RETHINKING ENTRAPMENT

Joseph A. Colquitt*

> *Entrapment is when you, the big, bad policeman, put evil thoughts into the mind of an otherwise innocent, law-abiding citizen and so coerce him to commit a crime for which you can then arrest him.*[1]

I. INTRODUCTION

Sergeant Frazier's sarcasm may be difficult for some to understand, but a brief look at the rancor surrounding entrapment[2] provides context for his sentiments. There are two traditional approaches to entrapment: the subjective[3] and objective[4] tests. The majority position, subjective entrapment, focuses on the actions of the accused, particularly the predisposition of that accused to engage in the type of crime charged.[5] A minority of jurisdictions, by way of contrast, employs the objective model of entrapment, which focuses on the actions of law enforcement and bars over-involvement in inciting criminal activity.[6]

Law enforcement tends to dislike the objective model because it limits the measures agents can take to apprehend or otherwise discourage criminals. In

---

* Jere L. Beasley Professor of Law, University of Alabama School of Law; retired circuit judge. Sixth Judicial Circuit, Stale of Alabama. The author thanks the University of Alabama Law School Foundation for its generous support. 1 am indebted to John C. H. Miller III, Jamie Cowley, Adam A. Bollaert, Will Holmes and Daryl P. Harris, who provided thorough research assistance and helpful comments. I also acknowledge the valuable editing assistance rendered by Amanda Mulkey and Chris Schwan. Naturally, I alone remain responsible for any errors.

1. SGT. STEVEN K. FRAZIER, THE STING BOOK 137 (1994).

2. As used throughout this Article, "entrapment" and the verb "entrap" are used to refer to *improper* police procedures. *See, e.g.*, BLACK'S LAW DICTIONARY 532 (6th ed. 1990) {describing entrapment as "inducing a person to commit a crime not contemplated by him, for the purpose of instituting a criminal prosecution against him"); KENNETH R. REDDEN & GERRY W. BEYER, MODERN DICTIONARY FOR THE LEGAL PROFESSION 297 (1993) (defining entrapment as the "[inducement of an individual into a crime that the individual had not previously contemplated committing by law enforcement officers or their agents").

The words "entrap" or "entrapment" are not used in the common import that a person can be ensnared or "entrapped" by permissible police actions. *See, e.g.*, Newman v. United States, 299 F. 128, 131 (4th Cir. 1924) (noting that "[i]t is well settled that decoys may be used to entrap criminals . . . [b]ut decoys are not permissible to ensnare the innocent and law-abiding"). In that sentence, Judge Woods used "entrap" as a synonym for ensnare, a permissible use in conversation. *See also* BLACK'S LAW DICTIONARY 532 (6th ed. 1990) (listing ensnare, catch or involve as synonyms for entrap); ROGET'S INTERNATIONAL THESAURUS 277 (6th ed. 2001) (listing entrap as a synonym for ensnare). In an article on entrapment, however, it seems better to use terminology in a more careful and predictable manner. Ergo, "to entrap" and "entrapment" are used in this Article to refer to impermissible or arguably impermissible practices by police. I try to cleave to this approach throughout the Article.

3. *See* Sorrells v. United States, 287 U.S. 435,451-53 (1932).

4. *Id.* at 454-55 (Roberts, J., dissenting in part).

5. *Id.* at 451. ("The predisposition and criminal design of the defendant are relevant.").

6. *Id.* at 454-55 (Roberts, J., dissenting in part) (noting that extreme government involvement in the planning and commissioning of a crime for the sole purpose of indicting an individual should revolt any tribunal).

opposition to law enforcement, defenders of civil rights tend to dislike the subjective model of entrapment because it allows the introduction of volatile predisposition evidence in contravention of the rules of evidence.[7]

There is no consensus on entrapment, save that we are better off with it than without it. That virtually every U.S. jurisdiction recognizes some form of entrapment defense is a testament to this proposition.[8]

The problem, however, remains that no one articulation of or approach to entrapment has stabilized the doctrine.[9] Therefore, the goal of this Article is to relocate the boundaries of the entrapment debate to establish a clearer frame of reference for rethinking entrapment. This Article will not take a position in the debate over the subjective versus the objective test. Instead, it will attempt to identify ways to increase the stability of the doctrine. The way to accomplish this is to investigate incentives for continued use of disfavored methods by law enforcement, and to examine flaws in the entrapment defense. What emerges from these considerations is that fixing the entrapment defense in statutory form and/or grounding it with some constitutional support seems to enhance its legitimacy and increases acceptance of the doctrine.[10]

Chief among the flaws of entrapment is that it provides no effective disincentive to prevent law enforcement from using entrapment techniques. Even a cursory glance at the news will show readers that sting and decoy operations continue to be used by law enforcement agents across the United States.[11] Not al! of these

---

7. *See, e.g.,* FED. R. EVID. 404 (staling that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion").

8. *See,* e.g., PAUL MARCUS, THE ENTRAPMENT DEFENSE § 1.02 (2ded. 1995) ("[Tltie entrapment defense has gained general acceptance in the United States___"); PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 209(a) (1984) (noting that "[njearly every American jurisdiction now recognizes some form of entrapment defense," and providing an extensive list of statutes and decisional law).

9. As the Article will discuss below, a number of states have flip-flopped on which model of entrapment to apply or whether to rely on common law or statutory support. These include Florida, New Jersey, Alabama, Michigan and California. Moreover, in 1973, the United States Congress contemplated changing the federal test from the subjective test adopted in *Sorrells* to a more objective entrapment test by statute (S. 1, 93d Cong. § 1-3B2(b)(1973)).

10. Florida serves as an example of a state that had moved from a court-promulgated subjective test to a court-promulgated objective standard until the state legislature supplanted the court-imposed test with a subjective entrapment statute. Unwilling to surrender what it saw as important considerations on limiting the power of law enforcement, the Florida Supreme Court juxtaposed on the statutory test its own independent due process analysis grounded in the Florida Constitution. Thus, Florida has both statutory (subjective) and constitutional (objective) tests. *See infra,* text at notes 89-104.

Another example of a mixed test drawn from both statutory and constitutional law exists in New Jersey. There, the state's common law was supplanted by a statute, but not before the courts also grounded entrapment in due process. *See* State v. Abdelnoor, 641 A.2d 1102, 1106-07 (NJ. 1994) (noting that "[t]he due process entrapment defense is significantly different than the statutory entrapment defense"); State v. Johnson 606 A.2d 315,320 (NJ. 1992) ("Entrapment based on standards of due process may occur even though entrapment has not been established under a statute."); State v. Rockholt, 476 A.2d 1236, 1239-42 (NJ. 1984) (discussing both statutory and due process entrapment defenses).

11. For examples, one needs only look for stories on Ryan Anderson, the Washington National Guardsman arrested February 13, 2004, or HemanI Lakhani, the British clothing merchant nabbed August 13,2003. *See* Sarah

operations constitute entrapment, but depending on the particular test(s) involved, many do. As this Article will point out, police may not necessarily count the inability to convict an accused as a disincentive to entrap. In fact, through the use of entrapment techniques, police may be able to achieve their goals without making arrests at all.

In addition to the entrapment defense failing to deter police from engaging in entrapment techniques,[12] the defense also fails to adequately prevent arrests, prosecution and conviction. Consider, for example, Keith Jacobson, who was arrested in 1987 on child pornography charges and essentially acquitted on an entrapment defense five years later by the United States Supreme Court.[13] By the time his case was granted certiorari, he had been arrested, incarcerated, subjected to public opprobrium, tried and convicted. Moreover, he had completed his sentence of community service before his conviction was overturned.[14]

While ultimately Jacobson received the benefit of the doctrine, his predicament highlights its many shortcomings.

A. Roadmap

This Article discusses entrapment as a defense to criminal charges. Part II describes the entrapment defense, the purpose(s) it is meant to serve, and the struggles to expand or restrict the doctrine. Part HI discusses how institutional incentives perpetuate police use of entrapment techniques and the resulting failure of the entrapment defense to meet its goal(s). Part IV discusses the costs to the system as well as whether the objectives of entrapment are justified, and if so, whether reasonable alternatives capable of attaining those goals should or can be developed.[15] After focusing on the institutional incentives for law enforcement to use entrapment techniques and on the weaknesses of the defense, the Article concludes that entrapment, regardless of the model employed, substantially fails to serve its intended purpose(s).

Kershaw, *Washington Guardsman Charged With Trying to Spy for Al Qaeda*, N.Y. TIMES, Feb 19, 2004, at A1; Ronald Smothers, *Man Pleads Not Guilty in Plot To Sell Missiles for Terror Use*, N.Y. TIMES, Jan. 10,2004, at B6.

12. Of course, if managing officials in a police department choose to abide by the law and thus prohibit use of questionable decoy and sting techniques, the prohibition would serve as a real disincentive. As the text suggests, though, many departments continue to engage in decoy and sting operations even when those operations entrap.

13. Jacobson v. United States, 503 U.S. 540,553-54 (1992) (holding that "[w]hen the government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene").

14. *60 Minutes: The Sting* (CBS television broadcast, Feb. 16, 1992).

15. However, it eschews discussion of the pros and cons of the subjective versus the objective form of the entrapment defense due to the wealth of scholarly attention to that issue. For discussions of that type, *see, e.g.*, Fred Warren Bennett, *From* Sorrells *to* Jacobson: *Six Decades of Entrapment Law and Related Defenses in Federal Court*, 27 WAKE FOREST L. REV. 829, 831 (1992) (discussing the history of entrapment law, related defenses, and the merits of the subjective approach.); Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. !63,164 (1976) (discussing the subjective approach and the objective version of the defense, which he describes as the "hypothetical person" approach).

B. Gathering the Data

Gathering data to prove or disprove that entrapment does not live up to its billing is difficult[16] but enough information can be marshaled to raise more than a scintilla of proof. Obviously, obtaining data on the number of criminal cases at the trial level that involve or potentially could involve entrapment defenses would be a substantial undertaking. Further, although studying the number of entrapment-issue cases reaching the appellate courts is possible, because of the dearth of information they present, the process is not particularly enlightening. There are at least six reasons why appellate data does not indicate the number of police operations involving entrapment concerns.

First, as discussed in detail below, charges may not be brought in many cases.[17] Second, many cases in which entrapment could have been a viable defense are dismissed or settled by plea.[18] Third, the entrapment defense may have been successful at trial by either bringing about a dismissal of charges by the trial judge, or by a verdict of not guilty by the trial jury, where either failed to acknowledge the role of entrapment in the decision-making process.[19]

A review of appellate cases probably would not uncover the foregoing three

16. Nevertheless, some research was undertaken. Westlaw was trolled for any case decided by any appellate court in the United States during the year 2002 in which the word "entrapment" appeared. The cases were then scrutinized to determine which cases actually involved an entrapment defense issue, Many cases were discarded. For example, "entrapment" is also used in cases involving children "entrapped" in abandoned refrigerators.

This research, admittedly insufficient to prove the hypothesis that entrapment fails to meet its intended purpose(s), resulted in 435* appellate opinions released in 2002 which discussed"entrapment."Only 138* of these opinions actually involved an entrapment defense. Of these 138 cases, only 7* actually involved a successful entrapment defense, a fact which, on its face, gives credence to the suspicion that entrapment fails to accomplish its *raison d'itre.* In 131* cases, appellate courts rejected the defense. Reduced to its essence, over 180,000 criminal cases usually are tried by state and federal courts in a calendar year.f Of those, 11,000 are likely to be appealed.! Of that number, fewer than 10 cases involved successful appeals based on the entrapment defense. *The original search of Westlaw cases occurred in 2002. We searched the ALLCASES database using an "entrapment & da(2002)" query. Subsequent searches during 2004 returned 401,442 and 467 cases. Two of those searches used the query "entrapment & year(2Q02)". These differences are insignificant when they are compared to a) the small percentage of those cases that truly involve successful entrapment defenses and b) the 180,000 or more cases actually tried by the courts. Moreover, the float in the numbers merely reinforces the conclusion in the text that gathering the data is difficult, f This figure is the sum of the total number of federal criminal cases filed and the number of felony convictions in state courts. Statistics are taken from BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2002 (2002), *available at:* http://www.albany.edu/sourcebook/1995/pdf/t511 .pdf (last visited on November 5,2004); $ Figure from BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2002 (2002), *available at:* http://www.atbany.edu/sourcebook/l995/pdf/t568.pdf (last visited on November 5, 2004).]

17. Although ensnared in a police operation, the defendant may simply be warned, or property may be forfeited in lieu of prosecution.

18. The plea may involve punishment, and even a dismissal may be conditioned on a penalty such as forfeiture of property.

19. In these situations some will argue that the entrapment defense was successful and served its purpose. By way of contrast, this Article argues that even in cases where entrapment "succeeds," the defense leaves the defendant less than redressed. In such cases, entrapment failed to prevent arrest, stigmatization, or even incarceration. *See infra* notes 149-182 and accompanying text.

categories of cases because they likely will not be reviewed by appellate courts. The following three types of cases also are unlikely to surface in such a study because the appellate opinions fail to discuss such issues.

Fourth, despite the potential viability of an entrapment defense, the defense was not raised at trial.[20] Fifth, although raised at trial, the entrapment issue was not addressed on appeal.[21] Sixth, even though raised at trial and on" appeal, the appellate court may have resolved the appeal without ever addressing the entrapment issue.[22]

C. The History and Current Context of Entrapment

Despite the dearth of discussions of the entrapment defense in appellate decisions, it can be shown that law enforcement, even at the highest levels, continues to execute stings and decoy operations.[23] For example, from December 2001 until August 2003, federal agents conducted a sting operation against Hemant Lakhani, an Indian-born British national.[24]

According to court documents, federal agents, operating on information that Lakhani was an international arms dealer, used a cooperating witness to contact Lakhani.[25] The cooperating witness, whose identity has not been disclosed, introduced himself to Lakhani as a Muslim representing a Somalian terrorist cell and indicated that he was seeking anti-aircraft missiles and guns. Lakhani and the cooperating witness engaged in over 150 conversations during the 21-month investigation. During this period, according to court documents, Lakhani met with

20. Entrapment is not a very useful defense in many cases, and may be harmful to any other defenses Ihe defendant may be able to advance. *See, e.g.,* United States v. Lewis, 987 F.2d. 1349, 1354 (8th Cir. 1993) (explaining that because entrapment defense necessitates admitting guilt, its use may undermine attorney efforts to convince the jury that the defendant is not guilty of the crime charged).

21. Many entrapment defenses may be abandoned on appeal in order to focus on more promising issues.

22. For example, if the appellate court decides to reverse a conviction on other grounds (particularly by unanimous vote), it is quite possible that the court would forego a discussion of other issues, such as an entrapment defense, over which the judges may be disputatious.

23. In addition to the international sting operation discussed in the text, another example involved a local sting operation against alleged homosexuals in Tuscaloosa, Alabama. During 2002, Tuscaloosa police officers arrested thirty-four individuals for various offenses following a bait-and-arrest operation in a public park. Because of community complaints about homosexual activity in a public park, the police commenced an undercover operation in which a plainclothes officer loitered in the park. Once the officer was propositioned, other officers arrested the individual who approached the officer. Seventeen individuals were arrested; eight were charged with criminal solicitation and nine were charged with indecent exposure. Tuscaloosanews.com, *18 Men Arrested in Sex Sweep* (Nov. 2,2002), ovai7aWea(http-7/www.tuscaloosanews.com/apps/pbcs.dll/article?AID=/20021102/NEWS/211020350&SearchID=73186347175812 (last visited Oct. 9,2004).

24. This operation resulted in several arrests, and cases are pending. See United States v. Lakhani, Mag. No. 03-7106 (D.N.J. 2003) (explaining the charges against Lakhani).

25. Because the case is in its early stages, facts remain sketchy. The description of the investigation is taken primarily from Attachment A to the Complaint filed against Lakhani. The attachment consists of a sworn narrative by James J. Tareco, an agent of the Federal Bureau of Investigation, describing the federal investigation. Attachment A to the Complaint, United States v. Lakhani, Mag. No. 03-7106 (D.N.J. 2003).

undercover Russian officers he believed to be arms dealers and purchased from them, what he thought was an operable Russian SA-18 shoulder-fired missile for the purpose of selling the item to the cooperating witness. This sting resulted in an arrest and the prosecution is pending. Lakhani plans to rely on entrapment;[26] thus, his defense will rely on a line of cases reaching back to Prohibition.

/. *The Origins of Entrapment:* Sorrells

The progenitor case for entrapment in the United States is *Sorrells* v. *United States?*[1] The majority and dissenting opinions in *Sorrells* founded the two major strands of the entrapment doctrine: the subjective and objective tests. The majority in *Sorrells* held that the purpose of the doctrine was to protect otherwise innocent people from being induced to commit crime.[28] This position is known as the subjective test. The dissent, however, asserted that the entrapment doctrine more appropriately served to govern police conduct. This established the minority position, known as the objective test.[29]

The facts in *Sorrells* are as follows: During Prohibition, a government Prohibition agent visited the defendant's home. The defendant and one of his visitors were veterans of World War I. Upon learning this fact, the agent claimed that he too was a veteran. During his roughly hour-long visit, the agent asked the defendant as many as five times for a half gallon of whiskey. Despite being told that the defendant did not "fool with whiskey," the agent persisted.[30] Eventually the defendant procured a half-gallon of whiskey and sold it to the agent. At trial, despite character evidence in favor of the defendant, the prosecution entered evidence that the defendant was reputed to be a "rum runner."[31]

The central holding in *Sorrells* was that law enforcement officers can only create an opportunity for an already predisposed person to engage in a proscribed act or conduct.[32] The court based its holding on its conclusion that Congress did not intend the federal prohibition statute to be interpreted "at the expense of the reason of the law and producing absurd consequences or flagrant injustice."[33]

Sorrells was a case of first impression before the Supreme Court. Entrapment, however, was already established as a defense. The Court claimed that "the weight

---

26. E-mail from Henry KJingeman, Esq., Hemant Lakhani's attorney, to John C. H. Miller, HI, research assistant (February 27, 2004, 16:50:29 CST) (on file with author).

