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To Catch the Lion, Tether the Goat: Entrapment, Conspiracy, and Sentencing Manipulation

Derrick Augustus Carter

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TO CATCH THE LION, TETHER THE GOAT:
ENTRAPMENT, CONSPIRACY, AND SENTENCING MANIPULATION

Derrick Augustus Carter

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I. INTRODUCTION

Like Beelzebub, “sentencing entrapment” has many names. Some call it “sentencing manipulation,” the government’s artful maneuvers to enhance a suspect’s crime.2 Some call it “sentencing gerrymandering,” the government’s maneuvers to enhance a suspect’s sentence.3 Some courts call it “imperfect entrapment,” government inducement which impairs the suspect’s intent.4 Michigan courts call it “sentencing escalation,” government action which guides the suspect towards additional crimes.5 In

2. See United States v. Garcia, 79 F.3d 74, 75 (7th Cir. 1996), cert. denied, 117 S. Ct. 158 (1996) (noting that “[s]entencing manipulation occurs when the government engages in improper conduct that has the effect of increasing a defendant’s sentence.”).

3. See United States v. Connell, 960 F.2d 191, 194 (1st Cir. 1992) (noting that “[m]uch has been written about . . . opportunities that the sentencing guidelines pose for prosecutors to gerrymander the district courts’ sentencing options and thus, defendants’ sentences.”); see also United States v. Barth, 990 F.2d 422, 424 (8th Cir. 1993) (noting that “it was ‘not at all fortuitous that the agent arrested [the defendant] only after he had arranged enough successive buys to reach the magic number (referring to 50 grams, the quantity that triggers the application of the 10-year mandatory minimum sentence.’”) (quoting United States v. Barth, 788 F. Supp. 1055, 1057 (D. Minn. 1992)).

4. See United States v. Dickey, 924 F.2d 836, 839 (9th Cir.), cert. denied, 112 S. Ct. 383 (1991) (holding that the agent’s action did not amount to imperfect entrapment).

5. See People v. Claypool, 684 N.W.2d 278, 280 (Mich. 2004) (stating that “if it can be objectively and verifiably shown that police conduct or some other precipitating cause altered a
the end, “sentencing entrapment” is a subset of the greater entrapment defense where the government creates or induces a far greater crime than the suspect originally intends.6 Once a reticent suspect agrees to commit a greater crime, then the suspect’s sentence, which is frequently mandatory, is increased dramatically.7 The government’s primary motivation is to increase their bargaining power over the suspect’s charges and sentence.8

There are several examples of sentencing entrapment. A suspect sells powder cocaine to an undercover agent, but the undercover agent demands repeatedly that the reticent suspect “cook” the cocaine into “crack,” which may carry a significantly higher punishment.9 A person buys handguns from an undercover agent, but the agent insists on selling machine guns to the reluctant suspect at an incredibly low discounted price, thereby adding 25 years to the suspect’s sentence.10 A suspect sells drugs, but the agent convinces the unwary suspect to sell the drugs near a school building, where the proximity of the school building invokes a mandatory sentence enhancement.11 A person agrees to possess a bundle of drugs, but the
undercover agent places more drugs in the bundle than the initial agreement. The suspect’s ignorance of the specific amount is immaterial and the suspect is sentenced based on the higher amount of drugs.

There is, admittedly, little sympathy for a criminal suspect who is willing to commit a crime, and with some inducement, is willing to commit an even greater crime. Such a suspect has illustrated his or her susceptibility and has established empirical proof of dangerousness. On the other hand, undercover agents and undercover informants are frequently motivated by financial rewards, by job promotions, by commissions, by reduced charges, by reduced sentences, by contingent fees, and by favorable treatment to corral the suspect(s) into a higher grade of offense(s). One of the most indelible characteristics of many prosecutors’ offices is the basic drive for excessive charges, in part to stimulate guilty pleas. The pay-off in “shock and awe” headlines alone is worth re-election.

This article examines how sentencing enhancement schemes play into undercover operations and manipulation ploys. This article reviews entrapment doctrines, starting with the common law principles of unclean hands and estoppel, to settled principles of objective and subjective entrapment. Through principles of conspiracy, the

Construction of 21 U.S.C. § 860 Enhancing Penalty for Drug Distribution if Offense Occurs within 1,000 Feet of School, College, or University, 108 A.L.R. Fed. 783. In small towns, drug free zones cover literally half the town. See NATE BLAKESLEE, TULIA: RACE, COCAINE, AND CORRUPTION IN A SMALL TEXAS TOWN 80 (2005) (noting that the town of Tulia, Texas, is an example of this situation).


13. In United States v. Ekwunoh, for instance, the court concluded that a person’s lack of knowledge regarding the amount of drugs she possessed was insignificant at sentencing. Id. at 370. Caroline Ekwunoh pled guilty to possession of cocaine with intent to distribute after accepting an attaché case containing one thousand thirteen grams of heroin from an undercover agent. Id. at 369. The Court of Appeals held that Ms. Ekwunoh’s knowledge was satisfied because she knew she possessed illegal drug contraband. Id. at 370. The amount, given the circumstances, was foreseeable, said the court. Id. “The defendant may be sentenced only for the quantity of drugs [s]he knew or should reasonably have foreseen that [s]he possessed.” Id.


15. See DRESSLER, supra note 8, at 674-75.

16. M. Daniel Gibbard, 5-Year Drug Sting Yields 15 Arrests in Evanston: Disciples’ Brass Quietly Removed, CHI. TRIB., Apr. 21, 2004; Ralph Blumenthal, A Zealous Prosecutor of Drug Criminals Becomes One Himself, N. Y. TIMES, Feb. 15, 2005, at A14 (noting how a self-righteous law and order prosecutor was stealing drugs from the property room — discovered through undercover investigation).
undercover operation ensnares perpetrators who intend factually impossible crimes, as long as an overt step is taken.

Sentencing enhancement crimes, induced by government agents, must be proven before a jury beyond a reasonable doubt. A reciprocal corollary is that the accused must be able to defend enhancement accusations through defenses such as sentencing manipulation and sentencing entrapment. Such manipulation has encouraged a venal war on the underclass. Mass arrests by rogue undercover agents have accounted for wrongful convictions and loss of society. Civil rights law suits and undercover standards belatedly redress the issues. The good and evil characters become indistinguishable.

Part II examines Common Law Entrapment through the equitable principles of Estoppel and Unclean Hands. Entrapment is a fundamental defense designed to shield the integrity of the courts and fulfill a fiduciary obligation to steer citizens from crime. Part III reviews Undercover Operations and current entrapment doctrine. Undercover operations frequently promote excessive inducements.

Part IV examines sentencing entrapment and sentencing manipulation doctrines as a cognizable defense to sentencing enhancement charges.\(^\text{17}\) Sentencing enhancement factors, frequently mandatory, are facts related to the offense which may increase a person’s sentence.\(^\text{18}\) Although the prosecutor has jurisdiction to determine the breadth of investigation, the courts may pierce the prosecutorial veil of discretion.\(^\text{19}\) Part V reviews the overlay of sentencing law and enhancement offenses and procedural tactics. The prosecutor’s burden to prove sentence enhancement factors beyond a reasonable doubt before a jury obliges a necessary corollary that the accused has an independent Sixth Amendment right to present defenses to the enhancement factors.\(^\text{20}\) Formal sentencing entrapment defenses, however, are frequently rejected.\(^\text{21}\)

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18. Id. at 494-95.


20. See generally Paul H. Robinson, Criminal Law Defenses: A Systematic Analysis, 82 Colum. L. Rev. 199 (1982). See also Oregon v. Guzek, 546 U.S. 517, 524 (2006) (recognizing that defendants have the right to present sentence defenses which explain how, but not whether, the crime occurred in capital death penalty cases).

21. United States v. Miller, 71 F.3d 813 (11th Cir. 1996). In Miller, where the accused who sold powder cocaine was predisposed to sell crack, the court held that sentencing entrapment is a defunct doctrine and impermissible in the 11th Circuit. Id. at 818. In addition, the defense theory of partial entrapment is not permissible either. Id. A number of federal courts do not recognize a partial entrapment defense. In the federal arena, the First, Seventh, Eighth, and Ninth Circuits accept the
Part VI considers entrapment through the lenses of conspiracy and governmental influences on the suspect’s \textit{mens rea}. Conspiracy prosecutions for imaginary crimes are abundant, where impossibility is no defense. Internet pornography and fantasy speech are convenient targets for high-tech sting operations. Part VII unravels Corruption of Police forces and disreputable undercover operations which have lead to the faulty incarceration of hundreds of minorities. Tulia, Texas is a model example of jurisprudential corruption invoking Civil Rights remedies, Reconciliation Committees, statutory changes, and Standards for Undercover Operations. The Article concludes with the overlay of entrapment and manipulation on our body politic.

II. COMMON LAW ENTRAPMENT: PRINCIPLES OF EQUITY

\textit{A. Entrapment by Estoppel}

Entrapment presents the equitable, common law principles of estoppel,\textsuperscript{22} clean hands, and consent.\textsuperscript{23} As estoppel, a party who misleads another is precluded from asserting a position at variance with the appearance he or she has created.\textsuperscript{24} The estoppel rule seeks to prevent one party from gaining advantage over another party by misleading conduct.\textsuperscript{25} The estoppel rule is a basic due process guarantee and bars the entire cause of action.\textsuperscript{26}

\textsuperscript{22} Sorrells v. United States, 287 U.S. 435, 445 (1932). (stating that “[n]either courts of equity nor those administering legal remedies tolerate the use of their process to consummate a wrong.” \textit{Id.} at 455 (Roberts, J., concurring).
\textsuperscript{23} Topolewski v. State, 109 N.W. 1037, 1039, 1040-41 (Wis. 1906); see also Johnson, supra note 6.
\textsuperscript{24} DAN DOBBS, LAW OF REMEDIES 84 (2d ed. 1993).
\textsuperscript{25} \textit{Id.}
\textsuperscript{26} See generally Johnson, supra note 6; State v. Ragan, 288 P. 218, 219-20 (Wash. 1930) (holding evidence not to show entrapment, but merely furnishing an opportunity to commit bootlegging offense in illicit traffic in intoxicating liquor); City of Seattle v. Gleiser, 189 P.2d 967, 967, 971-72 (Wash. 1948) (affording opportunity to aid and abet prostitution is not entrapment).
A variation of the estoppel claim is the mistake of law doctrine of reliance. A person may raise a mistake of law defense, if actions were induced by government solicitation or interpretation. In *Raley v. Ohio*, for instance, the Supreme Court held that a defendant’s conviction for refusing to answer questions about Communist activities before a State Commission violated the Due Process Clause of the 14th Amendment because defendants were entrapped by being assured that the exercise of the 5th Amendment privilege against self-incrimination would shield them from liability. Under mistake of law principles, a person’s crime is excused if that person reasonably relied on an official inducement or official interpretation. The entrapment by estoppel defense similarly applies where a person acts on reasonable governmental assurances or inducements that the actions are proper. Over undercover operations, however, fall short of estoppel unless the implicit conduct of the undercover operative is so brazen as to create the crime. If so, the government has forfeited its right to prosecute.

**B. Entrapment as Unclean Hands**

Entrapment, as an equitable defense, also invokes the clean hands doctrine. The maxim, “one who comes into equity must come with clean hands” applies when the plaintiff has dirtied his or her hands in initiating

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27. *See Dressler*, supra note 8, at 168 (discussing Reasonable-Reliance Doctrine (entrapment by estoppel)).
28. *Id.* at 169.
30. *Id.* at 441.
31. *Id.* at 425-26.
32. United States v. Levin, 973 F.2d 463, 468 (6th Cir. 1992) (citing United States v. Smith, 940 F.2d 710, 714 (1st Cir. 1991)). In California, the entrapment by estoppel defense allows private citizens to contest criminal charges because they had been told by the authorities in advance they could not be prosecuted for certain acts. People v. Chacon, 150 P.3d 755, 761-62 (Cal. 2007). This is a type of Mistake of Law defense. Interestingly enough, the entrapment by estoppel defense is not available to a public official who acts in reliance upon advice provided by a government lawyer who serves at his or her pleasure. *Id.* at 763. The Court explains that, “[i]f permitted to rely on the defense of entrapment by estoppel, such an official could insulate herself from prosecution by influencing an appointee to provide the advice she seeks.” *Id.*
33. U.S. v. Healy, 202 F. 349, 349 (D. Mont. 1913) (stating that “[d]ecoy are permissible to entrap criminals, but not to create them . . . Where a statute . . . makes an act a crime regardless of the actor's intent or knowledge, ignorance of fact is no excuse if the act be done voluntarily; but when done upon solicitation by the government's instrument to that end ignorance of fact stamps the act as involuntary, and . . . estops the government from a conviction.”); *See also Johnson*, supra note 6.
34. *Healy*, 202 F. at 349; *see also Johnson*, supra note 6.
the prosecution. The courts’ jurisdictional moral standing is jeopardized if a court aids a prosecution initiated from corrupt practices. “It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law.”

Early American cases concerning entrapment distinguished active versus passive participation as the determining line whether the government created the criminal intent. These cases concerned the distribution of intoxicating liquors, pornography, and theft — similar to issues of today. Government over-reaching violates the equitable due process principles, exemplified in such cases as United States v. Jacobson, where the government so sullied itself as a pornographic agent as to demean the entire prosecution with unclean hands.

C. Entrapment as Consent

Entrapment principles, argued as consent, extend to those prosecutions which invite crimes and lure potential offenders in order to prosecute tempted individuals. In Topolewski v. State, for instance, the manager of a meat packing company intentionally left meat on the loading platform as bait. The employees encouraged the suspect to take the meat and they arranged a wagon for the suspect’s escape. The court found such actions amounted to entrapment and consent. Similarly, equitable entrapment principles of consent applied to slaves in early America, when slaves were induced by their owners to sell and buy liquor for the owners, who belatedly claimed the slaves committed theft.

