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Entrapment by Numbers

Dru Stevenson

I. INTRODUCTION

This Article analyzes emerging trends in entrapment law, and is the first to describe the declining numbers of reported cases that involve the entrapment defense. This phenomenon is attributed to decreasing levels of uncertainty in the rules pertaining to the defense and to discreet procedural issues. The shifting degrees of certainty in penal rules, which have become increasingly mechanical and mathematical over time, are shown to disfavor certain defendants inherently, to the point of being a snare or source of "entrapment" themselves.

Most articles about entrapment discuss the competing legal tests used to approach the problem, typically arguing in favor of one rule as opposed to the other.[1] This Article focuses instead on how the entrapment defense currently functions in our legal landscape, and highlights some important emerging trends.

As the rules for entrapment become increasingly well-defined and established, the defense itself becomes less relevant. The proportion of cases where entrapment arises as a defense appears to be decreasing in almost every state, as well as in the federal courts.[2] In most states, the raw number of reported cases has dropped off in recent years or has leveled off in comparison with the mushrooming criminal dockets, meaning entrapment cases are a diminishing proportion of the overall criminal caseload. This is especially true of drug cases, which constitute the vast majority of entrapment claims. Entrapment as a defense seems to have peaked in the 1980s and early 1990s, correlating roughly to the unprecedented explosion of drug-related cases, and has since fallen to a

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1. *See* PAUL MARCUS, THE ENTRAPMENT DEFENSE 104 (3d ed. 2002) (noting that "the vast majority of legal scholars regard the objective test favorably"); Gregory Deis, Note, *Economics, Causation, and the Entrapment Defense*, 2001 U. ILL. L. REV. 1207, 1218 (2001) (Deis himself does not favor the objective test but acknowledges that he is in the minority in the academy); Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 167 (1976). When Park wrote in 1975, he could only find one article from the previous twenty-five years criticizing the objective test, and that article proposed abolishing the entrapment defense completely. *See id.* at 167 n.13 (citing Michael De Feo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory, and Application*, 1 U.S.F. L. REV. 243 (1967)). Park, in the same footnote, remarks that there had been over one hundred student notes from the same period that almost uniformly advocated for the objective test. *Id.* My own research indicates that this continues to be a disproportionately popular subject for student comments and case notes. Justice Stewart noted the clear tilt of the academy to his side when he dissented in *United States v. Russell*. United States v. Russell, 411 U.S. 423, 445 n.3 (1973) (Stewart, J., dissenting); *see also* Model Penal Code Comment § 2.13, subs. (1) n.3 (listing influential early articles on the subject).

2. *See infra* Part III.A.

fraction of the previous levels,[3] even though drug convictions continue to rise. It also is surprising that the defense most closely related to undercover police work and sting operations would not keep pace with the growth of its attendant police activity.

Across jurisdictions, this leveling-off of the defense appears to be unrelated to the legal test used — there are two leading contenders, the so-called "objective" and "subjective" approaches.[4] The cases that do occur seem disproportionately concentrated in certain jurisdictions, with some using one test and some using the other. This waning of a particular criminal defense is interesting not only for the study of the defense itself but also for understanding the legal system overall. We normally study defenses as element-based, formalistic concepts, rather than as a social phenomenon that goes in or out of style.

A second emerging trend, previously overlooked in the relevant literature, is the disproportionate number of entrapment cases that arise as post-sentencing appeals.[5] These are often couched as ineffective assistance of counsel claims, or as challenges to a judge's refusal to give any entrapment instructions to the jury. In either case, the defense really functions as a "second bite at the apple," a last-resort defense used only after others have failed. Framing entrapment in an "assistance of counsel" appeal rarely works,[6] due in part to the defendant's burden of showing that his lawyer's shortcomings determined the outcome of the verdict. Entrapment appeals based on jury instructions generally fare better since the defendant's burden is functionally much lighter, but they are still far from a safe bet for the defendant. The procedural posture of these cases suggests that entrapment now functions less as a means of second-guessing the aggressive activity of the police, which was the defense's genesis, and more as a way of second-guessing attorneys and judges.

A third trend is the shift away from cases about the classic elements of the defense, such as "inducement" or "predisposition," toward newer variations such as "sentencing entrapment"[7] (manipulation of sentencing factors by savvy undercover agents) or "entrapment by estoppel"[8] (where the defendant relied upon official assurances about the legality of the activity charged as an offense). Both of these variations operate under special rules and have yet to be accepted in most jurisdictions. While conceptually related to traditional entrapment, they really function as separate defenses. There is currently a split among the federal circuits as

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3. *See infra* Part III and sources cited therein.
4. *See infra* Part II (discussing history of the two tests).
5. *See infra* Part III.D and sources cited therein.
6. *See infra* text accompanying notes 75-89.
7. *See infra* Part IV.A and sources cited therein.
8. *See infra* Part IV.D and sources cited therein.

to whether to recognize "sentencing entrapment," meaning the U.S. Supreme Court is likely to address the issue at some point.[9] Most of the literature to date frames "sentencing entrapment" as a problem of excessive investigative/prosecutorial discretion resulting from the adoption of mechanical sentencing guidelines that are designed to limit judicial discretion.[10] This Article proposes that both "sentencing entrapment" and "entrapment by estoppel" might be better understood as a function of varying levels of uncertainty in legal rules and the effects of disparate *ex ante* legal knowledge.[11] Understood within this framework, the practice of

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9. The Eleventh Circuit has rejected it entirely; the Seventh Circuit "disparages" it, but several other circuits recognize it. *See infra* text accompanying notes 94-118.

10. *See* Robert S. Johnson, Note, *The Ills of the Federal Sentencing Guidelines and the Search for a Cure: Using Sentence Entrapment to Combat Governmental Manipulation of Sentencing*, 49 VAND. L. REV. 197 (1996); Eric P. Berlin, Comment, *The Federal Sentencing Guidelines' Failure To Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 WIS. L. REV. 187 (1993). For an excellent recent treatment of the subject of the Federal Sentencing Guidelines, including a concise survey of the history and summary of the current state of appellate review, see Andrew D. Goldstein, Note, *What Feeney Got Right: Why Courts of Appeals Should Review Sentencing Departures De Novo*, 113 YALE L.J. 1955 (2004).

11. *See generally* FRANK KNIGHT, RISK, UNCERTAINTY, & PROFIT (1921). The *Dictionary of Economics* offers the following succinct explanation of "uncertainty" as opposed to risk:

> [Uncertainty is] the state in which the number of possible outcomes exceeds the number of actual outcomes and when no probabilities can be attached to each possible outcome. It differs from risk, which is defined as having measurable probabilities. Where probabilities are measurable, insurance can be taken out to cover the worst contingencies – the risk of them occurring is spread among many people or taken on by someone who can reasonably be certain to bear them. In the case of uncertainty, however, no insurance company could properly assess what premium to charge to cover bad outcomes – it is simply a possibility that has to be faced. It is the role of the entrepreneur to face each uncertainty when setting up a new company that justifies profit as a reward.

DICTIONARY OF ECONOMICS 390 (Graham Bannock et al. eds., 7th ed. 2002); *see also* Marcello Basili, *Knightian Uncertainty in Financial Markets: An Assessment* (demonstrating that uncertainty in financial markets tends to generate inertia in investing decisions), *available at* http://papers.ssrn.com/sol3/papers.cfm? abstract_id=237279 www.ssrn.com (last visited Aug. 30, 2004); *see also* Daniel Ellsberg, *Risk, Ambiguity and the Savage Axioms*, 75 Q.J. ECON. 643 (1961). Ellsberg demonstrated that individuals "act 'as though' the worst were somewhat more likely than his best estimates of likelihood," which would "indicate he distorts his best estimates of likelihood, in the direction of increased emphasis on the less favorable outcomes and to a degree depending on his confidence in his best estimate." *Id.* at 667. Ellsberg conducted famous experiments in which subject faced two urns, M and N, which each contained one hundred red or black balls. Subjects were informed that Urn M contained exactly half red and half black balls; the other contained an unknown proportion of each. Bets were placed on the subject's ability to draw a black ball from either urn; the subject showed a strong preference for Urn M, for which they knew the likelihood of winning (fifty percent). This presented a contradiction to the classic rational-actor model of economic thought because the subjects had no rational basis for such a consistent preference —

setting defendants up for stiffer sentences during the sting operation may not seem as nefarious as most commentators have asserted thus far.[12] The increasingly rigid, mathematical nature of penal rules, whether gradated levels of offenses or sentencing guidelines, do not confer discretion or allow more room for abuse. Instead, they allow state agents to plan the outcomes of their cases before an investigation even begins.

Not surprisingly, the last few years have also seen a spate of cases concerning entrapment via the Internet,[13] particularly in on-line chat rooms trawled by pedophiles.[14] Agents are able to exploit the anonymity of the Internet to impersonate young adolescents willing to meet up with strangers for a sexual rendezvous, which is where the defendant's arrest occurs.[15] These cases proceed under traditional rules for entrapment in the

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uncertainty was just as likely to favor them, especially when compared to a fifty-fifty chance, as it was to disfavor them. *Id.* at 650. This pattern of human decision-making has been verified in innumerable subsequent experiments and came to be known as Ellsberg's Paradox. Uncertainty can take the form of straightforward ambiguity — the individual knows the set of possible outcomes, but cannot ascertain the relative likelihood of one as opposed to another. Alternatively, uncertainty can take the form of the individual's recognition that there are unknown or hitherto unimagined possible outcomes of a situation, an awareness of one's own ignorance. This latter type of uncertainty would not apply to Ellsberg's experiment, of course, because the subjects knew that they would either draw a black ball or a red one. There was no chance of drawing yellow or blue.

12. Other commentators have recently begun to apply the principles of uncertainty and risk to criminal law, but this remains a new and fertile area for research and discussion. *See, e.g.*, Alon Harel & Uzi Segal, *Criminal Law and Behavioral Law and Economics: Observations on the Neglected Role of Uncertainty in Deterring Crime*, 1-2 AM. L. ECON. REV. 276 (1999) (discussing how uncertainty in criminal sanctions serves as a better deterrent than increased sanctions or enforcement); Tom Baker et al., *The Virtues of Uncertainty in Law: An Experimental Approach* (Feb. 14, 2003) (also describing the previously unappreciated value of orchestrated uncertainty in law enforcement as an effective deterrent against crime), *available at* http://ssrn.com/abstract=380302 (last visited Aug. 30, 2004).

13. *See infra* Part V and sources cited therein.

14. *See, e.g.*, United States v. Mitchell, 353 F.3d 552, 553 (7th Cir. 2003); State v. Cunningham, 808 N.E.2d 488, 489 (Ohio Ct. App. 2004); State v. Turner, 805 N.E.2d 124, 127 (Ohio. Ct. App. 2004); State v. Canaday, 641 N.W.2d 13, 17 (Neb. 2003); People v. Superior Court, 2003 WL 21246774 (Cal. Ct. App. 2003); State v. Snyder, 801 N.E.2d 876, 879 (Ohio Ct. App. 2003); Marreel v. State, 841 So. 2d 600 (Fla. Dist. Ct. App. 2003); Kirwan v. State, 96 S.W.3d 724, 725 (Ark. 2003); Laughner v. State, 769 N.E.2d 1147, 1151 (Ind. Ct. App. 2002); People v. Martin, 2001 WL 1699653 (Mich. Ct. App. 2001); State v. Jones, 21 P.3d 569, 570 (Kan. 2001); United States v. Burgess, 175 F.3d 1261, 1262 (11th Cir. 1999); People v. Barrows, N.Y.S.2d 672, (N.Y. Sup. Ct. June 9, 1998); *see also infra* Part V.

15. *See generally* Donald S. Yamagami, *Prosecuting Cyber-Pedophiles: How Can Intent be Shown in a Virtual World in Light of the Fantasy Defense?*, 41 SANTA CLARA L. REV. 547, 549 (2001) (arguing for legislative changes to facilitate greater law enforcement against on-line pedophiles, specifically to deal with newfangled defenses that the on-line environment has generated); William R. Graham, Jr., *Uncovering and Eliminating Child Pornography Rings on the Internet: Issues Regarding and Avenues Facilitating Law Enforcement's Access to "Wonderland,"* 2000 L. REV. MICH. ST. U. DETROIT C.L. 457, 458 (2000).

given jurisdiction and generally result in upheld convictions. The classic entrapment rules do not account for the lack of face-to-face contact in criminal activity conducted entirely through a computer nor how this significantly changes the nature of both crimes and sting operations.[16]

While all these trends may at first glance appear unrelated, together they form a realist's picture of the entrapment defense and its evolving shape within our legal system. As a whole, the defense is in a state of decline, as indicated by both the decreasing number of cases and the procedural weakness in which they arise, usually after sentencing. Newer areas such as sentencing entrapment and entrapment by estoppel have not produced a boon for questionably-convicted defendants but probably need to be re-formulated to reduce the legal uncertainty that really drives these niche cases. Newer cases introducing novelties such as Internet chat room stings illustrate the obsolescence of the traditional rules because of their cumbersome application to modern on-line communication.

Part II of this Article provides a very brief description of traditional entrapment rules and the issues that have created perennial controversy. Part III describes the decline of entrapment cases in recent years and offers possible explanations for this phenomenon, as well as an assessment of its significance for our legal system. This section also includes a discussion of the weak procedural posture of many of these cases. Part IV discusses sentencing entrapment and entrapment by estoppel as a manifestation of uncertainty about legal rules and proposes that these two areas may be understood differently than most commentators have suggested. Part V discusses on-line chat room sting operations and how they reflect on the current state of entrapment rules. Part VI offers a brief conclusion.

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16. *See generally* Jarrod S. Hanson, *Entrapment In Cyberspace: A Renewed Call For Reasonable Suspicion,* 1996 U. CHI. LEGAL F. 535 (1996) (arguing that entrapment no longer provides adequate safeguards for civil liberties in cyberspace, and should have an added element of reasonable individualized suspicion prior to commencement of on-line sting operations); Jennifer Gregg, *Caught In The Web: Entrapment In Cyberspace,* 19 HASTINGS COMM. & ENT. L.J. 157, 170 (1996) (arguing that traditional entrapment rules provide inadequate safeguards against abuses by law enforcement in the cyberspace arena). Both of these student comments take the position that on-line law enforcement activities should be more circumscribed, somewhat contrary to the position taken in this Article. The strength of these two pieces of scholarship is the way in which they highlight the obsolescence of certain traditional rules and defenses pertaining to computer crime and computer-based law enforcement. *See infra* Part V.

II. BACKGROUND

Entrapment is a creature of American law, recognized nowhere else in the world.[17] It is entirely a function of undercover operations.[18] Undercover

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17. *See* Dru Stevenson, *Entrapment and the Problem of Deterring Police Misconduct*, 37 CONN. L. REV. (forthcoming 2004) (discussing the origins of the defense in this country and its absence elsewhere). For a thoughtful comparative-law analysis of entrapment, contrasting the approaches used in Europe with the United States, see generally Jacqueline E. Ross, *Tradeoffs in Undercover Investigations: A Comparative Perspective*, 69 U. CHI. L. REV. 1501 (2002) (explaining that in Europe the general rule is for the defendant to be found guilty but for the police to be charged as accessories to the crime in situations that would be analogous to entrapment in the United States). Ross discusses the fact that entrapment is a defense to criminal liability nowhere outside the United States. She adds: "Most Western European legal systems instead treat entrapment as a mode of complicity that fails to excuse targets but implicates the investigator in the crime . . . European legal systems treat such conduct as criminal unless a law expressly exempts the investigator from liability for specified acts." *Id.* at 1521-22; *see* Ian Walden & Anne Flanagan, *Honeypots: A Sticky Legal Landscape?* 29 RUTGERS COMPUTER & TECH L. J. 317 (2003) (comparing entrapment rules for the United States, England, Canada, and Australia, particularly with regards to computer-crime decoys known as "honeypots"). Canada has taken an approach that resembles this (but it is a more stark variation). In *Queen v. Mack*, the Supreme Court of Canada defined its rule on entrapment in light of the Canadian Charter of Rights and Freedoms, a Constitutional Act passed in 1982. Queen v. Mack, 2 S.C.R. 903 (1988). The Canadian high court does not recognize entrapment as a defense to a crime, in the sense that the defendant can obtain a complete acquittal; nonetheless, it empowered the judiciary to use its discretion in rejecting "the spectacle of an accused's being convicted of an offense which was the work of the state." *Id.* at 81. When a court finds, *after the defendant is convicted*, that the "authorities provide an opportunity to persons to commit an offence [sic] without reasonable suspicion or acting *mala fides* . . .," the judge can issue a "stay of proceedings," which puts the case on hold indefinitely without sentencing the defendant at all. *Id.* at 119, 159.

The entrapment defense may have emerged in this country and not elsewhere because both versions of the defense allow the courts to appropriate for themselves the power to supervise the criminal justice system, even though that power of the judiciary is not clearly present in the U.S. Constitution. For an argument along these lines, see Nancy Y.T. Hanewicz, Note, Jacobson v. United States: *The Entrapment Defense and Judicial Supervision of the Criminal Justice System*, 1993 WIS. L. REV. 1163 (arguing that both tests for entrapment serve the same basic purpose of giving the courts a self-appointed monitoring position over the police and sting operations). The subjective test enables courts to achieve this supposed goal less explicitly — and therefore is less likely to rankle the populace or the other branches of government — than the objective test. The enhanced power of the courts through the entrapment defense comports overall with the greater policy-making power of the judiciary in the United States than most other countries. Of course, another explanation may lie in the fact that many other countries have not regulated vices like sex crimes and addictive substances to the extent that the United States has, and thus have less need for sting operations. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 572-73 (2001). Many countries also simply lack the resources for elaborate sting operations.

18. *See* Stevenson, *supra* note 17:

> Not all sting operations would constitute entrapment; but entrapment almost definitionally involves sting operations. No discussion of entrapment could have

operations are a function of a special type of criminal law, focusing on "willing party" activities, such as sexual impropriety with minors, sales of contraband and firearms, and bribery.[19] These consensual crimes naturally

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much depth without touching on public policy about government stings. Sting operations are but one method of law enforcement; police can also focus on investigating crimes that have already been committed, or engage in more monitoring and surveillance to catch would-be offenders in the nick of time.

See MARCUS, *supra* note 1, at 334 ("Simply stated, there is no defense of private entrapment when the individual who induces the defendant is acting purely as a private citizen, not on behalf of the government. This rule is accepted by virtually every court in the United States, with little challenge."). Private entrapment may, however, constitute criminal solicitation, subjecting the entrapper to criminal liability. *See id.* at 335 n.21. Government agents are generally immune from this risk. For examples of failed attempts at raising "private entrapment" as a defense, see United States v. Turner, No. C.R.A. 99-10098-RES, 2003 WL 22056405, at *2 n.3 (D. Mass. Sept. 4, 2003) (citing United States v. Emmert, 9 F.3d 699, 703 (8th Cir. 1993) ("There is simply no defense of private entrapment as Turner's hypothetical seems to suggest."); United States v. Squillacote, 221 F.3d 542, 573 (4th Cir. 2000) ("Thus, there is no defense of private entrapment; a defendant who was induced to commit a crime by a private party, without any government involvement, cannot claim that he was entrapped."); State v. O'Neill, 967 P.2d 985, 990 (Wash. Ct. App. 1998) (a reasonable amount of persuasion to overcome reluctance does not constitute entrapment.); *Emmert,* 9 F.3d at 703 (defendant not entitled to entrapment because he failed to show facts of improper government inducement); Prince v. State, 638 So. 2d 1022, 1023 (Fla. Dist. Ct. App. 1994) (The district court held that entrapment was not an available defense when a middleman, not a state agent, induced appellant to engage in a crime.); United States v. Marren, 890 F.2d 924, 931 (7th Cir. 1989) (district court property refused to instruct the jury on entrapment because the defendant failed to prove that he was not predisposed to commit the crime); United States v. Burkley, 591 F.2d 903, 911 n.15 (D.C. Cir. 1978) ("Persuasion, seduction, or cajoling by a private party does not qualify as entrapment even if the defendant was not predisposed to commit the crime prior to such pressure."). A similar principle, of course, applies to evidentiary exclusionary rules. *See* Colorado v. Connelly, 479 U.S. 157, 166 (1986) (Even "[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause.").

19. For more discussion of the historical correlation between entrapment and these transactional-type crimes, see DeFeo, *supra* note 1, at 250-51; MARCUS, *supra* note 1, at 12. For a very thoughtful discussion of the prevalence of vice-related crimes in American law, and some of the unintended consequences, see Stuntz, *supra* note 17, at 573. Stuntz notes the ironies inherent in such legislated morality but also notes that such crimes do indeed create costly externalities that concentrate in the neediest sectors of society.

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

go unreported and are notoriously difficult to detect without excessive surveillance.[20] Using stings and setups becomes the most feasible and efficient way to catch lawbreakers under these circumstances.[21]

Stings and setups, however, can ensnare almost anyone if taken far enough. Consequently, American courts began to draw lines to separate true criminals from those who appeared to simply be victims, regular citizens dragged into activity they would never have done without police inducement.[22] These lines were drawn in two ways. The U.S. Supreme

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> permits legislatures to define criminal liability in ways that might otherwise be politically impossible.

Id. at 573.

20. Justice Rehnquist observed this point with eloquence.

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

United States v. Russell, 411 U.S. 423, 432 n.1 (1973).