27. 287 U.S. 435 (1932).

28. *Sorrells,* 287 U.S. at 452 (holding that while law enforcement may present opportunities for predisposed individuals to break the law, it may not goad otherwise innocent parties into crime).

29. *Id.* at 458-59. {Roberts, J., dissenting in part) (stating that the court has a "public policy" role to protect the "purity of its own temple" and that misconduct on the part of an "official of government" should not be "condoned and rendered innocuous by the fact that the defendant had a bad reputation or had previously transgressed").

30. *Id* at 440.

31. *Id.* at 441.

32. *Id.* at 451 -52 (noting the relevance of the predisposition and criminal design of the defendant).

33. Sorrells v. United States, 287 U.S. 435,446 (1932).

of authority in the lower federal courts is decidedly in favor" of the availability of the defense.[34] Every federal circuit had issued an opinion approving of entrapment in like cases except the Tenth Circuit, which, while it did not actively support the defense, had not issued an opinion to the contrary.[35]

The tenor of the Court's opinion made obvious the conclusion it would draw. It accused law enforcement of unconscionable conduct, claiming that its "first and chief endeavor [had been] to cause, to create, crime in order to punish it."[36] That said, the court clearly stated that law enforcement could use traps or decoys in certain circumstances. Quoting a circuit judge, the Court stated: "It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime. But decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime."[37]

Addressing the government's contention that the defendant committed a proscribed act, police conduct or no, the court reiterated the established principle that statutory construction cannot occur "at the expense of the reason of the law and producing absurd consequences or flagrant injustice."[38] The most forceful iteration of its perspective in the case occurred when the court noted that:

> We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them.[39]

As opposed to the majority opinion's subjective approach, Justice Roberts's dissent proposed that instead of being a question of fact left to the jury, entrapment should act as a form of estoppel against law enforcement. He defined entrapment as "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."[40] He went on to cite situations in which the acts of law enforcement officers would estop the government from proving the offense charged, primarily on the public policy ground that police should not create crime where their duty is to deter its commission.[41] Roberts further suggested that:

> Proof of entrapment, at any stage of the case, requires the court to stop the prosecution, direct that the indictment be quashed, and the defen-

34. *Id.* at 443.
35. *Id.*
36. *Id.* at444.
37. *Id.* at 445.
38. *Id.* at 446.
39. Sorrclls v. United States, 287 U.S. 435,448 (1932).
40. *Id.* at 454 (Roberts, J., dissenting in part).
41. W.at453.

> dant set at liberty. If in doubt as to the facts it may submit the issue to a jury for advice. But whatever may be the finding upon such a submission the power and the duty to act remain with the court and not the jury-[42]

Thus, the two principal differences that emerge between the two tests are that the objective test focuses on police conduct rather than predisposition, and it makes entrapment a question of law for the judge rather than an issue of fact for the jury.[43]

2. The Current Anatomy of Entrapment: Decoys and Stings

The kind of operation employed in *Sorrells* still occurs today; law enforcement agents pose in any number of guises to lure people into breaking the law. The line between criminal and innocent is not always as clearly drawn as some would like. As one author has phrased it, "The history of America is littered with good guys and bad guys."[44] While both the police and the courts must decide which are which, what happens under current entrapment law is that police, who are supposed to be "good guys," and offenders, who are ostensibly the "bad guys,"[45] can instantly trade sides. The overreaching police officer and the duped offender invert this typical formulation of American justice. Police are supposed to prevent crime and protect the innocent, not create crime and ensnare the innocent.[46]

At bottom, one of the most difficult things about making sense of the world of entrapment is how police—the archetypal good guys—can resort to the methods of criminals to achieve good. Of course, trickery and deception have long been tools used by police in their war on crime.[47] Courts have acknowledged and authorized the use by police of deception and even outright dishonesty.[48] These tactics usually

---

42. *Id.* at 457.

43. *See, e.g.,* Cruz v. State, 465 So. 2d 516,521 (Fla. 1985) ("The objective test is a matter of Jaw for the trial court to decide."); People v. D'Angelo, 257 N.W.2d 655, 658 (Mich. 1977) ("The policy considerations which moved us to adopt the objective test of entrapment compel with equal force the conclusion that the judge and not the jury must determine its existence."); MARCUS, THE ENTRAPMENT DEFENSE § 6.17 (2d ed. 1995) ("In states which use the objective test, the court usually decides the question."). *But see* State v. Mullen, 216 N.W.2d 375, 382 (Iowa 1974) (holding the trial court determines entrapment as a matter of law if the facts are undisputed, but the issue is addressed to the jury if the defendant properly raises the defense and a factual dispute on the question exists in the evidence).

44. MICHAEL CORBITT, DOUBLE DEAL xi (2003).

45. The offenders are the "bad guys," despite Sergeant Frazier's sarcastic reference to "ihe big, bad policeman." *See supra* note 1 and accompanying text.

46. *See, e.g.,* People v. Makovsky, 44 P.2d 536,537 (Cal. 1935) ("The first duties of the officers of the law are to prevent, not to punish crime.").

47. *See, e.g.,* RONALD W. GLENSOR ET AL., POLICE SUPERVISION 183 (1999) (noting that for many years, trickery was the "principal method used by detectives and police officers to secure confessions and convictions"); Sorrells v. United States, 287 U.S. 435, 441 (1932) (stating that "[ajrtifice and stratagem may be employed to catch those engaged in criminal enterprises").

48. It is ironic to some that police may use deception and trickery, yet be bound by a code of ethics to "protect the innocent against deception ., .." Law Enforcement Code of Ethics contained in MARK L. DANTZKER,

surface in the form of proactive maneuvers such as decoy operations, buy-bust or sell-bust schemes, or phony fencing operations.[49] By their nature, such tactics almost invariably risk entrapment because of the amount of discretion they afford police officers.[50]

Despite law to the contrary, police may engage in operations that involve entrapment in order to combat certain forms of crime. Such operations occur most frequently with regard to crimes such as drug offenses, "quality-of-life" crimes,[51] government or corporate corruption, and street crimes.[52] These crimes—frequently numerous—may impact greatly on life in the local community, but the techniques used to defeat them are unlikely to receive scrutiny at the higher levels of the judiciary.

Police operations that border on or constitute entrapment come in many forms. Some agencies send minors into stores to attempt to purchase tobacco or alcohol.[53] Others send undercover female officers into neighborhoods to act as prostitutes[54] or as vulnerable individuals.[55] Some police patrol in decoy taxicabs in an effort to

---

UNDERSTANDING TODAY'S POLICE 282 (1995) (citations omitted). Yet the subjective test of entrapment seeks to protect the innocent (the "un-predisposed") person from the wiles of the deceptive police officer.

49. *See, e.g.*, SUSAN E. MARTIN & LAWRENCE W. SHERMAN, CATCHING CAREER CRIMINALS: THE WASHINGTON, IX, REPEAT OFFENDER PROJECT 8-9 (1986), *available at* http://www.policefoundation.org/pdf/CatchingCareer-Criminals, pdf.

50. *Id.* at 20 (noting that undercover proactive police operations "using a variety of unorthodox tactics gives officers an enormous amount of discretion... [and without supervision an] opportunity to harass, entrap, and otherwise violate a citizen's rights").

51. *See, e.g.*, William J. Bratton, *The New York City Police Department's Civil Enforcement of Quality-of-Ufe Crimes*, 3 J.L. & POL'Y 447, 448 (1995) (referring to "street prostitution, low-level drug dealing, underage drinking, blaring car radios and a host of other quality-of-life crimes"). I prefer the quality-of-life label over the older "victimless crimes" designation. *See, e.g.*, EDWIN KIESTER, JR., CRIMES WITH NO VICTIMS 3-4 (1972) (listing as victimless crimes, among other offenses, public drunkenness, gambling, prostitution, distributing pornography, certain sexual activities and illegal drug possession); DAVID A.J. RICHARDS, SEX, DRUGS, DEATH, AND THE LAW 21 n.20 (1982) ("Often the liberal critique is characterized as directed toward 'victimless crimes,' defined as drug and alcohol abuse, gambling, prostitution, and homosexuality."); George P. Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401,437 (1971) (mentioning vice and narcotics offenses as victimless crimes); Sherryl E. Michaelson, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U.L. REV. 301, 301 n.l (1984) ("In the 1960's, the controversy took the form of public demands for the decriminalization of victimless crimes.").

52. *See, e.g.*, Chillous v. State, 441 So.2d 1055, 1056 (Ala. Crim. App. 1983) (noting that "in order to deter street crimes such as purse snatchings, muggings, and robberies," the police utilized a "Decoy Squad" in a downtown area).

53. *See, e.g.*. Agenda Report, Public Safety Committee, City of Oakland, California 2 (March 25, 2003) (discussing decoy operations by the Alcoholic Beverage Action Team); http://www.canton-mi.org/Police/special.asp (last visited Nov. 7, 2004) (detailing the Canton, Michigan, Special Enforcement Unit's Decoy Operation).

54. *See* DANTZKER, *supra* note 48, at 97 (observing that female officers are used as decoys in prostitution and narcotics undercover operations); http://www.tampagov.net/dept_poLice/districts/sac_faq.asp (last visited on Nov. 11, 2004) (explaining that once complaints of prostitution are received, the Tampa, Florida, Police Street Anti-Crime Squad may attempt "to arrest the prostitutes, put a decoy officer out to arrest the person(s) picking up the prostitute or both").

55. See Chillous v. State, 441 So. 2d 1055, IO56(Ala. Crim. App. 1983) (describing decoy operation involving female officer posing as a "bum" and "feigning drunkenness").

reduce robberies.[56] In anti-drug operations, the more popular approaches are the buy-bust programs—in which an officer purchases drugs from a dealer and other officers immediately arrest the dealer—as well as the perhaps less common sell-bust operations—in which the officer sells drugs to an individual, then arrests that person for possession of drugs. These types of operations usually result in significant arrest numbers if they are conducted in areas with high rates of drug sales.[57] Similarly, in areas of high theft rates, police may use victim-decoys or set up a sting operation where police operate a pawn shop and buy stolen merchandise from thieves.

To some courts, the decoy or sting operation constitutes a questionable form of police activity that manufactures crime instead of preventing it.[58] In fact, some studies indicate that pawnshop stings actually create crime.[59] Nevertheless, many courts accept or even embrace decoy operations. For example, in *State* v. *Long*,[60] a New Jersey appellate court affirmed a conviction that arose out of a police decoy operation. According to the prosecution's evidence in *Long*, the Atlantic City Police Department sent an undercover officer to a parking lot near the Boardwalk. The officer, a "robbery decoy," had some dollar bills in his shirt pocket. He was sitting on a brick wall. Nearby, other officers stationed themselves out of sight and waited. The defendant and another individual approached the decoy. After stopping and observing the officer, they spoke with him. Then they took him by the arms and attempted to walk him toward a more remote area. The officer resisted whereupon the two individuals armed themselves with a rock and a "large brush" and accosted the officer. The other officers rushed to the decoy's aid and arrested the defendant and his associate.[61]

On appeal, the defendant argued that the trial court should have instructed the jury on the defense of entrapment. He asserted that the tactic of using an "easy prey" decoy led to a crime "manufactured by the police."[62] The New Jersey appellate court rejected this argument and observed that:

> It would be a sad commentary on our society if the mere presence of a vulnerable individual were to be held capable of inducing an ordinary

---

56. *See, e.g.*, Alice McQuillan, *Street Crime Unit Axed*, http://www.nyfinestsnews.com/streetcrimel .html (last visited Nov. 9, 2004) (reporting that "[a]bout 30 officers from the street crime unit will remain patrolling in decoy taxis to protect the city's cab drivers . . . ").

57. *See* RONALD W. GLENSOR ET AL., POLICE SUPERVISION 276 (1999) ("Buy-bust programs often yield a high number of arrests.")-

58. *See* Cruz v. State, 465 So. 2d 516,522 (Fta. 1985) {questioning police actions "seeking to prosecute crime where no such crime exists but for the police activity engendering the crime"). *See also* text accompanying notes 90-105 (discussing Florida appellate history).

59. *See, e.g.*, GLENSOR ET AL, *supra* note 57, at 183 (listing two articles that maintain "that police sting operations create crime").

60. 523 A.2d 672, 678 (NJ. Super. App. Div. 1987).

61. *Long*, 523 A.2d at 674-75.

62. *Id.* at 677.

> person to succumb to crime. We cannot through a rule of law condone such conduct at a time when decent persons are looking to the law for guidance and protection.[63]

The court found that the decoy operation did not create a "substantial risk" that an average person would be enticed into committing a crime.[64]

II. CURRENT ENTRAPMENT LAW: THE DEBATE OVER FUNCTION AND FORM

State courts have split along the lines drawn by the majority and dissent in *Sorrells.* For example, in *Rivera* v. *State*,[65] the Wyoming Supreme Court adopted the majority position: "Presently existing entrapment law serves the purpose of ensuring that a defendant is not punished who, but for government encouragement, would not have committed an offense."[66] Unfortunately, as this Article will show, current entrapment law ensures no such thing.

Other jurisdictions, like California and Vermont, follow the dissent, grounding their entrapment defense in the public policy goal of preserving the integrity of the judicial process by deterring police misconduct.[67] In the words of a Vermont decision, "the purpose of the entrapment defense is to deter improper governmental activity in the enforcement of the criminal laws."[68] Just as the entrapment defense fails in protecting individuals, presently existing entrapment defense law provides no such deterrent effect,[69] although the argument might be advanced that a true objective approach is more likely to deter than is the subjective model.

A. Differing Rationales for the Entrapment Defense

In order to address the reasons why entrapment fails, we first must define entrapment and identify rationales for its existence. As a preliminary caveat, the fact that multiple models of the entrapment defense exist frustrates attempts to define it in simple terms. Furthermore, the reason the entrapment defense exists changes according to the model chosen. An additional complication arises because in many jurisdictions, the defense was judicially crafted, while in others, entrapment was established by statute.

---

63. *Id.*

64. *Id.* (noting that a "substantial risk" is necessary to satisfy the objective element of the entrapment test).

65. 846 P.2d t (Wyo. 1993).

66. Rivera, 846 P.2d. at 4.

67. *See, e.g.,* Peoplev. Barraza, 591 P.2d 947,955 (Cal. 1979)("[W]eholdthatthepropertestofentrapmentin California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense?"); People v. TumeT, 210N.W.2d 336,342 (Mich. 1973) ("We . . . adopt an objective test of entrapment in Michigan.").

68. State v. Wilkins, 473 A.2d 295, 298 (Vt. 1983).

69. *Cf.* People v. Barraza, 591 P.2d947,954(Cal. 1979) (favorably noting Chief Justice Traynor's admonition that by adhering to the subjective approach, California courts "have seriously undermined the deterrent effect of the entrapment defense on impermissible police conduct").

In originally establishing the entrapment defense, the judiciary asserted its need to preserve the sanctity of justice and the purity of the institution. Entrapment, then, was necessary to safeguard the *idea* of justice. At the same time, however, a majority of courts entertained practical considerations in forming the doctrine. Those courts recognized that the entrapment defense could not unduly burden the prosecution by protecting otherwise guilty defendants from conviction. Given the choice between the subjective and objective models of entrapment, the majority of courts chose the subjective model. The subjective test achieved two objectives. First, the subjective test maintained the appearance of protecting the innocent, which, in turn, protected the judiciary. Second, in contrast to an objective standard, the subjective test allowed the police to apprehend some bad actors even by extraordinary means.

However, this approach contains at least two fallacies. First, it is an incontestable fact that subjective entrapment does not always protect the otherwise innocent. The mere fact that cases are reversed on entrapment grounds illustrates that the defense fails as a prophylactic measure. Second, even in cases where police activity has exceeded acceptable bounds, or the prosecution cannot support a finding of predisposition, the accused still may plead guilty or simply not know of the entrapment defense. If the judiciary's main purpose was to keep its hands clean, it would have been better served to adopt the objective test. But doing so would have meant releasing the guilty with the innocent.

Courts claim to protect the innocent with the entrapment defense. The requirement of a finding of predisposition means courts *do* not convict people who have not committed crimes. That they have accepted a collateral cost in the conviction of the occasional actually innocent accused goes largely unnoticed. Furthermore, despite the results possible under the subjective test, police protest that they incur a cost by not being able to convict bad actors. They see the accused individual who relies on entrapment as guilty. In sting and decoy operations, police are present when the accused commits the act—or at least they are present immediately thereafter. Because they can show factual guilt even without a showing of predisposition, law enforcement sees courts as protecting guilty parties with the entrapment defense. For the police and the public alike, the problem is explaining that a difference exists between the fact of the bad act and the finding of guilt necessary to establish culpability.

B. The Different Tests for Entrapment

Despite arguments as to its flawed reasoning, entrapment exists as a potential defense in all or virtually all U.S. jurisdictions,[70] albeit in different forms. The two

70. *See, e.g.*, MARCUS, *supra* note 8, at 2. ("[T]he entrapment defense has gained general acceptance in the United States___"); 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 209(a) (1984) {"'Nearly every American jurisdiction now recognizes some form of entrapment defense.").

principal forms of entrapment are subjective[71] and objective.[72] To a limited extent, some jurisdictions provide an amalgamated version.[73]

/. *Subjective Standard*

In its subjective version, entrapment "is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."[74] One explanation of the approach may be that although the defendant is factually culpable, if he was entrapped he is not legally guilty.[75] Put simply, under the subjective test police are allowed to create the opportunity for an offender to commit a crime, but may not induce its commission. Exercised legally, police may "set up" individuals predisposed to commit violations.

