.3d 286, 289–91 (5th Cir. 1997); United States v. Aref, No. 04-CR-402, 2007 WL 603508, at *4 (N.D.N.Y. Feb. 22, 2007); United States v. Siraj, 468 F. Supp. 2d 408, 413–14 (E.D.N.Y. 2007); Elgabrowny v. United States, No. S5 93 CR. 181(MBM), 2003 WL 22416167, at *10 (S.D.N.Y. Oct. 22, 2003); United States v. Awadallah, 202 F. Supp. 2d 82, 107–08 (S.D.N.Y. 2002); United States v. Bin Laden, No. S(7) 98 CR. 1023, 2001 WL 30061, at *1–2 (S.D.N.Y. Jan. 2, 2001) (describing surveillance and capture of Al Qaeda associate); United States v. Bin Laden, 91 F. Supp. 2d 600, 613 (S.D.N.Y. 2000); *see also* John Caher, *Terrorism Trial of Muslims Raises Issues of Entrapment*, 236 N.Y.L.J., Sept. 14, 2006, at 1, 1–2; Scott Hiaasen, *Did Feds Foil—or Foster—Terror Plot?*, MIAMI HERALD, June 25, 2006, at A4; Brendan J. Lyons, *Intent of Missile Plot Not Lost in Translation: FBI Case Juror Says Panel Dis-*

Detection by law enforcement, therefore, must depend heavily on either invasive, widespread surveillance,[2] or the use of undercover agents to infiltrate the cells.[3] Of course, both of these methods could be in use at the same time. Surveillance and stings are not mutually exclusive in any inherent sense and may even complement each other; nevertheless, they are distinct alternatives for law enforcement.[4] Where agency

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missed Concerns that Defendants Were Duped, Albany Times Union, Oct. 13, 2006, at A1; William K. Rashbaum, *Lawyer Confronts Informer in Subway Bomb Plot Case*, N.Y. Times, May 5, 2006, at B2; Michelle Shepherd, *Muslim Went Undercover to Save Lives*, Hamilton Spectator (Ont., Can.), July 14, 2006, at A12. There has also been much academic discussion of this point. *See* Paul Marcus, *Presenting Back from the (Almost) Dead, the Entrapment Defense*, 47 Fla. L. Rev. 205, 244 n.227 (1995) (discussing sting operation against Egyptian Sheik Omar Abdel Rahmen and subsequent criminal proceedings and defenses); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 Mich. L. Rev. 485, 560–61 (1994); Ian Walden & Anne Flanagan, *Honeypots: A Sticky Legal Landscape?*, 29 Rutgers Computer & Tech. L.J. 317, 318 (2003); *see also Defending Entrapment as an Anti-Terror Technique* (N.P.R. radio broadcast Mar. 11, 2007), *available at* 2007 WLNR 4617379 (discussing the prosecutorial belief that stings are probably the best way to thwart terrorist attacks before they occur, and that entrapment defenses are a major concern). For a definitive explanation of the entrapment defense, see generally Paul Marcus, The Entrapment Defense (LexisNexis 3d ed. 2002) (1989).

[2] *See, e.g.*, Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 Geo. Wash. L. Rev. 1306, 1308 (2004) ("In 2003, for the first time, the number of surveillance orders issued under FISA exceeded the number of law enforcement wiretaps issued nationwide.").

[3] *See* Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 Iowa L. Rev. 1201, 1203 (2004); Solveig Singleton, *Privacy and Twenty-First Century Law Enforcement: Accountability for New Techniques*, 30 Ohio N.U. L. Rev. 417, 446–47 (2004). There are many examples of sting operations in connection with antiterrorism efforts. *See Albany Muslims Convicted After Terror Sting*, 236 N.Y.L.J., Oct. 11, 2006, at 1; Desmond Butler, *Sting Halts Sale of Uranium for Nuke*, Cincinnati Post, Jan. 25, 2007, at A14; Julia Preston, *Judge Issues Secret Ruling in Case of Two at Mosque*, N.Y. Times, Mar. 11, 2006, at A10 ("A federal judge issued a highly unusual classified ruling yesterday, denying a motion for dismissal of a case against two leaders of an Albany mosque who are accused of laundering money in a federal terrorism sting operation. Because the ruling was classified, the defense lawyers were barred from reading why the judge decided that way."); *Anti-War Protests in the Nation's Capital; New War Plan Derided—Part 2* (CNN television broadcast Jan. 27, 2007), *available at* 2007 WLNR 1722925 ("A uranium sting, officials in the former Soviet Republic of Georgia announced just this week that they have arrested a Russian man who is trying to sell weapons grade uranium to an undercover agent."); *see also* Richard Posner, Economic Analysis of Law 230–31 (7th ed. 2007); Nancy S. Marder, *Introduction to Secrecy in Litigation*, 81 Chi.-Kent L. Rev. 305, 315 n.52 (2006) (noting that many records in terrorism trials have been kept secret).

[4] That is, most sting operations probably occur with surreptitious surveillance going on in the background, both as a means of documenting the crime and monitoring the safety of undercover agents. Conversely, undercover agents may gather incriminating statements and information for purposes of testifying at trial, which is a form of surveillance; it becomes a sting when the agents actually provide an opportunity for a crime and schedule its commission. Judge Richard Posner, however, sees a significant conflict between intelligence gathering and law enforcement, of which stings are an integral part,

resources are limited, a shift toward one methodology typically means a shift away from the other, because each requires the investment or consumption of resources.[5]

There are also social costs of each method, apart from the direct budgetary costs of labor and overhead, which agencies may not internalize; in other words, any method of law enforcement can create externalities.[6] When the government uses more wide-ranging or intrusive surveillance, as it might in the War on Terror, infringements on the civil liberties of all law-abiding citizens can arise, to a greater or lesser degree.[7] In contrast, the use of more sting operations has less effect on civil liberties overall, even if it presents some of its own ethical or constitutional issues.[8] In any case, relying on more undercover operations in the War on Terror seems cheaper, politically, for government agencies, and such operations will presumably increase whenever terrorism becomes a priority target for law enforcement.[9]

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and argues that an agency attempting to do both simultaneously will be ineffective at both. *See* Richard A. Posner, Uncertain Shield: The U.S. Intelligence System in the Throes of Reform 110–17, 135 (2006).

[5] Several authors have addressed the idea of sting operations being an efficient allocation of resources, and that efficiency concerns are part of the appropriate test for entrapment. *See, e.g.*, Ronald J. Allen, *Clarifying Entrapment*, 89 J. Crim. L. & Criminology 407, 415 (1999) ("The most fruitful criterion of government inducements . . . is whether the inducements exceeded real world market rates . . . ."); J. Gregory Deis, Note, *Economics, Causation, and the Entrapment Defense*, 2001 U. Ill. L. Rev. 1207, 1209–10, 1226 (agreeing with Judge Posner's observation that entrapment is "merely the name we give to a particularly unproductive use of law enforcement resources").

[6] *See* Paul Marcus, The Entrapment Defense 265 (2d ed. 1995) ("[D]efendants contend that the nature of the governmental conduct is too overreaching, too egregious. They argue that the government is manufacturing crime . . . ."); Richard Posner, *An Economic Theory of Criminal Law*, 85 Colum. L. Rev. 1193, 1220 (1985) ("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."). Even if the police activity in a given case was wasteful or inefficient, it does not necessarily follow that judges should remedy the situation by acquitting the defendant. Acquitting the defendant certainly does not recoup any of the resources already wasted (they are sunk costs); acquittals can impose additional costs on society by releasing a criminal. This makes the approach that the above commentators espouse problematic. If it were certain that such acquittals would deter all future inefficient sting operations, this approach would make sense, but deterring malicious or sloppy police through acquittals is an unpredictable, unreliable mechanism.

[7] *See* Posner, *supra* note 3, at 245.

[8] On the other hand, Judge Posner seems to suggest that a prosecutorial bent in the Federal Bureau of Investigation poses more of a concern from a civil libertarian standpoint, and sting operations are decidedly prosecutorial in their orientation. *See* Posner, *supra* note 4, at 116–17.

[9] *See, e.g.*, Jordan Carleo-Evangelist, *Fateful Day Arrives for Muslims Caught in Sting*, Albany Times Union, Mar. 8, 2007, at A1; Michael Hill, *Mosque Leaders Get Prison in Sting*, Buffalo News, Mar. 9, 2007, at A10 (describing sting operation that resulted in the arrests

The entrapment defense is our legal system's primary device for regulating undercover sting operations by government agents.[10] Predictably, these law enforcement efforts give rise to allegations of overreaching, especially from criminal defendants trapped in sting operations.[11]

Historically, almost all entrapment cases have involved the so-called "victimless crimes," violations of laws that prohibit otherwise consensual transactions between parties.[12] These include trafficking

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of two mosque leaders in Albany, New York for laundering money connected to a terrorist operation); Eric Lichtblau, *Trying to Thwart Possible Terrorists Quickly, F.B.I. Agents Are Often Playing Them*, N.Y. Times, May 30, 2005, at A10; *Mosque Leaders Get 15 Years in Money Scam*, Charleston Gazette & Daily Mail (W. Va.), Mar. 9, 2007, at 3A.

[10] *See* Bruce Hay, *Sting Operations, Undercover Agents, and Entrapment*, 70 Mo. L. Rev. 387, 387 (2005); Richard H. McAdams, *The Political Economy of Entrapment*, 96 J. Crim. L. & Criminology 107, 108 (2005); Jacqueline E. Ross, *Valuing Inside Knowledge: Police Infiltration as a Problem for the Law of Evidence*, 79 Chi.-Kent L. Rev. 1111, 1123–27 (2004) (stating that "the entrapment defense regulates this problem only incompletely"); Dru Stevenson, *Entrapment by Numbers*, 16 U. Fla. J.L. & Pub. Pol'y 1, 69 (2005).

[11] *See, e.g.*, United States v. Russell, 411 U.S. 423, 424 (1973).

[12] *See id.* ("[D]efendant was convicted on all three counts of having unlawfully manufactured and processed methamphetamine ('speed') and of having unlawfully sold and delivered that drug."). Of course, these crimes arguably have "victims" in the sense of lives wasted through vice, devastated families, and other effects. In general, however, they pertain to voluntary or consensual transactions whose harm is mostly in the aggregate instead of in particular instances; usually no party to a drug deal calls the police to complain about the crime. These crimes are conceptually different than crimes against the person (e.g., rape, murder, battery, and mayhem), which involve an interpersonal assault, and crimes against property (e.g., larceny, embezzlement, robbery, and burglary), which leave the victim unjustly deprived. Such traditional crimes are less conducive to enforcement by sting operations, and less conducive still to the defense of entrapment. Most cases where entrapment would be asserted as a defense to one of these traditional crimes (against the person or property) would involve problems with proving an element of the crime or the defense of consent, which were tidier defenses at common law. For more discussion of the history and evolution of entrapment, especially as it correlates to the development of these more transactional-type crimes, see Marcus, *supra* note 1, at 1–50; Michael DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory, and Application*, 1 U.S.F. L. Rev. 243, 250–251 (1967). William Stuntz provides an insightful discussion of the prevalence of vice-related crimes in American law, and some of the unintended consequences. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 572–76 (2001). Stuntz notes the ironies inherent in such legislated morality, but also notes that such crimes do indeed create costly externalities that concentrate in the neediest sectors of society:

> Gambling, sex for hire, and intoxicants are all things that a large portion of the public wants, and these goods and services are sufficiently cheap, at least in some forms, that people of all social classes can afford them. At the same time, these things generate both intense disapproval among another large slice of the population, and substantial social costs that tend to concentrate in poor communities. The result is complicated: anti-vice crusades tend to have strong public support, but only so long as the crusades are targeted at a fairly

drugs, unregistered firearms, child pornography, and illegal immigrants; soliciting sex with prostitutes and children; and schemes for laundering or counterfeiting money.[13] The consensual nature of these offenses makes reporting of them exceedingly rare and their detection difficult, leading law enforcement agencies to depend heavily on undercover agents, paid informants, and sting operations, all of which give rise to claims of entrapment.[14] The nature of these offenses determines the nature of the defenses associated with them later on, when the prosecution brings the case to trial.

This Article focuses on entrapment in the terrorism context, and this is the first academic article to consider this specific issue in depth.[15] We can anticipate a surge in terror-related entrapment cases in the years following a similar surge in undercover antiterrorism operations.[16] We expect, therefore, that a greater percentage of entrapment cases will involve the conspiracies to provide financial support to terrorists,[17] in addi-

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> small subset of the population. Our tradition of giving police and prosecutors basically unregulated enforcement discretion makes that targeting easy. Which in turn permits legislatures to define criminal liability in ways that might otherwise be politically impossible.

Id. at 573.

[13] The federal statutory framework for money laundering crimes includes a sting provision to facilitate the use of undercover operations in detecting violators. *See* 18 U.S.C. § 1956(a)(3) (2000); Scott Golde & Winston Calvert, *A Practitioner's Guide to the Federal Money Laundering Statutes*, 62 J. Mo. B. 312, 317 (2006).

[14] *See* Stevenson, *supra* note 10, at 8; *infra* notes 254–271 and accompanying text.

[15] Most articles about entrapment discuss the competing legal tests used to approach the problem, typically arguing in favor of one rule as opposed to the other. *See* Marcus, *supra* note 1, at 104 (noting that "the vast majority of legal scholars regard the objective test favorably"); Roger Park, *The Entrapment Controversy*, 60 Minn. L. Rev. 163, 170 (1976); Deis, *supra* note 5, at 1218 (Deis, himself, does not favor the objective test but acknowledges that he is in the minority in the academy). When Park wrote in 1975, all articles from the previous twenty-five years were criticizing the objective test except one (an article that proposed abolishing the entrapment defense completely). *See* Park, *supra*, at 167 n.13 (citing DeFeo, *supra* note 12). Park himself takes the position of defending the approach used in the federal courts, and he was one of the first two commentators to do so. *See id.* at 170. His article became one of the seminal works in the area for over two decades. He also observes that there had been over one hundred student notes from the same period that almost uniformly advocated for the objective test. *Id.* at 167 n.13. Justice Stewart noted the clear tilt of the academy to his side (in favor of the objective test) when he dissented in *United States v. Russell*. *See* 411 U.S. at 445 n.3 (Stewart, J., dissenting); *see also* Model Penal Code § 2.13 cmt. 1, n.3 (1985) (listing influential early articles on the subject).

[16] *See supra* note 1.

[17] *See, e.g.*, United States v. Abdi, 463 F.3d 547, 554 (6th Cir. 2006) (defendant charged with providing material support); *Aref*, 2007 WL 603508, at *2–4 (sting operation and criminal prosecution for providing funds to Islamic terrorists); Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 259 (E.D.N.Y. 2007) (involving tort action against Jordanian bank

tion to bomb plots,[18] sales of nuclear technology or raw materials,[19] and other characteristic terrorist activities. In addition, we would expect to see greater international interest in the entrapment defense, as indeed we can already observe in Europe and elsewhere.[20] England and the European Union, for example, have recently begun to recognize the entrapment defense for the first time, albeit in limited circumstances.[21] Un-

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alleged to have knowingly provided banking and other services that facilitated the actions of terrorist organizations); United States v. Salah, 462 F. Supp. 2d 915, 915 (N.D. Ill. 2006).

[18] *See, e.g.*, *Nettles*, 476 F.3d at 510 (personal vendetta bomb plot to mimic Oklahoma City bombing); United States v. Ressam, 474 F.3d 597, 598 (9th Cir. 2007) (Al-Qaeda attempt to bomb the Los Angeles Millennium celebrations); United States v. McMorrow, 471 F.3d 921, 923 (8th Cir. 2006) (bomb threats on Fargo, North Dakota); United States v. Olmeda, 461 F.3d 271, 277 (2d Cir. 2006) (possession of eighteen pipe bombs and other munitions); United States v. Mohamed, 459 F.3d 979, 981 (9th Cir. 2006) (threatened Islamic terror bomb attack on Los Angeles); United States v. Campa, 459 F.3d 1121, 1158–60 (11th Cir. 2006) (history of bombings in southern Florida); *Aref*, 2007 WL 603508, at *9 n.10 (Islamic terror bomb plots); Hurst v. Socialist People's Libyan Arab Jamahiriya, 474 F. Supp. 2d 19, 22 (D.D.C. 2007) (litigation over Lockerbie plan crash); United States v. Lin, No. CR-01–20071-RMW, 2007 WL 101647, at *1(N.D. Cal. Jan. 5, 2007) (defendant told woman that her family was going to die and that her brother was next); Estate of Heiser v. Islamic Republic of Iran, 466 F. Supp. 2d 229, 248 (D.D.C. 2006) (bombing of American installations in Saudi Arabia); United States v. Coronado, 461 F. Supp. 2d 1209, 1210 (S.D. Cal. 2006) (involving violation of statute prohibiting distribution of information relating to explosives, destructive devices, and weapons of mass destruction); Blais v. Islamic Republic of Iran, 459 F. Supp. 2d 40, 45 (D.D.C. 2006) (bombing of American installations in Saudi Arabia); People v. Quinonez, No. H027654, 2006 WL 2567718, at *1 (Cal. Ct. App. Sept. 7, 2006) (bombs placed at elementary schools and childcare center in California to distract authorities during bank heist); People v. Osantowski, 736 N.W.2d 289, 295 (Mich. Ct. App. 2007) (terror threats and bomb production); State v. Sands, No. 2006-L-171, 2007 WL 37792, at *1 (Ohio Ct. App. Jan. 5, 2007) (attempted bombing of municipal authorities in Ohio); State v. Luers, 153 P.3d 688, 691 (Or. Ct. App. 2007) (bombing of oil refinery/storage facilities). Note that this lengthy string cite of bomb-related cases covers a period of only a few months prior to the writing of this Article, in March 2007.

[19] *See, e.g.*, Owens v. Republic of Sudan, 412 F. Supp. 2d 99, 107 (D.D.C. 2006) (discussing purchase of uranium by terrorists); Butler, *supra* note 3.

[20] *See, e.g.*, McAdams, *supra* note 10, at 110 nn.20, 22. McAdams asserts that the growing interest is due to pressure from the United States for our allies to participate in more undercover operations to detect terrorists and drug traffickers. *See id.* at 110. *See generally* Jacqueline E. Ross, *Impediments to Transnational Cooperation in Undercover Policing: A Comparative Study of the United States and Italy*, 52 Am. J. Comp. L. 569 (2004).

[21] England resolutely refused to recognize the entrapment defense for many years. *See generally* R. v. Sang, (1979) 69 Crim. App. 282 (H.L.) (appeal taken from C.A.) (U.K.), *available at* 1979 WL 68315. Recently, however, in *R. v. Loosely*, (2001) 1 Crim. App. 29 (H.L.) (appeal taken from C.A.) (U.K.), *available at* 2001 WL 1171942, the House of Lords changed course and adopted an "abuse of process" rule akin to the objective rule version of the entrapment defense; but instead of providing an acquittal (finding of no guilt), the courts issue an indefinite "stay of proceedings"—meaning no penal sanction will ensue, but neither do the pending criminal charges disappear entirely. A detailed discussion of the transition from *Sang* to *Loosely* in England is available elsewhere. *See* Dan Squires, *The Problem with Entrapment*, 26 Oxford J. Legal Stud. 351, 351–52 (2006); *see also* Simon

til very recently, the entrapment defense was available only in the United States—it was not a feature of English common law,[22] and no other industrialized nations (e.g., Western Europe, Canada,[23] Australia[24]) traditionally recognized the entrapment defense.[25] Entrapment's absence from these other legal traditions is due partly to other devices in their legal systems for regulating aberrant police activity, such as outright criminal liability for government agents who overreach.[26] A second possible factor is a cultural difference between America and Europe regarding privacy expectations, as Europeans seem to have greater tolerance for

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Bronitt, Sang *Is Dead,* Loosely *Speaking*, 2002 SING. J. LEGAL STUD. 374, 374 (explaining that courts in Singapore have followed the *Sang* rule—no entrapment defense at all—and not yet responded to the *Loosely* decision).

As regards the European Union, see generally Teixeira de Castro v. Portugal, 28 Eur. Ct. H.R. 101 (1999), *available at* 1998 WL 1043930. This was a watershed case that heavily influenced the House of Lords in the *Loosely* decision. *See id.* The *Teixeira* opinion, found in Westlaw by clicking one of the internal links beneath the caption, is an excellent resource for previous European decisions on sting operations, as well as various international treaties that specifically allow for the use of undercover agents. *See id.* The European Court of Human Rights not only acquitted Mr. Teixeira de Castro, but also compelled the Portuguese government to repay his lost wages during his time of imprisonment, various litigation costs, and other expenses. *See id.*; *see also* Bronitt, *supra*, at 376–78.

[22] *See generally Sang*, 69 Crim. App. 282.

[23] In *R. v. Mack*, [1988] 2 S.C.R. 903 (Can.), the Supreme Court of Canada defined its rule on entrapment in light of the Canadian Charter of Rights and Freedoms, a constitutional act passed in 1982. The Canadian high court does not recognize entrapment as a defense to a crime, in the sense that the defendant can obtain a complete acquittal; nonetheless, it empowered the judiciary to use its discretion in rejecting "the spectacle of an accused being convicted of an offence which is the work of the state." *Id.* ¶ 77. When a court finds, *after the defendant is convicted*, that the "authorities provide[d] an opportunity to persons to commit an offence without reasonable suspicion or acting mala fides," the judge can issue a "stay of proceedings," which puts the case on hold indefinitely without sentencing the defendant at all. *Id.* ¶¶ 10, 122.

[24] *See* Ridgeway v. Regina (1995) 184 C.L.R. 19, 43 (Austl.) (adopting exclusionary rule for evidence obtained through sting operation). For an excellent discussion of entrapment law in Australia, and the legislative backlash following *Ridgeway v. Regina*, see Paul Marcus & Vicki Waye, *Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds*, 12 TUL. J. INT'L & COMP. L. 27, 73–78 (2004).

[25] *See* Jacqueline E. Ross, *Tradeoffs in Undercover Investigations: A Comparative Perspective*, 69 U. CHI. L. REV. 1501, 1521 (2002) (explaining that in Europe the general rule is for the defendant to be found guilty but for the police to be charged as accessories to the crime in situations that would be analogous to entrapment in the U.S.). Ross discusses the fact that entrapment is a defense to criminal liability nowhere outside the United States, adding: "Most Western European legal systems instead treat entrapment as a mode of complicity that fails to excuse the target but implicates the investigator in the crime. . . . European legal systems treat such conduct as criminal unless a law expressly exempts the investigator from liability for specified acts." *Id.* at 1521–22 (citation omitted).

[26] *Id.* at 521–22.

invasive government surveillance,[27] and less tolerance for government trickery or "stings."[28] More surveillance makes undercover stings less necessary.

In the United States, the entrapment defense currently has two main versions or tests that have caused splits between courts and between states. The "subjective test," used by the majority of states and all federal courts, focuses on the defendant's predisposition to commit the crime, with the goal of protecting otherwise innocent citizens from becoming the targets of undue badgering by undercover agents, who solicit them to commit crimes.[29] The rival approach, normally called the "objective test," focuses solely on the outrageousness of the government's conduct, regardless of the defendant's guilt or eagerness to commit crimes, with the purported goal of deterring bad behavior by police.[30] The relative virtues of each test are a subject this author has addressed elsewhere,[31] and is the focus of most academic commentary on this defense.[32]

As mentioned above, the federal courts all use the subjective test, by choice of the U.S. Supreme Court in a line of consistent cases.[33]

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[27] *See generally* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1159 (2004) ("In France and Germany, according to a recent study, telephones are tapped at ten to thirty times the rate they are tapped in the United States—and in the Netherlands and Italy, at 130 to 150 times the rate.").

[28] This is evident in the European Court of Human Right's discussion in *Teixeira*. *See supra* note 21.

[29] *See* MARCUS, *supra* note 1, at 53 ("The overwhelming concern is with the 'otherwise innocent' person, not with the nature of the government activity."); Anthony M. Dillof, *Unraveling Unlawful Entrapment*, 94 J. CRIM. L. & CRIMINOLOGY 827, 831–35 (2004). *See generally* Park, *supra* note 15, at 165 (providing an exhaustive survey of cases up to the date of the article's publication). Several cases also discuss the focus of the subjective test. *See Lakhani*, 480 F.3d at 178–79 ("'[T]he element of non-predisposition to commit the offense is the primary focus of an entrapment defense.'" (quoting United States v. Fedroff, 874 F.2d 178, 182 (3d Cir.1989))); United States v. Gambino, 788 F.2d 938, 944 (3d Cir. 1986).

[30] *See, e.g.*, Dillof, *supra* note 29, at 835–37; Deis, *supra* note 5, at 1216–18. Several cases explain that the purpose of the entrapment defense is to deter impermissible police conduct. *See* Bradley v. Duncan, 315 F.3d 1091, 1095 (9th Cir. 2002); People v. Barraza, 591 P.2d 947, 956 n.5 (Cal. 1979); People v. Holloway, 55 Cal. Rptr. 2d 547, 551 (Cal. Ct. App. 1996). The drafters of the Model Penal Code advanced the same view: "It is therefore the attempt to deter wrongful conduct on the part of the government that provides the justification for the defense of entrapment, not the innocence of the defendant." MODEL PENAL CODE § 2.13 cmt. 1 (1985).

[31] *See generally* Dru Stevenson, *Entrapment and the Problem of Deterring Police Misconduct*, 37 CONN. L. REV. 67 (2004).

[32] *See, e.g.*, MARCUS, *supra* note 1, at 104 ("[T]he vast majority of legal scholars regard the objective test favorably.").

[33] *See* Jacobson v. United States, 503 U.S. 540, 554 (1992) (reversing the defendant's conviction because the government failed to establish that defendant was independently

Most terrorism cases will be in federal court, given the federal statutory framework in this area and the agencies that devote the most resources to targeting terrorists.[34] We can assume that the Supreme Court's subjective test will govern the adjudication of entrapment defenses by most terror suspects. The alternative test is not very relevant to the discussion that follows, as it is not likely to be relevant in terrorism cases generally.[35]

The thesis of this Article is that the unique nature of terrorist crime requires a tweaking of the entrapment rules, at least for these cases.[36] Although the proposed adaptation will appear at first to be unfashionably progovernment, facilitating the use of more undercover operations

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predisposed to commit the crime for which he was arrested); Mathews v. United States, 485 U.S. 58, 63, 66 (1988) (rejecting government's claim that entrapment defense should be unavailable because defendant did not concede all elements of the charged crime); Hampton v. United States, 425 U.S. 484, 488–89 (1976) (holding that the defense of entrapment was unavailable to the defendant because he was predisposed to commit the crime); *Russell*, 411 U.S. at 436 (holding that the defendant's concession that there was evidence to support the jury's finding that he was predisposed to commit the crime was fatal to his claim of entrapment); Sherman v. United States, 356 U.S. 369, 373 (1958) (holding that entrapment was established as a matter of law because petitioner was induced to commit the crime); Sorrells v. United States, 287 U.S. 435, 451 (1932) (holding defense of entrapment available for man who gave government agent alcohol during Prohibition). The first Supreme Court case was *Sorrells v. United States*, where a federal agent posing as a tourist/fellow war veteran enticed his host, a hospitable farmer, to sell him some liquor during the Prohibition years. 287 U.S. at 439–40. The lower courts had denied the availability of the entrapment defense; the U.S. Supreme Court reversed, stating that the defense should be available, at least in a pretrial hearing. *Id.* at 438–39, 452. Justice Roberts wrote a concurrence arguing that no trial should occur at all where the police instigated the offense, and that the majority focused too much on the defendant's predisposition. *Id.* at 453–59.

[34] Besides the statutory framework that furnishes the basis for the charges, federal agents usually work in partnership with state and local law enforcement agencies in combating terrorism, resulting in even more federalization of these crimes and the relevant defenses. The Federal Bureau of Investigation has created Joint Terrorism Task Forces (federal-state-municipal) in over eighty cities. *See* POSNER, *supra* note 4, at 116.

[35] On the other hand, an insightful colleague, Geoffrey Corn, suggested that the "objective test" might be better suited to antiterrorism prosecutions, because juries are more likely to find almost any police conduct reasonable in combating terrorism, and because predisposition could be more difficult to show in the sample group of defendants. Presumably, those with enough pro-terrorist acts to evidence a predisposition would be charged directly in regard to those acts, rather than becoming the subject of a belabored sting. This is an interesting suggestion, but the change would have to come from Congress because the Supreme Court has dug in its heels on the subjective test.

[36] Richard McAdams has recently argued, rather persuasively, that the entrapment defense should vary for each crime (or at least type of crime), including terrorism. *See generally* McAdams, *supra* note 10, at 114–15. This Article focuses only on terrorism and modifying the entrapment defense for this special type of crime, inasmuch as other crimes giving rise to the entrapment defense are conceptually similar to one another, while terrorist crimes are uniquely distinct.

in fighting terrorism will make intrusive, panoptic surveillance less necessary and less attractive to government agencies. Shifting our antiterrorism efforts to methodologies that require less widespread surveillance can be an indirect but useful tool in the struggle to preserve civil liberties at a time when public safety is a paramount concern.[37] The proposed mechanism is to relax the predisposition component of the rule to make the defense less available to certain dangerous defendants. The necessary modification can come from either the legislature or the judiciary, as is the case with any tweaking of affirmative defenses.[38]

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[37] Judge Posner elsewhere makes a rather compelling argument that surveillance and intelligence gathering are relatively ineffective methods of preventing surprise attacks, like the September 11, 2001 terrorist bombings. *See* Richard Posner, Preventing Surprise Attacks 99–126 (2005). If the payoffs are low from the information gathering approach to antiterrorism enforcement, then it might be worthwhile to shift resources elsewhere.

[38] Traditionally, the "affirmative defenses" include duress, necessity, self-defense, insanity, impossibility, and entrapment, and most are now a matter of statute in each state. For purposes of this Article, it is worth noting that impossibility is perhaps the defense most likely to overlap with entrapment, given that there is a conceptual problem with whether the "crime" committed could have been a real "crime" if the property involved belonged to the government all along, or if the only other parties to a criminal conspiracy were government agents. *See* Audrey Rogers, *New Technology, Old Defenses: Internet Sting Operations and Attempt Liability*, 38 U. Rich. L. Rev. 477, 502–08 (2004). The point is that some defendants, especially in Internet cases, could raise an impossibility defense as an alternative to the entrapment defense. For a thoughtful student note analyzing the relationship between predisposition, inability, and impossibility, see John F. Preis, Note, *Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases*, 52 Vand. L. Rev. 1869, 1873–74 (1999). Preis argues generally that the entrapment defense should be available where the defendant would have been unable to commit the crime due to impossibility, albeit in a small number of cases. *Id.*; *see also* R.A. Duff, Commentary, *Estoppel and Other Bars to Trial*, 1 Ohio St. J. Crim. L. 245, 253 (2003). In many cases, the "impossibility" defense for sting operations is eliminated by the relevant statute, such as the "sting" provision of the federal money laundering statute. *See* 18 U.S.C.A. § 1956(a)(3) (West 2001 & Supp. 2006).

Unlike all other affirmative defenses in criminal law,[39] the entrapment defense can influence the planning and policy decisions of law enforcement agencies.[40] I have argued elsewhere that acquittals based on the entrapment defense are unlikely to deter police misconduct,[41] in part because enforcement agencies have almost perfect ex ante knowledge about the law (unlike many criminals) and can plan their sting operations around the rules.[42] For this reason, unlike all other affirmative defenses, one would expect to see successful entrapment defenses decrease over time, at least pertaining to specific offenses.[43] Law enforcement agencies can plan around the rules to

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[39] Entrapment is also distinguishable from most of the other affirmative defenses in that it is an "excuse" rather than a "justification." *See, e.g.*, Adav Noti, Note, *The Uplifted Knife: Morality, Justification, and the Choice-of-Evils Doctrine*, 78 N.Y.U. L. Rev. 1859, 1861 (2003) ("Insanity and entrapment are examples of legal excuses . . . ."). There is some debate about this classification, although it is not exactly a controversial issue. *See, e.g.*, 2 Paul H. Robinson, Criminal Law Defenses § 209(b) (1984) ("It has been argued that there are two alternative theories of entrapment: entrapment as an excuse, similar in some respects to duress, which provides a defense because the defendant's actions were not fully his own, and entrapment as a nonexculpatory defense designed to deter police misconduct, even at the expense of allowing a culpable defendant to go free.") This seems to correlate roughly to the subjective and objective divide. Robinson concludes, however, after some discussion, that entrapment under either scheme should really be classified separate from other "excuses:"

> Thus, the entrapment defense, even in its excuse-like formulation, does not appear to be based solely on culpability principles, as excuses are, but probably reflects a combination of concerns including an estoppel notion that it is unfair to permit the entity that has entrapped to then punish. Ultimately, then, both approaches to entrapment must be viewed as nonexculpatory defenses, although one may result in a greater deviation from culpability principles than the other. The excuse-like formulations of the entrapment defense may be seen as an attempt to minimize the societal costs associated with nonexculpatory defenses by minimizing the number of culpable persons who escape conviction under the defense.