35. See Craig E. Davis, Equity: Clean Hands Doctrine: Tradename Infringement: Relief Awarded on Condition That Complainant Cleanse His Hands, 43 MICH. L. REV. 409, 409 (1944).
37. Grimm v. United States, 156 U.S. 604, 610-11 (1895) (concerning pornography sent through the mails, where the Court recognized that the participation of the detectives was passive investigation).
38. See generally Johnson, supra note 6.
40. Id. In Jacobson, the government created several fictitious pornographic sites and through the years lured a farmer to finally subscribe to Bare Boys magazine. Id. at 542-43.
42. Topolewski v. State, 109 N.W. 1037, 1039 (Wis. 1906).
43. Id.
44. Id.
45. Id. (stating that “the purpose on the part of the latter being to entrap and bring to justice one thought to be disposed to commit the offense of larceny . . . ”).
46. State v. Geze, 1853 WL 4169 at *1 (La. 1853) (holding it constitutes entrapment to sell liquor to a slave).
Early entrapment principles sought to remedy manipulations which undermined the “social contract” established between the government and its people to encourage social benefits, not create societal harms.47 “The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it.”48 If a crime originated in the mind of the government and the defendant was lured into the criminal act, then no prosecution was valid.49 Undercover investigations are necessary tools to unravel surreptitious and intricate crimes. A certain leeway is granted where the government must infiltrate the criminal mind and expose those bent on clandestine and specialized offenses.50 “Artifice and stratagem may be employed to catch those engaged in criminal enterprises.”51 “You want to catch the lion, first you tether the goat.”52

III. UNDERCOVER OPERATIONS AND CURRENT ENTRAPMENT DOCTRINE

Undercover operations, if the truth be told, are closely aligned with conspiracy, manipulation, intent, privacy intrusions, wiretapping, and, of course, spying.53 Undercover investigations are intricately immersed with manipulative agents, who initiate, coax, sway, and befriend those "predisposed" to commit criminal offenses. On one hand, undercover investigations are solid, empirical proof of present and future dangerousness. Through the operation, the police can prove the suspect’s intent to commit the crime.54 The typical detective stands after-the-fact, too late to prevent the crime. Undercover operations, however, are empirical pre-crime investigations, where the undercover agent conspires with the suspect, only to arrest the suspect(s) at some inchoate or cultivated stage.

48. Id. (holding that defendant’s prosecution for the sale of morphine amounted to entrapment).
49. Id.
51. Id.
52. LECARRE, supra note 1, at 302 (providing a fictional account of a prolonged pursuit by Israeli intelligence agents to capture a deceptive Palestinian terrorist leader).
53. See generally CHARLES BOWDEN, A SHADOW IN THE CITY, CONFESSIONS OF AN UNDERCOVER DRUG WARRIOR (2005) (providing a literary account of an undercover drug agent, who orchestrates “take downs” with imagination and obsessive precision. Years have eroded the certainty about the meaning of his work, yet the “bust goes down” in a clatter of broken lives).
54. Every crime must have a mens rea, intent component, and actus reus, voluntary act component. In re Winship, 397 U.S. 358, 364 (1970); see also DRESSLER, supra note 8, at 115.
Undercover investigations are embedded in our criminal and literary folklore. There are intricate, sophisticated, and surreptitious crimes that only the deceptive undercover police informant can unravel. The informant may be a police agent with a dramatic skill or an informant who fears criminal prosecution. Police officials, behind the scenes, direct the agent or informant on the objectives and progress of the operation. In theory, the undercover operation is a conspiratorial action. In deed, the undercover operation is the lie that tells the truth.

When the undercover operation promotes excessive inducements on reluctant suspects, therein lies the defense of entrapment. The government, through its manipulative acts, may create the crime or prey upon natural human weaknesses. Depending on a person's status, needs, addictions, or desires, "the only salient question is whether a person's price has been met" to accommodate his or her weakness, be it money, sex, drugs, or any of the deadly sins.

As previously stated, the entrapment doctrine is a product of equitable common law principles. It is also a judicial creation through the court’s supervisory role to deter governmental excessiveness, to constrain outrageous police behavior, and to promote judicial integrity. Congress could not have intended criminal punishment for a defendant who has

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55. See, e.g., BOWDEN, supra note 53.
56. See Slobogin, supra note 14, at 805-08 (assessing investigative lies in undercover work, searches and seizures, and interrogation).
57. Id.
58. Id. at 776.
59. See State v. Lively, 921 P.2d 1035, 1048-49 (Wash. 1996); United States v. Cuervelo, 949 F.2d 559, 568-69 (2d Cir. 1991). Sex is an attractive inducement. In Lively, the court held that a government agent took advantage of a vulnerable single mother who attended Alcoholics Anonymous by befriending her and beginning a sexual relationship in order to involve her in drug activities. See also Cuervelo, 949 F.2d at 568-69 (remanding case to consider whether the government consciously set out to use sex as a weapon in its investigatory arsenal).
60. See Lively, 921 P.2d at 1048-49; Cuervelo, 949 F.2d at 568-69.
61. Ronald J. Allen, Melissa Luttrell, & Anne Kreeger, Clarifying Entrapment, 89 J. CRIM. L. & CRIMINOLOGY 407, 413 (1999) (stating that "[t]he only salient question is whether a person’s price has been met, not whether he has one, since by hypothesis everyone but the saintly does . . . [T]he person who does not take the bait almost surely would take a higher, even if greatly higher, bait. The failure to take this one is evidence of his price, but not of predisposition.”); see also Louis Michael Seidman, The Supreme Court, Entrapment, and Our Criminal Justice Dilemma, 1981 Sup. Ct. Rev. 111, 146 (1981). The seven deadly sins are “pride, covetousness, lust, anger, gluttony, envy, and sloth.” Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/deadly%20sin.
62. Lively, 921 P.2d at 1044-45; see also Sorrells v. United States, 287 U.S. 435, 457 (1932), where Justice Roberts, concurring, invoked the court’s supervisory role and identified entrapment as a legitimate defense in order to protect “the purity of [the court’s] own temple . . . “
committed all the elements of a proscribed offense but was induced to commit them by the government.”

In determining entrapment, the courts consider (1) whether the police instigated the crime or merely infiltrated an ongoing criminal activity, (2) whether the undercover agent was a passive or active accomplice in the criminal offense, (3) whether the undercover informant overcame defendant’s reluctance through pleas of sympathy, promises of excessive profits, or persistent solicitations, and (4) whether the overall police conduct was “repugnant to a sense of justice.” Some states have adopted statutory entrapment defenses. The Washington legislature, for instance, provides:

“(1) In any prosecution for a crime, it is a defense that:
   (a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and
   (b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.

(2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.”

Current entrapment law remains an equitable remedy, as the case is dismissed because the investigatory agency has initiated the prosecution with Unclean Hands. The entrapment defense compares whose hands are most dirty: the predisposed suspect or the predetermined government.

A. The Subjective Test of Entrapment – Predisposition of the Suspect

The entrapment defense causes weak people to make strong excuses. In the majority of jurisdictions, entrapment is governed by the subjective test, which focuses on whether a person is "predisposed" to commit the criminal transaction. If a person is predisposed, or inclined, to commit the criminal transaction, then the police inducement or offer is acceptable. Predisposition is quite informal and may be based on suspicion, hearsay,
rumor, reputation, prior record, or the suspect’s eagerness to commit the offense.\(^{69}\) To determine entrapment, a vague line is drawn separating the unwary innocent person from the unwary criminal.\(^{70}\) Frequently, sting operations for prostitution, drugs, theft, and other vices ignore labels of innocence and ensnare all who take the bait.\(^{71}\)

The use of character evidence to prove predisposition burdens those with prior criminal records, and those with addictions, and those who are poor.\(^{72}\) In the eyes of some, this burden is deserved considering that criminal behavior is frequently repeated. In the eyes of others, it creates an uneasy, self-fulfilling prophecy. It is easy to interweave the extrasensory delights of addictive narcotics into the fabric of an ongoing crime. While addicted persons would certainly be predisposed to sell more drugs, there is something unfathomable for the police to prey on these weaknesses in order to sentence people to higher terms.\(^{73}\) Indigent persons are generally more desperate, with emotional, social, and economic crises that make them easy prey to alluring temptations.\(^{74}\)

There is no probable cause hearing to determine whether the suspect is predisposed.\(^{75}\) The investigation proceeds on a loose suspicion that a certain person is, or certain persons are, engaged in criminal activity. The police cannot prove it, so they arrange an undercover operative to interact with the suspect(s).\(^{76}\)

Several scholars have unsuccessfully appealed for a reasonable suspicion test before an undercover investigation is undertaken.\(^{77}\) An undercover investigation intrudes on privacy issues, self-incrimination concerns, and the entire layer of personal liberties.\(^{78}\) The courts have uniformly ruled, however, that a probable cause hearing is unnecessary

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69. United States v. Thomas, 134 F.3d 975, 979-80 (9th Cir. 1998) (noting that the accused may rebut bad reputation evidence with evidence of prior good acts, or prior clean record). See also Sykes v. State, 739 So. 2d 641, 642 (Fla. Dist. Ct. App. 1999) (explaining that evidence that defendant lacked a prior criminal history was relevant to rebut predisposition).

70. Sherman, 356 U.S. at 372.


72. Id.

73. Id. at 1211-12.

74. Id. at 1211.

75. Id. at 1216-17; see also William C. Sherrill, Note, The Defense of Entrapment: A Plea for Constitutional Standards, 20 U. FLA. L. REV. 63, 80-83 (1967) (recommending a test requiring probable cause prior to solicitation and reasonableness in execution).

76. See Dix, supra note 14, at 216.

77. See, e.g., Sherrill, supra note 75, at 80-83 (recommending a test requiring a probable cause hearing).

78. Id. at 68.
as the investigation is generally the province of the prosecution under the Separation of Powers doctrine.\textsuperscript{79}

Due to the inherent intrusiveness of undercover operations and electronic monitoring, some courts are toughening the standards to require some measure of probable cause.\textsuperscript{80} The West Virginia Supreme Court, for instance, held that law enforcement officers must obtain a warrant before equipping an informer with surveillance devices inside a suspect’s home.\textsuperscript{81} The Court recognized that there is a significant difference in the expectation of privacy in one’s home versus outside the home.\textsuperscript{82}

Under the subjective test, the jury determines whether the suspect had the initial intent to commit the criminal offense.\textsuperscript{83} There are several famous jury acquittals applying the subjective test of entrapment. John Delorean, a former General Motors Executive, started his new auto company, strikingly called The Delorean, but ran into financial difficulty.\textsuperscript{84} A disgruntled employee whispered to the feds that Delorean was financing his company through illicit drug transactions.\textsuperscript{85} The government engaged in a prolonged undercover operation steering Delorean into financing his operation from corrupt Middle Eastern financiers.\textsuperscript{86} The undercover

\begin{itemize}
\item \textsuperscript{79} See, e.g., United States v. Allibhai, 939 F.2d 244, 249 (5th Cir. 1991) (rejecting even a requirement that government agents must have reasonable suspicion that a person is engaged in illegality before targeting him in a sting operation).
\item \textsuperscript{80} See, e.g., State v. Mullens, 650 S.E.2d 169, 190 (W. Va. 2007).
\item \textsuperscript{81} Id.
\item \textsuperscript{82} Id. This ruling is contrary to the prevailing federal standard enunciated in \textit{United States v. White}, where the federal government does not need a warrant for in-house participant monitoring, 401 U.S. 745, 754 (1971).
\item \textsuperscript{83} United States v. Russell, 411 U.S. 323, 424, 436 (1973) (concerning entrapment where a government undercover agent supplied the defendant with the necessary ingredients to make methamphetamine). The courts typically instruct the jury on entrapment as follows:
\begin{quote}
If the defendant was entrapped he [or she] must be found not guilty. The government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped. If the defendant before contact with law-enforcement officers or their agents did not have any intent or disposition to commit the crime charged and was induced or persuaded by law-enforcement officers o[r] their agents to commit that crime, then he [or she] was entrapped. On the other hand, if the defendant before contact with law-enforcement officers or their agents did have an intent or disposition to commit the crime charged, then he [or she] was not entrapped even though law-enforcement officers or their agents provided a favorable opportunity to commit the crime or made committing the crime easier or even participated in acts essential to the crime.
\end{quote}
\item \textsuperscript{84} Whelan, supra note 71, at 1198. The Delorean is a gull-winged car made famous in the movie trilogy of \textit{BACK TO THE FUTURE} (Universal Pictures 1985, 1989, 1990), starring Michael J. Fox.
\item \textsuperscript{85} Whelan, supra note 71, at 1198.
\item \textsuperscript{86} Id.
\end{itemize}
agents convinced DeLorean to sign over the entire voting stock of his fledgling company to federal agents posing as drug dealers in order for DeLorean to save his company. The Detroit jury found that DeLorean was not predisposed and the government preyed on his need to keep the company afloat.

B. The Objective Test – Outrageous Conduct by the Government

A minority of jurisdictions assess entrapment under the objective test, which focuses on whether the government’s outrageous behavior induced the suspect to commit the crime. In the case of People v. Turner, for instance, the police repeatedly badgered Turner to sell heroin. The police investigator, who befriended defendant Turner, pretended to be addicted and begged for help. The investigator convinced Turner to travel long distances to buy heroin for his girlfriend. The Michigan Supreme Court applied the objective test and found the government’s conduct in coaxing a reluctant defendant to travel long distances and in preying on his friendship and drug weakness was outrageous police conduct. Jacobson, decided on due process grounds, illustrates a case of outrageous government behavior. Here, the federal government, under several pseudonyms, engaged in a long campaign to steer a former veteran turned farmer into soliciting pornographic boy magazines.

The subjective test and the objective test of entrapment consider similar factors, such as the accused’s prior criminal record, the accused’s reputation, whether the undercover agent repeatedly badgered the accused

87. Id.
88. Id. at 1199.
91. Id. at 12.
92. Id. at 12-13.
93. Id. at 13.
94. Id. at 22-23. With a reluctant defendant, the police should prevent the commission of the offense and elevate the criminal, rather than tend to further debase him. Id. at 16 (citing People v. Sinclair, 194 N.W.2d 878, 888 (Mich. 1972)).
96. Id. at 542-43.
to participate in the criminal transaction, whether there were disproportionate inducements like extreme monetary discounts, and whether the accused had an opportunity to withdraw from the illegal transaction. The subjective test emphasizes the defendant’s predisposition to commit the crime, which is decided by a jury. The objective test emphasizes the police conduct and is decided by the trial judge at a pre-trial hearing. If the judge decides there is no entrapment, then the defendant cannot raise the entrapment issue at trial. This is similar to a Fourth Amendment claim: if the evidence is suppressed as an unconstitutional search, the jury never hears it. The subjective and objective tests frequently overlap and lead to the same conclusion. Occasionally, the two tests may lead to different conclusions. In United States v. Searcy, for instance, the court held that the sale and possession of crack cocaine was not entrapment under the objective, outrageous conduct test, but it was entrapment under the subjective, predisposition test because the accused was not predisposed.