Regardless of how one explains it, the subjective test requires the accused to have committed the act. Defendants in subjective jurisdictions do not deny committing the proscribed act. To the contrary, their defense relies on the fact of its commission. "[B]y definition, the entrapment defense cannot arise unless the defendant actually committed the proscribed act."[76] Where used successfully in subjective jurisdictions, the entrapment defense shows that police manufactured a new criminal rather than capturing an established one.

2. Objective Standard

In its objective variant, "[p]roof of entrapment, at any stage of the case, requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty."[77] Objective entrapment acts as a form of estoppel, whereby police are forbidden to create crime when their principle duty is to deter

---

71. *See generally* Sorrells v. United Stales, 287 U.S. 435 (1932) (seminal case).

72. Batson v. Slate, 568 P.2d 973,978 (Alaska 1977) (holding that Alaska has adopted the objective theory of entrapment).

73. *See, e.g.*. State v. Rockholt, 476 A.2d 1236, 1240 (NJ. 1984) (interpreting New Jersey's statutory entrapment test as containing both subjective and objective components); England v. State, 887 S.W.2d 902,913 (Tex. Crim. App. 1994) (concluding that the Texas entrapment statute embraces a subjective-objective test).

74. *Sorrells*, 287 U.S. at 454 (Roberts, J., dissenting in part).

75. *See Sorrells*, 287 U.S. at 456 (Roberts, J., dissenting in part) (observing that "[v]iewed in its true light entrapment is not a defense [to an offender]; his act, coupled with his intent to do the act, brings him within the definition of the law"). *But cf. Sorrells*, 287 U.S. at 452:

> The defense is available, not in the view that the accused though guilty may go free, but that the government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct. The federal courts in sustaining the defense in such circumstances have proceeded in the view that the defendant is not guilty.

76. United States v. Russell, 411 U.S. 423,442 (1973) (Stewart, J., dissenting).

77. Sorrells v. United States, 287 U.S. 435,457 (1932) (Roberts, J., dissenting in pan).

it.[78] Proponents of the objective test assert that entrapment^ primary purpose is to prevent inappropriate activity by police in the enforcement of the criminal laws.[79] This is explained as a duty to protect the justice system from unscrupulous activity on the part of the police. In protecting itself from such inappropriate conduct, the judiciary has expressed outrage at the nature of law enforcement's conduct.[80] Despite its beguiling clarity, the objective entrapment test fails to establish clearly the boundaries of permissible police conduct.[81]

3. Amalgamated Standard

In its amalgamated model, "an accused who claims entrapment [must] show both that he was in fact induced, and that the conduct that induced him was such as to induce an ordinarily law abiding person of average resistance."[82]

Several jurisdictions have adopted a mixed test which contains both subjective and objective components.[83] Under an amalgamated approach, to support an entrapment defense, the evidence generally must show both that 1) the conduct of the police would induce an ordinary, law-abiding person to commit the crime, and 2) that the defendant was so induced.[84] Thus the test is objective with respect to the police conduct and subjective with regard to the defendant's response.

C. Problems of Dual Sovereignty

The entrapment doctrine within a jurisdiction may be difficult to apply, but to complicate matters even further, a state may use a form of entrapment other than the subjective standard, but the federal government utilizes only the subjective test. This potential difference makes for significant problems in consistency of outcome. For example, a predisposed defendant in a state using the objective

78. *See id.* at 454 (Stewart, J. dissenting) (slating that acts of police officers can estop the government from proving the offense).

79. *See id.* at 459 (Roberts, J-, dissenting in pan) ("The applicable principle is that court must be closed to the trial of a crime instigated by the government's own agents."); State v. Wilkins, 473 A.2d 295, 298 <Vt. 1983) (noting that "the purpose of the entrapment defense is to deter improper governmental activity in the enforcement of the criminal laws").

80. *See* Sherman v. United States, 356 U.S. 369, 378 (1958) (Frankfurter, J., concurring in the result) ("The lower courts have continued gropingly to express the feeling of outrage at conduct of law enforcers ihat brought recognition of the defense in the first instance.").

81. *See* Timothy A. Raezer, *Needed Weapons in the Army's War on Drugs: Electronic Surveillance and Informants,* 116 MIL. L. REV. 1,49(1987) (noting that the particular conduct that police officers "may or may not engage in remains unclear").

82. England v. State, 887 S.W.2d 902,913 (Tex. Crim. App. 1994).

83. *See, e.g., id.* at 913 n.10 (construing for the first time that state entrapment statute embraces not only an objective test but "also embraces a subjective component..."); Molnar v. State, 410 A.2d 37, 42 (NJ. 1980) (reading New Jersey's entrapment statute as a mixed test, containing both subjective and objective elements).

84. *See, e.g., England,* 887 S.W.2d at 913. (holding that the persuasion by law enforcement is not improper "unless it would also have induced an ordinarily lawabiding person of average resistance" and accused must "produce evidence that he was actually induced to commit the charged offense").

standard perhaps could fend off state charges with an entrapment defense, only to be convicted of federal crimes arising out of the same conduct because of the different standards used by the jurisdictions to define entrapment.[85] In that way, police conduct that offended the state's objective test might even be detrimental to an accused, because the shift to the federal standard will divert attention to the defendant's predisposition rather than the nature of the police operation. Similarly, an operation that might offend *Jacobson's* requirement that the police have evidence of predisposition at the time of first-contact[86] possibly could be pursued in a state court which uses a different predisposition standard.

D. Federal and State Jurisdictional Standards

1. Indecision and Development in State Jurisdictions

Discomfort over the potential for entrapment to ensnare innocents or to release criminals has resulted in a substantial volatility in entrapment doctrine among the states. As discussed in detail below, some state courts and legislatures have converted their tests from subjective to objective; others have moved from objective to subjective; still others have mandated both tests or adopted an amalgamated approach. By focusing on several states' approaches, one can quickly see the doctrine has few firm roots; rather in some jurisdictions, it is seemingly an ever-shifting doctrine that potentially leads police simply to ignore the doctrine or to adopt new ways to circumvent the entrapment defense. Further, this flux lends credence to the notion that without some form of solid foundation, the doctrine will generally be ineffectual. Reviewing several state doctrines and histories helps demonstrate the lack of consistency and staying power of, and support for, the entrapment doctrine.

a. Florida

Before 1985, Florida applied the subjective test of entrapment.[87] Then, in *Cruz v. State?** the Supreme Court of Florida abandoned the subjective model and

85. *See, e.g.*. United States v. Ciaiborne, 92 F. Supp. 2d 503, 506-09 (E.D. Va. 2000) (discussing dual sovereignty generally and the proposition that state and federal prosecutors may cooperate on successive prosecutions for the same criminal acts without violating due process).

86. *See* Jacobson v. United States, 503 U.S. 540, 548 n. I (1992) ("The government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped.").

87. *See* State v. Dickinson, 370 So. 2d 762, 763 (Fla. 1979) ("It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play.") (internal citations omitted); Lashley v. State, 67 So. 2d 648, 649 (Fla. 1953) ("One who is instigated, induced, or lured by an officer of the law... into the commission of a crime which he had no intention of committing may avail himself of the defense of 'entrapment.'").

88. 465So.2d516(Fla. 1985).

adopted the objective test.[89] *Cruz* involved a decoy operation. The facts were as follows:

> Tampa police undertook a decoy operation in a high-crime area. An officer posed as an inebriated indigent, smelling of alcohol and pretending to drink wine from a bottle. The officer leaned against a building near an alleyway, his face to the wall. Plainly displayed from a rear pants pocket was $150 in currency, paper-clipped together. Defendant Cruz and a woman happened upon the scene as passersby some time after 10 P.M. Cruz approached the decoy officer, may have attempted to say something to him, then continued on his way. Ten to fifteen minutes later, the defendant and his companion returned to the scene and Cruz took the money from the decoy's pocket without harming him in any way. Officers then arrested Cruz as he walked from the scene.[90]

Noting that subjective-form entrapment focuses on the issue of predisposition rather than the conduct of the police,[91] and that the subjective model allows impermissible techniques by police to lead to the conviction of predisposed defendants,[92] the Florida court decided that the objective and subjective tests were not mutually exclusive.[93] The court promulgated a new threshold test for entrapment: "Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity."[94]

The first "virtue testing" prong of the test limits police conduct that creates crime. The second prong focuses on police techniques. The court applied the test to the facts in *Cruz* and determined that the "drunken bum decoy operation" failed in two aspects. First, although the police were attempting to thwart ongoing criminal activity in a high-crime neighborhood, there was a "lack of focus" to their efforts. There was no history of "rolling drunks" in the area. Second, even had there been reports of theft from drunks in the neighborhood, the police did not reasonably tailor their operation. Instead, in the view of the court, they used enough cash to make the theft a felony under Florida law, and they placed the money in a way that it "enticingly protruded" from the decoy's pocket, creating a substantial risk of ensnaring someone not predisposed to commit a theft.[95] The Florida court noted its

89. *See* Munoz v. State, 629 So. 2d 90, 95 (Fla. 1993) (stating that "in *Cruz* ... we specifically rejected the subjective test for entrapment and adopted instead the basic principles of the objective standard of entrapment").

90. *Cruz,* 465 So. 2d at 517.

91. *Id.* af518.

92. *Id.* at 520.

93. *Id.* at 520-21.

94. Cruz v. State, 465 So. 2d 516,522 (1985).

95. *Id.*

new two-pronged test went beyond the state's subjective test for entrapment.[96]

In dissent, Justice Alderman noted that in *State v. Dickinson*[97] the Florida court had upheld the constitutionality of a state statute that established a subjective-test entrapment defense for certain crimes. Alderman's dissent noted that the *Dickinson* opinion had found the statute consistent with the state's existing entrapment test. Justice Alderman concluded that the court should not expand entrapment beyond the subjective test "explained in *Dickinson* and codified by statute."[98]

The Florida Legislature responded to *Cruz* by enacting a new subjective-model entrapment statute." After passage of the statute, the Supreme Court of Florida determined that the Florida Legislature in fact had eliminated the objective prong created in *Cruz*[lO°] and had established the subjective test,[101] but had not prevented—and without constitutional revision, could not prevent—the judiciary from reviewing entrapment issues under an objective standard via the due process clause of the Florida Constitution.[102] The Florida Supreme Court juxtaposed its due-process-based objective test on the statutorily established subjective-test entrapment defense.

b. New Jersey

Like Florida, New Jersey tended to follow the federal example by utilizing the subjective test. The courts of New Jersey applied this test until the New Jersey Supreme Court decided *State v. Talbot*[*03] In that case, the court remarked that "a point may be reached where the methods used by the State to obtain a conviction cannot be countenanced, even though a defendant's predisposition is shown."[104] Although this remark suggested that an objective test for entrapment could be used, the court gave no basis for the objective test. The court did state that the objective test should be decided by the trial judge, not the finder of fact.[105]

---

96. *Id.* at 522 ("We note that, under this threshhold (sic) test, considerations which normally might not be recognized under the subjective test may be cognizable."). Justice Overton opined in his special concurrence that the majority opinion was consistent with the *Dickinson* case and the majority approach in the United States. *Id.* at 523 (Overton, J., concurring specially). In his dissent, Justice Alderman objected to the court's "adoption of a threshhold (sic) objective test for entrapment..." *Id.* at 523 (Alderman, J., dissenting).

97. 370 So. 2d 762 (Fla. 1979).

98. Cruz v. State, 465 So. 2d 516,524 (1985) (Alderman, J., dissenting).

99. S«RA.STAT.ANN.§777.201(2004).

100. *See* Munoz v. State, 629 So. 2d 90, 91 (Fla. 1993). The court observed that "[t]he legislative history of that statute clearly reflects that section 777.201 was enacted to reinstate the federal subjective test we rejected in *Cruz*."*Id.* at 96.

101. &* Munoz, 629 So. 2d at 95-96.

102. *Id.* at 91 (referring to FLA. CONST., art. I, § 9: "No person shall be deprived of life, liberty or property without due process of law").

103. 364A.2d9(N.J. 1976).

104. rateor,364A.2datl3.

105. *Id.* ("Whether the police activity has overstepped the bounds of permissible conduct is a question to be decided by the trial court rather than the jury.").

The facts of *Talbot* are not unique. The police arrested an individual on a narcotics charge. The agents told him that they would assist him on his charge if he would assist them in making additional arrests.[106] The individual agreed, became an informant and attempted to set up a heroin sale with the defendant.[107] The informant called the defendant twice to set up a sale and then, after the initial sale, twice more to arrange a sale from the defendant to an undercover police officer.[108] Based on these facts, the court stated that the "defendant's criminal conduct, from beginning to end, was the product of the creative activity the police."[109]

The New Jersey legislature decided to enact an entrapment statute based in part on the Model Penal Code,[110] but modified the statute to establish an amalgamated test. The courts have thus construed the New Jersey statute to reflect an amalgamated test. In *State* v. *Molnar,*[xn] the New Jersey Supreme Court interpreted the statute to include both subjective and objective prongs."[2] The court reached this conclusion by stating that the statute itself focuses on the defendant's predisposition, but since it does not deal with the specific situation, it thereby allows an objective element.[113] Further, the court stated that "since it is based upon constitutional considerations of due process and fundamental fairness, this objective approach necessarily remains good law."[114]

Several cases after *Molnar* have asserted that there are situations where due process might be violated by police conduct—thereby imposing a second test in New Jersey, the objective due process test."[5] This parallels the Florida court's decision to permit defendants to use an objective test under the rubric of constitutional law despite the state legislature's insistence on a subjective test.

The actions by the Florida and New Jersey courts may portend a progression on the part of the states toward an objective test based in the due process clause of their own state constitutions. Further, the shifting rationales and split opinions demonstrate the inability of jurists to come to a common understanding when looking at the underpinnings of the doctrine.

---

106. M at 10.
107. *Id*
108. *Id.* at 10-11.
109. State v. Talbot, 364 A.2d 9, 13(NJ. 1976).
110. See MODEL PENAL CODE §2.13(2003).
111. 410A.2d37(NJ. 1980).
] 12. *Molnar,* 410 A.2d at 42 (noting that both standards have been recognized by the court).
113. *Id,*
114. *Id.*
115. See State v.Abdelnoor, 641 A.2d 1102, 1108 (NJ. 1994) (indicating that a factor of constitutional due process entrapment analysis involves objective analysis of government conduct); State v. Johnson 606 A.2d 315, 320 (N.J. 1992) (stating that "due process entrapment is like traditional objective entrapment in that it concentrates on government conduct"); State v. Rockholt, 476 A.2d 1236, J241 (NJ. 1984) (indicating diat constitutional due process requires objective analysis of government conduct).

c. Alabama

Alabama's history is quite different from that of Florida and New Jersey. Prior to the enactment of its criminal code, Alabama courts applied the subjective test.[116] In 1977, the Alabama legislature enacted a new comprehensive criminal code[117] which would become effective on May 16, 1978."[8] Section 650 of the Act both made entrapment a statutory defense and established the objective model as the statutory test.[119] The change from subjective to objective never became effective. Even before the new criminal code became law, the state's attorney general succeeded in having the legislature return to the subjective standard by repealing the new, impending objective test and retaining the still-existing subjective test.[120]

d. Michigan

In the opinion of one Michigan Supreme Court Justice, "[t]he current state of Michigan law regarding the entrapment defense is unclear."[121] The state follows a "modified" objective test, although the state's supreme court seems to have reservations about the model used. As recently as 2002, the court was asking parties to "address whether this Court should adopt the federal subjective test for

116. *See* Miller v. State, 298 So. 2d 633,638 (Ala. Crim. App. 1974) (applying subjective test).

117. *See generally* ALA. CODE §§ 13A-1-1-13A-14-5 (1975).

118. 1977 Ala. Acts 607, §9910, 918 (providing that the code was to take effect one year after passage and noting date of May 16,1977, as date of passage).

119. 1977 Ala. Act 607, § 605,828 provides:

> Entrapment is a defense to proscribed conduct that otherwise would be criminal.
>
> (1) Entrapment occurs when a law enforcement agent induces the commission of an offense, in order to obtain evidence for the purpose of criminal prosecution, by methods creating a substantial risk that the offense would be committed by one not otherwise disposed to commit it. Conduct merely affording the actor an opportunity to commit the offense does not constitute entrapment.

As explained in the Commentary to the proposed code submitted to the Alabama Legislature:

> Subsection (1) differs from the present statement of entrapment in Alabama because it focuses on whether the method of inducement created a substantial risk that the offense would be committed. Under this section the actor's prior criminal record and his predisposition to crime are irrelevant and not admissible when considering entrapment. The determination to be made is whether the inducement was sufficient to persuade one who was not otherwise disposed to commit a crime.

Commentary, Alabama Law Institute, Proposed Revision with Commentary, Alabama Criminal Code § 650, at 55 (1974). The Author of this Article served as one of the five Reporters on the criminal code project.

120. 1979 Ala. Acts 79-664, § 1,1163 (codified as ALA. CODE § 13 A-3-31 (1979)). The act provides simply that "[t]he Alabama Criminal Code adopts the present case law on entrapment." The "present case law" in Alabama was subjective. See, *e.g.*, Johnson v. State, 285 So. 2d 723, 724 (Ala. 1973) (stating that under Alabama law, "[entrapment occurs when State officers or persons under their control, incite, induce, lure, or instigate a person into committing a criminal offense, which that person would not have otherwise committed, and had no intention of committing").