Id. at 516.

[40] *See* Posner, *supra* note 4, at 136.

[41] In my first article on the subject, I argued that acquittals of defendants are unlikely to deter specific acts of police overreaching, for a number of individualized subjective reasons. Stevenson, *supra* note 31, at 73. Individual acquittals in isolated instances of agent misconduct are also unlikely to affect overall policy decisions of bureau chiefs or agency administrators, contrary to the assumption underlying the minority "objective test" for entrapment. *Id.* at 75–80. Even so, the entrapment defense is the primary legal mechanism for regulating undercover operations, and we must assume that policymakers are sensitive to the parameters of the rules when they plan such operations.

[42] *See generally* Joseph A. Colquitt, *Rethinking Entrapment*, 41 Am. Crim. L. Rev. 1389, 1428–31 (2004) (arguing that the current entrapment defense under-deters bad police behavior and over-deters good police behavior).

[43] *See* Stevenson, *supra* note 10, at 27–30.

preempt successful entrapment claims; or, if the rules are too prodefendant, undercover operations will fall into disuse.[44] In either case, once the rules or parameters become clear through adjudication, there will be fewer opportunities for a successful entrapment defense, and the defense itself will wane into disuse. Bureau chiefs and agency directors are aware of limitations imposed by this affirmative defense and will make policy decisions about enforcement methods accordingly; the allocation of law enforcement resources must be sensitive and responsive to the rules about this particular defense.[45] The entrapment defense therefore affords a unique opportunity to influence law enforcement policy for the relevant crimes, including terrorism. Entrapment is the most relevant affirmative defense to terror-related prosecution.

In federal courts, adjudication of the entrapment defense turns on whether the defendant was "predisposed" to commit the crime.[46] The undercover agent(s) induced the defendant to commit the specific act; the question is whether the government induced an otherwise innocent, law-abiding citizen to breach some legal norm.[47] Typically, the sting operation includes having the defendant caught in the act, so

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[44] *See id.*

[45] *See, e.g.*, Lininger, *supra* note 3, at 1272–74. Lininger provides a thought-provoking example:

> Because officers are so highly dependent on the involvement of prosecutors in proactive investigations, it should come as no surprise that constraints on prosecutors often have the transitive effect of constraining the police officers involved in a particular investigation. The best example of this phenomenon is the recent experience of Oregon, where the state supreme court construed an ethical rule to prevent prosecutors from supervising undercover investigations. In the case *In re Gatti*, the court interpreted DR 1–102(A)(4) of the Oregon Code of Professional Responsibility, which prohibits a lawyer from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation." The court determined that this language prevented prosecutors from supervising investigations in which law enforcement officers posed as participants in criminal activity, such as drug users seeking to buy drugs from a target under investigation. The Oregon State Bar eventually revised DR-102 to make clear that prosecutors could supervise such investigations, and the Oregon Supreme Court approved this change. But in the meantime, for the two-year period in which "the *Gatti* rule" remained in effect, proactive criminal investigations ground to a halt in Oregon. F.B.I. Agent Nancy Savage, the Special Agent in Charge of the F.B.I. office in Eugene, Oregon, commented on a national television broadcast that the *Gatti* rule had "shut down major undercover operations" in Oregon.

Id. at 1273–74 (citations omitted).

[46] MARCUS, *supra* note 1, at 61–63.

[47] *See, e.g.*, *Hampton*, 425 U.S. at 486.

there is no question about the defendant's role in the crime itself.[48] Entrapment is an affirmative defense, as opposed to an attack on the elements of the charges themselves—the defendant asserts that "but for" the government's inducement, she would never have committed such an offense.[49]

The predisposition element of the entrapment defense can trigger the introduction of evidence about the defendant's character and prior related crimes,[50] evidence that might otherwise be excludable as irrelevant and overly prejudicial.[51] This feature probably deters many defendants from claiming entrapment, for strategic reasons;[52] a surprisingly large proportion of defendants attempt to raise the defense only on appeal, after there is nothing left to lose.[53] The predisposition inquiry also considers factors like the alacrity with which the defendant embraced the undercover agent's offer or inducement,[54] the time or number of attempts required to obtain the defendant's par-

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[48] *See Sorrells*, 287 U.S. at 439–40.

[49] *See id.* at 439–41.

[50] *See, e.g.*, Sherroan v. Kentucky, 142 S.W.3d 7, 21–22 (Ky. 2004) ("However, if the existence of the character trait determines the rights and liabilities of the parties, then it is an essential element and provable by specific instances of conduct . . . [as in] criminal cases where the defense is entrapment, because of the need to prove the defendant's predisposition to commit the charged offense."); *see also* MARCUS, *supra* note 1, at 147–54 (discussing the admission of defendant's prior bad acts at trial).

[51] *See Lakhani*, 480 F.3d at 179 (noting that raising the entrapment defense allows the prosecution to offer as proof the character or reputation of the defendant, including any prior criminal record). The U.S. Court of Appeals for the Third Circuit noted that in Lakhani's case, the evidence of prior acts, taken alone, would not have been sufficient to show predisposition. *See id.* at 180 n.11.

[52] The same issue arises in military tribunals and military commissions. *See, e.g.*, MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. II, II-110. (2005 ed.), *available at* http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf ("When the defense of entrapment is raised, evidence of uncharged misconduct by the accused of a nature similar to that charged is admissible to show predisposition." (citing MIL. R. EVID. 404(b))).

[53] *See* Stevenson, *supra* note 10, at 32–36 (providing approximately fifty recent examples). It appears that one-third to one-half of all reported entrapment cases have the defense arising only in the context of post-trial, post-sentencing appeals, mostly as (unsuccessful) "ineffective assistance of counsel" claims alleging that the defense attorney should have raised the defense earlier. *See id.* at 32–33.

[54] *See* MARCUS, *supra* note 1, at 143 ("Whether or not the defendant responded to government inducement with reluctance is an important factor in determining state of mind."); *see also id.* at 159–61. This was the main issue in the Third Circuit's discussion of Lakhani's entrapment claims—the court cataloged the instances where the defendant showed eagerness and enthusiasm to sell rocket launchers to the undercover informant. *Lakhani*, 480 F.3d at 180 ("No piece of evidence indicates a reluctance on Lakhani's part to complete the illegal arms deal; indeed, everything demonstrates the opposite.").

ticipation,[55] and the defendant's subsequent resolve or hesitation in pursuing the criminal activity.[56] The cases also take note of who initiated the first contact, and if it was the government, then what reasons the government had to initiate contact with this target.[57] These six factors have not comprised a definitive list in the judicial analysis of predisposition, but the Supreme Court could adopt such a delineated list, which would capture much of the jurisprudence to date and reduce confusion in the lower courts.[58] An additional factor (not hitherto considered in many cases) would be the seriousness or societal approbation of the crime itself, that is, whether most citizens would find this crime so offensive that it outweighs almost any inducement. If the criminal act would strike most people as heinous, it makes predisposition more likely for the rare person who actually succumbs. Crimes with less moral or societal stigma would presumably require less inducement, and therefore make individual predisposition less apparent. This consideration is particularly relevant to the discussion that follows.

The Supreme Court's "but-for" rhetoric[59] in analyzing predisposition may give the appearance of a bright-line rule, but the reality is that the concept is rather elastic.[60] Sometimes the Court finds no predisposition even where the defendant has a history of similar crimes and needed little persuasion from the undercover agent.[61] In other cases, the Court has found predisposition even where the agent made repeated proposals and provided free materials, ingredients, or equipment for the criminal enterprise.[62]

The vagueness of the term confers enough discretion on the Court to adjust its application for special circumstances such as terror-

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[55] *See* MARCUS, *supra* note 1, at 139 (discussing the role of timing in numerous entrapment cases); *see also id.* at 159–61 (discussing relevance of defendant's acts subsequent to his first contact with government agents).

[56] *See id.* at 146.

[57] *See id.* at 137, 163.

[58] *See id.* at 136–38. On the other hand, in these pages Marcus discusses *United States v. Navarro*, 737 F.2d 625, 635 (7th Cir. 1984), which did enunciate a five-factor test, but these have not become the standard for other courts.

[59] *See, e.g.*, *Russell*, 411 U.S. at 440 (Stewart, J., dissenting) ("[T]he entrapment defense is available under this approach only to those who would not have committed the crime but for the Government's inducements. Thus, the subjective approach focuses on the conduct and propensities of the particular defendant in each individual case . . . .").

[60] *See* United States v. Hunt, 749 F.2d 1078, 1085 (4th Cir. 1984) ("Predisposition is necessarily a nebulous concept . . . ."); MARCUS, *supra* note 1, at 128–29.

[61] *See, e.g.*, *Sherman*, 356 U.S. at 371–74.

[62] *Hampton*, 425 U.S. at 488–89.

ism.[63] No mechanical change is needed in the rule itself to allow a relaxed predisposition standard for this particular crime. Of course, a modification could come as a statutory enactment, creating a rebuttable presumption that predisposition exists, defining the term statutorily to include almost all foreseeable defendants, or simply making the entrapment defense unavailable for certain crimes (like terrorist activities). Appellate courts could create similar rules by precedent if the right case came up on appeal. Whether coming from the legislature or from the judiciary, if the entrapment defense were unavailable for terror suspects, or, more likely, if law enforcement agencies knew that predisposition would be easier to prove for these cases due to a relaxed standard, it would bolster the government's undercover operations.

The more interesting question is whether the rule *should* change for these special crimes; whether special circumstances exist that would justify such a departure from the norm. To this end, I offer several considerations.

First, the stakes are plainly higher for deterring or incapacitating perpetrators of terrorism as opposed to the traditional "victimless" crimes.[64] Although the drug trade and sex trade may impose high social costs in the aggregate (an admittedly controversial point), it is relatively easy for nonparties who want to eschew such things to insulate themselves from the direct harms that come from these activities. This is, of course, one of the main conventional arguments against prohibiting such activities in the first place. Terrorists, in contrast, kill and maim innocent civilians, destroy private property, and disrupt daily life and commerce.[65] As the goal of terrorism is to draw attention to a cause,[66] to

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[63] *See* MARCUS, *supra* note 1, at 136–39 (discussing the "totality of the circumstances" approach used by most courts).

[64] *See, e.g.*, McAdams, *supra* note 10, at 113, 169 ("Particularly for crimes of bribery and terrorism, where the stakes are high and conventional methods appear least effective, it seems that the benefits of this investigative tool justify some use of it."); *see also infra* notes 273–291 and accompanying text. *But see* Hay, *supra* note 10, at 422 (acknowledging the same point but explaining that there are other factors that should influence public policies in this regard).

[65] Karl J. Leger, *The Security Professional, Terrorism, Bio-Terrorism, and the Next Level*, *in* HANDBOOK OF LOSS PREVENTION AND CRIME PREVENTION 487, 489 (Lawrence J. Fennelly ed., 4th ed. 2004).

[66] *See, e.g.*, PHILIP B. HEYMANN, TERRORISM AND AMERICA 9 (1998) ("From the terrorists' perspective, the major force of terrorism comes not from its physical impact but from its psychological impact.").

intimidate and instill fear,[67] and (perhaps) to provoke an ill-fated overreaction in response,[68] the value of a stunt is in its sensationalism.[69] Excess carnage and shock value are the commodities of terrorism.[70] This point is nothing new; it is obvious from events of the last decade that terrorism is a special category of crime, something particularly horrific, albeit statistically infrequent compared to similarly lethal natural disasters, aggregate violent crime rates, and aggregate mortal accidents.[71] Even if terrorists were incredibly rare, the deterrence calculus is the same.[72] The potential harm from a single act of terrorism, successfully executed, is great enough that there should be a consensus about deterring it as much as possible or incapacitating would-be perpetrators. Increasing the likelihood of conviction provides both greater deterrence and more incapacitation, and limiting the most relevant affirmative defense to such cases would increase the likelihood of convictions. The

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[67] *See id.* ("By generating a combination of fear and fascination, terrorists have been able to capture important parts of the agendas of great nations.").

[68] *See id.* at 73–74 (discussing "reasons why retaliation that appears promising on its face might fail or even backfire").

[69] *See* Leger, *supra* note 65, at 489.

[70] *See id.*

[71] *See, e.g.*, Charles J. Diecidue, *Executive Protection, the Security Professional, Terrorism, Bio-Terrorism, and the Next Level*, *in* Handbook of Loss Prevention and Crime Prevention, *supra* note 65, at 59 (discussing the increased rate in terror-related kidnappings of corporate executives, but noting that kidnappings motivated by ransom expectations are increasing faster than those motivated by political agendas).

[72] *See, e.g.*, Bruno S. Frey & Simon Luechinger, *How to Fight Terrorism: Alternatives to Deterrence*, (Zurich Inst. for Empirical Research in Econ., Working Paper No. 137, 2002), *available at* http://ssrn.com/abstract=359824 (discussing the deterrence calculus for terrorists and arguing that raising opportunity costs is more efficient than raising the threatened sanctions).

Judge Posner discusses the theory of deterrence and the "calculus" that describes deterrence in terms of the equation D=pL, where D represents the deterrent value, p represents the likelihood of detection and punishment, and L represents the sanction or liability itself. *See* Posner, *supra* note 3, at 218–27. Most of the modern approaches to deterrence focus on the rational mind and calculating decision-making mechanisms, instead of primal emotions like fear (or even morality). Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169, 170 (1968); *see also* David Friedman, Price Theory 459–65 (1986); Cesare Beccaria-Bonesana, An Essay On Crimes and Punishments 48 (Academic Reprints 1953) (1764) (perhaps the oldest work in the area); Maurice Cusson & Pierre Pinsonneault, *The Decision to Give Up Crime*, *in* The Reasoning Criminal 72–81 (Derek B. Cornish & Ronald V. Clarke eds., 1986); Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 Am. L. & Econ. Rev. 344, 344 (2003) (assessing the effects of the death penalty by analyzing fluctuations in crime rates immediately after a death sentence is carried out—the authors conclude there is a strong deterrent effect); Floyd Feeney, *Robbers as Decision-makers*, *in* The Reasoning Criminal, *supra*, at 53–71; George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. Pol. Econ. 526, 527 (1970).

stakes are very high, prevention is paramount, and the entrapment defense in its current form (mostly a product of narcotics enforcement) undermines incapacitation and, therefore, prevention. An adaptation is necessary. This tradeoff between the stakes and the loss of leniency is not a complete justification for relaxing the definition of predisposition, but it is one factor.

Second, the stakes are higher with terrorism, as opposed to other victimless crimes, not only because of the greater harm to innocent victims, but because terrorists are more likely to elude detection and apprehension than everyday drug peddlers or prostitutes.[73] The professionalized secrecy of terrorist conspiracies makes infiltration by undercover agents more necessary, and its only alternative—government surveillance—exponentially more intrusive and ubiquitous.[74] This is a distinct sense in which the stakes are higher.[75] The ability to play hide-and-seek on several continents, and the financial resources to stay networked with coconspirators through satellite phones and other gadgets, make capturing a terrorist leader more difficult than catching a regular gang leader; the lower probability of capture means less deterrence for a more injurious crime.[76] Capturing malevolent escape artists solely through increased surveillance would require such a dramatic increase in surveillance that it would infringe on our civil liberties; this sacrifice is itself a cost that we should seek to avoid.[77]

Third, and in a similar vein, antiterrorism efforts differ from antitrafficking efforts with respect to the missing compulsiveness component.[78] The willing parties to the victimless crimes are often addicted to the vice in question—whether drugs, child porn, or other vices.[79]

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[73] *See, e.g.*, Louis R. Mizell, Jr., Target U.S.A.: The Inside Story of the New Terrorist War 67–79 (1998) (chronicling many examples of sophisticated avoidance of detection); *see also* Posner, *supra* note 3, at 230 (explaining that conspiracies are more efficient at "avoiding being caught"); *infra* notes 292–300 and accompanying text.

[74] *See* Bruce Ackerman, Before the Next Attack 84 (2006) ("Terrorists are newspaper readers and Internet surfers like the rest of us, and they can learn a lot about the government's surveillance efforts that might allow them to escape detection.").

[75] *See* Posner, *supra* note 4, at 116–17.

[76] *See id.* at 245.

[77] *See* Erwin Chemerinsky, *Civil Liberties and the War on Terrorism*, 45 Washburn L.J. 1, 14–19 (2005).

[78] *See infra* notes 301–307 and accompanying text.

[79] William J. Campbell, *Delays in Criminal Cases*, 55 F.R.D. 229, 256 (1972). Judge William J. Campbell has opined that:

> Today the conspiracy statute is frequently used in narcotic cases in which many defendants are addicts. Very often, such defendants act as messengers for government agents procuring narcotics for them. A conspiracy indictment

This compulsiveness or desperation of addicts introduces many internal risks or weak links into the relevant supply chain. In other words, the parties to the victimless crimes are self-selected to make mistakes, betray themselves unwittingly, or fail in some objective. This feature of these crimes lowers the stakes, that is, the value or necessity of perfect law enforcement; the perpetrators will blunder in many cases, making detection easy or the crime less likely to succeed. Terrorists may be zealots,[80] but they are not carrying out their mission amidst the onset of withdrawal symptoms. Their chosen undertaking is certainly more challenging than a simple drug transaction, but we cannot count on them to make the same types of mistakes as the perpetrators of the other crimes that normally give rise to the entrapment defense.[81] In this sense, the criminals are a different category of prey for law enforcement (terrorists being less prone to silly errors), and the legal rules should reflect this reality.[82]

Fourth,[83] the type of predisposition that presents a real danger is different for this crime. Unlike the traditional victimless offenders, the danger at issue here is not just those already contemplating the crime, but also those who are particularly susceptible to recruitment by terrorist groups, regardless of whether they wanted the opportunity to join such a conspiracy before the chance came.[84] Many people might assist with a trafficking scheme if offered a fantastic sum of

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> is then used as a means to admit hearsay to overcome the inevitable defense of entrapment through showing the jury that someone said that the defendant knew where to get narcotics. The conspiracy statute thus again becomes a means to convict only the lowest stratum in the criminal ladder while the big supplier remains unprosecuted although the statistics of the investigating bureau reflect great numerical success.

Id. at 256.

[80] *See, e.g.*, Heymann, *supra* note 66, at xiv.

[81] *See, e.g.*, John B. Wolf, Fear of Fear: A Survey of Terrorist Operations and Controls in Open Societies 28 (1981) (noting that terrorist recruits are technically competent in their areas of specialization).

[82] These first three justifications could also apply to the entrapment defense as it related to firearms violations, but the remaining four are more dependent on the antiterrorism context. Modifying the entrapment defense for firearms violations is outside the scope of this Article, but would be a legitimate question for future inquiry or commentary.

[83] *See infra* notes 308–343 and accompanying text.

[84] *See* Johannes Andenaes, Punishment and Deterrence 122–25 (1974). In this seminal work in the area of deterrence theory, Andenaes surveys the leading approaches to deterrence of crimes, and appears to suggest that the most effective method of deterrence is actually the removal or incapacitation of special lawless individuals who are "bad examples" and tend to lead others into crimes. *Id.* Sting operations are particularly useful for incapacitating those who would be potential recruiters for terrorist organizations, or even the recruits who would serve as a sufficient catalyst to give the conspiracy momentum.

money, or if frightened or badgered enough by an undercover agent—at least in an isolated instance. These are the intended beneficiaries of the current entrapment defense. Far fewer would agree to drive a truck bomb up to the city's federal building, or hijack a plane, for *any sum* of money or other inducement. Perhaps only people with a certain psychological makeup,[85] or certain entrenched attitudes, could be potential recruits (or recruiters) for a terror cell.[86] Let us assume that undercover agents will pose as recruiters—or even the venerated leaders—of local terror groups. They hatch a plan that involves killing untold numbers of civilians, assign tasks to each member, solicit vows of loyalty, and the like. The day before the supposed attack ends with a roundup and arrests, and the prosecutor has a cornucopia of admissible evidence proving each defendant's involvement and activities in furtherance of the conspiracy. At the trials, suppose the defendants predictably plead entrapment and claim the inducements offered by the recruiter or phony leader were irresistible, that they would have been otherwise indisposed to join. No level of inducement justifies yielding to such a temptation. If the recruiter or leader were genuine (not a government agent), no inducement, small or great, would provide a defense for the suspect. There is no defense of private entrapment.[87] No inducement by the government could exceed the poten-

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[85] There is a least one example of where a defendant attempted the opposite of what is being suggested here—unsuccessfully requesting a more favorable entrapment defense standard given his fragile psychological makeup and susceptibility to control by undercover agent. *See* United States v. Ford, No. 05-cr-00537-REB, 2007 WL 628069, at *1 (D. Colo. Feb. 26, 2007) ("Defendant claimed that because of his vulnerable psychological and emotional makeup, he was, inter alia, particularly susceptible to the entreaties of [the undercover agent buying firearms], who defendant saw as a father figure that defendant wanted to please and did not want to disappoint.").

[86] It is outside the scope of this Article, of course, to suggest any model for terrorist profiling; there seems to be no consensus on this in the social sciences literature. The point instead is the underlying assumption that a finite set of individuals furnish the pool or base for potential recruits, from the terrorists' perspective, and that this fact could legitimately inform "predisposition" analysis in entrapment cases. For a comprehensive survey of the psychological and social literature on terrorist profiling up to 1999, see generally Rex A. Hudson, The Sociology and Psychology of Terrorism: Who Becomes a Terrorist and Why? (Marilyn Majeska ed., 1999), *available at* http://www.fas.org/irp/threat/frd.html. Liaquat Ali Khan presents a broadside attack on the entire body of literature that argues that modern Islamic terrorists are merely frustrated and misunderstood Muslim. *See* Liaquat Ali Khan, *The Essentialist Terrorist*, 45 Washburn L.J. 47, 88 (2005).

[87] *See generally* Gideon Yaffe, *"The Government Beguiled Me": The Entrapment Defense and the Problem of Private Entrapment*, 1 J. Ethics & Soc. Phil. 2 (2005).

tial inducements from genuine terrorists[88] enough to justify a different outcome in the case.[89] If the recruits were susceptible to the undercover agent, they would also be "recruit material" for real terrorists;[90] it is fortunate for the rest of us that the undercover agent recruited them first. With this particular crime, we should assume that a normal person would be immune to inducements.[91] We can infer predisposition merely by the fact that the person agreed to engage in such a horrible act, and that other evidence of predisposition is unnecessary.[92]

The fifth justification for limiting the entrapment defense in these cases—or relaxing the predisposition test—is the positive externality that undercover operations offer in antiterrorism efforts.[93] If terrorist leaders realize that a significant percentage of their recruited minions are informants or undercover agents, or if potential recruits realize that their recruiter (or even the venerated leader himself) could be a government agent, there will be a chilling effect on the entire enterprise.[94] Transaction costs increase significantly as mistrust abounds. Each party diverts resources to screening and testing their coconspirators more than they would otherwise.[95] There is less "progress" in the conspiracy because of this added cost, this drain on time, energy, and other resources. It becomes more difficult to trust recruits with necessary details and assignments, and more difficult to recruit anyone in the first place, as the field becomes more cluttered with undercover government agents. For the ideologues and radicals, the presence of unknown traitors is discouraging and deflating. In a con-

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[88] *See, e.g.*, Jane Boulden & Thomas G. Weiss, Terrorism and the U.N.: Before and After September 11, at 204–05 (2004) (discussing the large financial resources available for inducing recruits in "real" organizations).

[89] For an interesting example of terrorist inducements to recruits, see Holly S. Hawkins, Note, *A Sliding Scale Approach for Evaluating the Terrorist Threat over the Internet*, 73 Geo. Wash. L. Rev. 633, 646 (2005).

[90] *See* Wolf, *supra* note 81, at 27–29. For further discussion of terrorist recruitment methods, see generally Hudson, *supra* note 86.

[91] *But see* Kevin A. Smith, Note, *Psychology, Factfinding, and Entrapment*, 103 Mich. L. Rev. 759, 772–74 (2005) (discussing "Milgram" principles of universality in predisposition—and perhaps suggesting that the average person *is* susceptible to inducements in this area).

[92] For more discussion of prevention of recruitment, see Stephen Seymour, Note, *The Silence of Prayer: An Examination of the Federal Bureau of Prisons' Moratorium on the Hiring of Muslim Chaplains*, 37 Colum. Hum. Rts. L. Rev. 523, 530–32 n.553 (2006).

[93] *See* Colquitt, *supra* note 42, at 1421–22; *see also infra* notes 344–356 and accompanying text.

[94] *See* Hay, *supra* note 10, at 412–13.

[95] *See id.*

spiracy that thrives on motivation and zeal instead of pecuniary gain, infiltrators undermine the most valuable resource of the conspiracy. Given the higher stakes with terrorism than with other crimes targeted by undercover agents, this "lemons effect" on the conspiracy has substantially greater social benefit than usual.[96] This merits more judicial deference for the mechanism that obtains this benefit.

An additional positive externality of undercover work in the antiterrorism arena is the disproportionately high value of giving prosecutors more bargaining power to elicit useful disclosures about the terror network and other plots.[97] The diminished availability of the most relevant affirmative defense would give prosecutors an additional edge in inducing the suspect to inform on others who are still at large.[98] Obviously, prevention of terror crimes is more important than prevention of a future drug sale or other victimless crime, because the latter are just as suited for law enforcement after the fact, apart from the problems of detection and nonreporting. Prevention is not as essential with the other crimes that gave rise to the entrapment defense and shaped its parameters. With terrorism, prevention is crucial, and rules regulating sting operations (the entrapment rules) should reflect this difference.

A final (or seventh) justification for modifying the entrapment defense is that it operates as an ex post regulatory device (reacting to the details of a particular sting after it occurs), and an ex post regulatory mechanism has a decreasing marginal return as ex ante restraints increase.[99] Put plainly, the dangerousness of infiltrating a terrorist conspiracy already serves as a check or deterrent against government overreaching; there is less need for the judiciary to add additional checks.[100] Judicial intervention to regulate undercover operations is less valuable where there are already significant natural restrictions on the enterprise. Some of these operations are not only dangerous, but involve costly international travel, training undercover agents in foreign lan-

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[96] George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. Econ. 488, 488–90 (1970).

[97] *See* Posner, *supra* note 4, at 112; *see also infra* notes 357–364 and accompanying text.

[98] *See, e.g.*, Heymann, *supra* note 66, at 27 (discussing the greater success of Scotland Yard in gaining useful antiterrorist information than Britain's secret service, because "most informants have been found among those who have been arrested and threatened with punishment for other crimes").

[99] *See infra* notes 365–374 and accompanying text.

[100] *See* Wolf, *supra* note 81, at 93 ("Police undercover work, designed to obtain information on terrorist groups, is extremely dangerous to the police officer, as there is a constant risk that he will face torture and death if discovered.").

guages,[101] and significant risks of failure. The entrapment defense's strong relationship to ex ante planning by law enforcement agencies can tip the scales too much in the wrong direction. There are enough restraints or screening effects inherent in undercover antiterrorism work to obviate some of the need for additional judicial intervention. Judicial hesitancy in finding a lack of predisposition, therefore, could be more appropriate in this context.

The remainder of this Article develops these points further, and discusses their applicability to entrapment's lesser known siblings, namely sentencing entrapment, entrapment by estoppel, and derivative entrapment (sometimes called vicarious entrapment). Part I provides some historical and conceptual background on the entrapment defense; readers who are already familiar with the development of the entrapment rules may prefer to skip to the subsequent sections, but readers new to the area may find this survey particularly helpful.[102] Part II explores the unique statutory framework operating in antiterrorism charges.[103] The heart of the Article, Part III, explains and defends the foregoing justifications for a modification of the rule.[104] Part IV addresses sentencing entrapment, entrapment by estoppel, and derivative entrapment in the terrorism context.[105] Besides the seven main points summarized above, each of these corollary defenses presents at least one additional reason for an adaptation or relaxation of the usual rule.

Having provided a roadmap for the ensuing discussion, this is an appropriate point to insert a few admissions and disclaimers. The arguments presented here have a "law and economics" bent, focusing on tradeoffs and incentives; the overall premise is utilitarian. This Article does not address the ethical or moral problems with undercover government operations, many of which are obvious: the problem of government deception, the problem of the government creating crimes that would not otherwise have occurred, the conceptual asymmetry of recognizing government entrapment while ignoring the problem of private entrapment, the role of moral luck in the outcomes, among others. Other commentators cover these moral issues comprehensively,

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[101] *See* Posner, *supra* note 4, at 111 (discussing the difficulty the FBI has experienced in recruiting agents with the necessary language skills for deciphering intercepted communications).

[102] *See infra* notes 111–253 and accompanying text.

[103] *See infra* notes 254–271 and accompanying text.

[104] *See infra* notes 272–374 and accompanying text.

[105] *See infra* notes 375–446 and accompanying text.

and such deontological arguments must stand on their own, rather than be pitted against teleological (utilitarian) concerns as if they were offsetting disutilities.[106] The fact that something is wrong does not offset its social value; it makes the social value irrelevant or out of bounds.[107] This Article explores the best version of the rule, from a pragmatic standpoint, and is not a moral endorsement of the things undercover agents may do. Similarly, this Article skirts the obvious

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[106] *See, e.g.*, Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 806–07 (1997). Slobogin points out that police deception can victimize the innocent, invade citizens' privacy, and should be subject to ex ante judicial supervision/permission, much like warrants for searches or arrests:

> These potential harms are much greater, however, when the undercover operation takes on an active mode by going after a specific target or targets thought to be criminal rather than seeking to lure criminals out of the general population. The propriety of infiltrating a particular organization or establishing an intimate relationship with a particular individual cannot be the subject of an abstract public debate. . . . Thus, where active undercover operations are contemplated, judicial authorization should be obtained. The police should not be able to use such techniques unless the public, in the form of the judge, decides that good reason to do so exists and that more straightforward methods are not likely to work.
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> . . . .
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> Further, the distinction between passive and active undercover operations jibes with the privacy notions that theoretically underlie Fourth Amendment jurisprudence. If the police merely set out a "honey pot," they are likely to discover only criminal aspects of a person's life. If, on the other hand, they use covert operations to surveil a person's everyday actions and learn his or her thoughts, they are practicing a significant invasion of privacy which, like electronic surveillance, should be regulated judicially, both in cause and necessity terms.

Id. at 806–07. Slobogin contends that such ex ante safeguards would make the unwieldy entrapment defense almost unnecessary. *Id.* It should be noted that the Federal Bureau of Investigation does conduct undercover operations under ex ante guidelines, *see generally* THE ATTORNEY GENERAL'S GUIDELINES ON FEDERAL BUREAU OF INVESTIGATIONS UNDERCOVER OPERATIONS (May 30, 2002), [hereinafter ASHCROFT, GUIDELINES] *available at* http://www.usdoj.gov/olp/fbiundercover.pdf, and much of the federal law enforcements activities contemplated in this article would come under its purview or presumably under similar internal rules. The U.S. Court of Appeals for the Seventh Circuit recently held that the guidelines still apply to agencies now reporting to Homeland Security after the post-September 11 reorganization. Pieniazek v. Gonzales, 449 F.3d 792, 793 (7th Cir. 2006). Admittedly, nonegregious violations of the guidelines by federal agents have no legal consequence for the defendant. *See* United States v. Abumayyaleh, Criminal No. 05-425 (JRT/JJG), 2006 WL 3690739, at *2 (D. Minn. Dec. 13, 2006).