21. *See, e.g.*, United States v. Owens, 228 F. Supp. 300, 303 (D.D.C. 1964) ("It is recognized, of course, that the use of informers and undercover agents to secure evidence in narcotics cases is necessary to the efficient enforcement of the narcotics laws and has been sanctioned by the courts."); Bernard W. Bell, *Secrets and Lies: News Media and Law Enforcement Use of Deception as an Investigative Tool*, 60 U. PITT. L. REV. 745, 747 (1999) ("Undercover techniques provide an efficient and effective means to reveal secrets society needs to know — either to sanction wrongdoers and frustrate their plans, or to warn potential victims."); Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 100 n.269 (1998) ("Complete control over the 'crime' makes 'sting operations' an efficient law enforcement technique."). *See generally* Bruce Hay, *Sting Operations, Undercover Agents, and Entrapment*, (modeling economic efficiency for sting operations) available on the Social Science Research Network (www.ssrn.com) (journal publication forthcoming).

22. The first federal court case to uphold an entrapment defense (at least with a published decision) was *Woo Wai v. United States,* in which an immigration enforcement officer (in the nascent days of immigration restrictions) had lured the defendant into a scheme for smuggling Chinese illegal aliens into the country. Woo Wai v. United States, 223 F. 412 (9th Cir. 1915). The recruitment process had taken eighteen months. The circuit court focused on the lack of evidence that the criminal intention had originated in the defendant's mind. *Id.* at 415. There are a few English cases, starting in the late eighteenth century, that considered the defense, but English courts never accepted it and the House of Lords officially disavowed it for the last time in the 1970s. Some of the English cases did include dicta or dissenting opinions sharply criticizing the police for overreaching, but they did not acquit the defendant. Also there are several American cases from the nineteenth century, but the courts did not begin to recognize the defense until the early 1900s. Perhaps the most frequently cited is *Board of Commissioners v. Backus* with its memorable but

Court crafted a rule focused on defendants' "predisposition" to commit crime.[23] Because the rule was binding on all federal courts and influential on many states, this approach became the majority rule, commonly called the "subjective test."[24]

A dissenting and vocal minority of the U.S. Supreme Court, however, insisted over the course of several decades that the rule focuses on the

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disdainful commentary: "Even if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the plea as ancient as the world, and first interposed in Paradise: 'The serpent beguiled me and I did eat.'" Bd. Comm'rs v. Backus, 29 How. Pr. 33, 42 (N.Y. Sup. Ct., 1864). The first known state court to grant an acquittal based on entrapment was the Texas Court of Appeals. O'Brien v. State, 6 Tex. Ct. App. 665 (1879); *see* MARCUS, *supra* note 1, at 2-14; Andrew Ashworth, *Re-Drawing the Boundaries of Entrapment*, 2002 CRIM. L. REV. 161 (U.K. 2002) (discussing recent material from the House of Lords).

23. The U.S. Supreme Court cases are as follows (listed in chronological order for readers' convenience): Sorrels v. United States, 287 U.S. 435 (1932); Sherman v. United States, 356 U.S. 369, 373 (1958) (holding that entrapment was established as a matter of law because petitioner was induced to commit the crime); *Russell*, 411 U.S. at 436 (the defendant's concession that there was evidence to support the jury's finding that he was predisposed to commit the crime was fatal to his claim of entrapment.); Hampton v. United States, 425 U.S. 484, 488-89 (1976) (holding that the defense of entrapment was unavailable to the defendant because he was predisposed to commit the crime); Mathews v. United States, 485 U.S. 58 (1988) (denying the entrapment defense because defendant failed to meet all of the elements); Jacobson v. United States, 503 U.S. 540, 554 (1992) (reversing the defendant's conviction because the government failed to establish that defendant was independently predisposed to commit the crime for which he was arrested). The first Supreme Court case was *Sorrels*, where a federal agent posing as a tourist/fellow war veteran enticed his host, a hospitable farmer, to sell him some liquor during the Prohibition years. The lower courts had denied the availability of the entrapment defense; the U.S. Supreme Court reversed, stating that the defense should be available, at least in a pretrial hearing. Justice Roberts wrote a concurrence arguing that no trial should occur at all where the police instigated the offense, whereas the majority focused too much on the defendant's predisposition. *Sorrels*, 287 U.S. at 435.

24. *See* MARCUS, *supra* note 1, at 53 ("The overwhelming concern is with the 'otherwise innocent' person, not with the nature of the government activity."); Park, *supra* note 1 (giving an exhaustive survey of cases up to that date). Park takes the position of defending the approach used in the federal courts, and he was one of the first two commentators to do so. Park attempted to change the terminology from "subjective test" to "federal entrapment defense," because he felt that the word "subjective" was confusing, given its different meanings in different areas of law. *Id.* at 166 n.4. His nomenclature did not catch on. However, to this day courts and commentators universally use the original terms. The U.S. Supreme Court's position on entrapment takes on special pragmatic importance for three reasons. First, the increasing federalization of criminal law in the United States means that federal rules have an ever-greater relevance for law enforcement. Second, the federal criminal code comprehensively covers many of the so-called "victimless crimes" that lend themselves to enforcement via sting operations, and hence would naturally give rise to more entrapment claims. Finally, entrapment remains a common-law defense in the federal courts, meaning that the Court's jurisprudence on the issue completely carries the day. *See also* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 517-19, 525 (2001) (discussing the issue of federalization and willing-party (morality-based) crimes).

police activities themselves.[25] This would allow more rules to define which tricks were acceptable and which were not.[26] The drafters of the Model Penal Code (MPC) agreed, as it fit better with the more progressive agenda of having juridical, and more mechanical, regulation of law enforcement.[27] As states adopted portions of the MPC into their own statutes, several

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25. The early cases had consistent dissenters favoring the other approach. *See Sorrells*, 287 U.S. at 435; *Sherman*, 356 U.S. at 369; *Russell*, 411 U.S. at 423; *see also* Park, *supra* note 1, at 166.

> Supreme Court Justices have been the oracles for both theories of entrapment. In two leading cases decided in 1932 and 1958 — *Sorrels v. United States* and *Sherman v. United States* — the Court endorsed the subjective defense. However, articulate minorities, led by Justices Roberts and Frankfurter respectively, urged a version that would focus solely on the issue of whether police conduct had fallen below proper standards.

Id. The majority, however, has never wavered from the subjective test, and the more recent cases indicate that the dissenters have given up or are no longer on the Court. *See, e.g., Mathews,* 485 U.S. at 66-67 (Brennan, J., concurring) ("I have previously joined or written four opinions dissenting from this Court's holdings that the defendant's predisposition is relevant to the entrapment defense . . . Therefore I bow to *stare decisis*, and today join the judgment and reasoning of the Court.").

26. *See generally* Hanewicz, *supra* note 17 (arguing that both tests for entrapment serve the same basic purpose of giving the courts a self-appointed monitoring position over the police and sting operations).

27. *See* Model Penal Code § 2.13 (1980); Model Penal Code § 2.11 cmts. 406-07, 412 (1985) (entrapment defense is an "attempt to deter wrongful conduct on the part of the government. . . ." "the primary justification for the defense . . . is to discourage unsavory police tactics."). Robinson & Darley identify the availability of the entrapment defense as one of several factors that undermine the deterrent value of criminal laws generally. *See* Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. (forthcoming 2004). The Model Penal Code's (MPC) position on entrapment has an interesting interplay with its approach to conspiracies, especially in light of the fact that entrapment and conspiracy crimes are interrelated. The MPC allows a conspiracy conviction even where the only other conspirator besides the defendant was a government agent. *See* Model Penal Code § 5.03(1) (1980). This is usually called the "unilateral approach" to conspiracy, which differs from the traditional (majority) rule known as the "bilateral approach," which requires at least two real criminal (nongovernment agent) members of a conspiracy before any member may be convicted of the charge. For a detailed discussion of this plurality requirement, see WAYNE R. LAFAVE, CRIMINAL LAW § 6.5(g), 605-10 (3d ed. 2000). The MPC therefore makes it easier for the government to obtain convictions by using sting operations — all one needs is a single victim (defendant) and one government agent — but then imposes a rule for the entrapment defense that is less favorable to law enforcement, as it focuses on the actions of the agents and not the defendant's predisposition. It is not clear if the drafters intended this to be a balancing-out feature of the MPC, or if the odd combination was a coincidence.

included the MPC's "objective test" for entrapment.[28] A few states, most notably Florida, have attempted to use both approaches simultaneously.[29]

Both approaches present problems. The subjective test's focus on the predisposition of the individual defendant opens the door for evidence of past crimes, which is prejudicial for many juries.[30] Also, given that the

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28. *See* Scott C. Paton, Note, *"The Government Made Me Do It:" A Proposed Approach to Entrapment Under* Jacobson v. United States, 79 CORNELL L. REV. 995, 1002 n.45 (1994) (listing thirteen, but the rules are constantly changing in the state courts and legislatures, with the courts sometimes adopting a different rule than appears to be in the statute, making it difficult to get a precise count). Alaska was the first jurisdiction to officially adopt the test in 1969, although it had won the hearts of innumerable commentators and dissenters on courts before then. *See* Grossman v. State, 457 P.2d 226, 229 (Alaska 1969). For more explanation and criticism of the "objective test," see Stevenson, *supra* note 17.

> The objective test is so named because it purports to look at what a hypothetical "average person" would have done if confronted with the same police come-on used in the defendant's case. In this sense it resembles a "reasonable person" standard from torts, albeit not exactly, because the "reasonableness" in torts is more or less synonymous with "socially desirable," while no one would claim that the defendant's commission of a crime, which has always occurred in an entrapment case, would be "socially desirable" or something courts would want to encourage. Courts using the objective test actually focus less on what the imaginary average person would do than what the actual police did in the case before them.

Id. The name "objective test" is sometimes used interchangeably with a defense called the "outrageous government conduct test," but the latter refers to a constitutional due process violation as opposed to a common-law affirmative defense. In the federal system, it appears to have been put to rest by recent U.S. Supreme Court cases. For discussion, see Andrea B. Daloia, Note, *Sexual Misconduct and the Government: Time to Take a Stand*, 48 CLEV. ST. L. REV. 793, 794 (2000) (arguing that such a test, although currently not used anywhere, should be mandated legislatively for sexual enticement in sting operations); John David Buretta, Note, *Reconfiguring the Entrapment and Outrageous Government Conduct Doctrines*, 84 GEO. L.J. 1945, 1950 (1996) (suggesting merging entrapment and outrageous government conduct into a single constitutional due process test); Kenneth M. Lord, *Entrapment and Due Proess: Moving Toward a Dual System of Defenses*, 25 FLA. ST. U. L. REV. 436 (1998).

29. Florida, Indiana, New Hampshire, New Jersey, and New Mexico have variations on the objective test that appear to be hybrids. *See* FLA. STAT. ANN. § 777.201 (West 1992); IND. CODE. ANN. § 35-41-3-9 (West 1982); State v. Little, 435 A.2d 517, 520 (N.H. 1981) (holding that the burden is on the defendant to prove the defense of entrapment); N.J. STAT. ANN. § 2C:2-12 (West 1982); Baca v. State, 742 P.2d 1043, 1045 (N.M. 1987) (holding that the defendant proved entrapment as a defense because he was improperly induced to commit the crime); MARCUS, *supra* note 1, at 182 ("A misreading of the objective test can cause inclusion of the predisposition element."). A few commentators have proposed hybrid approaches, but the idea has not gained widespread acceptance. *See, e.g.*, Jeffrey N. Klar, *The Need for a Dual Approach to Entrapment*, 59 WASH. U. L.Q. 199, 220 (1982); *see generally supra* note 17; Lord, *supra* note 28 (arguing for both a hybrid entrapment defense to be available as well as a separate due process type defense).

30. *See Sorrells*, 287 U.S. at 458 (Roberts, J., dissenting); LAFAVE, *supra* note 27, § 5.2(d). Such evidence may often be admissible, to impeach the character of the defendant if she testifies

defendant cannot deny having committed the crime itself, since stings usually set up the defendant to be caught in the act, denying the disposition to do it sounds contradictory to the jury.[31]

The objective test purports to avoid these pitfalls,[32] but instead allows the awkward situation of acquitting some obviously dangerous criminals simply because the judge feels squeamish about the undercover agent's aggressive tactics.[33] There also is doubt about whether the objective test is an effective deterrant to police misconduct, given that police tend to

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on her own behalf, and to impeach the reliability of other character witnesses for the defense. This, in turn, can provide enforcement too much latitude in targeting people with previous convictions, rather than looking for actual perpetrators of the latest unsolved crimes. Laurie Levenson notes a similar phenomenon in the context of "three-strikes-you're-out" rules, claiming that defendants with previous convictions will not risk life imprisonment and therefore plead guilty easily. When the defendant enters a plea agreement instead of going to trial, there is no opportunity to raise the exclusionary rules or claim that there were Fourth or Fifth Amendment violations. Thus, Levenson argues, police can afford to be much more cavalier about the exclusionary rules in cases where they know the suspect has two previous convictions. *See* Laurie L. Levenson, *Police Corruption and New Models for Reform,* 35 SUFFOLK U. L. REV. 1, 40-41 (2001).

31. Justice Stewart put it this way in his dissent in *Russell:* "The very fact that he has committed an act that Congress has determined to be illegal demonstrates conclusively that he is not innocent of the offense." United States v. Russell, 411 U.S. 442 (1973) (Stewart, J., dissenting). In addition, the term itself can be confusing for juries. *See, e.g.,* Deis, *supra* note 1, at 1209 (stating that "predisposition" is defined as "one who would have likely committed the same crime, without government inducement, only in circumstances that would have made police detection more difficult and more costly"); Richard Posner, *An Economic Theory of Criminal Law,* 85 COLUM. L. REV. 1193, 1220 (1985) ("Police inducements that merely affect the timing and not the level of criminal activity are socially productive; those that increase the crime level are not."). This begs the question, of course. Does "likely to commit the crime" mean more than 50%? Or could it mean likely enough to be "not remote"? It is an unanswered question how much "likelihood" is enough to make the person dangerous enough to be a burden to society. Some critics contend that the subjective approach seems to give law enforcement *carte blanche* to employ any form of trickery or even coercion to get the defendant to commit a crime; no one can feel safe in such a society. *See* LAFAVE, *supra* note 27, § 5.2(d), at 458 ("A second criticism of the subjective approach is that it creates, in effect, an 'anything goes' rule for use against persons who can be shown by their prior convictions or otherwise to have been predisposed to engage in criminal behavior.").

32. Paul Marcus put it nicely: "The greatest strength of the objective test may simply be that it avoids the problems of the subjective test." MARCUS, *supra* note 1, at 104.

33. LaFave, *supra* note 27, § 5.2(e), at 459; MARCUS, *supra* note 1, at 108. Paul Marcus observes that many object that the test is rather unworkable in its application, which seems to be another way of saying the same thing: "The second major criticism of the objective test deals with its practical application. Because the standard involves the hypothetical 'average person,' or 'reasonable person,' or 'normally law-abiding person,' it may be difficult to apply. The conceptual difficulty is that such individuals generally do not commit crimes." MARCUS, *supra* note 1, at 106; *see also* Pascu v. State, 577 P.2d 1064, 1066-67 (Alaska 1978) (complaining that the test is unmanageable for the same reason). Justice Scalia stated in his concurrence in *Mathews* that "the defense of entrapment will rarely be genuinely inconsistent with the defense on its merits," which perhaps hints that he views the defense as mostly unnecessary. Mathews v. United States, 485 U.S. 58, 67 (1988) (Scalia, J., dissenting).

measure their success in terms of the number of arrests they make rather than the number of convictions to which they contribute.[34] The fact that arrestees may eventually be acquitted is a less urgent concern than catching the perpetrator in the first place.

In addition, the objective test creates a type of legal certainty that is more likely to favor the state than potential defendants. Jurisdictions using the objective test, nearly a third of the states according to some authorities, generate clear precedents about the lines undercover agents cannot cross. The agents are more likely to have *ex ante* legal knowledge of these specific parameters than the general population. The state actors therefore are in a superior position to find loopholes in the rules, to plan around them, and to make sure their tactics fall just shy of entrapment. This is true in general; greater specificity in legal rules favors the parties that are more established in society and have greater resources for obtaining legal

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34. *See* Stevenson, *supra* note 17. There seems to be a growing consensus among commentators that police maximize arrests, not convictions. For a review of the relevant literature, see Stuntz, *supra* note 17, at 538 n.133.

> Police differ from prosecutors in (at least) two critical ways. Their focus is on a different stage of criminal proceedings. With some qualifications, prosecutors maximize convictions; police are more likely to maximize arrests. And they are more culturally distinct from the rest of the population than are prosecutors, so that departmental culture is a more powerful force in police conduct than it is in prosecutorial behavior.

Id. at 538; *see also* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 377-78 (1999) ("But the sociological literature strongly suggests that the primary goal of officers in the field in the average case is to get a 'collar.' If they do, they've done their job. It is the prosecutor's job to convict."). Roger Park notes that police sometimes find enough satisfaction in harassing or inconveniencing suspects with arrests that the final outcome of the case is not critical to them. Park, *supra* note 1, at 232. There is more ongoing controversy, however, over the question of whether prosecutors also have motivations other than maximizing convictions. *See, e.g.*, Daniel Richman, Old Chief v. United States: *Stipulating Away Prosecutorial Accountability?* 83 VA. L. REV. 939, 981-89 (1997) (suggesting that besides political and public relations concerns, some prosecutors' offices believe it is much more valuable to prosecute serious or dangerous criminals than first-time or petty offenders, even though the latter would often be easier cases to win); *but see* Catherine Ferguson-Gilbert, *It is not Whether You Win or Lose, it is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice For Prosecutors?* 38 CAL. W. L. REV. 283 (2001) (arguing, mostly anecdotally, that prosecutors are obsessed with winning); Thomas A. Hagemann, *Confessions From a Scorekeeper: A Reply to Mr. Bresler*, 10 GEO. J. LEGAL ETHICS 151, 152-53 (1996) (arguing that winning is very important to many prosecutors, but that this is not necessarily mutually exclusive with the pursuit of justice); Scott Baker Claudio Mezzetti, *Prosecutorial Resources, Plea Bargaining, and the Decision To Go To Trial*, 17 J.L. ECON. & ORG. 149, 150-51 (2001) (presenting conventional model that prosecutors maximize convictions subject to cost restraints); State v. Rummer, 432 S.E.2d 39, 70 (1993) ("Today's goal is simply to maximize convictions. This need to convict has driven prosecutors to rely on the plea bargain as a quick and easy way to maximize the number of convictions.").

counsel beforehand.[35] Thus, even though the objective test on the surface seems to be more pro-defendant since it scrutinizes the police rather than the accused — the ultimate effect may be to make the state's sting operations almost invincible and the defendant's conviction more certain as a result of the greater certainty in the rules.

The nature of the entrapment defense also creates some problems with accumulating reliable data. Defendants who assert the defense successfully are acquitted or have charges dismissed, and there is usually no written decision issued in such a case that would appear in published reports. The written opinions, especially the appellate opinions, usually reflect only the cases where the entrapment defense failed. It is therefore difficult to determine exactly how often the defense is raised or how often it succeeds, although the reported cases do provide helpful clues. The conventional wisdom is that it is rarely raised and that it rarely succeeds,[36] but this

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35. *See generally* John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Sanctions*, 70 VA. L. REV. 965 (1984) (arguing generally that uncertainty overdeters and underdeters the wrong people respectively); Louis Kaplow, *Optimal Deterrence, Uninformed Individuals, and Acquiring Information about Whether Acts are Subject to Sanctions*, 6 J.L. ECON. & ORG. 93 (1990); Michael F. Ferguson & Stephen R. Peters, *But I Know It When I See It: An Economic Analysis of Vague Rules* (unpublished manuscript) (arguing that vague rules have more deterrent value and are often more efficient), *available at* http://papers.ssrn.com/paper.taf?abstract_id=218968 (last visited Aug. 31, 2004); Isaac Ehrlich & Richard Posner, *An Economic Analysis of Legal Rulemaking*, J. LEGAL STUD. 257 (1974) (arguing that vagueness-related uncertainty in legal sanctions is inefficient). I have maintained elsewhere, however, that over-deterrence is of limited concern in criminal law because most crimes do not border on socially desirable behaviors. Many of the activities that come "close" to the line of illegality would present no social loss in being avoided; in addition, the under-deterrent effect would be weaker than any over-deterrent effect, given that aversion to uncertainty outweighs aversion to risk. *See generally* Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. (forthcoming 2004); *see also* Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279, 299 (1986) ("Our analysis shows that if the uncertainty created by the legal system is distributed normally about the optimal level of compliance, and if the uncertainty is not too large – two seemingly plausible assumptions – then the result under normal damage rules will be too much deterrence rather than too little."); Ehrlich & Posner, *supra* at 263 ("Those costs [of overdeterrence through uncertainty] must be compared with the costs in reduced prevention of socially undesirable activity as a result of loopholes that must arise when the legislature reformulates the statutory prohibition in more specific terms."); Ferguson & Peters, *supra* at 7 ("More complex rules provide a greater advantage to those skilled in creating loopholes.").