121. People v. Maffett, 633 N.W.2d 339,340 (Mich. 2001) (Corrigan, C.J., dissenting on other grounds).

entrapment."[122]

The earliest Michigan case, and, incidentally, one of the first U.S. cases addressing entrapment is *Saunders v. People.*[123] In that case, an attorney approached a police officer and asked the officer to leave the door to a courtroom open. The defendant planned to enter the courtroom later that night to get court documents. The police officer talked with his superior officer and then agreed to the request. The officers waited in the darkness for Saunders to enter, and when he did, they arrested him. The majority in *Saunders* cited evidentiary flaws as a basis for dismissing the case, but the concurring opinion stated that:

> The course pursued by the officers in this case was utterly indefensible. Where a person contemplating the commission of an offense approaches an officer of the law, and asks his assistance, it would seem the duty of the latter, according to the plainest principles of duty and justice, to decline to render such assistance, and to take such steps as would be likely to prevent the commission of the offense, and tend to the elevation and improvement of the would-be criminal, rather than to his farther [sic] debasement.... The mere fact that the person contemplating the commission of a crime is supposed to be an old offender can be no excuse, much less a justification for the course adopted and pursued in this case.[124]

This appears to set an objective standard for the entrapment policy. Other early cases also seemed to bolster the objective public policy for entrapment in their discussions, although they too did not explicitly adopt the test.[125]

Michigan later followed the federal example, and adopted a subjective test without much commentary.[126] Over thirty years later, the Michigan Supreme Court shifted to the objective model.[127] In *People v. Turner,*[128] the court, in adopting the objective test, cited "the position of Justices Roberts, Frankfurter, and Stewart of the United States Supreme Court and the view articulated by Justices Marston and Campbell of [the Michigan] Supreme Court [in] adopting] an objective test of

122. People v. Johnson, 647 N.W.2d 480,490 (Mich. 2002). The court found it unnecessary to reach the issue, however, because the defendant was unable to prove entrapment. *Id.*

123. 38 Mich. 218 (1878).

124. *Id.* at 222 (Marston, J., concurring).

125. *See, e.g.*. People v. England, 192 N.W. 612, 612 (Mich. 1923) (noting law enforcement activities in regards to inducing the defendant); People v. Mclntyre, 188 N.W. 407, 408 (Mich- 1922) (same); People v. Pinkerton,44N.W. 180,181 (Mich. 1889).

126. *See* People v. Mitchell, 298 N.W. 495, 499-500 (Mich. 1941) (finding no error in the trial court's jury instruction on entrapment which focused on the issue of whether the defendant had been induced by the police to commit the crime).

127. *See* People v. Turner, 210 N.W.2d 336, 342 (Mich. 1973) (adopting an objective test of entrapment in Michigan).

128. 210 N.W.2d 336 (Mich. 1973).

entrapment. . . ."[129] The *Turner* case, though, did not end Michigan's quest for an entrapment test. The state supreme court retained the objective test in subsequent cases but the splintered opinions in those cases reflect the disagreement of the justices on the exact formulation and application of the test.[130] Moreover, the court's renewed interest in the subjective test reflects a potential volatility.[131]

e. California

In a final demonstration of judicial uncertainty about entrapment, one can survey California's cases which also reflect a defense that has been mutable. In *People* v. *Matone,*[132] perhaps the first case to solidly state grounds for the doctrine, the court used the subjective approach:

> [W]hen an officer induces a person to commit a crime which he would not have done without such inducement, the law will not punish the person so lured into the crime . . . [b]ut this is true only where the intent originates with the officer and where the defendant is induced to commit a crime which was not contemplated by him.[133]

Shortly after this decision, the United States Supreme Court decided *Sorrells,* and *posX-Sorrells* California cases continued to focus on the subjective approach.[134] Then, in 1959, the California Supreme Court decided *People v. Benford.*[135]

In *Benford,* the California Supreme Court reviewed the federal and state rationales and imposed a hybrid test.[136] Essentially, the court rejected the federal legislative-intent rationale for the defense and rested its entrapment doctrine on "sound public policy" and "good morals."[137] Moreover, despite the use of the subjective approach, the court reiterated the fact that California law barred

129. 7umer,210N.W.at342.

130. *See. e.g.*. People v. Juillet, 475 N.W.2d 786, 818 (Mich. 1991) (Griffin, J., concurring in part and dissenting in part) (disagreeing with the majority regarding whether the defendant had met the burden required for the objective test); People v. Jamieson, 461 N.W.2d 884, 910 (Mich. 1990) (Archer, J., dissenting) (noting possible other factors to consider when considering the objective test).

131. *See* People v. Johnson, 647 N.W.2d 480,490 (Mich. 2002) (inviting parties to address whether the court should adopt the federal subjective test of entrapment).

132. 4P.2d287(Cal.Dist.Ct.App. 1931).

133. *Matone,* 4 P.2d at 288 (internal citations omitted).

134. *See, e.g.*. People v. Nunn, 296 P.2d 813,819 (Cal. 1956) ("This court has held that where an accused has a pre-existing criminal intent, the fact that when solicited by a decoy he commits a crime, raises no inference of unlawful entrapment."); People v. Terry, 282 P.2d 19, 20 (Cal. 1955) (noting the entrapment defense fails if substantial evidence supports an inference that the offense originated in the defendant's mind). In People v. Makovsky, 44 P.2d 536 (Cal. 1935), the court focused on the origin of intent and barely mentioned that the police operative "was not a regular officer but was paid so much for each case in which he procured arrests for offenses. In the present case he received the sum of $7.50 for his services." *Id.* at 537.

135. 345 P.2d 928 (Cal. 1959).

136. See People v.Barraza, 591 P.2d 947,954 (Cal. 1979) (describing the California test adopted in *Benford* as representing "a hybrid position").

137. *Benford,345* P.2dat 933.

prosecutors from proffering predisposition evidence of the nature commonly allowed in other jurisdictions for the purpose of defeating entrapment defenses.[138] California's hybrid model thus consisted of a modified subjective approach.

In the view of some courts, *Benford* did not entirely resolve the issues. The California courts continued to impose a hybrid-subjective test,[139] but the *Benford* model was openly criticized by some courts.[140]

Then, in 1979, the California Supreme Court, in *People v. Barraza,*[*41] held that the objective test is the only test in California:

> [W]e hold that the proper test of entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? For the purposes of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect—for example, a decoy program—is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime.[142]

Since *Barraza,* courts in California have applied the objective test,[143] but once again it uses a hybrid approach because unlike other objective-test jurisdictions which direct the entrapment issue to the judge,[144] California courts submit the

138. *Id.* at 935 (noting thai the "evidence that defendant had previously committed similar crimes or had the reputation of being engaged in the commission of such crimes or was suspected by the police of criminal activities is not admissible on the issue of entrapment").

139. *See, e.g.*. People v. Sweeney, 357 R2d 1049,1061 (Cal. 1960) (declaring that "[e]ntrapment as a matterof law is not established where there is any substantial evidence ... from which it may be inferred that the criminal intent to commit the particular offense originated in the mind of the accused") (internal citations omitted). *See also* People v. Francis, 450 P.2d 591,599 (Cal. 1969) (quoting *Sweeney).*

140. *See, e.g.,* People v. Pijal, 109 Cal. Rptr. 230, 237 (Cal. Ct. App. 1973) (interpreting *Benford* as adopting Justice Roberts' "the government policy and police conduct theory" in *Sorrells* and lamenting the fact that the issue of entrapment nevertheless was left to the jury rather than the court).

141. 591P.Zd947(Cal. 1979).

142. *Barraza, 591 P.2dai955.*

143. *See* People v. Smith, 80 P.3d 662, 665 (Cal. 2003) ("In California, unlike in federal courts, the test for entrapment focuses on the police conduct and is objective.").

144. *See, e.g.*. People v. D'Angelo, 257 N.W.2d 655, 658 (Mich. 1977) ("The policy considerations which moved us to adopt the objective test of entrapment compel with equal force the conclusion that the judge and not the jury must determine its existence."); PAUL MARCUS, THE ENTRAPMENT DEFENSE § 6.16 (3d ed. 2002) ("In states which use the objective test, the court usually decides the question."). *But see* State v. Mullen, 216 N.W.2d 375, 382 (Iowa 1974) (holding that the trial court determines entrapment as a matter of law if the facts are undisputed, but the issue is addressed to the jury if the defendant properly raises the defense and a factual dispute on the question exists in the evidence).

issue to the jury.[145]

In sum, consistency across state lines is lacking. Most states have attempted to follow the federal doctrine established by *Sorrells,* but some state courts have begun a shift towards either a hybrid or an objective test for entrapment. These alternative approaches sometimes are based on due process;[146] other times they are court-promulgated;[147] and in yet other jurisdictions, they are statutory.[148]

2. Federal Standards - Operation Looking Glass: Success or Failure?

Unlike the volatility in state entrapment law, the federal test, while subject to debate, remains stable as the subjective test. The current state of entrapment law in federal cases comes from one of the more famous reverse-stings[149] carried out by the federal government: Operation Looking Glass. This operation led to the arrest and subsequent conviction of Keith Jacobson.[150] Because of its eventual outcome—reversal by the United States Supreme Court of Jacobson's conviction and the establishment of a more restrictive federal predisposition model—it stands to reason that Operation Looking Glass was a failure. But was it?

Consider Jacobson's so-called victory over the Postal Service, It is hardly the material of an uplifting triumph of liberty over tyranny. Instead, it inhabits a gray corner between the private life of an individual and the power of the government to act on presumptions about that individual's predilections, Jacobson, a Nebraska farmer and veteran of the armed services,[151] was arrested in 1987 for violating the

145. *See Barraza,* 591 P.2d at 956 n.6 ("In view of its potentially substantial effect on the issue of guilt, the defense of entrapment remains a jury question under the new test."); People v. Peppars, 189 Cal. Rptr. 879,883-84 (Cal. Ct. App. 1983) (stating that trial judge properly submitted entrapment issue to jury).

146. *See. e.g.,* Munoz v. Stale, 629 So. 2d 90, 98-99 (Fla. 1993) (noting that the legislature may overturn judicially-created standards as long as they do not implicate due process rights); State v. Glosson, 462 So. 2d 1082, 1085 (Fla. 1985) (looking to the due process provision of the Florida Constitution for help in determining entrapment case); State v. Johnson, 606 A.2d 315, 320 (N.J. 1992) ("Entrapment based on standards of due process may occur even though entrapment has not been established under a statute."); State v. Rockholt, 476 A.2d 1236, 1241 (NJ, 1984) (noting that even after looking at relevant code provisions, the court must do a due process check).

147. *See.e.g.,* People v. Barraza, 591 P.2d 947,955 (Cal. 1979) (layingout the California test for entrapment); People v. Turner, 210 N.W.2d 336, 342 (Mich. 1973) (establishing the Michigan test for entrapment).

148. *See, e.g.,* ALASKA STAT. § 11.81.450 (Michie 2004).

149. A reverse sting is an operation in which a government agent sells or negotiates to sell illegal items or substances to a suspect. Not all law enforcement agencies can use reverse-stings. For example, the U.S. Army prohibits such operations. *See* ARMY CID REG. 195-8, H 2-13a, *quoted in* United States v. Frazier, 30 M J. 1231, 1233 n.l (A.C.M.R. 1990) ("Under no circumstances, even to facilitate investigative activity, will USACIDC personnel or personnel employed by USACIDC in drug suppression activities, engage in the illicit possession or distribution of controlled substances or direct that others do so."); ARMY CID REG. 195-8, *H 2-13b, *quoted in* Frazier, 30 M.J. at 1233 n.l ("Under no circumstances will USACIDC personnel or personnel assigned to drug suppression duties supply controlled substances to any source, suspect or subject for any purpose.").

150. See Jacobson v. United States, 503 U.S. 540 (1992).

151. Jacobson had served in both the U.S. Army and the U.S. Navy, and was awarded the bronze star for bravery in Vietnam. *60 Minutes; The Sling* (CBS television broadcast, Feb. 16, 1992).

Child Protection Act of 1984 ("the CPA"),[152] which forbade receipt by mail of visual representations of children engaged in explicit sex acts.

In many ways the story of the case is the story of the Government's tremendous efforts to net Jacobson. How did an otherwise average, middle-aged man end up the target of a federal investigation? He bought two magazines—*Bare Boys I* and *Bare Boys II*—from an adult bookstore in California before the CPA became effective. At the time, the purchase was legal under California, Nebraska and federal law. That same month, postal inspectors found his name on the bookstore's mailing list. As Justice White phrases it in his opinion, "[tjhere followed over the next 2 1/2 years repeated efforts by two Government agencies, through five fictitious organizations and a bogus pen pal, to explore petitioner's willingness to break the new law by ordering sexually explicit photographs of children through the mail."[153]

The end result was that a federal district court convicted Jacobson of violating the CPA over his defense of entrapment.[154] Later, the Eighth Circuit upheld that conviction, again rejecting Jacobson's entrapment defense.[155]

The Supreme Court's discussion centered on the scope of the Government's efforts against Jacobson. The Court explicitly defined the contours of predisposition, and placed the burden on federal law enforcement agents of establishing that the accused was predisposed prior to first contact.[156]

The majority opinion noted that government agents contacted Jacobson in many guises, posing as the American Hedonist Society, Midlands Data Research, Heartland Institute for a New Tomorrow (HINT), and as The Far Eastern Trading Company Ltd. It noted further that many of the contacts were not simple solicitations to purchase pornography through the mail, but were couched in terms of freedom of expression, government censorship, even the grand tradition of the First Amendment.[157] One organization, HINT, even held itself out to be a lobbying organization funded through the sales of its catalogues and materials.[158]

Jacobson finally took the bait when he received a solicitation from a purported Canadian company that described the United States Government's attitudes toward pornography as "hysterical nonsense" and entirely disproportionate given the incidence of drug and other crimes in America.[159] Jacobson ordered one magazine and was arrested when he took delivery of it. When agents searched

152. I8U.S.C. § 2252(a)(2XA) (2000).

153. *Jacobson,* 503 U.S. at 543.

154. The district court case is unreported. The facts of the case are cited in *United States v. Jacobson,* 893 F.2d 999,999-1000 (8th Cir. 1990).

155. United States v. Jacobson, 916 F.2d 467,470 (8th Cir. 1990) *(en bane); see generally Jacobson,* 893 R2d 999 (partial session of the Eighth Circuit reversed the district court).

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

157. *Id* at 544-45.

158. *Id.*

159. /d. at 546.

Jacobson's home, they found only the legally purchased *Bare Boys* magazines and the materials they had supplied to him.

Though the Government relied heavily on Jacobson's purchase of *Bare Boys I* and // as a showing of predisposition prior to first contact, the Court rejected this proposition, in part because the purchases were legal at the time they were made. Furthermore, the majority took the opportunity to draw a finer distinction, opining that Jacobson's purchase "may indicate a predisposition to view sexually oriented photographs that are responsive to his sexual tastes; but evidence that merely indicates a generic inclination to act within a broad range, not all of which is criminal, is of little probative value in establishing predisposition."[160] In drawing this fine line, the Court distinguished between an interest in seeing child pornography and a predisposition to violate the law. The majority concluded that any predisposition to break the law on Jacobson's part resulted only from more than two years of Government prodding, and not from his own volition.[161]

It bears noting that the decision—a five-to-four decision—was hotly contested. Justice O'Connor's dissent declared that the majority was not refining the Court's case law on entrapment.[162] Instead, she insisted that the decision created a "chicken-and-egg" problem within entrapment, providing defendants with a ready-made defense. Under the dissent's interpretation, defendants could argue that while they had some tendency related to an illegal act, it was only after being contacted by the government that they developed a predisposition to break the law.[163]

The dissent also attempted to distinguish prior entrapment cases, arguing that the pressure agents had used against defendants in other cases—claiming to be a fellow veteran of World War I who wanted liquor, or pretending to be an addict undergoing withdrawal—was higher than here.[164] What this position fails to take into account is the extraordinary length of time involved—two-and-a half years of governmental contact. Moreover, the dissent totally ignores the constitutionally freighted arguments for free expression.

Perhaps what the dissent objected to was not the difference in pressure applied to the accused, but the fact that the revised predisposition standard provided the opportunity to interject due process concerns via a tailoring requirement, potentially grounding entrapment in the Constitution rather than the common law in future cases.

As mentioned earlier, Jacobson's ultimate success on appeal was hardly a victory. He was arrested, tried, convicted and sentenced for an ignominious crime.

160. *Id.* at 550.

161. *Id.*

162. Jacobson v. United States, 503 U.S. 540,555-57 (1992).

163. *Id.*

164. *Id.* at 558 (O'Connor, J., dissenting) (citing Sonells v. United States, 287 U.S. 435,440 (1932); Sherman v. United States, 356 U.S. 369,371 (1958)).

Beyond Jacobson, Operation Looking Glass, conducted by the United States Postal Service in the 1980s, resulted in 161 arrests across the nation. Of the active child pomographers who were located and arrested, 147 were convicted and 4 committed suicide.[165]

Keith Jacobson may have won his appeal, but most fellow Operation Looking Glass suspects, including Lowell Brown,[166] Patsy Boffardi,[167] Darrell Clough,[168] John Driscoll,[169] Llewellyn Flippen,[170] Ralph Goodwin,[171] and James Mitchell[172] were not so fortunate. Clement Bain, Robert Brase, Dale Riva and another suspect committed suicide before going to trial.[173]

Moreover, similar child-pornography stings existed before and after *Jacobson v. United States.*[174] The Customs Service conducted Operation Borderline,[175] which targeted "people involved in the importation of child pornography into the United States."[176] The operation ensnared David Duncan,[177] Victor Kalinowski,[178] Kenneth Musslyn'[79] and Allen Porter.[180] In early 1992, John Burian was nabbed in a

165. Dirk Johnson, *Postal Inspectors' Porno Entrapment Plunged Farmer into a Life of Shame,* HOUSTON CnRON.,Apr. 19, 1992, at 1A.