On the subject of moral problems with undercover agents, and the widespread and problematic use of sexual relationships to manipulate the targets of sting operations, see generally Andrea B. Daloia, *Sexual Misconduct and the Government: Time to Take a Stand*, 48 CLEV. ST. L. REV. 793 (2000).

[107] The justice or righteousness inherent in a government policy is a separate discussion from the usefulness of various versions of the legal rules.

moral and ethical quandaries that often arise in antiterrorism efforts, such as ethnic or religious profiling,[108] protection of international scoundrels because of their "usefulness" as informants, prolonged detention of terror suspects without due process, or the use of torture to extract information about upcoming attacks. These are very appropriate subjects for academic inquiry but are outside the scope of this Article, even though they may be relevant in the same adjudications in which this Article is relevant.

The entrapment defense is distinct from other criminal defenses and procedural safeguards in the extent to which it can influence ex ante planning by bureau chiefs and policymakers. I assume throughout this Article that allocation of antiterrorism resources is a zero sum game such that investing resources in one method diverts them from others.[109] Therefore, making one method "cheaper" for police by altering the legal rules will provide an incentive to concentrate resources on that method;[110] this is a corollary assumption. Finally, this author assumes a predilection for preserving the privacy and minimizing unnecessary government surveillance, and that thwarting deadly terrorist attacks is desirable.

I. Background on the Entrapment Defense

A. *Brief History*

The entrapment defense was not a feature of English common law, and it gained recognition in this country only in the twentieth century.[111] Other commentators have chronicled the leading cases in

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[108] *See generally* Khan, *supra* note 86, at 47–48, 50 (arguing throughout that antiterrorist policy literature has demonized Muslims unjustifiably, and offering numerous examples of resultant harms to law-abiding Muslims).

[109] *See, e.g.*, State v. Mullens, 650 S.E.2d 169, 215 (W. Va. 2008) (Maynard, J., dissenting) ("Cash-strapped and overworked law-enforcement agencies have no incentive to arbitrarily send wired informants into the homes of law-abiding citizens when there are real crimes to investigate.").

[110] By implication, then, the entrapment defense is unique among defenses in its ability to make one particular method (sting operations) more "expensive" for police when the defense is robust, and "cheaper" for police when it is unavailing for culprits.

[111] *See* United States v. Lakhani, 480 F.3d 171, 177–78 (3d Cir. 2007); Marcus, *supra* note 1, at 2–6. For a discussion of recent material from the House of Lords, see generally Andrew Ashworth, *Re-Drawing the Boundaries of Entrapment*, 2002 Crim. L. Rev. 161 (U.K.). This article focuses on the modern use of the defense as a method of deterring police misconduct, so the historical origins are terribly relevant.

this area in amazing detail,[112] so it would be redundant to do so here. My purpose instead is to provide a brief summary.

The rise of the entrapment defense corresponded to the advent of Comstock laws, Prohibition, the Mann Act, narcotics regulation, and restrictive immigration laws.[113] These so-called "victimless crimes,"[114] involve transactions in contraband or illicit services, where both parties are willing participants, like buyers and sellers. Ubiquitous regulation of such matters is a distinguishing feature of modern criminal law.[115] The commercialized nature of many of the proscribed acts (like distribution and possession) not only requires buyers and sellers, but also invites distributional and production organizations, as in any market, because economies of scale and efficiencies from specialization benefit the participants.[116] The result is increasingly large groups working in concert in the criminal enterprise.

The networks that spring up for the purpose of working around these rather moralistic laws have an additional consequence. Law enforcement agents posing as any one of the individuals in the enterprise can help catch everyone involved. Thus, the criminalization of such activities lends itself to sting operations due to the collective nature of the prohibited acts. In addition, the lack of victims to report crimes also

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[112] *See generally* Park, *supra* note 15, at 171–216 (offering a breathtaking survey of cases up to the mid-1970s). Park's labyrinthine footnotes span his entire article, but alas the cases are all from before 1973, and the field has developed since then. A newer history, done with a Foucault-based anthropological viewpoint was provided more recently by Rebecca Roiphe. *See* Rebecca Roiphe, *The Serpent Beguiled Me: A History of the Entrapment Defense*, 33 SETON HALL L. REV. 257, 260–92 (2003). Most of her article is a history of the defense, as well as the social context preceding its advent.

[113] *See* Sorrells v. United States, 287 U.S. 435, 453 (1932) (Roberts, J., concurring) (acknowledging link between entrapment claims and new federal regulation of consensual transactions).

[114] *See supra* note 12.

[115] On the other hand, the country was, in a sense, birthed in the context of conflict over the regulation of imports and crimes of possession, as seen in the colonial-era spats with England and the Whiskey Rebellion in Kentucky. *See* Roiphe, *supra* note 112, at 260–70. Roiphe's history begins immediately after the Civil War. *See id.* These regulations were less moralistic and more economic; of course, most regulations are a mixture of moral judgments and economic regulation.

[116] *See* POSNER, *supra* note 3, at 230 ("But conspiracies are also more dangerous in being able to commit crimes more efficiently . . . by being able to take advantage of the division of labor—posting one man as a sentinel, another to drive the getaway car, another to fence the goods stolen, and so on. Their costs thus are lower (a conspiracy simulates the market approach to the commission of crime) and they are also more likely to be effective both in completing the crime and in avoiding being caught . . . ."). Examples as disparate as cocaine and anthrax would be applicable. Bodyguards are useful for illegal transactions, but so are production specialists, suppliers of raw materials, distributors, marketers, and other agents.

is a contributing factor, discussed more below.[117] Of course, a perfect and universal system of surveillance might be an alternative to sting operations for these crimes, but society would have to sacrifice a tremendous amount of individual privacy for that to happen, even if panoptic surveillance were technologically feasible. The government does not have the means, with present technology, to be omniscient about the behavior of the citizenry.

As sting operations became more prevalent, so did defendants claiming that the authorities tricked them into a crime.[118] In a sense this was also a matter of necessity; entrapment truly is a defense of last resort, likely to come up in cases where the defense is most desperate. Sting operations can provide an airtight case for the prosecutor. The first reported federal case to uphold the entrapment defense was in 1915.[119] The first Supreme Court case addressing the defense was in 1932, in *Sorrells v. United States*,[120] where a federal agent posing as a tourist/fellow war veteran enticed his host, a hospitable farmer, to sell him some liquor during the Prohibition years. The lower courts had denied the availability of the entrapment defense; the Supreme Court reversed, stating that the defense should be available, at least in a pre-trial hearing.[121] Justice Roberts wrote a concurrence arguing that no trial should occur at all where the police instigated the offense, and that the majority focused too much on the defendant's predisposition.[122]

The Supreme Court went on to issue four more key decisions on the defense,[123] which comprise the entirety of the Court's jurisprudence on the matter. These cases, and the "subjective test" they espoused (over strident dissents), became binding on all federal courts, and persuasively influential for state courts and legislatures. Approximately half the states have now incorporated the defense into their

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[117] *See infra* notes 171–173 and accompanying text.

[118] *See* Woo Wai v. United States, 223 F. 412, 412–13 (9th Cir. 1915) (first federal case recognizing entrapment defense).

[119] *Id.* In *Woo Wai v. United States* an immigration enforcement officer (in the nascent days of immigration restrictions) had lured the defendant into a scheme for smuggling Chinese illegal aliens into the country. *Id.* The recruitment process had taken eighteen months; the court focused on the lack of evidence that the criminal intention had originated in the defendant's mind. *Id.* at 415.

[120] 287 U.S. at 438.

[121] *See id.* at 442, 452.

[122] *Id.* at 454–55 (Roberts, J., concurring).

[123] *See* Jacobson v. United States, 503 U.S. 540, 554 (1992); Mathews v. United States, 485 U.S. 58, 59–60 (1988); Hampton v. United States, 425 U.S. 484, 485 (1976); United States v. Russell, 411 U.S. 423, 424–25 (1973); Sherman v. United States, 356 U.S. 369, 370 (1957).

criminal statutes, in various permutations; the others have the defense as a matter of judicial precedent.[124]

The Court in *Sorrells* discussed two possible approaches to the defense, called the "subjective" and "objective" tests, and adopted the subjective test.[125] The concurring Justices wanted the objective test instead.[126] These two tests still define the field. The subjective test assumes that entrapment is not a constitutional matter, although the Court has not permanently foreclosed the idea that entrapment could be tied to a generic procedural due process claim at some point.[127] Due process, however, is the entire concern of the objective test; some courts actually call it the "due process test."[128] The fact that entrapment is not a constitutional issue, according to the majority of the Court, means that states are free to ignore the Court in this area and adopt alternative approaches.[129] The Model Penal Code (the "MPC") followed the dissenters on the Court and opted for the objective test,[130]

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[124] All states have the entrapment defense, but only half have codified it. For a list, see John E. Nilsson, Note, *Of Outlaws and Offloads: A Case for Derivative Entrapment*, 37 B.C. L. Rev. 743, 747 n.26 (1996).

[125] *Sorrells*, 287 U.S. at 448 (emphasizing that Congress would not have enacted a statute seeking to punish someone without criminal intent, thereby focusing on the defendant's disposition); *id.* at 457 (Roberts, J., concurring) (focusing on entrapment as a way for the judiciary to preserve the integrity of the judicial process).

[126] *Id.* at 457 (Roberts, J., concurring); *see also Sherman*, 356 U.S. at 382 (Frankfurter, J., concurring).

[127] A few courts have tried this, but the idea has not caught on; nor has the Supreme Court ever adopted it. *See, e.g.*, United States v. Twigg, 588 F.2d 373, 375 (3d Cir. 1978); Greene v. United States, 454 F.2d 783, 787 (9th Cir. 1971) (stating that "the Government may not involve itself so directly and continuously over such a long period of time in the creation and maintenance of criminal operations"); *see also* Kenneth M. Lord, *Entrapment and Due Process: Moving Toward a Dual System of Defenses*, 25 Fla. St. U. L. Rev. 463, 467–68 (1998) (arguing that courts should use both an entrapment defense and a related due process defense, depending on the case); Eric L. Muller, *Constitutional Conscience*, 83 B.U. L. Rev. 1017, 1020 (2003) (lamenting the passing of the outrageous government conduct defense from the government system and proposing its revival); John David Buretta, Note, *Reconfiguring the Entrapment and Outrageous Government Conduct Doctrines*, 84 Geo. L.J. 1945, 1950 (1996) (urging that entrapment be merged into an outrageous government conduct test under constitutional due process analysis); Molly Kathleen Nichols, Comment, *Entrapment and Due Process: How Far is Too Far?*, 58 Tul. L. Rev. 1207, 1207 (1984) (advocating a due process dimension to entrapment defense).

It is important to note that granting a due process entrapment defense would not necessarily trigger the fruit of the poisonous tree doctrine. The courts would have to make that explicit.

[128] *Twigg*, 588 F.2d at 385.

[129] *See Sorrells*, 287 U.S. at 446.

[130] *See* Model Penal Code § 2.13 (1980). The MPC's position on entrapment is particularly interesting when taken together with its approach to conspiracies, especially in light of the fact that entrapment and conspiracy crimes are interrelated. The MPC allows a

which probably influenced the minority of states that follow the MPC's approach on this point.[131] Five jurisdictions[132] have tried to combine the approaches into a hybrid, which is harder on defendants because it makes them pass through both sets of hurdles.[133] The majority of the Supreme Court, however, has never wavered from the subjective test, and the more recent cases[134] indicate that the dissenters have either given up or are no longer on the Court.[135]

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conspiracy conviction even where the only other conspirator besides the defendant was a government agent. *See id.* § 5.03(1). This is usually called the "unilateral approach" to conspiracy, which differs from the traditional (majority) rule known as the "bilateral approach," which requires at least two real criminal (nongovernment agent) members of a conspiracy before any member may be convicted of the charge. For a detailed discussion of this plurality requirement, see WAYNE R. LAFAVE, CRIMINAL LAW § 6.5(g) (3d ed. 2000). The MPC, therefore, makes it easier for the government to obtain convictions by using sting operations—all one needs is a single victim (defendant) and one government agent—but then imposes a rule for the entrapment defense that is less favorable to law enforcement, as it focuses on the actions of the agents and not the defendant's predisposition. It is not clear if the drafters intended this to be an equalizing feature of the MPC, or if the odd combination was a coincidence.

[131] *See, e.g.*, Marcus, *supra* note 1, at 173–74 ("More than a dozen states have found the subjective test wanting and have, therefore, adopted the objective test."); *see also* ALASKA STAT. § 11.81.450 (2006); ARK. CODE ANN. § 5-2-209 (2006); COLO. REV. STAT. § 18-1-709 (2006); HAW. REV. STAT. ANN. § 702-237 (LexisNexis 2007); KAN. STAT. ANN. § 21-3210 (1995); N.Y. PENAL LAW § 40.05 (McKinney 2004); N.D. CENT. CODE § 12.1-05-11 (1997); 18 PA. CONS. STAT. ANN. § 313 (West 1998); TEX. PENAL CODE ANN. § 8.06 (Vernon 2003); UTAH CODE ANN. § 76-2-303 (2003); State v. Mullen, 216 N.W.2d 375, 382 (Iowa 1974); People v. Turner, 210 N.W.2d 336, 342–43 (Mich. 1973); State v. Wilkins, 473 A.2d 295, 298–99 (Vt. 1983).

[132] Florida, Indiana, New Hampshire, New Jersey, and New Mexico have variations on the objective test that appear to be hybrids. *See* FLA. STAT. ANN. § 777.201 (West 2005); IND. CODE. ANN. § 35-41-3-9 (LexisNexis 2004); N.J. STAT. ANN. § 2C:2-12 (West 2005); State v. Little, 435 A.2d 517, 519 (N.H. 1981); Baca v. State, 742 P.2d 1043, 1045–46 (N.M. 1987); *see also* Marcus, *supra* note 1, at 180–84 ("A misreading of the objective test can cause inclusion of the predisposition element.").

[133] A few commentators have proposed hybrid approaches, but the idea has not gained widespread acceptance. *See, e.g.*, Lord, *supra* note 127, at 467–68 (arguing for both a hybrid entrapment defense to be available as well as a separate due process type defense); Jeffrey N. Klar, Note, *The Need for a Dual Approach to Entrapment*, 59 WASH. U. L.Q. 199, 203 (1981).

[134] *See, e.g.*, *Mathews*, 485 U.S. at 66–67 (Brennan, J., concurring) ("I have previously joined or written four opinions dissenting from this Court's holdings that the defendant's predisposition is relevant to the entrapment defense . . . . Therefore I bow to *stare decisis*, and today join the judgment and reasoning of the Court.").

[135] *See supra* notes 33–35 and accompanying text. The Supreme Court's position on entrapment takes on special pragmatic importance for three reasons: 1) the increasing federalization of criminal law in the United States means that federal rules have an ever-greater relevance for law enforcement; 2) the federal criminal code comprehensively covers many of the so-called "victimless crimes" that lend themselves to enforcement via sting operations, and hence would naturally give rise to more entrapment claims; and 3) entrapment remains a common law defense in the federal courts, meaning that the Court's jurisprudence on the issue completely carries the day. *See supra* notes 33–35.

B. *The Internationalization of the Entrapment Defense*

Traditionally, entrapment as an affirmative defense was unique to American law;[136] other industrialized countries did not recognize the defense,[137] but instead regulated sting operations by charging law enforcement agents for participation in the crimes they helped instigate.[138] This appears to be changing.[139]

In the United States, the increased federalization of criminal law[140] in the last quarter of the twentieth century naturally led to a commensurate federalization of criminal defenses, so that entrapment cases increased temporarily.[141] It appears that we are now in a new phase of globalization or internationalization of criminal law,[142]

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[136] *See supra* notes 22–28 and accompanying text.

[137] *See* Ross, *supra* note 25, at 1521 (explaining that in Europe the general rule is for the defendant to be found guilty but for the police to be charged as accessories to the crime in situations that would be analogous to entrapment in the United States).

[138] *See id.* at 1521–22 ("Most Western European legal systems instead treat entrapment as a mode of complicity that fails to excuse the target but implicates the investigator in the crime . . . . European legal systems treat such conduct as criminal unless a law expressly exempts the investigator from liability for specified acts." (citation omitted)).

[139] *See, e.g.*, McAdams, *supra* note 10, at 110 & n.21 (asserting that the growing interest is due to pressure from the United States for our allies to participate in more undercover operations to detect drug traffickers).

[140] *See, e.g.*, United States v. Patton, 451 F.3d 615, 631 (10th Cir. 2006); United States v. Sabri, 326 F.3d 937, 956 (8th Cir. 2003) (Bye, J., dissenting); United States v. Jacquez-Beltran, 326 F.3d 661, 665 (5th Cir. 2003) (DeMoss, J., specially concurring).

There has been much academic acknowledgment of the federalization of criminal law. *See generally* John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 Temp. L. Rev. 673 (1999); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135 (1995); Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf?"* 50 Syracuse L. Rev. 1317 (2000); Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. Rev. 893, 897 (2000); Dick Thornburgh et al., *The Growing Federalization of Criminal Law*, 31 N.M. L. Rev. 135 (2001); Christine DeMaso, Note, *Advisory Sentencing and the Federalization of Crime: Should Federal Sentencing Judges Consider the Disparity Between State and Federal Sentences Under Booker?*, 106 Colum. L. Rev. 2095, 2104–06 (2006).

[141] *See* Stevenson, *supra* note 10, at 19. For an exhaustive list of reported entrapment cases in recent years, see *id.* at nn.38, 40–56, 81–83. For a tabulation of the increases and subsequent decreases in the number of cases in which the defense arises, see *id.* at 37–38.

[142] *See, e.g.*, United States v. Balsys, 524 U.S. 666, 714–15 (1998) (citing several academic sources); *In re* Impounded, 178 F.3d 150, 152 (3d Cir. 1999) (discussing the emerging internationalization of criminal antitrust enforcement); United States v. Balsys, 119 F.3d 122, 130–31 (2d Cir. 1997). *See generally* Bruce D. Landrum, *Globalization of Justice: The Rome Statute of the International Criminal Court*, Army Law., Sept. 2002, at 1; Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 Harv. Int'l L.J. 1 (2004) (discussing the influence of American plea bargaining in the international arena); Edgardo Rotman, *The Globalization of Criminal Violence*, 10 Cornell J.L. & Pub. Pol'y 1 (2000) (providing a useful

so we would expect to see a similar internationalization of traditional defenses.[143] This seems to be the case with entrapment, as courts in more industrialized countries have addressed it in recent years. The approaches to entrapment vary, and include some alternatives for regulating sting operations besides the two rival rules found in America, that is, the objective and subjective tests.

Canada's Supreme Court recognized entrapment-like claims in *Queen v. Mack* in 1988.[144] The court based this move in part on the Canadian Charter of Rights and Freedoms, a constitutional act passed in 1982.[145] Unlike the United States, Canada does not recognize entrapment as an "affirmative defense" to a crime, in the sense that the defendant can obtain a complete acquittal;[146] rather, courts issue a "stay of proceedings," *after the conviction of the defendant*, which puts the case on hold indefinitely without sentencing the defendant at all.[147] The Canadian courts use a rule akin to the "objective test" in the United States; for example, in *Regina v. Sullivan*, the Canadian Supreme Court explained, "The policy considerations here are analogous to those which apply when proceedings against an accused are stayed because of en-

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nomenclature and identification of which crimes tend to be the most prone to international effects, and consequently, enforcement).

[143] *See, e.g.*, *Balsys*, 524 U.S. at 714–15 (discussing the problems of government overreaching in the international context).

[144] *See* R. v. Mack, [1988] 2 S.C.R. 903, ¶¶ 10, 122 (Can.). For an academic overview (somewhat dated) of entrapment law in Canada, see generally David Lanham, *Entrapment, Qualified Defences and Codification*, 4 Oxford J. Legal Stud. 437 (1984).

[145] *See Mack*, 2 S.C.R. ¶¶ 10, 122. For an earlier and oft-cited case that had moved in this direction, see R. v. Jewitt, [1985] 2 S.C.R. 128, ¶¶ 2, 55 (Can.). Note that Canada appears to recognize the defense of "entrapment by estoppel." Lévis (Ville) c. Tétreault, [2006] 1 S.C.R. 420, ¶¶ 20–28 (Can.), *available on Westlaw at* 2006 CarswellQue 2911; R. v. Jorgensen, [1995] 4 S.C.R. 55, ¶¶ 22–24 (Can.), *available on Westlaw at* 1995 CarswellOnt 985; *see also infra* notes 415–436 and accompanying text (describing entrapment by estoppel). Canada does not appear to recognize "vicarious" or "derivative" entrapment. *See* R. v. Carosella, [1997] 1 S.C.R. 80, ¶ 135 (Can.), *available on Westlaw at* 1997 CarswellOnt 85; *see also infra* notes 437–446 and accompanying text (describing derivative entrapment).

[146] *See, e.g.*, R. v. Pearson, [1998] 3 S.C.R. 620, at ¶ 6 (Can.), *available on Westlaw at* 1998 CarswellQue 1079 ("Entrapment is a unique area of the criminal law. In our view, it has been somewhat inappropriately referred to as an affirmative defence.").

[147] *See id.* ¶¶ 7–12 ("[Entrapment] is, in fact, completely separate from the issue of guilt or innocence . . . . A claim of entrapment is in reality a motion for a stay of proceedings based on the accused's allegation of an abuse of process. . . . Entrapment concerns the conduct of the police and the Crown. The question to be answered is not whether the accused is guilty, but whether his guilt was uncovered in a manner that shocks the conscience and offends the principle of decency and fair play. . . . Once the accused is found guilty of the offence, the accused alone bears the burden of establishing that the conduct of the Crown and/or the police amounted to an abuse of process deserving of a stay of proceedings . . . .").

trapment. They are concerned with the integrity and fairness of the administration of justice rather than with the culpability of the accused."[148]

Canadian entrapment cases often include references to American entrapment law,[149] as extradition proceedings by the United States government become more common; typically, the Canadian courts defer to the foreign court's rules and reject the entrapment claims in these cases.[150] The international characteristics of terrorism make it more likely that Canada will encounter more entrapment claims in this area; so far there have only been a few.[151] As in the United States, the entrapment defense is not always successful.[152]

England refused to recognize the entrapment defense for many years; it was not a defense in English common law.[153] In 2002, however, in *Regina v. Loosely*,[154] the House of Lords changed course and adopted an "abuse of process" rule similar to the objective version of the entrapment defense (explicitly rejecting a "predisposition" rule, interestingly).[155] Unlike the United States, however, England now uses the same procedural relief mechanism as Canada—a "stay of proceedings"—rather than a finding of no guilt or dismissal of the charges

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[148] [1991] 1 S.C.R. 489, ¶ 25 (Can.) (quoting R. v. P., [1989] 2 S.C.R. 3, ¶ 22 (Can.)). *See generally* R. v. Brown, [1999] 3 S.C.R. 660 (Can.) (holding that police manipulation of accused's known alcohol addiction constituted active inducement to commit crime; accused was entrapped and further proceedings would constitute abuse of process, so judicial stay of proceedings entered).

[149] An additional illustration of Canada's awareness of American entrapment law is apparent in the legal academic literature. *See, e.g.*, M. L. Friedland, *Controlling Entrapment*, 32 U. Toronto L.J. 1, 12–14 (1982).

[150] *See generally, e.g.*, United States v. Kwok, [2001] 1 S.C.R. 532 (Can.); United States v. Dynar, [1997] 2 S.C.R. 462, at ¶ 116 (Can.).

[151] *See* R. c. Khela, [1995] 4 S.C.R. 201, ¶ 56 (Can.) (attempt to bomb American airplane, entrapment claims raised); United States v. Reumayr, [2003] CA029202, CA029839, 2003 CarswellBC 1570, ¶ 13 (B.C. Ct. App.) (extradition request by U.S. for defendant accused of trying to bomb Alaska pipeline; entrapment claims raised, court deferred to U.S. courts); R. v. Young, [2000] 2/00, 2000 CarswellOnt 4970, ¶¶ 3, 16 (Ont. Super. Ct. of Justice) (bombing of police station, entrapment claims raised).

[152] *See, e.g.*, R. v. Shirose, [1999] 1 S.C.R. 565, 576–79 (Can.) (holding that in the absence of proved entrapment, it was unnecessary to consider the legality of "reverse-sting" operations generally or specifically; rather, entrapment requires application of the "clearest cases" doctrine, reserved for the most egregious instances of government misconduct; "reverse-sting" in this case did not shock the conscience or weigh against the conviction).

[153] *See, e.g.*, R. v. Sang, (1979) 69 Crim. App. 282, 286 (H.L.) (appeal taken from C.A.) (U.K.), *available at* 1979 WL 68315.

[154] (2002) 1 Crim. App. 29, 366–67 (H.L.) (appeal taken from C.A.) (U.K.).

[155] *Id. See generally* Squires, *supra* note 21 (discussing in detail the opinion and the case history leading up to *Loosely*).

(the American rule).[156] The defendant escapes penal sanctions for the incident; of course, one may still find it inconvenient to have a conviction on record.

The House of Lords felt influenced (possibly bound, depending on how one understands European Union law) by a landmark decision from the European Court of Human Rights (the "ECHR") in 1999, *Teixeira de Castro v. Portugal*.[157] The remedy for entrapment in the ECHR is more drastic than elsewhere. The tribunal acquitted Mr. Teixeira du Castro, who was the victim of a drug sting by Portuguese undercover agents, and ordered the Portuguese government to repay his lost wages during his time of imprisonment and various litigation costs.[158] This case will probably continue to be influential over the other countries of Western Europe for several years.[159]

Australia has also moved in the direction of recognizing entrapment claims,[160] but with a different remedial device. Australian courts impose an exclusionary rule on evidence or testimony related to police overreaching[161] (again, something similar to an objective test in the United States).[162] Following the celebrated 1995 *Ridgeway v. Regina* case, however, state legislatures rushed to enact statutes granting immunity for undercover agents, preventing prosecution for their involvement in sting-related crimes (the historical remedy for overdone stings).[163] This seems to have offset the effect of *Ridgeway* somewhat, making Australian judicial oversight of sting operations, in the words of Paul Marcus and Vicki Waye, "extremely thin."[164]

Singapore still does not recognize entrapment at all;[165] courts there apparently continue to follow the 1980 *R. v. Sang* decision from England, which England itself has overruled.[166] Given Singapore's ongoing dependence on British jurisprudence and precedents, it seems

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[156] *See Loosely*, 1 Crim. App. at 366–67.

[157] *See generally* 28 Eur. Ct. H.R. 101 (1999), *available at* 1998 WL 1043930. The *Teixeira* opinion is available in Westlaw by clicking one of the internal links beneath the caption on the Westlaw case above; it is an excellent resource for previous European decisions on sting operations.

[158] *See generally id.*

[159] *See* Bronitt, *supra* note 21, at 376–78.

[160] Ridgeway v. Regina (1995) 184 C.L.R. 19, 43 (Austl.) (adopting exclusionary rule for evidence obtained through sting operation).

[161] *See* Marcus & Waye, *supra* note 24, at 73–78.

[162] *See id.* at 78.

[163] *Id.* at 75.

[164] *Id.* at 78.

[165] *See* Bronitt, *supra* note 21, at 375.

[166] *See id.* at 375, 384.

likely that courts there will follow the *Loosely* decision eventually.[167] South Africa's Supreme Court also completely rejected the entrapment defense in *State v. Hassen and Another*,[168] in 1998.

Even though antiterrorism efforts will probably contribute to the further internationalization of criminal law and relevant defenses, a deep cultural divide between Europe and the United States in attitudes about appropriate behavior for police will remain problematic for adopting a unified approach. As James Q. Whitman has observed, Europeans seem to have a higher tolerance for invasive government surveillance,[169] but are more sensitive about personal control over one's public identity or portrayal, which seems to weigh against sting operations. Sting operations, to the extent that they are a "setup," remove some of the culprit's control over self-representation, as in the time, place, and exposure of illegal acts. Surveillance bothers Americans, perhaps, because of the chilling effect it has on cherished freedoms, like free speech and freedom of association, which is conceptually different from control of one's public portrayal. Richard Posner has made a similar point about the British: "[T]hey perceive less tension between M15-style domestic intelligence and civil liberties than between police measures and civil liberties."[170] Sting operations are police operations from this standpoint, focused on obtaining arrests and convictions.

C. *Necessity Is the Mother of Invention*

The entrapment defense is always the product of an undercover sting operation, and sting operations are usually the product of certain types of criminal activity. There are two characteristics of a crime that most invite undercover enforcement methods: consent between the

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[167] *See generally id.* at 375–84.

[168] *See* Recent Developments, *Entrapment and the Right to a Fair Trial*, 43 J. AFR. L. 112, 112 (1999) (discussing this decision by the Supreme Court of South Africa). The defendants found themselves apprehended as a result of a police trap for purchasing unpolished diamonds without a permit (violating section 20 of the 1986 Diamonds Act). *Id.* They appealed on the grounds that the sting and the admission of the evidence from it violated their constitutional due process rights. *Id.* The South African Supreme Court held that there was no substantive entrapment defense under the South African Constitution; although it recognized the possibility that a case might arise where the trap was so unfair as to violate the right to a fair trial; this trap was not so egregious. *Id.*

[169] *See* Whitman, *supra* note 27, at 1159 ("In France and Germany, according to a recent study, telephones are tapped at ten to thirty times the rate they are tapped in the United States—and in the Netherlands and Italy, at 130 to 150 times the rate.").

[170] POSNER, *supra* note 4, at 135.

immediate parties to the crime, and a special need to prevent the crime from occurring in the first place. The traditional "victimless crimes," such as drug sales, sex sales, and firearms trafficking, are examples of the consensual transactions that our government has criminalized. Most common law crimes addressed nonconsensual transfers (thefts) and extreme versions of otherwise tortious injuries (battery, wrongful death, and the like). The dramatic rise in criminalization of certain consensual transactions, a prevalent feature of modern law, necessitated the increased use of both surveillance and sting operations, because the chances of detection are otherwise terribly low, from a law enforcement perspective. The absence of an immediate victim who would be upset enough to report the crime or press charges after the fact presents special challenges to law enforcement.[171] The criminalization of activities forces them underground, often into clandestine criminal networks, which further encumbers enforcement efforts. Infiltration of the network by undercover agents becomes expedient.

Preventing crimes can also necessitate the use of infiltrators or sting operations, especially if the crime is difficult to deter for some reason. Strict prevention, however, is usually not a priority, and is usually not very necessary. If the goal of law enforcement is simply to deter or punish, as is usually the case, then penal actions after the commission can serve both of these goals reasonably well. Traditional methods of investigating crimes and arresting the suspects are often appropriate. Admittedly, catching the wrongdoers might be more dif-

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[171] Justice Rehnquist observed this point with eloquence:

> 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 practices. Such infiltration is a recognized and permissible means of investigation . . . .

Russell, 411 U.S. at 423. An interesting twist on this paradigm is the modern problem of computer crime directed at corporations (hacking, theft, point of service denials, vandalism of corporate websites, and so forth), and for which decoys called "honeypots" are now in use to trap would-be hackers. Corporations, although not willing parties to a hacking transaction, are often loathe to report that their systems have been breached by unauthorized users. *See* Walden & Flanagan, *supra* note 1, at 338. First, corporations do not want the rest of the hacking community to be aware of security weaknesses in their systems, which would invite more intrusions. *See id.* Second, corporations are also concerned about shareholder value, and public reporting about the crime could have negative repercussions in this respect. *See id.*

ficult for some crimes than for others, as discussed in the preceding paragraph. Yet aside from the downward-skewed probabilities of detection, either deterrence or retribution is easily obtainable after the crime occurs. Crime *prevention* is a separate goal that might require government activity before the crime, although effective deterrence is one way to prevent the commission of crimes. If a crime is difficult to deter, perhaps because the normal motivations for the crimes are impervious to dissuasion, then intervention by the government beforehand becomes necessary to prevent the crime.[172] Similarly, if the potential harm from the crime is extraordinarily widespread and severe, preventing its occurrence becomes more important than with isolated instances of the usual "victimless crimes."[173] Terrorism meets both of these criteria: the ideological motivations make it difficult to deter by conventional means (the risk of punishment and social approbation), and the risk of thousands of deaths at once makes absolute prevention a higher priority than usual. Hence, undercover operations become more expedient as antiterrorism efforts increase.