36. *See, e.g.*, Carrie Casey & Lisa Marino, *Federal Criminal Conspiracy*, 40 AM. CRIM. L. REV. 577, 599 (2003) ("The entrapment defense is also only rarely successful."); Raphael Prober & Jill Randall, *Federal Criminal Conspiracy*, 39 AM. CRIM. L. REV. 571, 593 (2002) ("The entrapment defense is also rarely successful."); Beth Allison Davis & Josh Vitullo, *Federal Criminal Conspiracy*, 38 AM. CRIM. L. REV. 777, 803 (2001); Bruce A. Green, *There but for Fortune: Real-Life vs. Fictional "Case Studies" in Legal Ethics*, 69 FORDHAM L. REV. 977, 985 (2000); Keri C. McGrath & Jennifer L. Pfeiffer, *Federal Criminal Conspiracy*, 36 AM. CRIM. L. REV. 661, 681 (1999); John D. Lombardo, Comment, *Causation and Objective Entrapment:*

assertion seldom comes supported by empirical data or even survey evidence.

III. CONCENTRATION AND DECLINE

A. *Introduction*

Entrapment cases are disproportionately concentrated in a few states.[37] They are declining almost everywhere, even including these concentration points. Many factors can account for this, but both of these phenomena seem to be largely dependent on levels of uncertainty and knowledge of the relevant legal rules.

The data supporting these conclusions is more survey-oriented than scientific or statistical. True scientific mapping of the entrapment defense, if possible in spite of the limitations already mentioned, could be the subject of future research. Even though the nature of written judicial opinions restricts a survey to cases where criminal defenses failed, we can draw some useful inferences from the numbers such a survey provides.

The numbers indicate that in both the federal and state systems, entrapment cases are on the decline.[38] This is particularly striking

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Toward A Culpability-Centered Approach, 43 UCLA L. REV. 209, 213 (1996) (citing Park, *supra* note 1, at 272). LaFave also mentions this problem in his section on the procedural aspects of the defense, noting that it is perceived to be a minefield for defendants wherein their character is put at issue. Some consider it a defense of last resort. *See* LAFAVE, *supra* note 27, § 5.2 (f), at 460.

37. California, Florida, Michigan, Ohio, Tennessee, Texas, Virginia, and Washington are among the states with far more entrapment cases than other states with large populations and significant crime rates.

38. For example, a search in the "ALLFEDS" database of Westlaw reveals only nineteen federal entrapment cases for the first half of 2004. This does not include sentencing entrapment and entrapment by estoppel, which are really distinct defenses. About forty-four each year were found for 2003 and 2002, but seventy-two for 2001, whereas the numbers in the early 1990s were in the hundreds. *See* United States v. Kennedy, 372 F.3d 686, 688 (4th Cir. 2004) (unsuccessful appeal of failed "perjury entrapment" defense); United States v. Ross, 372 F.3d 1097, 1101 (9th Cir. 2004) (defense failed); United States v. Chavez, No. 03-1482, 2004 WL 1157780, at *1 (10th Cir. May 25, 2004) (jury rejects defendant's entrapment defense); United States v. Guevara, No. 02-1426, 2004 WL 1147091, at *1 (2d Cir. May 21, 2004) (unsuccessful entrapment defense); United States v. Ferby, Nos. 02-1506, 02-1535, 2004 WL 1147087, at *3 (2d Cir. May 19, 2004) (upholding trial court's refusal to give entrapment instruction to jury); United States v. Anderson, No. 02-4255, 2004 WL 857442, at *1 (3d Cir Apr. 22, 2004) (ineffective assistance appeal for failing to raise entrapment defense); United States v. Hsu, 364 F.3d 192, 203 (4th Cir. 2004) (defendant not entitled to entrapment instruction); United States v. Vega, Nos. 02-50253, 02-50499, 2004 WL 785311, at *1 (9th Cir. Apr. 17, 2004) (jury rejects entrapment defense); Cunigan v. Hurley, No. 03-3284, 2004 WL 540446, at *1 (6th Cir. Mar. 17, 2004) (ineffective assistance for failing to request entrapment instruction at trial, conviction affirmed); United States v. Valenzuela, No. 02-2216, 2004 WL 376852, at *3 (6th Cir. Feb. 27, 2004) (insufficient evidence of lack of

predisposition); United States v. Gallardo, No. 03-30124, 2004 WL 300423, at *1 (9th Cir 2004) (attempt to withdraw guilty plea in order to raise entrapment defense post-sentencing); United States v. Glaum, 356 F.3d 169, 177-78 (1st Cir. 2004) (unsuccessful entrapment defense); United States v. King, 356 F.3d 774, 776-78 (7th Cir. 2004) (entrapment defense abandoned in middle of proceedings); Ozoroski v. Klem, No. CIV.A.04-561, 2004 WL 1446046, at *4 (E.D. Pa., June 28, 2004) (unsuccessful ineffective assistance of counsel appeal, where one witness was brought to support entrapment defense); United States v. McGee, No. 03C4618, 2004 WL 1125893, at *1 (N.D. Ill., May 19, 2004) (ineffective assistance of counsel appeal for failure to raise defense); United States v. Al Selami, No. 04CR20, 2004 WL 1146116, at *5 (N.D. Ill., May 18, 2004) (unsuccessful entrapment defense); Padgett v. United States, 302 F. Supp. 2d 593, 607-08 (D. S.C. 2004) (entrapment rejected); United States v. Alvarez, 317 F. Supp. 2d 1163 (C.D. Cal. 2004); Barnes v. Dretke, No. 4:03-CV-0816-4, 2004 WL 323941 (N.D. Tex., Jan. 26, 2004) (unsuccessful entrapment defense at trial). The forty-four federal entrapment cases for 2003 illustrate the general failure of the defense: United States v. Pratt, 351 F.3d 131, 140 (4th Cir. 2003) (defendant not entitled to jury instructions on multiple conspiracies or entrapment defense); United States v. Howard, No. 02-21355, 2003 WL 22849815, at *1 (5th Cir. Dec. 2, 2003) (defendant not entitled to entrapment jury instruction); United States v. Franklin, No. 02-2299, 2003 WL 22854571, at *2 (10th Cir. Nov. 28, 2003) (ineffective assistance of counsel appeal); United States v. Capelton, 350 F.3d 231, 243 (1st Cir. 2003) (evidence supported findings that defendant voluntarily sold drugs to undercover officer, defeating entrapment defense); United States v. Persinger, No. 02-1477, 2003 WL 22905307, at *5 (6th Cir. Nov. 24, 2003) (unsuccessful entrapment defense); United States v. Lewis, 349 F.3d 1116 (9th Cir. 2003) (entrapment unsuccessful at trial); United States v. Carrillo, No. 02-106916, 2003 WL 22682509 (9th Cir. Nov. 12, 2003); United States v. Vlanich, Nos. 01-2264, 01-2315, 2003 WL 22213951 (3d Cir. Sept. 24, 2003) (refusal to allow entrapment defense as matter of law); United States v. Edwards, No. 02-3068, 2003 WL 22239582, at *1 (D.C. Cir. Sept. 21, 2003) (admitting "other crimes" as evidence is necessary to determine defendant's predisposition to commit the crime); United States v. Jackson, 345 F.3d 59, 67 (2d Cir. 2003) (affirming jury's rejection of defendant's entrapment defense, given his eagerness to commit the crimes); United States v. Tignor, No. 03-4140, 2003 WL 22113628, at *1 (4th Cir. Sept. 12, 2003) (entrapment jury instruction refused); United States v. Si, 343 F.3d 1116, 1125 (9th Cir. 2003) (jury rejects defense); United States v. Medina, Nos. 00-2267, 01-1974, 2003 WL 22016375, at *4 (1st Cir. Aug. 27, 2003) (defendants not entitled to entrapment instructions); United States v. Nishnianidze, 342 F.3d 6, 17 (1st Cir. 2003) (not entitled to entrapment instructions where defendant's burden of proof not met); United States v. Hanson, 339 F.3d 983, 987-88 (D.C. Cir. 2003) (defendants prohibited from withdrawing guilty plea in order to raise entrapment); United States v. Gutierrez, 343 F.3d 415, 421 (5th Cir. 2003) (sting operation did not induce defendant's criminal activity so as to warrant entrapment instruction); United States v. Tafoya, No. 00-50660, 2003 WL 21949167 (9th Cir. Aug. 13, 2003); United States v. Jahner, No. 02-10536, 2003 WL 21920011, at *1 (9th Cir. 2003) (unsuccessful entrapment defense); United States v. Shults, Nos. 01-6532, 01-6533, 01-6534, 2003 WL 21500006, at *9 (6th Cir. June 26, 2003) (entrapment defense waived by guilty plea, cannot be withdrawn); United States v. Gurolla, 333 F.3d 944, 959 (9th Cir. 2003) (reversing where defendant was forbidden to submit entrapment evidence to jury); United States v. Pedraza, No. 02-2313, 2003 WL 21246583 (10th Cir. May 30, 2003); United States v. Ogle, 328 F.3d 182, 188 (5th Cir. 2003) (affirming district court's refusal to give an entrapment instruction to jury in money laundering case); United States v. Broadwater, No. 02-2426, 2003 WL 21265185, at *4 (7th Cir. May 30, 2003) (unsuccessful entrapment defense); United States v. Brooks, No. 01-10282, 2003 WL 21147412 (9th Cir. May 15, 2003) (Defendant's entrapment defense failed because there was no showing that defendant was induced to commit the crime by illegal acts of the government agents.); United States v. Curtis, 328 F.3d 141 (4th Cir. 2003) (defendant unsuccessfully claimed a psychological condition made him abnormally

because the number of criminal cases, especially drug cases, increase over time with the population and with the ongoing advances of the War on Drugs.[39] There is no reason to think, for instance, that undercover or sting

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susceptible to entrapment); United States v. Kimley, No. 01-4324, 2003 WL 1090706, at *1 (3d Cir. Mar. 12, 2003) (deciding not to downward departure for sentence entrapment); United States v. Thomas, No. 024128, 2003 WL 593384 (4th Cir. Feb. 28, 2003) (holding that the entrapment defense inapplicable); Urias v. Lucero, No. 01-2352, 2003 WL 359448, at *1 (10th Cir. Feb. 19, 2003) (ineffective assistance of counsel in failing to present an entrapment defense); United States v. Morin, No. 02-30109, 2003 WL 344344, at *1 (9th Cir. Feb. 13, 2003) (quoting United States v. Marquardt, 949 F.2d 283, 285 (9th Cir. 1991) ("[A]ffirming refusal to apply downward adjustment where defendant indicated that he had not intended to violate the law and that the authorities 'steered' him toward child pornography"); United States v. Fuentes, No. 02-2143, 2003 WL 191442, at *3 (10th Cir. Jan. 29, 2003) ("[A]ssertion of the entrapment defense coupled with acknowledgment of the underlying criminal activity automatically entitles a defendant to a two-point acceptance of responsibility reduction."); United States v. Schake, No. 02-1743, 2003 WL 202439, at *1 (3d Cir. Jan. 29, 2003) (the circuit court affirms the district court's holding that defendant had failed to show how trial counsel's arguably deficient performance prejudiced defendant's trial to the extent that it undermined confidence in the trial's outcome); United States v. Salazar, No. 02-2018, 2003 WL 165940, at *3 (10th Cir. Jan. 24, 2003) (refusing to give the jury a definition of "inducement" did not significantly affect the jury verdict); United States v. Coger, No. 02-4568, 2003 WL 149848, at *1 (4th Cir. Jan. 22, 2003) (ruling that the defendant did not meet the burden of showing that the district court erred in denying him the use of the entrapment defense); Towles v. Dretke, No. CIV.A.403CV0822Y, 2003 WL 22952820, at *6 (N.D. Tex., Dec 10, 2003) (ineffective assistance appeal contending that had counsel talked to potential defense witnesses regarding his entrapment defense prior to trial, counsel would have known the witnesses were not going to testify favorably); Unsell v. Dretke, No. CIV.A.4:03-CV-254-A, 2003 WL 22328904, at *1 (N.D. Tex. Oct. 8, 2003) (jury unconvinced by attempted entrapment defense); United States v. Waddy, No. CRIM 00-66-1, Civ. 92-6827, 2003 WL 22429047, at *4 (E.D. Pa. Sept. 18, 2003) (ineffective assistance of counsel appeal for failing to raise defense); Montag v. United States, No. CRIM. 0079(1)(JRT/FLN, Civ. 02-4723(JRT), 2003 WL 22075759 (D. Minn. Aug. 5, 2003) (ineffective assistance of counsel appeal for failing to raise defense); United States v. Turner, No. CR.A.99-10098-RGS, 2003 WL 22056405, at *3 (D. Mass. Sept. 4, 2003) ("vicarious entrapment" defense unsuccessful); McMillen v. United States, 2003 WL 21751707 (N.D. Tex. July 28, 2003) (defense regarded as frivolous in this case); United States v. Duncan, CR. 3:02CR122(CFD), 2003 WL 21305469, at *1 (D. Conn. June 4, 2003) (jury rejects entrapment defense); United States v. Nguyen, No. CR 99-4068-MWB, 2003 WL 1785884, at *1 (N.D. Iowa Apr. 3, 2003) (ineffective assistance of counsel); United States v. Davis, Nos. 99-40091-JAR, 02-3174-JAR, 2003 WL 1463263, at *1 (D. Kan. Mar. 19, 2003) (unsuccessful entrapment defense at trial); Miles v. Jackson, No. 02-CV-72789-DT, 2003 WL 1119930 (E.D. Mich. Feb. 11, 2003).

39. There is evidence that interpersonal crime (murder, assault, rape, etc.) and larceny decreased noticeably in the 1990s, and there are competing explanations for this phenomenon (changes in gun laws, economic conditions, etc.). For a thought-provoking survey of the various explanations, see Steven D. Levitt, *Understanding Why Crime Fell in the 1990's: Four Factors that Explain the Decline and Six That Do Not,* 18 J. ECON. PERSP. 163, 163-64 (2004). Levitt does not discuss the types of crimes that are typically the subject of sting operations, however; it is difficult to find data on these crimes in particular. The numbers of reported cases on Westlaw continue to grow, of course. Another recent publication by Levitt, reviewing the work of others, discusses the War on Drugs and notes that the number of those incarcerated on drug charges grew from 30,000 nationwide in 1980 to 400,000 by 1996, the period during which entrapment cases peaked and then

operations themselves are decreasing. For example, a Westlaw search comparing drug-related entrapment cases with the overall number of drug related cases in a given year shows that the ratio of reported entrapment cases to the larger body of cases for the same substantive offense has dropped to single digits (usually five or less) in almost every state. The same ratio was well into the double-digits almost everywhere approximately fifteen years ago. These are not precise figures or even categories, of course, but the trends are remarkable. Westlaw searches are not perfect — they turn up many false positives — but one would expect similar numbers of false positives for the same search conducted for different years (but perhaps not across jurisdictions). Yet almost every jurisdiction saw a spike in the ratio of entrapment cases around 1988, and a smaller surge in the early 1990s, and then a steady decline since then to numbers half the size of the peaks figures, or even less.

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began to decline. Steven D. Levitt, *Review of* Drug War Heresies *by MacCoun and Reuter,* 41 J. ECON. LITERATURE 540, 541 (2003). Levitt offers a way to reconcile the increases in drug convictions and decreases in violent crimes.

> [V]iolent and property crime are 1-3 percent lower as a result of the incarceration of drug offenders. This result may seem counterintuitive since increased drug prisoners have crowded out punishments for other offenders. Empirically, however, incarcerating a drug criminal yields almost as large a reduction in violent and property crime as locking up someone convicted of those crimes. As a consequence, the net effect of increasing drug punishment is to reduce other crimes.

Id. at 544.

Given that the written decisions reflect mostly losing defenses,[40] one explanation for the decline might be that more defendants are winning

40. *See supra* text accompanying note 38 and cases cited therein for the most recent two years; the 2002 cases are similarly uniformly dismal from a defendant's perspective and are few enough to be cited in their entirety: Bradley v. Duncan, 315 F.3d 1091, 1096 (9th Cir. 2002) (trial court's refusal to give entrapment instruction merited reversal); United States v. Valle-Leanos, Mo. 01-10752, 2002 WL 31779833, at *1 (9th Cir. Dec. 2, 2002) (entrapment completely unsupported by evidence); United States v. Cope, 312 F.3d 757 (6th Cir. 2002) (failed motion for directed verdict on entrapment defense); United States v. Hines, No. 01-5011, 2002 WL 31496420, at *1 (4th Cir. Nov. 8, 2002) (entrapment instruction refused); United States v. Fridley, No. 01-5553, 2002 WL 1808448, at *3 (6th Cir. Aug. 6, 2002) (refusal to give entrapment jury instruction); United States v. Burns, 298 F.3d 523, 528-39, (6th Cir. 2002) (affirming trial court's denial of entrapment defense in drug case); United States v. Corona, No. 01-10487, 2002 WL 1417555, (9th Cir. July 1, 2002) (reversing and granting a new trial based on district court's refusal to provide undercover informant's statements to defendant for preparation of entrapment defense); United States v. Scott, No. 01-7124, 2002 WL 1150819, at *2 (10th Cir. May 30, 2002) (failed entrapment defense); United States v. Mannar, No. 01-4379, 2002 WL 1020705, at *1 (4th Cir. May 21, 2002) (jury disbelieved entrapment defense); United States v. Ryan, 289 F.3d 1339, 1344-45 (11th Cir. 2002) (government informant's favorable terms for sale of narcotics did not entitle defendant to submission of entrapment defense); United States v. Arnold, No. 01-10251, 2002 WL 598056, at *1 (9th Cir. Apr. 18, 2002) (holding that the factual findings support the court's decision not to reduce sentencing because of entrapment); United States v. Pedroni, No. 99.5182, 2002 WL 993573, at *3 (3d Cir. Apr. 18, 2002) (defense failed); United States v. Desena, 287 F.3d 170, 173-74 (2d Cir. 2002) (defense failed); Aros. v. Stewart, No. 01-15795, 2002 WL 530536, at *1-2 (9th Cir. Apr. 8, 2002) (ineffective assistance of counsel appeal, failed); United States v. Coleman, 284 F.3d 892, 894-95 (8th Cir. 2002) (jury disbelieved entrapment defense); United States v. Johnson, No. 01-4553, 2002 WL 431936, at *1 (4th Cir. Mar. 20, 2002) (jury rejects entrapment defense); United States v. Tierney, No. 01-1018, 2002 WL 461750, at *1 (9th Cir. Mar. 19, 2002) (elements of entrapment not met); United States v. Kurkowski, 281 F.3d 699, 701-02 (8th Cir. 2002) (entrapment rejected as a matter of law); United States v. Thomas, Nos. 00-5426, 00-5831, 2002 WL 89670, at *3 (6th Cir. Jan. 22, 2002) (failed entrapment claim); United States v. Khalil, 279 F.3d 358, 364-65 (6th Cir. 2002) (unsuccessful); Slusher v. Furlong, No. 01-1192, 2002 WL 12252, at *5 (10th Cir. Jan. 4, 2002) (ineffective assistance of counsel appeal failed); United States v. James, No. 02CR278, 2002 WL 31749174at *3 (N.D. Ill. Dec. 3, 2002) (pretrial rejection of entrapment defense); Tocco v. Senkowski, No. 00Civ.5508(JSM), 2002 WL 31465803, at *3 (S.D.N.Y. Nov, 04, 2002) (refusal to give entrapment jury instruction upheld); United States v. DeWoody, 226 F. Supp. 2d 956, 957 (N.D. Ill. 2002) (claim that destruction of evidence by government fatally undermined entrapment defense rejected as harmless error); Lombardo v. United States, 222 F. Supp. 2d 1367, 1375 (S.D. Fla. 2002) (failed entrapment defense); United States v. Hospedales, 247 F. Supp. 2d 530, 541 (D. Vt. 2002) (failed entrapment defense); United States v. Adamidov, No. CV01-72-BR, 2002 WL 31971836, at *5 (D. Or. Sept. 4, 2002) (defense failed); United States v. Gambini, No. CIV.A.99-225, 2002 WL 1767418, at *1 (E.D. La. July 30, 2002) (unsuccessful); Causey v. Bock, No. 99-CV-10309-BC, 2002 WL 1461766, at *5 (E.D. Mich. July 2, 2002) (failed entrapment defense); Sims v. Cockrell, No. CIV.A.301CV1007M, 2002 WL 1315797, at *3 (N.D. Tex. June 12, 2002) (failure of counsel to investigate evidence to support

entrapment claims. This might seem to explain the drop in entrapment-related appeals. This explanation, however, is inadequate for several reasons.

First, the available opinions, although representing cases where the defense failed at trial, or failed to arise procedurally, describe in vivid detail the facts and circumstances under which entrapment defenses lose. These fact summaries can leave the reader wondering if any defendant could ever win under such strict rules since many of the failed entrapment claims seem plausible. Entrapment is an affirmative defense, meaning the defendant bears the burden of offering *some* evidence of entrapment before the prosecution must respond as part of proving the state's case. The level of proof required of the defendant varies somewhat from jurisdiction to jurisdiction, but is lower than a burden of proof. Courts regularly find insufficient evidence of entrapment where the stipulated facts reflect a complex, heavy-handed sting operation. In other words, the available cases leave no reason to believe that other defendants easily prevail with the entrapment defense.

Second, if a decline were due to more defendants winning, one would expect this, in turn, to be explained by some sudden shift in the rules to favor defendants. This has not occurred. The rules of entrapment in almost all jurisdictions have been the same since the early 1980s.

Third, even if the rules had become more lenient or the courts had found some other mechanism to accomplish the same thing, a rise in acquittal rates from the entrapment defense would presumably increase its popularity with more marginal defendants, especially given the existence of a defined set of local defense attorneys. An easy acquittal technique would be adopted by everyone, even those with marginal claims to the defense. This would reduce the number of plea agreements and increase the number of defendants losing at trial, at least for a short time period. In fact, one might expect the number of losing cases to rise along with the numbers of wins, until the real boundaries became clear. This observation also could apply in reverse: a spike in the number of entrapment appeals, even though they were loser defenses, could reflect more unreported acquittals for the same period.