166. *See* United States v. Brown, 862 F.2d 1033, 1033-34 (3d Cir. 1988) (reversing trial court's post-trial judgment of acquittal and reinstating jury's verdict of guilty). Brown ordered a tape after the first contact. He did not raise entrapment as a defense.

167. *See* United States v. Boffardi, 684 F. Supp. 1263, 1269 (S.D.N.Y. 1988) (denying motion to dismiss indictment and suppress evidence based on claim of selective prosecution), *aff'd,* 872 F.2d 1022 (2d Cir. 1989) (mem.). Boffardi was a retired New York City police officer. *Boffardi,* 684 F. Supp. at 1264.

168. *See* United Stales v. Flippen, 674 F. Supp. 536, 537 (E.D. Va. 1987) (mem.) (upholding admissibility of child-pomography evidence resulting from stings directed toward Clough and Flippen).

169. *See* United Slates v. Driscoll, 852 F.2d 84, 87 (3d Cir. 1988) (upholding conviction arising out of Operation Looking Glass). Driscoll's defense violation of due process argument was rejected. *Id.* at 86.

170. *See* United States v. Flippen, No. 88-5041,1988 WL 105307 (4th Cir. 1988) (per curiam unpublished op.) (affirming conviction).

171. *See* United States v. Goodwin, 854 R2d 33, 34 (4th Cir. 1988) (affirming conviction). Goodwin responded to all contacts and ordered four magazines after receiving a catalog. His violation of due process argument was rejected.

172. *See* United States v. Mitchell, 915 F.2d 521, 526 (9th Cir. 1990) (upholding conviction based on conditional plea of guilty). Mitchell's argument that the government was guilty of outrageous conduct was rejected. *Id.*

173. *See* Douglas O. Under, *Journeying Through the Valley of Evil,* 71 N.C.L. REV. Mil, 1124-25 (1993) (discussing Robert Brase); *Defendant in Pornography Case Falls to his Death in Fairfax,* THE WASHINGTON POST (Dec. 9, 1987) (discussing Clement Bain); United Press Int'l, *Child Porn Suspect Apparent Suicide,* (Sept. 16, 1987) (reporting on Dale Riva).

174. 503 U.S. 540(1992).

175. *See. e.g.,* United Stales v. Duncan, 896 ¥.*26* 271 (7th Cir. 1990) (describing Operation Borderline, conducted in 1986, and upholding conviction arising out of the sting).

176. *Id.* at 272.

177. *See id.*

178. *See* United States v. Kalinowski, 890 F.2d 878,882 (7th Cir. 1989) (noting conviction; dismissing appeal as untimely based on failure of trial court to rule on post-conviction motions regarding sentencing issues).

179. *See* United States v. Musslyn, 865 F.2d 945, 948 (8th Cir. 1989) (per curiam) (upholding conviction based on conditional plea of guilty).

180. *See* United States v. Porter, Nos. 89-1339, 89-1473, 1990 WL 14635 (6th Cir. 1990) (per curiam unpublished op.) (affirming conviction).

comparable sting.[181] In 1998, it was George Sherman.[182] Some of these people could not prevail on an entrapment defense in a subjective-test jurisdiction (such as the federal courts) because of demonstrable predisposition. In an objective-test jurisdiction, some might have had a defense. But they were convicted and sentenced despite being ensnared in the same or similar operation that netted Keith Jacobson. Only Jacobson's case resulted in a finding of entrapment, but even his case resulted in an arrest, conviction, and a sentence of community service. On balance, the Postal Service and Customs—and some would argue, society—won.

E. Beyond Entrapment

Regardless of the test utilized in a jurisdiction, police may employ some entrapment-like practices so egregious that courts refuse to countenance them.[183] For example, courts sometimes turn away cases in which the police acted in such an inappropriate manner as to have violated due process rights.[184]

III. THE PERSISTENCE OF ENTRAPMENT AND ITS CONTINUED FAILURE

Problems with the entrapment doctrine are evident. For example, many individuals entrapped by impermissible police practices are convicted and punished despite the existence of the entrapment defense. Others are punished without being convicted. Jurisdictions that use police governance as the rationale for the entrapment defense argue that the existence of the defense deters police from engaging in conduct that would violate the rights of the citizenry. Proof, however, that the entrapment doctrine actually deters police from utilizing entrapment or quasi-entrapment[185] methods is at most very weak.[186] A similar rationale—deterrence of improper police conduct in the investigation of crime—has been advanced for the exclusionary rule which bars the use at trial of unconstitutionally

181. *See* United States v. Burian, 19 F.3d 188{5thCir. 1994) (upholding conviction based on plea of guilty resulting from Operation Looking Glass-type sting during January 1992).

182. *See* United States v. Sherman, 268 F.3d 539 (7th Cir. 2001) (upholding conviction based on guilty plea).

183. *See, e.g.*. State v. Rockholt, 476 A.2d 1236. 1241 (N.J. 1984) (discussing New Jersey's amalgamated entrapment defense and stating that police are not free to act in any fashion that they might choose because "[t]here is still constitutional due process underpinning to be observed").

184. See, *e,g.*. State v. Blanco, 2004 WL 86646 (Ha. Dist. *Cx,* App. 2004) (holding officer's conduct in drug sting violated defendant's due process rights); People v. Issacson, 378 N.E.2d 78 (N.Y. 1978) (dismissing the indictment based on denial of defendant's due process rights despite defendant's predisposition to commit the crime charged).

185. For ease of discussion in the remainder of the Article, the term "quasi-entrapment" refers to police operations or techniques which test the fringes of the entrapment defense and raise a specter of entrapment, but which may or may not constitute entrapment depending upon the facts involved or the entrapment test of used in the jurisdiction.

186. *See, e.g.*. State v. Blanco, 2004 WL 86646 (Fla. Dist. Ct. App. 2004) (holding officer's conduct in drug sting violated the defendant's due process rights).

obtained evidence."[87]

Regardless of the basis in law for defenses against entrapment, police use methods bordering on or involving entrapment because those methods help them achieve their goals. The current configuration of entrapment as a defense depends on two false premises: first, that police need to make arrests that result in convictions in order to be successful; and second, that court condemnation is a disincentive to using entrapment. Neither proposition holds up under scrutiny. Why else would police, who see themselves as a "bulwark against fear and crime," and feel that their work sustains or improves the quality of life in their jurisdiction,[188] run the risk of having arrests thrown out?

Scholars have argued that historically, police believe their responsibility ends upon making an arrest."[89] That police continue to use quasi-entrapment techniques bears out this argument. To begin with, police do not prosecute. Rather, as the name "police" indicates, their primary duty is enforcement, through investigation and observation. Thus, convicting criminals is not, by definition, the primary goal of law enforcement agents. Rather, they seek to stop or prevent crime, either through their presence, or if necessary, by making arrests. Though this proposition may seem alien, one study of several police departments revealed that few felony arrests resulted in convictions and the "fallout" rate—the number of arrests that did not result in conviction—was very high.[190]

If police do not see convictions as their primary objective, do not require convictions in their view of success and are conditioned to a high fallout rate, then the current model of entrapment serves as little or *no* disincentive to police who abuse the doctrine. Accepting arguendo that law enforcement does not need convictions to result from arrests to achieve their goals makes entrapment an appealing strategy. Police agencies may resort to stings and decoys, even illicit ones, for a number of reasons.

A. Quasi-Entrapment Techniques Bolster Public Relations and Police Image

Police agencies consistently face problems in community-police relations.[191]

187. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding inadmissible in state courts evidence seized in violation of the federal Constitution); Weeks v. United States, 232 U.S. 383, 398 (1914) (holding that in federal prosecutions Fourth Amendment bars use of evidence obtained during illegal search and seizure). *See also* the discussion of the McNabb-Mallory Rule *infra* in text accompanying noies 227-30.

188. *See* Alan F. Arcuri, *Police Pride and Self-Esteem; Indications of Future Occupational Changes,* 4 J. POLICE Sa & ADMIN. 436,441 (1976).

189. *See, e.g.,* Lawrence W. Sherman, *Police in the Laboratory of Criminal Justice, in* CRITICAL ISSUES IN POLICING 74,92 (Roger G. Dunham & Geoffrey P. Alpert eds., 3d ed. 1997) ("Police have historically viewed their responsibilities as ending when they have made an arrest.").

190. *See* Lawrence W. Sherman, *Police in the Laboratory of Criminal Justice, in* CRITICAL ISSUES IN POLICING 74,92 (Roger G. Dunham & Geoffrey P. Alpert eds., 3d ed. 1997).

191. *See, e.g.,* DANTZKER, *supra* note 48, at 208 ("One of the most persistent and perplexing problems for policing is its relations with the community."). Of course, many issues may impact on community-police

Citizens seem to gauge police effectiveness primarily by their crime-fighting successes and their response times to calls for assistance.[192] A reduction in response times may require more personnel, but changing a community's view of police effectiveness may not. Visible operations in a community likely will be viewed by many citizens as a good thing. Because it takes only a few officers to operate a sting, such operations are frequently possible without added personnel. Moreover, they may lead to a reduction in the level of crime in the area, the fearof crime among the citizenry and, therefore, a more favorable opinion of the police and their effectiveness.[193]

Police patrolling may be the "backbone" of policing a community,[194] but it can be tiresome, frustrating and fruitless. Patrolling, in addition to being routine, means police cannot always be at the scene of a crime.[195] In stark contrast, decoy and sting operations always allow police to be at the scene of the crime, albeit either hidden or in an undercover role. Moreover, patrolling may be inadequate in certain law enforcement environments. For example, in the wake of the September 11th attacks the "beat" of federal law enforcement has become global. The recent arrests of Hemant Lafchani and Ryan Anderson may or may not have resulted from the use of entrapment techniques, but the public relations boon of arresting individuals allegedly posing real, live threats to national security is undeniable.

B. Quasi-Entrapment May Help in Professional Advancement

Stings and decoy operations enhance opportunities for promotion because they increase the likelihood that officers will be involved in making arrests rather than engaged in routine patrol duties.[196] Promotional opportunities aside, an additional incentive may be that officers may favor the action and excitement of the undercover or decoy operation to the routine of patrol.

---

relations. Conuption, costs, or race and gender issues—with respect to hiring or promotion of officers, or stops, searches or arrests of citizens—greatly affect police-community relations. These topics are beyond the scope of this Article, but police coverage, responsiveness, tactics and effectiveness are within its reach.

192. *See, e.g.,* DANTZKER, *supra* note 48, at 205 ("One of the biggest concerns or complaints about police agencies is their inability to control or deter crime."); City of Santa Monica, Public Opinion Survey of the city's residents in November of 1999, *available at* http://pen.ci.santa-monica.ca.us/residents/surveys/SMResSurvey-99.pdf {last visited Sept. 27, 2004) (evaluating that response time as indicia for public evaluation of police success).

193. *See, e.g.,* DANTZKER, *supra* note 48, at 205 ("[Eliminating crime and fear leads to improved relations" between the community and the police). Fear of crime is a significant problem, particularly since the public fears crime disproportionate to the risks. *See, e.g.,* Antony P. Pate, Mary Ann Wycoff, Wesley G. Skogan & Lawrence W. Sherman, *Reducing Fear of Crime in Houston and Newark, in* 5 POLICE AND LAW ENFORCEMENT 47 (Daniel B. Kennedy & Robert J. Homant eds., 1987).

194. *See, e.g.,* DANTZKER, *supra* note 48, at 82 (denoting patrolling as "the backbone of a police agency").

195. *See, e.g.,* DANTZKER, *supra* note 48, at 54 (noting that despite public expectations, it is "unrealistic to expect patrol officers to be everywhere a crime is committed …").

196. *See, e.g.,* John Van Maanen, *Making Rank: Becoming an American Police Sergeant, in* CRITICAL ISSUES IN POLICING 167,168-69 (Roger G. Dunham & Geoffrey P. Alpert eds., 3d ed. 1997) (noting that police promotion decision-makers believe promotion candidates from other than the patrol division are better candidates).

Police who engage in undercover operations may receive promotions,[197] departmental or community awards, or favorable comments from other officers. Thus, on the one hand, awards and peer approval serve as incentives to engage in stings and decoy operations;[198] while on the other hand, court criticism or condemnation of such activities serves as a disincentive. Without effective enforcement prospects, though, the disincentive of court criticism is likely to be of little consequence to law enforcement.

C. Quasi-Entrapment Drives up Arrest Numbers Needed to Justify Funding

Stings and decoy operations can result in large numbers of arrests, thus supporting the case for the existence of a task force or agency.[199] Law enforcement, funding agencies, and the public at large assess police effectiveness not from convictions but from reduced crime rates or the number of arrests.[200] In fact, many police agencies justify their existence and operations based on an appearance of

197. Although most police agencies are probably governed by civil service laws and procedures with regard to promotion practices, meritorious performance by an officer might lead 1o, or at least enhance an officer's prospect for, promotion. For example, in 1997, a task force on police promotions for the City of Chicago recommended a promotion and testing plan for the Chicago Police Department to Mayor Richard Daley. The plan included a "merit selection" process that sought to identify and reward "police men and women who have exhibited exceptional leadership in the field." Although the officers still take an examination for promotion, up to 30 percent of promotions to sergeant and lieutenant could be "made through merit selection . . . ." Police Department and Promotion and Testing Task Force Report, City of Chicago (Jan. 16, 1997), http://www.kenlaw.com/cases/police/lieutenants/taskforcereport.html (last modified Jan. 16, 1997).

198- *See, e.g.,* DANTZKER, *supra* note 48, at 129 (discussing the impact of departmental rewards and peer review on police conduct); Martin Reiser, *Some Organizational Stresses on Policemen, 2* J. POLICE SCI. & ADMIN. 156, 158 (1974) (noting that peer group influence is a significant factor in police agencies).

199. *See, e.g.,* MARTIN & SHERMAN, *supra* note 49, at 21:

> Informal pressure to "put some meat on the table" (i.e., make more arrests) has implications for the type of targets and arrests produced. Emphasis on the number of arrests made results in greater temptations to pick "easy" (argets . . . . An exclusive focus on selecting and arresting only the most active targets, however, is likely to increase the quality of each arrest but decreases their number. Because such a strategy also increases the amount of personnel and other resources devoted to each target, a "failure" (i.e., selection of a low rate offender or failure to make an arrest) has higher costs and makes accuracy an even more critical part of the target selection process.

Id.

200- *See,* e.g., Geoffrey P. Alpert & Mark H. Moore, *Measuring Police Performance in the New Paradigm of Policing, in* CRITICAL ISSUES IN POLICING 265-66 (Roger G. Dunham & Geoffrey P. Alpert eds., 3d ed 1997) (listing reported crime rates, overall arrests, clearance rates and response rates as four "generally accepted" measures of police performance; "For most practical purposes, these are the statistics by which police departments throughout the United States are now held accountable."); John R. Hepburn, *Crime Control. Due Process, and the Measurement of Police Performance, in* 3 POLICE AND LAW ENFORCEMENT 63 (Robert J. Homant & Daniel B. Kennedy eds., 1985) ("Both professional and lay persons tend to base their assessment of police efficiency on crime rates (crimes known to the police) and clearance or arrest rates (crimes for which an arrest has been made)."). In fact, police may lose interest once an arrest has been made. *See, e.g.,* Lawrence W. Sherman, *Police in the Laboratory of Criminal Justice, in* CRITICAL ISSUES IN POLICING 74, 92 (Roger G. Dunham & Geoffrey P. Alpert eds., 3ded. 1997) ("Police have historically viewed their responsibilities as ending when they have made an arrest.").

success drawn from the numbers of cases "cleared by arrest." Departments provide offense and arrest data to budget committees or fiscal officers in an attempt to prove their effectiveness.[201] The numbers provide an easily understandable referent and aid in the appearance of effectiveness.[202]

Many specialized task-forces are multi-jurisdictional, drawing their officers from different municipal, state and perhaps even federal departments.[203] Their very survival may depend on the perception of success. Consider, for example, a narcotics task force. If agents attempt to infiltrate drug trading in the area, the unit may not last long enough to show results, but if the agents focus on the street-level sellers and buyers, the unit can show results quickly and cheaply through numerous arrests. A real-life example can be found in the United States Postal Service's Operation Looking Glass. After postal inspectors had all but eradicated the suppliers of child pornography, agents turned to arresting consumers in order to continue making arrests.[204]

D. Quasi-Entrapment Techniques Succeed Without Convictions or Even Arrests

As quality-of-life offenses such as drug dealing, prostitution or gambling expand in a neighborhood, residents may press city leaders for a solution. That solution may come through the higher number of arrests promised by the use of quasi-entrapment techniques such as stings and decoys.[205] As noted above, deterrence of street crime does not necessitate convictions. Police may seek to prevent or deter crime by pervasive presence, but it is costly to place police on

---

201. *See,* e.g., Geoffrey P. Alpert & MarkH. Moore, *Measuring Police Performance in the New Paradigm of Policing, in* CRITICAL ISSUES IN POLICING 266 (Roger G. Dunham & Geoffrey P. Alpert eds., 3d ed. 1997) (stating that city councils and city managers "have all been primed to acknowledge and use these measures" when evaluating police performance); James J. Fyfe, *Good Policing, in* CRITICAL ISSUES IN POLICING 194,201 (Roger G. Dunham & Geoffrey P. Alpert eds,, 3d ed. 1997) (referring to "enforcement 'activity' so often used to justify police budget requests").

202. *See, e.g.,* James J. Fyfe, *Good Policing, in* CRITICAL ISSUES IN POLICING 194,201 (Roger G. Dunham & Geoffrey P. Alpert eds., 3d ed. 1997) ("Quantitative measures of police activity . . . say[s] nothing about the vigor or quality of police service. . .")-

203. *See, e.g.,* myoc.com. *Major incident log for Dec. tO-16(Dec.* I7,2001),a(http7/myoc.com/community/gardengrove/news/ggblotter.shtml (describing "an underage decoy program" in Garden Grove, California, during "Zero Tolerance Month" involving an investigator from the city's Special Investigations Unit, agents from the state beverage control agency and Garden Grove Police Cadets) (last visited Nov. 9, 2004); Pleasanton Weekly Online Edition, *Police Bulletin* (June 15, 2001), *at* http://pleasantonweekly.com/morgue/2001/2001_06_I5.bulletl5.html (announcing a city-state multi-department undercover decoy operation in Pleasanton, California) (last visited Nov. 9,2004).