Another factor contributes to an increase in undercover law enforcement, but it is environmental more than inherent in the characteristics of a particular crime. If the exclusionary rules are more likely to arise at trial, or are easier for defendants to wield as legal weapons than the entrapment defense, the police may devote more attention to

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[172] In actuality, the favored antiterrorism statutes for prosecutors are newer enactments forbidding "material support" of terrorism, which are designed to be preventative rather than punitive, allowing prosecutors to bring charges before the terrorist attack itself takes place. *See infra* notes 254–271 and accompanying text; *see also* Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT'L SEC. L. & POL'Y 5, 7 (2005) ("The government is also using these offenses as a basis for early intervention, a kind of criminal early-warning and preventative-enforcement device designed to nip the risk of terrorist activity in the bud.").

[173] *See* Brian P. Comerford, Note, *Preventing Terrorism by Prosecuting Material Support*, 80 NOTRE DAME L. REV. 723, 732–33 (2005) ("Terrorism is different from traditional crime because it is uniquely destructive and the perpetrators often do not live to be punished. Any response to terrorism must focus on prevention of future terrorist acts. If terrorism were a typical crime, the government might consider preventing terrorism through deterrent measures, such as tougher penalties and stricter enforcement. Terrorists, however, cannot be deterred; if an offender is willing to die for his actions, no fear of punishment will discourage him. The only option is to incapacitate terrorists before a plot has been initiated and before members of the public are harmed. Statutes that merely criminalize terrorist acts are inadequate because they target completed crimes. Prohibiting attempt and conspiracy to commit terrorist acts is only marginally better because the public is put at great risk when prosecutors wait until an act of terrorism is sufficiently close to commission. The only acceptable response to terrorism is to criminalize support of the terrorist group. This allows prosecutors to act when an offender trains with, joins, and potentially lies in wait for instructions from, a foreign terrorist organization.").

avoiding actions that would trigger the exclusionary rules rather than those that might constitute entrapment. This can even occur unwittingly, as when police focus more on proper procedure for searches and seizures, so that they become less vigilant about creating a possible entrapment defense. On a more conscious level, police could conclude that an acquittal based on entrapment is less likely than one based on the exclusionary rules, leading to more willingness to cheat in the area with the least likely consequences.

There can also be unintended consequences from disparities in sanctions for police, including disparities in probabilities. Some commentators see the rise of conspiracy as a favorite charge for prosecutors as a reaction against the dramatic increase in prodefendant exclusionary rules during the Warren Court era.[174] Prosecuting more often for conspiracy charges, instead of other crimes, may be an attempt to restore equilibrium. An unintended consequence of focusing more on conspiracy, however, is that it creates new opportunities to use government informants and sting operations, more so than traditional common law crimes.[175] The incriminating statements made and recorded by undercover agents in a group conversation, prior to a custodial interrogation, are far less likely to trigger exclusionary rules. The police, therefore, have extra incentives to conceptualize law enforcement in terms of conspiracy, and thence to use sting operations, which set the stage for entrapment.[176]

Heightened exclusionary rules in criminal procedure, therefore, can lead to more sting operations to offset the limitations or costs imposed by the exclusionary rules.[177] The police will have a tendency to use an agent, either to infiltrate an existing conspiracy or to create a

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[174] *See* Stevenson, *supra* note 31, at 104.

[175] I generally take a favorable view of criminalizing conspiracy, as discussed more in the following paragraphs. It should be mentioned, however, that some commentators have argued forcefully that conspiracy is completely unnecessary as a crime (especially given the modern breadth of laws of attempt and accomplice liability) and that it provides too much power to law enforcement. *See generally* Phillip Johnson, *The Unnecessary Crime of Conspiracy*, 61 Cal. L. Rev. 1137 (1973). Attempt, however, requires that the defendant have taken a "substantial step" toward the commission of the crime; conspiracy does not, but rather requires only that there was an agreement—sometimes somewhat tentative—to pursue a criminal enterprise. This is much easier for the prosecution to prove. Also, the usual rules against admitting hearsay evidence can be circumvented when the out-of court testimony is offered to prove this criminal agreement, which is an element of the crime. *See generally id.*

[176] *See* Ross, *supra* note 25, at 1509 ("The Fifth Amendment invites the use of undercover tactics as a means of obtaining by deceptive stratagems prior to arrest what police may not elicit by coercion afterwards.").

[177] *See* Posner, *supra* note 4, at 114–15.

new one; to recruit those who would have joined a conspiracy otherwise, or to have more codefendants who will incriminate each other at trial.[178] In addition, if the exclusionary rules focus mostly on arrest and search procedures (as they do), then law enforcement is more likely to want a "controlled" setting for these particular phases of enforcement; inadvertent violations that trigger the exclusionary rules are more likely in a spontaneous response to a crime that occurs as a surprise. Police have an incentive to reduce risk and uncertainty by "creating" the occasion for the crime; this allows police to plan the timing and occasion of the arrest, and the timing, occasion, and method of obtaining incriminating evidence. The exclusionary rules create an extra incentive to use sting operations as the method of choice for law enforcement.

D. *Legal Regulation of Sting Operations*

There are currently four devices in our legal system that regulate sting operations. The primary device is the affirmative defense of entrapment. There are, however, three other devices with which we currently regulate sting operations; one is administrative, and the other two are judicial or legislative. Each is secondary to the entrapment defense in import and effect, and reflects the ex ante, indirect effects of the entrapment defense.

1. Entrapment as an Affirmative Defense

Modern sting operations are an outgrowth of modern criminalization of consensual transactions, the prosecutorial-statutory framework of conspiracy charges, and the substitution effects of the exclusionary rules in criminal procedure.[179] The entrapment defense is our

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[178] To the extent that exclusionary rules interfere with the admissibility of confessions, law enforcement has additional reasons for favoring conspiracy. For example, conspiracies provide the opportunity to "flip" members into confessing against each other (but such incriminations are unlikely to trigger the exclusionary rules). For a discussion of how the criminalization of conspiracies generally provides a societal advantage through the phenomenon of "flipping," see Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1328–32 (2003). Judge Richard Posner notes a similar point as an inherent weakness of conspiracies, but one that can lead to additional crimes: "While it is also true that a conspiracy is more vulnerable to being detected because of the scale of its activities, the scale may also enable the conspiracy to escape punishment by corrupting law enforcement officers." POSNER, *supra* note 3, at 230. My focus is on the value of sting operations to police, but the insight is the same.

[179] A few commentators have presented empirical arguments that the advent of the exclusionary rules led to significant increases in crime rates nationwide, ranging from three percent to thirty percent, especially in the wake of *Mapp v. Ohio*, 367 U.S. 643 (1961). *See,*

legal system's primary means of regulating government sting operations. As a regulatory scheme, it depends on an ex post mechanism: the acquittal of defendants who were wrongly entrapped. There is a resultant ex ante effect on the planning and execution of the sting operations (anticipating the pitfalls of the entrapment defense and working around them), but it is indirect.[180] The direct operation of the entrapment defense is the ex post acquittal of the sting's target. Without the indirect, ex ante effect alongside it, of course, any ex post regulation causes a certain amount of social waste, as the entire undercover operation comes to naught when the court acquits the target. The resources invested in the sting go to waste; it would have been better to invest the resources in other forms of law enforcement, including surveillance and investigation. The indirect or ex ante effects of the entrapment defense, therefore, are crucial for it to function as an efficient regulatory device.

2. The Federal Guidelines for FBI Undercover Operations

The internal, administrative regulation of sting operations comes from the U.S. Attorney General's *Guidelines on Federal Bureau of Investigation Undercover Operations*, which set rules for sting operations that the Federal Bureau of Investigation (the "FBI") may conduct.[181] The rules are the subject of modifications every few years, at the discretion of the Attorney General, and the last modification occurred in 2002, under John Ashcroft, mostly in response to the 2001 terrorist attacks in New York and Washington, D.C. and the reactionary "War on Terror" that ensued thereafter.[182] The Attorney General ("AG") has authority to promulgate and revise the guidelines pursuant to federal

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e.g., Raymond Atkins & Paul Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rules*, 46 J.L. & Econ. 157, 159 (2003). Judge Richard Posner cites statistics that the "crime index" compiled by the Federal Bureau of Investigation grew sevenfold between 1960 and 1996; for reasons he links to exclusionary rules, the number of federal prosecutions during the same period increased only by a third. *See* Richard A. Posner, Frontiers of Legal Theory 369 n.61 (2001). Of course, many theories explaining the rise in crime rates in the 1960s and 1970s are in circulation. *See, e.g.*, George B. Vold & Thomas J. Bernard, Theoretical Criminology 157–58 (3d ed. 1986) (discussing Durkheim's influential social anomie theory); *id.* at 287–98 (social conflict theories).

[180] *See* Posner, *supra* note 4, at 114, 136 (discussing Bureau planning around the criminal procedure rules in an ex ante manner).

[181] *See generally* Ashcroft, Guidelines, *supra* note 106.

[182] *See* Posner, *supra* note 4, at 137–38 (discussing the guidelines' place in the reorganized intelligence system after September 11, 2001).

statute.[183] The AG has full discretion in this area; that is, the fullest amount of discretion that courts recognize for administrative agencies generally. These guidelines are important not only because the FBI is the main law enforcement agency of the federal government (and thus involved in almost all entrapment cases), but also because a number of other federal agencies—even those that may not report to the Attorney General directly—also follow the guidelines.[184] In addition, some states and major municipal police departments have incorporated the *Guidelines on Federal Bureau of Investigation Undercover Operations* into their own internal manuals or regulations,[185] and many states conduct their sting operations only in collaboration with the FBI, following the FBI's procedures and protocol.[186]

The regulations seem reasonably cautious, placing modest budgetary constraints on sting operations ($50,000 in nondrug cases, $100,000 in drug cases), and requiring prior approval and ongoing oversight by the FBI and an administrative organ called the Undercover Operations Review Committee (the "UORC").[187] It is a fair criticism, however, to say that they seem to be lacking teeth, at least from a lawyer's perspective. The guidelines themselves provide no sanctions for violations of its requirements, other than discretionary removal of individual agents from an operation by the agent's superiors in the FBI or the Department of Justice (the "DOJ") (presumably there are other internal disciplinary protocols for wayward employees).[188] In addition, nearly all of the guidelines' strictures and safeguards are subject to appeals and discretionary exceptions by designated officials. There is a predictable, sweeping "Reservation" clause at the conclusion. It declares that the guidelines are "not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable by law by any party in any matter, civil or criminal . . . ."[189]

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[183] 28 U.S.C. §§ 509, 533 (2000 & Supp. III 2003); *id.* § 510 (2000).

[184] *See, e.g.*, Pieniazek v. Gonzales, 449 F.3d 792, 794 (7th Cir. 2006) (immigration agency); United States v. Dion, 762 F.2d 674, 686 n.9 (8th Cir. 1985) (Fish & Wildlife Service conducting undercover operations to catch Native Americans trafficking in eagle feathers).

[185] *See, e.g.*, Handschu v. Special Servs. Div. (*Handschu V*), 475 F. Supp. 2d 331, 333 (S.D.N.Y. 2007); Handschu v. Special Servs. Div. (*Handschu IV*), 273 F. Supp. 2d 327, 335–36 (S.D.N.Y. 2003).

[186] *See generally* Susan N. Herman, *Collapsing Spheres: Joint Terrorism Task Forces, Federalism, and the War on Terror*, 41 WILLAMETTE L. REV. 941 (2005) (discussing the widespread involvement of federal agents in state undercover operations).

[187] ASHCROFT, GUIDELINES, *supra* note 106, at 4, 8–9.

[188] *Id.* at 17.

[189] *Id.* at 19.

There is, therefore, no judicial enforcement of the guidelines' provisions, and no recourse for victims of such violations; victims must seek redress elsewhere, perhaps under § 1983 actions, for which the guidelines have no relevance.[190] Consistent with this "Reservation" clause (but not relying on it), federal courts have held that guideline violations do not furnish the basis for an entrapment defense,[191] or supply the necessary basis for tort recovery in § 1983 actions.[192] The lack of enforcement mechanisms or sanctions makes the guidelines essentially advisory, a matter of internal processes, and a secondary device for regulating sting operations.

The guidelines do, however, illustrate the ex ante effects of the entrapment defense on law enforcement procedures and the planning of future sting operations. There is a special section on Entrapment,[193] stating emphatically, "Entrapment must be scrupulously avoided. Entrapment occurs when the Government implants in the mind of a person who is not otherwise disposed to commit the offense the disposition to commit the offense and then induces the commission of that offense in order to prosecute."[194] This summarizes the federal rule for entrapment (which is judge-made) reasonably well, but is otherwise precatory verbiage, without stipulated conse-

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[190] *See* Suter v. United States, 441 F.3d 306, 311–12 (4th Cir. 2006) (discussing the relevance of the guidelines in a Federal Tort Claims Action and concluding that the FBI had broad discretion that negated the claims of the plaintiffs); *see* Donald Yoo, *Immune Response: With the Federal Tort Claims Act, the Federal Government Has Waived Its Sovereign Immunity on a Limited Basis*, L.A. Law, Feb. 2007, at 24, 29 ("Moreover, the court concluded that the offending conduct in the case was based on considerations of public policy as the Undercover Guidelines that govern FBI investigations directed FBI officials to weigh risks and benefits, including risks to persons or businesses, before deciding whether to undertake a proposed operation.").

[191] *See, e.g.*, United States v. Abumayyaleh, No. 05–425 (JRT/JJG), 2006 WL 3690739, at *2 (D. Minn. Dec. 13, 2006) ("Defendant appears to be arguing that the contacts with the undercover officer that occurred prior to the final authorization of the undercover operation violated Attorney General's Guidelines on FBI Undercover Operations. The Court is not persuaded that the government violated the Guidelines by engaging in these preliminary contacts, but even if the behavior does violate the Guidelines, the Court concludes that the behavior was not so outrageous or fundamentally unfair as to bar defendant's conviction."); United States v. Marbelt, 129 F. Supp. 2d 49, 56 (D. Mass. 2000) ("Nor would a showing of some deviation from the guidelines by the agent in this case be a ground of effective defense. A showing that the Customs Service had not followed its internal guidelines is not a valid defense to the crime charged.").

[192] *See generally* Yoo, *supra* note 190 (discussing *Suter*, 441 F.3d 306). *But see* Alvarez-Machain v. United States, 331 F.3d 604, 643 (9th Cir. 2003) (suggesting, albeit somewhat ambiguously, that compliance with the guidelines does not create automatic immunity to tort actions).

[193] Ashcroft, Guidelines, *supra* note 106, at 16.

[194] *Id.*

quences for noncompliance. The next subsection admits that the foregoing is a "legal prohibition" (apparently meaning an "external" bar), and states that "additional restrictions limit FBI undercover activity to ensure, insofar as it is possible, that entrapment issues do not adversely affect criminal prosecutions."[195] The "restrictions" are conditions for approving the sting operation beforehand, and proceed as follows:

> (1) The illegal nature of the activity is reasonably clear to potential subjects; and
> (2) The nature of any inducement offered is justifiable in view of the character of the illegal transaction in which the individual is invited to engage; and
> (3) There is a reasonable expectation that offering the inducement will reveal illegal activity; and
> (4) One of the two following limitations is met:
>
> > (i) There is reasonable indication that the subject is en gaging, has engaged, or is likely to engage in the illegal activity proposed or in similar illegal conduct; or
> > (ii) The opportunity for illegal activity has been struc tured so that there is reason to believe that any persons drawn to the opportunity, or brought to it, are predis posed to engage in the contemplated illegal conduct.[196]

The Supreme Court's "predisposition" test is evident throughout the conditions; operations conducted according to these convictions should make an entrapment defense unavailable for the intended targets when they come to trial. The first item, that the illegal nature of the activity be clear to potential subjects, takes on special importance in the terrorism context, as will be discussed below in relation to the statutory framework under which terror prosecutions usually arise.[197] The stronger the mens rea or scienter requirement of a particular criminal statute, the more item (1) matters. The last condition on the list, item (4)(ii), will be especially relevant to the later discussion about the need to identify and incapacitate the people most likely to join terrorist groups before they even have a real opportunity to do so.[198] In any case, this administrative method of regulating sting operations is subordinate

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[195] *Id.*

[196] *Id.*

[197] *See infra* notes 254–271 and accompanying text.

[198] *See infra* notes 273–291 and accompanying text (discussing the heightened stakes of terrorist incapacitation).

to the entrapment defense, at least up to now. The entrapment defense affects, or even controls, the parameters of the guidelines, but the guidelines do not affect the entrapment defense.[199]

It is certainly possible to have administrative regulation of police operations that includes more concrete enforcement provisions. For example, even in the context of antiterrorism, the Foreign Intelligence Surveillance Act ("FISA")[200] created a Foreign Intelligence Surveillance Court ("FISC") that reviews, albeit in secret proceedings, the foreign surveillance actions of government agents.[201] There is even an appellate panel, the United States Foreign Intelligence Surveillance Court of Review, which reviews decisions of the FISC if the government attorneys appeal, which is rare (the government is the only party in FISC proceedings, so the process is not adversarial).[202] It would be possible to have a similar arrangement governing sting operations, as opposed to surveillance, which could exercise a degree of control that would rival the entrapment defense; but at present, no such regime exists.[203] Such a system would have to originate with the legislature.

3. Consent Decrees

The third manner in which our legal system regulates sting operations is through class action consent decrees covering an individual agency or police department.[204] The prototype is the Handschu

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[199] *See Marbelt*, 129 F. Supp. 2d at 55.

[200] 50 U.S.C. §§ 1801–1862 (2000 & Supp. III 2003). It seems that FISA is a particularly bad fit with modern computerized communications technology, and hamstrings our national security and antiterrorist efforts unnecessarily. *See, e.g.*, K.A. Taipale, *The Ear of Dionysus: Rethinking Foreign Intelligence Surveillance*, 9 Yale J.L. & Tech. 128, 141–56 (2007).

[201] 50 U.S.C. § 1803.

[202] *See In re* Sealed Case, 310 F.3d 717, 719 (FISA Ct. Rev. 2002) (the FISA Court of Review accepted amici briefs from the ACLU and the National Association of Criminal Defense Lawyers because the government was the only party to the FISA proceedings).

[203] For a detailed discussion of FISA and its failures in safeguarding civil liberties regarding surveillance, see generally David S. Kris, *The Rise and Fall of the FISA Wall*, 17 Stan. L. & Pol'y Rev. 487 (2006).

[204] *See, e.g.*, Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 Duke L.J. 1265, 1288–1302 (discussing the problematic character of organizational change litigation); Alan Effron, Note, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 Colum. L. Rev. 1796, 1802–11 (1988) (arguing that the consent decrees violate essential principles of federalism). For more general analysis of consent decrees, outside the immediate context of undercover infiltrators, see generally Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. Ill. L. Rev. 725 (discussing inherent structural difficulties with consent decrees, but not addressing consent decrees about policing); Theodore Eisenberg & Stephen Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 Harv. L. Rev. 465 (1980) (ob-

Decree in New York City,[205] and similar consent decrees in Chicago,[206] Detroit, Los Angeles, Memphis, and Seattle.[207] These cases focus primarily on government surveillance of legitimate political activities (e.g., reformist activist groups), including the use of undercover infiltrators and informants.[208] Plaintiffs are typically political activists who seek declaratory and injunctive relief from a litany of documented abusive actions by local police against their members or group activities.[209] Undercover government infiltrators in political groups have a chilling effect on a number of constitutional rights, including free speech and freedom of association.[210] The protracted litigation that ensues culminates in a settlement with a quasi-contractual consent decree, by which the law enforcement agency promises to restrain it-

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serving that the procedures and remedies employed in institutional litigation have analogues in older judicial traditions); Nancy Levit, *Mega-Cases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. Rev. (forthcoming Mar. 2008) (discussing the effectiveness of consent decrees in remedying workplace discrimination).

[205] Handschu v. Special Servs. Div., 605 F. Supp. 1384 (S.D.N.Y. 1985), *aff'd*, 787 F.2d 828 (2d Cir. 1986). *See generally Handschu V*, 475 F. Supp. 2d 331; *Handschu IV*, 273 F. Supp. 2d 327. The original Handschu case, prior to the consent decree, is Handschu v. Special Servs. Div. (*Handschu I*), 349 F. Supp. 766 (S.D.N.Y. 1972).

[206] *See generally* Alliance to End Repression v. City of Chicago (*Alliance II*), 237 F.3d 799 (7th Cir. 2001); Alliance to End Repression v. City of Chicago (*Alliance I*), 742 F.2d 1007 (7th Cir. 1984) (en banc). *Alliance II* significantly rolled back the restrictions on government undercover work that *Alliance I* had imposed in the post-Watergate era; writing the opinion in early 2001, Judge Posner now seems (in hindsight) prescient in his concerns about terrorist attacks posing a greater threat than repression of domestic dissent. *Alliance II*, 237 F.3d at 802. For a recent review of the *Alliance* cases, and a brief survey of the pendulum swing back toward the side of government in the years since these consent-decree cases, see generally Adrian Vermeule, Commentary, *Posner on Security and Liberty:* Alliance to End Repression v. City of Chicago, 120 Harv. L. Rev. 1251 (2007). For the latest round of litigation in this case regarding attorney fees from the previous litigation, see generally Alliance to End Repression v. City of Chicago, 356 F.3d 767 (7th Cir. 2004).

[207] For an excellent survey of the litigation in each of these cases and summaries of the consent decrees, see generally Paul Chevigny, *Politics and Law in the Control of Local Surveillance*, 69 Cornell L. Rev. 735 (1984).

[208] *See, e.g.*, *Handschu I*, 349 F. Supp. at 767.

[209] *See* Chevigny, *supra* note 207, at 768–75 (describing Los Angeles consent decree, which included the LAPD's Public Disorder Intelligence Division, entered into in response to growing concerns over disappearing files and records and putting strict limitations on undercover operations, requiring an elevated level of suspicion in order investigate an individual); *see also* David Berry, Note, *The First Amendment and Law Enforcement Infiltration of Political Groups*, 56 S. Cal. L. Rev. 207, 207 (1982) (arguing that infiltration alone, even without disruption or harassment, violates First Amendment rights, and that consent decrees have been an ineffective tool for addressing this).

[210] Alliance to End Repression v. City of Chicago, 627 F. Supp. 1044, 1054 (N.D. Ill. 1985).

self from political surveillance.[211] If the police later violate the terms (usually detailed guidelines proscribing police behaviors), the plaintiffs can commence contempt proceedings and obtain effective judicial relief.[212] In this sense, the consent decree mechanism is the mirror image of the FBI guidelines: the decree has ample teeth, but limited scope geographically.[213] Like the FBI guidelines, however, there were modifications to the Handschu Decree after the September 11, 2001 attacks to give greater latitude for antiterrorism operations;[214] in fact, in 2003, the Handschu Decree incorporated the FBI guidelines as revised in 2002.[215]

Sting operations are not necessarily included in each consent decree, but the limitations on undercover infiltrators would stultify the use of undercover agents for stings as well. There is a wealth of academic literature analyzing whether consent decrees are an effective means of institutional reform;[216] it is also difficult to know whether to attribute decreases in government abuses as fruit of the decrees or the result of societal trends, contemporaneous media attention, and the like.

On the point of regulating sting operations, however, there are two prima facie limitations of consent decrees. First, they generally

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[211] *See* Jerrold L. Steigman, Note, *Reversing Reform: The* Handschu *Settlement in Post-September 11 New York City*, 11 J.L. & Pol'y 745, 748 (2003) (describing consent decrees and analogizing them to court orders).

[212] *See* Anderson, *supra* note 204, at 737 (describing the available remedies of institutional-reform consent decrees and their scope).

[213] *See* Berry, *supra* note 209, at 229–30 (giving a detailed explanation of FBI Guidelines—including the relevant factors used in determining when the FBI can initiate an investigation—and how they govern the manner in which investigations may be carried out). Although Berry concludes that the guidelines lack effective external monitoring to ensure enforcement of the guidelines, he does propose remedies. *Id.* at 231–36.

[214] *See* Steigman, *supra* note 211, at 770–98. Steigman presents an excellent discussion on the *Handschu* settlement in the wake of September 11, 2001. He notes the concurrent interests in protecting against terrorism and the preservation of constitutional rights, and cautions against willingly waiving those rights in reaction to tragedies like the attacks in 2001. *See id.* The notable modification to the settlement is that it no longer contains a "criminal activity requirement," that is, the NYPD does not have to base an investigation on suspected criminal activity. *Id.* at 778. Steigman opines that such a modification effectively eliminates the protection granted by the settlement and cuts its legs out from underneath it. *Id.*

[215] *See id.* at 769; *see also Handschu IV*, 273 F. Supp. 2d at 335–36.

[216] *See, e.g.*, Berry, *supra* note 209, at 232. Berry evaluates the efficacy of consent decrees, particularly in light of the difficulty in obtaining standing and the lack of effective remedies, such as money judgments. *Id.* at 231. He also says that they are defective in that they cannot adequately prevent prospective harm. *Id.* Because constitutional rights are vitally important, he says that they should be afforded prospective protection, rather than retroactive remedies. *See id.* at 234.

prohibit targeting of legitimate political activity and dissent (meetings, political petitioning, rallies, and so forth).[217] Law enforcement activities against "material support" of terrorist organizations have already survived constitutional challenges that attempted to qualify the targeted activities as "political" in the sense of having constitutional protection.[218] Sting operations within the statutory framework of antiterrorism laws, discussed below, have a reasonable chance of falling outside the stated purview of the consent decrees.[219] Second, they have a limited geographical applicability, typically applying to a single municipality or at most a single state.[220] Of course, it is conceivable that federal law enforcement agencies could someday find themselves bound by similar consent decrees, but so far, that has not occurred. It seems less likely to begin at this point in history than in previous eras.

4. State Restrictions on Wired Stings

The fourth device in our legal system for regulating sting operations is state-level statutory or constitutional (i.e., judicial) restriction of "wired" sting operations that occur within the defendant's home; this limits the ways in which police can execute a sting. Five states have such restraints based on their state constitutions (that is, as interpreted by the respective state supreme court):[221] Alaska,[222] Massachusetts,[223] Pennsylvania,[224] Vermont,[225] and West Virginia.[226] West Virginia's Su-

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[217] *See, e.g.*, Timothy Zick, *Clouds, Cameras, and Computers: The First Amendment and Networked Public Places*, 59 FLA. L. REV. 1, 69 (2007) (arguing that technology has changed the nature of public political activity and demonstrations); Nick Suplina, Note, *Crowd Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism*, 73 GEO. WASH. L. REV. 395, 419–20 (2005) (arguing that surveillance in the name of counterterrorism is really targeting legitimate political activity and dissent).

[218] United States v. Lindh, 212 F. Supp. 2d 541, 569–70 (E.D. Va. 2002).

[219] *See infra* notes 254–271 and accompanying text.

[220] *See* Steigman, *supra* note 211, at 753–54.

[221] Basically, these courts have flatly disagreed with the holding of the U.S. Supreme Court in 1971, in *United States v. White*, which held that such surreptitious recording by undercover agents does not violate the U.S. Constitution, and held that their state constitutional search-and-seizure clauses (nearly identical to the federal counterpart) forced the exact opposite conclusion. 401 U.S. 745, 750–51 (1971).

[222] *See* State v. Glass, 583 P.2d 872, 879 (Alaska 1978), *opinion on reh'g*, 596 P.2d 10 (Alaska 1979) (addressing, on rehearing, the issue of the prospective application of the original opinion).

[223] *See* Commonwealth v. Blood, 507 N.E.2d 1029, 1029–30 (Mass. 1987).

[224] *See* Commonwealth v. Brion, 652 A.2d 287, 287 (Pa. 1994).

[225] *See* State v. Blow, 602 A.2d 552, 556 (Vt. 1991).

[226] *See generally* State v. Mullens, 650 S.E.2d 169 (W. Va. 2007).

preme Court adopted this position only in February 2007,[227] overruling its previous holdings and accompanied by a strident dissent.[228]

In addition, the Oregon Supreme Court has imposed the same restraint, but based on statutory language instead of its state constitution.[229] Wisconsin apparently limits these recorded, in-home stings without warrants to drug enforcement.[230]

Almost every state has some kind of electronic surveillance statute. Forty-two states[231] have adopted electronic surveillance statutes

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[227] *Id.*

[228] *See id.*

[229] *See* State v. Fleetwood, 16 P.3d 503, 507–14 (Or. 2000). Strangely, the statute in question seems to follow its federal counterpart closely, which the U.S. Supreme Court read to mean the exact opposite in *White*. *See id.*

[230] In *State v. Smith*, the Supreme Court of Wisconsin ruled that one-party consent surveillance evidence obtained in a suspect's home was inadmissible under the state's electronic surveillance statutes. 242 N.W.2d 184, 186–87 (Wis. 1976). In 1989, however, the Wisconsin legislature amended the statutes to permit one-party consent surveillance for felony drug investigations. *See* Wis. Stat. § 968.27–.37 (1998). In addition, Connecticut, New Hampshire, and New Jersey permit wired in-home stings with prior Attorney General authorization, but without the need for a judicial warrant (this is similar to the FBI Guidelines). Conn. Gen. Stat. Ann. § 53a-187(b) (West 2001); N.H. Rev. Stat. Ann. § 570-A:2 (2001); N.J. Stat. Ann. 2A:156A-4 (West 1985 & Supp. 2007).

[231] *See* Alaska Stat. § 12.37.010–.900 (2006); Ariz. Rev. Stat. Ann. § 13-3001 to -3019 (2001); Ark. Code Ann. § 5-60-120 (2005); Cal. Penal Code § 629.50–.98 (West 1999 & Supp. 2007); Colo. Rev. Stat. § 16-15-101 to -102 (2006); Conn. Gen. Stat. Ann. § 53a-187 to -189 (West 2001); Del. Code. Ann. tit. 11, §§ 2401–2434 (2001); D.C. Code Ann. § 23-541 to -546 (LexisNexis 2001); Fla. Stat. Ann. § 934.01–.15 (West 2006); Ga. Code Ann. § 16-11-60 to -67 (2003); Haw. Rev. Stat. Ann. § 803-41 to -49 (LexisNexis 2007); Idaho Code Ann. § 18-6701 to -6709 (2004); 720 Ill. Comp. Stat. Ann. 5/14-1 to -9 (West 2003); Ind. Code Ann. § 35-33.5-1-5 to -5-3 (LexisNexis 1998); Iowa Code Ann. § 808B.1–.14 (West 2003); Kan. Stat. Ann. § 22-2514 to -2529 (1995); La. Rev. Stat. Ann. § 15:1301–:1316 (2005); Me. Rev. Stat. Ann. tit. 15, §§ 709–713 (2003); Md. Code Ann., Cts. & Jud. Proc. § 10-401 to 10-4B-05 (LexisNexis 2006); Mass. Gen. Laws ch. 272, § 99 (2006); Minn. Stat. Ann. § 626A.01–.391(West 2003); Miss. Code Ann. § 41-29-501 to -701 (West 2005); Mo. Ann. Stat. § 542.400–.422. (West 2002 & Supp. 2007); Neb. Rev. Stat. Ann. § 86-271 to -293 (LexisNexis 2007); Nev. Rev. Stat. Ann. § 179.410–.530 (LexisNexis 2006); N.H. Rev. Stat. Ann. § 570-A:1 to -B:7 (2001); N.J. Stat. Ann. § 2A:156A-1 to -23 (West 1985 & Supp. 2007); N.M. Stat. Ann. § 30-12-1 to -11 (LexisNexis 1994); N.Y. Crim. Proc. Law. § 700.05–.70 (McKinney 2005 & Supp. 2007); N.C. Gen. Stat. Ann. § 15A-286 to -299 (West 2005); N.D. Cen. Code § 29-29.2-01 to -29.3-05 (2006); Ohio Rev. Code Ann. § 2933.51–.66 (West 2006); Okla. Stat. Ann. tit. 13, §§ 176.1–177.5 (West 2002); Or. Rev. Stat. §§ 133.721–.739 & 165.535–.673 (2005); 18 Pa. Cons. Stat. Ann. §§ 5701–5781 (West 2000 & Supp. 2007); R.I. Gen. Laws §§ 12-5.1-1 to -5.2-5 (2002); S.C. Code Ann. § 17-30-10 to -145 (2003 & Supp. 2006); S.D. Codified Laws § 23A-35A-1 to -34. (2004); Tenn. Code Ann. § 40-6-301 to -311 (2006); Tex. Code Crim. Proc. Ann. art. 18.20–.21 (Vernon 2005 & Supp. 2006); Tex. Penal Code Ann. § 16.01–.06 (Vernon 2005); Utah Code Ann. § 77-23a-1 to -16 (2003); Va. Code Ann. § 19.2-61 to -70.3 (2004); Wis. Stat. Ann. § 968.27–.37 (West 2007); Wyo. Stat. Ann. § 7-3-701 to -806 (2007).

patterned after the Federal Title III electronic surveillance rules.[232] Of these, thirty-two follow Title III by statutorily permitting one-party consent to electronic surveillance (including the undercover agent wearing a recording device).[233] Under the statutes of these jurisdic-

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[232] In 1968, Congress enacted detailed electronic surveillance laws through Title III of the Omnibus Crime Control and Safe Streets Act, the relevant provision being found at 47 U.S.C. § 605 (2000). According to the U.S. Supreme Court, Title III "sets forth comprehensive standards governing the use of . . . electronic surveillance by both governmental and private agents." Mitchell v. Forsyth, 472 U.S. 511, 515 (1985). In 1986, Congress amended and updated Title III with the Electronic Communications Privacy Act ("ECPA"). Pub. L. No. 99–508, 100 Stat. 1868 (codified as amended at 18 U.S.C. § 3121 (2000 & Supp. III 2003)). ECPA established standards for intercepting telephone numbers through the use of pen registers and trap and trace devices. *Id.* ECPA also had a second component, the Stored Communications Act, which established penal sanctions for unauthorized access of electronically stored wire or electronic communication. *See* 18 U.S.C. §§ 2701–2708 (2000).