For these reasons, it is reasonable to glean some tentative, general conclusions from the reported entrapment cases, even if they provide only a partial picture. The partial picture we have indicates that entrapment is on the decline as a defense everywhere. In addition, the cases tend to be concentrated in a few states: California,[41] Florida,[42] Michigan,[43] Ohio,[44]

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possible entrapment defense); Petta v. Cain, No. CIV.A.01-3891, 2002 WL 1216619, at *11 (E.D. La. June 3, 2002) (jury disbelieved entrapment defense); United States v. Brunshtein, No. 98CR769TPG, 2002 WL 987275, at *2 (S.D.N.Y. May 13, 2002) (defendant not entitled to new

trial to present entrapment defense); United States v. Barragan-Rangel, 198 F. Supp. 2d 973, 978 (N.D. Ill. 2002) (ineffective assistance of counsel appeal, failed); United States v. Richardson, No. CRIM.A.01-235, 2002 WL 461662, at *1 (E.D. La. Mar. 21, 2002) (evidentiary contest unrelated to contemplated entrapment defense);United States v. Merlino, 204 F. Supp. 2d 83, 88 (D. Mass. 2002) (rejection of attempted "entrapment as matter of law" defense); Perkins v. United States, No. CIV.A.300CV2042M, 2002 WL 368523, at *5 (N.D. Tex. Mar. 6, 2002) (unsuccessful entrapment defense); United States v. Perez, No. 3:97-CR-342M, 2002 WL 442231, at *4-6 (N.D. Tex. Mar. 5, 2002) (unsuccessful entrapment defense at trial); Decker v. Cockrell, No. 7:98-CV-085-R, 2002 WL 180888, at *2 (N.D. Tex. Feb. 1, 2002) (ineffective assistance of counsel appeal); United States v. Grass, No. CRIM.A-00-120-01, 2002 WL 59364, at *8 (E.D. Pa. Jan. 16, 2002) (failed entrapment defense); United States v. Richardson, No. CRIM.A.01-235, 2002 WL 59412, at *3 (E.D. La. Jan. 14, 2002) (evidentiary ruling jeopardizing entrapment defense); United States v. Hall, 56 M.J. 432, 437 (C.A.A.F. 2002) (military entrapment case; defense unsuccessful); *see also* Magana v. Hofbauer, 263 F.3d 542, 545 (6th Cir. 2001) (habeas petition contesting plea agreement, discusses failed entrapment defense in state court proceedings); United States v. Nunez, No. 00-3188, 2001 WL 277832, at *1 (8th Cir. Mar. 22, 2001) (affirming rejection of defendant's entrapment claims); United States v. Martinez-Villegas, No. 98-50056, 2001 WL 219893, at *2 (9th Cir. Feb. 7, 2001) (defense disproved sufficiently by prosecution); United States v. Terry, 240 F.3d 65, 70 (1st Cir. 2001) (appellant blamed unsuccessful entrapment defense on jury instructions, conviction affirmed); United States v. Barriga, 246 F.3d 676 (9th Cir. 2000) (upholding trial court's rejection of entrapment defense); United States v. Pinque, 234 F.3d 374, 378 (8th Cir. 2000) (defendant not entitled to entrapment instruction); United States v. Boyd, 248 F.3d 1160 (7th Cir. 2000) (unsuccessful entrapment defense at trial); United States v. Cox, 242 F.3d 368 (2d Cir. 2000) (defendant's entrapment defense unsuccessful because government proved he had the predisposition to sell cocaine); *but see* Barbee v. Wal-Mart Stores, Inc., No. 01-2228 GBRE, 2002 WL 1784318, at *2 (W.D. Tenn. July 16, 2002) (defendants acquitted on entrapment defense); United States v. Garcia, No. 00-10062, 2001 WL 30043, at *1 (9th Cir. Jan. 5, 2001) (trial court's refusal to give entrapment instructions held to be error, cases reversed and remanded).

41. *See, e.g.*, People v. Reyes, No. B167375, 2004 WL 1354298, at *3 (Cal. Ct. App. June 17, 2004); People v. Reiner, No. B150375, 2004 WL 1171507, at *9 (Cal. Ct. App. May 26, 2004), *Reh'g denied*, June 14, 2004 (defense unsuccessful in extortion case); People v. Smith, No. H02562B, 2004 WL 1120878, at *5 (Cal. Ct. App. May 20, 2004); People v. Estrada, No. B166217, 2004 WL 765958 (Cal. Ct. App. Apr. 12, 2004); People v. Hale, No. C042472, 2004 WL 602641, at *5 (Cal. Ct. App. Mar. 26, 2004); People v. Dang, No. A102449, 2004 WL 370791, at *1 n.1 (Cal. Ct. App. Mar. 1, 2004); People v. Johnson, No. E033632, 2004 WL 194035, at *9 (Cal. Ct. App. Feb. 2, 2004); People v. Tinoco, No. B161983, 2004 WL 156873, at *3 (Cal. Ct. App. Jan. 28, 2004); People v. Hernandez, No. H024632, 2003 WL 23101085, at *9 (Cal. Ct. App. Dec. 30, 2003); People v. Washington, No. B164430, 2003 WL 22966235, at *3 (Cal. Ct. App. Dec. 18, 2003); People v. Huerta, No. A097743, 2003 WL 22839284, at *6 (Cal. Ct. App. Nov. 26, 2003); People v. Buckmaster, No. C041801, 2003 WL 22520497, at *3 (Cal. Ct. App. Nov. 7, 2003); People v. Pigage, 6 Cal. Rptr. 3d 88, 97 (Cal. Ct. App. Oct. 30, 2003); People v. Nicolas, No. A099174, 2003 WL 21738954, at *4 (Cal. Ct. App. July 28, 2003); People v. Jefferson, No. B158725, 2003 WL 2008282, at *8 (Cal. Ct. App. May 2, 2003); People v. Bristow, No. F039418, 2003 WL 257372, at *15 (Cal. Ct. App. Feb. 7, 2003); People v. Adair, 62 P.3d 45, 53 (Cal. 2003).

42. *See*, e.g., State v. Blanco, No. 4D03-113, 2004 WL 86646, at *2-*4 (Fla. Dist. Ct. App. Jan. 21, 2004) (the celebrated "hottie defense" case); Perez v. State, 856 So. 2d 1074, 1077 (Fla. Dist. Ct. App. 2003) (holding that evidence of prior convictions showed defendant's predisposition to commit the crime); Concepcion v. State, 857 So. 2d 299, 301 (Fla. Dist. Ct. App. Oct. 3, 2003) (holding that jury instructions and the use of the word "or" constituted reversible error); Worley v. State, 848 So. 2d 491, 492 (Fla. Dist. Ct. App. 2003); Marreel v. State, 841 So. 2d 600, 603 (Fla.

Tennessee, Texas,[45] and Washington[46] are states with the highest numbers of entrapment cases. The large criminal dockets of these states helps

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Dist. Ct. App. 2003) (ruling that the entrapment defense is denied because law enforcement agents induced the defendant).

43. *See, e.g.*, People v. Mills, No. 245226, 2004 WL 787145, at *2 (Mich. Ct. App. Apr. 13, 2004) (ineffective assistance appeal); People v. Anderson, No. 241769, 2004 WL 103189, at *2 (Mich. Ct. App. Jan. 22, 2004) (ineffective assistance of counsel appeal); People v. Leonard, No. 236871, 2003 WL 22681789, at *2-*4 (Mich. Ct. App. Nov. 13, 2003); People v. Micheau, No. 241036, 2003 WL 22358874, at *2 (Mich. Ct. App. Oct. 16, 2003); People v. Hunter, No. 236888, 2003 WL 22112435, at *3 (Mich. Ct. App. Sept. 11, 2003)(ineffective assistance of counsel appeal).

44. *See, e.g.*, State v. Klapka, No. 2003-L-044, 2004 WL 1238411, at *4-*5 (Ohio Ct. App. June 04, 2004) (trial court refusal to give entrapment instruction); State v. Burgins, No. 03JE34, 2004 WL 1240373, at *1 (Ohio Ct. App. June 4, 2004) (failed entrapment defense); State v. Bolden, No. 19943, 2004 WL 1043317, at *2 (Ohio Ct. App. May 7, 2004); State v. Scurles, No. W0-03-041, 2004 WL 937276, at *1 (Ohio Ct. App. Apr. 30, 2004); State v. Cunningham, 808 N.E.2d 488, 491 (Ohio Ct. App. 2004) (Internet chat room case); State v. Turner, 805 N.E.2d 124, 133 (Ohio Ct. App. 2004); Chong Hadaway, Inc. v. Ohio Liquor Control Comm'n, No. 03AF-414, 2004 WL 232147, at *2 (Ohio Ct. App. Feb. 3, 2004) (a rare administrative enforcement-entrapment case, defense unsuccessful); City of Dayton v. Clark, No. 19672, 2004 WL 67945, at *2 (Ohio Ct. App. Jan. 16, 2004); State v. Carter, No. 02CA028, 2004 WL 35458, at *4 (Ohio Ct. App. Jan. 5, 2004); State v. Ellison, No. L-02-1292, 2003 WL 22946188, at *3 (Ohio Ct. App. Dec. 12, 2003); State v. Snyder, 801 N.E.2d 876, 880-87 (Ohio Ct. App. 2003) (rejecting the defendant's entrapment defense); State v. Mahan, No. CA2002-10-262, 2003 WL 22326562, at *2 (Ohio Ct. App. Oct. 13, 2003); State v. Charlton, No. 02CA008048, 2003 WL 21185794, at *4 (Ohio Ct. App. May 21, 2003); State v. Graves, No. L-02-1053, 2003 WL 21040652, at *4 (Ohio App. May 9, 2003); State v. Matthews, No. 0T-02-020, 2003 WL 1699926, at *2-*3 (Ohio Ct. App. Mar. 31, 2003); State v. Edwards, No. L-00-1161, 2003 WL 257383, at *5 (Ohio Ct. App. Feb. 7, 2003); State v. West, No. 2002CA38, 2003 WL 139976, at *1-*2 (Ohio Ct. App. Jan. 17, 2003).

45. Entrapment failed in every one of the following cases: Busby v. State, No. 01-02-00554-CR, 2003 WL 22999526, at *3 (Tex. Ct. App. Dec. 18, 2003); Warfield v. State, No. 12-03-00032-CR, 2003 WL 22480405, at *3 (Tex. Ct. App. Oct. 31, 2003); Sullivan v. State, No. 05-02-00313-CR, 2003 WL 22456326, at *2 (Tex. Ct. App. Oct. 30, 2003); Garza v. State, No. 06-02-00163-CR, 2003 WL 22232836, at *2 (Tex. Ct. App. Sept. 30, 2003); Jang v. State, No. 05-02-01343-CR, 2003 WL 22020788, at *6 (Tex. Ct. App. Aug. 28, 2003); Fautner v. State, No. 05-01-01297-CR, 2003 WL 21783349, at *3 (Tex. Ct. App. Aug. 4, 2003); Routier v. State, 112 S.W.3d 554, 587 (Tex. Crim. App. 2003); Gonzalez v. State, No. 2-02-291-CR, 2003 WL 21101520, at *2 (Tex. Ct. App. May 15, 2003); O'Dell v. State, No. 11-02-00085-CR, 2003 WL 21047576, at *7 (Tex. Ct. App. May 8, 2003); Faughn v. State, No. 14-02-00431-CR, 2003 WL 1987855, at *3 (Tex. Ct. App. May 1, 2003); Dow v. State, No. 03-02-00515-CR, 2003 WL 1922435, at *6 (Tex. Ct. App. Apr. 24, 2003); Chowdhury v. State, No. 14-02-00176-CR, 2003 WL 1738414, at *1 (Tex. Ct. App. Apr. 3, 2003); Garcia v. State, No. 14-02-00408-CR, 2003 WL 748858, at *1 (Tex. App. Mar. 6, 2003).

46. *See, e.g.*, State v. Bradley, No. 51112-2-I, 2004 WL 880382, at *6-*7 (Wash. Ct. App. Apr. 26, 2004); State v. Woodman, No. 29949-6-II, 2004 WL 729198, at *3 (Wash. Ct. App. Apr. 6, 2004); State v. Rivera, No. 51684-1-I, 2004 WL 188306, at *2 (Wash. Ct. App. Feb. 2, 2004); State v. Wright, No. 21285-8-III, 2003 WL 22970974, at *9 (Wash. Ct. App. Dec. 18, 2003); State v. Finnie, No. 21317-0-III, 2003 WL 22753621, at *3 (Wash. Ct. App. Nov. 20, 2003); State v. Gisvold, No. 49357-4-I, 2003 WL 21267822, at *4 (Wash. Ct. App. June 02, 2003); State v. Whipple, No. 49711-1-I, 2003 WL 1963239, at *1 (Wash. Ct. App. Apr. 28, 2003).

explain the larger number of cases for a certain criminal defense, but states such as New York,[47] Pennsylvania,[48] New Jersey,[49] and Illinois[50] are surprisingly absent from the list. These latter states have large populations and large criminal dockets, but their numbers of reported entrapment cases are less than five or ten per year.

There are, therefore, two parallel phenomena operating in tandem: the concentration of entrapment cases in certain places, and the overall decline in every jurisdiction. Both merit discussion.

B. *Concentration and Uncertainty*

One might expect that the difference in legal rules between jurisdictions would explain the concentration of cases in certain areas. Such a view would have an inherent appeal to those who believe in the rule of law as the causal factor for legal outcomes. The appeal is heightened, naturally, where there are two rival rules at play: the subjective and objective approach.

Regardless of the relative merits of the rules, they do not appear to affect the relative number of entrapment cases that arise. Pennsylvania, for example, uses the objective test, but has had only five reported entrapment cases in the last three years[51] and only three in the three years before that.[52] New York uses the subjective test, and its number of entrapment cases for

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47. *See infra* text accompanying note 53.

48. *See infra* text accompanying notes 51-52.

49. *See, e.g.,* State v. Brooks, 841 A.2d 505, 510-11 (N.J. Super. Ct. App. Div. 2004) (rejecting the defendant's entrapment defense); State v. Williams, 834 A.2d 433, 436 (N.J. Super. Ct. App. Div. 2003) (stating that the confidential informant aided law enforcement in a drug bust by pointing out the defendant); State v. Williams, 813 A.2d 1215, 1219 (N.J. Super. Ct. App. Div. 2003) (holding that the identity of the informant was not necessary for this case).

50. *See, e.g.,* People v. Glenn, 804 N.E.2d 661, 666 (Ill. App. Ct. 2004) (rejecting the defendant's entrapment defense); People v. Rose, 794 N.E.2d 1004, 1007 (Ill. App. Ct. 2003) (holding that the defendant's entrapment defense did not warrant releasing the informant's identity); People v. Mendez, 784 N.E.2d 425, 427 (Ill. App. Ct. 2003) (claiming ineffective assistance of counsel).

51. Commonwealth v. Joseph, 848 A.2d 934, 939 (Pa. Super. Ct. 2004) (Internet chat room case); Commonwealth v. Zingarelli, 839 A.2d 1064, 1075 (Pa. Super. Ct. 2003) (Internet chat room case); Commonwealth v. Boyd, 835 A.2d 812, 819 (Pa. Super. Ct. 2003); Commonwealth v. Lebo, 795 A.2d 987, 993 (Pa. Super. Ct. 2002) (child pornography case); Commonwealth v. Wilson, 829 A.2d 1194, 1202 (Pa. Super. Ct. 2003) (remanding for re-sentencing due to issues dealing with how close the drugs were to a school zone).

52. Commonwealth v. Chmiel, 738 A.2d 406 (Pa. Aug. 19, 1999) (claiming ineffective assistance of counsel); Commonwealth v. Boyle, 733 A.2d 633, 638 (Pa. Super. Ct. 1999) (allowing past offenses into court to show the likelihood that defendant was involved with the transaction); Commonwealth v. Medley, 725 A.2d 1225, 1228 (Pa. Super. Ct. 1999) (rejecting the defendant's entrapment defense).

the last three years was little more than Pennsylvania's;[53] but the numbers are still paltry for a state with such an active and interesting criminal docket. Ohio[54] and Texas,[55] in contrast, each had over twenty-five entrapment cases in the last three years. Their numbers are close, yet Ohio uses the subjective test and Texas the objective test. Numerous other comparisons could be made to illustrate the same phenomenon: the test used by courts in a given jurisdiction is not very predictive of how many entrapment cases will arise. Therefore, the effect of the rules on more causal factors such as the activities of police or the acquittal rates for defendants is also in doubt.

The concentration of entrapment cases in certain jurisdictions is more likely to result from a combination of three factors other than the rule of law. These are: undercover or sting operations being favored by local law enforcement chiefs, peer influence among the local defense bar, and a state of uncertainty about the legal rules in a given jurisdiction. It seems that the first two factors are largely dependent on the third but not vice-versa, making the third the most important variable.

There is no question that undercover operations are unevenly distributed across the United States. Certain law enforcement agencies embark on undercover or sting operations as part of a discreet project targeting a particular crime. Ohio, for example, recently deployed enforcement officers to pose as decoys in Internet chat rooms to catch pedophiles,[56] imitating a job often done by federal agents. This led to

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53. By comparison, covering the exact same time period as the preceding footnotes, see People v. Moultrie, 773 N.Y.S.2d 287, 287-88 (N.Y. App. Div. 2004) (denying the defendant's request to charge the affirmative defense of entrapment because there was no evidence that defendant was improperly induced to commit the crime); People v. Coleman, 773 N.Y.S.2d 146, 148 (N.Y. App. Div. 2004) (holding that the entrapment defense was neither raised nor preserved); People v. Delaney, 765 N.Y.S.2d 696, 699 (N.Y. App. Div. 2003) (rejecting the defendant's entrapment defense because there was no evidence that the officer actively persuaded the defendant to engage in the transaction); People v. Otto, No. 2002-924DCR, 2003 WL 21974317, at *2 (N.Y. Supp. App. Term July 3, 2003) (administrative entrapment case); People v. Arias, 756 N.Y.S.2d 487 (N.Y. App. Div. 2003); People v. Missrie, 751 N.Y.S.2d 16 (N.Y. App. Div. 2002) (granting a new trial because of erroneous jury instructions on entrapment); People v. Castro, 750 N.Y.S.2d 510,511 (N.Y. App. Div. 2002) (rejecting the defendant's entrapment defense because he was predisposed to commit the offense); People v. Chou, 738 N.Y.S.2d 210 (N.Y. App. Div. 2002) (rejecting the defendant's entrapment defense); People v. Alicea, 734 N.Y.S.2d 525 (N.Y. App. Div. 2001) (deciding no to the defendant's entrapment defense on appeal); People v. Rojas, 760 N.E.2d 1265, 1269 n.5 (N.Y. 2001); People v. Gilbert, 722 N.Y.S.2d 144 (N.Y. App. Div. 2001).

54. *See supra* text accompanying note 44.

55. *See supra* text accompanying note 45.

56. *See, e.g.*, State v. Snyder, 801 N.E.2d 876, 887 (Ohio Ct. App. 2003) (upholding Ohio State Statute as not constituting entrapment); State v. Moller, No. 2001-CA-99, 2002 WL 628634, at *1 (Ohio Ct. App. Apr. 19, 2002) ("The Xenia Police Department created the Xenia Computer Crime Unit in 2000 to capture Internet criminals.").

several Internet-entrapment cases in Ohio that are not typical for most states. Such projects depend on available resources and local political pressure to respond to crime waves. Undercover activities also may react to legal rules, although police are generally more focused on making arrests than obtaining convictions. Bright-line rules are conducive to planning operations ahead of time and make it easier to work around the rules or find loopholes.[57] For instance, if police know that certain types of sting operations are expressly rejected by local courts, the police can simply resort to alternative schemes to sidestep the rules. Clarity and specificity in legal rules create legal loopholes.[58] Those with *ex ante* legal knowledge and time to plan ahead are in the best position to take advantage of these loopholes in the rules. In other words, legal certainty favors entities that are established, endowed with resources, and able to obtain legal counsel. Few entities fit this profile better than the state itself, including its enforcement arm.[59] Legal certainty disfavors small or less-enfranchised parties, such as individual defendants, who are unaware of the stronger party's strategy which is designed around the rules. Weaker parties also have less recourse or redress when the case is in court because the inflexibility of bright-line rules determines the outcome.[60] This is not to say bright-line rules are wrong; they are efficient to the extent that they yield predictable, consistent results. However, predictable results are most beneficial to those with the advance knowledge of the rules. Legal foresight is not evenly distributed.

Conversely, small parties or individual defendants are sometimes favored by uncertainty in the law, which allows for windfall benefits in individual cases that would otherwise be unavailable. This is the legal equivalent of "profits," as Frank Knight uses the term.[61] Thus, one would expect to find more undercover or sting operations in jurisdictions with clear, specific rules about entrapment, just as *ex ante* sentencing manipulation by agents occurs in the presence of mechanical sentencing guidelines.

The opportunities for entrapment cases depend on the number of undercover operations conducted at the margins of legality. Entrapment cases are necessarily a subset of the number of sting operations. Factors that encourage more sting operations, like bright-line rules about what tactics are permissible, will also be factors that can increase the number of entrapment cases in that area. At the same time, as more entrapment cases

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57. *See, e.g.*, Ferguson & Peters, *supra* note 35.