204. *60Minutes: The Sting* (CBS television broadcast, Feb. 16, 1992).

205. *See, e.g.,* James J. Fyfe, *Good Policing, in* THE SOCIO-ECONOMICS OF CRIME AND JUSTICE 269,276 (Brian Forst, ed., 1993) ("From a desk in police headquarters, it is very easy and often very convincing to report to a concerned city councilperson that the police response to complaints about drug dealing on 25* Street has resulted in *n* arrests."); http://www.tampagov.net/depljolice/districts/sacjaq.asp (last visited on Nov. 11,2004) (describing the Tampa, Florida, Police Street Anti-Crime Squad and its operations against prostitution, robbery, burglary and theft which includes the use of decoys).

every corner or to send patrol cars to every block. Stings and decoy operations may be attractive alternatives.[206]

Historically, police departments have used special units,[207] such as vice squads, to attack quality-of-life offenses. But it may not be possible for all police forces or agencies to bear the costs of creating and operating specialized squads. Quasi-entrapment operations provide a cheap and easy alternative. For example, if the targeted crime is the sale of alcohol to minors, sting operations may develop the evidence necessary to support the revocation of liquor licenses without the need for a criminal conviction.[208] Even if none of the arrests results in conviction, widespread, publicized use of neighborhood stings or decoys would almost certainly deter crime at least in that locale.[209]

Sometimes, police can achieve their objectives even without arrests. If the police seek to rid a neighborhood of prostitutes, they may be able to do so with decoys rather than arrests.[210] For example, in 1997, in response to a series of rapes in lower Manhattan, the New York Police Department Street Crimes Unit moved in with female decoy officers and undercover units. No arrests were made, but the series of rapes stopped within days.[211]

Likewise, seizure and forfeiture of personal and real property can serve as a powerful deterrent.[212] Whether or not they result in arrests, sting or decoy operations deter crime.

Clearly the hope of agencies like the Department of Homeland Security is that knowledge of its operations and methods will deter potential terrorists or those who might aid them.

---

206. *See, e.g.,* Alice McQuillan, *Street Crime Unit Axed,* http://www.nyfinestsnews.com/streetcrimel.html (last visited Nov. 9, 2004) (reporting that "[a]bout 30 officers from the street crime unit will remain patrolling in decoy taxis to protect the city's cab drivers .. .").

207. *See, e.g.,* Foster v. State, 13 P.3d 61, 63 (Nev. 2000) (mentioning the "Consolidated Narcotics Unit ('CNU')," a multi-unit task force of county, city and federal officers); http://www.tampagov.net/dept_police/districts/sac_faq.asp (tast visited on Nov. 11, 2004) (describing the Tampa, Florida, Police Street Anti-Crime Squad).

208. *See, e.g.,* Pleasanton Weekly Online Edition, *Police Bulletin* (June 15,2001), *at* http://pleasantonweekly-.com/roorgue/2001/2001_06_15.bu]]etl5.hunl (mentioning revocation of liquor license as possible result if retailers are "caught selling alcohol to the decoys").

209. *See, e.g.,* Pleasanton Weekly Online Edition, *Police Bulletin* (June 15,2001), *at* http://pleasantonweekly-.com/niorgue/2001/2001_06_J5.buHetl5.html (announcing for June, 2001 "a series of undercover and decoy tests throughout the city [Pleasanton, California] this month to deter the illicit sale of alcohol to minors").

210. *See, e.g.,* Fyfe, supra note 205, at 275-76. (suggesting that instead of arrests, a department might direct officers to maintain a visible presence in a neighborhood in order lo drive drug dealers out "fj]ust as they routinely have done in neighborhoods marred by street prostitution and other annoying public order offenses").

211. *See* David Kocieniewski, *Police Unit Creates Fear of Unchecked Aggression,* N. Y. TIMES, Feb. 15,1999, at Al.

212. *See. e.g.,* http:/Avww.tampagov.net/dept_police/districts/sac_faq.asp (last visited Nov. 11,2004) (explaining that in Tampa, Florida, if a person is arrested for prostitution, their "vehicle is seized and held for civil forfeiture. A hearing may be held and a $500.00 penalty assessed")

E. Arrests Result in Convictions Despite Entrapment

Studies frequently demonstrate that the vast majority of criminal cases—perhaps as high as ninety to ninety-five percent—are settled or dismissed.[213] Of the cases settled, many are resolved through plea bargaining. Comparatively speaking, few cases are resolved by trial. In a system that relies on negotiated pleas to meet institutional demands, entrapment may become just another bargaining chip during negotiations.

Offenses conducive to stings include a broad range of activities from child pornography and prostitution offenses to minor drug infractions and ticket scalping. Stigma-averse offenders are more likely to seek quick resolution of their cases rather than protracted litigation leading to increased public attention, thereby forfeiting the right to raise the entrapment defense.

F Quasi-Entrapment Fixes "Broken Windows"

In their *Atlantic Monthly* article,[215] James Wilson and George Kelling articulated a model of law enforcement that bears on the entrapment defense. They suggested that highly interactive community policing could stop crime by combining the effects of netting bad actors already in the community and sending a strong message of deterrence.

By utilizing yet another method—enforcing forfeiture[216] and nuisance[217] statutes—police attempt to make the costs of operating criminal enterprises exceed their profitability. Police might see these approaches as legitimate, useful and effective tools for law enforcement.

Quasi-entrapment techniques serve a similar purpose in the view of law enforcement. By engaging in quasi-entrapment operations in high crime areas, police announce their presence to criminals and consumers alike. By utilizing reverse stings and decoy operations, police also drive down demand for criminal

213. *See, e.g.,* Joseph A. Colquitt, *Ad Hoc Plea Bargaining,* 75 TUL. L. REV 695, 700 (2001) (noting that "in many jurisdictions, ninety to ninety-five percent of the criminal convictions are by plea of guilty")-

214. *See, e.g.,* DANTZKER, *supra* note 48, at 42 ("When the circumstances of a police arrest... do not meet the criteria of the courts ... [i]t leads to plea bargains and dismissal of legal proceedings ....").

215. James Q. Wilson and George L. Kelling, *Broken Windows,* THE ATLANTIC MONTHLY, March 1982, at 29.

216. *See, e.g.,* ALA. CODE § 13A-12-72 (1994) (addressing forfeitures of vehicles involved in gambling offenses); ALA. CODE § 13A-12-198 (1994) (providing for forfeiture of "[a]ny article, equipment, machine, materials, matter, vehicle.or other thing whatsoever" used for child pornography purposes); ALA. CODE § 13A-12-200.8 (1994) (defining property subject to forfeiture); TEX. CODE ANN. art. 18.18 (Vernon Supp. 2004) (providing for disposition of property—such as gambling devices, equipment or proceeds, prohibited weapons, obscene devices or materials, criminal instruments, or dog-fighting equipment—seized, whether or not a conviction is obtained).

217. *See, e.g.,C\L.* PENAL CODE § 11225 (West 2000) (providing for abatement and prevention of nuisances such as illegal gambling and prostitution); TEX. Civ. PRAC. & REM CODE ANN. § 125.0015 (Vernon Supp. 2004) (maintaining a nuisance, including conduct involving prostitution, obscene materials, gambling or drugs); TEX. CIV. PRAC. & REM. CODE ANN Jj 125.002 (Vernon Supp. 2004) (bringing suits to enjoin or abate nuisances).

services. The end result is that without demand for their product or activity, criminals must move to other locales or cease operations.

In addition to applying pressure to high crime areas, quasi-entrapment operations help to gather intelligence, to ensnare fugitives[218] and to remove contraband from circulation.[219] The police regularly seek to gather intelligence about on-going or planned criminal activity from informants. Those apprehended in decoy or sting operations frequently become informants and lead law enforcement to higher-level offenders. In return for information about criminal activity, the person apprehended in the sting or decoy operation may go uncharged.

Moreover, those who are arrested on fugitive warrants during sting or decoy operations are not likely to have a viable entrapment defense on those charges. Entrapment also results in the seizure of contraband. Even when officers knowingly entrap individuals they still may seize drugs or stolen articles as contraband. Whether or not charges are brought, contraband is removed from the street at little cost to the agency.

Furthermore, it is not just drug stings that lead to drug arrests. Police operating an undercover prostitution sting- and-bust may find drugs on the person arrested during a search.[220] Whether or not the search and seizure is legal, because the possession of drugs usually carries a higher penalty than does soliciting prostitution, the suspect may be arrested for possession of drugs rather than solicitation—or may be simply forced out of the area.

In sum, decoy and sting activities, whether or not crossing the entrapment boundary, are useful police undertakings in the view of many officers. Therefore, police, as stated earlier, use quasi-entrapment techniques because they help the police achieve their goals.

---

218. *See, e.g.,* News Release, Office of Media Relations, Baton Rouge (Louisiana) Police Dep't (June 6,2002) (reporting arrests, including one arrest for "Fugitive from Probation & Parole" as result of prostitution sting), *available at* http://brgov.cora/dept/brpd/news/pdfs/16_Charged_in_Prostitution_Sting.pdf; News Release, Metro Nashville (Tennessee) Police Dep't (June 3,2002) (reporting reverse prostitution sting arrests including one arrest for failure to appear warrant), *available at* http://www.police.nashville.org/news/media/2002/jun6/06032002a.htm.

219. *See, e.g.*. News Release, Office of Media Relations, Baton Rouge (Louisiana) Police Dep't (June 6,2002) (reporting arrests for possession of marijuana, cocaine and drug paraphernalia as result of prostitution sting), *available at* http://brgov.eom/dept/brpd/news/pdfs/l 6_Charged_in_Prostitution_Sting.pdf; News Release, Metro Nashville (Tennessee) Police Dep't (May 4, 2004) (reporting four arrests for possession of controlled substances as result of reverse prostitution sting), *available at* http://www.police.nashviHe.org/news/media/20004/05/04c.htm.

220. *See, e.g.,* News Release, Office of Media Relations, Baton Rouge (Louisiana) Police Dep't (June 6,2002) (reporting arrests for possession of marijuana, cocaine and drug paraphernalia as result of prostitution sting), *available at* http://brgov.com/depl/brpd/news/pdfs/l6_Charged_in_Prostituttoh_Sting.pdf; News Release, Metro Nashville (Tennessee) Police Dep't (May 4, 2004) (reporting four arrests for possession of controlled substances as result of reverse prostitution sting), *available al* http://www.police.nashville.org/news/media/2004/05/04c.htm.

IV. ENTRAPMENT'S WEAKNESSES

As a defense, entrapment is fraught with weaknesses. This Article lists and briefly discusses eight shortcomings.

A. The Non-Prophylactic Nature of the Entrapment Defense

For entrapment effectively to fulfill either of its promises—protecting the unwary innocent or controlling aberrant police behavior—the doctrine must function as a prophylactic device. As such, the entrapment doctrine ultimately is addressed to the police. To meet either of the alternative objectives, the entrapment doctrine must influence police behavior. As a prophylactic device, the doctrine tells police not to invent crime, incite it or ensnare otherwise innocent actors. If police and prosecutors understand the doctrine, adhere to its admonitions and forego operations that constitute illicit practices that goad innocents to commit crime, entrapment serves its purpose(s). If the doctrine merely is applied after arrest, and perhaps even after conviction, by dismissal of charges already brought or reversal of conviction on appeal, the ills sought to be prevented already will have occurred.[221] AH should be able to agree that allaying the ills is not the same as preventing them. The individual arrested, charged, prosecuted or convicted is stigmatized and must bear the expense of the defense (financial and otherwise) whether or not that person ultimately is released from the charge.

How police respond to the doctrine, though, is influenced by what they view as their ultimate goal. If that goal is conviction and attendant punishment, police might not use illicit or even questionable tactics because they will recognize that entrapment may bar conviction and punishment. However, when police consider their goal to be the suppression of crime or the apprehension of offenders, sting or decoy operations appeal broadly.[222] The particular lure of sting and decoy operations may be that they allow authorities to achieve their goals—institutional or personal—whether or not convictions follow.[223] As explained by Lieutenant Tony Holloway, a district commander of the Clearwater, Florida Police Depart-

---

221. *See. e.g.,* News Release, Office of Media Relations, Baton Rouge (Louisiana) Police Dep'l (June 6, 2002), *available at* http://brgov.conVdepi/brpd/news/pdfs/16_Charged_in_Prostitution_Sting.pdf. The news release lists the names, ages, addresses and charges brought against sixteen individuals following a prostitution sting. The charges include, among others, soliciting for prostitution, crime against nature, attempted intentional exposure to the AIDS virus and possession of drugs or drug paraphernalia. Now assume for a moment that the sting ensnared unwary innocents among others. Their arrest, booking and need to defend, plus the stigma arising from the publicity of the arrest hardly reinforces the idea that the entrapment doctrine effectively protects unwary innocents.

222. *E.g.,* Chris Tisch, *Mold's latest amenity: a police sting,* ST. PETERSBURG TIMES, Apr. 21, 2002, *at* http://www.sptimes.eom/2002/04/2 t/NorthPinellas/Motet_s_latest_amenit.shtml. In explaining two planned prostitution stings and one drug sting by the Clearwater, Florida, Police Department, it was reported that: "[t]he goal is to move the hookers and dealers out of town instead of from place to place within the city limits."

223. *See supra* Pan III of this Article (discussing police incentives to engage in entrapment-laden activities).

ment: "If you do police work by the book, you're never going to win."[224]

Despite any potential constitutional issues of court-made rules governing police (as executive branch officials) practices, entrapment is not the only area of the law in which the courts generally and the United States Supreme Court in particular have attempted to control the behavior of law enforcement authorities by establishing non-constitutional-law-based prophylactic rules.[225]

In *McNabb v. United States*?[26] the Court addressed the perceived need for law enforcement officers to bring arrested individuals before magistrates or judges in a prompt manner.[227] In *Mallory v. United State*ş[228] the Supreme Court held inadmissible a confession by an accused rapist because the officers had not taken the accused before a federal magistrate in a timely fashion.[229] The result of these cases, known as the McNabb-Mallory Rule, was to prevent the use of confessions made by persons detained for an "unreasonable" period without having an opportunity to appear before a judicial officer. Congress eventually essentially abrogated the McNabb-Mallory Rule by statute.[230]

Unlike the McNabb-Mallory Rule, the entrapment doctrine is still very much alive, although not necessarily well. Overall, it does not serve as the effective deterrent its proponents sought.

B. The Dubious Basis for the Doctrine

The entrapment defense generally is grounded neither in constitutional nor

---

224. Chris Tisch, *Motel's latest amenity: a police sting*, ST. PETERSBURG TIMES, Apr. 21, 2002, *at* http://www.sptimes.com/2002/04/21/NorthPi neIlas/MoteLs_laiest_amenit.shtml.

225. *See, e.g.*, ALA. R. CRIM. P. 4.2 (providing Ihat an arrested person shall be given an opportunity to make a telephone call without undue delay).

226. 3I8U.S.332(1943).

227. *McNabb*, 318 U.S. at 342 (noting that statutes requiring law enforcement present those persons arrested in front of a "committing authority" appear on the books of almost all states).

228. 354 U.S. 449 (1957).

229. *Mallory*, 354 U.S. at 455-56. FED. R. CRIM. P. 5(a)(l)(A) provides, with certain exceptions, that "[a] person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless a statute provides otherwise."

230. Congress eventually responded to the McNabb-Mallory Rule by providing that a voluntary confession may be admissible in a federal prosecution despite delay by law enforcement officers in bringing an arrested individual before a judicial officer. The congressional action essentially abrogated the McNabb-Mallory Rule, although the statute provides only a six-hour window during which confessions will not be deemed inadmissible solely because of a delay in taking a person before a magistrate. Of course, if the confession was improperly obtained by way of intimidation, coercion or other inappropriate means, use of the confession may be barred, but reasonable delay in presenting the person to a magistrate is not, in itself, sufficient reason to bar prosecutorial use of a confession.

Subsequent to the statutory abrogation of the McNabb-Mallory Rule, the Supreme Court determined that the statute does not govern the period suspects are held by state authorities.

Of course, the McNabb-Mallory Rule was not applicable to state prosecutions because it was not based on constitutional law. Moreover, the state authorities, like Congress, were not enamored with the McNabb-Mallory Rule. Many state appellate courts rejected its premise.

common law. Rather than being drawn from constitutional law or precedent, the entrapment defense essentially sprang from the United States Supreme Court's construction of an unexpressed intent on the part of Congress that its criminal statutes would not be used to ensnare unwary innocent actors.[231]

Similarly, in many states, entrapment is a court-created defense.[232] Because of its status as a creature of the courts rather than a statute or executive order, police and prosecutors, as representatives of the executive branch, are all but impervious to its effects. For most practical purposes, only when they seek convictions does entrapment affect their practices. Judicially-decreed defenses are less likely to deter police use of quasi-entrapment techniques than are statutes or instructions issued within the hierarchy of the executive branch. Put simply, even where the entrapment defense is established by statute or executive order, police actors will continue to abuse the doctrine.[233] In the absence of legislative mandates or execution orders, prosecutors also may not abide by the entrapment doctrine; instead, they may just dump or plea bargain cases if entrapment becomes a viable issue.