C. A Hybrid Test

Several states employ a hybrid test, a combination of the subjective and objective tests, where the judge initially adjudicates the claim under the objective test at a pretrial hearing and, if the entrapment defense fails at this stage, the jury is then given the opportunity at trial to adjudicate the claim under the subjective test. This is similar to a Fifth Amendment confession issue. If a court rules that a confession is proper in a pretrial hearing, the defense can still argue the confession was involuntary to the jury.

97. United States v. Miller, 71 F.3d 813, 816 (11th Cir. 1996) (citing United States v. Ventura, 936 F.2d 1228, 1231, 1232 (11th Cir. 1991)). See also United States v. Searcy, 233 F.3d 1096, 1101 (8th Cir. 2000) (holding that crack cocaine was not entrapment under the objective, outrageous conduct test, but it was entrapment under the subjective, predisposition test).

98. This is similar to a search and seizure issue, which is raised in pre-trial proceedings. Mapp v. Ohio, 367 U.S. 643, 654-55 (1961). If a search violation is found, the evidence is suppressed at trial. Id.

99. Id.

100. See Allen et. al., supra note 61 at 410-13 (discussing the nonexistent practical distinctions between the subjective and objective tests for entrapment).

101. Id. at 413-14; Searcy, 233 F.3d at 1100-01.

102. Searcy, 233 F.3d at 1096.

103. Id. at 1098, 1100.

104. State v. Vallejos, 945 P.2d 957, 961 (N.M. 1997) (holding that a judge may first rule as a matter of law; then the accused has a second opportunity to argue the defense before a jury).
There are other hybrid configurations. One can imagine the objective test concerning outrageous police conduct, decided by a jury. In civil rights cases, for instance, jurors are frequent arbiters of improper police conduct. One can also imagine the subjective test on predisposition being decided by a judge in a pre-trial hearing.

Through dramatic acting and artifices, undercover agents have posed as seductive, mini-skirted prostitutes, as Arab sheiks, as male prostitutes, as drug dealers, as con-artists, as war veterans, as Wall Street brokers, as racketeers, and as politicians. Rogue informants commit an unbridled array of crimes and offer their status as


106. Sorrells, 287 U.S. at 441 (stating that “artifice and stratagem may be employed to catch” criminals).

107. See generally, Gregory G. Sarno, Entrapment Defense in Sex Offense Prosecutions, 12 A.L.R. 4th 413. See also, e.g., United States v. Simpson, 813 F.2d 1462, 1465 (9th Cir. 1987) (holding that the FBI’s manipulation of a prostitute, who was a heroin user, into becoming an informant and the prostitute’s use of sex to deceive defendant into believing she was an intimate friend so that she could lure him into selling heroin was “not so shocking as to violate the due process clause”).

108. United States v. Kelly, 707 F.2d 1460, 1461-63 (D.C. Cir. 1983) (explaining that the great Abscam undercover investigation of United States congressmen, in which the FBI posed as wealthy Arabs trying to bribe members of Congress to ensure that the congressmen would introduce immigration legislation).

109. See generally. Sarno, supra note 107; see also State v. Trombley, 206 A.2d 482, 483 (Conn. Cir. Ct. 1964) (describing how a police officer in civilian clothes approached defendant’s car and offered to engage in a sex act with him).


111. See David Jackson, Jeff Coen, & Ray Gibson, FBI Mole had Long History of Fraud – but Looked Great, Chi. Trib. Jan. 11, 2007, at 1 (stating that “Andre P. Johnson cut a dapper figure as he tooled around the South Side with Ald. Arenda Troutman . . . [I]n addition to his elegant suits and designer eyeglasses, he wore an unusual accessory: a hidden FBI tape recorder . . . Johnson is the undercover mole whose wiretapped conversations with Troutman form the basis of the federal bribery charge.”).


113. See Whelan, supra note 71, at 1198. In the John DeLorean trial, the undercover agents convinced DeLorean to sign over the entire voting stock of his fledgling company to federal agents posing as drug dealers. Id.

114. See id. at 1193; see also LeCARRÉ, supra note 1.

115. Matt O’Connor, Life as an FBI Mole in Berwyn: Former Alderman Brings Bribery to Light, but He Lost His Job and Faced a Mental Breakdown, Chi. Trib., Nov. 23 2006, at 1 (telling the story of how former alderman Alex Bojovic went undercover and became an FBI “mole”).
“undercover informants” as a defense. They are immune from prosecution because of the prosecutor’s dependency on the informant in greater cases. In one situation in New York, a defendant caught on a robbery charge in an adjacent county argued that he was an undercover agent for the Drug Enforcement Agency because his instructions were open-ended to engage in any nefarious activity.116

Undercover agents are frequently supported with fancy cars, money, elaborate apartments, and luxurious clothes.117 It is a cat and mouse game where the charismatic undercover agents and the detectives orchestrating the investigation share as much conspiratorial drama as the criminals themselves.118

IV. SENTENCING ENTRAPMENT AND MANIPULATION

A. Sentencing Entrapment

The sentencing entrapment defense refutes the factual enhancements which aggravate a defendant’s sentence.119 The sentencing jury considers whether the defendant, who was predisposed to commit a crime, had a previous intent or willingly committed additional acts related to the crime.120 Several courts disparage the notion of “sentencing entrapment”

116. See Timothy Williams, Robbery Suspect Says the D.E.A. Made Him Do It, N. Y. TIMES, Mar. 19, 2007, at B1 (noting that “[m]any people accused of crimes come up with unusual defenses and alibis, but one sad-faced man now imprisoned at Rikers Island has offered a novel one. He says he was working as an undercover operative and committed a home-invasion robbery in 2004 with the full knowledge and approval of the United States Drug Enforcement Agency . . . The D.E.A. has acknowledged that Mr. Medina, 24, was under contract as an informant . . . Mr. Medina was quickly able to infiltrate, under D.E.A. orders, a crew that robbed drug dealers, a fact the agency has confirmed.”).


118. See State v. Lively, 921 P. 2d 1035, 1048 (1996) (stating that “[t]he conduct of the informant here is so closely related to the actions of the Defendant we conclude that the informant controlled the criminal activity from start to finish.”).

119. United States v. Searcy, 233 F.3d 1096, 1103 (8th Cir. 2000) (recognizing sentencing entrapment, but remanded to determine if defendant was entrapped to sell crack cocaine); Leech v. State, 66 P.3d 987, 990 (Okla. Crim, App. 2003) (explaining that persons who characteristically possess small amounts of drugs could be entrapped into trafficking in drugs).

120. Leech, 66 P.3d at 990-91 (holding that the defendant became “ready and willing” to commit the greater crime during the course of the transaction).
for the simple reason that a person who commits an offense is predisposed to commit additional features related to the offense.  

Criminal behavior implies an inherent deviant indoctrination. Many social criminal behaviorists recognize that criminals evolve from singular misdemeanors to aggravated felonies. A person who is initially predisposed to commit a crime is no longer an “innocent” person as to that entire species of crime. Such a person has tasted the fruits and allure of criminal behavior. Indeed, predisposition is the basis of the venerable Similar Acts rule, where evidence of crimes of the same general nature may be admitted at trial to show motive, intent, scheme, and manner of action. The similar acts rule is predicated on the notion that a pattern of similar conduct may be indicative of the suspect’s intent. One cannot be entrapped when one engages in a reign of similar conduct.

On the other hand, an individual who commits an underlying crime may be unwilling to commit a greater crime or unwilling to commit additional acts related to the crime. People commit daily acts of venial sins or misdemeanors, yet are unwilling to commit mortal sins or aggravated felonies related to their acts. A person may commit an assault, but may be unwilling to kill. A person may cheat on her taxes, but never cheat in her business accounting practices. A person may deal in small amounts of drugs, but never traffic in large amounts.

121. In United States v. Miller, where the accused who sold powder cocaine was predisposed to sell crack, the court held that sentencing entrapment is a defunct doctrine and impermissible in the 11th Circuit. 71 F.3d 813, 818 (11th Cir. 1996). Nor is the defense theory of partial entrapment permissible. Id. A number of federal courts do not recognize a partial entrapment defense. In the federal arena, the First, Seventh, Eighth, and Ninth Circuits accept the doctrine of sentencing entrapment, which focuses on the defendant’s predisposition. See, e.g., Searcy, 233 F.3d at 1101 (accepting doctrine as defense; proper analysis focuses on defendant’s predisposition). The Searcy court accepted sentencing entrapment, but few courts find it under the facts. Typically, there are other facts indicative of the accused’s willingness to engage in a higher crime. See also United States v. Lacey, 86 F.3d 956, 962-63, 966 (10th Cir. 1996) (finding sufficient evidence of defendant’s engagement in large drug deals to overcome his argument of sentencing entrapment or manipulation).

122. LARRY J. SIEGEL, ET AL., JUVENILE DELINQUENCY: THEORY, PRACTICE, AND LAW 104-137 (Thomson, Wadsworth Publishing 2003). The inclination of the criminal is defined: “the only way to get rid of a temptation is to yield to it.” BARTLETT’S FAMILIAR QUOTATIONS 566 (16th Ed. 1992) (quotation by Oscar Wilde).

123. FED. R. EVID. 404(b) (stating that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.”).

124. Id.

125. See, e.g., United States v. Staufer, 38 F.3d 1103, 1108 (9th Cir. 1994).
A venial sinner may be impervious to mortal sins. It is, of course, possible that a small crime may be indicative of a person’s predisposition to commit a greater offense – like the young boy who brutalizes dogs and then kills his friend.126 Yet, criminal behavior is no forgone conclusion of predisposition. Many police officers, prosecutors, and judges have personally experienced wild and sordid pasts and have avoided criminal predisposition.

Sentencing entrapment arguments are rarely successful because other factors suggest that the accused, while initially reticent in committing a higher offense, grew eager to comply with the undercover officer’s demands.127 In the Miller case for instance, the suspect, initially reluctant, eagerly engaged in an elaborate cooking scheme to multiply the cocaine.128 On the other hand, in the Cannon case,129 a defendant who was unwilling to buy handguns was unfairly coerced into buying a machine gun at an outrageous discount, thereby increasing his potential sentence by 25 years.130 Entrapment conveys undue persuasion; manipulation conveys inordinate direction.

B. Sentencing Manipulation

Sentencing manipulation, like the objective test, focuses on police investigative methods which steer suspects into greater sentences.131 For example, an undercover agent engages in multiple drug purchases with a defendant for the sole purpose of increasing the defendant’s sentencing

126. Another example would be a small time drug dealer who escalates the amount of drugs he or she deals. See, e.g., United States v. Golding, 742 F.2d 840, 841–42 (5th Cir. 1984) (charging a defendant with a previous narcotics conviction with “multi-hundred thousand dollar cocaine deals”).
127. See, e.g., Miller, 71 F.3d at 817-18.
128. Id. at 814-15. The accused, who sold powdered cocaine, was predisposed to sell crack. Id. at 816-17. While the defense argued that the government manipulated the transaction from powder to crack to achieve a greater sentence against the accused, the Miller court abstained from this finding because there was plenty of other evidence indicating the accused was trafficking in cocaine and because the trial judge rejected the accused’s defense to entrapment. Id. See also Searcy, 233 F.3d at 1101 (accepting doctrine as defense; proper analysis focuses on defendant’s predisposition). The Searcy court accepted sentencing entrapment, but few courts find it under the facts. Typically, there are other facts indicative of the accused’s willingness to engage in a higher crime. See also United States v. Lacey, 86 F.3d 956, 962-63, 966 (10th Cir. 1996) (finding sufficient evidence of defendant’s engagement in large drug deals to overcome his argument of sentencing entrapment or manipulation).
130. Id. at 1500-01, 1506.
exposure.\textsuperscript{132} Or, the accused agrees to deliver drugs, but is steered into delivering it near a playground, where mandatory sentences attach. A defendant’s conduct is manipulated towards greater punitive schemes for no other “legitimate law enforcement purpose.”\textsuperscript{133}

Several jurisdictions refuse to recognize the sentencing manipulation doctrine because the investigatory method is solely the province of the prosecution.\textsuperscript{134} Many complex investigations require greater proofs to unravel the intricacies of the criminal’s behavior.\textsuperscript{135} Nefarious drug crimes require an undercover agent to develop trust and patience with the long chain of drug suppliers.\textsuperscript{136} A higher quantum of proof is necessary, where the prosecution witnesses are usually incredible, immunized drug dealers or disreputable informants.\textsuperscript{137} Fee arrangements with informants and promises of reduced charges significantly discredit the witnesses and weaken the prosecution’s case. The prosecution’s burden of proof is compromised through incompetent and unreliable evidence. Consequently, the prosecution needs much latitude to probe the extent of a criminal enterprise, to determine whether co-conspirators exist, and to trace the distribution hierarchy.\textsuperscript{138} Since the prosecution bears the burden of proving its case beyond a reasonable doubt, the prosecution must exercise

\textsuperscript{132.} \textit{Id.} at 89-90.


\textsuperscript{134.} See, e.g., \textit{United States v. Baker}, 63 F.3d 1478, 1500 (9th Cir. 1995) (rejecting defendant’s proposed rule that would find sentencing manipulation whenever the government continues to investigate after accumulating enough evidence to indict).

\textsuperscript{135.} \textit{United States v. Russell}, 411 U.S. 423, 432 (1973) (stating that “[t]he illicit manufacture of drugs is not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise.”).

\textsuperscript{136.} \textit{United States v. Barth}, 990 F.2d 422, 425 (8th Cir. 1993) (stating that “[the] government’s evidence showed that an established drug dealer will not readily sell large quantities of drugs to a new customer and that repeated buys are necessary to gain the dealer’s confidence.”).

\textsuperscript{137.} \textit{Baker}, 65 F.3d at 1500 (noting that charging delays are difficult to prove because there are often legitimate government purposes for stringing out the investigation before arrest).