58. *Id.*

59. *Id.*

60. *Id.*

61. *See generally* KNIGHT, *supra* note 11; Ellsberg, *supra* note 11 (explaining "uncertainties that are not risks").

challenge various undercover tactics lines will be drawn more clearly, making subsequent attempts at pleading entrapment futile because the outcome will be predictable.

Peer influences among criminal defense lawyers also affect the proliferation of certain defenses or trial strategies. If a few defendants succeed with the entrapment defense, this will quickly become known to other attorneys working in that courthouse, who will consider adopting it for their own clients. This, too, is dependent on uncertainty in the legal rules. Uncertain outcomes will encourage defendants and their attorneys to take their chances at trial, but this becomes futile as the outcomes become a sure thing. Plea agreements replace trials as certainty increases.[62] Thus, uncertainty is the most important variable determining where entrapment cases will concentrate.

C. *Decline and Uncertainty*

The overall rise and fall of the entrapment cases over the last twenty years also relates to the varying levels of uncertainty in the legal rules.[63] The first real spike in the entrapment cases occurred in almost every state in the three years between 1988 and 1991, followed by a second large spike in the three years between 1992 and 1995. There was a significant drop-off after 1995, and a continuing decline to the present. Current levels have returned to their pre-1998 state.

The temporary surge in entrapment cases in the late eighties and early nineties was due to two contemporaneous and related events: the War on Drugs and a pair of entrapment decisions by the U.S. Supreme Court. The War on Drugs generated far more undercover operations than ever before, not only for narcotics but also for related crimes, such as firearm offenses and money laundering. These ensnaring tactics were new to many defense attorneys and defendants alike. It would have been easy to see a possible entrapment claim in every case. The defense had been relatively rare prior to this time, but so were undercover operations, at least compared to the

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62. Obviously bright-line rules are more efficient for moving cases on the judicial docket and generally lowering transaction costs for all the parties. Criminal defendants, however, do not always benefit from an efficient, predictable prosecutorial system as much as they do from a system allowing for some unpredictable results.

63. The reported cases from earlier decades, such as the 1960s and 1970s, reveal rare instances of the entrapment defense, which could be explained in terms of predating the War on Drugs (which made undercover operations much more commonplace) and the modern Supreme Court cases on the subject. The problem with drawing any sort of conclusions from these early periods is that older cases are less likely to be available on Westlaw and Lexis — especially unpublished opinions.

present time.[64] So, it is unsurprising that many of those caught in the new abundance of sting operations would try the defense created to address this very form of law enforcement, even though it must have been only vaguely familiar to many of those using it. As the courts addressed the cases and the rules and outcomes became more predictable, the defense would have become less useful. Prosecutors would not bother to take cases to trial where it was clear that the defendant had a strong entrapment case, and defendants with weaker arguments would tend to enter plea bargains. Legal uncertainty, however, is likely to last for only a certain number of cases.

A 1988 ruling by the U.S. Supreme Court, *Mathews v. United States*,[65] also seemed to spur the increase in entrapment cases everywhere. The defendant in *Mathews* was an employee of the Small Business Administration and was caught accepting a bribe as part of a sting operation.[66] He was denied a jury instruction on entrapment because he refused to admit to certain elements of the charged offense.[67] The Court held that defendants are entitled, as a matter of law, to jury instructions regarding entrapment whenever there is sufficient evidence to indicate the possibility of entrapment.[68] The U.S. Supreme Court's jurisprudence on entrapment is naturally very influential even in states using other tests.[69] Even though this case was not an obvious expansion of the entrapment

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64. The first Supreme Court cases from the Prohibition Era contain similar comments that the defense, unknown at common law, was turning up everywhere as undercover operations to enforce prohibition and Comstock laws were becoming more widespread. There is no available data to draw a comparison to the present time, but one may surmise that the present era has far surpassed any earlier periods in this regard.

65. 485 U.S. 58 (1988).

66. *Id.* at 60.

67. *Id.* at 61.

68. *Id.* at 62.

69. The U.S. Supreme Court's decision generated a small flurry of law review articles and case notes in the next two or three years. *See, e.g.*, George Robert Hicks, III, Note, *The 'No I Didn't, And Yes I Did But . . .' Defense: Is the Entrapment Defense Available to Criminal Defendants Who Deny Doing the Crime?* — Mathews v. United States, 11 CAMPBELL L. REV. 279, 308-09 (1989) (urging state court adoption of *Mathews* rule); Jerry Schreibstein, Note, *Entrapment in Light of* Mathews v. United States*: The Property of Inconsistency and the Need for Objectivity*, 24 U.S.F. L. REV. 541, 569 (1990) (arguing in support of *Mathews* holding); Laura Gardner Webster, *Building A Better Mousetrap: Reconstructing Federal Entrapment Theory From* Sorrells *To* Mathews, 32 ARIZ. L. REV. 605, 629 (1990) (criticizing the *Mathews* Court for not taking the opportunity to adopt the objective test instead of the subjective test for entrapment generally); Lana Wender, Comment, Mathews v. United States*: Simultaneous Denial of Crime and Claim of Entrapment — Should Inconsistency Preclude Availability of the Entrapment Defense?* 23 GA. L. REV. 257, 274 (1988) (supporting the *Mathews* holding as a victory for justice and fairness); Kristine K. Keller, Note, *Evolution and Application of the Entrapment Defense: Abandonment of the Inconsistency Rule,* 11 HAMLINE L. REV. 351, 362 (1988) (arguing in favor of allowing defendants to plead inconsistent defenses simultaneously).

defense, its subtle tinkering created uncertainty about how to apply the rules to various fact patterns, allowing more fodder for litigation.

The second of the pair of U.S. Supreme Court cases from this period was the 1992 case *Jacobson v. United States*,[70] in which the U.S. Supreme Court ruled in favor of the defendant in a child-pornography case. The government agents in this case had spent two years sending increasingly provocative pornography, until the defendant finally succumbed to the pressure to order some explicitly illegal material, which prompted his arrest.[71] The case led to a flurry of speculation in academic journals about the rules being relaxed[72] since the defendant won.

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70. 3 U.S. 540 (1992).

71. *See generally id.*

72. *See, e.g.*, Paul Marcus, *Presenting, Back from the [Almost] Dead, The Entrapment Defense*, 47 U. FLA. L. REV. 205, 229-30 (1995) (arguing that entrapment will always have the inducement of the defendant by the government element, as well as the lack of predisposition to commit the crime by the defendant element); Christopher D. Moore, Comment, *The Elusive Foundation of the Entrapment Defense*, 89 NW. U. L. REV. 1151 (1995); Scott C. Paton, *"The Government Made Me Do It": A Proposed Approach to Entrapment Under* Jacobson v. United States, 79 CORNELL L. REV. 995, 998-1005 (1994) (discussing the subjective and objective approaches to the entrapment defense); Amy Perkins, Comment, Jacobson v. United States — *Entrapment Redefined?*, 28 NEW ENG. L. REV. 847 (1994) (discussing a defendant's predisposition); Aubry Matt Pesnell, Note, *The Entrapment Defense: A Cry for Decisiveness, Consistency, and Resolution*, 14 MISS. C. L. REV. 163 (1993); Brian Thomas Feeney, Note, *Scrutiny For The Serpent: The Court Refines Entrapment Law in* Jacobson v. United States, 42 CATH. U. L. REV. 1027, 1038-47 (1993) (discussing the objective approach and the predisposition element); J. Patrick Sullivan, Note, *The Evolution of the Federal Law of Entrapment: A Need for a New Approach* Jacobson v. United States, 58 MO. L. REV. 403 (1993); Leslie G. Bleifuss, Note, *Entrapment and* Jacobson v. United States*: "Doesn't The Government Realize that They can Destroy a Man's Life?,"* 13 N. ILL. U. L. REV. 431 (1993); Damon D. Camp, *Out of the Quagmire After* Jacobson v. United States*: Towards a More Balanced Entrapment Standard*, 83 J. CRIM. L. & CRIMINOLOGY 1055, 1063-74 (1993) (discussing the subjective and objective approaches to the entrapment defense); Elena Luisa Garella, Note, *Reshaping the Federal Entrapment Defense:* Jacobson v. United States 68 WASH. L. REV. 185, 197 (1993) (stating that "a defendant asserting entrapment cannot complain of an appropriate and searching inquiry into his own conduct and predisposition."); Michael O. Zabriskie, Comment, *If the Postman Always "Stings" Twice, Who is the Next Target? — An Examination of the Entrapment Theory*, 19 J. CONTEMP. L. 217 (1993); Erich Weyand, Comment *Entrapment: From* Sorrells *To* Jacobson *— The Development Continues* 20 OHIO N.U. L. REV. 293 (1993) (showing some criticism of the entrapment defense); Jack B. Harrison, Note, *The Government as Pornographer: Government Sting Operations and Entrapment:* United States v. Jacobson, 61 U. CIN. L. REV. 1067 (1993) (discussing the question that is at the heart of every discussion of the entrapment defense: "Can the government encourage persons to violate the law by creating the mechanism which makes such a violation possible and then prosecute the person for that violation?"); Hanewicz, *supra* note 17, at 1163 ("explores the interaction between the Supreme Court's approach to entrapment and its stand on the issue of judicial supervisory power by analyzing the *Jacobson* opinion"); Fred Warren Bennett, *From* Sorrells *To* Jacobson*: Reflections on Six Decades of Entrapment Law, and Related Defenses, in Federal Court*, 27 WAKE FOREST L. REV. 829 (1992); Lance B. Levy, Comment, *The "Sting" of Government Operations: An Analysis of Predisposition as it Relates to the Entrapment Defense* — Jacobson v. United States, 26 SUFFOLK

Jacobson also generated a spate of new attempts to use the entrapment defense by hopeful parties. The rules were uncertain. As the first few rounds of new cases were litigated, however, it became clear that any change in the entrapment rules would be applicable to only a narrow set of circumstances or facts and the furor subsided. In fact, by raising the uncertainty temporarily, the U.S. Supreme Court's somewhat confusing ruling probably contributed to an eventual decline in the number of entrapment cases. The temporary uncertainty would have spawned new attempts at entrapment claims, and the new surplus of cases would have provided opportunities for more judicial holdings on more fact patterns, regarding various subtleties of the rules. Once the new batch of cases was resolved, the rules would be clearer than ever. This would have made entrapment claims in the trial context more and more unfruitful. However, the *Jacobson* ruling was narrow enough to result in uncertainty for only a short time.[73] It did not require a wholesale reassessment of the defense.

It should be noted that simply creating a definitive rule does not result in legal certainty. For example, several legislatures have codified their test for entrapment,[74] perhaps to pre-empt the courts from choosing a test for themselves. Changed rules cause a surge in related cases until the courts have time to apply the new rules to various sets of facts. Once a number of fact patterns have been adjudicated, the certainty effect sets in, and the cases that are tried or appealed diminish.

U. L. REV. 1177 (1992) (discussing a child pornography case where the court found that the defendant did not have the predisposition to commit the offense); *see also* Cynthia Perez, Casenote, United States v. Jacobson*: Are Child Pornography Stings Creative Law Enforcement or Entrapment?,* 46 U. MIAMI L. REV. 235 (1991).

73. The main uncertainty resulting from *Jacobson* was whether the government would thereafter have to show some individualized reasonable suspicion of the defendant before commencing the "inducement" phase of a sting. No courts subsequently adopted this approach, however, and the issue has subsided.

74. Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Missouri, Montana, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Tennessee, Texas, Utah, and Washington. *See* ALA. CODE § 13A-3-31 (2002); ALASKA STAT. § 11.81.450 (Michie 2002); ARIZ. REV. STAT. § 13-206 (2004); ARK. CODE ANN. § 5-2-209 (Michie 2002); COLO. REV. STAT. § 18-1-709 (2002); CONN. GEN. STAT. § 53a-15 (2002); DEL. CODE ANN. tit. 11, § 432 (2002); FLA. STAT. ch. 777.201 (2002); GA. CODE ANN. § 16-3-25 (2002); HAW. REV. STAT. ANN. § 702-237 (Michie 2002); 720 ILL. COMP. STAT. 5/7-12 (2002); IND. CODE ANN. § 35-41-3-9 (Michie 2002); KAN. STAT. ANN. § 21-3210 (2002); KY. REV. STAT. ANN. § 505.010 (Michie 2002); MO. REV. STAT. § 562.066 (2002); MONT. CODE ANN. § 45-2-213 (2002); N.H. REV. STAT. ANN. § 626:5 (2002); N.J. STAT. ANN. § 2C:2-12 (West 2002); N.D. CENT. CODE § 12.1-05-11 (2002); OR. REV. STAT. § 161.275 (2002); 18 PA. CONS. STAT. ANN. § 313 (2004); TENN. CODE ANN. § 39-11-505 (2004); TEX. PENAL CODE ANN. § 8.06 (Vernon 2004); UTAH CODE ANN. § 76-2-303 (2004); WASH. REV. CODE § 9A.16.070 (2004).

D. *Ineffective Assistance of Counsel*

The procedural posture of a defense can be another signal of decline. In the context of entrapment, procedural posture reaches the level of paradox. Entrapment is an affirmative defense, which means the defendant does not deny the allegations but rather asserts some extenuating circumstances that should cancel out any culpability.[75] Affirmative defenses[76] are supposed to appear early in the drama of the criminal trial; many states require that defendants notify the judge and prosecution of a contemplated affirmative defense, including an entrapment defense before a trial is set,[77] often so that the court can weigh the claim in a preliminary

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75. Delaware's entrapment statute sums this up particularly well: "The defense of entrapment as defined by this Criminal Code concedes the commission of the act charged but claims that it should not be punished because of the wrongdoing of the officer. . . ." DEL. CODE ANN. tit. 11, § 432 (2004). For a thoughtful discussion of affirmative defenses, see generally Leslie Yalof Garfield, *Back to the Future: Does* Apprendi *Bar a Legislature's Power to Shift the Burden of Proof Away from the Prosecution by Labeling an Element of a Traditional Crime as an Affirmative Defense?*, 35 CONN. L. REV. 1351 (2003) (discussing recent U.S. Supreme Court rulings on the issue); B. Patrick Costello, Jr., Comment, Apprendi v. New Jersey*: "Who Decides What Constitutes A Crime?" An Analysis of Whether a Legislature is Constitutionally Free to "Allocate" an Element of an Offense to an Affirmative Defense or a Sentencing Factor Without Judicial Review*, 77 NOTRE DAME L. REV. 1205 (2002).

76. Generally speaking, unless a defense goes to the merits of the prosecutor's allegations, affirmative defenses involve shifting the burdens of proof in a criminal case from the prosecution to the defendant, usually temporarily and to a lesser degree, and then back to the prosecutor. Regarding entrapment, "The courts have split as to which parts of the entrapment defense must be proved by whom. In addition, questions are raised as to the standards of proof and the allocation of burdens." MARCUS, *supra* note 1, at 216. Furthermore, the U.S. Supreme Court has not defined the burden of proof issue precisely for the subjective test used in federal courts. *Id.* Most jurisdictions require the defendant to make a *prima facie* case for entrapment — most use a "preponderance of evidence" burden of proof at this point — before the burden shifts back to the prosecutor to disprove the allegations or to show that the defendant was predisposed to commit the crime. *Id.* at 216-23. The prosecutor carries the normal burden of proof on this point. *Id.* at 226. States using the objective test almost always place the burden on the defendant to show that the police activity was outrageous. *Id.* at 227-28.

77. *See, e.g.*, MONT. CODE ANN. § 46-15-323 (2) (2004).

> Within 30 days after the arraignment or at a later time as the court may for good cause permit, the defendant shall provide the prosecutor with a written notice of the defendant's intention to introduce evidence at trial of good character or the defenses of alibi, compulsion, entrapment, justifiable use of force, or mistaken identity.

Id.; *see* State v. Dezeeuw, 992 P.2d 1276, 1278 (Mont. 1999); People v. Day, 665 N.E.2d 867, 870 (Ill. App. Ct. 1996) ("He gave the state notice of his intent to use the entrapment defense at trial."); *see also* N.M. CRIM. P. § 5-508; FLA. R. CRIM. P. RULE § 3.200. Such pretrial notice does not necessarily bind the state or the defense to bring the defense up at trial, depending on the jurisdiction. *See* State v. Davis, 512 P.2d 1366, 1369 (Or. Ct. App. 1973). The pretrial notice rule

hearing.[78] In some states, especially those using the objective test, a decision in the defendant's favor at this stage results in a complete dismissal of the charges[79] rather than an acquittal.[80] Even in states where entrapment is a question for the jury to decide after trial, which is the majority rule, the entrapment defense is intended to arise early in the case.

Yet that is not how the cases always play out. In fact, a surprising number of the cases — possibly one-third to half of all entrapment claims in recent years — occur in the context of post-trial, post-sentencing appeals. Some of these appeals are complaints against the trial judge for refusing to let the jury consider an entrapment defense.[81] More interesting

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has been challenged, sometimes successfully. *See, e.g.,* State v. Lane, N. 14-01-34, 2002 WL 1299771 (Ohio Ct. App. May 30, 2002) (successful challenge to such a rule by defendant).

78. *See, e.g.,* United States v. James, No. 02CR278, 2002 WL 31749174, at *6 (N.D. Ill. Dec. 3, 2002) (pretrial rejection of entrapment defense).

79. *See., e.g.,* Hernandez v. State, No. 03-03-00285-CR, 2004 WL 1403706, at *6 (Tex. Ct. App. June 24, 2004) (defendant successful where "The proper remedy when the State fails to disprove the entrapment defense at a pretrial hearing is dismissal of the prosecution with prejudice."); Taylor v. State, 886 S.W.2d 262, 266 (Tex. Crim. App. 1994) (holding that the defense was successful because the pretrial determination was in the nature of an acquittal and did not impact the charging instrument); State v. Turner, 805 N.E.2d 124 (Ohio Ct. App. 2004) (defendant unsuccessful at obtaining dismissal); West v. Commonwealth, No. 2002-CA-001876-MR, 2004 WL 68524, at *4 (Ky. Ct. App. Jan. 16, 2004).

80. A dismissal of criminal charges can be beneficial to the defendant in that it eliminates the legal costs of going through a trial (which is required to obtain an acquittal), and can avoid trial evidence and testimony that would generally tarnish the defendant's reputation. On the other hand, dismissal does not trigger double jeopardy protections, meaning the defendant could face revamped charges relating to the same events if the prosecutor wishes to try again.

81. *See, e.g.,* United States v. Ferby, Nos. 02-1506, 02-1535, 2004 WL 1147087, at *3 (2d Cir. May 19, 2004) (upholding trial court's refusal to give entrapment instruction to jury); United States v. Pratt, 351 F.3d 131, 140 (4th Cir. 2003) (defendant not entitled to jury instructions on multiple conspiracies or entrapment defense); United States v. Vlanich, Nos. 01-2264, 01-2315, 2003 WL 22213951, at *4 (3d Cir. Sept. 24, 2003) (refusal to allow entrapment defense as matter of law); United States v. Medina, No. 00-267, 2003 WL 22016375, at *4 (1st Cir. Aug. 27, 2003) (defendants not entitled to entrapment instructions); United States v. Nishnianidze, 342 F.3d 6, 17-18 (1st Cir. 2003) (not entitled to entrapment instructions where defendant's burden of proof not met); United States v. Pedraza, No. 02-2313, 2003 WL 21246583 (10th Cir. May 3, 2003); United States v. Ogle, 328 F.3d 182, 185 (5th Cir. 2003) (affirming district court's refusal to give an entrapment instruction to jury in money laundering case); United States v. Hines, No. 01-5011, 2002 WL 31496420, at *1-*2 (4th Cir. Nov. 8, 2002) (entrapment instruction refused); United States v. Ryan, 289 F.3d 1339, 1345 (11th Cir. 2002) (government informant's favorable terms for sale of narcotics did not entitle defendant to submission of entrapment defense); United States v. Kurkowski, 281 F.3d 699, 701 (8th Cir. 2002) (entrapment rejected as a matter of law); Tocco v. Senkowski, No. 00 Civ. 5508(JSM), 2002 WL 31465803, at *3 (S.D.N.Y. Nov. 04, 2002) (refusal to give entrapment jury instruction upheld); United States v. Barriga, No. 99-10549, 2000 WL 1844271, at *1 (9th Cir. Dec. 14, 2000) (upholding trial court's rejection of entrapment defense); United States v. Pinque, 234 F.3d 374, 379 (8th Cir. 2000) (defendant not entitled to entrapment instruction); Barr v. State, 79 P.3d 795 (Kan. Ct. App. 2003); *but see* United States v. Gurolla, 333 F.3d 944, 956 (9th Cir. 2003) (reversing where defendant was forbidden to submit entrapment

is the large number of cases couched as appeals for ineffective assistance of counsel, where the defense attorney did not raise the defense earlier.[82] Either the trial attorneys encouraged defendants to accept a plea agreement, which they regret once they receive their sentence,[83] or an alternative trial

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evidence to jury); United States v. Garcia, No. 00-10062, 2001 WL 30043, at *1 (9th Cir. Jan. 5, 2001) (trial court's refusal to give entrapment instructions held to be error; case reversed and remanded).