In addition to these problems, in jurisdictions where entrapment is a court-created defense, police may be cynical about the doctrine.[234] Aside from its questionable basis as judge-made law, among the common law nations, only the jurisdictions of the United States make entrapment defenses generally available to criminal defendants.[235]

C. Judicial System Dilution of Impact

Despite being a creature of the judicial system, the strength of the entrapment doctrine is weakened by the very machinations of that system. In many instances, prosecutors exercise considerable discretion in the bringing of criminal charges. In

---

231. *See* Sorreils v. United Slates, 287 U.S. 435,452 (1932) (noting that Congress could not have intended for the accused to be required to argue entrapment after pleading guilty, but rather, "the Government cannot be permitted to contend [the accused] is guilty of a crime where the government officials are the instigators of the conduct").

232. *See, e.g.,* Cooper v. State, 288 S.W.2d 762,763 (Tex. Crim. App. 1956); Langford v. State, 149 So. 570, 571 (Fla. 1933); People v. Mitchell, 298 N.W. 495,499 (Mich. 1941); Nelson v. Roanoke, 135 So. 312,313 (Ala. CtApp. 1931); People v. Norcross, 234 R 438,441 (Cal.Dist.Ct.App. 1925); People v.Tomasovich, 206 P. 119, 125 (Cai. Dist.Ct. App. 1922); State v. Dougherty, 93 A. 98,101 (NJ. Sup. Ct. 1915).

233. *See, e.g.*. State v. Blanco, No. 4D03-113, 2004 WL 86646, at *3 (Fla. DisL Ct. App. 2004) (per curiam) (holding officer's conduct in drug sting violated defendant's due process rights).

234. *See, e.g.,* DANTZKER, *supra* note 48, at 42 ("When the circumstances of a police arrest… do not meet the criteria of the courts … [i]t also leads to plea bargains and dismissal of legal proceedings that upset the police.").

235. *See* SIMON BRONITT & BERNADETTE MCSHERRY, PRINCIPLES OF CRIMINAL LAW 870-71 (2001) (stating that England and Australia have refused to recognize entrapment as a defense while noting Australian, Canadian and English cases that have recognized somewhat limited judicial discretion used to stay proceedings or to exclude evidence in egregious cases); GEORGE FLETCHER, RETHINKING CRIMINAL LAW § 7.3, at 541 (1978) (noting that the entrapment defense is "virtually unique to the criminal jurisprudence of the United States"); MARCUS, THE ENTRAPMENT DEFENSE § 1.02, at 2 (3d ed. 2002) (stating that British courts generally reject entrapment as a defense).

obvious cases of entrapment, prosecutors have considerable incentives to decline prosecution or enter into a plea bargain. Should a prosecutor take either course of action due to a potentially strong entrapment defense, though an individual defendant will be spared further embarrassment, any deterrent effect on the police may be lost if the entrapment never comes to light. Publicity-averse defendants may prefer early resolution rather than the media attention that might accompany vindication.

Even when entrapment issues do reach the court, in subjective-test jurisdictions the question usually—but not always[236]—is submitted to the jury. Because a prosecutor in a subjective-test case is entitled to present evidence of the accused's predisposition—frequently in the form of reputation or character evidence—it is foreseeable that even if the evidence shows extensive manipulation and enticement by government agents, the jury may convict.[237] In fact, juries may convict career criminals based on predisposition evidence rather than on a showing of guilt for the crime in question.[238]

D. Non-Availability of Entrapment

Whether the entrapment doctrine seeks to protect the unwary innocent or to control police behavior, a significant problem surfaces in the limitations placed on its availability. Under the subjective test, the entrapment defense is not available to predisposed defendants.[239] Thus, in subjective-rule jurisdictions, police operations that ensnare predisposed individuals potentially are beyond entrapment's reach, and any interest in corralling police behavior in such cases is thwarted unless the police misconduct rises to the level of denial of due process, a limit that itself might be unavailable in this context.[240]

Similarly, entrapment generally is unavailable to persons seduced by the

---

236. Entrapment may sometimes be "established as a matter of law." *See, e.g.,* Sherman v. United States, 356 U.S. 369,373 (1958) (concluding that Sherman was entrapped as a matter of law based on undisputed evidence on the issue of entrapment).

237. *See, e.g., id.* at 382 (Frankfurter, J., concurring) (noting that under the subjective test, the "defendant must forego the claim of entrapment or run the substantial risk that, in spite of instructions, the jury will allow a criminal record or bad reputation to weigh in its determination of guilt of the specific offense of which he stands charged").

238. In part, this is why California, even in its hybrid-subjective-test era, did not permit predisposition evidence, *See, e.g.*. People v. Benford, 345 P.2d 928, 935 (Cal. 1959) (en bane) (noting that "evidence that defendant had previously committed similar crimes or had the reputation of being engaged in the commission of such crimes or was suspected by the police of criminal activities is not admissible on the issue of entrapment").

239. *See* Sorrells v. United States, 287 U.S. 435, 451 (1932) (noting that a defendant relying upon the entrapment defense must assent to inquiries into potential predisposition).

240. *See, e.g.*. Unites States v. Rahman, l89F.3d88, 131 (2d Cir. 1999) (per curiam) (supply of technical expertise and needed materials to defendant did not constitute outrageous government conduct); United States v. Berg, 178 F.3d 976, 979 (8th Cir. 1999) (involvement of government informants in drug manufacturing did not amount to outrageous government conduct); United States v. Nunez, 146 F.3d 36, 38-39 (1st Cir. 1998) (using drug dealer to purchase explosive devices from defendant did not rise to outrageous government conduct).

conduct of non-public actors because entrapment addresses police conduct.[241] Thus, the unwary innocent actor may be incited by non-government actors into conduct which leads to criminal charges to which the entrapment defense does not apply. Or, private actors may induce individuals—predisposed or not—to commit a crime by particularly nefarious means. Of course, it should be noted, objective-test proponents may argue that entrapment is unaffected by the conduct of non-official inciters because entrapment's goal is only to control police behavior and not the conduct of others.

E. Entrapment's Ad Hoc Nature

At least part of the animus against the entrapment defense is motivated by its potential for over-reaching. Commonly criticized for its lack of definition or guidance, no bright-line rule exists on judicially-created entrapment. Instead, claims of entrapment are reviewed virtually ad hoc. Others have raised similar concerns in associated contexts. For example, in arguing against recognition of an outrageous-government-conduct defense, Judge Easterbrook of the Seventh Circuit Court of Appeals noted:

> Any line we draw would be unprincipled and therefore not judicial in nature. More likely there would be no line; judges would vote their lower intestines. Such a meandering, personal approach is the antithesis of justice under law, and we ought not indulge it. Inability to describe in general terms just what makes tactics too outrageous to tolerate suggests that there is no definition—and "I know it when I see it" is not a rule of any kind, let alone a command of the Due Process Clause.[242]

Leaving judges to vote their "lower intestines" creates problems of rank subjectivity and inconsistency. Therefore, the police and the public may be less supportive of the entrapment defense because of concerns that judges will apply the law inconsistently or expand its reach beyond reasonable limits.

E Entrapment is Fraught with Procedural Disincentives

Because entrapment becomes an issue only if a defendant raises it as a defense, it is not as effective as it might otherwise be. This aspect of the doctrine discriminates against pro se defendants and risk-averse attorneys and clients. Defendants, with or without counsel, who proceed to trial may opt not to raise the entrapment defense even where it is viable. In some jurisdictions, to raise the

---

241. *See* United States v. Burkley, 591 F.2d 903, 911 n.15 (D.C. Cir. 1979) (stating that "(persuasion, seduction, or cajoling by a private party does not qualify as entrapment even if the defendant was not predisposed to commit the crime prior to such pressure"); State v. Rockhoit. 476 A.2d 1236, 1242 (N.J. 1986) (stating where a private party solicits the criminal act, there is no defense of entrapment).

242. United States v. Miller, 891 F.2d 1265, 1273 (7th Cir. 1989) (Easterbrook, J., concurring).

entrapment defense, the defendant must admit the offense and then argue that "but for" inappropriate actions by the police the defendant would not have committed the crime.[243] This approach undermines virtually any hope of avoiding conviction based on a finding that the government failed to prove guilt. The deterrent effect of the entrapment doctrine on police conduct is less potent—and in cases like the one proposed, meaningless—if the defense is not raised.

Even in those jurisdictions that do not require an admission that the defendant committed the offense as a prerequisite to reliance on the entrapment defense, attorneys commonly believe that juries are unlikely to acquit people that they believe committed a crime simply because the police acted inappropriately (but effectively).[244]

Additionally, even if the entrapment defense does not defeat a factually not-guilty defense per se, it may make an acquittal on the facts less likely because predisposition evidence probably depreciates the value of the defendant's testimony.[245] In subjective-test jurisdictions, an entrapment defense permits the government to proffer evidence perhaps otherwise inadmissible to show predisposition.[246] Due to the highly prejudicial nature of such evidence, defendants face a Hobson's choice: rely on an entrapment defense and face the damaging evidence of predisposition, or avoid the prejudicial evidence, but forego the entrapment defense to avoid damaging evidence. With the state's proof of predisposition in response to an entrapment defense, the jury may view the state's case as stronger, not weaker. Similarly, if the defendant seeks to testify, evidence of predisposition, admissible only in response to the entrapment defense, may weaken the impact or believability of the defendant's testimony.

---

243. *See, e.g.,* Owens v. Slate. 278 So.2d 693,696 (Ala. 1973) (holding defense of entrapment is unavailable if defendant denies commission of the offense); Neumann v. State, 156 So. 237,240 (Fla. 1934) (noting that defense of entrapment is unavailable if the defendant does not admit either commission of or participation in the offense); State v. Amodei, 563 P.2d 440,443 (Kan. 1977) (staling that entrapment is not available where defendant denies commission of the offense); State v. Sanders, 381 S.E.2d 827, 830 (N.C. Ct. App. 1989) (holding defendant must admit commission of the underlying acts for which he is charged in order for entrapment to be available as a defense); State v. Good, 165 N.E.2d 28, 39 (Ohio Ct. App. I960) (concluding that entrapment defense was properly disallowed by the trial court as inconsistent with defendant's denial of factual guilt).

244. See, *e.g.*. United States v. Lewis, 987 F.2d 1349, 1354 (8th Cir. 1993) (noting difficulty in combining defense of entrapment and "factual innocence"); Nora Lopez, *Question of Entrapment Follows in Wake of Cop Bust,* SAN ANTONIO EXPRESS-NEWS, Mar. 25,2001 at 17 A (quoting defense attorney to the effect that juries do not like the entrapment defense).

245. *See, e.g.,* United States v. Van Kirk, 935 F.2d 932,934 £8th Cir. 1991) (noting the likelihood of destroying the credibility of the defendant with the trier of fact as a problem when using the not-guilty-but-I-was-entrapped defense).

246. See State v. Long, 523 A.2d 672, 678 (NJ. Super. 1987) (recounting the defendant's record of prior convictions and observing that "[ijf they had been shown to this jury, defendant may well have been convicted of armed robbery."). In *Long,* the defendant had been charged with armed robbery but was convicted of the lesser-included offense of attempted theft. *Id.* at 674. *But see* People v. Benford, 345 P.2d 928, 935 (Cal. 1959) ("[E]vidence that defendant had previously committed similar crimes or had the reputation of being engaged in the commission of such crimes or was suspected by the police of criminal activities is not admissible on the issue of entrapment.").

If the true purpose of the entrapment doctrine in objective-test jurisdictions is to preserve the integrity of the judicial process, perhaps courts in those states should address entrapment whether or not defendants raise it. Unfair police conduct—whether real or purported—undermines the judicial process, and thus might warrant court intervention regardless of a particular defendant's wishes.[247] Otherwise, the integrity of the system is left to parties using the system, rather than parties superintending it.

Moreover, as mentioned earlier,[248] there also are occasions—such as in drug prosecutions—when the prosecution may be able to duck the reach of entrapment in one jurisdiction by selecting a jurisdiction with a more favorable entrapment defense for the prosecution of the case. Thus, at least potentially, cases could be moved from state-to-federal or federal-to-state courts in an effort to avoid an unfavorable entrapment test.

Another obstacle to the use of the entrapment defense springs from the fact that in many cases the accused must get review in an appellate court in order to prevail. This is because juries may be less than enthralled with the argument that, yes, the defendant committed the offense but the police instigated it.[249] But in most instances, to get to an appellate court, the accused must have been arrested, convicted and possibly subjected to community opprobrium. As a prophylactic defense, entrapment has already failed if these events have occurred because entrapment was the means used to ensnare the accused. To couch it in terms of *Jacobson*, the entrapment defense did not succeed when Jacobson's conviction was overturned by the United States Supreme Court; rather, it had already failed two years before—the instant postal inspectors entrapped him. The defense failed to prevent Operation Looking Glass, Jacobson's crime, his arrest or his conviction. The costly final resolution of the case hardly is a glowing success from his perspective. Of course, from the perspective of law enforcement and perhaps the public, entrapment's failure to deter Operation Looking Glass (and its clones) might be quite acceptable.

---

247. *Cf.*, e.g., Georgia v. McCollum, 505 U.S. 42 (1992) ("As the representative of all its citizens, the State is the logical and proper party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial."); Powers v. Ohio, 499 U.S. 400, 411 (1991) (noting racial discrimination in the selection of jurors "casts doubt on the integrity of the judicial process" and "places the fairness of a criminal proceeding in doubt").

248. See *supra* text accompanying note 85.

249. *See* Jacobson v. United States, 503 U.S. 540, 540 (1992) (defendant convicted despite entrapment plea). *But see Residents' complaints sparked police sting in Roanoke 's Wasena Park,* Roanoke Times (Sept. 8,1999), *at* http://www.sodomylaws.org/usa/virginia/vanews24.htm (last visited on November 5, 2004). That sting resulted in an airest and prosecution of an individual who "did not dispute that he went to the park hoping for" a then-illegal homosexual encounter. The jury, though, deliberated only 15 minutes before returning an acquittal verdict.

G. Entrapment Sometimes Prevents Use of Effective Law Enforcement Techniques

When executed properly, sting and decoy operations, like statutes addressing inchoate crimes, enable police to arrest offenders after the commission of a crime but before that crime directly harms society.

Police agencies are fond of the slogan "To Protect and To Serve." Protection of the citizenry against crime is posited as a principal goal of law enforcement. Arrests, to be sure, are an important function of law enforcement, but apprehension is secondary to prevention.[250] If the police are successful in preventing crime, apprehension is unnecessary. The question becomes how to prevent crimes without stripping liberties. Statutes establishing inchoate crimes and decoy and sting operations, in the police view, make this possible.

The creation of inchoate crimes such as solicitation,[251] conspiracy[252] and attempt[253] authorize preventive intercession by law enforcement.[254] Thus, for example, in attempts, police can apprehend suspects before the intended crime is committed. As a result, courts can punish individuals who (1) have a formed intent to commit a crime and (2) have engaged in sufficient overt conduct to constitute the attempt.

Inchoate crimes arguably balance the goals of law enforcement with the rights of citizens. On the one hand, the law seeks to suppress crime by permitting intervention before the completion of the criminal purpose.[255] On the other hand, it prevents the intervention of law enforcement before the actor has formed a criminal purpose and has engaged in adequate conduct in furtherance of that intent. In this way, inchoate crimes prevent harm, but not so early as to interfere unnecessarily with the individual liberty or rights of individuals.

Decoy and sting operations serve a similar purpose. Rather than waiting for an individual to plan and perpetrate a crime, law enforcement creates an opportunity for the crime and is in a much better position to limit societal harm and apprehend culprits.

From a police perspective, Operation Looking Glass is a strong example. Child pornography is an opprobrious crime. By ferreting out customers of child pornography, other crimes related to the distribution of child pornography arguably did

250. Prevention is the process of eliminating factors that might lead to criminal activity. *See* DANTZKER, *supra* note 48, at 54-55.

251. *See, e.g.,* MODEL PENAL CODE § 5.02 (criminal solicitation) (2003).

252. *See, e.g.*. MODEL PENAL CODE § 5.03 (criminal conspiracy) (2003).

253. *See, e.g.*. MODEL PENAL CODE § 5.01 (criminal attempt) (2003).

254. *See* BRONITT & MCSHERRY, *supra* note 235, at 431 ("[l]nchoate offences exist to assist the police and law enforcement officials to intervene before the commission of the offence."); A. P. SIMESTER & G. R- SULLIVAN, CRIMINAL LAW THEORY & DOCTRINE 257 (2000) ("The obvious virtue of inchoate offences is that they permit the lawful restraint and arrest of aspirant criminals prior to the realisation of any concrete harm.").

255. *See* DANTZKER, *supra* note 48, at 55 (observing that "lc]rime suppression is really stopping the crime before it gets started or is completed").

not occur. In the words of a postal service inspector involved in the *Jacobson* case, "[b]ecause if we could dry up the market for child pornography, then we felt that we could protect children from being sexually molested and abused—which is what's required to make child pornography."[256]

While these operations may not prevent crime, they do limit its harmful impact on society. Because decoys and stings involve police actors, crimes occur under the control of, or at least the observation of, law enforcement. The police can intervene before harm occurs. Another benefit from the law enforcement perspective is that apprehension and prosecution of criminal actors become much easier.

H. The Possibility of Weak Public Support for Widespread Use of Entrapment as a Prophylactic Rule

Not only the courts and defendants, but also the community and the police must live with entrapment's impact. If entrapment laws are faithfully applied, police effectiveness arguably is impaired and neighborhoods potentially suffer. Consider, for example, prostitution. If a community has a prostitution problem, the police may target either the prostitutes (by use of decoy customers) or potential customers" (by use of decoy prostitutes). If either operation is viewed as entrapment, the police may be less effective in eradicating the neighborhood's prostitution problem. Thus police likely will believe that the court's assiduous application of the entrapment defense improperly complicates their effort to rid the neighborhood of blight. This can lead to frustration and even contempt for the courts on the part of police officers[257] and the citizenry.