\textsuperscript{138.} As the court in \textit{Baker} noted, “[s]uch a rule ‘would unnecessarily and unfairly restrict the discretion and judgment of investigators and prosecutors. Police . . . must be given leeway to probe the depth and extent of a criminal enterprise, to determine whether coconspirators exist, and to trace [the drug] deeper into the distribution hierarchy.’” \textit{Baker}, 65 F.3d at 1500 (quoting \textit{United States v. Calva}, 979 F.2d 119, 123 (8th Cir. 1992)). “[I]t is legitimate for police to continue to deal with someone with whom they have already engaged in illicit transactions in order to establish that person’s guilt beyond a reasonable doubt.” \textit{United States v. Lora}, 129 F.Supp.2d 77, 89, n. 15. (D. Mass 2001). \textit{See also} \textit{United States v. Estrada}, 256 F.3d 466, 476 (7th Cir. 2001) (holding that defendant did not present sufficient sentencing entrapment claim).
its own judgment in determining when the investigation is sufficient.\footnote{Baker, 63 F.3d 1478 at 1500 (stating, “[m]oreover, since the government bears the burden of proving its case beyond a reasonable doubt, it must be permitted to exercise its own judgment in determining at what point in an investigation enough evidence has been obtained.”).}

The Separation of Powers doctrine guarantees to the prosecution the discretion to decide the breadth and conclusion of the investigation.\footnote{United States v. Williams, 504 U.S. 36, 46-47 (1992). In Williams, the Court held that its supervisory power could not be used to dictate prosecutorial standards concerning the disclosure of exculpatory evidence to a grand jury. \textit{Id.} In the Minnesota case of State v. Soto, 562 N.W. 2d 299 (Minn. 1997), the prosecution reaffirmed its need to continue the drug investigation to discover the accomplices, the drug supplier, and to build trust with the drug supplier. Repeated drug transactions with a suspect were necessary to develop trust in the drug community and to trace the drug dealer’s supplier. The Soto court refused to recognize sentencing manipulation as a factor at sentencing, unless there is egregious police conduct which goes beyond legitimate investigative purposes. \textit{Id.} at 305 (quoting Barth, 990 F.2d at 424).}

“[T]he defense of entrapment . . . was not intended to give the federal judiciary a ‘chancellor’s foot’ veto over law enforcement practices of which it did not approve.”\footnote{United States v. Russell, 411 U.S. 423, 435 (1973).}

\section*{C. Reverse Sting Operations}

Reverse sting operations exemplify manipulations. Reverse sting operations occur when a government agent controls the supply of contraband and offers attractive inducements to potential buyers, who are frequently addicted, poor, or distressed.\footnote{See Damon D. Camp, \textit{Out of the Quagmire after Jacobson v. United States: Towards a More Balanced Entrapment Standard}, 83 J. CRIM. L. & CRIMINOLOGY 1055, 1056 (1993).}

A typical “sting” operation requires the government to operate as a passive party waiting for criminal encounters.\footnote{\textit{Id.}}

A reverse sting operation requires the government to undertake an active role, like being the seller, in inducing criminal activity.\footnote{\textit{Id.} (stating that “[u]nlike the traditional ‘sting’ operation, where undercover officers pose as buyers of illicit goods or services, in the ‘reverse sting’, law enforcement personnel act as sellers.”).}

The government may, for instance, sell guns or drugs at artificial prices to make arrests. In such operations, it is common to encounter government informants or government agents who are more blameworthy than the buyers.\footnote{\textit{Id.}} State and federal courts are uniformly
suspicious of reverse sting operations because of deplorable police conduct which induces the weak and vulnerable.\textsuperscript{146} If the inducement preys on addictions, poverty, or other allures, then the reverse sting operation is subject to manipulation or entrapment arguments.\textsuperscript{147}

\section*{D. Sentencing Escalation – Altering Specific Intent}

The Michigan Supreme Court recognizes that governmental misconduct which manipulates a person into committing a criminal offense or even a higher grade offense may be relevant to the accused’s intent:

\begin{quote}
Police misconduct, standing alone, tells us nothing about the defendant. However, if the defendant has an enhanced intent that was the product of police conduct or any other precipitating factor, and the enhanced intent can be shown in a manner that satisfies the requirements for a sentencing departure, . . . [then] it is permissible for a court to consider that enhanced intent in making a departure.\textsuperscript{148}
\end{quote}

This case arose from a series of crack cocaine sales by Deon Claypool to an undercover officer.\textsuperscript{149} According to the defense, the police manipulated the defendant, who was addicted to drugs, by making repeated purchases for increasing quantities of cocaine by paying the defendant $500 more than the going rate for crack cocaine.\textsuperscript{150} The prosecutor countered that investigative jurisdiction rests with the prosecutor’s office and that the prosecutor had many reasons for prolonging the investigation for the undercover agent to build trust in the drug community.\textsuperscript{151} The trial court found nevertheless that the extra $500 was an improper inducement, and that the prosecution intentionally prevented the defendant from getting all the facts of this case, that the sentence should be modified to ten (10) years imprisonment.”


147. Id.

148. People v. Claypool, 684 N.W.2d 278, 283-284 (Mich. 2004) (stating that “if it can be objectively and verifiably shown that police conduct or some other precipitating cause altered a defendant’s intent, that altered intent can be considered by the sentencing judge as a ground for a downward sentence departure.”). \textit{Id.} at 280.

149. \textit{Id.} at 281. A Michigan statute allowed sentencing downward departure “if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” \textit{Mich. Comp. Laws Ann.} § 769.34(3)


151. \textit{Id.}
substance abuse treatment. The trial court reduced the defendant’s sentence by two years.

The Michigan Supreme Court recast the sentencing entrapment argument as sentencing manipulation or sentencing escalation. Defendant’s intent was altered by the manipulative acts of the undercover agents. Moreover, the crime was a specific intent crime, where intent was paramount. Defenses which alter a defendant’s mens rea are readily admissible with specific intent offenses. The Claypool court continued:

The element of intent to sell drugs is left untouched; indeed, defendant himself admitted that he sold drugs. However, defendant’s intent concerning the amount of drugs he sold may have been altered in this case when the police repeatedly returned to him to buy ever-increasing amounts, if those amounts were in fact greater than what defendant originally intended to sell.

The specific intent formula derived from the fundamental incongruity of a heightened intent on one hand, and the exclusion of evidence that might defeat that heightened intent. If the specific intent to commit a crime is vigorously massaged by an undercover officer, then the defendant’s intent is reduced.

E. Piercing the Prosecutorial Veil of Discretion

There are occasions when the courts must pierce the prosecutorial veil of discretion. There are constitutional constraints on police investigative

152. Id. at 282.
153. Id. at 283.
154. Id. See also People v. Fields, 448 Mich. 58, 79 (Mich. 1995). “[T]he Court found that the government’s actions, although not rising to the level of entrapment, purposely escalated the crime. This last factor is of particular importance in our approval . . . . As a mitigating circumstance surrounding the offense, it weighs heavily in favor of a deviation from the statutory minimum.” Id. (discussing People v. Shinholster, 196 Mich. App. 531 (1992)) (emphasis added).
155. Claypool, 470 N.W.2d at 283-84 (permitting downward departures based on police conduct, but remanding to the trial court to provide its reasons for doing so on the record). But see the dissent, which argues that the mens rea element is really motive, not intent. Id. at 289 (Corrigan, C. J., concurring in part and dissenting in part).
156. See Derrick Augustus Carter, Bifurcations of Consciousness: The Elimination of the Self-Induced Intoxication Excuse, 64 Mo. L. Rev. 383, 403-09 (1999) (discussing defenses to general and specific intent crimes).
157. Id. at 286.
158. Id.
159. Id.
160. Id.
methods through the Fourth Amendment concerning search and seizure, the Fifth Amendment concerning confessions, and Sixth Amendment concerning speedy trial. There are additional due process constraints on investigative methods concerning eyewitness identification, vindictive and selective prosecution, overcharging, and investigative methods. The courts will impose their supervisory powers over abusive investigative tactics that taint the administration of justice.

Some courts identify malicious investigations as those where the police manipulate the charges "for no legitimate law enforcement purpose[, but solely] to increase the severity of the defendant's sentence." In United States v. Staufer, for instance, the government agent preyed upon the suspect's poverty and depression to encourage a reluctant suspect to sell more LSD than the suspect originally intended. In determining whether the government improperly prolonged its investigation for no legitimate purpose, courts examine several factors, such as the length of time between the first offense and the arrest, whether there was an immediate need to arrest the suspect, whether the suspect had committed a violent offense, whether continued investigation would ensnare a co-conspirator, and whether delay would provide a greater understanding of the nature of the enterprise. A hearing on the objectives of the undercover operation is required.

166. See Santobello v. New York, 404 U.S. 257, 261 (1971) (noting that the concept of plea bargaining "presuppose[s] fairness in securing agreement between an accused and a prosecutor"); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (prosecutor may threaten to bring greater charges to convince an accused to plead guilty to lesser charges, but only if the prosecutor has probable cause to believe that the accused committed the offense).
169. See e.g., People v. Smith, 120 Cal. Rptr.2d 831 (2001) (rev’d on other grounds, 80 P.3d 662 (Cal. 2003)).
170. United States v. Staufer, 38 F.3d 1103, 1105 (9th Cir. 1994).
171. Id. at 1105.
172. United States v. Garcia, 79 F.3d 74, 75-76 (7th Cir. 1996). In Garcia, however, the Court held that “there is no defense of sentencing manipulation in this circuit,” at least to instances of prolonged
In *United States v. Ramirez-Rangel*, the court held that:

[I]t was error for the district court to deny the motion to reveal the identity of the informant without holding an in camera hearing to determine whether the informant’s testimony would be relevant and helpful to the defendants on the question of sentencing entrapment. . . . If the district court concludes that the testimony is relevant, . . . then the district court must conduct a hearing to resolve that claim[.]

Several cases illustrate that, depending on their rewards and commissions, undercover agents advantageously manipulate charges against their prey. The manipulation powers of the undercover investigator or informant coincide with mandatory sentences, which enhance punishment for slight factual variances. In short, the prosecution very frequently delegates its charging powers to a salacious informant. The agent or informant can approach a suspect, suggest a drug deal, name the amount and place, engage in suggestive selling techniques, provide the drugs, determine the mandatory sentence scheme, and reap a reward. Most confidential informants seek great incentives to arrange large scale drug transactions. Prosecutorial discretion is undermined when the investigation is steered by an undercover agent or informant of police investigations. Id. at 76. “A suspect has no constitutional right to be arrested when the police have probable cause.” Id. These various terms refer to the same notion of objective entrapment, where the police allow the investigation to unnecessarily continue in order to enhance and manipulate the charges and mandatory sentences against the suspect. See *United States v. Lora*, 129 F.Supp.2d 77, 89 (D.Mass 2001).

173. 103 F.3d 1501 (9th Cir. 1997).
174. Id. at 1508.
175. See *Defense Presses Agent in DeLorean Case*, N.Y. TIMES, June 23, 1984, at 16. In the John DeLorean case, one agent testified “that it was ‘possible’ he had once referred to the informer who proposed John Z. DeLorean for a narcotics investigation as his ‘meal ticket’.” Id.
176. See *United States v. Blakely*, 542 U.S. 296, 300 (2004). In the underlying case, the trial court increased the defendant’s sentence because of victim’s statements rendered at sentencing. The Supreme Court ultimately reversed the defendant’s sentence. Id. at 313-14. For further discussion of *Blakely*, see infra notes 201-202 and accompanying text.
177. As the Eighth Circuit discussed in *United States v. Stavig*, 80 F.3d 1241, 1247 (8th Cir. 1996), “sentencing discretion is delegated all the way down to the individual drug agent operating in the field.” (quoting United States v. Staufer, 38 F.3d 1103, 1107 (9th Cir. 1994)). “Because of the great potential for abuse, these cases require the most careful scrutiny and a probing examination by the district court.” Id. See also *United States v. Staufer*, 38 F.3d 1103, 1107-08 (9th. Cir. 1994) (noting that “[d]rug agents can decide, apparently without any supervision by anybody to negotiate with somebody for an ounce, a pound, a kilo, 100 kilos, a million kilos of a substance and, of course, if the defendant bites at the bait, then that amount chosen by the drug agent will determine his drug sentence.”).
178. *Stavig*, 80 F.3d at 1247.
dubious credibility and great manipulative skills.\textsuperscript{179} Sentencing defenses are essential to unravel the inherent due process failings related to enhancements and manipulations.

\textbf{F. Imperfect Sentencing Defenses}

Many state sentencing statutes recognize \textit{partial defenses, quasi-defenses, or imperfect defenses} at sentencing.\textsuperscript{180} As such, sentencing entrapment issues can be corralled through the procedural mechanism of an imperfect defense at sentencing. In Tennessee, for example, the court may reduce a sentence if "[s]ubstantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense."\textsuperscript{181}

State sentencing guidelines recognize some latitude for the sentencing court to consider matters inadmissible at trial, but material to the presentence report.\textsuperscript{182} Frequently, inadmissible evidence at trial may be highly relevant at sentencing in order to accurately gage the accused's culpability.\textsuperscript{183}

Some states, like Indiana, apply a statutory form of aggravating and mitigating circumstances at sentencing.\textsuperscript{184} Sentencing entrapment or sentencing manipulation, for instance, would fall under the rubric of victim provocation, where "[t]he victim of the crime induced or facilitated the offense."\textsuperscript{185} The victim in entrapment cases would arguably be the government through the conspiratorial undercover operation.\textsuperscript{186} Many states have catch-all sentencing provisions, which allow defenses where there are substantial grounds tending to excuse or justify the crime, though failing to establish a defense.\textsuperscript{187} Nonetheless, many federal jurisdictions do

\begin{itemize}
\item \textsuperscript{179} McNabb v. United States, 318 U.S. 332, 341-42 (1953). This amounts to prosecutorial misconduct in the investigation stage. \textit{Id.} The court cannot be an accomplice to police misconduct. \textit{Id.} \textsuperscript{180} See, e.g., TENN. CODE. ANN. § 40-35-113(3) (2008).
\item \textsuperscript{181} Id.
\item \textsuperscript{182} People v. Claypool, 684 N.W.2d 278, 286 (Mich. 2004).
\item \textsuperscript{183} See Elson v. State, 659 P.2d 1195, 1205 (Alaska 1983) (holding illegal evidence is admissible only where it is clear that the evidence was not obtained for purposes of influencing the sentencing judge). \textit{See also} Smith v. State, 517 A.2d 1081, 1085 (Md. 1986) (holding any evidence the court deems to have probative force may be received regardless of its admissibility under the exclusionary rules of evidence).
\item \textsuperscript{184} Ind. Code Ann. § 35-38-1-7.1, Considerations in Imposing Sentence.
\item \textsuperscript{185} See \textit{id.} at (b)(3).
\item \textsuperscript{186} In setting up bogus undercover operations, there is no private victim.
\end{itemize}
not recognize partial sentencing defenses such as sentencing entrapment or sentencing manipulation.\textsuperscript{188}

Mitigation efforts at sentencing fall far short of formal defenses. Mitigation factors essentially acknowledge the truth of the aggravating factors, but beg for “consideration” to reduce the accused’s sentence. Mitigation conveys compromise and does not eliminate essential aggravating factors. Unlike “mitigation” factors, sentencing defenses convey a full panoply of safeguards: the right to present witnesses and expert witnesses, the right to cross-examine those witnesses, and the right to dispute the enhancement altogether.