82. *See, e.g.*, United States v. Anderson, No. 02-4255, 2004 WL 857442, at *1 (3d Cir. Apr. 22, 2004) (ineffective assistance appeal for failing to raise entrapment defense); Cunigan v. Hurley, No. 03-3284, 2004 WL 540446, at *2 (6th Cir. Mar. 17, 2004) (ineffective assistance for failing to request entrapment instruction at trial, conviction affirmed); United States v. McGee, No. 03C4618, 2004 WL 1125893, at *2 (N.D. Ill. May 19, 2004) (ineffective assistance of counsel appeal for failure to raise defense); Urias v. Lucero, No. 01-2352, 2003 WL 359448, at *1 (10th Cir. Feb. 19, 2003) (ineffective assistance of counsel in failing to present an entrapment defense); United States v. Coger, No. 02-4568, 2003 WL 149848, at *1 (4th Cir. Jan. 22, 2003); Towles v. Dretke, No. CIV.A.403CV0822Y, 2003 WL 22952820, at *4 (N.D. Tex. Dec. 10, 2003) (ineffective assistance appeal contending that had counsel talked to potential defense witnesses regarding his entrapment defense prior to trial, counsel would have known the witnesses were not going to testify favorably); United States v. Waddy, No. CRIM. 00-66-1, Civ. 92-6827, 2003 WL 22429047, at *5 (E.D. Pa. Sept. 18, 2003) (ineffective assistance of counsel appeal for failing to raise defense); Montag v. United States, No. CRIM. 0079(1)(JRT/FLN, Civ. 02-4723(JRT)), 2003 WL 22075759, at *2 (D. Minn. Aug. 05, 2003) (ineffective assistance of counsel appeal for failing to raise defense); United States v. Nguyen, No. CR99-4068-MWB, 2003 WL 1785884, at *4 (N.D. Iowa Apr. 3, 2003) (ineffective assistance of counsel); Aros. v. Stewart, No. 01-15796, 2002 WL 530536, at *1 (9th Cir. Apr. 18, 2002) (ineffective assistance of counsel appeal, failed); Slusher v. Furlong, No. 01-1198, 2002 WL 12252, at *5 (10th Cir. Jan. 4, 2002) (ineffective assistance of counsel appeal, failed); Decker v. Cockrell, No. 7198-CV-085-R, 2002 WL 180888, at *1 (N.D. Tex. Feb. 1, 2002) (ineffective assistance of counsel appeal); People v. Hunter, No. 236888, 2003 WL 22112435, at *5 (Mich. Ct. App. Sept. 11, 2003) (sentencing issues due to the school zone statute); Commonwealth v. Wilson, 829 A.2d 1194 (Pa. Super. Ct. 2003); State v. Sanders, 667 N.W.2d 377 (Wis. Ct. App. 2003) (requires special hearing to determine if counsel was ineffective in this manner); Lanier v. State, 826 So. 2d 460 (Fla. Dist. Ct. App. 2002); State v. Bojorquez-Ochoa, No. 47474-0-I, 2002 WL 1290180, at *1 (Wash. Ct. App. June 10, 2002) (choosing not to review ineffective assistance of counsel claim); People v. Burton, No. A093289, 2002 WL 1204405, at *3 (Cal. Ct. App. June 5, 2002); State v. Freeman, 796 So. 2d 574, 576 (Fla. Dist. Ct. App. 2001) (ineffective assistance of counsel); Duke v. State, No. M2002-03091-CCA-R3-9C, 2004 WL 578586, at *4 (Tenn. Crim. App. Mar. 22, 2004); People v. Anderson, No. 241769, 2004 WL 103189, at *2 (Mich. Ct. App. Jan. 22, 2004); Commonwealth v. Harding, 797 N.E.2d 946 (Mass. Ct. App. 2003); Whitham v. State, No. CR 01-528, 2003 WL 22100472, at *1 (Ark. Sept. 11, 2003); People v. Hunter, No. 236888, 2003 WL 22112435, at *3 (Mich. Ct. App. Sept. 11, 2003); People v. Shook, No. 233346, 2002 WL 31379664, at *2 (Mich. Ct. App. Oct. 22, 2002); State v. Higgins, No. 01-1285, 2002 WL 31016491, at *2 (Iowa Ct. App. Sept. 11, 2002); *Ex parte* Dwyer, No. 08-01-00059-CR, 2002 WL 28018, at *6 (Tex. Ct. App. Jan. 10, 2002); People v. Brooks, No. 222833, 2001 WL 1545903, at *2 (Mich. Ct. App. Nov. 30, 2001).

83. *See, e.g.*, United States v. Gallardo, No. 03-30124, 2004 WL 300423, at *1 (9th Cir. Feb. 1, 2004) (attempt to withdraw guilty plea in order to raise entrapment defense post-sentencing); Whitham v. State, No. CR 01-528, 2003 WL 22100472, at *3 (Ark. Sept. 11, 2003) (ineffective assistance of counsel for recommending plea instead of developing entrapment defense); People v. Mendez, 784 N.E.2d 425, 427 (Ill. Ct. App. 2003) (holding counsel ineffective for failing to

strategy, like defeating the charges on the merits, made the entrapment defense untenable. In other words, the defendant opted for another strategy besides entrapment the first time around, either a plea bargain or a denial/alibi, and used entrapment either as an afterthought or a backup plan. These are notoriously difficult appeals to win.

Even the appeals regarding jury instructions often involve the defense being raised too late procedurally for the judge to include it in the instructions without creating confusion or bias. In these cases, the feeling comes through again that the defense was an afterthought when the trial started to go badly.[84] Entrapment was not the dominant theory of the defendant's case in the first place.

There is a paradox, then, between entrapment's official procedural position to arise at the beginning of the case and the posture it often takes in practice. There are, of course, strategic reasons for saving entrapment as a last resort. It usually requires the defendant to admit the allegations,[85] and to have one's "rap sheet" come in for the jury's review.[86] Both of these can backfire, making the choice to use the defense a gamble. If the defendant believes the prosecution's case is weak on the merits, entrapment would not be the first choice, regardless of what the undercover agents did. Once the defendant loses and is in prison, however, there is little to lose by adding entrapment to the appeal.

The fact that so many of the entrapment cases arise after conviction, however, highlights the image of a defense in decline. The paltry numbers of cases in recent years would be even smaller if one excluded those that are truly desperate attempts at an ineffective assistance appeal. The weaker posture of the defense in this context contributes to the result that the majority of reported entrapment claims fail. The appeals for ineffective assistance of counsel lose almost invariably, due to the appellant's special

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advise client on the entrapment defense); Harris v. State, 806 So. 2d 1127, 1131 (Miss. 2002) (counsel erroneously advised client); Campbell v. State, 878 So. 2d 227, 331 (Miss. Ct. App. 2004); Johnson v. State, 817 So. 2d 619, 626 (Miss. Ct. App. 2002) (denying defendant's ineffective assistance of counsel claim).

84. The remaining instruction-related appeals are almost always cases where the defense was asserted half-heartedly (i.e., no supporting evidence was proffered) or contradicted the defendant's other arguments.

85. The entrapment defense usually includes an admission that the defendant committed the acts charged, with full intent, but should be excused due to entrapment; a regular defense means denying either the actions alleged or the requisite criminal intent. Most courts impose restrictions on inconsistent defenses. *See* MARCUS, *supra* note 1, at 261-65. The U.S. Supreme Court opened the door for some inconsistent defenses in *Mathews*, but many courts still impose some restrictions. Mathews v. United States, 485 U.S. 58, 65 (1988).

86. "When the entrapment defense is raised, the prosecution may produce evidence concerning relevant prior acts of the defendant to show predisposition." MARCUS, *supra* note 1, at 149. Such evidence would normally be inadmissible and can prejudice the jury against the defendant.

burden of showing that the neglected strategy would have affected the outcome.[87]

In hindsight, courts feel that the entrapment defense would have failed even if it had arisen at trial. Of course, these cases are self-selected to be the ones with the most disfavorable facts for claiming entrapment. The effect on precedent for future defendants can only be deleterious because they include a recitation of a fact pattern and then a dismissive conclusion: the defendant did not show that an entrapment defense would have mattered in this case.[88] Although the holding strictly means only that the defendant failed to submit enough evidence, the subtle effect is to hint that similar facts in future cases would make the entrapment defense a waste of time. The challenges to the jury instructions fare better[89] but this is still not a "silver bullet" for defendants. Many such appeals fail, and those remanded sometimes express doubt about the likelihood of convincing the jury on the second try.

Entrapment, then, is often a second-best defense, as indicated by its continuing place as a backup plan. As mentioned above, asserting entrapment can be very risky, so the numbers are not terribly surprising in this sense. It seems that many of the affirmative defenses would present similar strategic risks, as many involve admission of the alleged actions, a burden of production or persuasion, and a relaxing of evidentiary protections.[90] To the extent this is true, many of the affirmative defenses must be second-best strategies, and would tend to appear frequently as appeals. We might refer to these as "secondary defenses," given their strategic and procedural weaknesses.

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87. In federal courts, the defendant must show "that but for counsel's failure to request an entrapment instruction, 'the result of the proceeding would have been different.'" Cunigan v. Hurley, No. 03-3984, 2004 WL 540446, at *2 (6th Cir. 2004); "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694 (1984); "[A] defendant must show that [trial] counsel's performance fell below an objective standard of reasonableness" and that he was prejudiced by trial counsel's representation. People v. Pickens, 521 N.W.2d 797, 799 (1994); *but see* State v. Coleman, No. 00-1756, 2001 WL 1448026, at *1 (Iowa Ct. App. Nov. 16, 2001) (reversing and remanding).

88. *See, e.g.*, Tse v. United States, 290 F.3d 462, 465 (1st Cir. 2002) ("[T]he evidence at trial did not come close to demonstrating the sort of government overreaching that would warrant an entrapment instruction."); People v. Anderson, No. 241769, 2004 WL 103189, at *2 (Mich. Ct. App. Jan. 22, 2004) ("Although counsel's trial strategy ultimately failed, it did not constitute ineffective assistance of counsel. Further, an entrapment defense would have been unsuccessful because defendant was not entrapped; thus, defendant has failed to show ineffective assistance of counsel.").

89. *See, e.g.*, United States v. Gurolla, 333 F.3d 944, 956 (9th Cir. 2003) (reversing where defendant was forbidden to submit entrapment evidence to jury).

90. *See* MARCUS, *supra* note 1, at 353-59.

To summarize, the numbers of cases indicate that the entrapment defense is declining, that the cases are concentrated in a few areas, and that many of the cases have a weak procedural posture that decreases the likelihood of success. Legal uncertainty seems to drive the entrapment numbers; as the rules become well-defined and the odds of prevailing or losing become more quantifiable, the number of cases goes down. Figure 1 illustrates the numbers of reported cases for both federal and state courts for the last eleven years and shows the relative proportion of ineffective assistance of counsel claims related to the defense.

Fig. 1
Federal and State

	Fed 2004*	State 2004*	Fed 2003	State 2003	Fed 2002	State 2002	Fed 2001	State 2001	Fed 2000	State 2000	Fed 1999	State 1999
Regular Entrapment	18	36	50	84	40	98	46	99	51	99	62	107
Ineffective Assistance	6	6	7	12	8	11	7	9	10	12	6	8

	Fed 1998	State 1998	Fed 1997	State 1997	Fed 1996	State 1996	Fed 1995	State 1995	Fed 1994	State 1994	Fed 1993	State 1993
Regular Entrapment	76	98	83	96	102	115	114	86	159	125	184	164
Ineffective Assistance	18	7	11	5	14	8	10	9	11	6	11	8

Federal

	Fed 2004*	Fed 2003	Fed 2002	Fed 2001	Fed 2000	Fed 1999	Fed 1998	Fed 1997	Fed 1996	Fed 1995	Fed 1994	Fed 1993
Regular Entrapment	18	50	40	46	51	62	76	83	102	114	159	184
Ineffective Assistance	6	7	8	7	10	6	18	11	14	10	11	11

State

	State 2004*	State 2003	State 2002	State 2001	State 2000	State 1999	State 1998	State 1997	State 1996	State 1995	State 1994	State 1993
Regular Entrapment	36	84	98	99	99	107	98	96	115	86	125	164
Ineffective Assistance	6	12	11	9	12	8	7	5	8	9	6	8

Combined by Year

	2004*	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993
Regular Entrapment	54	134	138	145	150	169	174	179	217	200	284	348
Ineffective Assistance	12	19	19	16	22	14	25	16	22	19	17	19

*Note: Year 2004 is from 1/1/2004-6/4/2004.

IV. SENTENCING ENTRAPMENT AND ENTRAPMENT BY ESTOPPEL

Sentencing entrapment provides a poignant illustration of the decline in entrapment as a defense as well as the role of uncertainty in this area of law.[91] Entrapment by estoppel,[92] which is a more established defense but less commonly used, also sheds light on the determinative effects of legal certainty on certain behaviors and cases.

A. *Sentencing Entrapment*

The advent of mechanical sentencing guidelines and, to a lesser extent, codified gradations of felonies and aggravating factor categories, allows undercover agents to "ratchet up" a crime by design.[93] For example, those planning a sting operation can decide the amount of drugs to be bought or sold,[94] or the substance to be sold[95] in order to catapult the defendant into

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91. *See id.*

92. *See id.* at 47-49.

93. The phrase "ratchet up" seems to have first been used by the Fifth Circuit in a money laundering case. United States v. Richardson, 925 F.2d 112, 117 (5th Cir. 1991), *cert. denied,* 501 U.S. 1237 (1991).

94. *See* United States v. Lenefesty, 923 F.2d 1293, 1300 (8th Cir. 1991) (noting that the defendant argued that the undercover agent's only motive in repeatedly purchasing from her was to increase her sentence); United States v. Stuart, 923 F.2d 607, 614 (8th Cir. 1991) (recapping the defendant's contention that he was entrapped by the government's act of fronting money to purchase a larger quantity of drugs than the defendant was predisposed to sell); United States v. Barth, 788 F. Supp. 1055, 1057 (D. Minn. 1992) (holding that "[t]he Court finds it not at all fortuitous that the agent arrested the defendant only after he had arranged enough successive buys to reach the magic number (in reference to the 50 grams of cocaine, which doubles the minimum mandatory sentence from 5 years to 10 years)"), *vacated,* 990 F.2d 422 (8th Cir. 1993); People v. Cousins, No. 239767, 2003 WL 22222056, at *7 (Mich. Ct. App. Sept. 25, 2003) (holding that the defendant was not a victim of sentencing entrapment when he was asked to supply a larger quantity of cocaine for the third transaction); *State v. Burnett,* No. C9-98-1201, 1999 WL 289221, at *4 (Minn. Ct. App. May 11, 1999) (holding that it was not enough to establish sentencing entrapment when the undercover agent had contacted her supervisor before making the last sale to determine if the addition of that amount would establish a first degree offense).

95. Often times a claim of sentencing entrapment arises under circumstance where an undercover agent requests the defendant to transform powder cocaine into cocaine base or to provide the agent with cocaine base rather than powder cocaine. Cocaine base carries a higher penalty under the Federal Sentencing Guidelines, 120-135 months, whereas powder cocaine carries a sixty month minimum mandatory sentence. Cocaine base is crack cocaine, powder cocaine can be "cooked" in a microwave to become crack. *See* United States v. Walls, 70 F.3d 1323, 1330 (D.C. Cir. 1995) (holding that a request by a government agent for crack cocaine upon a seller's delivery of powder cocaine, does not warrant reversal of a conviction); United States v. Saulter, 60 F.3d 270, 280 (7th Cir. 1995) (rejecting the defendant's contention that downward departure from the Guidelines is warranted due to the undercover agent's encouragement of having the defendant transform the powder cocaine into crack); United States v. Shepherd, 857 F. Supp. 105, 112

a higher sentencing range. This sometimes makes the difference of decades on a sentence. Other cases involve an agent suggesting that the defendant come to the transaction heavily armed since the presence of firearms often generates a sentencing enhancement.[96] Similarly, agents posing as decoys for pedophiles in Internet chat rooms ascribe an age to themselves that is just young enough to implicate the most serious category of attempted sexual predation, while not so young as to limit the appeal to the most radical perpetrators.[97]

The idea of agents planning and scheming around the specific provisions of the sentencing guidelines strikes many as an abuse.[98] Some

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(D.D.C. 1994) (holding that the undercover agent's insistence that the purchase of cocaine was conditioned on the defendant transforming the cocaine powder into crack was impermissible because this demand did not further the investigation); United States v. Kimley, No. 01-4324, 2003 WL 1090706, at *1 (3d Cir. Mar. 12, 2003) (reiterating the defendant's claim that the informant both induced him to sell crack rather than powdered cocaine and manipulated his sentence by making repeat purchases from him).

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

97. This tactic does not have to rely on subjectivity or passions of judges exclusively, of course; sometimes the grading of punishments or sentencing guideline enhancements are explicit and are drawn at somewhat arbitrary lines. For example, the Federal Sentencing Guidelines contain a two-level enhancement for attempts to engage in prohibited sexual conduct with a minor or an undercover agent posing as a minor or an adult with custody of the minor. U.S. FEDERAL SENTENCING GUIDELINES MANUAL § 2A3.2(b)(3)(B); *see* United States v. McGraw, 351 F.3d 443, 445 (10th Cir. 2003) (involving Internet and child pornography); United States v. Robertson, 350 F.3d 1109, 1118 (10th Cir. 2003) (stating that the Sentencing Guidelines do not draw a distinction between someone posing as a child over the Internet or someone posing as a panderer, so no distinction should be drawn between the two); United States v. Dotson, 324 F.3d 256, 259 (4th Cir. 2003) (holding that Internet advertising for child pornography is not an abuse of power). The Sentencing Guidelines explicitly state that for pedophiliac computer crimes, it does not matter whether there was a real "victim" or merely an undercover agent posing as a victim. SENTENCING GUIDELINES MANUAL § 2A3.1, cmt., application n.1. The prospect of sentencing enhancement, or sentencing entrapment, may be one of the more important distinctions between the exclusionary rules and the entrapment defense, at least in practical terms from the vantage point of deterring the police. Violation of an exclusionary rule may be the end of the case for that defendant; but the idea of sentencing entrapment means that even where undercover agents have botched the case regarding one charge, they can keep going and get the defendant on others, with a little more inducement.

98. The Sentencing Reform Act of 1984 was created to remedy the level of judicial discretion in determining sentence duration. Therefore, the Sentencing Guidelines established minimum mandatory sentences for drug transactions, focusing on the quantity and type of drugs involved in the exchange. Many scholars have noted that the new system has now shifted the discretion and abuse to the prosecutors and undercover agents that determine the amount of drugs sold, types of drugs sold, and who to target. *See, e.g.*, Eric P. Berlin, Comment, *The Federal Sentencing Guidelines' Failure To Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 WIS. L. REV. 187, 205, 214 (1993) (arguing that the Sentence Guidelines create an increase in the severity of punishment and double prison populations nationwide); Andrew G. Deiss, Comment, *Making the Crime Fit the Punishment: Prearrest Sentence Manipulation by*

courts, therefore, entertain arguments that the defendant's sentence should be mitigated to offset the increase that state agents manipulated.[99] The conviction itself stands, but the sentence can be for less time[100] if the case meets the applicable test.[101]

Not surprisingly, there are two rival tests, generally tracking the subjective and objective tests for regular entrapment. Most of the courts

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Investigators Under the Sentencing Guidelines, 1994 U. CHI. LEGAL F. 419, 419-20 (1994) (stating that the minority view is that the Guidelines give the undercover agents too much discretion, the majority opinion is that the Guidelines give the prosecutors too much discretion); Joan Malmud, Comment, *Defending A Sentence: The Judicial Establishment of Sentencing Entrapment and Sentencing Manipulation Defenses*, 145 U. PA. L. REV. 1359, 1361-66 (1997) (discussing the history of abuse in sentencing and the possible remedies); Mark Thomas, Note and Comment, *Sentencing Entrapment: How Far Should the Federal Courts Go?*, 33 IDAHO L. REV. 147, 182 (1996) (discussing the history of abuse in sentencing and arguing that sentencing entrapment should not be used for "straight stings").

99. *See* 18 U.S.C. § 3553(b)(1) (2003) ("[T]he court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."); United States v. Staufer, 38 F.3d 1103, 1107 (9th Cir. 1994) (stating that before the advent of the Sentencing Guidelines courts could prevent sentencing entrapment by voicing their discretion in sentencing, however under the Guidelines "courts can ensure that the sentences imposed reflect the defendants' degree of culpability only if they are able to reduce the sentences of defendants who are not predisposed to engage in deals as large as those induced by the government.").

100. United States v. Palo, No. 97-50167, 1999 WL 51507, at *1 (9th Cir. June 22, 1999) (stating that the Ninth Circuit has identified two available remedies for valid sentencing entrapment claims: 1) "a sentencing court may decline to apply the statutory penalty provision for the greater offense that the defendant was induced to commit, and instead apply the penalty provision for the lesser offense that the defendant was predisposed to commit[;]" or 2) "a sentencing court may exercise its discretion to depart downward from the sentencing range for the greater offense that the defendant was induced to commit.").