The electronic surveillance provisions of Title III are in 18 U.S.C. §§ 2510–2522 (2000 & Supp. III 2003). One relevant exception to the prohibition on unauthorized electronic surveillance is found in 18 U.S.C. § 2511(2)(c). This subsection provides, "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(c). An additional pertinent exception, under 18 U.S.C. § 2511(2)(d), reads as follows:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

Id. § 2511(2)(d). After the Supreme Court's decision in *White*, it is clear that there is statutory authority for federal officials to place an electronic surveillance device on a consenting informant, without judicial authorization, for the purpose of recording communications with a third-party suspect. *See* 401 U.S. at 745. Similarly, there is no constitutional problem, after *White*, if police lack judicial authorization before sending a wired informant into the home of another person. *See* United States v. Brathwaite, 458 F.3d 376, 377 (5th Cir. 2006) (informant's use of electronic surveillance in defendant's home did not violate Fourth Amendment); United States v. Hankins, 195 F. App'x 295, 301–03 (6th Cir. 2006) (same); United States v. Eschweiler, 745 F.2d 435, 437–38 (7th Cir. 1984) (same).

[233] *See* ARIZ. REV. STAT. ANN. § 13-3012(9) (2000 & Supp. 2006); ARK. CODE ANN. § 5-60-120(a) & (c) (2005); CAL. PENAL CODE § 633.5 (West 1999); COLO. REV. STAT. § 18-9-303 & -304 (2006); DEL. CODE ANN. tit. 11, § 2402(c)(4) (2001); D.C. CODE ANN. § 23-542(b)(2) (LexisNexis 2001); FLA. STAT. ANN. § 934.03(2)(c) (West 2001 & Supp. 2007); GA. CODE ANN. § 16-11-66(a) (2007); HAW. REV. STAT. ANN. § 803-42(b)(4) (LexisNexis 2007); IDAHO CODE ANN. § 18-6702(2)(c) (2004); IOWA CODE ANN. § 808B.2.2.b (West 2003); LA. REV. STAT. ANN. § 15:1303(C)(3) (2005 & Supp. 2007); ME. REV. STAT. ANN. tit. 15, § 709(4) (2003); MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(2) (LexisNexis 2006); MASS. GEN. LAWS ch. 272, § 99(B)(4) (2000); MINN. STAT ANN. § 626A.02(2)(c) (West 2003); MISS. CODE ANN. § 41-29-531(d) (2005); MO. ANN. STAT. § 542.402(2)(2) (West 2002); NEB. REV. STAT.

tions, the police do not need judicial authorization to conduct electronic surveillance if one party to the communication consents to the recording.[234] Massachusetts is the only state of these thirty-two whose Supreme Court has held that its state constitution trumps the legislation on this issue.[235]

Vermont is unique in that it apparently lacks any statutory laws addressing electronic surveillance devices. In 1991, the Supreme Court of Vermont, in *State v. Blow* relied solely on the search and seizure provision of the state's constitution to address the issue of using an informant equipped with an electronic surveillance device to enter the home of a suspect, without a warrant.[236]

Alaska, Pennsylvania, and West Virginia are among the ten states that have a statute generally following the federal Title III model, but

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ANN. § 86-290(b) (LexisNexis 2007); N.M. STAT. ANN. § 30-12-1(E)(3) (LexisNexis 1994); N.Y. CRIM. PRO. LAW. § 700.05(3) (McKinney 1995 & Supp. 2007); N.C. GEN. STAT. § 15A-287(a) (2005); N.D. CENT. CODE § 29-29.2-05 (2006); OHIO REV. CODE ANN. § 2933.52(B)(4) (West 2006); OKLA. STAT. ANN. tit. 13, § 176.4(4) (West 2002); S.C. CODE ANN. § 17-30-30(B) (2003 & Supp. 2006); S.D. CODIFIED LAWS § 23A-35A-20 (2004); TEX. PENAL CODE ANN. § 16.02(c)(3) (Vernon 2003); UTAH CODE ANN. § 77-23a-4(7)(a) (2003); VA. CODE ANN. § 19.2-62(B)(2) (2004); WIS. STAT. ANN. § 968.31(2)(b) (West 2007); WYO. STAT. ANN. § 7-3-702(b)(iv) (2005).

[234] Six states with statutes authorizing one-party consent for electronic surveillance devices have had their courts address the issue in the context of an informant recording communications in the home of a suspect: Florida, Massachusetts, Mississippi, Ohio, Wisconsin, and Wyoming. *See* State v. Sarmiento, 397 So. 2d 643, 644 (Fla. 1981); *Blood*, 507 N.E.2d at 1029, 1032; Lee v. State, 489 So. 2d 1382, 1383–86 (Miss. 1986) (upholding surveillance under state and federal constitutions); State v. Azzi, No. 558, 1983 WL 6726, at *1–3 (Ohio Ct. App. Sept. 28, 1983) (upholding surveillance under Federal Constitution); *Smith*, 242 N.W.2d at 185–87 (modified by statute); Alamada v. State, 994 P.2d 299, 302, 308–11 (Wyo. 1999) (upholding surveillance under state constitution).

In 1981 in *State v. Sarmiento*, the Supreme Court of Florida rejected the *White* decision by the U.S. Supreme Court and held that the search and seizure provision of the state constitution prohibited an informant from using an electronic surveillance device in a suspect's home without judicial authorization. *Sarmiento*, 397 So. 2d at 644. In response to the decision in *Sarmiento*, Florida's citizens amended the state's constitutional search and seizure provision to require that it be "construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." FLA. CONST. art. 1, § 12. The Supreme Court of Florida subsequently conceded, in 1987 in *State v. Hume*, that "the recording of conversations between a defendant and an undercover agent in a defendant's home . . . does not violate the fourth amendment of the United States Constitution and, accordingly, does not violate the newly adopted article I, section 12, of the Florida Constitution." 512 So. 2d 185, 188 (Fla. 1987).

[235] *See Blood*, 507 N.E.2d at 1032–34.

[236] 602 A.2d at 555; *see also* State v. Geraw, 795 A.2d 1219, 1220–21 (Vt. 2002) (holding that a police officer working undercover cannot enter a defendant's home with an electronic surveillance device without a search warrant).

without the exception for one-party consent;[237] the other seven states in this group have held that their state constitutions pose no problem, or have not considered the issue yet.[238] Alabama, Kentucky, Michigan, and Montana have their own eavesdropping statutes, not based on the federal model, but they permit recorded sting operations within a defendant's home.[239]

This state-level restraint on stings is limited, being inapplicable for stings outside the home (in a car, office, dark alley, or elsewhere).[240] It does not affect wireless stings, where the arresting officers are either lying in wait at the scene of the crime, or the undercover operative takes notes from the conversations and is willing to testify at trial.[241] These restraints may pose inconveniences and limitations on law enforcement—stings must occur either outside the culprit's home or without surreptitious recording—but in most cases, agents can work around these hurdles. As a regulation of sting operations, this device also has a confined geographical scope (only two of the states in question, Pennsylvania and Massachusetts, have dense populations or significant urbanization), and are inapplicable to stings by the federal government.

5. Dormant Federal Constitutional Constraints

It is worth noting one possible regulatory device for sting operations that is missing at present from our legal system, at least on the federal level: the U.S. Constitution. The Constitution itself does *not* regulate sting operations, at least presently, because the Supreme Court has held that the entrapment defense is not a constitutional issue.[242] Of course, states that have followed the MPC in adopting the

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[237] ALASKA STAT. § 12.37.010–.900 (2006); 18 PA. CONS. STAT. ANN. §§ 5701–5781 (West 2000 & Supp. 2007); W. VA. CODE ANN. § 62-1D-14 to -16 (LexisNexis 2005).

[238] CONN. GEN. STAT. ANN. § 53a-187 to -189 (West 2001); 720 ILL. COMP. STAT. ANN. 5/14-1 to -9 (West 2003); IND. CODE ANN. § 35-33.5-1-5 to -5-3 (LexisNexis 1998); KAN. STAT. ANN. § 22-2514 to -2529 (1995); NEV. REV. STAT. ANN. § 179.410–.530 (LexisNexis 2006); N.J. STAT. ANN. § 2A:156A-1 to -23 (West 1985 & Supp. 2007); OR. REV. STAT. §§ 133.721–.739 & 165.535–.673 (2005); 18 PA. CONS. STAT. ANN.18, §§ 5701–5781; TENN. CODE ANN. §§ 40-6-301 to -311 (2006).

[239] *See, e.g.*, ALA. CODE § 13A-11-30(1) (LexisNexis 2005); KY. REV. STAT. ANN. § 526.010 (LexisNexis 1999); MICH. COMP. LAWS ANN. § 750.539g(a) (West 2004); MONT. CODE ANN. § 45-8-213(1)(c)(i) (2005); Carrier v. Commonwealth, 607 S.W.2d 115, 117 (Ky. Ct. App. 1980); People v. Collins, 475 N.W.2d 684, 696 n.45 (Mich. 1991); State v. Brown, 755 P.2d 1364, 1368 (Mont. 1988).

[240] *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/14-2.

[241] *See id.*

[242] *See Sorrells*, 287 U.S. at 445-48.

"objective test" treat entrapment solely as a due process matter. Some courts in earlier decades have expressed the view that excessive police entrapment methods violate the procedural due process rights of the defendant, echoed by innumerable commentators.[243] Whatever the merits of this position, the U.S. Supreme Court has avoided it so far.

Treating entrapment as a due process violation essentially restates the objective test, and the usual criticisms of the objective test would apply.[244] For example, it is fair to say (but not necessarily persuasive) that the subjective test accomplishes everything a due process approach would do, except for letting plainly guilty defendants go free; if the police have to resort to atrocious methods to trap someone, the victim clearly did not have the predisposition to commit the crime.[245] Advocates of the current subjective test argue that the defendant's predisposition relates more closely to the preservation of the rights of innocent citizens.[246] In addition, some argue that kinder, gentler sting operations (resulting from a more prodefendant entrapment defense) are less likely to fool actual criminals, who are savvy and suspicious, but may fool the simple hearted and guileless, who are presumed to be more naïve or innocent.[247] Constitutionalizing the entrapment defense effectively puts the police on trial and stalls the proceedings against the de-

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[243] *See, e.g.*, Greene v. United States, 454 F.2d 783, 787 (9th Cir. 1971) (holding defendant's due process rights violated where the government was "enmeshed" in the criminal enterprise, "from beginning to end"); *Twigg*, 588 F.2d at 378–81.

[244] For a recent consideration of a quasi-entrapment "due process" defense alongside the traditional entrapment defense, see *Lakhani*, 480 F.3d at 180–83.

[245] Of course, this is also an argument used by those who say there is no practical difference in the results under the two tests. Many object that the test is rather unworkable in its application, which seems to be another way of saying the same thing. *See* MARCUS, *supra* note 1, at 106 ("The second major criticism of the objective test deals with its practical application. Because the standard involves the hypothetical 'average person,' or 'reasonable person,' or 'normally law-abiding person,' it may be difficult to apply. The conceptual difficulty is that such individuals generally do not commit crimes."); *see also* Pascu v. State, 577 P.2d 1064, 1066–67 (Alaska 1978) (complaining that the test in unmanageable for the same reason). Justice Scalia stated in his concurrence in *Mathews v. United States* that "the defense of entrapment will rarely be genuinely inconsistent with the defense on its merits," which perhaps hints that he views the defense as mostly unnecessary. *See* 485 U.S. at 67 (Scalia, J., concurring).

[246] *See* LAFAVE, *supra* note 130, § 5.2(e); MARCUS, *supra* note 1, at 80.

[247] Wayne LaFave puts this objection as follows: "A second major criticism of the objective approach is that the 'wrong' people end up in jail if a dangerous, chronic offender may only be offered those inducements which might have tempted the hypothetical, law-abiding person." LAFAVE, *supra* note 130, § 5.2(e). Park's version of this is that the objective test can result in the conviction of nonpredisposed defendants. *See* Park, *supra* note 15, at 217. Another way of thinking about this is that the police may have used an inducement that would not ensnare the average person.

fendant, and degenerates into an argument between the police and the defendant about what really occurred.[248] Others have expressed doubts about courts acting as the morality police for law enforcement agencies.[249] Finally, a due process approach, with its focus on police misconduct instead of the innocent disposition of the defendant, allows too much ambiguity and discretion to the finders of fact; such unfettered discretion leaves too much room for prejudice, personal vendetta, or other inappropriate motives to color the decision one way or the other. For example, the objective test for entrapment, without clear-cut standards, could allow judges or juries to act out of bias against minority police officers, especially if the agent is of foreign ethnicity (as some effective undercover agents would be) and the target of the sting operation is a Caucasian American.[250]

One could argue, in theory, that entrapment violates the vesting clause of the Constitution[251] by overstepping the limited police power that the Constitution invests in the executive branch, i.e., that the Constitution simply does not vest the Executive with the right to create crimes for purposes of trapping the nongovernmental participants. Courts could also decide at some point that entrapment encroaches on the right against self-incrimination,[252] if a court concludes that entrapment merges the investigatory and accusatory stages of criminal procedure; the difference between self-incrimination at trial and during an overdone sting operation is rather formalistic. More tenuous, but still

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[248] *See* Park, *supra* note 15, at 221. Park believes that the swearing match will usually favor the state, given the burden of proof on the defendant to prove entrapment, but he does not substantiate this claim. *See id.* at 221–22.

[249] *See* LaFave, *supra* note 130, § 5.2(e) ("It is questioned whether the 'purity' of the courts is itself a sufficient justification, and whether the objective approach can be expected to serve the deterrence objective in a meaningful way.").

[250] This issue is really the mirror image of the racial/stereotyping problem with the subjective test. The subjective test allows more room for prejudice against defendants; the objective test allows more room for prejudice against minority officers. It would seem that both of these problems would be more pronounced where there is a racial difference between police and defendants. Under the objective test (as well as the exclusionary rules), a judge or jury that believes a certain minority group is more aggressive, less honest, more lazy, and so on, is more likely to believe the minority officer unduly pressured the (white?) defendant to commit crimes, lie about the defendant's response, plant or tamper with evidence, and try to find inappropriate shortcuts in obtaining convictions. In general, one might expect the majority to be more afraid of aggressive law enforcement from minority officers than from other members of the majority. The objective test provides an outlet for such attitudes to manifest themselves. Again, this topic seems to have been ignored in the academic literature, but it is worthy of more investigation.

[251] *See* U.S. Const. art. II, § 1.

[252] *See id.* amend. V.

theoretically possible, would be a claim that entrapment violates Fifth or Sixth Amendment rights to counsel, in that investigatory and accusatory phases of enforcement merge together at the moment of the sting operation's consummation, and therefore the target should have had the benefit of counsel for the latter.[253]

II. The Statutory Framework Behind Antiterrorism Sting Operations: "Material Support" Prosecutions vs. Victimless Crime Prosecutions

As mentioned in the Introduction, entrapment is distinct from other affirmative defenses in criminal law because it can influence the planning and adoption of methods by law enforcement agencies.[254] Unlike defenses of duress, necessity, insanity, and self defense, all of which can defeat criminal charges, the entrapment defense allows law enforcement agencies to plan undercover operations around the rules to preempt successful entrapment claims; or, if the rules are simply too prodefendant, to abandon such operations.[255] Bureau chiefs and agency directors are aware of the ways in which this affirmative defense regulates undercover activities, so they can make policy decisions accordingly.[256] Decisionmakers who allocate law enforcement resources must be sensitive and responsive to the rules about this particular defense. Given the priority of preventing terrorist crimes before they occur, as opposed to catching offenders after the act, entrapment becomes the most relevant affirmative defense to terror-related prosecution.

The ex ante planning associated with the entrapment defense is even more pronounced for antiterrorism efforts than other forms of law enforcement, because of the statutory framework under which terrorism charges arise. Most terrorism-related prosecutions base their charges in the "providing material support"[257] prohibitions of 18 U.S.C.

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[253] *See id.*; *id.* amend. VI.

[254] *See supra* notes 39–45 and sources cited therein.

[255] *See* Stevenson, *supra* note 10, at 14.

[256] *See supra* notes 181–199 and accompanying text (discussing the FBI Guidelines for Undercover Operations).

[257] *See* Norman Abrams, Antiterrorism and Criminal Enforcement 16, 30 (2d ed. 2006) ("The government views these offenses as especially important tools in the effort to prevent terrorism."); Stephen Dycus et al., National Security Law 834 (3d ed. 2006) ("The material support charge is increasingly the government's weapon of choice against suspected terrorists."). *See generally* Kristen Eichensehr, *Treason's Return*, 116 Yale L.J. Pocket Part 229 (2007), http://thepocketpart.org/2007/01/16/eichensehr.html (com-

§§ 2339A–2339B, which contain a relatively robust scienter requirement.[258] A successful sting operation must include the gradual disclosure of enough "hints" (that the decoy individual is a terrorist) to ensure that the defendant falls within the definition for "knowingly" supporting terrorism. Unlike antitrafficking stings, which can furnish a conviction once the simple, ill-conceived transaction occurs, the sting operations must plan for meeting the more complicated elements of "material support."[259] In addition, common types of statutorily defined "material support" are the provision of substantial funds or special expertise, training, and the like.[260] These categories aim at a different socioeconomic demographic than traditional trafficking crimes (more sophisticated or wealthy), meaning the selection of targets for a sting will require more planning, as well as a more limited field of possible targets.

The "material support" statutes differ from traditional victimless crimes in that they criminalize otherwise everyday, legal activities based on potential consequences instead of a substantive aspect of the activity itself.[261] Donations, loans, and the provision of training, lodging, and

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paring the recent indictment of Adam Gadahn for "material support" in relation to his highly-publicized pro-terrorist videos to World War II-era treason cases).

[258] *See* 18 U.S.C.A. § 2339A(a) (West 2001 & Supp. 2006) ("Whoever provides material support . . . knowing or intending that they are to be used in preparation for, or in carrying out, a violation . . . ."); 18 U.S.C. § 2339B(a)(1) (2000 & Supp. IV 2004) ("Whoever knowingly provides material support or resources to a foreign terrorist organization . . . ."); *see also* United States v. Al-Arian, 308 F. Supp. 2d 1322, 1335–39 (M.D. Fla. 2004) (interpreting the scienter requirement to mean that 1) the recipient organization was designated as a foreign terrorist organization, and 2) that the defendant was indeed supplying "material support"). Note that Norman Abrams has argued that the mens rea requirement of the material support statutes is too weak, being nothing more than "knowledge-plus-aid." Abrams, *supra* note 172, at 21–25, 31. Abrams also observes that the "knowledge" requirement in § 2339A is more specific than for § 2339B. *Id.* at 11.

[259] *See* Abrams, *supra* note 172, at 8–9; *see also* Abrams, *supra* note 257, at 18 (discussing the definition of "material support").

[260] *See* 18 U.S.C.A. § 2339A(b)(1). Section 2339A(b)(1) provides the following definition of "material support":

> [A]ny property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials . . . .

Id.

[261] *See* Abrams, *supra* note 257, at 16 ("These offenses share certain special characteristics: they are among the most doctrinally innovative of the new terrorism offenses; they can

expert advice—without the element of terrorism—are common, legal, and even necessary components of our modern economy.[262] They fall under the statute's criminalizing purview only when the actor has reason to believe that the recipient has terrorist connections.[263] By contrast, the "victimless crimes" involve the transfer of rather obvious contraband, sex under circumstances that most people eschew, transportation of truckloads of foreigners across a border, and the like.[264] In other words, the scienter element may be the *only* element that distinguishes the proposed activity (in the sting operation) from perfectly respectable behavior.[265] The sting's preplanned deception must focus on this aspect, therefore, unlike sting operations for the traditional offenses that attract undercover operations. A scienter requirement and the predisposition component of the entrapment defense have a special connection.[266] Showing that the defendant proceeded, even after knowing that the material support could aid terrorists, suggests a predisposition more strongly than acceding to an impulse crime, like sampling drugs.[267] The latter could appear to be simple surrender to temptation in a moment of weakness. Conversely,

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be used to prosecute a wide variety of different kinds of conduct; and they can be invoked relatively early in the chronology of steps toward completing a terrorist act.").

[262] *See, e.g.*, United States v. Jayyousi, No. 04–60001-CR, 2007 WL 781373, at *1 (S.D. Fla. Mar. 12, 2007) (material support in the form of newsletters advocating terrorism and explaining various techniques); *see also* 18 U.S.C. § 2339A(b)(2) (defining "training" as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge").

[263] *See, e.g.*, United States v. Sattar, 314 F. Supp. 2d 279, 290 (S.D.N.Y. 2004); *Al-Arian*, 308 F. Supp. 2d at 1328.

[264] One exception to this distinction would be money laundering, which is more akin to the "material support" crimes in that it usually utilizes everyday, otherwise legal transactions to obscure the illegal method of income. Even so, money laundering is distinguishable from "material support" because the latter is consequentialist in its imputation of culpability, but the former finds its turpitude in an antecedent act.

[265] For examples of the scienter requirement being the critical issue in the prosecutions, see Humanitarian Law Project v. U.S. Dep't of Justice, 352 F.3d 382, 399–404 (9th Cir. 2003), *vacated by* 382 F.3d 1154 (2004); *Al-Arian*, 308 F. Supp. 2d at 1336–39.

[266] *See* United States v. Lakhani, 480 F.3d 171, 178–80 (3d Cir. 2007).

[267] The "material support" statute itself leans in this direction already, in some sense folding part of the mens rea element into the actus reus. *See* Abrams, *supra* note 257, at 18 ("Another way of characterizing the approach taken in these two statutes is that a trade-off was made between the mens rea required for the offenses and the actus reus or conduct required to hold the aiding person criminally liable. Thus, the statutes require that the contribution of the actor be material, and they put content into the concept of material support by defining it in terms of substantial forms of aid through the specification of listed categories. By thus 'hardening up' the actus reus, the drafters made more acceptable a diluted mens rea of knowledge, which is less demanding than the usual complicity requirement of purpose.").

setting up a sufficient scienter element in a sting is more difficult than tempting a target with hedonic contraband, leaving more possibility that the sting will seem like overreaching when entrapment claims arise at trial.

Academic commentators have harshly criticized the "material support" statutes.[268] Nevertheless, the statutes have survived constitutional challenges for violating the First Amendment right to free association,[269] for overbreadth,[270] and for violations of due process.[271]

III. Principles for Adapting the Entrapment Defense for Terrorism Prosecutions

The entrapment defense has always been a tailored response to special methods of law enforcement; these methods, in turn, were a tailored response to a limited set of crimes having certain characteristics. Thus, the crimes themselves gave rise to the defense by this two-step process. Yet there are profound ways in which terrorist activities differ from the crimes that gave rise to the entrapment defense. These differences will influence the methods that enforcement agencies deploy.[272] As a tailored response to this altered state of law enforcement, the federal entrapment defense will require some modification, especially concerning the predisposition element. This Section focuses on seven distinguishing features of the new context that should guide the adjustments of the entrapment rules.

A. *The Heightened Stakes*

Undercover operations traditionally focused on crimes whose aggregate harm, rather than the minimal or remote harm of an individual instance, motivated the enactment of the penal provisions.[273]

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[268] *See, e.g.*, Abrams, *supra* note 172, at 25; Michele A. Krengel, Case Comment, *Constitutionality of a Statute Prohibiting Material Support to Organizations Designated as "Terrorist,"* 30 Suffolk Transnat'l L. Rev. 253, 257 (2005); Eichensehr, *supra* note 257, at 229.

[269] *Lindh*, 212 F. Supp. 2d at 569–70.

[270] *Sattar*, 314 F. Supp. 2d at 304–05; *Lindh*, 212 F. Supp. 2d at 572.

[271] *See Al-Arian*, 308 F. Supp. 2d at 1343–44; *Sattar*, 314 F. Supp. 2d at 299–300. For a detailed summary of constitutional challenges, see Comerford, *supra* note 173, at 751–53.

[272] *See* Posner, *supra* note 4, at 112 ("And the critical issue is the 'point' at which to institute prosecution; a criminal investigator will arrive at that point sooner than an intelligence officer would.").

[273] Judge Richard Posner describes the seemingly harmless nature of the acts that form the crux of sting operations in this way:

One counterfeit bill in circulation might not harm anyone, but enough counterfeit currency can diminish the value of all the legal currency in circulation. One dose of narcotics may be relatively harmless recreation in an isolated instance, but widespread use begets a host of social problems related to the disabling effects of addiction. Sex for money, in a single instance, might produce no immediate injury; prostitution as an industry can exploit immigrants and addicts, undermine a social structure dependant on nuclear families, and so forth. These aggregate harms are somewhat amorphous and the subject of endless debate, and can appear to be merely legislation of morality. If the aggregate harms are a genuine policy concern, on the other hand, then there is too much incentive, and not enough individual cost, in each isolated case; too many people will engage in that activity if the law does not deter it. In any case, these modern crimes, like trafficking, money laundering, counterfeiting, and the sex trade, stand in stark contrast to the common law crimes, like murder, theft, or rape. Each instance of the latter type is a personal tragedy to the individual victim.

Terrorism is obviously different from both of these types of crimes.[274] Its harm can be widespread, even catastrophic, in a single instance or attack. It differs from the common law crimes because of the drastic multiplication of innocent victims from each delict. It differs from the consensual-transaction crimes, which usually attend the entrapment defense, in that the aggregate harm is not the concern as much as the harm in each instance. The goal of terrorism is to draw attention to a cause,[275] to intimidate citizens, and to coerce governments.[276] The immediate goal of a terrorist stunt is sensationalism.[277]

> Often the police solicit a person to commit a crime, for example by sending an undercover agent or informant to buy narcotics from a drug dealer, who is then prosecuted for an illegal sale. It may seem odd that the law should punish such a harmless act, for obviously the sale of narcotics to an undercover agent who then destroys the narcotics does no harm to anyone . . . . But the rationale is again prevention.

POSNER, *supra* note 3, at 231. Even though the harm of a single instance of the victimless crimes is almost nil, the preventative and deterrent value of random transactions being stings has a net positive value in reducing the aggregate number of instances.

[274] *See, e.g.*, HEYMANN, *supra* note 66, at 80 ("Why, then, do we not rely on the processes of law enforcement alone to maintain law and order in the case of terrorist bombings . . . ? The answer is because of the degree of harm that may be done before any arrest is made.").

[275] *See id.* at 9.

[276] *See id.* at 12–18.

[277] *See* Leger, *supra* note 65, at 489.

Civilian casualties and community shock value are commodities for terrorists.[278] It is almost a cliché now to say that September 11th "changed everything"[279] or that the priorities of law enforcement must change.[280] Yet the shift in emphasis toward prevention, as opposed to punishment, means that the defenses to crimes deserve reconsideration.

Judge Posner recently explained the difference in the cost-benefit analysis of preventing these different types of crimes:

> The broader point is that prevention is a much more important policy goal in the case of global terrorism than in the case of ordinary crime. The nation can live with 30,000 ordinary murders a year, but not 30,000 murders by terrorists. Criminal punishments are designed to limit the crime rate, but not to reduce it to zero; the costs would be disproportionate to the benefits. This is much less clear in the case of terrorism.[281]

Prevention of a particular crime, as opposed to simple penalization, depends on a combination of deterrence and incapacitation. Deterrence is usually complicated with terrorism, because it means playing with incentives for those acting mostly out of ideological zeal, precommitted to making extreme personal sacrifices.[282] Punishment of traditional crimes can serve the ends of retribution and deterrence simultaneously, because the actual wrongdoer suffers and potential wrongdoers become aware of higher costs for pursuing their aims. A would-be terrorist with a martyr complex, however, might view certain increased costs (such as potential punishment, enhanced security systems, and lethal consequences for tiny mistakes) as the stage props of orchestrated heroism, the type of challenges that make the activity even more rewarding. In the well-trod dichotomy between specific deterrence (deterring a specific individual) and general deterrence (deterring the entire population),[283] terrorism requires a middle road of "customized general deterrence," an increase in the kinds of costs that

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[278] *See id.*

[279] *See, e.g.*, Katyal, *supra* note 178, at 1316.

[280] *See, e.g.*, Sanford Levinson, *The Deepening Crisis of American Constitutionalism*, 40 GA. L. REV. 889, 890 (2006).

[281] POSNER, *supra* note 3, at 245.

[282] For a fascinating discussion of terrorist incentives toward certain types of tactics and away from others, see generally Peter J. Phillips, Terrorism: A Mean-Variance Analysis (Feb. 12, 2007), *available at* http://ssrn.com/abstract=966006.

[283] *See* United States v. Lakhani, 480 F.3d 171, 187 (3d Cir. 2007) ("[A]side from general deterrence, the penological goal of specific deterrence provides ample reason for Lakhani's sentence: he will never again seek to provide material support to terrorists.").

offset the terrorist's utility,[284] rather than enhancing it by making the act seem more heroic. Tailoring the legal rules—for either the penal statute or the available defenses—is necessary to achieve this end.

Some, including Judge Posner, have suggested that the heightened stakes with terrorism warrant less procedural protections and benefit of the doubt for terror suspects, and greater surveillance of the general population, to catch them more often and avoid acquittals based on technical procedural violations (that is, application of the exclusionary rules).[285] The heightened need for prevention does not necessarily require such a superficial cost-benefit tradeoff between the civil liberties of innocent suspects and the devastating injuries caused by a single attack. The point is not that the heightened stakes justify tipping the scales of justice in favor of prosecutors at every turn; that is the blunt-tool approach. Rather, the higher stakes mean that ex ante prevention is more necessary than with other types of crimes, and that the legal rules should steer law enforcement more toward methods that would provide effective prevention, instead of simply empowering law enforcement across the board. Increasing the would-be terrorist's costs via increased punishments may not be as pragmatic for customized deterrence, for example, as increasing the risk of failure and incapacitation,[286] which are not necessarily the same thing as punishment after the fact. General deterrence may be more limited in the terrorism context, but this does not mean that all varieties of deterrence have lower value; it merely means that the deterrence must be more artful or better aimed to be effective.

Incapacitation is the second prong of prevention, and increased incapacitation can make up for a lack in deterrence.[287] Of course, incapacitation can itself deter—a would-be offender may conclude that the likelihood of success is too low to justify an attempt—but we can also analyze it as a distinct method. Catching and imprisoning the would-be terrorist before a real plot is underway, even for a relatively short time (suppose three or four years, enough time for a network of collaborators to erode) may be a more efficient prevention device than trying to thwart an actual attack and punishing the conspirators for attempt. The

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[284] *See generally* Phillips, *supra* note 282.