Generally, despite a significant decline of crime over the recent past, segments of the public continue to believe that crime is rampant and that increased protection from crime is necessary.[258] Moreover, many in the public and in law

256. *60 Minutes: The Sting* (CBS television broadcast, Feb. 16, 1992).

257. *See* DANTZKER, *supra* note 48, at 42-43 (describing the "strained" relationship between police and the courts and noting that "[although these functions of courts are important safeguards to justice, they may sometimes be a source of frustration to police officers").

258. *See, e.g.,* http://www.abcnews.go.com/sections/poltiics/DailyNews/polI000607.htinl (last visited on Nov. 5,2004). The article noted that in a recent mid-2004 ABC-Washington Post poll, despite the fact that "both crime rates and the perceived severity of the problem are on the wane, crime remains a top public priority. It ranked third out of fifteen issues .... (TJhere's still a broad sense that crime is a national problem, even though the intensity of that view has eased. In addition to the thirty-six percent who call the crime problem 'very bad,' another forty-four percent call it 'bad,'for a total of eighty percent. That's down from ninety percent in 1996, but still very high." ABC further observed that although the general crime rate was declining, violent crime rales remain higher than those in many other countries. *Id. See also* Humphrey Taylor, *How Hard it Is to Communicate Good News[:J Most People Underestimate, Deny or Disbelieve Positive Trends on New Jobs, Crime Rates and Teen Pregnancy,* The Harris Poll #34 (June 2, 1999), http://www.harrisinteractive.com/harris_poll/printerfriend/index.asp?PID=50. Taylor states that the public's "ignorance of crime rate societal trends are [sic] even worse. Only two percent (one in every fifty) of adults believe that rates of violent crime are decreasing 'a lot'—which all the statistics certainly say they are—and fully sixty percent believe violent crime is stilt increasing, something which has not been true for a long time." *Id.*

enforcement believe lenient court rulings hamper effective enforcement of the criminal law.[259] Entrapment may be viewed as part of that leniency, a technicality waiting to thwart otherwise effective police operations.[260]

Further evidence of the concern the public has with the entrapment doctrine may be evidenced by the fact that entrapment defenses created by courts are not always well received by legislators. The supreme courts of Florida, New Jersey and North Dakota created versions of entrapment that were repealed by statute. Moreover, even some legislatively crafted entrapment defenses do not survive scrutiny. For example, as mentioned earlier, under pressure from law enforcement, the Alabama legislature repealed its own creation even before it took effect.[261]

V. THE NEED FOR AN ALTERNATIVE

The entrapment defense—whether in its objective or subjective form—does not meet the goal(s) established by its proponents. Does it serve a purpose? Certainly; it serves several purposes. First, court-established entrapment communicates to law enforcement and the public the enmity courts have for police procedures that go too far. Second, albeit imperfectly so, it serves as a defense in the absence of an alternative; it's better than nothing. Third, sometimes it actually fulfills the intended objective of preventing the conviction of an "innocent" person.

In sum, though, the entrapment defense does not ensure that a person who was enticed into committing an offense by police will not be convicted. As shown in this Article, many entrapped individuals are convicted, and even those who escape

---

259. See, *e.g.*, David Rudovsky, *The Criminal Justice System and the Role of the Police, in* THE POLITICS OF LAW: A PROGRESSIVE CRJTIQUE 315 (rev. ed., David Kairys, ed., 1990) (noting a "widely held perception" of excessive leniency within the criminal justice system that hinders law enforcement).

260. *See, e.g.*. People v. Barraza, 591 P.2d 947, 958-59 (Cal. 1979) (Clark, J., dissenting) (criticizing the court's shift from the subjective to the objective test:

> The evil of the hypothetical-person test is apparent-it leads to acquittal of persons who are in fact guilty.. . . The evidence [in this case] would support the conclusion that defendant is one of the most cynical manipulators of the criminal justice system imaginable.... With today's decision [adopting the objective standard] this court outdoes its mentor in rendering guilt irrelevant.)

261. *See* ALA. CODE § 13A-3-31 (1975) ('The Alabama Criminal Code adopts the present case law on entrapment."). The Alabama Criminal Code was a product of the 1970s. The drafters were greatly influenced by the Model Penal Code and revised codes of other states. As explained by the Commentary to Section 650 (entrapment) of the proposed code, "[u]nder this section the actor's prior criminal record and his predisposition to crime are irrelevant and not admissible when considering entrapment." Alabama Law Institute, Proposed Alabama Criminal Code § 650 Commentary, at 55 (October 1974). The Commentary explains that originally the Criminal Code "focuse[d] on whether the method of inducement created a substantial risk that the offense would be committed ... [and] the actor's prior criminal record and predisposition to crime [were] not relevant and not admissible when considering entrapment." Thus, in enacting ihe Alabama Criminal Code, Alabama's legislature repealed the state's subjective version of entrapment and enacted the objective view. *Compare.* Pius v. State, 279 So. 2d 119,120 (Ala. 1973) (applying the subjective test of entrapment), *with* § 650. Then the legislature revisited the issue in 1979, repealed the objective test and reinstated the subjective test.

conviction are punished nevertheless. Moreover, as discussed in this Article, the entrapment doctrine neither precludes police enticement of persons into the commission of an offense nor prevents police tactics involving trickery or fraud. Put simply, entrapment fails in its intended purpose.[262]

Do we need an entrapment defense? Other jurisdictions manage without one,[263] but those jurisdictions usually have alternatives.[264] Some critics of entrapment—particularly individuals in subjective-entrapment jurisdictions who have failed to muster adequate support for an objective model—have championed a due-process defense as an addition to their subjective-entrapment scheme. Some jurisdictions have embraced the due-process defense as an adjunct to their entrapment defense.[265] But the due-process variant of entrapment suffers from many of the same concerns applicable to the objective and subjective versions, although it is based on constitutional law rather than statutory interpretation.

One might argue for monetary remedies, but relying on lawsuits against offending police to deter quasi-entrapment practices also suffers from a number of shortcomings. First, the fact that the remedy comes only after a party has suffered damages is an obvious deficiency. Second, litigation is costly and time-consuming, and, in this context, quite possibly fruitless.[266] Whether lawsuits would serve a prophylactic purpose or not, entrapment in many cases does not, so alternatives are needed.

Entrapment is a statutory defense in a number of jurisdictions; it probably should be a legislative product in all.[267] But legislation alone will not close the matter. Police must operate within entrapment's limits. Therefore, prosecutors must be willing to press for police restraint; supervisors must require adherence; the police must be trained; manuals and guidelines must be prepared and

---

262. If it were a civil remedy, we might say that it fails in its essential purpose. *See V.C.C.* § 7-2-719(2) (2004) ("Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.").

263. *See, e.g.*, BRONITT & MCSHERRY, *supra* note 235, at 870 ("Unlike the United States, the common law of England and Australia has refused to recognize a substantive defence of entrapment."); GEORGE FLETCHER, RETHINKING CRIMINAL LAW § 7.3.B, 541 (1978) (noting that the entrapment defense "is virtually unique to the criminal jurisprudence of the United States.").

264. *See id.* at 870 ("In Australia, the law governing entrapment is an amalgam of evidential discretion and recent federal and State legislation governing the use of controlled operations."); *see also* Teixeira de Castro v. Portugal, 28 Eur. Ct. H.R. at 1463 (1998) ("The public interest cannot justify the use of evidence obtained as a result of police incitement.")

265. *See generally, e.g.*, Munoz v. State, 629 So. 2d 90, 98-99 (Fla. 1993) (juxtaposing due-process-based objective test on siatutorily established subjective-test entrapment defense); People v. Isaacson, 378 N.E.2d 78, 82-83 (N. Y. 1978) (ordering dismissal of the indictment based on denial of defendant's due process rights despite defendant's predisposition to commit the crime charged).

266. But it should be noted that parties are trying litigation as a device for addressing perceived police misconduct. *See* RONALD W. GLENSOR ET AL., POLICE SUPERVISION 195 (1999) ('The number of lawsuits against police officers and police departments is constantly increasing.").

267. *Cf.* People v. Maffett, 633 N.W.2d 339, 340 (Mich. 2001) (Corrigan, J., dissenting) ("If there is to be a legally valid entrapment defense in Michigan, it must be enacted by the Legislature.").

disseminated. Until the disincentives outweigh the incentives, police will continue to see stings and decoy operations as viable police techniques even when those operations transgress the boundaries of the entrapment doctrine.

Finding a way to encourage law enforcement to respect more fully the contours of entrapment might be a difficult undertaking. After all, stings and decoy operations are widely used, economical and effective. Moreover, the courts already have acknowledged their effectiveness, necessity and legitimacy. In the immediate term, reliance on a due process model could be beneficial because it would add more legitimacy to the doctrine and it allows subjective jurisdictions to inject objective criteria into their analyses of entrapment cases. Thus, it permits the courts to establish a two-tiered test for entrapment, namely by retaining the existing subjective test for those cases in which law enforcement lures an innocent into crime, and by adding an objective test for those few cases in which law enforcement simply goes too far.

But relying on constitutional law, whether alone or paired with a subjective test, may not be the most effective means to render the entrapment defense a more palatable option. What must be done eventually is to make the entrapment defense more legitimate, precise and predictable. One of the most promising ways to achieve this result is to make the defense statutory.

With a legislative imprimatur, entrapment statutes would be able to avoid some of the problems the doctrine incurs by virtue of being a creature of judicial insight instead of legislative debate. Fixing entrapment in statutory form would help prevent, or at least slow, the kind of doctrinal creep possible with developing bodies of case law. Furthermore, public debate helps to identify and account for the kinds of eventualities and wrinkles in ways that judge-made law simply cannot. The legislative process provides more opportunity for review, study, debate and compromise than does a request by a court to litigants for briefs.[268]

Another positive aspect of statutorily created entrapment is that law enforcement likely will show a greater respect for its limits on their conduct than they demonstrate under the amorphous restraint of case law. As a statutorily created defense, entrapment would be the product of representative democracy, and thus, would show some measure of approval from the public through their representatives and senators.

Crafting an effective entrapment statute, however, is not without its own particular difficulties. Ironically, the way to achieve greater predictability and uniformity of result is to break with history. Rather than simply codifying extant case law, or borrowing from other states, or even following the federal government, states should implement statutes that create a multi-factor analysis for entrapment. Whether objective or subjective, tests that incorporate multiple bases

268. *See, e.g.*. People v. Johnson, 647 N.W.2d 480, 490 (Mich. 2002) (noting that the court had invited the panies to address whether ihe court should adopt the federal subjective test of entrapment).

for analysis promise to prevent entrapment decisions from being a vote of one's lower intestine.[269] Under these tests, no single factor would be dispositive. Rather, a court employing a test would use the factors to create a more precise and objective picture of the facts of the case before them.

A number of cases that deal with either entrapment or outrageous governmental conduct suggest factors for consideration.[270] Although created with specific reference to the problem of law enforcement conduct violating the due process rights of defendants, many of these factors are equally helpful in the context of entrapment.

The following list of proposed entrapment factors are drawn from a number of the cases which discuss entrapment or due process issues:

> (1) Did the criminal undertaking or enterprise preexist the police involvement?[271]
>
> (2) Do the facts establish predisposition on the part of the defendant[272] and, if so, was it before or after first contact with the defendant? If the defendant was predisposed towards criminal activity, was the action taken by law enforcement agents narrowly tailored to prompt criminal action based on the defendant's predisposition? Are the charged crime and the predisposition of the defendant sufficiently related to support a finding that the defendant's actions were a result of that predisposition and not law enforcement influence?

---

269. *Cf. supra* text accompanying note 242 (Judge Easterbrook's description); BRONITT & MCSHERRY, *supra* text accompanying note 235.

270. *See, e.g.,* United States v. Brown, 635 F.2d 1207, 1213 (6th Cir. 1980) (listing possible factors for consideration such as the type of criminal activity under investigation, whether the government instigates the criminal activity in question, and the strength of the connection between the challenged government conduct and the commission of the acts); People v. Barraza, 591 P.2d 947, 955 (Cai. 1979) (stating that certain factors are helpful in looking at the conduct of the police officer and the suspect in entrapment cases: transactions preceding the offense, suspect's response to the inducements of the officer, the gravity of the crime, and the difficulty of detecting instances of its commission); People v. Johnson, 647 N.W.2d 480,485 (Mich. 2003) ("Under the current entrapment test in Michigan, a defendant is considered entrapped if either (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances or (2) the police engaged in conduct so reprehensible that it cannot be tolerated."); State v. Johnson, 606 A.2d 3)5,323 (NJ. 1992) (noting that "the factors most invoked" are "the justification for the police in targeting and investigating the defendant" and "the nature and extent of the government's actual involvement in bringing about the crime"); People v. Isaacson, 378 N.E.2d 78, 83 (N.Y. 1978) ("Illustrative factors to be considered are: (1) whether the police manufactured a crime which otherwise would not likely have occurred...; (2) whether the police themselves engaged in criminal of [sic] improper conduct repugnant to a sense of justice; (3) whether the defendant's relucatance to commit the crime is overcome by appeals to humanitarian instincts..., by temptation of exorbitant gain, or by persistence solicitation in the face of unwillingness; and (4) whether the record reveals simply a desire to obtain a conviction ...") (internal citations omitted).

271. *See* United States v. Norton, 700 F.2d 1072, 1075 (6th Cir. 1983) (noting, that one of the criteria to consider is "whether the criminal enterprise preexisted the police involvement").

272. *See Johnson,* 647 N.W.2d at 485 (listing as a factor "whether the defendant had been known to commit the crime with which he was charged").

(3) Which party—the government or the defendant—took the lead in creating and planning the crime?[273]

(4) Which party—the government or the defendant—primarily controlled the commission of the crime?[274]

(5) Did the police themselves engage in improper conduct and, if so, to what degree?[275]

(6) If the government instigated the crime, did it have a legitimate law enforcement purpose in bringing about the crime?[276]

(7) What was the gravity of the crime, and how difficult is the detection of such crimes?[277]

(8) Do the facts of the case reveal on the part of law enforcement a desire to obtain a conviction or police motive to prevent further crime or protect the populace?[278]

(9) Was the defendant reluctant to commit the crime? If so, did the police engage in affirmative conduct that would make commission of the crime unusually attractive to the defendant (or, alternatively, to a normally law-abiding person)? For example, was the defendant's reluctance overcome by appeals to sympathy or friendship, by temptation of exorbitant gain, by guarantees that the crime will go undetected, or by persistent solicitation despite the defendant's reluctance?[279]

This proposed multi-pronged test not only incorporates traditional entrapment inquiries, but also includes questions that probe in new directions. By weighing the degree and kind of police action and the conduct of the defendant in relation to the crime charged, courts will be better able to distinguish between entrapment and valid police use of subterfuge. Additionally, these factors would help emphasize the particular approaches of different jurisdictions toward the objective or subjective paradigms of entrapment.

---

273. *See Johnson*, 606 A.2d at 323 (noting "whether the government or the defendant was primarily responsible for creating and planning the crime" as a relevant factor in determining if an entrapment situation exists).

274. See *id.* (listing "whether the government or the defendant primarily controlled and directed the commission of the crime" as a relevant factor in determining if an entrapment situation exists).

275. *See* People v. Isaacson, 378 N.E.2d 78, 83 (N.Y. 1978) (noting that one "illustrative factor" is whether law enforcement officers engaged in any improper or criminal conduct).

276. *See* State v. Johnson, 606 A.2d 315, 323 (NJ. 1992) (noting "whether the government had a legitimate law enforcement purpose in bringing about the crime" as a relevant factor in determining if entrapment existed).

277. See People v. Barraza, 591 P.2d 947,955 (Cal. 1979) (iistingthe gravity ofthecrime and thedifficulty in detecting its existence as a relevant circumstance to consider).

278. *See, e.g., Isaacson*, 378 N.E.2d at 83 (noting that a record revealing that the police intended solely to seek a conviction without a motive to prevent further crime is a factor to consider in determining if an entrapment situation exists).

279. See, *e.g., Barraza*, 591 P.2dat955 ("[W]as the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense?"); People v. Johnson, 647 N.W.2d 480, 485 (Mich. 2003) (noting that when considering whether the government activity is impermissible, it is important to look at "whether there existed appeals to the defendant's sympathy as a friend"); *Isaacson*, 378 N.E.2d at 83 (listing as a factor whether the defendant's hesitation to commit the crime was overcome by "temptation of exorbitant gain").

In short, at least two things must be achieved to repair the defects of the entrapment doctrine. First, the defense must be articulated in a more precise form that creates more uniform and predictable results. It stands to reason that enacting entrapment statutes is the best way to do this. Second, police must be encouraged to respect the limits that entrapment places on their conduct. Again, statutory entrapment schemes with their attendant legitimacy promises to do this in ways that case law simply does not.

VI. CONCLUSION

If we accept the idea that police should deter criminals rather than create them, then we need the entrapment doctrine or something like it. Entrapment fulfills some, but not all, of its promises in this regard. It still inhabits a twilight zone between the conflicting desires of the public to live in safety and yet to limit the power of police to act on their behalf.

Police protect; they serve—and in most instances they do so in an exemplary manner. But sometimes, at the prompting of the public or in furtherance of their own institutional or personal goals, they also instigate crime.

There are times when doing so allows law enforcement to thwart otherwise impending crimes by predisposed actors. Other times, however, law enforcement agents ensnare otherwise innocent actors. And because they sometimes do so, we need the entrapment doctrine.

No matter which form the entrapment defense takes, it fails to fully protect the otherwise innocent; it fails to adequately prevent overreaching police conduct. To remedy these failings, we need to revisit the doctrine, rethink the issues and create an entrapment paradigm that truly will serve the needs of the public, the needs of the court system and the needs of law enforcement.