101. Circuits that recognize sentencing entrapment use similar tests that revolve around predisposition. *See* United States v. Gutierrez-Herrera, 293 F.3d 373, 377 (7th Cir. 2002) (quoting United States v. Estrada, 256 F.3d 466, 473-74 (7th Cir. 2001)) ("when the government causes a defendant initially predisposed to commit a lesser crime to commit a more serious offense"); United States v. Woods, 210 F.3d 70, 75 (1st Cir. 2000) (quoting United States v. Staufer, 38 F.3d 1103, 1106 (9th Cir. 1994)) ("[W]hen a defendant, although predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment."); United States v. Citro, 842 F.2d 1149, 1152 (9th Cir. 1988) (discussing five factors used to determine sentencing entrapment: "(1) the character or reputation and previous conduct of the defendant; (2) whether the government made the initial suggestion of criminal activity; (3) whether the defendant engaged in the activity for profit; (4) whether the defendant showed any reluctance; and (5) the nature of the government's inducement"); United States v. Padilla, No. CNA. 03-CV-85, 2003 WL 22016886, at *6 (E.D. Pa. June 20, 2003) (stating that the Eighth Circuit defines "sentencing entrapment as 'outrageous official conduct' that overcomes the volition of an individual who was predisposed to commit a less serious crime and unduly influences them to commit a more serious crime for the purpose of increasing the resulting sentence of the entrapped defendant") (citing United States v. Rogers, 982 F.2d 1241, 1245 (8th Cir. 1993)).

categorize the issue as "sentencing entrapment" and use a predisposition test: was the defendant predisposed to commit the crime to the degree charged (i.e., to buy or sell the full quantity of drugs involved), or something less, but for the agent's inducement?[102] The burden is on the defendant to prove his reticence.[103] Other courts[104] focus instead on what they call "sentencing manipulation" and look solely at whether the undercover agents themselves deployed any outrageous tactics to induce the defendant into committing a greater crime. This is much like the objective test for regular entrapment.[105] A few courts apparently consider

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102. *See* United States v. Si, 343 F.3d 1116, 1128 (9th Cir 2003) (citing *Staufer*, 38 F.3d at 1106) (stating that "[s]entencing entrapment occurs when a defendant is predisposed to commit a lesser crime, but is entrapped into committing a more significant crime that is subject to more severe punishment because of government conduct."); United States v. Stavig, 80 F.3d 1241, 1245 (8th Cir. 1996) (stating that sentencing entrapment may occur where outrageous government conduct overcomes the will of a defendant predisposed to deal only in small quantities of drugs, for the purpose of increasing the amount of drugs and the resulting sentence imposed against the defendant); United States v. Aikens, 64 F.3d 372, 376 (8th Cir. 1995) (citing United States v. Warren, 16 F.3d 247, 250 (8th Cir. 1994)) (stating that sentencing entrapment "may occur where outrageous government conduct overcomes the will of a defendant predisposed to deal only in small quantities of drugs, for the purpose of increasing the amount of drugs and the resulting sentencing imposed against that defendant"); United States v. Stuart, 923 F.2d 607, 614 (8th Cir. 1991) (stating that "sentencing entrapment posits the situation where defendant, although predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment.").

103. *See* United States v. Nieto-Cruz, No. 03-50420, 2004 WL 886346, at *1 (9th Cir. Feb. 11, 2004) (stating that the defendant failed to meet his burden of proving that "he had neither the intent nor the ability to produce the amount of drugs involved."); United States v. Medina, No. 99-10332, 2002 WL 1808705, at *1 (9th Cir. Aug. 6, 2002) (citing United States v. Naranjo, 52 F.3d 245, 250 n.13 (9th Cir. 1995)) (stating that "[t]he defendant bears the burden of showing sentencing entrapment by a preponderance of the evidence."); *Naranjo*, 52 F.3d at 250 n.13 (stating "[i]n making a sentencing entrapment claim, the burden is on the defendant to demonstrate both the lack of intent to produce and the lack of the capability to produce the quantity of drugs at issue.").

104. *See, e.g.*, United States v. Cunningham, No. 3-97-CR-213-R, 2002 WL 1896932, at *10 (N.D. Tex. Aug. 14, 2002) (recognizing sentence manipulation but has not used the doctrine to depart downward from the Guidelines).

105. "Outrageous government conduct" is used sometimes instead of "sentencing manipulation," and *may* result in an acquittal rather than a lower sentence, even though it addresses the same basic phenomenon of undercover agents ratcheting up the sentence as the sting operation proceeds. Acquitting a defendant outright can serve no other purpose than possibly punishing the police, which I have argued elsewhere is misguided public policy. Acquittals do not deter police because police are focused on arrests rather than convictions. There is little economic or psychological basis for assuming that the police suffer disutility when a third party (like a defendant) receives a benefit or increased utility. The type of police most likely to engage in reprehensible conduct are the least likely to be deterred by such an abstract form of punishment; and that the potential for greater payoffs in some cases outweighs the inconvenience of acquittals in other cases. *See generally* Stevenson, *supra* note 17; *see also Padilla*, 2003 WL 22016886, at *5 (stating that "[s]entencing manipulation by definition is not a defense. . . . [and] has no bearing on the defendant's guilt or innocence. Succeeding under this theory will result in the court granting

both,[106] but the failure rate of these defensive maneuvers makes this point almost moot.[107] "Sentencing entrapment" is the far more common approach and term.[108] In the academic literature, "sentencing entrapment" is a general phrase used to describe the whole area — the agents' tactic itself, the defense, and the body of cases or concept — rather than to describe one test as opposed to another.

This phrase seems to have been coined by the Eighth Circuit in the 1991 case *United States v. Lenfesty*.[109] At the time, this was a novel argument from a defendant and it did not go over well: "We are not prepared to say there is no such animal as 'sentencing entrapment.'"[110] The same week, the Eighth Circuit addressed the issue in another ruling, *United States v. Stuart*,[111] this time less dismissively: "Perhaps there is such a thing as 'sentencing entrapment,' but we are not persuaded that [the defendant] has succeeded in establishing it."[112] A slow onslaught of cases

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a downward offense level adjustment under the guidelines."); State v. Soto, 562 N.W.2d 299, 305 (Minn. 1997) (stating that "[s]entencing manipulation is outrageous government conduct aimed only at increasing a person's sentence. Whereas sentencing entrapment focuses on the predisposition of the defendant, the related concept of sentencing manipulation is concerned with the conduct and motives of government officials.").

106. *See Padilla*, 2003 WL 22016886, at *7 (stating that "the First Circuit[ ] commingle[s] the sentencing manipulation and sentencing entrapment doctrines."); Dehaney v. United States, No. 97 CR. 545(BSJ), 2001 WL 1242289, at *5 (S.D.N.Y. Oct. 16, 2001) (noting that the Second Circuit recognizes sentence manipulation but also requires that one must necessarily prove that "he was not predisposed to commit the offense.").

107. *See* United States v. Montoya, 62 F.3d 1, 4 (1st Cir. 1995) (stating that "garden variety manipulation claims are largely a waste of time," because "sentencing factor manipulation is a claim only for the extreme and unusual case.").

108. The First Circuit uses the terms sentencing entrapment and sentencing factor manipulation to describe the same conduct. *Padilla*, 2003 WL 22016886, at *5 (quoting United States v. Woods, 210 F.3d 70, 75 (1st Cir. 2000)). The Eighth Circuit, Seventh Circuit, and Ninth Circuit use the term sentencing entrapment and have recognized the defense. *Id.* at *5, *6. The D.C. Circuit recognized sentencing entrapment in *United States v. Shepherd*, 857 F. Supp. 105 (D.D.C. 1994). The First Circuit and Second Circuit recognize sentence manipulation. *Padilla*, 2003 WL 22016886, at *5, *7 (citing *Woods*, 210 F.3d at 75; *Dehaney*, 2001 WL 1242289, at *5). In *United States v. Jones*, 18 F.3d 1145, 1154 (4th Cir. 1994), the Fourth Circuit recognized the existences of sentence entrapment and sentence manipulation, however the viability of either defense was not addressed. For more discussion, see Malmud, *supra* note 98, at 1372-75 (distinguishing between the doctrines of sentence entrapment and sentence manipulation, also noting that the Sixth Circuit and Eighth Circuit have recognized the existence of some form of the sentence manipulation doctrine); Todd E. Witten, Comment, *Sentence Entrapment and Manipulation: Government Manipulation of the Federal Sentencing Guidelines*, 29 AKRON L. REV. 697, 709-30 (1996) (discussing the evolution and history behind the different circuits' treatment of sentencing entrapment and sentence manipulation).

109. 923 F.2d 1293 (8th Cir. 1991), *cert. denied*, 499 U.S. 968 (1991).

110. *Id.* at 1300.

111. 923 F.2d 607 (8th Cir. 1991).

112. *Id.* at 614 (citation omitted).

ensued in various circuits over the next year. The first court to recognize "such an animal" as sentencing entrapment was a district court in Minnesota, in *United States v. Barth*,[113] in which the district court found that the Sentencing Commission had "failed to adequately consider the terrifying capacity for escalation of a defendant's sentence based on the investigating officer's determination of when to make the arrest."[114]

The lower federal courts are split on whether to recognize sentencing entrapment at all,[115] meaning the U.S. Supreme Court may have to settle the question. A few circuits have not yet considered the question.[116] Those that do recognize it in theory generally reject it in individual cases.[117] Individual defendants often appear unsympathetic, given that they set out to commit some crime, and the government agent simply orchestrated an

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113. 788 F. Supp. 1055 (D. Minn. 1992).

114. *Id.* at 1057.

115. United States v. Padilla, No. CIV.A.03-CV-85, 2003 WL 22016886, at * 5, *7 (E.D. Pa. June 20, 2003) (stating that the circuits are split on both the sentence entrapment doctrine and the sentence manipulation doctrine); *see* United States v. Garcia, 79 F.3d 74, 76 (7th Cir. 1996) (rejecting sentence manipulation as a matter of law); United States v. Perez, Crim. A. No. 94-0192-01, 1996 WL 502292, at *6 (E.D. Pa. Aug. 27, 1996) (quoting United States v. Williams, 954 F.2d 668, 673 (11th Cir. 1992) (stating that the Eleventh Circuit rejects sentencing entrapment as a matter of law.)

116. *Padilla*, 2003 WL 22016886 at * 6, *8 (citing United States v. Raven, 39 F.3d 428, 438 (3d Cir. 1994)) (noting that to date, the Third Circuit has not recognized sentencing entrapment or manipulation).

117. *See, e.g.*, United States v. Ross, 372 F.3d 1097, 1113-14 (9th Cir. 2004) (holding that the evidence was sufficient to support the finding that the defendant was predisposed to commit an offense involving 100 kilograms of cocaine); United States v. Rice, No. 02-1383, 2004 WL 1240824, at *3, *4 (10th Cir. June 7, 2004) (rejecting the defendant's sentencing factor manipulation claim that he was improperly induced into manufacturing and selling twenty machine guns because of the government's fronting him with the money to purchase supplies); United States v. Vega, Nos. 02-50253, 02-50499, 2004 WL 785311, at *3 (9th Cir. Apr. 7, 2004) (holding that the defendant was not entitled to reduction of his sentence because he was "predisposed to sell in amounts up to whatever he could handle, including the 233-gram sale"); United States v. Hightower, No. 03-1015, 2004 WL 729255, at *4 (10th Cir. Apr. 6, 2004) (holding that the defendant was not a victim of sentencing entrapment when the agent specifically asked for crack when he had knowledge that the defendant could also supply other drugs which carried less penalty); United States v. Gutierrez-Herrera, 293 F.3d 373, 377 (7th Cir. 2002) (holding that the defendant was predisposed to distribute cocaine by his admittance of supplying two kilograms to individuals intended for them to resell it); United States v. Estrada, 256 F.3d 466, 476-77 (7th Cir. 2001) (rejecting defendant's claim that he was offered bargain basement prices for cocaine, given generous credit terms to accept the larger amount even though he originally requested a much smaller amount, and that he only had enough money on him to purchase 3.75 kilograms of the 5 kilogram purchase); United States v. Case, 217 F. Supp. 2d 158, 161-62 (D. Me. 2002) (rejecting the defendant's claim that his sentence should be reduced for the final sale, which occurred after the agents could have arrested him for making a ten pound sale); United States v. Lora, 129 F. Supp. 2d 77, 94 (D. Mass. 2001) (holding that the defendants were predisposed to buy cocaine and were not offered "artificially favorable credit terms" that induced them to purchase more cocaine than they had resources for).

incremental escalation.[118] I have some suggestions to offer for the approach the U.S. Supreme Court should adopt if it does have the opportunity to address the issue in the near future. The opportunity may not arise, however, if the current decline in cases continues.

B. *Decline in Sentencing Entrapment*

Sentencing entrapment cases reached their peak in the federal courts in 1996-1997, and the cases have dropped off steadily since then. In addition, the claims do not fare well at all. In the mid-1990s sentencing entrapment seemed like the new, fresh area of entrapment law. It now has the same earmarks of decline, disuse, and discredit as the traditional entrapment defense.[119]

C. *Risk, Uncertainty, and Sentences*

The 1996-1997 peak in sentencing entrapment cases, followed by a drop-off in numbers, provides a vivid illustration of the effects of legal uncertainty on criminal litigation. As mentioned above, the idea of sentencing entrapment first appeared in the *Lenfesty* case in 1991.[120] More defense attorneys attempted to raise the argument nationwide over the next several years. Most of the early holdings created a state of almost "perfect" legal uncertainty: the court recognized that the defense of sentencing

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118. As discussed by the district court in *United States v. Kaczmarski*, the difference between sentence entrapment and manipulation may be significant due to the possibility that even if a sentencing entrapment defense is not available to a defendant that is predisposed to commit a greater crime, a sentence manipulation claim might still be available. United States v. Kaczmarski, 939 F. Supp. 1176 (E.D. Pa. 1996); *but see Garcia*, 79 F.3d at 76 (quoting United States v. Baker, 63 F.3d 1478, 1500 (9th Cir. 1995)) (stating that Seventh Circuit rejects sentence manipulation because the government "must be permitted to exercise its own judgment in determining at what point in an investigation enough evidence has been obtained.").

119. Combining the state and federal cases, the numbers are as follows: 2001-2004 = 86 cases, 2003-2004 = 30, 2002-2003 = 27, 2001-2002 = 29, 1998-2001 = 107 cases, 2000-2001 = 31, 1999-2000 = 32, 1998-1999 = 44, 1995-1998 = 147 cases, 1997-1998 = 47, 1996-1997 = 60, 1995-1996 = 40, 1994-1995 = 30 cases. From the numbers, it seems like 1996-1997 was the year for sentencing entrapment cases. Before and after 1996-1997 the numbers remain fairly steady but are decreasing. Note that this includes some cases that procedurally occurred as an appeal for ineffective assistance or counsel due to counsel not arguing the defense at district court level. *See, e.g.*, United States v. Romero, 85 Fed. Appx. 178, 180 (10th Cir. 2004) (defendant unsuccessfully tying ineffective assistance claim to post-sentencing assertion of); People v. Mills, 2004 WL 787145, at *2 (Mich. Ct. App. 2004) (unsuccessful claim that lawyer's failure to assert various applications of a "sentencing entrapment" defense was ineffective assistance); United States v. Nanez, 83 Fed. Appx. 271, 273 (10th Cir. 2004); United States v. Call, 73 Fed. Appx. 268, 275 (9th Cir. 2003); United States v. Barnes, 228 F. Supp. 2d 82, 88-89 (2002); United States v. Franco, 826 F. Supp. 1168, 1169-72 (N.D. Ill. 1993) (rejecting ineffective assistance claim based on failure to raise sentencing entrapment defense, which had not then been recognized in the Seventh Circuit).

120. United States v. Lenfesty, 923 F.2d 1293, 1300 (8th Cir. 1991).

entrapment might exist, although no fact pattern had yet arisen that would suffice — including the case at bar.[121] This atmosphere of uncertainty functioned as a "green light" for defendants to try this claim, with no way of knowing whether the facts of their case would foreclose the option. As more of these cases made their way through the appeal process,[122] the rules

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121. *See, e.g.*, United States v. Knecht, 55 F.3d 54, 57 (2d Cir. 1995) (expressing that the validity of the defense has not been determined, even if it was, the defendant was predisposed to launder proceeds from illegal activity with the knowledge that it was probably drug money); United States v. Washington, 44 F.3d 1271, 1279-80 (5th Cir. 1995) (choosing not to address the viability of the theory due to the facts of the case); United States v. Wright, No. 93-4228, 1995 WL 101300, at *3 (6th Cir. Mar. 9, 1995) (declining to address the issue of accepting the sentencing entrapment doctrine, because even in a court that accepts the doctrine, the facts of the case would not support a claim); United States v. Cotts, 14 F.3d 300, 306 n.2 (7th Cir. 1994) (stating that sentencing entrapment is a viable theory, defendant failed to present evidence that outrageous conduct occurred); United States v. Stuart, 923 F.2d 607, 614 (8th Cir. 1991) (acknowledging the existence of the defense and elaborating upon it, but holding that the facts of the case do not warrant the defense).

122. Between 1994 and 1996, numerous sentence entrapment cases were addressed on appeal. For examples of cases, see Figueroa v. United States, 19 F.3d 7 (1st Cir. 1994); United States v. Satterwhite, 23 F.3d 404 (4th Cir. 1994); United States v. Jones, 102 F.3d 804, 809 (6th Cir. 1996) (holding defendant's entrapment defense not reviewable); United States v. Broomfield, 103 F.3d 131 (6th Cir. 1996); United States v. Wright, 48 F.3d 1220 (6th Cir. 1995); United States v. Murphy, 16 F.3d 1222 (6th Cir. 1994); United States v. Williams, 97 F.3d 1455 (7th Cir. 1996); United States v. Castellanos, 70 F.3d 117 (7th Cir. 1995); United States v. Garcia, 53 F.3d 334 (7th Cir. 1995); United States v. Okoro, 42 F.3d 1392 (7th Cir. 1994); Roldan v. United States, 33 F.3d 56 (7th Cir. 1994); United States v. Cotts, 14 F.3d 300, 309 (7th Cir. 1994) (affiriming sentencing judgment of the lower court); United States v. Shipley, 62 F.3d 1422 (8th Cir. 1995); United States v. Doyle, 60 F.3d 396, 398-99 (8th Cir. 1995) (holding that government did not engage in outrageous government conduct by offering the defendant leniency in exchange for cooperation to lead to a more culpable drug dealer); United States v. Clark, 36 F.3d 1101 (8th Cir. 1994); United States v. Merical, 32 F.3d 571 (8th Cir. 1994); United States v. Hulett, 22 F.3d 779, 782 (8th Cir. 1994) (holding that the record failed to support that the defendant was entrapped as a matter of law, and that the issue of entrapment was properly submitted to the jury); United States v. McLinn, 19 F.3d 24 (8th Cir. 1994); United States v. Warren, 16 F.3d 247, 250-51 (8th Cir. 1994) (holding that the government's repeated undercover purchases of drugs from the defendant does not constitute outrageous conduct); United States v. Appel, 105 F.3d 667 (9th Cir. 1996); Noble v. United States, 105 F.3d 666 (9th Cir. 1996); United States v. Lutz, 103 F.3d 142 (9th Cir. 1996); United States v. Mitchell, 103 F.3d 142 (9th Cir. 1996); United States v. Lee, 99 F.3d 1147 (9th Cir. 1996); United States v. McCord, 99 F.3d 1147 (9th Cir. 1996); United States v. Bui, 97 F.3d 1461 (9th Cir. 1996); United States v. Robinson, 94 F.3d 1325, 1326-27 (9th Cir. 1996) (concerning a government sting operation for manufacturing and selling counterfeit credit cards); United States v. Castaneda, 94 F.3d 592, 595 (9th Cir. 1996) (affirming the trial courts' decision that the defendant was a victim of sentencing entrapment but reversed defendants sentence because the trial court failed to adjust his sentencing); United States v. Brown, 73 F.3d 370 (9th Cir. 1995); United States v. Ashley, 72 F.3d 135 (9th Cir. 1995); United States v. Graves, 67 F.3d 309 (9th Cir. 1995); United States v. Gamboa, 66 F.3d 336 (9th Cir. 1995); United States v. Chavez-Vasquez, 64 F.3d 667 (9th Cir. 1995); United States v. Valencia, 61 F.3d 914 (9th Cir. 1995); United States v. Davis, 56 F.3d 74 (9th Cir. 1995); United States v. Simpson, 64 F.3d 667 (9th Cir. 1995); United States

became clarified, comments to the sentencing guidelines were added and judicially noticed, and more defendants could predict the outcome of the claims ahead of time. This led to a decrease in the number of cases.

Sentencing entrapment and regular entrapment are conceptually distinct. The former is a mitigating factor for punishments, while the latter allows the defendant to go free if the claim is successful.[123] Yet there must be some interplay between the two, as evidenced by the fact that the tests for sentencing entrapment are simply adaptations of the two tests for regular entrapment.[124] Obviously, courts have been influenced by traditional entrapment law in crafting rules for these newer types of cases.

What may be less obvious is the fact that sentencing entrapment cases can influence future decisions on regular entrapment. Courts in sentencing entrapment cases are still defining the boundaries and subtleties of "predisposition," "inducement vs. opportunity," and "outrageous government conduct," the elements of the traditional defense under alternative rules. The precedents established are not irrelevant or completely distinguishable. "Predisposition" is being used in almost the same way, semantically, whether it is the predisposition to go from selling

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v. Arvizo, 53 F.3d 340 (9th Cir. 1995); United States v. Banh, 33 D.3d 60 (9th Cir. 1994); United States v. Gibbs, 15 F.3d 1091 (9th Cir. 1994).

123. *Garcia*, 79 F.3d at 75 (distinguishing between "sentencing manipulation" and the objective test or outrageous government conduct.)