[285] *See* Posner, *supra* note 3, at 245.

[286] *See* Heymann, *supra* note 66, at 84–85.

[287] *See* Posner, *supra* note 4, at 135 (discussing the difference between the intelligence agency's reaction and the law enforcer's reaction, the latter being more focused on prevention and incapacitation).

same is true for undercover infiltrators as saboteurs,[288] but this tactic relates less directly to the entrapment defense, and is perhaps less likely for a law enforcement system that is used to maximizing arrests and convictions rather than interfering with criminal success rates.

Similarly, a phony terrorist cell set up as a sting operation creates a substantial opportunity cost for would-be terrorists,[289] diverting them into a plot that is bound to fail from the outset (because it is planned by government agents) instead of a real one that might succeed. More specifically, "material support" under the antiterrorism statutes that is provided to undercover agents is a diversion of resources away from real terrorists.[290] This has two effects. It is harder for real terrorists to garner the material support they need (as it is diverted elsewhere), and the awareness that a supporter might waste all his resources on government agents can deter would-be supporters from aiding anyone.[291]

Less leniency at trial may indeed be more justifiable, but this frames the question as a tradeoff between the stakes and the loss of leniency or lenity. Rather than being simply more draconian about prosecuting terrorism, however, we could be more sophisticated and tailor the rules to shift law enforcement more toward effective prevention.

B. *Eluding Detection and the Increase in Surveillance*

Continuing with the theory that an affirmative defense like entrapment needs to fit certain characteristics of the crime in question, it is significant that terrorism differs from other crimes in its difficulty of detection.[292] Terrorists are more likely to elude detection and apprehension than everyday drug peddlers are; the defendants in antiterrorism cases are different from those in the traditional cases where the entrapment defense arises.[293] The professionalized secrecy of terrorist

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[288] *See* HEYMANN, *supra* note 66, at 112.

[289] *See* Frey & Luechinger, *supra* note 72, at 18–19. Frey and Luechinger argue that raising opportunity costs is more effective than threats, but this is somewhat different from the opportunity costs I mention here. *See id.*; *see also* HEYMANN, *supra* note 66, at 80.

[290] *See* HEYMANN, *supra* note 66, at 96.

[291] For extremely thoughtful and well-informed discussion of the role of material support and philanthropy in international terrorism, see Monica Serrano, *The Political Economy of Terrorism*, *in* TERRORISM AND THE U.N. 202–06 (Jane Boulden & Thomas G. Weiss eds., 2004). Monica Serrano argues that "[t]he deep financial logic of terrorism, then, is to be found in the symbolic structures of philanthropy." *Id.*

[292] POSNER, *supra* note 3, at 230 (explaining that conspiracies are more efficient at "avoiding being caught").

[293] *See* HEYMANN, *supra* note 66, at 113.

conspiracies[294] presents a (sometimes tragic) choice between two methods of detection: infiltration by undercover agents, and government surveillance that is exponentially more intrusive and widespread.

Relying on increased surveillance carries extra costs. There is the much decried loss of civil liberties for the general population as government eavesdropping becomes more ubiquitous, a point that other commentators have covered exhaustively.[295] Regardless of whether it is justifiable to make sacrifices to our civil liberties, it seems obvious that such sacrifices are worth avoiding if there are less costly alternatives. A discreet sting operation—a setup to catch a would-be supporter of terrorism in a preplanned, orchestrated criminal situation—consumes fewer resources than ongoing surveillance making broad enough sweeps to detect the right criminals.[296] There are welfare losses to society that accompany the erosion of civil liberties, as transaction costs increase for useful activities increase with the reduced freedoms of mobility and privacy; the emblematic example is the extra cost and difficulty of air travel in the post-September 11th world. Long lines at airport security, a dramatic increase in lost baggage by the airlines, increased security costs borne by the airlines and passed through to customers, are but a few examples of the deadweight loss caused by the surveillance-centered reaction to terrorism.

It is expensive to maintain sufficient staff in law enforcement agencies to intercept communications and analyze the data; the specialized qualifications needed for surveillance (bilingualism, technology training, background checks, and so forth) pose additional costs. A dramatic increase in surveillance means a dramatic increase in personnel costs.[297] Moreover, a surveillance-centered approach means

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[294] *See* MIZELL *supra* note 73, at 67–79 (chronicling older examples, from the 1970s and 1980s, of sophisticated avoidance of detection).

[295] *See, e.g.*, Chemerinsky, *supra* note 77, at 14–19.

[296] *See, e.g.*, Mark D. Villaverde, Note, *Structuring the Prosecutor's Duty to Search the Intelligence Community for* Brady *Material*, 88 CORNELL L. REV. 1471, 1472 (2003) (noting that 40,000 FBI investigations yielded only 115 prosecutions, and 24 convictions—not a very efficient approach).

[297] *See* POSNER, *supra* note 37, at 99–125 (describing the inherent difficulties—or impossibility—of getting intelligence organizations to work effectively). Judge Posner states:

> Specifically, one can expect intelligence officers to protect their jobs by 1) avoiding definite predictions, 2) erring on the side of not sounding the alarm, 3) deferring the making of a prediction, while gathering more information, 4) hesitating to update predictions on the basis of new information, 5) shying away from making predictions that are inconsistent with what their colleagues and superiors are predicting, and 6) in the wake of an attack, overemphasizing intelligence directed at preventing an exact repetition of it.

indefinite surveillance, always watching and waiting for the next plot to hatch, sorting through endless false leads and proposals that the terrorists abandon.[298] A good sting operation runs its course, traps the wrongdoer, and concludes. Incapacitating a future terrorist can happen within a predetermined time with a sting, or after an indefinite period of monitoring; the latter involves indefinite costs, while the former conforms to a preset budget.[299]

The budgetary concerns, of course, are less troubling than the loss of liberties to which we are accustomed.[300] Such losses may be unnecessary if we recognize a substitution effect in law enforcement. Orwellian surveillance is really an alternative to stings; this is true at least where the stakes are high and the wrongdoers are especially elusive. The entrapment defense limits and discourages sting operations to the degree that the defense is available and effective for defendants. A generous entrapment defense in the terrorism arena produces a substitution effect that increases the government's use of invasive surveillance.

C. *Self-Screening for Compulsiveness and Self-Disclosure*

Antiterrorism efforts also differ from antitrafficking efforts with respect to personal traits of the typical defendant. The crimes that historically implicated the entrapment defense often had a compulsiveness component. The willing parties to the victimless crimes are often addicted to the act or contraband in question,[301] which is part of the aggregate harm that leads to the criminalization of these consensual transactions in the first place. The prevalence of addicts in this field, with their associated compulsiveness and desperation, introduces many internal risks or weak links into the supply chain of a trafficking conspiracy. Some degree of self-screening occurs with victim-

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Id. at 108. The point here is that there are inherent, predictable agency costs in the intelligence bureaus, which make staff increases for gathering more information, or analyzing intercepted communications, relatively inefficient, from a cost-benefit standpoint.

[298] *See generally* Jack M. Balkin et al., *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 521–29 (2006).

[299] *See* HEYMANN, *supra* note 66, at 80–81 (discussing the relative costs of gathering sufficient intelligence to prevent attacks versus the costs of incapacitating the terrorists through other means).

[300] *See id.* at 97.

[301] *See* Campbell, *supra* note 79, at 229 (observing that most defendants prosecuted under conspiracy statutes are addicts).

less crimes, alluring participants who are prone to make mistakes,[302] betray themselves unwittingly, or fail in some objective—a fortunate effect for law enforcement. When criminal perpetrators blunder often, detection is easier (which lowers the costs of law enforcement generally), and the crime less likely to succeed (which lowers the stakes by decreasing the probability of harm).[303]

Terrorists may seem fanatical to the point of irrationality, but fanaticism does not cause clumsiness.[304] Admittedly, a well-orchestrated bombing or other sensational stunt is a complex, challenging undertaking, especially compared to a simple drug transaction or downloading of child porn. Even so, we cannot count on terrorists (or their material supporters)[305] to make the same types of mistakes as the perpetrators of the other crimes that normally give rise to the entrapment defense.[306] The legal rules should reflect this reality.

Turning to the specific charges that usually furnish antiterrorism prosecutions, "material support" often includes the provision of substantial funds or necessary resources, special expertise, training, or other assistance. Providers of such assets are likely to be more sophisticated or wealthy than stereotypical traffickers, purveyors, and panderers.

The self-screening effect for the victimless crimes makes the costs of sting operations arguably less necessary because there is a reasonable chance of the perpetrators betraying themselves, perhaps with minimal surveillance or monitoring, or failing in their endeavors even without government interference. Sting operations are therefore less necessary with these crimes, and the regulation of stings through the entrapment defense can be more burdensome relative to terrorism crimes. Provision of material support for terrorists (or terrorist organizations) is self-screening in the other direction, for almost the opposite type of perpe-

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[302] *See, e.g.*, Katyal, *supra* note 178, at 1317 ("[W]hen they voiced clearly wrong answers, the naive subjects would conform over one-third of the time to these obviously incorrect answers (compared to a one percent error rate when confederates voiced correct answers).").

[303] For an example of incompetent conspirators, see generally United States v. Martinez, 16 F.3d 202 (7th Cir. 1994).

[304] *See* Leger, *supra* note 65, at 490 (discussing the relative rationality of different categories of terrorist organizations).

[305] *See* Heymann, *supra* note 66, at 96; Serrano, *supra* note 291, at 204–05.

[306] *See* Wolf, *supra* note 81, at 28 (explaining that recruits for terrorist organizations are technically competent in their areas of specialization). *See generally* Hudson, *supra* note 86 (arguing that terrorists are sophisticated and highly skilled).

trator,[307] making sting operations more essential. Legal regulation of such stings, therefore, deserves to be less burdensome, suggesting a relaxed entrapment defense.

D. *Those Who Are Predisposed to Be Predisposed*

Victimless crimes attract people naturally—in fact, one (paternalistic) rationale for criminalizing the activities is that they appeal to too many people, or appeal to people too strongly. The idea is that people cannot resist the temptation even through they are aware of the hazards, so the government must intervene to protect them from themselves. By contrast, it seems that terrorists must recruit,[308] even proselytize, in order to attract participants, or at least to draw useful participants. Traffickers and purveyors have a customer base, a ready market for their contraband; terrorists have no customers.

The current intended beneficiaries of the entrapment defense are average law-abiding people who might succumb if tempted by a fantastic sum of money, or if frightened or badgered enough by an undercover agent—at least in an isolated instance.[309] There seem to be three tacit assumptions behind the predisposition rule. First, it assumes that most people are not disposed to commit crimes;[310] second, that even those without this disposition are likely to commit crimes if confronted with enough incentive; and third, that government agents can provide a sufficient incentive to beguile a person whom real criminals could not. These three underlying assumptions apply to almost all the crimes for which the entrapment defense is likely to arise, but are less applicable to terrorism.[311]

Far fewer people would agree to drive a truck bomb up to the city's federal building, or hijack a plane, regardless of inducement,

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[307] *See* Leger, *supra* note 65, at 490–91 (discussing the psychology of those who join different types of terrorist groups); *see also* Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. Pa. L. Rev. 11, 26 n.45 (2006) (discussing prosecution of computer science student in Idaho for designing and maintaining a website for an Islamic charity that posted edicts from radical clerics and links to terrorist sites; student was acquitted but then deported).

[308] *See, e.g.*, Weinstein v. Islamic Republic of Iran, 184 F. Supp. 2d 13, 19 (D.D.C. 2002) (discussing the enormous funds spent on recruiting).

[309] *See* Sorrells v. United States, 287 U.S. 435, 438–42 (1932).

[310] *See generally* Smith, *supra* note 91, at 772–74 (providing a detailed critique of this assumption and agreeing with the Milgram Hypothesis that average people actually are predisposed to commit heinous crimes, but simply lack the opportunity). This author disagrees in the context of terror crimes; I contend that the pool of potential recruits is finite.

[311] *See* Leger, *supra* note 65, at 490–91.

even the almost-infinite inducement for *any sum* of money or other incentive. Perhaps only people with a certain psychological makeup,[312] or certain entrenched attitudes, could be potential recruits for a terror cell.[313] Terrorists recruit; they do not have customers.[314] If the recruits were susceptible to the undercover agent, they would also be "recruit material" for real terrorists; it is fortunate for the rest of us that the undercover agent recruited them first.[315] With this particular crime, we should assume that a normal person would be immune to inducements, that we can infer predisposition merely by the fact that the person agreed to engage in such a horrible act, and that other evidence of predisposition is unnecessary.[316] They must be predisposed to be predisposed, as it were.

This assumes that there are a finite number of potential recruits for terrorism, and that these people pose a danger because of their susceptibility to recruitment. Both of these assumptions are admittedly controversial. Judge Posner, for example, says, "[I]ncapacitation has little effect because the supply of terrorists appears to be extremely elastic, since terrorist enterprises can draw on a vast pool of disaffected Muslim youth the world over."[317] Disaffected Muslim youth may abound,

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[312] *See* United States v. Ford, No. 05-cr-00537-REB, 2007 WL 628069, at *2 (D. Colo. Feb. 26, 2007) ("Defendant claimed that because of his vulnerable psychological and emotional makeup, he was, *inter alia*, particularly susceptible to the entreaties of [the agent], who defendant saw as a father figure that defendant wanted to please and did not want to disappoint."). *See generally* HUDSON, *supra* note 86 (surveying the entire corpus of psychological and sociological literature about the personality profiles of terrorist recruits).

[313] *See* Leger, *supra* note 65, at 490–91 (discussing the profiles of individuals who join the three types of terrorist groups).

[314] *See* Hawkins, *supra* note 89, at 646.

[315] *See* Karen Pittel & Dirk T.G. Rubbelke, *What Directs A Terrorist?* (Chemnitz Univ. of Tech. Econ. Working Paper No. WWDP 67/2005, 2005), *available at* http://ssrn.com/abstract=752845 (discussing what motivates both terrorist cell members and leaders and employing various mathematical models).

[316] *See* Smith, *supra* note 91, at 775–79 (arguing that factfinders are likely to infer disposition from the mere fact that the defendant committed the crime, and that this is a product of a documented psychological-heuristic fallacy called "attribution"). If Smith is correct, the courts have nonetheless not admitted that this occurs. Regardless of whether "attribution" occurs subconsciously in garden variety entrapment cases, I contend that we should be explicit about inferring predisposition in some cases based simply on the seriousness of the offense. I cannot find a single entrapment case, however, where a court inferred predisposition merely from the seriousness of the offense.

[317] POSNER, *supra* note 3, at 245. As much as I appreciate Judge Posner's overall analysis, his comment here seems to conflate the insurgents' guerrilla tactics in Iraq and Afghanistan with the generally sophisticated, educated terrorist recruits and cell leaders in the West. Disaffected Muslim youth in undeveloped countries, most of whom lack any way to get a visa to the United States or to learn English, are not terribly relevant for antiterrorism stings and prosecutions here in this country. *See* Pittel & Rubbelke, *supra* note 315, at

but the vast majority of them never join a terrorist group.[318] Perhaps this is due to lack of opportunities, but it may also be because terrorists need certain types of people (not just drones or foot soldiers, like a street gang or militia group), or because even disaffected Muslim youth generally lack the requisite predisposition to join.[319] If the supply of terrorists were truly elastic, it seems that there would be more terrorist strikes than we currently have. The number is relatively miniscule, at least compared to the other crimes for which the entrapment defense avails.[320] Occupied countries and territories, like Iraq or the West Bank, seem to have an endless supply of suicide bombers, which suggests that opportunity and example (to strike at the perceived enemy) are crucial factors.

In his seminal work on deterrence and punishment,[321] Johannes Andenaes surveyed the common approaches to deterrence (specific,[322] general,[323] educative,[324] moral,[325] and others), and suggests that one of the most effective ways to lower criminal activity is to remove "bad examples" from a section of society.[326] When transgressions become visibly commonplace, other individuals feel emboldened to engage in the same conduct; the "unthinkable is not unthinkable any longer when one sees one's comrades doing it."[327] Without a "bad example," others would never have thought of committing the offense, or they would have felt inhibited from doing so.[328] This makes it particularly important to catch and remove the first-comers to an offense; Andenaes makes a direct application to terrorist hijackings in the 1970s.[329] Sting operations are particularly useful for incapacitating those who would be potential recruiters for terrorist organizations, or even the recruits who would serve as a sufficient catalyst to give the conspiracy momentum.

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14 ("In contrast to previous analyses . . . we find the basic question of whether an agent could become a suicide bomber at all, to be independent of his level of income.").

[318] *See generally* Pittel & Rubbelke, *supra* note 316 (discussing calculus for how successful a terrorist leader will be in recruiting).

[319] *See* HEYMANN, *supra* note 66, at 79.

[320] *See* Pittel & Rubbelke, *supra* note 315, at 1.

[321] *See generally* ANDENAES, *supra* note 84.

[322] *See id.* at 3.

[323] *Id.* at 34–79.

[324] *Id.* at 110–20.

[325] *Id.* at 129–30.

[326] *See* ANDENAES, *supra* note 84, at 122–25.

[327] *Id.* at 123.

[328] *See id.*

[329] *See id.*

This is, of course, not the classic model for either deterrence or incapacitation. The focus is not on removing (ex post) the perpetrators of crimes, but rather the catalysts who join the conspiracy early and help expand it. It is, in a sense, a mirror image of regular deterrence—instead of giving disincentives to commit a crime, this approach removes the social incentives for the crimes (i.e., certain individuals).[330]

Turning now to the realities of prosecutions and arrests, the crime is normally the provision of material support, and the question is the predisposition for that act.[331] Although this is a step removed from delivering the bomb oneself—an important psychological step that broadens the pool of possible actors—not every disaffected youth has any useful contribution to make to the cause.[332] Similarly, if hotheaded vainglory or an overweening martyr complex motivates the actual bombers or leaders of the conspiracies, then "material support provider" might seem like a lackluster legacy; a more calculating, unassuming sympathizer is a better candidate.[333] The point is that if we *do* have a finite set of potential offenders, regardless of the inducements, then the rules for entrapment should change.[334]

If the set of possible participants is reasonably finite, then it becomes a zero some game[335] between the real terrorists and the undercover agents to get the recruits. Sting operations can serve the useful

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[330] *See id.*; *see also* Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1554 n.85 (2005).

[331] *See* Serrano, *supra* note 291, at 204–05.

[332] *See* Kreimer, *supra* note 307, at 91–93 (discussing the provision of "material support"—from the prosecutor's standpoint—in the creation and maintenance of Internet websites).

[333] This is exactly the point that the U.S. Court of Appeals for the Third Circuit discussed in the celebrated *United States v. Lakhani* case in March 2007. *See* 480 F.3d at 186–87 ("Lakhani also argues that the District Court's general deterrence justifications are inapt. He states that 'no sentence would be long enough' to deter a true terrorist and that the only thing his sentence may have accomplished is the deterrence of 'charlatans and con-artists from suggesting they can provide weapons to terrorists.' That may be so, but accepting Lakhani's argument would require criminal courts to abandon their sworn duty in the face of an irrational enemy . . . . Moreover, even if potential terrorists are unlikely to be undeterrable, their necessary aiders and abetters-such as Lakhani believed he was-may be. Moreover, aside from general deterrence, the penological goal of specific deterrence provides ample reason for Lakhani's sentence: he will never again seek to provide material support to terrorists. Despite the role the Government played in his crime, we have no doubt that if Lakhani had actually stumbled into a willing provider of a real missile, he would eagerly have arranged to smuggle it into the United States all the same.").

[334] *See* HEYMANN, *supra* note 66, at 80 ("[I]ncapacitation can significantly affect the number able and willing to stay the course.").

[335] *See id.* at 82 ("[R]educing what may be a very limited total pool of participants by discouraging beginners, increasing defections, and incapacitating the firmly committed.").

purpose of diverting potential participants into decoy operations instead of real (and dangerous) operations.[336] This not only incapacitates the potential wrongdoers by trapping and arresting them, but leaves the organizers or masterminds of the plots understaffed or undersupplied with material support, and forces them to waste more time and resources on finding new people as the pool shrinks.[337] Resources wasted on recruiting, because of diminishing recruits, are resources that cannot go towards the terrorist attacks themselves.

The second assumption—that anyone susceptible to recruitment by a terrorist organization already poses an abnormal danger—does not mean we should arrest people based on profiling.[338] Raising the entrapment defense presumes that the person *did* assent to participate in a criminal enterprise that turned out to be a sting.[339] Returning for a moment to the three assumptions underlying the predisposition test, in the case of terrorism, all three assumptions falter. Instead of the average law-abiding person not being predisposed to commit the crime, with terrorism we can assume that nearly everyone would be resistant to it. Second, whereas we assumed before that many or most people would succumb if the inducement were great enough, with terrorism we assume that adequate inducements are almost unimaginable for most people, and feasible for only certain people.[340] Third, we cannot assume that the government's inducements will exceed whatever the terrorists use; their financial resources can be vast.[341]

As stated in the Introduction, the current predisposition test may already be vague enough to confer sufficient discretion for judges to

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[336] *See, e.g.*, *Lakhani*, 480 F.3d at 187 ("Despite the role the Government played in his crime, we have no doubt that if Lakhani had actually stumbled into a willing provider of a real missile, he would eagerly have arranged to smuggle it into the United States all the same.").

[337] For more discussion about preventing recruitment, see Seymour, *supra* note 92, at 553.

[338] *But see* HEYMANN, *supra* note 66, at 92 (discussing identification of potential threats in a manner that borders on this).

[339] *See* Smith, *supra* note 91, at 775–79, (arguing that there is a tendency to infer predisposition from mere commission of an offense, and that that tendency taints the current entrapment defense). I am suggesting that with this particular crime, it matters a great deal whether someone succumbed to the temptation in the first place, more than with other, less injurious crimes.

[340] *See generally* Pittel & Rubbelke, *supra* note 315, at 14 (discussing the predisposition to become a suicide bomber).

[341] As Judge Posner explains, terrorist groups are larger, more sophisticated, and better financed than even very large gangs; their resources may exceed that of prosecutors. POSNER, *supra* note 3, at 241.

tailor it to this unique type of crime, without overtly changing the rule.[342] Congress could also create a statutory exclusion of the entrapment defense for terror-related crimes.[343] Alternatively, a judicial rule that finds predisposition "per se," or as a presumed inference, seems warranted where the undercover agents made the terrorist connection clear to the target of the sting.

E. *The Lemons Effect as a Positive Externality of Sting Operations*

As suggested above, diverting or wasting terrorists' resources is a method of prevention. It is important, therefore, that the presence of undercover infiltrators raises the transaction costs of terrorism across the board. As leaders realize that some of their recruits are possible informants or undercover agents,[344] or if potential recruits realize that their recruiters (or leaders) could be government agents,[345] a chilling effect besets the entire enterprise.[346] This is desirable. Transaction costs increase as mistrust permeates the organization or network.[347] Each member must divert some resources to screening and testing their co-conspirators more than they would otherwise, and each must be more guarded, less cooperative, and less forthcoming with useful information. The added transaction costs pose a drain on time, energy, and other resources, slowing the progress of the plot. Internal mistrust helps prevent terrorism.[348]

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[342] *See supra* note 63 and accompanying text.

[343] Norman Abrams implies that Congress has already done this by creating a relatively weak mens rea requirement for the "material support" crimes (especially compared to the specific intent elements of traditional conspiracy charges or the "purpose" element of traditional complicity charges), and compensated for this by hardening the actus reus element with the adjective "material" and a statutory list of possible items. *See* Abrams, *supra* note 172, at 10–11, 18.

[344] *See generally* Pittel & Rubbelke, *supra* note 315, at 3–4 (discussing terrorist leaders' instruments for controlling recruits).

[345] *See id.* at 7–13 (modeling in economic terms the sense of belonging that motivates the terror cell member).

[346] *See id.* at 5–7 (discussing the importance of raising the organization's utility level).

[347] *See* Katyal, *supra* note 178, at 1325 (discussing how conspiracies depend on a "framework of trust to reduce the transaction costs in forming new contracts with each other"). For an example of where a court found that undercover infiltrators can have this chilling effect (but used in an abusive way, to target legitimate, peaceful political dissent), see Alliance to End Repression v. City of Chicago, 627 F. Supp. 1044, 1054 (N.D. Ill. 1985).

[348] Posner, *supra* note 3, at 245 (observing that organized crime depends more heavily on trust than legal transactions do, as breaches of illegal contracts are unenforceable, and therefore tends to organize around crime "families," as well as lines of business that have lower turnover in their ranks, like brothels instead of streetwalkers).

As undercover agents clutter the field, recruiting grows more difficult, not only because many potential recruits are off following decoy plots (described in the previous subsection), but also because some of the remaining recruits are undercover agents who pose a serious threat to the organization. Attracting the necessary contributors to the conspiracy takes more time, requires more screening, and results in false positives—turning away recruits suspected of being undercover agents, who actually would have been an asset to the program instead.[349] For the true believers in the cause, the radicals,[350] the presence of unknown traitors is not only worrisome (they jeopardize everything), but also terribly discouraging.[351] In an organization that thrives on excitement and zeal for motivation[352] instead of pecuniary gain, infiltrators undermine the most valuable resource of the conspiracy.[353]

This creates an analogous situation to the famous "lemons effect" for used cars or other commodities: it devalues the original, makes transactions more costly for everyone, and tends to escalate over time.[354] The difference here is that instead of being a problem, this is a social benefit, because it undermines an enterprise that injures society. This merits more judicial deference for the mechanism that obtains this benefit, the sting operations.

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[349] *See Alliance to End Repression*, 627 F. Supp. at 1050–51.

[350] *See* Leger, *supra* note 65, at 490 (discussing "physiological terrorists").

[351] *See* HEYMANN, *supra* note 66, at 82.

[352] *See* Leger, *supra* note 65, at 490–91 (discussing the commitment and trust level required within these organizations).

[353] This is consistent with the analysis of Pittel and Rubbelke. *See generally* Pittel & Rubbelke, *supra* note 315.

[354] *See, e.g.*, Akerlof, *supra* note 96, at 488–90; Winand Emons & George Sheldon, *The Market for Used Cars: A New Test of the Lemons Model* (Univ. of Bern, Dep't of Econ. Discussion Paper 02.02, 2005), *available at* http://ssrn.com/abstract=306939; *see also* Hay, *supra* note 10, at 412–13 (applying the "lemons" concept to undercover sting operations by police) Bruce Hay explains:

> When deterrence is the objective, the government creates something akin to the well-known market for lemons. The government introduces lemons—phony criminal opportunities—that resemble the genuine article. To the would-be offender, the risk of being caught in a trap makes it costlier to seize apparent opportunities for crime. He may therefore turn away genuine opportunities that would otherwise attract him. Just as the presence of lemons in the auto market discourages the sale of even good cars, the presence of lemons in the market for crime discourages genuine criminal transactions. If the sting totally succeeds, the market for real criminal opportunities "unravels," driving criminals into other activities. For example, if there were enough phony buyers of narcotics on the street, the price of drugs would rise so high that genuine buyers would disappear.

Id.

Admittedly, the benefit of the lemons effect is from the criminals' perception more than the actual number of undercover infiltrators. The government has an incentive, therefore, to publicize its use of undercover agents, to foster a perception than they are ubiquitous and effective.[355] There are many ways to do this, such as leaking the identity of one or two former undercover agents, who face little danger of retaliation now that they are out of the field, to the press. If convictions generate written opinions and reportable news more than acquittals do, prosecutors have an incentive to make examples of those caught in sting operations, rather than showing them leniency.[356] The point is that the use of sting operations against terrorists affords some positive externalities in the efforts to prevent terrorism generally, far-reaching positive effects beyond the immediate apprehension of potential attackers or supports. This consideration should influence the regulation of sting operations, which occurs primarily through the entrapment defense.

F. *Terrorism, Information Asymmetries, and Prosecutorial Bargaining Power*

Prosecutorial bargaining power during the plea negotiations before trial is especially important where prevention of future crimes is a priority, as with terrorism. Prosecutors with more bargaining power may elicit useful disclosures about the larger terror network and other plots.[357] If the affirmative defense most relevant to the charge were less available, this would give prosecutors an additional edge in inducing the suspect, as part of a plea agreement, to inform on others who are still at large.[358]

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[355] *See* Hay, *supra* note 10, at 412–13. Of course, even *unsuccessful* stings can serve this end. The fact that the sting worked well enough to lead to an arrest, regardless of whether the trial ends in an acquittal, can make others more wary in the future. Assume for sake of argument that the police engage in a particularly atrocious sting operation, something that would sicken even the most progovernment judge. From the standpoint of disseminating a frightening impression among would-be offenders, this could be useful: the sensational nature of the news makes it more likely to spread quickly, and to make a deeper impression on those who hear. This is not to say that unsuccessful stings are as desirable as successful ones, of course.

[356] *See* Andenaes, *supra* note 84, at 137 ("If a case has for some reason attracted great publicity, a severe sentence could be expected to have great deterrent effect.").

[357] *See* Posner, *supra* note 4, at 112.

[358] *See, e.g.*, Heymann, *supra* note 66, at 27 (discussing the greater success of Scotland Yard in gaining useful antiterrorist information than Britain's secret service, because "most informants have been found among those who have been arrested and threatened with punishment for other crimes").

At first glance, this may seem to verge on the idea, disavowed in an earlier subsection, that the heightened stakes justify dispensing with procedural rights of these defendants. Yet the idea here is to focus on prevention, not punishment—to enhance the defendant's willingness to cooperate with disclosure requests in quid pro quo bargaining before trial. Every other procedural safeguard at trial could remain intact, except this particular affirmative defense.

In cases where entrapment might otherwise avail, however, the crime in question would be the product of a sting operation.[359] This means that many of the usual procedural safeguards are less relevant, such as the exclusionary rules. With stings, the agents can plan the incident and catch the defendant in the act, perhaps on videotape.[360] Entrapment becomes relevant when the constitutional protections are not available in a case, as a defense of last resort,[361] when the defendant's involvement is unquestionable.[362]

There is a significant difference between this point and the usual "give less rights to terrorists" argument.[363] Here, we are talking about increased prosecutorial power to bargain for information before the trial, as opposed to increased prosecutorial power regarding sentencing, admissibility of incriminating evidence, degree of the charges brought, and so forth. All of those other features of the criminal process remain the same regardless of the entrapment defense. The goal is to provide an incentive for defendants to give up valuable information for the prevention of future attacks, not to get the defendant to accede to a tougher sentence or more severe charges. The information disclosure should put the defendant in no worse position than she already was, but it puts society in a better position than it would be without the disclosure; it seems Pareto Superior.[364]

G. *Diminishing Marginal Value of Ex Post/External Regulation of Antiterrorism Stings*

A final consideration for adapting the entrapment defense in the antiterrorism context is the obvious dangerousness of infiltrating a

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[359] *See Sorrells*, 287 U.S. at 438–42.

[360] *See id.*

[361] *See* Stevenson, *supra* note 10, at 34.

[362] Most of the antiterrorism prosecutions, in fact, end with plea agreements. *See* Abrams, *supra* note 172, at 21.

[363] *See* HEYMANN, *supra* note 66, at 112 (discussing various methods for extracting useful information out of defendants).

[364] *See id.* at 121.

terrorist conspiracy.[365] This already serves as a check or deterrent against government overreaching, and screens out some "bad apple" agents who might otherwise do undercover work in other contexts. There is less need here for the judiciary to add additional checks.

Judicial intervention to regulate undercover operations has a diminishing marginal value where there are already significant natural restrictions on the enterprise. Some of these operations are not only dangerous,[366] but involve costly international travel, training undercover agents in foreign languages,[367] and inherent risks of failure.