In bifurcated sentencing proceedings in capital death penalty cases, the accused has a right to raise new sentencing defenses as long as the defenses are not inconsistent with the accused’s prior conviction.\textsuperscript{189} Sentencing entrapment evidence is admissible because such evidence shows “how, not whether, the defendant committed the crime.”\textsuperscript{190}

V. THE PROSECUTOR’S ENHANCEMENT PACKAGE

The prosecutor’s sentencing artillery is riddled with sentencing enhancement statutes,\textsuperscript{191} mandatory drug sentences,\textsuperscript{192} repeat offender prosecutions,\textsuperscript{193} presumptive sentencing guidelines,\textsuperscript{194} and factual

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{188} Id. at 1411-15.
\item \textsuperscript{189} See Oregon v. Guzek, 546 U.S. 517, 523, 527 (2006) (holding that neither Eighth nor the Fourteenth Amendment granted capital murder defendant a right to present additional alibi evidence at resentencing, because such evidence was inconsistent with prior conviction).
\item \textsuperscript{190} Id. at 524; See also Lockett v. Ohio, 438 U.S. 586, 604-05 (1978), where the plurality of the Court held that evidence that accused played minor role in crime is admissible at the sentencing stage, because it is relevant to any aspect of defendant’s character or record and any of the circumstances of the offense that the defendant proffers for a reduced sentence; see also Green v. Georgia, 442 U.S. 95, 97 (1979) (per curiam) (holding it proper for defendant to introduce hearsay evidence at sentencing proceedings that a third party admitted to the murder).
\item \textsuperscript{191} See Apprendi v. New Jersey, 530 U.S. 466, 469-70 (2000) (concerning sentencing enhancement statute for racial hatred).
\item \textsuperscript{192} Harmelin v. Michigan, 501 U.S. 957, 961, 996 (1991) (holding that mandatory sentence of life imprisonment with no parole for possessing over 650 grams of cocaine is constitutional).
\item \textsuperscript{193} See Ewing v. California, 538 U.S. 11, 17-18, 30-31 (2003) (affirming a mandatory sentence of twenty five years-to-life in prison imposed under California’s three strikes law for the theft of three golf clubs).
\item \textsuperscript{194} Blakely v. Washington, 542 U.S. 296, 313-14 (2004). During the factual basis portion of the guilty plea, Blakely admitted to the elements of second-degree kidnapping and domestic-violence and the firearm allegation. Id. at 299. After hearing Blakely’s wife describe additional horrible facts and cruelty, the judge rejected the forty nine to fifty three month range and increased Blakely’s sentence to ninety months (seven years and six months), an increase of three years and one month. Id. at 300. On appeal, the Washington Court of Appeals affirmed his sentence, but the United States Supreme Court ultimately reversed it. Id. at 301, 314. For further discussion of Blakely, see infra notes 201-202 and accompanying text.
\end{enumerate}
\end{footnotesize}
variances. A judge may find additional res gestae facts at sentencing, which may import a higher sentencing range. Previously, a judge could
determine these factors by a preponderance of the evidence. A trilogy of
cases has changed the sentencing enhancement landscape. In Apprendi
v. New Jersey, concerning a racial hatred sentencing enhancement
statute, the court found the racial hatred aspect must be proven beyond a
reasonable doubt before a sentencing jury. Similarly in Blakely v.
Washington, where the judge increased the sentence beyond the

195. Many wrongful convictions are caused by intentional prosecutorial manipulation and
A21 (stating, “[m]y recently completed study of the 124 exonerations of death row inmates in
America from 1973 to 2007 indicated that 80, or about two-thirds, of their so-called wrongful
convictions resulted not from good-faith mistakes or errors but from intentional, willful, malicious
prosecutions by criminal justice personnel . . . [W]hen a police officer manufactures or destroys
evidence to further the likelihood of a conviction, then it is deceptive to term these conscious
violations of the law.”).

196. See United States v. Booker, 543 U.S. 220, 228-29 (2005) (sentencing judge finding that
defendant possessed more drugs than trial revealed). Federal prosecutors have at their disposal the
“Sentencing Package Doctrine,” which promotes a blanket rule that affords trial courts the
discretion to resentence all defendants who happen to have multi-count convictions, regardless of
whether the individual charges are interrelated. Id. See, e.g., United States v. Townsend, 178 F.3d
558, 567 (D.C. Cir. 1999) (explaining Sentencing Package Doctrine). Id. at 570-71 (holding that
when a defendant is found guilty on a multi-count indictment, there is a strong likelihood that the
district court will craft a disposition in which the sentences on the various counts form part of an
overall plan).

197. See McMillan v. Pennsylvania, 477 U.S. 79, 91 (1896) (holding that sentencing system
requires the state to prove facts for sentencing only by a preponderance of the evidence).

198. See Apprendi v. New Jersey, 530 U.S. 466, 466 (2000); Blakely, 542 U.S. at 296; Booker,
543 U.S. at 220.

199. Apprendi, 530 U.S. at 466. Charles Apprendi was a convicted racist. Id. at 471. Apprendi
fired shots “into the home of an African-American family that had recently moved into a previously all-
white neighborhood in Vineland, New Jersey.” Id. at 469. When Apprendi was arrested he admitted
that he did not want an African-American family in the neighborhood, although he later retracted the
statement. Id. The state grand jury indicted Apprendi on 23 counts of assault and weapons charges. Id.
There were no charges for hate crimes. Id. The prosecution offered Apprendi a guilty deal he could not
refuse. Apprendi agreed to plead to two counts of second-degree possession of a firearm and one count
of unlawful possession of an antipersonnel bomb. Id. Amusingly, the prosecution dismissed the other
20 counts. Id. at 470. As part of the plea agreement, however, the prosecution reserved the right to ask
the court to impose a higher “enhanced” sentence on the ground that some of the offenses were
committed for a biased purpose and that he hated Black people, which was contrary to a recently enacted
New Jersey hate-crimes statute. Id.

200. Id. at 490. New Jersey’s hate crime law provided for an extended sentence term if the trial
judge found by a preponderance of the evidence, that “the defendant in committing the crime
acted with a purpose to intimidate an individual or group of individuals because of race, color,
gender, handicap, religion, sexual orientation or ethnicity.” N.J. STAT. ANN. § 2C:44-3(e) (West
1999-2000). The extended term authorized by the hate crime law for second degree offenses is
imprisonment “between 10 and 20 years.” N.J. STAT. ANN. 2C:43-7(a)(3) (2004). The hate crime
statute only applies if the defendant is convicted or pleads guilty to an underline offense. Id.

201. Blakely, 542 U.S. at 296.
presumptive range because of new facts presented at sentencing, the Court held the prosecutor must prove the new facts beyond a reasonable doubt and present them before a jury.\textsuperscript{202} In the third case, \textit{United States v. Booker},\textsuperscript{203} concerning a drug offense where the sentencing judge discovered more drugs than found at trial, the prosecutor had the burden of proving the allegations beyond a reasonable doubt before a jury.\textsuperscript{204} In \textit{Booker}, the Supreme Court concluded the federal sentencing guidelines are now \textit{advisory}, and \textit{no longer mandatory}.\textsuperscript{205} The procedural theme of these cases is that any factual element that has the possibility of increasing the defendant’s \textit{maximum} sentence must be proven beyond a reasonable doubt before a jury.\textsuperscript{206}

In \textit{Harris v. United States},\textsuperscript{207} however, the court narrowly held that the reasonable doubt and jury requirement is not triggered with mandatory \textit{minimum} sentences, only mandatory \textit{maximum} sentences.\textsuperscript{208} Maximum sentences concern aggravated facts which are not presented to the jury.\textsuperscript{209} Mandatory minimum sentences, however, concern findings within the jury’s verdict.\textsuperscript{210}

Mandatory sentences on slight factual variances are perfectly legal.\textsuperscript{211} Small differences in the quantity or type of drugs or where the drugs are sold significantly alter a defendant’s prison term.\textsuperscript{212} “Every new element that a prosecutor can threaten to charge is also an element that a defendant can threaten to contest [and present as a defense] at trial [or sentencing] and make the prosecutor prove beyond a reasonable doubt.”\textsuperscript{213}

The accused has a reciprocal Sixth Amendment right and Fifth Amendment due process right to present a defense to the sentencing enhancement charges.\textsuperscript{214} If, for instance, an undercover agent induced Apprendi to commit a series of racial assaults, the government’s

\begin{flushleft}
\textsuperscript{202.} \textit{Id.} at 303-04.  \\
\textsuperscript{203.} \textit{Booker}, 543 U.S. at 220.  \\
\textsuperscript{204.} \textit{Id.} at 230-31.  \\
\textsuperscript{205.} \textit{Id.} at 243-44.  \\
\textsuperscript{206.} \textit{See supra} notes 199-205 and accompanying text.  \\
\textsuperscript{207.} Harris, v. United States, 536 U.S.  545, 545 (2002).  \\
\textsuperscript{208.} \textit{Id.} at 557.  \\
\textsuperscript{209.} \textit{Id.} at 566-67.  \\
\textsuperscript{210.} \textit{Id.} at 557.  \\
\textsuperscript{211.} Apprendi v. New Jersey, 530 U.S.  466, 485-86 (2000).  \\
\textsuperscript{212.} United States v. Sanchez, 138 F.3d 1410, 1414 (11th Cir. 1998).  \\
\textsuperscript{214.} Jones v. United States, 526 U.S. 227, 232-34, 237-41 (1999) (holding that the Due Process Clause of the Fifth Amendment and the Notice and Jury Trial guarantees of the Sixth Amendment require enhancers that increase the maximum punishment to be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt).
\end{flushleft}
conspiratorial influences would affect Apprendi’s actions. Due process would demand that Apprendi be afforded a fair opportunity to present a sentencing entrapment defense on the racial hatred element.

A. Sentencing Enhancement as Cell Reproduction

Another way of understanding the phenomenon of sentencing enhancement is through biology and cell reproduction. Each cell has a membrane and cell wall. Inside the cell is a nucleus, which is the control center of the cell. Imagine a cell as a criminal offense. There are many elements in the cell, and the nucleus is the intent element and the heart of liability. The jury must decide on each element of the cell beyond a reasonable doubt.

Now imagine another cell invading the first cell. This second cell could be a form of bacteria, virus, or any type of independent cell. This second cell is a type of sentencing enhancement. The original cell may merge with the additional cell, or the second cell may lodge itself independently within the first. A jury must review all of the elements of the original cell and all of the elements of the second cell. As manipulation, imagine that the creator of the second cell, which induces it to invade the first cell, is the government.

B. A Unitary v. Bifurcated Trial on Sentencing Enhancements

When sentencing enhancement elements are integrated within the transaction, it is difficult to reserve the element for sentencing adjudication. For instance, in the Apprendi case, the reason for the series of assaults was racial hatred. If Apprendi had elected to go to trial on the assault charges, the prosecutor could not excise the evidence of hate crimes from the liability portion of the trial. The absence of information about the

215. Many courts hold that sentencing entrapment, not sentencing manipulation, may be a basis for a downward departure at sentencing. United States v. Baker, 63 F.3d 1478, 1500 (9th Cir. 1995). In Civil Rights cases, the F.B.I. encouraged informants to assist in assaults against the freedom riders in order not to blow their cover. See Raymond Arsenault, Freedom Riders 151-53 (2006).
216. See Montana v. Egelhoff, 518 U.S. 37, 62 (1996) (O’Conner, J., dissenting). While the legislature may be able to eliminate defenses that bear on intent, such as intoxication in Montana v. Egelhoff, the elimination must undergo a grueling test to determine its constitutionality. The court must determine whether the defense is fundamental and historical, whether it is relevant to mens rea, and the public policy implications. Id. at 43-44, 55.
217. See Donna Rae Siegfried, Biology For Dummies 22-35 (2001).
218. Id.
220. See id. at 469-72.
motive for the assaults would cause the jurors to doubt the coherence of the prosecution’s case.\textsuperscript{221} The New Jersey hate crimes statute was strictly a sentencing enhancement statute, but the hate evidence was material to the trial stage.\textsuperscript{222}

There is prejudice, however, in a unitary proceeding, where evidence of the sentencing enhancement is introduced at trial, because once the jury hears the aggravating sentencing evidence, they will be materially prejudiced to convict the accused as a “bad person,” and no jury instruction can cure the prejudice.\textsuperscript{223} Joinder of the sentencing enhancement element at the trial stage may confuse the jury and lead the jury to rely on one offense as corroborative of the other.\textsuperscript{224} Prejudice may develop if the accused wishes to testify at the trial phase, but not the sentencing phase.\textsuperscript{225} A defendant’s silence at the trial phase would be damaging in the face of
his denial at the sentencing phase. 226 Multiple counts induce improper inferences of combined guilt. 227

Juries, however, have the ability to consider multiple charges through coordinated, special verdicts. 228 While the evidence related to sentencing enhancements may be introduced at the trial, the jury would refrain from rendering a verdict on the enhancement issue. Upon guilt, the jury would then deliberate on the sentencing enhancement issue. In civil cases, for instance, juries often determine coordinated, contingent verdicts that require various weights on several sets of facts. 229

Rules of Criminal Procedure allow joinder at trial of offenses “of the same or similar character.” 230 Joining the underlying offense and the sentence enhancement offense in one trial under the res gestae test, concerning all the facts related to the transaction, may save time and avoid annoyance for the jury. A unitary trial would avoid the expense and ordeal of recalling witnesses to the court and avoid repetitive testimony. With a proper jury instruction, in accordance with special verdicts, the jury can coordinate multiple evidence and engage in separate deliberations, and thereby reduce the danger of jury confusion. 231

When the sentencing enhancement element can be carved from the underlying offense, it would be prejudicial to introduce the sentencing matters during the liability portion of the trial. 232 Returning to our cell analogy, imagine that the second cell so intertwines with the first cell that both cells are indistinguishable. In that case, the jury should hear the evidence of both cells in a unitary trial, and through carefully crafted jury instructions determine guilt at the liability stage from guilt at the sentencing stage. 233 If the two cells, embedded together, are clearly separate, then the

226. See, e.g., Cross v. United States, 335 F.2d 987, 991 (D.C. Cir. 1964) (finding improper joinder of offenses at trial).
227. See, e.g., id.
230. FED. R. CRIM. P. 8(a). The court rules allow joinder when several offenses are not part of a single scheme or plan and are committed at different times and places. Id.
233. FED. R. CRIM. P. 404. An intriguing question is presented whether a sentence enhancement offense may be admissible under the similar acts doctrine. Evidence of other crimes is admissible when relevant to (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so relegated to each other that proof of the one tends to establish the other, and (5) the identity of the person charged with the
evidence of the second cell can be excised from the determination of liability at the first trial. The second cell is then litigated at the sentencing stage.\(^{234}\)

C. Pretrial Notice of Sentencing Enhancement Charges

As a proud advocate for deviation, a vigilant defense attorney must consider whether to contest potential sentencing defenses at the pretrial stage to reduce manipulative overcharging practices. A pretrial hearing will also determine whether the sentencing enhancement charges are presented in a unitary or bifurcated proceeding.\(^{235}\) The prosecutor could theoretically charge each enhancement offense as a separate crime altogether, but separate charges from a singular transaction would normally result in concurrent sentences, which present little threat to the accused.\(^{236}\) A prosecutor deals a significantly better hand with sentencing enhancement factors, which are consecutive and frequently mandatory.\(^{237}\)

The accused is entitled to know the sentencing consequences near the indictment stage in order to give the accused fair notice of the full extent of the jeopardy.\(^{238}\) For instance, the \textit{Apprendi} defendant must know early in the criminal proceeding all of the potential charges, including the sentencing enhancement of hate crimes.\(^{239}\) Proper notice of the charges is

\(^{234}\) In addition to the bifurcated trial system, Justice Breyer in his dissenting opinion in \textit{Apprendi} suggested other legislative alternatives in dealing with \textit{Apprendi}'s new procedural requirements. \textit{Apprendi} v. New Jersey, 530 U.S. 466, 555-66 (2000) (Breyer, J., dissenting). The legislature could adopt: (1) single, mandatory sentences for each crime; (2) indeterminate sentences with parole chosen by judges within broad statutory sentence ranges; (3) the bifurcated system proposed above; (4) inverted guidelines with high sentences to each crime, followed by a list of mitigating factors; or (5) increase the top of each guideline range to the statutory maximum of the offense. \textit{Id.}

\(^{235}\) See George Frampton, \textit{Some Practical and Ethical Problems Of Prosecuting Public Officials}, 36 Md. L. REV. 5, 21 (1976) (stating, “[c]ertainly it is reasonable to suggest that every prosecutor ought to be under an affirmative ethical obligation to ensure that both he and the grand jury are exposed to both sides of a prospective criminal case, and whenever possible the defendant should also have some opportunity for input into the charging decision, even if the opportunity falls short of a full adversary hearing. However, present ethical standards do not even touch on this subject.”).  


\(^{237}\) See the trifecta cases: \textit{Apprendi, Blakely, and Booker}, discussed supra notes 199-206.

\(^{238}\) Perhaps, the accused should know the sentencing consequences by the preliminary examination stage or indictment.

\(^{239}\) If the liability and sentencing enhancement issues are litigated in one unitary trial, the defense may wish to sanitize the predicate offense by stipulating to the initial offense, and litigate...
required under the Constitution and to avoid any appearance of vindictiveness.240

VI. CONSPIRACY IN IMAGINARY CRIMES AND INTERNET PORN

A. Conspiratorial Manipulation

As a co-conspirator, the undercover investigator, directed by higher superiors, encourages the collective effort, which results in elaborate and efficient crimes.241 An embedded undercover operative must prove his or her loyalty to the group and commit felonious offenses or some anti-social behavior.242 Some undercover investigators are licensed to roam free to ensnare as many people as possible in conspiratorial sting operations.243 Confidential informants, as spies, play both ends and reap significant rewards.244 Each suspect is less likely to abandon the criminal plan than if the suspect was acting alone.245 The symbiotic relationship between the suspect and the government agent breeds reliance, dependence, and loyalty.246

The conspiratorial operation creates an irresistible pull, which “makes more likely the commission of crimes unrelated to the original purpose for which the group was formed.”247 “In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.”248 Once the government plays a conspiratorial role in aggravating the criminal action, the accused’s intent is altered by the government’s role in escalating the criminal venture.249

Entrapment is seldom appreciated as an influential conspiratorial event.\(^{250}\) Many unsuccessful entrapment claims fail to rebut the predisposition evidence with the practical behavioral influences that a conspiracy entails. Expert testimony on the dynamic of group action and its effect on individual behavior clarifies the suspect’s susceptibility and undue influences.\(^{251}\) A suspect on the fringes of society can find friendship, business dealings, love, and even sex from an undercover operative.\(^{252}\) Such conspiratorial evidence may dilute the suspect’s culpability in both the liability phase and sentencing phase.\(^{253}\) The conspiratorial influences fall short of entrapment, but prevail as a type of diminished capacity.\(^{254}\) The power of the group dynamic, sponsored by the government agent, can affect the individual’s will.\(^{255}\)

### B. Undercover Operations Which Induce Imaginary Crimes

A conspiracy exists where two or more persons agree to commit a criminal offense.\(^{256}\) If the offense is completed, each person is guilty of the completed offense and a separate count of conspiracy to commit the offense.\(^{257}\) Each conspirator is also guilty of additional acts reasonably foreseeable from their agreement.\(^{258}\) Conspiracy law is established to

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\(^{250}\) See, e.g., United States v. Russell, 411 U.S. 423, 424, 436 (1973) (holding that the undercover agent supplying the essential ingredient to make an illegal drug was not entrapment).

\(^{251}\) See, e.g., Ake v. Oklahoma, 470 U.S. 68, 86-87 (1985) (discussing defendant’s right to have a psychiatrist testify as an expert witness).

\(^{252}\) See State v. Lively, 921 P.2d 1035, 1048-49 (Wash. 1996); United States v. Cuervelo, 949 F.2d 559, 568-69 (2d Cir. 1991). Sex is an attractive inducement. In *Lively*, the court held that a government agent took advantage of a vulnerable single mother who attended Alcoholics Anonymous, by befriending her and beginning a sexual relationship in order to involve her in drug activities. *Lively*, 921 P.2d at 1048-49. See also *Cuervelo*, 949 F.2d at 568-69 (remanding case to consider whether the government consciously set out to use sex as a weapon in its investigatory arsenal).

\(^{253}\) See, e.g., Dixon v. United States, 548 U.S. 1, 7 (2006). The duress defense allows the defendant to “avoid liability . . . because coercive conditions or necessity negates a conclusion of guilt even though the necessary mens rea was present.” Id. (citing United States v. Bailey, 444 U.S. 394, 402 (1980); see also Daniel L. Abelson, *Sentencing Entrapment: An Overview and Analysis*, 86 MARQ. L. REV. 773, 786-94 (2003).


\(^{255}\) United States v. Ramirez-Rangel, 103 F.3d 1501, 1508 (9th Cir. 1997) (holding that an entrapment hearing should be held to determine objectives of the undercover operation).

\(^{256}\) See DRESSLER, supra note 8, at 424-26.

\(^{257}\) Id.

\(^{258}\) State v. Bridges, 628 A.2d 270, 281 (N.J. 1993) (holding defendants liable for accidental murders reasonably foreseeable as the natural consequences of the drug conspiracy transaction); see also Pinkerton v. United States, 328 U.S. 640, 646-47 (1946) (holding conspirators are liable for all acts done in furtherance of a conspiracy).
offset the special dangers that group action entail regarding more sophisticated crimes. 259

Many states operate under a unilateral theory of conspiracy wherein a person may be prosecuted for a two-party conspiracy, even though one of the parties is immune from prosecution. 260 For instance, a person may be prosecuted for conspiracy to commit murder by unwittingly hiring an undercover police agent, who is immune from prosecution. 261

It is textbook law that a person may also be prosecuted for conspiring to commit a crime that is imaginary. 262 Factual impossibility is no defense. 263 For instance, if one agrees with an undercover agent to rob a drug house that does not exist, the impossibility of the crime is no defense. If an overt step is made towards the commission of that imaginary crime, then such a person can be prosecuted for conspiracy to commit robbery. 264

In United States v. Sanchez, 265 the undercover agent orchestrated a fictitious plan to rob a drug house with a group of suspected drug dealers. 266 The undercover agent imagined the amount of drugs and convinced the men to rob the house. 267 The defendants were successfully convicted of conspiracy to rob the drug house based on the amount of drugs concocted by the agent. 268 The court held that the government's fictitious reverse sting operation which involved a large quantity of

259. See DRESSLER, supra note 8, at 425-26.
260. See, e.g., Garcia v. State, 394 N.E. 2d 106, 108-09 (1979). In Garcia, a police informant conspired with the defendant wife to kill her husband. Id. at 107. The court found the defendant guilty of conspiracy even though the informant had no intent to accomplish the act. Id. at 110. The court ruled that this was a unilateral conspiracy, replacing the traditional bilateral conspiracy concept. Id.
261. See id. at 107-09. A number of states operate under the bilateral doctrine, where there must be at least two legitimate people agreeing to commit the offense. See id. at 108.
262. See DRESSLER, supra note 8, at 452. The majority rule is that factual impossibility is no defense to a criminal conspiracy. Id.
263. Id. An overt step is essential to separate imaginary offenses from a purposeful intent. Id. A step by any of the co-conspirators towards the commission of the crime applies to all of the co-conspirators. Id.
264. State statutes generally require an overt step towards the commission of the substantive offense to decipher “talk” from actual dangerousness. In the federal arena, however, an overt step is unnecessary to prove conspiracy in many instances. Many federal statutes have eliminated the overt step requirement. See Model Penal Code § 5.03(5) (providing that “[n]o person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.”) (emphasis added).
265. 138 F.3d 1410.
266. Id. at 1412.
267. Id.
268. Id.
imagined drugs did not, in and of itself, amount to the type of manipulative
government conduct warranting a downward sentencing departure.269

Individuals are easy prey for conspiratorial schemes. Bluffing,
bragging, and daring are no longer innocent acts associated with certain
ethnic groups. In one New Jersey terrorist case, for instance, the police
used an informant of questionable veracity to penetrate a loose group of
disenchanted Muslim men.270 The informant instructed the men on how to
become terrorists, encouraged a holy war, and supplied the men with
sophisticated weapons.271 The confederation of politically suspicious
groups attracts wayward investigations which promote self-fulfilling
prophecies.

C. Internet Porn and Fantasy Speech

Through the Internet, e-mail, text messages, and Facebook,
undercover agents pose as youngsters seeking older men or pose as parents
wishing to sell their children.272 With the Internet fantasy, several
predators and curious adults fall for the allure of sexual trysts.273
Encouraged to fulfill their fantasy, unwitting predators are met by aged,
bald policemen, rather than Lolita-type seductresses.274

269. Id. at 1414.
270. David Kocieniewski, Informer’s Role Draws Praise and Questions, N. Y. TIMES, May 10,
271. Id.
272. See 18 U.S.C. § 2422(b), which imposes criminal liability on anyone who “knowingly
persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to
engage in prostitution or any sexual activity for which any person can be charged with a criminal
offense, or attempts to do so.” See also United States v. Gagliardi, 506 F.3d 140, 146 (2d Cir. 2007)
(stating that “[a]t the time of § 2422(b)’s 1998 amendment, the House Judiciary Committee pointed
out that law enforcement plays an important role in discovering child sex offenders on the Internet
before they are able to victimize an actual child. Those who believe they are victimizing children,
even if they come into contact with a law enforcement officer who poses as a child, should be
punished just as if a real child were involved.”).
273. See, e.g., id. at 143 (describing a 62-year-old man’s conversations through instant
messaging with an adult informant he believed to be a 13-year-old girl).
274. See Abby Goodnough, Town is Shaken After Prosecutor’s Arrest in a Child-Sex Sting, N.
Y. TIMES, Sept. 29 2007, at A8 (a popular Federal prosecutor from Florida, J. D. Roy Atchison, an
involved father and devoted coach, was arrested in Detroit as he arranged with an undercover
agent to have sex with a five-year-old girl. Online, the former prosecutor posing as “fdaddy04,” stated
that he was sexually gentle with young girls and had done it plenty of times. Id. “I adore
everything about young girls,” the profile says, ‘how they talk, think, act, walk, look.” Id. “The
police in Michigan said Mr. Atchison had been chatting online for two weeks with an undercover
detective for the Macomb County Sheriff’s Department, who posed as a mother offering to let men
have sex with her young daughter. Id. When she expressed concern that sex could injure the girl,
according to court documents, Mr. Atchison responded, ‘I’m always gentle and loving; not to
worry; no damage ever; no rough stuff ever ever.’ He added, ‘I’ve done it plenty.’”). Id.
The fantasies and vulnerabilities engendered by the Internet world supplant traditional relationships. For many, online attractions are the sole source of companionship and fulfillment. Those involved in Internet flirting are usually incognito, and they masquerade by age, appearance, orientation, desire, and fantasy. Persons assume extra-dimensional roles, pretending to be their super alter-egos. As a comical dog once stated, “On the Internet, nobody knows you’re a dog.”

It is very difficult to decipher truly dangerous predators without engaging in orchestrated activity that presses the buttons of criminal fantasies. Once such a person leaves the seductive illusion and visits a child to fulfill a fantasy, an overt step has breached into the real world. In United States v. Jacobson, for instance, the entrapment claim succeeded because the government, through several fictitious organizations, persisted for two years to seduce a lonely farmer into the joys, protected by the First Amendment, of pornographic magazines depicting naked young boys.