As mentioned above, the entrapment defense is our legal system's primary device for regulating government sting operations.[368] It is an "ex post" regulatory device, in that it imposes sanctions (acquittal of the target) after the operation is complete, although such setbacks can influence future agency planning, as can be seen in the FBI Guidelines for Undercover Operations.[369] The entrapment defense is also an external regulatory device, in that the judiciary decides whether the sting operation stayed within proper boundaries, rather than the agency or actors responsible for obtaining the operation's intended product, arrests and convictions.[370]

The ex post and external nature of the entrapment defense as a regulatory device suggests that it will have diminishing effectiveness, or diminishing marginal value, as either ex ante or internal restrictions

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[365] *See* WOLF, *supra* note 81, at 93 ("Police undercover work, designed to obtain information on terrorist groups, is extremely dangerous to the police officer, as there is a constant risk that he will face torture and death if discovered. Police undercover operatives nevertheless must often be used to supplement routine police counterterrorist operations. The police undercover agent must be a person who blends in with the surrounding of the target area, and, in so doing, leaves the public totally oblivious as to what he is doing. Counterterrorist undercover operatives should be experienced police officers with a proven track record of success in deep-cover operations, since they will not be controlled by any onsite intelligence or undercover groups. Many of these onsite units are not so 'tight' as some police officers believe them to be, and, therefore, undercover operatives are usually on their own, insofar as looking after themselves is concerned. . . . It is best that all other police officers operating in an area where a deep-penetration undercover operation is being conducted should not be aware of the operation . . . .").

[366] *See id.*

[367] *See* POSNER, *supra* note 4, at 111 (discussing the difficulty the FBI has experienced in recruiting agents with the necessary language skills for deciphering intercepted communications).

[368] *See supra* note 10 and accompanying text.

[369] *See* ASHCROFT, GUIDELINES *supra* note 106, at 16.

[370] *See Sorrells*, 287 U.S. at 442.

increase.[371] Sting operations in the antiterrorism context have *both* elevated ex ante and elevated internal restrictions compared to operations focused on other crimes.[372] The screening effect on agents that results from the increased dangerousness and enhanced skills needed provide natural disincentives and selectiveness for finding agents; these place elevated ex ante limitations on the sting operations. The higher budgetary costs for the agency,[373] as well as the higher stakes, political considerations, and absolute need for successful prevention of attacks, place elevated internal restrictions on the agencies in planning and executing the operations.[374] Compared to other crimes where the entrapment defense is useful, the antiterrorism context presents ex ante and internal conditions that make judicial regulation less valuable and less necessary.

In sum, there are enough restraints or screening effects inherent in undercover antiterrorism work to obviate some of the need for additional judicial intervention. Judicial hesitancy in finding a lack of predisposition, therefore, is especially appropriate in this context.

IV. Sentencing Entrapment, Entrapment by Estoppel, and Derivative Entrapment

This Section discusses the entrapment defense's lesser-known siblings: sentencing entrapment, entrapment by estoppel, and derivative entrapment (also called vicarious entrapment). Each of these defenses has potential relevance in upcoming antiterrorism prosecutions.[375] The previous Section discussed principles for the adaptation of the entrapment defense that would be applicable to these defenses as well. In addition, each of these defenses has a unique trait or element that requires special analysis as it applies to terrorism.

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[371] For an excellent discussion of ex ante and ex post regulatory devices, see generally Robert Innes, *Enforcement Costs, Optimal Sanctions, and the Choice Between Ex-Post Liability and Ex-Ante Regulation*, 24 Int'l Rev. L. & Econ. 29 (2005).

[372] *See supra* notes 366–367 and accompanying text.

[373] *See, e.g.*, State v. Mullens, 650 S.E.2d 169, 215 (W. Va. 2007) (Maynard, J., dissenting) ("Cash-strapped and overworked law-enforcement agencies have no incentive to arbitrarily send wired informants into the homes of law-abiding citizens when there are real crimes to investigate.").

[374] *See, e.g.*, Heymann, *supra* note 66, at 80 (discussing the heightened stakes of terrorism investigations).

[375] *See, e.g.*, United States v. Lakhani, 480 F.3d 171, 186–87 (3d Cir. 2007) (challenging sentence for failure to give a mitigation or downward departure in light of the government's involvement in the sting operation); United States v. Meskini, 319 F.3d 88, 90–91 (2d Cir. 2003) (terrorist defendant unsuccessfully challenging sentence under terrorist provision of section 3A1.4 of the Federal Sentencing Guidelines as violative of due process).

A. *Sentencing Entrapment and Antiterrorism Prosecutions*

Modern criminal law has become increasingly algorithmic with the widespread adoption of mechanical sentencing guidelines,[376] gradations for offenses, and aggravating factors. A byproduct of this punishment calculus, "sentencing entrapment"[377] is the name for the process by which undercover agents intentionally "ratchet up" a crime.[378] For example, agents who plan a trafficking sting operation can decide beforehand the amount of drugs to buy or sell,[379] or which drugs to in-

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[376] The Federal Sentencing Guidelines, of course, have been the subject of a spate of recent Supreme Court cases, and it is not clear how the new limitations on the sentencing guidelines will affect the phenomenon of sentencing manipulation or sentencing entrapment. *See, e.g.*, Cunningham v. California, 127 S. Ct. 856, 860 (2007) (holding that California's determinate sentencing framework is unconstitutional, because it authorized judge, not jury, to find facts exposing defendant to elevated upper term sentence, which violated defendant's right to trial by jury); United States v. Booker, 543 U.S. 220, 226 (2005); Rita v. United States, No. 06–5754, 2006 WL 1144508, at *1 (4th Cir. May 1, 2006); United States v. Claiborne, 439 F.3d 479, 481–82 (8th Cir. 2006) (finding sentence unreasonable on appeal), *vacated as moot*, 127 S. Ct. 2245 (2007). The requirement of jury findings for sentencing enhancement factors would tend to encourage law enforcement to rely even more on preplanned events to guarantee that the evidence for the jury is sufficient. Similarly, a decrease in judicial discretion in applying the Federal Sentencing Guidelines (i.e., more ex ante predictability) also makes it easier for law enforcement to plan sting operations around the more predictable sentencing factors. At least one court has hinted that the ongoing changes in the application of the Federal Sentencing Guidelines could affect its treatment of sentencing entrapment claims. *See* United States v. Gunn, 369 F.3d 1229, 1237 (11th Cir. 2004).

[377] *See* MARCUS, *supra* note 1, at 353–59. The law review articles and student notes on this subject have become innumerable; for a recent one that provides excellent background, see generally Jess D. Mekeel, Note, *Misnamed, Misapplied, and Misguided: Clarifying the State of Sentencing Entrapment and Proposing a New Conception of the Doctrine*, 14 WM. & MARY BILL RTS. J. 1583 (2006).

[378] The phrase "ratchet up" seems to have first been used in 1991, by the U.S. Court of Appeals for the Fifth Circuit in *United States v. Richardson*, a money laundering case. 925 F.2d 112, 114 (5th Cir. 1991).

[379] *See* United States v. Lenfesty, 923 F.2d 1293, 1300 (8th Cir. 1991) (noting that the defendant argued that the undercover agent's only motive in repeatedly purchasing from her was to increase her sentence); United States v. Stuart, 923 F.2d 607, 613–14 (8th Cir. 1991) (recapping the defendant's contention that he was entrapped by the government's act of fronting money to purchase a larger quantity of drugs than the defendant was predisposed to sell); United States v. Barth, 788 F. Supp. 1055, 1057 (D. Minn. 1992) (holding that "[t]he Court finds it not at all fortuitous that the agent arrested the defendant only after he had arranged enough successive buys to reach the magic number [of fifty grams of cocaine base, doubling the minimum mandatory sentence from five years to ten years]"), *vacated*, 990 F.2d 422 (8th Cir. 1993); People v. Cousins, No. 239767, 2003 WL 22222056, at *6, 7 (Mich. Ct. App. Sept. 25, 2003) (holding that the defendant was not a victim of sentencing entrapment when he was asked to supply a larger quantity of cocaine for the third transaction); State v. Burnett, No. C9–98–1201, 1999 WL 289221, at *3–4 (Minn. Ct. App. May 11, 1999) (holding that it was not enough to establish sentencing entrapment when

clude, as different drugs carry different punishments.[380] By so doing, agents can catapult the defendant into a higher sentencing range, sometimes making the difference of years on a sentence.[381] Similarly, an agent can suggest that the target bring a gun to the transaction. The presence of firearms can trigger a sentencing enhancement,[382] especially for weapons like automatic rifles, which agents sometimes request specifically.[383] Similarly, agents posing as decoys for pedophiles in

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the undercover agent had contacted her supervisor before making the last sale to determine if the addition of that amount would establish a first degree offense).

[380] Often claims of sentencing entrapment arise under circumstances where an undercover agent requests the defendant to transform powder cocaine into cocaine base or to provide the agent with cocaine base rather than powder cocaine. Cocaine base carries a higher penalty under the Sentencing Guidelines, 120–135 months, whereas powder cocaine carries a sixty month minimum mandatory sentence. *See, e.g.*, U.S. Sentencing Guidelines Manual § 2D1.1 (2006). Cocaine base is crack cocaine; powder cocaine can be "cooked" in a microwave to become crack. *See* United States v. Kimley, No. 01–4324, 2003 WL 1090706, at * 1 (3d Cir. Mar. 12, 2003) (reiterating the defendant's claim that the informant both induced him to sell crack rather than powdered cocaine and manipulated his sentence by making repeat purchases from him); United States v. Walls, 70 F.3d 1323, 1328–30 (D.C. Cir. 1995) (holding that a request by a government agent for crack cocaine upon a seller's delivery of powder cocaine, without more, does not establish a claim of sentencing entrapment); United States v. Saulter, 60 F.3d 270, 279–80 (7th Cir. 1995) (rejecting the defendant's contention that downward departure from the Guidelines is warranted due to the undercover agent's encouragement of having the defendant transform the powder cocaine into crack); United States v. Shepherd, 857 F. Supp. 105, 110–12 (D.D.C. 1994) (holding that the undercover agent's insistence that the purchase of cocaine was conditioned on the defendant transforming the cocaine powder into crack was impermissible because this demand did not further the investigation).

[381] *See, e.g.*, U.S. Sentencing Guidelines Manual § 2D1.1. Professor Neal Katyal offers the following explanation:

> [O]ne kilo of crack yields a 188–235 month sentence and one kilo of heroin yields 121–151 months. The four level enhancement increases a crack sentence to 292–365 months—an average increase of about ten years. The enhancement increases a heroin sentence, however, to 188–235 months, a much smaller increase of about six years.

Neal Kumar Katyal, *Deterrence's Difficulty*, 95 Mich. L. Rev. 2385, 2422 (1997).

[382] *See* 18 U.S.C. § 924(c) (2000) (establishing a minimum five year enhancement for the use of a firearm in drug trafficking, ten years if the firearm is a short-barreled shotgun, thirty years if the firearm is a machine gun or a gun equipped with a silencer).

[383] *See* United States v. Ramirez-Rangel, 103 F.3d 1501, 1508 (9th Cir. 1997) (holding that the trial court should have held a private hearing in chambers to decide whether the confidential informant's testimony would be relevant to the defendants' claim that the agents chose to exchange machine guns for their methamphetamines instead of handguns, in an attempt to enlarge their sentences by a mandatory thirty years); United States v. Jones, 102 F.3d 804, 809 (6th Cir. 1996) (holding that sentencing entrapment was not warranted despite the defendant's allegation that the agents knew that they would arrest him already but only insisted upon him exchanging a machine gun for drugs in an attempt to lengthen his sentence); United States v. Cannon, 886 F. Supp. 705, 708 (D.N.D. 1995) (holding that an undercover agent's encouragement of buying handguns and a

Internet chat rooms ascribe an age to themselves that is just young enough to implicate the most serious category of attempted sexual predation, although not too young, lest the trap appeal to too few targets.[384] From the law enforcement perspective, ex ante knowledge of the sentencing enhancements can provide a way around the exclusionary rules. Even where undercover agents have botched a case regarding one charge, they can continue an operation if other potential charges are still alive, ratcheting up the sentence enough to get the same result. There is a diminishing marginal inducement needed for enhancement factors, once the culprit has agreed to the base offense.

The idea of agents planning around the sentencing guidelines is predictably controversial.[385] Some courts, therefore, entertain arguments that the defendant's sentence should be mitigated to offset the

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machine gun warranted a downward departure because the sole purpose of this action was to increase the defendants' sentences by twenty-five years), *rev'd on other grounds*, 88 F.3d 1495 (8th Cir. 1996).

[384] Federal Sentencing Guidelines contain an enhancement for attempts to engage in prohibited sexual conduct with a minor *or an undercover agent posing as a minor.* U.S. SENTENCING GUIDELINES MANUAL § 2A3.2(b) application n.1; *see* United States v. McGraw, 351 F.3d 443, 444 (10th Cir. 2003); United States v. Robertson, 350 F.3d 1109, 1111 (10th Cir. 2003); United States v. Dotson, 324 F.3d 256, 258 (4th Cir. 2003). The Sentencing Guidelines explicitly state that for pedophiliac computer crimes, it does not matter whether there was a real "victim" or merely an undercover agent posing as a victim. U.S. SENTENCING GUIDELINES MANUAL § 2A3.1 application n.1.

[385] *See, e.g.*, Eric P. Berlin, Comment, *The Federal Sentencing Guidelines' Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 WIS. L. REV. 187, 201 (arguing that the Sentencing Guidelines create an increase in the severity of punishment and double prison populations nationwide); Andrew G. Deiss, Comment, *Making the Crime Fit the Punishment: Pre-Arrest Sentence Manipulation by Investigators Under the Sentencing Guidelines*, 1994 U. CHI. LEGAL F. 419, 419–20 (stating that the minority view is that the Sentencing Guidelines give the undercover agents too much discretion, the majority opinion is that the Sentencing Guidelines give the prosecutors too much discretion); Joan Malmud, Comment, *Defending a Sentence: The Judicial Establishment of Sentencing Entrapment and Sentencing Manipulation Defenses*, 145 U. PA. L. REV. 1359, 1362–76 (1997) (discussing the history of abuse in sentencing and the possible remedies); Mark Thomas, Comment, *Sentencing Entrapment: How Far Should the Federal Courts Go?*, 33 IDAHO L. REV. 147, 147–51 (1996) (discussing the history of abuse in sentencing and arguing that sentencing entrapment should not be used for "straight stings").

Most academic commentators frame the problem with sentencing entrapment as a matter of excessive investigative/prosecutorial discretion resulting from the adoption of mechanical sentencing guidelines, designed to limit judicial discretion. *See, e.g.*, Berlin, *supra*, at 196; Robert S. Johnson, Note, *The Ills of the Federal Sentencing Guidelines and the Search for a Cure: Using Sentence Entrapment to Combat Governmental Manipulation of Sentencing*, 49 VAND. L. REV. 197, 205–06 (1996).

increase that state agents manipulated.[386] The conviction stands, but the court may reduce or mitigate the sentence.[387]

There is currently a circuit split among the federal courts of appeal about whether even to recognize "sentencing entrapment."[388] Those

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[386] *See* United States v. Staufer, 38 F.3d 1103, 1106–07 (9th Cir. 1994) (stating that, before the advent of the Sentencing Guidelines, courts could prevent sentencing entrapment by voicing their discretion in sentencing, however under the Sentencing Guidelines "courts can ensure that the sentences imposed reflect the defendants' degree of culpability only if they are able to reduce the sentences of defendants who are not predisposed to engage in deals as large as those induced by the government"); *see also* 18 U.S.C. § 3553(b) (2000 & Supp. 2003) ("[T]he court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.").

[387] *See* United States v. Padilla, No. Civ.A. 03-CV-85, CRIM.A. 00-CR-12-1, 2003 WL 22016886, at *5 (E.D. Pa. June 20, 2003) ("Sentencing manipulation by definition is not a defense . . . [and] has no bearing on the defendant's guilt or innocence. Succeeding under this theory will result in the court granting a downward offense level adjustment under the guidelines."); *see also* United States v. Palo, No. 97–50167, 1999 WL 51507, at *1 (9th Cir. Dec. 10, 1999) (stating that the Ninth Circuit has identified two available remedies for valid sentencing entrapment claims: 1) "a sentencing court may decline to apply the statutory penalty provision for the greater offense that the defendant was induced to commit, and instead apply the penalty provision for the lesser offense that the defendant was predisposed to commit"; or 2) "a sentencing court may exercise its discretion to depart downward from the sentencing range for the greater offense that the defendant was induced to commit" (quoting United States v. Parrilla, 114 F.3d 124, 127 (9th Cir. 1997))).

[388] It appears, as of this writing, that the U.S. Courts of Appeal for the Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits have rejected it entirely. *See* United States v. Sanchez, 138 F.3d 1410, 1414 (11th Cir. 1998) (acknowledging sentencing entrapment defense but rejecting it on the instant facts); *Jones*, 102 F.3d at 809 ("While other circuits have recognized sentencing entrapment, this circuit has never acknowledged sentencing entrapment as a valid basis for a downward departure . . . ."); United States v. Lacey, 86 F.3d 956, 962–66 (10th Cir. 1996) (analyzing defendant's sentencing entrapment argument under an outrageous official conduct rubric, and finding no such outrageous official conduct); United States v. Garcia, 79 F.3d 74, 76 (7th Cir. 1996) (rejecting sentence manipulation as a matter of law); United States v. Walls, 70 F.3d 1323, 1328–29 (D.C. Cir. 1995) (not expressly accepting or rejecting the sentencing entrapment doctrine, but definitively rejecting it for the instant facts); United States v. Washington, 44 F.3d 1271, 1279 (5th Cir. 1995) (dismissing the defense as "trendy"). The U.S. Court of Appeals for the Second Circuit has not yet adopted a position. United States v. Bala, 236 F.3d 87, 93 (2d Cir. 2000). The U.S. Courts of Appeals for the First, Third, Fourth, and Eighth Circuits have recognized the defense in theory, but not to the benefit of any defendants. *See* Mekeel, *supra* note 378, at 1596–1602 (surveying unsuccessful attempts in these circuits). The U.S. Court of Appeals for the Ninth Circuit has adopted the defense and applied it to lower a defendant's sentence. *See Staufer*, 38 F.3d at 1107; *see also Padilla*, 2003 WL 22016886, at *5, 7 (stating that the circuits are split on both the sentence entrapment doctrine and the sentence manipulation doctrine).

that do recognize it use a predisposition test,[389] that is, whether the defendant would have refused to commit the crime on the scale that occurred in the sting, "but for" the government inducement.[390] The defendant bears the burden of proving his reticence.[391] The claim is usually unsuccessful;[392] one court has commented, "garden variety ma-

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[389] Circuits that recognize sentencing entrapment use similar tests that revolve around predisposition. *See* United States v. Gutierrez-Herrera, 293 F.3d 373, 377 (7th Cir. 2002) (describing sentencing entrapment as occurring "when the government causes a defendant initially predisposed to commit a lesser crime to commit a more serious offense." (quoting United States v. Estrada, 256 F.3d 466, 473–74 (7th Cir. 2001))); United States v. Woods, 210 F.3d 70, 75 (1st Cir. 2000) (describing sentencing entrapment as occurring "when 'a defendant, although predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment'" (quoting *Staufer*, 38 F.3d at 1106)); United States v. Citro, 842 F.2d 1149, 1152 (9th Cir. 1998) (discussing five factors used to determine sentencing entrapment: "(1) the character or reputation of the defendant; (2) whether the government made the initial suggestion of criminal activity; (3) whether the defendant engaged in the activity for profit; (4) whether the defendant showed any reluctance; and (5) the nature of the government's inducement"); *Padilla*, 2003 WL 22016886, at *6 (stating that the Eighth Circuit defines "sentencing entrapment as 'outrageous official conduct' that overcomes the volition of an individual who was predisposed to commit a less serious crime and unduly influences them to commit a more serious crime for the purpose of increasing the resulting sentence of the entrapped defendant" (citing United States v. Rogers, 982 F.2d 1241, 1245 (8th Cir. 1993))).

[390] *See* United States v. Si, 343 F.3d 1116, 1128 (9th Cir. 2003) ("Sentencing entrapment occurs when a defendant is predisposed to commit a lesser crime, but is entrapped into committing a more significant crime that is subject to more severe punishment because of government conduct."); United States v. Stavig, 80 F.3d 1241, 1245 (8th Cir. 1996) (stating that sentencing entrapment "may occur where outrageous government conduct overcomes the will of a defendant predisposed to deal only in small quantities of drugs, for the purpose of increasing the amount of drugs and resulting sentence imposed against that defendant" (quoting United States v. Aikens, 64 F.3d 372, 376 (8th Cir. 1995))); *Stuart*, 923 F.2d at 614 ("'Sentencing entrapment' as defined by the defendant, posits the situation where a defendant, although predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment.").

[391] *See* United States v. Nieto-Cruz, No. 03–50420, 2004 WL 886346, at *1 (9th Cir. Apr. 6, 2004) (stating that the defendant failed to meet his burden of proving that "he had neither the intent nor the ability to produce the amount of drugs involved"); United States v. Medina, No. 99–10332, 2002 WL 1808705, at *1 (9th Cir. Aug. 6, 2002) ("The defendant bears that burden of showing sentencing entrapment by a preponderance of the evidence."); United States v. Naranjo, 52 F.3d 245, 250 & n.13 (9th Cir. 1995) ("In making a sentencing entrapment claim, the burden is on the defendant to demonstrate both the lack of intent to produce and the lack of capability to produce the quantity of drugs at issue.").

[392] *See, e.g.*, United States v. Ross, No. 02–50226, 2004 WL 1375522, at *12 (9th Cir. June 21, 2004) (holding that the evidence was sufficient to support the finding that the defendant was predisposed to commit an offense involving 100 kilograms of cocaine); United States v. Rice, No. 02–1383, 2004 WL 1240824, at *3 (10th Cir. June 7, 2004) (rejecting the defendant's sentencing factor manipulation claim that he was improperly induced into manufacturing and selling twenty machine guns because of the government's fronting him with the money to purchase supplies); United States v. Vega, Nos. 02–50253,

nipulation claims are largely a waste of time" as this "is a claim only for the extreme or unusual case."[393]

The United States Court of Appeals for the Eighth Circuit apparently coined the phrase[394] in the 1991 case *United States v. Lenfesty*.[395] The defendant's argument was novel at the time, and it met with skepticism from the Court: "We are not prepared to say there is no such animal as 'sentencing entrapment.'"[396] The same week, however,

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02–50499, 2004 WL 785311, at *3 (9th Cir. Apr. 7, 2004) (holding that the defendant was not entitled to reduction of his sentence because he was "predisposed to sell in amounts up to whatever he could handle, including the 233 gram sale"); United States v. Hightower, No. 03–1015, 2004 WL 729255, at *4 (10th Cir. Apr. 6, 2004) (holding that the defendant was not a victim of sentencing entrapment when the agent specifically asked for crack when he had knowledge that the defendant could also supply other drugs that carried less penalty); *Gutierrez-Herrera*, 293 F.3d at 377 (holding that the defendant was predisposed to distribute cocaine by his admittance of supplying two kilograms to individuals and that he intended for them to resell it); *Estrada*, 256 F.3d at 476 (rejecting defendant's claim that he was offered bargain basement prices for cocaine, given generous credit terms to accept the larger amount even though he originally requested a much smaller amount, and that he only had enough money on him to purchase 3.75 kilograms of the 5 kilogram purchase); United States v. Case, 217 F. Supp. 2d 158, 161–62 (D. Me. 2002) (rejecting the defendant's claim that his sentence should be reduced for the final sale, which occurred after the agents could have arrested him for making a ten pound sale); United States v. Lora, 129 F. Supp. 2d 77, 94 (D. Mass. 2001) (holding that the defendants were predisposed to buy cocaine and were not offered "artificially favorable credit terms" that induced them to purchase more cocaine than they had resources for).

[393] *See* United States v. Montoya, 62 F.3d 1, 4 (1st Cir. 1995).

[394] "Sentencing entrapment" is the most common moniker, but some courts call it "sentencing manipulation," and a few courts and commentators have tried to find two separate defenses in these two terms—but this seems to be the minority view. The First Circuit uses the terms sentencing entrapment and sentencing factor manipulation to describe the same conduct. *Padilla*, 2003 WL 22016886, at *5 (quoting *Woods*, 210 F.3d at 75). The Seventh, Eighth, and Ninth Circuits use the term sentencing entrapment and have recognized the defense. *Id.* at *5, 6. The U.S. District Court for the District of Columbia recognized sentencing entrapment in 1994, in *United States v. Shepherd*. 857 F. Supp. at 110–12. The First and Second Circuits recognize sentence manipulation. *Padilla*, 2003 WL 22016886, at *7. The Fifth Circuit recognizes sentence manipulation but has never applied it. *Id.* (citing United States v. Cunningham, Nos. 3-97-CR-263-R, 3-01-CV-1160-R., 2002 WL 1896932, at *10 (N.D. Tex. Aug. 14, 2002)). In 1994, in *United States v. Jones*, the Fourth Circuit recognized the separate existences of sentence entrapment and sentence manipulation, however the viability of either defense was not addressed. 18 F.3d 1145, 1154–55 (4th Cir. 1994). For more discussion, see Malmud, *supra* note 385, at 1373–74 (distinguishing between the doctrines of sentence entrapment and sentence manipulation and noting that the Sixth and Eighth Circuits have recognized the existence of some form of the sentence manipulation doctrine); Todd E. Witten, Comment, *Sentence Entrapment and Manipulation: Government Manipulation of the Federal Sentencing Guidelines*, 29 Akron L. Rev. 697, 716–34 (1996) (discussing the evolution and history behind the different circuits' treatment of sentencing entrapment and sentence manipulation).

[395] 923 F.2d at 1300.

[396] *Id.*

the Eighth Circuit addressed it in another ruling, *United States v. Stuart*,[397] this time less dismissively: "Perhaps there is such a thing as 'sentencing entrapment,' but we are not persuaded that [the defendant] has succeeded in establishing it."[398] The first court to recognize sentencing entrapment formally was a federal district court in Minnesota in 1992, in *United States v. Barth*, where the court found that the Sentencing Commission had "failed to adequately consider the terrifying capacity for escalation of a defendant's sentence based on the investigating officer's determination of when to make the arrest."[399] Based on the number of reported cases on Westlaw,[400] sentencing entrapment cases reached their peak in the period between 1996 and 1997, at least in the federal courts (the state cases are too rare to speak of a pattern), and the cases have dropped off steadily since then.[401]

Of special interest to our discussion, federal courts use the same verbiage, i.e., "predisposition," in deciding sentencing entrapment as they do in the regular entrapment defense.[402] This is also true in cases involving terrorism charges where sentencing entrapment arises as a defense.[403] Courts frame the question the same way, whether it is the

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[397] *See generally* 923 F.2d 607 (8th Cir. 1991).

[398] *Id.* at 614.

[399] 788 F. Supp. at 1057.

[400] It is difficult, if not impossible, to determine exactly how many cases involved an entrapment defense, because in trials where the defense was effective, resulting in an acquittal, there would often be no written opinion, and this would be true in many unsuccessful attempts to use the defense as well if the defendant did not appeal the conviction. Nevertheless, the aggregate numbers of cases in which entrapment occurs in written opinions must be roughly representative of its use overall, sufficiently so to serve as a proxy in making approximations.

[401] *See* Stevenson, *supra* note 10, at 45.

[402] *See, e.g.*, United States v. Knecht, 55 F.3d 54, 57 (2d Cir. 1995) (expressing that the validity of the defense has not been determined, and even if it was, the defendant was predisposed to launder proceeds from illegal activity with the knowledge that it was probably drug money); *Washington*, 44 F.3d at 1279–80 (choosing not to address the viability of the theory due to the facts of the case); United States v. Wright, No. 93–4228, 1995 WL 101300, at *3 (6th Cir. Mar. 9, 1995) (declining to address the issue of accepting the sentencing entrapment doctrine, because even in a court that accepts the doctrine, the facts of the case would not support a claim); United States v. Cotts, 14 F.3d 300, 306 n.2 (7th Cir. 1994) (stating that even if sentencing entrapment is a viable theory, defendant failed to present evidence that outrageous conduct occurred); *Stuart*, 923 F.2d at 613–14 (acknowledging the existence of the defense and elaborating upon it, but holding that the facts of the case do not warrant the defense).

[403] *See, e.g.*, United States v. Hale, 448 F.3d 971, 989 (7th Cir. 2006) ("The argument suggests 'sentencing entrapment,' which occurs when an individual predisposed to commit a lesser crime commits a more serious offense as a result of 'unrelenting government persistence.' The government overcomes an alleged entrapment defense by establishing that the defendant was predisposed to commit the offense charged." (citation omitted)).

predisposition to go from selling zero drugs to one gram (that is, to commit the crime in the first place), or to go from selling nine grams to ten. In either case, it means something like readiness, willingness, or a lack of resistance to lawbreaking.[404]

The length of sentences goes directly to the issue of incapacitation. As discussed above, incapacitation of terrorists is necessary because prevention of attacks is so important. As a policy matter, stings that produce longer periods of incapacitation for terrorists have value, and should receive a higher degree of judicial deference than usual.[405]

The scienter requirement of the "material support" statutes[406] means that undercover agents must include extra steps in the sting operations to demonstrate that the culprit meets this element.[407] Repeated or escalated acts help prove scienter, rather than merely ratcheting up a sentence, as they would for other crimes. Planning the operation around the statutory scienter requirements may necessitate repeated acts or escalating factors.

On the other hand, terrorism prosecutions have special sentencing considerations under the Sentencing Guidelines and the "material support" statutes.[408] Following a hypothetical offered by Brian Comerford,[409] under the regular Sentencing Guidelines, the base offense level for Section 2339B violations would be twenty-six, which does not include specific offense enhancements for "dangerous weapons, explo-

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[404] *See, e.g.*, Biggs v. United States, No. 99-5238, 2001 WL 128413, at *2–3 (6th Cir. Feb. 6, 2001) ("[T]he record reveals that Biggs was predisposed to deal in distribution-sized quantities of methamphetamine. Biggs was charged following the execution of a reverse-sting operation in which the government sold four pounds of methamphetamine to Biggs and his co-defendant. Biggs sought to purchase the drugs so that he could resell them in Memphis, Tennessee. Biggs met an informant at a nightclub and gave the informant $2,000 for the purchase. Later, during a telephone conversation that was recorded, the informant stated that he felt a pressing need to be rid of the four pounds of methamphetamine he was about to possess and that Biggs could have all four pounds for $5,000. Biggs accepted the bargain, delivered $2,500 to make the purchase, and was arrested after he and his co-defendant took possession of all four pounds of methamphetamine. At sentencing, Biggs stated that it was never his 'intention to buy four pounds of crystal meth.' He stated that, 'If they had not been practically give [sic] to me, I wouldn't be in the trouble I am now.'").

[405] In *United States v. Lakhani*, the defendant argued, after his primary entrapment defense failed, that he should receive a mitigated sentence because of the hint of entrapment. 480 F.3d at 186–87. The court was dismissive; his sentence remained at forty-seven years. *Id.*

[406] *See* 18 U.S.C.A. § 2339A(a) (West 2006); 18 U.S.C. § 2339B(a)(1) (2000 & Supp. IV 2004).

[407] *See* Abrams, *supra* note 172, at 21–35.

[408] *See* Comerford, *supra* note 173, at 752–56.

[409] *Id.* at 753.

sives, or the provision of support with the intent to commit or assist in the commission of a violent act."[410] If a defendant has no criminal record, and was not subject to any enhancements, the guideline range would therefore equal sixty-three to seventy-eight months;[411] except that there is an additional provision of the Sentencing Guidelines ratcheting up the sentence for "federal crimes of terrorism."[412] This terrorism enhancement increases the sentencing by twelve levels, which means that the defendant who otherwise would receive a sentence of five or six years would receive a sentence of thirty years or more.[413] Yet no defendant could receive this sentence for a "material support" charge, because the applicable criminal statute caps the punishment at fifteen years.[414] This cap serves as an ex ante limit, in theory, to the amount of "sentencing manipulation" or "sentencing entrapment" that stings could achieve in the terrorism context.

B. *Entrapment by Estoppel*

Entrapment by estoppel involves no stings and no undercover agents,[415] unlike traditional entrapment.[416] Rather, this refers to situa-

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[410] U.S. Sentencing Guidelines Manual § 2M5.3 (2004).

[411] *Id.* § 5A.

[412] *Id.* § 3A1.4.

[413] *See* Comerford, *supra* note 173, at 753–54.

[414] 18 U.S.C. § 2339B(a)(1) (2000).