If less extreme than Jacobson, undercover operations may discover who is predisposed to commit child sex crimes. It does not matter if the decoys are adults, rather than children. Legal impossibility is no defense. Nor can the accused successfully defend his actions on the basis of fantasy speech. Internet porn incitement statutes require sufficient overt steps towards the fulfillment of the crime to separate

276. See id. (addressing how humans will expand their horizons of love and sex with the development of highly sophisticated humanoid robots).
277. Id.
278. Id.
279. Id.
280. See Model Penal Code, Section 5.03(5); see also Goodnough, supra note 274, at A8.
282. United States v. Gagliardi, 506 F.3d 140, 144, 151 (2d Cir. 2007) (holding defendant properly convicted of attempting to entice a minor to engage in illegal sexual activity through adult undercover operations).
283. See, e.g., United States v. Tykarsky, 446 F.3d 458, 466 (3d Cir. 2006) (stating that “Congress did not intend to allow the use of an adult decoy, rather than an actual minor, to be asserted as a defense to § 2422(b).”) United States v. Weisser, 417 F.3d 336, 352 (2d Cir. 2005) (holding that factual impossibility is not a defense to a charge of attempt in substantive criminal law).
284. See id.
285. Id.; see also United States v. Tykarsky, 446 F.3d 458, 466 (3d Cir. 2006) (stating that “Congress did not intend to allow the use of an adult decoy, rather than an actual minor, to be asserted as a defense to § 2422(b).”)
286. See, e.g., Gagliardi, 506 F.3d at 144, 150.
intended harm from fantasy. The ease of the Internet lures risky sex adventures, which implicates First Amendment privacy joys, and teases one into action, which implicates Fifth Amendment self-incrimination woes. Fantasies morph into semi-reality. With a little nudge, the government jostles the semi-reality into the overt step of complete reality and the macabre world of doom.

D. Sting Operations v. Visible Police Presence

In a celebrated case, Senator Larry Craig, from Idaho, was arrested in June 2007 at a Minnesota Airport by a plainclothes police officer investigating lewd conduct complaints in a men’s public restroom. The news reports stated that Senator Craig made homosexual advances in the stalls to the undercover officer. Senator Craig pled guilty to a misdemeanor solicitation, but unsuccessfully attempted to withdraw his guilty plea based on weak entrapment claims. Under intense pressure, the Senator announced his retirement after years of public service based on this misdemeanor offense and his prior sanctimonious stance against homosexuals.

Senator Craig’s entrapment claim presents interesting policy perspectives comparing investigative subterfuge against a visible police presence in preventing public nuisance crimes. Sting operations are frequently used to catch the unwary innocent, as well as the predisposed, in prostitution, drugs, and other lascivious crimes. A traffic officer can hide behind a billboard to catch a speeder or openly travel along the highway amidst traffic, which encourages safe driving. The very presence of the

287. Id. In Gagliardi, the defendant chose to enter a chat room, labeled “I Love Older Men,” contacted the supposed youngster without solicitation, offered to pay for sex, vividly described his sexual inclinations, attempted to set up meetings, and visited the designated meeting place with condoms and Viagra. Id.


290. Id. (stating that “[t]he officer said Mr. Craig had tapped his foot, in what the officer called a known signal to engage in lewd conduct.”).

291. Id.

292. See Carl Hulse, Senate Ethics Committee Admonishes Craig for His Conduct in Sex Sting Arrest, N. Y. TIMES, Feb. 14, 2008, at A22 (stating, “Senator Larry E. Craig was admonished by his colleagues on Wednesday for conduct that reflected poorly on the Senate as the result of his arrest and guilty plea last summer in an undercover sex sting in a men’s bathroom at the Minneapolis airport.”).

293. Id. (stating, “[a]lthough [Senator Craig] initially said he would leave Congress, he decided to serve out this term, his third, but will not seek re-election.”).

294. See id.
officer is an inhibitory factor. Once the officer leaves the scene, however, the drivers return to speeding and the solicitors return to prostitution. A visible police presence is expensive and *temporarily* halts illegal behavior. An undercover operation captures an offender, humiliates him, and theoretically deters other wrongdoers long after the undercover operation concludes.295

Sting operations are a periodic purge.296 To purge the sentiment of corrupt politicians, the government set up a broad sting operation to ensnare United States congressmen.297 The ABSCAM undercover investigation corralled several congressmen who were willing to take bribes to introduce legislation.298 No particular congressman was targeted for investigation; rather, ABSCAM purged those tempted congressmen through a standard fencing operation.299 As an occasional purge, especially with the lucrative lures of lobbyists, undercover operations successfully identify corrupt politicians. But sting operations are set to capture not just the unwary criminal, but the eager innocent as well.300

**VII. CORRUPTION OF POLICE FORCES**

*A. Tulia, Texas: Undercover Investigations Run Amok and Unchecked*

Undercover drug operations have spearheaded a legion of political responses: mandatory sentences, three-strike provisions, lucrative forfeiture practices, and increased imprisonment of minorities.301 In Tulia, Texas,302

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295. *See id.* (detailing Senator Craig’s public admonishment by his Senate colleagues).
296. *See e.g.* Andy Newman, *Lawmaker Found Guilty of Corruption*, N. Y. TIMES, April 9, 2008, at B1 (stating, “State Assemblywoman Diane M. Gordon of Brooklyn was convicted on Tuesday of receiving a bribe for offering to help a developer acquire a parcel of city-owned land [through an undercover investigation].”). The councilwoman’s entrapment defense was unsuccessful. *Id.*
298. *Id.* The Abscam operation employed a convicted confidence man to spread the word that wealthy Arabs were willing to bribe members of Congress to ensure that they would introduce private immigration legislation. *See id.* at 1462.
299. *Id.* at 1461-67.
300. *See, e.g.*, Jamie Reno & Dirk Johnson, ‘These Guys Had To Be Taken Down’: Four pounds of Cocaine. Fifty Pounds of Marijuana. *Inside the San Diego State University Drug Raid*, NEWSWEEK, May, 19, 2008, at 40 (stating, “[t]he highly organized, widespread drug dealing at a university with a solid academic reputation astonished seasoned prosecutors and narcotics officers . . . The raid provoked some protest among students who saw it as overly aggressive.”).
301. *See BLAKESLEE, supra note 11, at 80* (stating, “the growth of the task force system coincided with a massive acceleration in prison construction in the state [of Texas] . . . [T]he state more than tripled its prison capacity—from 40,000 to 150,000 beds—in just ten years. Texas [in 2007] has
for instance, one undercover agent worked for eighteen months, during which time he netted forty-seven drug dealers, approximately thirteen percent of the adult, black male population.\textsuperscript{303} Sentences for small or repeat offenses ranged from five to 361 years.\textsuperscript{304} Several of those convicted were former high school football stars, with no prior record, convicted for selling small amounts of cocaine and sentenced to mandatory 20 years.\textsuperscript{305} One 60-year-old so-called “drug kingpin,” who had prior convictions of small drug offenses, lived in a shack and was sentenced to ninety years for allegedly selling a single eight ball of cocaine.\textsuperscript{306} Belated habeas evidentiary hearings revealed that much of the drugs were diluted eight balls mixed by the undercover officer.\textsuperscript{307}

Unknown to the defendants, the undercover officer faced theft charges from another county and was in serious debt.\textsuperscript{308} The undercover officer was tried in Tulia, Texas, where the population is five thousand people.\textsuperscript{302} The Tulia operation was spearheaded by Tom Coleman, a police officer who had been fired from two previous positions.\textsuperscript{304} After a series of unpaid debts, Coleman was subsequently convicted of perjury.\textsuperscript{308} The judge stated that “Tom Coleman is the most devious, nonresponsive law enforcement witness that this court has encountered in twenty-five years on the bench.”\textsuperscript{307} The bar license of Terry McEachern, the prosecutor who had given Coleman a two-year probated suspension, was suspended.\textsuperscript{308}
officer was ill-tempered, suffered mental problems, and was a suspected racist. The habeas hearings revealed that the prosecutor and trial judge suppressed evidence of the undercover officer’s background. The undercover officer kept few reports by scrawling information on his leg and based his testimony of 18 months of investigation on memory.

The criminal justice system in Tulia, Texas, like the criminal justice system throughout the country, ignored the detention of the town’s Black male residents for trivial and questionable drug offenses. The prosecutor charged small amounts of drugs before all white juries, comparing trace amounts of drugs to a rattlesnake: “It doesn’t matter if it’s a little rattlesnake or a big rattlesnake; if a rattlesnake bites you, it’s going to kill you.”

the discredited Tulia drug bust.(

309. See BLAKESLEE, supra note 11, at 330. The belated habeas hearings discovered that one of the Texas Rangers reported that the undercover officer needed constant supervision and had a bad temper. Id. at 305.

310. Id. at 329-30.

311. Id. at 332-33. In a deposition, Sheriff Amos admitted that he “personally disciplined Coleman for using the word ‘nigger’ around the office, and that he had attempted to get Coleman to make some buys outside of the black community when it became apparent that his operation was almost entirely focused on black suspects.” Id. at 332.

312. Id. at 14. In habeas corpus proceedings, the evidence revealed that the Swisher County prosecutor, Terry McEachern, withheld information about Coleman – such as Coleman’s pending criminal indictment from another county. Id. at 14. Judge Ed Self made a statement to the Amarillo Globe News after the case was remanded to him by the Texas Court of Criminal Appeals, “[The Texas voters are] partly tired of all the talk about the drug bust. I think it’s also that the voters in Swisher County believe their officials do their jobs properly and act within the law.” Id. at 290. In response to the defense motion to disqualify Judge Self for bias, the Judge recused himself. Id. at 291. During discovery proceedings, the Sheriff admitted that Tom Coleman was a “bad apple,” yet they turned him loose in Tulia anyway. Id. at 332.

313. Id. at 46. The trial judge, Ed Self, refused to allow evidence impugning the credibility of the prosecutor, Terry McEachern, and informant, Tom Coleman, who allegedly used money and falsified drug reports to the tune of $7,000. Id. at 120. The bottom line was that with no corroboration, only Tom Coleman could say which of the cases were real, and which cases were fabricated. Id. at 296.

314. Id. at 404. Black residents and White residents, such as Gary Gardner, Alan Bean, and Thelma Johnson, organized the Friends of Justice, seeking to bring media attention to the busts in Tulia. Id. Their protests made them targets of local scorn. Fred Brookins, Sr., a manager at a meatpacking plant, became a leader of the protest movement. Id. at pictures following page 230, 404. On October 7, the Tulia story appeared on the Front Page of the New York Times and Los Angeles Times. Id. at 182. A feature segment on CNN soon followed. Id. On 20/20 program, a room full of jurors indicated that they had no second thoughts about their verdicts, even when told of Coleman’s background. Id.

315. Id. at 119. Police corruption and abuse is common throughout the country. See e.g., Susan Saulny, Chicago Police Abuse Cases Exceed Average, N. Y. TIMES, Nov. 15, 2007, at A24. The article provides that

Chicago police officers are the subject of more brutality complaints per officer than the
The willingness of several pro bono attorneys, attorneys from the NAACP Legal Defense fund, attorneys from the American Civil Liberties Union, the keen investigative reporting of several news agencies, and 60 Minutes televised news shows finally prompted the legislature, the Governor, and the courts to act.\textsuperscript{316}

There are many stories across the nation where undercover drug agents fabricate evidence or engage in illegal practices. In New Jersey, a former undercover narcotics investigator was convicted in 2000 of running a brothel and selling protection to drug dealers.\textsuperscript{317} In Tucson, Arizona, a narcotics agent and his wife were indicted for embezzling $615,000 over a four year period.\textsuperscript{318} In central Missouri, thirty convictions were reversed after a task force undercover narcotics officer was indicted in 2003 for perjury.\textsuperscript{319} In April of 2001, several civil rights cases were filed against the Texas town of Hearne after a task force snitch admitted fabricating evidence.\textsuperscript{320}

Many state undercover drug operations throughout the country are funded by grants from the U.S. Department of Justice.\textsuperscript{321} Nationwide, there are over 750 Byrne task forces in rural areas, employing approximately 5,000 to 7,000 narcotics agents.\textsuperscript{322} The narcotics task forces employ undercover agents, who solicit drugs with large amounts of cash.\textsuperscript{323}

\textsuperscript{316} B LAKESLEE, supra note 11, at 241-43, 420.
\textsuperscript{317} Id. at 201.
\textsuperscript{318} Id.
\textsuperscript{319} Id.
\textsuperscript{320} Id. at 401.
\textsuperscript{321} Id. at 201-02. One example is the Edward Byrne Memorial State and Local Law Enforcement Assistance Grant. Id. The grant funds drug task forces in mostly rural and suburban areas across the country. The program was named in memory of Edward Byrne, a New York City police officer shot dead by drug dealers in 1988. Id.
\textsuperscript{322} Id. at 204. The Byrne Grant provided federal money; the manpower came from local police forces, county sheriffs, and district attorney’s offices, which combined with neighboring counties to form new drug outfits. Id. at 203. The money was distributed to the states by the Department of Justice’s main grant-making arm, the Bureau of Justice Assistance. Id.
\textsuperscript{323} Id. at 206. Republican State Representative Terry Keel stated the problem with the heavily funded task force operations,

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Many states rewrote their respective asset forfeiture laws to allow greater percentages of assets seized during drug busts to be funneled to law enforcement agency budgets. The lucrative drug trade incites police corruption throughout the nation. There are rogue officers, missing drugs, stolen cash, fabricated cases, failed drug tests, and profitable financial arrangements in every county. Many undercover agents have psychological problems.

Defendants filed civil rights actions against the cities and counties, funded by the federal grant, for the unmonitored investigations and discovery violations, which imprisoned hundreds of men and left fatherless hundreds of children.

them carefully . . . They are left undercover and loosely supervised in some cases. They have unbridled discretion often on their interdiction decisions, and they deal with large amounts of cash . . . Now all of that is a formula for disaster.

Id.

324. Id. Other tasks force included the state’s famous scandal involving the Permian Basin Drug Task Force, setting for Friday Night Lights, the classic account of Texas high school football, id.; a major police scandal occurred in Dallas in 2001 where a pair of undercover narcotics agents “set up bogus cocaine busts in order to cash in on huge informant’s fees.” Id. at 261. “[H]alf of all the cocaine seized in Dallas in 2001 was actually powdered gypsum, better known as Sheetrock.”