[415] A few of the cases involve former government informants who had temporary authority to go along with illegal activities as part of a sting operation (or so it was claimed), but this authorization expired while the defendant continued. *See, e.g.*, United States v. Hilton, 257 F.3d 50, 55–56 (1st Cir. 2001) (arguing that the defendant's previous collaboration with the government misled him to believe that collecting child pornography was legal as long as he turned over the material to a government agent).

[416] *See* Marcus, *supra* note 1, at 47. Marcus notes that "much of the rationale for the claim implicates due process concerns under the fifth and fourteenth amendments." *Id.* There is only one academic article devoted to the subject from the last ten years. *See* Sean Connelly, *Bad Advice: The Entrapment by Estoppel Doctrine in Criminal Law*, 48 U. Miami L. Rev. 627, 647 (1994) (arguing that the defense should only apply to crimes not requiring proof of culpable intent, and that the applicability of the defense in a given case should be decided by the court, not the jury). And, in the same time period, only two bar journal articles have been devoted to the topic. *See* Mark S. Cohen, *Entrapment by Estoppel*, Colo. Law., Feb. 2002, at 45; Michael S. Pasano et al., *Using the Defense of Entrapment by Estoppel*, Champion, May 2002, at 20. Both articles are descriptive law summaries designed to aid practitioners, without advocating for a significant change in policy. *See generally* Cohen, *supra*; Pasano et al., *supra*.

Two older articles provided some of the conceptual framework for courts addressing this issue before it took on its present name. *See generally* Note, *Applying Estoppel Principles in Criminal Cases*, 78 Yale L.J. 1046 (1969); Recent Cases, *State Estopped to Prosecute Criminal Conduct Suggested by Police*, 81 Harv. L. Rev. 895 (1968) (discussing People v. Donovan, 279 N.Y.S. 2d 404 (Ct. Spec. Sess. 1967)).

tions where 1) there was an official assurance of the legality of a certain action,[417] 2) by an appropriately authorized state actor,[418] 3) followed by a reasonable reliance on the assurance by the defendant,[419] and 4) criminal charges against the defendant for carrying out the action.[420] It

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[417] *See, e.g.*, United States v. Aquino-Chacon, 109 F.3d 936, 939 (4th Cir. 1997) (holding defendant required to show "active misleading" by government); United States v. Trevino-Martinez, 86 F.3d 65, 69–70 (5th Cir. 1996); State v. Krzeszowski, 24 P.3d 485, 489–90 (Wash. Ct. App. 2001) ("active representation" by government agent required); *see also* MARCUS, *supra* note 1, at 47–49.

[418] *See, e.g.*, United States v. Mendoza, 89 F. App'x 632, 634 (9th Cir. 2004); United States v. Bunnell, 280 F.3d 46, 49–50 (1st Cir. 2002) (firearm violation); United States v. Ormsby, 252 F.3d 844, 851 (6th Cir. 2001) (holding that state government official's assurances cannot be basis of reasonable reliance for federal law firearm regulations); United States v. Spires, 79 F.3d 464, 466 (5th Cir. 1996); People v. Chacon, 12 Cal. Rptr. 3d 211, 218–19 (Cal. Ct. App. 2004); State v. Woods, 616 N.W.2d 211, 217 (Mich. Ct. App. 2000); *see also* MARCUS, *supra* note 1, at 49.

[419] The question of whether the defendant's reliance was reasonable tends to be the most common point of dispute in the cases. For a good discussion of the doctrine generally and of this point in particular, see United States v. Gil, 297 F.3d 93, 107–08 (2d Cir. 2002)*; see also* United States v. Parker, 267 F.3d 839, 844 (8th Cir. 2001) (involving child pornography case, where defendant claimed he was supplying the government with leads on other violators); United States v. Rector, 111 F.3d 503, 506–07 (7th Cir. 1997); State v. Kremlacek, No. A-98-1195, 1999 WL 759970, at *3–4 (Neb. Ct. App. 1999); MARCUS, *supra* note 1, at 47–49.

[420] A succinct explanation of this defense, distinguishing it from similar strategies a defendant could use, was explained as follows:

> Several defenses may apply when a defendant claims he performed the acts for which he was charged in response to a request from an agency of the government. . . . First, the defendant may allege that he lacked criminal intent because he honestly believed he was performing the otherwise-criminal acts in cooperation with the government. "Innocent intent" is not a defense *per se*, but a defense strategy aimed at negating the *mens rea* for the crime, an essential element of the prosecution's case. . . . A second possible defense is "public authority." With this affirmative defense, the defendant seeks exoneration based on the fact that he reasonably relied on the authority of a government official to engage him in a covert activity. The validity of this defense depends upon whether the government agent in fact had the authority to empower the defendant to perform the acts in question. If the agent had no such power, then the defendant may not rest on the "public authority" [defense]. . . . A third possible defense . . . is "entrapment by estoppel." This defense applies when a government official tells a defendant that certain conduct is legal and the defendant commits what would otherwise be a crime in reasonable reliance on the official's representation.

See United States v. Baptista-Rodriguez, 17 F.3d 1354, 1368 n.18 (11th Cir. 1994) (citation omitted); *see also* United States v. Burrows, 36 F.3d 875, 881 (9th Cir. 1994) (adopting the above passage as its own rule). A strange illustration of the foregoing distinctions can be seen operating in the background of *United States v. George*, where the prosecution requested that the defendant be acquitted, if at all, under the theory of entrapment by es-

is similar to promissory estoppel in contracts.[421] The Supreme Court addressed the doctrine in three cases, albeit without using the moniker "entrapment by estoppel."[422] The Court cites articles referring to the "estoppel" defense, but its own verbiage emphasizes the due process violation inherent in officials misleading defendants with false assurances about the legality of their proposed actions.[423]

Despite its association by name with the entrapment defense, there is little association with the rest of entrapment law;[424] inadvertent actions by state actors are usually the issue instead of planned operations, and the agent's position with the government is obvious. One similarity to the entrapment defense, however, is how rarely this defense works.[425]

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toppel, rather than a lack of the requisite mental state, to avoid creating unfavorable precedent. 266 F.3d 52, 59 n.7 (2d Cir. 2001), *vacated in part*, 386 F.3d 383 (2d Cir. 2004).

[421] *See, e.g.*, EDWARD J. MURPHY ET AL., STUDIES IN CONTRACT LAW 129 (Robert C. Clark et al. eds., 6th ed. 2003) ("The doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such a belief to his detriment. The elements of the doctrine are that (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.").

[422] United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 674–75 (1973); Cox v. Louisiana, 379 U.S. 559, 571 (1965); Raley v. Ohio, 360 U.S. 423, 426 (1959).

[423] *See Pa. Indus. Chem. Corp.*, 411 U.S. at 674.

[424] *See* Connelly, *supra* note 416, at 628 ("Entrapment by estoppel differs markedly from the traditional entrapment defense because a defendant need not show that a government official 'induced' his conduct but only that the official offered an honest, albeit mistaken, opinion that the conduct was lawful. Similarly, the defense differs from the 'outrageous government misconduct' defense that some courts have recognized as a matter of substantive due process in cases where, even though the defendant was criminally predisposed, the government induced the crime or participated in it through means that 'shock the conscience.'").

[425] In the last few years, the defense was only successful in one reported federal case. United States v. Batterjee, 361 F.3d 1210, 1219 (9th Cir. 2004). Batterjee was convicted for violating a federal statute prohibiting nonimmigrant aliens from possessing firearms or ammunition; Batterjee was residing in the United States on a student visa. *Id.* at 1212. He ordered a pistol and filled out Federal Form 4473 to obtain a permit for the weapon, indicating truthfully that he was not a citizen on the forms. *Id.* at 1212–14. He provided additional materials requested by the gun store owner, a firearms licensee, and was given assurances from the store owner that he was completing the license application properly. *Id.* at 1214. The statute prohibiting certain aliens from possessing firearms, however, was amended before the defendant's gun purchase, making it illegal for him to consummate the purchase, although the instructions on the application forms were not updated to reflect this change. *Id.* at 1215. When prosecuted, Batterjee claimed that the form and the store owner (a federal licensee) had misled him. *Id.* The district court rejected this defense, but his conviction was reversed on appeal; he reasonably relied on the licensee's representations as to his eligibility to possess a firearm. *Id.* at 1219.

The defense arises in a variety of cases (different types of crimes),[426] but most pertain to regulatory offenses, especially firearms violations.[427] It is usually a federal crime for convicted felons to purchase guns, but a surprising number decide that prohibition does not apply in their case, based on misunderstood instructions from official sources.[428] Typically, the purported assurances usually come in the form of the confusing written instructions on the permit application form, or perhaps verbal

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In state courts, entrapment by estoppel seems to have succeeded only twice in the last few years, and in one of these cases the acquittal was reversed on an appeal by the state. State v. Hagan-Sherwin, 158 S.W.3d 156, 158 (Ark. 2004) (successful estoppel defense where defendant was charged with appropriating insurance premiums for own use, where state regulators had tacitly condoned the practice); *Chacon*, 12 Cal. Rptr. 3d at 212 (successful defense at trial reversed on appeal).

Entrapment by estoppel usually arises in cases where the defendant cannot meet the test—where there was either no assurance or not reasonable reliance. *See* MARCUS, *supra* note 1, at 49 ("Defendants have had a difficult time demonstrating that these elements are all present.").

[426] Recent entrapment by estoppel cases include tax fraud, *see* United States v. Young, 350 F.3d 1302, 1309 n.7 (11th Cir. 2003), food and dairy regulations, *see* United States v. Lagrou Distrib. Sys., Inc., No. 03 CR 605, 2004 WL 524438, at *1 (N.D. Ill. Feb. 2, 2004), trafficking in endangered animals/animal products, *see* United States v. Kapp, No. 02-CR 418–1, 2003 WL 23162408, at *5 (N.D. Ill. Nov. 6, 2003), defrauding the Department of Housing and Urban Development, *see* United States v. Westover, No. 02–40012–01-SAC, 2003 WL 1904046, at *3 (D. Kan. Mar. 6, 2003), securities fraud, *see* United States v. Greyling, No. 00CR.631(RCC), 2002 WL 424655, at *1 (S.D.N.Y. Mar. 18, 2002), violation of insurance regulations, *see Hagan-Sherwin*, 158 S.W.3d at 158, operation of pyramid scheme, *see* People v. Micheau, No. 241076, 2003 WL 22358874, at *1 (Mich. Ct. App. Oct. 16, 2003), election code violations, *see* Commonwealth v. Cosentino, 850 A.2d 58, 61 (Pa. Commw. Ct. 2004), violation of alimony orders, *see* White v. White, 564 S.E.2d 700, 702 (Va. Ct. App. 2002), welfare fraud, *see* United States v. Whitecloud, 59 F. App'x 918, 919 (9th Cir. 2003), operation of nudist club, *see* Poppell v. City of San Diego, 149 F.3d 951, 959 (9th Cir. 1998), child pornography, *see Hilton*, 257 F.3d at 50, drug possession, *see* United States v. Guevara, 99 F. App'x 300, 303 (2d Cir. 2004), importation and sale of drug paraphernalia, *see* United States v. Marshall, 332 F.3d 254, 262 (4th Cir. 2003), and immigration violations. *See Mendoza*, 89 F. App'x at 634; United States v. Miranda-Ramirez, 309 F.3d 1255, 1261 (10th Cir. 2002); United States v. Alba, 38 F. App'x 707, 708–09 (3d Cir. 2002); *George*, 266 F.3d at 60 n.7. The most common crime charged is firearm violations.

[427] *See, e.g.*, *Batterjee*, 361 F.3d at 1212; United States v. Haire, 89 F. App'x 551, 553 (6th Cir. 2004); United States v. Emerson, 86 F. App'x 696, 698 (5th Cir. 2004); United States v. Kubowski, 85 F. App'x 686, 688(10th Cir. 2003); Hood v. United States, 342 F.3d 861, 863 (8th Cir. 2003); *Bunnell*, 280 F.3d at 49; United States v. Scott, 41 F. App'x 372, 375 (10th Cir. 2002); *Ormsby*, 252 F.3d at 847; Fehr v. Coplan, No. Civ. 03–59-M, 2003 WL 22489735, at *3 (D.N.H. Nov. 4, 2003); Swartz v. Iowa, No. C00–2065, 2002 WL 32173383, at *1 (N.D. Iowa Aug. 30, 2002); People v. Babich, No. A098521, 2003 WL 21958615, at *1 (Cal. Ct. App. Aug. 18, 2003); People v. Sparazynski, No. 243381, 2004 WL 345371, at *1 (Mich. Ct. App. Feb. 24, 2004); State v. Morley, No. 21357–9-III, 2004 WL 171587, at *4 (Wash. Ct. App. Jan. 29, 2004); State v. Leavitt, 27 P.3d 622, 625–28 (Wash. Ct. App. 2001); *Krzeszowski*, 24 P.3d at 489–90. These are all recent cases; surveys going back further reveal a similar predominance of firearms violations as the underlying substantive offense.

[428] *See, e.g.*, *Batterjee*, 361 F.3d at 1212.

assurances from gun shop owners,[429] who in rare cases are held to be agents of the state, due to their special role in administering the federal applications.[430] Some cases allege misleading assurances from judges, police, or probation officers.[431] Besides cases relating to eligibility to purchase firearms, there are some eligibility cases pertaining to immigration or illegal reentry.[432]

These regulatory offenses, in turn, can constitute a probation violation, so the consequences for some defendants are quite severe.[433] If one thinks of "entrapment by estoppel" primarily in terms of fudging on gun license applications and the like, the limited usefulness of the defense becomes apparent.

Entrapment by estoppel poses two special considerations in the context of antiterrorism prosecutions.[434] First, given the astute plan-

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[429] *See, e.g.*, *Scott*, 41 F. App'x at 375.

[430] *See, e.g.*, *Batterjee*, 361 F.3d at 1217; *Scott*, 41 F. App'x at 375; *Sparazynski*, 2004 WL 345371, at *2 (involving overdue permit; defendant alleged clerk at county Gun Board told defendant he had a grace period); *Fehr*, 2003 WL 22489735, at *3–4.

[431] *See, e.g.*, *Haire*, 89 F. App'x at 553 (holding that although defendant was told by state police he could own firearms this was not valid defense on federal charges); *Kubowski*, 85 F. App'x at 688 (assurances from judge); *Hood*, 342 F.3d at 865; *Ormsby*, 252 F.3d at 847 (implicit permission of sheriff's department); Swartz v. Mathes, 291 F. Supp. 2d 861, 869 (N.D. Iowa 2003); *Swartz*, 2003 WL 32173383, at *1; State v. Johnson, 83 P.3d 772, 772 (Haw. Ct. App. 2004) (unpublished table decision) (assurances of probation officer); *Babich*, 2003 WL 21958615, at *1 (sheriff returned guns to defendant's possession after confiscation); Miller v. Commonwealth, 492 S.E.2d 482, 491 (Va. Ct. App. 1997) (defense successful where probation officer authorized gun possession).

[432] *See, e.g.*, *Mendoza*, 89 F. App'x at 634; *Alba*, 38 F. App'x at 708–09; *Miranda-Ramirez*, 309 F.3d at 1258; *George*, 266 F.3d at 59 n.7; United States v. Santana Cruz, 216 F.3d 1074 (2d Cir. 2000) (unpublished table decision); United States v. Ramirez-Valencia, 202 F.3d 1106, 1108 (9th Cir. 2000); United States v. Gutierrez-Gonzalez, 184 F.3d 1160, 1162 (10th Cir. 1999); United States v. Ortegon-Uvalde, 179 F.3d 956, 957 (5th Cir. 1999); *Aquino-Chacon*, 109 F.3d at 937; United States v. Thomas, 70 F.3d 575, 575 (11th Cir. 1995).

[433] *See, e.g.*, *Spires*, 79 F.3d at 465; People v. Dingman, 55 Cal. Rptr. 2d 211, 213, 217 (Cal. Ct. App. 1996); State v. Howell, No. 97CA824, 1998 WL 807800, at *8–13 (Ohio Ct. App. Nov. 17, 1998); *see also Whitecloud*, 2003 WL 1459508, at *1 (welfare fraud violates probation); *Poppell*, 149 F.3d at 959 (operation of nudist club); *Johnson*, 83 P.3d at 772 (plea agreement in homicide case violated probation in another jurisdiction).

[434] For an interesting discussion and alternative (practitioner's) view of the defense as it might relate to terrorism-related crimes and tort litigation, see John W. Stamper, *Looking at the Events of September 11: Some Effects and Implications*, 69 DEF. COUNS. J. 152, 166–68 (2002). Stamper concludes:

> Thus, a defendant could utilize this defense—if the above requirements are met—to defend itself in a criminal or civil action brought by the government. There is some possibility that the defense could succeed if formally asserted in a civil suit, and it could still have value even if it did not succeed. In the case of a private tort suit brought in relation to the September 11 events, a defendant's reliance on an official statement or interpretation of law from the FAA could be

ning and preparation that goes into a terror-related crime, it is foreseeable that this defense could be set up in advance by soliciting official approval, with half-truths or a manipulative presentation, of various auxiliary activities (like the provision of support to an NGO operating as a front organization). A court should look askance at such official assurances relied on by sophisticated conspirators, as opposed to the more typical felon-purchaser of handguns.

Second, most antiterrorism prosecutions in the next several years will involve "material support to terror-related organizations," rather than actual bombings or hijackings.[435] As has already occurred, defendants are likely to claim reliance on the fact that the organization in question was not on some official government list of recognized terror groups, or even that some administrative agency gave assurances that the organization was in good standing. There is a problem here with private information; the donor often has better information about the true nature of a charity or NGO than do the regulatory agencies (e.g., the Internal Revenue Service) that issue certificates of tax exemption, licenses, and permits. It is foreseeable that the primary antiterrorism statutes will lend themselves to entrapment by estoppel claims, and it would be prudent to tighten the rule in anticipation of this scenario.[436]

C. *Derivative or Vicarious Entrapment*

"Derivative entrapment" (also called "vicarious entrapment") is a developing area of law.[437] Sometimes the original targets of the sting

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> relevant to whether that entity had exercised due care. This would be particularly true if the applicable standard of care was drawn from the very regulations that the FAA was interpreting and enforcing. Thus, while such reliance would provide good arguments that the airport or airline wasn't negligent in performing its security functions, it probably wouldn't trigger a true "government authorization" or "entrapment by estoppel" defense. The true form of this defense is best utilized in an action brought by the government.

Id. at 168.

[435] *See* ABRAMS, *supra* note 257, at 30 ("The government views these offenses as especially important tools in the effort to prevent terrorism.").

[436] On the topic of internationalization of entrapment law, there are two relatively recent cases from the Supreme Court of Canada applying a defense that appears to be identical to what Americans call "entrapment by estoppel." *See* Lévis (Ville) c. Tétreault, [2006] 1 S.C.R. 420, ¶ 25 (Can.); R. v. Jorgensen, [1995] 4 S.C.R. 55, ¶¶ 22–23 (Can.).

[437] *See* United States v. Hollingsworth, 27 F.3d 1196, 1204 (7th Cir. 1994); United States v. Valencia, 669 F.2d 37, 39–41 (2d Cir. 1981); Carbajal-Portillo v. United States, 396 F.2d 944, 947 (9th Cir. 1968) ("Thus we have the paradoxical situation in which the principal participant goes free because he was entrapped, while his lesser confederate must remain in prison and serve his sentence unless the 'umbrella' of [the principal's] entrapment is

operation act on their own to recruit additional members of the conspiracy,[438] but usually derivative entrapment refers to situations where the undercover agent uses an unsuspecting intermediary as a means of passing on an inducement to a distant target.[439] Some federal appellate courts have held that if the original party had a valid entrapment defense, then the friend or relative whom the culprit subsequently recruited could also use the defense.[440] In some circumstances, an en-

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stretched to cover [the lesser] as well."); United States v. Klosterman, 248 F.2d 191, 196 (3d Cir. 1957); Hassel v. Matthues, 22 F.2d 979, 979–80 (E.D. Pa. 1927). For more academic commentary and discussion, see LaFave, *supra* note 130, § 5.2(a); Nilsson, *supra* note 124, at 746 (1996); Note, *Entrapment Through Unsuspecting Middlemen*, 95 Harv. L. Rev. 1122, 1129 (1982) ("[E]ven when the government has no reason to suspect that a target of an investigation will induce a nonessential collaborator to join in criminal activity, the third party should still be able to plead entrapment if it is found that the initial target was himself entrapped."). For an excellent recent judicial discussion of the defense, including detailed analysis of appropriate jury instructions, see United States v. Turner, No. CRIM. 99–10098-RGS, 2005 WL 516007, at *3–5 (D. Mass. Mar. 4, 2005).

[438] *See, e.g.*, United States v. Pilarinos, 864 F.2d 253, 254–55 (2d Cir. 1988) (explaining how the Internal Revenue Service (the "IRS") inspector posed as a corrupt IRS employee who took bribes from taxpayers to avoid taxes; agent met two coconspirators, a priest-businessman and an accountant, who acted as middlemen and who shared in the bribe revenues; priest told the inspector that he had a client, the defendant, who was willing to pay $4000 to stop a federal audit on a gas station).

[439] *See, e.g.*, United States v. Toner, 728 F.2d 115, 127 (2d Cir. 1984) (holding that defendant is entitled to a derivative entrapment defense when the government's inducement was directly communicated to the person seeking the entrapment charge by an unwitting middleman); People v. Wiegelos, 568 N.E.2d 861, 862–64 (Ill. 1991).

[440] *See, e.g.*, United States v. Emmert, 829 F.2d 805, 808–09 (9th Cir. 1987) (rejecting defendant's derivative entrapment claim, reasoning that defendant's college roommate was not an agent of the government); *Klosterman*, 248 F.2d at 196 (friend); State v. Hunter, 586 So. 2d 319, 322 (Fla. 1991) ("When a middleman, not a state agent, induces another person to engage in a crime, entrapment is not an available defense."). The success rate of the defense seems to vary somewhat depending on the familial relationship at issue, but there are not necessarily enough cases to extrapolate a definite pattern or rule. For example, in *United States v. Mers*, a court held that a son could not claim vicarious entrapment through his father. 701 F.2d 1321, 1340 (11th Cir. 1983). In that case, the son never dealt with or even met the government's informant, any inducements to the son to traffic in drugs came from his father (a private citizen), and thus the vicarious entrapment defense was held to be unavailable. *Id.* Defenses where a sibling was the intermediary have been more successful. *See, e.g.*, *Matthues*, 22 F.2d at 979–80 (holding that bribery conviction was tainted by entrapment of brother); People v. McIntire, 591 P.2d 527, 530–31 (Cal. 1979) (reversing sister's conviction of possession of marijuana for sale where her younger brother had been entrapped). Asserting entrapment via one's spouse yields mixed results. *See* United States v. Valencia, 645 F.2d 1151, 1168–69 (2d Cir. 1980) (holding that husband's vicarious entrapment defense via his wife was potentially meritorious although the wife herself was held unable to defend on the ground of entrapment; but ultimately holding that the defense faltered because the husband could not show sufficient communication between himself and his wife); Norman v. State, 588 S.W.2d 340, 344 (Tex. Crim. App. 1979) (wife unsuccessfully argued vicarious entrapment partly via her husband). At least one grandparent derivative entrapment claim seems to have succeeded. *See, e.g.*, United

trapment defense has succeeded for the distant target;[441] but usually the defense is unsuccessful.[442]

Although the relative newness and lack of widespread acceptance[443] makes this defense less significant for purposes of this discus-

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States v. Pardue, 765 F. Supp. 513, 525–31 (W.D. Ark. 1991) (holding that grandfather's tacit derivative or vicarious entrapment argument based on entrapment of his grandson was meritorious). In a case involving an uncle and nephew the defense failed. United States v. Fernandez, No. 87 CR 75-3, 1988 U.S. Dist. LEXIS 5027, at *15 (N.D. Ill. May 27, 1988).

[441] *See* United States v. Washington, 106 F.3d 983, 993–96 (D.C. Cir. 1997) (recognizing derivative entrapment as a legally cognizable defense but stating facts of the case do not support it); United States v. Manzella, 791 F.2d 1263, 1269–70 (7th Cir. 1986) (recognizing possibility of derivative entrapment instruction, but holding that facts of the case did not support such an instruction); *Valencia*, 645 F.2d at 1168–69 (recognizing derivative entrapment defense and remanding for determination of whether there was sufficient communication from wife to defendant to support the defense). *Contra* United States v. Buishas, 791 F.2d 1310, 1313–14 (7th Cir. 1986).

[442] *See, e.g.*, United States v. Hsu, 364 F.3d 192, 202 (4th Cir. 2004) ("[W]e have expressly refused to recognize derivative entrapment as a basis for an entrapment defense."); United States v. Squillacote, 221 F.3d 542, 573–74 (4th Cir. 2000) ("[I]n the Fourth Circuit, a defendant cannot claim an entrapment defense based upon the purported inducement of a third party who is not a government agent if the third party is not aware that he is dealing with a government agent."); United States v. Hodges, 936 F.2d 371, 371 (8th Cir. 1991); United States v. Marren, 890 F.2d 924, 931 (7th Cir. 1989); *Pilarinos*, 864 F.2d at 256; United States v. Lomas, 706 F.2d 886, 891 (9th Cir. 1983); United States v. Noll, 600 F.2d 1123, 1125 (5th Cir. 1979); United States v. Gonzales, 461 F.2d 1000, 1000 (9th Cir. 1972); United States v. Turner, No. CR.A. 99-10098-RGS, 2003 WL 22056405, at *2 (D. Mass. Sept. 4, 2003) (derivative entrapment defense held unavailable where intermediary was not found to have been entrapped); Acosta v. State, 477 So. 2d 9, 9–10 (Fla. Dist. Ct. App. 1985); *Wiegelos*, 568 N.E.2d at 862–63.

[443] For example, it is difficult to find cases where it has succeeded in a state court as opposed to federal court. *See, e.g.*, People v. Van Alstyne, 46 Cal. App. 3d 900, 906–08 (Cal. Ct. App. 1975); *Hunter*, 586 So. 2d at 322; *Acosta*, 477 So. 2d at 9–10; State v. Perez, 438 So. 2d 436, 437–39 (Fla. Dist. Ct. App. 1983); State v. Agrabunte, 830 P.2d 492, 501 (Haw. 1992); *Wiegelos*, 568 N.E.2d at 862–64; Rettman v. State, 292 A.2d 107, 110 (Md. Ct. Spec. App. 1972); Commonwealth v. Silva, 488 N.E.2d 34, 41 (Mass. App. Ct. 1986); State v. McGee, 299 S.E.2d 796, 800 (N.C. Ct. App. 1983); Commonwealth v. Lindenmuth, 554 A.2d 62, 65 (Pa. Super. Ct. 1989); Ramirez v. State, 822 S.W.2d 240, 248 (Tex. App. 1991); *Norman*, 588 S.W.2d at 345–46. *But see McIntire*, 591 P.2d at 530–31 (reversing sister's conviction of possession of marijuana for sale where her younger brother had been entrapped); People v. Weatherford, 341 N.W.2d 119, 120 (Mich. Ct. App. 1983) (suggesting that vicarious entrapment defense was successful, albeit not explicitly distinguishing it from a standard entrapment charge).

About one-third of the federal circuits have explicitly refused to recognize the defense as a matter of law. *See Hsu*, 364 F.3d at 202; *Washington*, 106 F.3d at 993–94 (adopting the proposition of *United States v. Layeni*, 90 F.3d 514, 520 (D.C. Cir. 1996), that "the entrapment defense can be raised by a defendant who was induced by an unknowing intermediary at the instruction or direction of a government official or third party acting on behalf of the government (*e.g.*, an informant)" but not if "the unknowing intermediary *on his own* induces the defendant to engage in criminal activity"); *Hollingsworth*, 27 F.3d at 1207; Farah

sion, the increased use of undercover agents and elaborate sting operations in the War on Terror will probably result in more instances of second-hand recruitment, that is, someone recruited by the undercover agent in turn recruits other people.[444] In the antiterrorism context, this seems to be a desirable result. If the earlier point is correct that there is a finite set of potential recruits for terrorism, at least within our country's prosecutorial jurisdiction,[445] then the broadest net for catching them is the most efficient net. The priority of prevention makes secondhand stings particularly useful, even necessary.[446]

Conclusion

In American criminal law, the entrapment defense is distinct from other defenses and procedural safeguards in two important ways. First, it is unique in the extent to which its parameters can influence the policy and planning of enforcement agencies; second, it is distinct in its inherent relations to a single method of policing. Its connection to this solitary method (sting operations) historically connected the defense

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v. United States, Nos. 2:06-CV-39-FtM-29DNF, 2:96-cr-27-FTM-29DNF, 2006 WL 2691520, at *2 (M.D. Fla. Sept. 19, 2006) (noting that the defense is not available in the Eleventh Circuit).

[444] *See* Carleo-Evangelist, *supra* note 9.

[445] On the issues of internationalization of the entrapment defense, there is a relatively recent case from the Supreme Court of Canada that appears to reject the notion of vicarious or derivative entrapment in Canada's legal system. *See* R. v. Carosella, [1997] 1 S.C.R. 80, ¶ 137 (Can.).

It is difficult to see how the conduct of a third party could undermine the moral integrity of a prosecution if it does not affect the fairness of the trial. The law recognizes that serious improprieties on the part of the *police or prosecuting authorities*—ulterior motives for a prosecution and entrapment, to name but two examples—could be so inconsistent with the community's sense of decency that a remedy for abuse of process is warranted even if the impugned conduct did not affect the fairness of the trial. *See* D. M. Paciocco, *The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept*, 15 Crim. L.J. 315, 318–19 (1991); Andrew L.-T. Choo, *Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited*, 1995 Crim. L. Rev. 864, 866–71. However, the conduct of a potential *witness* or other third party cannot be assimilated to an abuse by the state of its investigatory powers and prosecutorial prerogative.

[446] In other areas of criminal defenses, particularly those involving constitutional rights, it is not clear that a defendant can assert Fourth or Fifth Amendment violations for searches conducted on another person or another's property that led to incriminating evidence against the defendant as a third party. *See, e.g.*, Rawlings v. Kentucky, 448 U.S. 98, 105 (1980) (defendant had no standing to contest admissibility of drugs seized from friend's purse). This point is noted by other commentators. Roger Park mentions the possibility of greater payoffs but not referring to the fruit of the poisonous tree doctrine; rather, he emphasizes what I would consider "side benefits" of harassing defendants with pretextual arrests. *See* Park, *supra* note 15, at 232.

to a finite set of crimes that lent themselves to this method, and this historical context shaped the development of its rules or elements.

The policing method in question, however, has special significance for antiterrorism efforts, and this new context necessitates a reconsideration of the traditional rules for the defense. Unlike "victimless" crimes, terrorism requires an emphasis on prevention more than punishment. This orientation toward prevention changes the scale of some policing methods, such as surveillance. Surveillance designed to detect crimes already committed, or committed repeatedly by the same criminals, allow for targeted, specific surveillance with relatively modest infringements on the civil liberties of third parties (innocent civilians). By contrast, preventing terrorism requires much more extensive and intrusive surveillance. This panoptic monitoring of large segments of the population poses much more significant infringements on everyone's privacy and civil liberties, is inconceivably costly, and relatively ineffective. Sting operations are discreet, narrowly targeted, and pragmatic, avoiding the extensive privacy invasions that surveillance brings.

Law enforcement resources are finite, and present agency directors with a zero sum game, forcing a choice between alternative methods. Spending resources on one police method diverts resources away from other alternatives; making one method "cheaper" in terms of legal obstacles will predictably shift agencies toward that method, and away from others. Sting operations are a rival method, in terms of allocating resources, to dragnet surveillance. To the extent that ubiquitous, invasive surveillance is undesirable, encouraging the use of stings for combating terrorism will decrease the use of widespread surveillance.

The entrapment defense is the primary means by which we regulate sting operations in this country. Encouraging law enforcement to use stings instead of dragnet surveillance, therefore, is achievable mostly through an adaptation of the entrapment defense. Courts or legislatures could confine such an adaptation to antiterrorism prosecutions, leaving the defense in its traditional state for the traditional crimes related to it. The present growth of antiterrorism prosecutions makes the need for a tailored entrapment defense especially urgent.