Id.

325. See David Heinsh Bund, Bar Tape Refutes Cops: Video of ’04 Raid Casts New Doubts On City’s Elite Police Unit, Chi. Trib., Sept. 18, 2007, at 1. The city of Chicago is infamous for its police corruption, even of its elite police units. Id. The video contradicts the arresting officer’s version of what happened that night, but it also raises constitutional issues about whether officers improperly searched dozens of people. The video also adds to a list of questions about [Special Operating Section] officers’ conduct, which is the focus of state and federal investigations.

Id.

326. BLAKESLEE, supra note 11, at 207; Drugs saturate the entire jurisprudential system with corruption. See, e.g., Azam Ahmed & Jason Meisner, Prosecutor Charged With Drug Possession: Cook County Officer was on Unpaid Leave, Chi. Trib., Feb. 22, 2008, at 5 (stating, “Cook County prosecutor Chad Sabora hung his head as an assistant state’s attorney detailed the evidence against him Thursday at a bail hearing . . . Sabora was found ingesting a white powder substance believed to be heroin and possessing five tin-foil packets of suspected heroin Wednesday night while in his vehicle, police reports said.”).

327. See BLAKESLEE, supra note 11, at 212. Texas criminal defense attorney Ed Lieck stated, “[m]ore numbers means more money. I’ve been doing this for ten years, and law enforcement is about money . . . Anybody who tells you different is lying to you.” Id.

328. Id. at 402-04. Many communities have tried reconciliation tactics and routine community meetings with the police. See, e.g., Christine Hauser, A Precinct’s Hard Road Back, N. Y. Times, Feb. 24, 2008. at A27. Very frequently, the hostilities engendered on both sides are not resolved by community reconciliation. Id.

Even though the detectives on trial this week – two on manslaughter charges and one on reckless endangerment charges – were part of an undercover unit . . . the precinct’s officers had to deal with protest marches and frustration . . . . The clergy, the police and the N.A.A.C.P. worked together after the Bell shooting to keep things calm, organizing youth gatherings and town hall meetings.
B. Civil Rights Remedies to Unmonitored Investigations

The actions of unmonitored undercover agents who falsify charges instigate civil rights actions under 42 U.S.C. §1983. The idea that cities and counties could be liable for misdeeds of undercover agents simply by virtue of being a member of a regional task force set an alarming precedent that rippled through the states. Many of the civil rights cases were settled for millions of dollars and the disbanding of the federal task forces.

Prosecutors are held liable for failing to adequately train and supervise undercover agents, and for the administrative functions concerning sharing of information of informants and promises made to informants. Personnel decisions concerning undercover agents are administrative functions. Prosecutors are not given immunity for conspiring to fabricate evidence. The undercover agent in the Tulia case

Id.

However, such community events did not stop Police Officer Edward Byrne, 22, from being killed while the officer was guarding the home of a witness. Id.

329. 42 U.S.C. § 1983 allows citizens to bring suit against a “person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.” Id. The Civil Rights lawsuit named every one of the cities involved in the regional Narcotics Task Force. BLAKESLEE, supra note 11, at 399. As a condition of settling the lawsuit, the city of Amarillo agreed to cease participation in the task force. The city of Amarillo led off the settlement with $5 million and the disbanding of the task force. Id. at 400.

330. See id. at 403. In the lawsuit in Hearne, Texas, a federal judge ruled that all political entities in a task force were at least potentially liable for malfeasance committed by its agents, regardless of where the acts in question occurred. Id.

331. Id. at 403-04.


334. See, e.g., Ceballos v. Garcetti, 361 F.3d 1168, 1184 (9th Cir. 2004) (holding that personnel decisions are administrative not prosecutorial, regardless of whether it would remove a prosecutor from future case), rev’d on other grounds, 547 U.S. 410 (2006); Burns v. Reed, 500 U.S. 478, 492, 496 (1991) (holding that the provision of legal advice to police investigators is not a prosecutorial activity).

335. Buckley v. Fitzsimmons, 509 U.S. 272, 278 (1993); see also Broam v. Bogan, 320 F.3d 1023, 1033-34 (9th Cir. 2003) (holding that prosecutors do not have absolute immunity when they withhold exculpatory evidence before probable cause exists to arrest a defendant); see also Maurice
was indicted and convicted of perjury charges. The prosecutor was sanctioned. In remedial fashion, the Texas legislature passed statutes granting bond to several defendants imprisoned. Governor Rick Perry pardoned all of the defendants convicted in the Tulia drug sting.


The Texas legislature passed the Fair Defense Act of 2001, which opened the files of police officers in bad standing. The Act raised the standards for undercover narcotics operations by requiring that evidence elicited by confidential informants be corroborated, by audio or video, or other means. The Act revised the entire attorney appointment process, requiring attorneys for the indigent within four to six days of arrest. The greatest attribute of this act is the appointment of attorneys at the very early stages of arrest who will address the probable cause determinations and false claims.

2. The Fallacy of Reconciliation Committees

Similar to the South African Reconciliation laws addressing the historical culture of police corruption, a “reconciliation committee” was

Possley, Ruling Could Put Prosecutor On Trial: Anthony Harris’ Murder Confession was Coerced and Inaccurate. He’s Suing Official Who Used it Against Him, CHI. TRIB., May 15, 2008, at 5 (insert entitled “Immunity Limits”) (providing, “Immunity Limits: In federal civil rights lawsuits, prosecutors are entitled to two kinds of immunity: absolute immunity and qualified immunity. When prosecutors act as advocates, they have absolute immunity from damages. If prosecutors act as investigators or administrators, they have immunity unless they engage in misconduct that violates the law.”).

336. BLAKESLEE, supra note 11, at 389, 407-08. Tom Coleman was found guilty of perjury in January 2005. Id.

337. Id. at 390, 399. 338. Id.

339. See Jennifer Emily & Steve McGonigle, Dallas County District Attorney Wants Unethical Prosecutors Punished, DALLAS MORNING NEWS, May 4, 2008 (noting, “[i]n 2005, the bar gave the former district attorney of Hale and Swisher counties, Terry McEachern, a two-year probated suspension of his law license for hiding evidence at trial in the discredited Tulia drug bust.”).

338. Id. at 400-02. The task force system was also amended to place them under the auspices of the state police, and Department of Public Safety, which discovered that many of the task forces were in disarray. Id. at 401-03. The Department of Public Safety crafted new rules for the task forces concerning the control of evidence and record keeping, and tightening procedures for forfeiture proceedings, which had accumulated hoards of money. Id.

339. Id. at 402. The Fair Defense Act of 2001 also provided for an impartial method for assigning cases to attorneys, set minimum qualifications, and higher compensation rates. Id.

340. Id.
formed in Tulia, though unsuccessfully, after the release of the defendants to give the community and the new police personnel a chance to open a dialogue. Successful reconciliation efforts typically include a process of accountability, an opportunity for the citizens to be heard, forthright compensation, and a historical accounting of the events. The community in Tulia and other communities around the nation suffer significantly for a mass class of wrongful incarcerations. Besides substantial economic losses and loss of familial consortium, there is the “loss of society” and the impact to their community roles. The reconciliation efforts failed to provide community standing on the pivotal policy issues which implemented a massive undercover operation in the first place. The police were only doing the bidding of the policy makers, which dictated a political course of action directed against minorities caught in the throes of a wayward drug policy. In short, reconciliation committees fail to reach the chief policy makers.

An English study regarding public confidence in the police noted that trust and confidence are not necessarily shaped by the sentiments about risk and crime, but by evaluations of the values and morals that underpin community life. The police must not replicate criminal behavior in the name of the “law.” The maintenance of peace and harmony in a neighborhood can be as effectively achieved by a benign gang as by the police. Citizens complain that “racial profiling, police corruption and the excesses of the war on drugs have made them suspicious of virtually any arm of the government.” Viable reconciliation committees require standing to address policy questions fomented by administrators and government personnel.


346. See, e.g., Joellen Lind, Valuing Relationships: The Role of Damages for Loss of Society, 35 N.M. L. REV. 301, 302 (2005) (discussing “loss of society” as a bona fide claim for relief). Loss of society damages allow the law of torts to reflect the impact to the community of injuries to the social roles and third parties. Id.

347. Andrews, supra note 345, at 1158.

348. Lind, supra note 346, at 302.

349. Id.

350. See, e.g., Andrews, supra note 345, at 1178-79.


352. Id.


354. Id.
There are several brands of undercover investigations: sting operations; long protracted investigations; passive operations; rogue task force; and the use of confidential informants. Several police agencies have established guidelines for undercover operations. Standards culled from points raised in this Article include:

1. The police must seek prosecutorial approval before an undercover operation, which invades all manners of privacy, speech, association and self-incrimination protections.
2. The objectives of the investigation must be articulated. The undercover operation must identify the target of the operation and substantiate the target’s importance.
3. The undercover agent must undergo a psychological profile and testing. The agent must receive psychological review during a protracted assignment. Playing dual roles and engaging in anti-social behavior requires psychological strength and stamina. As one literary investigator stated when the political climate changed in favor with Columbia, “all this time I thought I was a cop pretending to be a drug dealer, when all the time I was a drug dealer pretending to be a cop.”
4. The investigating officer must take clear, unequivocal notes of each transaction and record the matter.
5. Undercover agents must avoid sexual deception and involvement during the investigation.
6. In protracted investigations, the role of the agent or informant must be systematically monitored and reviewed. Occasionally,

358. See e.g., Rhode Island Department of Attorney General Rules and Regulations for Reverse Undercover/Proprietary Operations, http://www.rules.state.ri.us/rules/released/pdf/AG/4383.pdf (1999); see, e.g., Reno & Johnson, supra note 301, at 40 (stating, “[t]he raid, which included crackdowns on several fraternities, came a year to the day after the overdose death of Jenny Poliakoff, a 19-year-old student at San Diego State. It was the tragedy that triggered the undercover drug operation.”).
359. This quotation is uttered by Lawrence Fishburne’s character in the film Deep Cover (News Line Productions 1992).
undercover agents become ringleaders of the very group they are monitoring. If the objectives change in light of new circumstances, then the operation must be reviewed.

7. There should be time limitations to the investigations.

8. When an undercover employee learns that persons under investigation intend to commit a violent crime, he or she shall try to discourage the violence.

9. If the agent participates in crimes and induces others to commit crimes in order to fulfill a higher objective, what is called *derivative entrapment*, then the deliberative influences must be articulated in discovery to the defense and all third persons, who are affected by the agent’s participation.

10. The agent’s participation and conspiratorial encouragement of crimes must be a factor weighted in the accused’s sentence.

11. A pretrial hearing to establish the contours of the investigation must be available to the defense.

12. All inducements, promises, and considerations made to the undercover informant or confidential informant must be disclosed to the defense.

There are many standards profiled in various police agencies, attorney general offices, and the F.B.I. The failure to adopt undercover investigation standards is grounds for a civil rights action.

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361. See, e.g., Michel Girodo, Ph.D., *Drug Corruption in Undercover Agents: Measuring the Risk*, 9 BEHAV. SCI. & L., 361, 361 (1991) (noting, “[d]rug corruption is more likely among law enforcement officers who use undercover investigative methods. Current views of police corruption attribute drug corruption either to flaws in character or to the corrupting criminal environment where investigations are carried out.”).

362. See *Gary May, The Informant: The F.B.I., The Ku Klux Klan, and the Murder of Viola Liuzzo* IX (2005) (recounting the murder of Detroit citizen Viola Liuzzo by the K.K.K., wherein an undercover informant assisted in her murder in Selma, Alabama). F.B.I. informant Gary Thomas Rowe was an informant from 1960-1965 and was present when Ms. Liuzzo was shot. *Id.* Rowe was involved in a number of murders during the civil rights movement. *Id.* To protect Rowe’s true identity, the F.B.I. allowed Rowe to attack Blacks and Freedom Riders without fear of arrest or prosecution. *Id.*


364. See, e.g., United States v. Pilarinos, 864 F.2d 253, 256 (2d Cir. 1988) (recognizing the principles of derivative entrapment, where third persons are affected by undercover agents influence).

VII. SUMMARY

Entrapment succeeds through conspiracy, and conspiracy breeds manipulative influences. Entrapment is a defense against mandatory sentences, against exploitive enhancement statutes, and against excessive police inducements. Manipulation is a common fact of life. Public relations, advertisements, media sound-bites, socialization, and even tax laws induce societal behavior. Aggravating criminal behavior through manipulative means, however, imperils a government’s equitable standing. The entrapment defense compares whose hands are dirtiest: the predisposed suspect or the predetermined government, which feeds from the coffers of crime. Lucrative forfeiture practices and incarceration of large minority groups feed the conspiratorial paranoia.

Undercover operations are lies that tell the truth. But the truth frequently presents conflicting policy objectives. Through the criminal processes in the drug wars, as in Tulia, Texas, the most desperate citizens are demonized, isolated, incarcerated, and denied a role in the American dream. In truth, undercover operations in the drug effort have acted as a venal war on the underclass. Yet, corporations bent on fraud and bribery are free-spirited with deferred prosecutions. Crime is a capital investment and the government is the major stockholder.

Undercover investigations intrude on our Bill of Rights, our freedom of association, of speech, of fantasies. Yet, such investigations are necessary as solid, empirical proof of present and future dangerousness. As with Beelzebub, the characters of good and evil become indistinguishable. When the government feeds at the trough of criminality, then the government has breached its social contract with its citizens and lost its moral imperative.

367. “Just because you’re paranoid, doesn’t mean they’re not out to get you.” Quote from unknown source available at http://www.rpi.edu/~markhn/quotes.html.
368. See generally BLAKESLEE, supra note 11.
369. See Eric Lichtblau, In Justice Shift, Corporate Deals Replace Trials, N.Y. TIMES April 9, 2008, at A1. The companies are legion: Monsanto on bribing millions of dollars with Indonesian officials, American Express, mortgage companies, and the sub-prime mortgage debacle. Id.
370. See generally MAURICE PUNCH, CONDUCT UNBECOMING: THE SOCIAL CONSTRUCTION OF POLICE DEVIANCE AND CONTROL 1-7 (1985). Police deviance elicits a special feeling of betrayal. Something extra is involved when public officials and policemen in particular deviate from accepted norms. That something more is the violation of a fiduciary relationship, the corruption of a public trust and public virtue. Id.