124. For examples of the objective approach to sentence entrapment (referred to as sentence manipulation), see United States v. Gibbens, 25 F.3d 28, 31 (1st Cir. 1994) ("When an accusation of sentencing factor manipulation surfaces, the judicial gaze should, in the usual case, focus primarily — though not necessarily exclusively — on the government's conduct and motives."); United States v. Connell, 960 F.2d 191, 194 (1st Cir. 1992) (hinting that sentence manipulation may occur even if the facts of the case are "insufficiently oppressive to support an entrapment defense . . . or [a] due process claim . . . ."); United States v. Jones, 18 F.3d 1145, 1153 (4th Cir. 1994) (internal citations omitted) (linking sentence manipulation to outrageous government conduct and holding that a successful manipulation claim only arises when "outrageous government conduct that offends due process could justify a reduced sentence."); United States v. Okey, 47 F.3d 238, 240 (7th Cir. 1995) (stating that "[s]entencing manipulation occurs when the government engages in improper conduct that has the effect of increasing a defendant's sentence."). For examples of the subjective approach to sentence entrapment, see United States v. Woods, 210 F.3d 70, 75 (1st Cir. 2000) (citing United States v. Staufer, 38 F.3d 1103, 1106 (9th Cir. 1994) ("[W]hen 'a defendant, although predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment.'"); United States v. Gutierrez-Herrera, 293 F.3d 373, 377 (7th Cir. 2002) (citing United States v. Estrada, 256 F.3d 466, 463-74 (7th Cir. 2001) ("[W]hen the government causes a defendant initially predisposed to commit a lesser crime to commit a more serious offense."); United States v. Citro, 842 F.2d 1149, 1152 (9th Cir. 1998) (internal citations omitted) (stating the five factors used in determining sentencing entrapment: "1) the character or reputation of the defendant; 2) whether the government made the initial suggestion of criminal activity; 3) whether the defendant engaged in the activity for profit; 4) whether the defendant showed any reluctance; and 5) the nature of the government's inducement.").

no drugs to one gram, or to go from selling nine grams to ten; in either case, it means something like readiness, willingness, or a lack of resistance to lawbreaking.[125] The problem is that sentencing entrapment cases are bad test cases for these concepts. The defendants are so unsympathetic that some courts refuse to recognize the defense,[126] and those which do usually refuse to apply it in a given case.[127] The precedents generated will be almost uniformly unfavorable. Still a definition of "predisposition" generated in a sentencing entrapment case would be appropriate to cite as authority in the traditional type of case, as the word is being used in the same sense. The influence of bad test cases on the core concepts of the defense will cause a shift over time that is unfavorable to defendants.

The other problem is that despite the nearly complete semantic overlap between the two occurrences of "predisposition"[128] (both types of cases use the term to refer to a lack of resistance on the defendant's part to an offer, request, or suggestion from an undercover agent), there is an important

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125. *See, e.g.*, Biggs v. United States, No. 99-5238, 2001 WL 128413, at *2-*3 (6th Cir. Feb. 6, 2001):

> [T]he record reveals that Biggs was predisposed to deal in distribution-sized quantities of methamphetamine. Biggs was charged following the execution of a reverse-sting operation in which the government sold four pounds of methamphetamine to Biggs and his co-defendant. Biggs sought to purchase the drugs so that he could resell them in Memphis, Tennessee. Biggs met an informant at a nightclub and gave the informant $2,000 for the purchase. Later, during a telephone conversation that was recorded, the informant stated that he felt a pressing need to be rid of the four pounds of methamphetamine he was about to possess and that Biggs could have all four pounds for $5,000. Biggs accepted the bargain, delivered $2,500 to make the purchase, and was arrested after he and his co-defendant took possession of all four pounds of methamphetamine.
>
> At sentencing, Biggs stated that it was never his "intention to buy four pounds of crystal meth." He stated that, "If they had not been practically give [sic] to me, I wouldn't be in the trouble I am now."

126. *See* United States v. Williams, 954 F.2d 668, 673 (11th Cir. 1992) ("[A]s a matter of law, we reject Duke's sentence entrapment theory. . . . [b]ecause this circuit rejects this theory as a defense, we need not address it further.").

127. *See* United States v. Kimley, No. 01-4324, 2003 WL 1090706, at *1 (3d Cir. Mar. 12, 2003); United States v. Brown, No. 02-4741, 2003 WL 21541050, at *2 (4th Cir. July 9, 2003); United States v. Jernigan, Nos. 01-2121, 01-2304, 2003 WL 463483, at *2 (6th Cir. Feb. 18, 2003); United States v. Bew, No. 03-2931, 2004 WL 1178196, at *2 (7th Cir. May 26, 2004); United States v. Parks, No. 03-2844, 2004 WL 87659, at *4 (8th Cir. Jan. 21, 2004); United States v. Searcy, No. 02-2882, 2003 WL 282449, at *1 (8th Cir. Feb. 11, 2003); United States v. Ross, No. 02-50226, 2004 WL 1375522 (9th Cir. June 21, 2004); United States v. Villa-Serrano, No. 03-30210, 2003 WL 22954240, at *1 (9th Cir. Dec. 8, 2003); United States v. Gunn, 369 F.3d 1229 (11th Cir. 2004) (finding that one defendant out of the five defendants in the case on appeal should have his sentence vacated and remanded); United States v. Hinds, 329 F.3d 184 (D.C. Cir. 2003).

128. The same analysis could be applied to the other core terms as well.

difference that most people would recognize but find difficult to articulate. A predisposition to commit a crime in the first place seems greater in degree than a predisposition to move from selling nine grams of drugs to ten.[129] The latter is merely an incremental change. The former, in contrast, seems to be a step from one category into another, from non-criminal to criminal, from not guilty to guilty. This is a large semantic step. Sentencing entrapment cases involve a move from criminal or guilty to slightly more criminal or more guilty.

The sentencing guidelines and codified gradations of felonies, however, transform this incremental step into a qualitative change. The increased certainty of the legal rules alters the semantic play of the terms. The consequences are significant — if the circuit court decides the term is applicable, it can mean a difference of several years in prison.[130] Now both uses of predisposition refer to a line between significant categories — the legal significance is no longer picayune and incremental even though the action seems incrementally different to the actor at the time. The legal rules frame the situation differently than the actor in the commission of the offense. The undercover agents will be more aware of this phenomenon than the offender will. The problem is that there is no linguistic wall or boundary to keep a court's application of "predisposition" to one set of factors from affecting its application to another type of case. This is different from the specialized uses of other legal terms like "agreement," which may have distinct meanings depending on whether it is a criminal case or a contracts case. With entrapment, the combination of semantic blurring between the core terms across different types of entrapment cases, and the semantic effect caused by codified, mechanical punishment factors, creates a linguistic effect that pushes all entrapment cases away from favoring defendants.

The Federal Sentencing Guidelines themselves present an interesting study in the effects of legal uncertainty. The guidelines were created with

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129. *See, e.g.*, United States v. Arvizo, 1995 WL 261137, at *3-*4 (9th Cir. May 3, 1995) (change from one kilo to four).

130. *See, e.g.*, U.S. Sentencing Guidelines Manual § 2D1.1 (1995), and the explanation offered by Professor Neal Katyal:

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

Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2422 (1997) (footnotes omitted).

the purpose of limiting judicial discretion.[131] The drafters and proponents of the guidelines feared that too much judicial discretion allowed for abuses, or at least disparities in punishments, and such disparities seemed unfair.[132] Indeed, legal vagueness does confer greater discretion on the relevant state actors. For example, in administrative law, enabling statutes containing vague, open-ended terms serve to delegate authority from the legislature to agency officials.[133] With the sentencing guidelines, the original thought was to re-appropriate punishment discretion from judges to the legislature.[134]

Many judges and commentators believe this process backfired, resulting in more unfair and draconian punishments than before.[135] In addition, many commentators on sentencing entrapment blame the

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131. *See* Goldstein, *supra* note 10, at 1958; Robert S. Johnson, Note, *The Ills of the Federal Sentencing Guidelines and the Search for a Cure: Using Sentence Entrapment to Combat Governmental Manipulation of Sentencing,* 49 VAND. L. REV. 197, 201-09 (1996); Daniel L. Abelson, Comment, *Sentencing Entrapment: An Overview And Analysis*, 86 MARQ. L. REV. 773, 776 (2003) ("Before enactment of the Guidelines, federal judges had almost completely unfettered discretion in imposing sentences, the exercise of which was generally not reviewable on appeal.").

132. *See, e.g.,* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1972) (describing "almost wholly unchecked and sweeping powers" possessed by judges in determining sentencing); Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences,* 91 NW. U. L. REV. 1441, 1445 (1997) (discussing sentencing review in the federal system); Goldstein, *supra* note 10, at 1959.

133. *See* William N. Eskridge, Jr. & Judith N. Levi, *Regulatory Variables and Statutory Interpretation*, 73 WASH. U. L.Q. 1103, 1107-08 (1995). Eskridge and Levi argue that governmental discretion or decision-making is often delegated through what they call "regulatory variables," linguistic devices in the statute that leave the delegated interpreter a range of meanings and applications. *See id.* (they eventually shift to the term "regulatory variability" out of fear that readers will imagine a list of magic words that delegate discretion). It is well-established that the legislature intends to delegate some of its authority to agencies; the focus here is on the mechanism for delegation, which is essentially a linguistic one. Some portions of enabling statutes may be specific and directive, other provisions contain ambiguity, requiring the authorized official or administrator to exercise discretion to fill in the gaps or flesh out the practical meaning. This linguistic feature of vagueness or ambiguity inherently delegates authority. As Eskridge and Levi observe, "The level of linguistic generality permits an inference about the speaker's willingness to delegate gap-filling discretion to another person (i.e., police officers and judges). The more general the statutory term, the more discretion the directive is implicitly vesting in the implementing official." *Id.* at 1111 (noting that this discretion may be "vested deliberately or inadvertently").

134. Although the nondelegation doctrine has received a fair amount of treatment in the academic literature, there seems to be a mirror-image phenomenon that we might call an "undelegation" doctrine, by which Congress uses greater specificity and detail in its enactment to appropriate more power for itself and away from other branches of government or the citizenry at large. A thorough discussion of this issue, however, is outside our scope here.

135. *See, e.g.,* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992) (discussing the sentencing process); Jose A. Cabranes, *Incoherent Sentencing Guidelines*, WALL ST. J., Aug. 28, 1992, at A11; Jose A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, N.Y. L.J., Feb. 11, 1992, at 2.

sentencing guidelines for the phenomenon of agents ratcheting up punishments during stings. These commentators claim that the sentencing guidelines simply shifted discretion from judges to prosecutors and law enforcement.[136]

This conclusion is misguided. Legal uncertainty was blamed for being the vehicle by which too much delegation of discretion and authority took place. This is a plausible enough argument. It seems paradoxical, then, to argue that a lack of uncertainty or vagueness confers or delegates discretion on a different branch of government. Normally, power is delegated to enforcement agencies through vague, open-ended statutes, just as it was with the judiciary before the guidelines were in place. The confusion here is that the issues are being framed in terms of discretion, which is really a problem of legal vagueness and agency costs. Instead, the issue should be framed as one of legal certainty, which is a problem of informational asymmetries and the abolition of windfall benefits in isolated cases. Prosecutors and undercover agents did not receive more discretion after the enactment of the guidelines. They were just as free to suggest that a target bring a firearm to a set-up drug deal before as they are now. If anything, prosecutors and agents have less freedom and discretion now because there are mechanical rules controlling the outcomes, around which they must plan. The guidelines merely afforded some possible incentives that influence strategy. The world of both judges and prosecutors alike is less free and discretionary; everything is more pre-determined.[137] Greater certainty, however, completely changes investment decisions of state actors, as well as their strategy games when moving toward trial.

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136. *See supra* note 131 (citing sources therein).

137. *But see* WILLIAM D. RICH ET AL., SENTENCING BY MATHEMATICS: AN EVALUATION OF THE EARLY ATTEMPTS TO DEVELOP AND IMPLEMENT SENTENCING GUIDELINES 159-60 (1982) (a study of localized experiments that predates the enactment of the federal guidelines):

> [T]hese diverse measures almost unanimously converge on a single conclusion: sentencing guidelines have had no detectable, objectively manifested impact on the exercise of judicial sentencing discretion.
>
> Judges frequently departed from the sentencing recommended by the guidelines. Denver judges rarely provided written reasons for their departures. There was no clear increase in the proportion of sentences that fell within the guidelines' prescriptions. Racial and sexual disparities, where extant before guidelines, showed no signs of reduction. Neither was there a significant diminution of statistically unexplained variation in sentences. Sentencing guidelines did not enhance the predictability of sentences.

The authors concede, however, that in each of the experimental settings, compliance with the suggested guidelines was voluntary and there was no sanction for a judge ignoring the recommendations. The authors posited that the results would be different if compliance could be enforced. *Id.*

When sentences were uncertain, the world of punishments was comparable to a Knightian market where future demands are uncertain. Under Frank Knight's model,[138] uncertainty is the only environment where true entrepreneurial profits can occur. These "true profits" are analogous to occasional windfall benefits for defendants in the form of acquittals. It is true that the lack of sentencing guidelines conferred discretion on judges, allowing them to express their own preferences, but the result for defendant was an occasionally lucky break, a shower of mercy, or an occasional unfortunate turn. Frank Knight's model of differentiating between risk and uncertainty for the purposes of results and investments implies that greater certainty in the outcomes flattens out any profits across the board. As outcomes become more predictable, uncertainty shifts toward straightforward, quantifiable risk.

Fixing the payouts of punishment eliminates extreme turns in fortune and levels off the possible "lucky breaks" to defendants. Thus, the sentencing guidelines appear to impose more draconian results. At the same time, Knight's model concludes that uncertainty in outcomes probably generates a net loss across the whole system because the losses of all the failed entrepreneurs taken together must outweigh the windfall profits of occasional winners.[139] Highly predictable outcomes flatten profits but probably result in an incremental net increase in societal wealth, because the increase in transactions with better information allows for increasingly efficient allocations of wealth and resources.[140]

This means that the advent of mechanical sentencing guidelines would result in most cases settling as plea bargains,[141] and defendants overall being slightly better off, but getting no breaks. The sentencing guidelines in this sense probably benefit defendants overall, very incrementally, but an individual defendant has far less chance of mercy or a lucky break.

That is only part of the picture, however, because in criminal law, the individual is always pitted against the state. This match is in place even before the decision to commit crime occurs. Greater specificity in legal rules tends to benefit parties who are more established and have greater access to ex ante legal information, enabling them to plan around rules or exploit loopholes in the rules.[142] Administrative regulations, for example, are usually more burdensome for would-be market entrants in the regulated industry than those already established.[143] In contexts where the individual

138. *See generally* KNIGHT, *supra* note 11.

139. *Id.*

140. *Id.*

141. For more discussion if the strategy influences on the high plea bargain rate, see RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 365-67 (2001).

142. *See* Ferguson & Peters, *supra* note 35.

143. *Id.*

is pitted against the state, greater legal certainty will almost always benefit the state and disadvantage the individual. This scenario may be better for society overall, and therefore beneficial to most individuals in society, as its overall wealth increases incrementally. However, the individual in an adversarial position to the state can only get lucky if there is legal uncertainty. This is a matter of informational asymmetries and the disparate position to exploit loopholes created by specificity in the rules. Prosecutors and undercover agents learn the rules ahead of time, or by being repeat players in the game, and plan their decisions around those.[144] Most criminals are in less of a position to do this, and end up losing.[145] The point here is not to defend or attack the guidelines, but to explain that this is not a matter of increased discretion for law enforcement, but the result of advantages that legal certainty brings to the informationally dominant party.

If a court is considering a rule to adopt for cases of sentencing entrapment or manipulation, it seems that "predisposition" is a problematic test, due to its semantic fluctuations and overlap with other categories of cases. Similarly, looking at the conduct of agents (the objective/outrageous government conduct approaches) will usually result in a win for the prosecution, because the agents are in a position to plan carefully around the rules. Any wrongdoing on their part will almost always appear to be nothing more than being more clever than the defendant. Perhaps a better test is to weigh the disparities in information access. An experienced criminal or one who "should have known better" should have less leniency in sentencing entrapment than a true novice to crime. The guidelines, of course, already have provisions recognizing the defendant's background, separating first-time offenders from repeat offenders. However, these are usually downward departures after the sentence has been ratcheted up for aggravating factors. Thus, enhancements should be subject to a quick-look approach to screen out setups of true novices.

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144. For a discussion of some of the strategic advantages held by prosecutors, and the incentives motivating their decisions, see POSNER, *supra* note 141, at 365-67. For example, due to the government's enormous resources, prosecutors can spread these resources out strategically but unevenly, "extracting guilty pleas by the threat to concentrate its resources against any defendant who refuses to plead and using the resources thus conserved to wallop the occasional defendant who does invoke his right to a trial." *Id.* at 367.

145. Admittedly, certain types of criminals, like those perpetrating computer crimes, are very well-networked and informed of law enforcement policies. The vast majority of entrapment cases, however, involve drug crimes, and these defendants are not necessarily characterized by expertise in the law.

D. *Entrapment By Estoppel*

Entrapment by estoppel involves no subterfuge and no undercover agents, unlike traditional entrapment.[146] The defense applies instead to situations where there was some official assurance of the legality of a certain action[147] by an appropriately authorized state actor[148] followed by a reasonable reliance[149] on the assurance by the defendant and criminal charges against the defendant for carrying out the action.[150] It is, really, the

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146. *See* MARCUS, *supra* note 1, at 447-48. Marcus notes that "much of the rationale for the claim implicates due process concerns under the fifth and fourteenth amendments." *Id.*

147. *See, e.g.*, United States v. Aquino-Chacon, 109 F.3d 936, 939 (4th Cir. 1997) (defendant required to show "active misleading" by government); United States v. Trevino—Martinez, 86 F.3d 464, 466 (5th Cir. 1996); State v. Krzeszowski, 24 P.3d 485, 489-90 (Wash. App. 2001) ("active representation" by government agent required); *see also* MARCUS, *supra* note 1, at 48-49.

148. *See, e.g.*, United States v. Bunnell, 280 F.3d 46, 49-50 (1st Cir. 2002) (firearm violation); United States v. Spires, 79 F.3d 464, 466 (5th Cir. 1996) (holding that the trial court properly refused to instruct the jury on entrapment because there was not evidentiary support in the record); United States v. Ormsby, 252 F.3d 844, 851 (6th Cir. 2001) (state government official's assurances cannot be basis of reasonable reliance for federal law firearm regulations); United States v. Mendoza, No. 03-10070, 2004 WL 385678, at *2, (9th Cir. Mar. 2, 2004); People v. Chacon, 12 Cal. Rptr. 3d 211, 219 (2004) (holding that the defense of entrapment by estoppel not available because the defendant did not rely on a government agent's advice); State v. Woods, 616 N.W.2d 211, 217-18 (Mich. Ct. App. 2000) (presenting elements of the entrapment by estoppel defense); *see also* MARCUS, *supra* note 1, at 49.

149. The question of whether the defendant's reliance was reasonable tends to be the most common point of dispute in the cases. For a good discussion of the doctrine generally and of this point in particular, see United States v. Gil, 297 F.3d 93, 107-08 (2d Cir. 2002) (vacating and remanding to allow crucial evidence to be presented); *see also* MARCUS, *supra* note 1, at 48; United States v. Parker, 267 F.3d 839, 844 (8th Cir. 2001) (child pornography case, where defendant claimed he was supplying the government with leads on other violators); State v. Kremlacek, 1999 WL 759970, at *4 (Neb. Ct. App. Sept. 28, 1999); United States v. Rector, 111 F.3d 503, 506-07 (7th Cir. 1997) (holding that the defendant is not entitled to the entrapment by estoppel defense because he did not met the element that he was relying on a government agent's advice).

150. A succinct explanation of this defense, distinguishing it from similar strategies a defendant could use, and is found in *United States v. Baptista-Rodriguez*:

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

criminal-law version of promissory estoppel in contracts.[151] The appellation "entrapment" is somewhat misleading, because there is little association with the rest of entrapment law.[152] The challenged actions of the state agents are nearly always inadvertent, and the agent's association with the government open and obvious.

Although the defense sounds straightforward enough, many people would be surprised to learn, in fact, that the defense rarely works,[153] as it

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> "entrapment by estoppel." This defense applies when a government official tells a defendant that certain conduct is legal and the defendant commits what would otherwise be a crime in reasonable reliance on the official's representation.

United States v. Baptista-Rodriguez, 17 F.3d 1354, 1368 n.18 (11th Cir. 1994) (internal citations omitted); *see also* United States v. Burrows, 36 F.3d 875, 881 (9th Cir. 1994) (adopting the above passage as its own rule). A strange illustration of the foregoing distinctions can be seen operating in the background of *United States v. George*, where the prosecution requested that the defendant be acquitted, if at all, under the theory of entrapment by estoppel, rather than a lack of the requisite mental state, to avoid creating unfavorable precedent. United States v. George, 266 F.3d 52 (2d Cir. 2001).

151. *See, e.g.*, EDWARD J. MURPHY ET AL., STUDIES IN CONTRACT LAW 129 (Robert C. Clark et al. eds., 6th ed. 2003).

> The doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such a belief to his detriment. The elements of the doctrine are that (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.

Id.

152. *See* Sean Connelly, *Bad Advice: The Entrapment By Estoppel Doctrine in Criminal Law*, 48 U. MIAMI L. REV. 627, 628 (1994).

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

Id.

153. In the last few years, the defense was only successful in one reported federal case, United States v. Batterjee, 361 F.3d 1210 (9th Cir. 2004). Batterjee was convicted for violating a federal statute prohibiting non-immigrant aliens from possessing firearms or ammunition. Batterjee was residing in the States on a student visa. He ordered a pistol and filled out federal Form 4473 to

usually arises in cases where the defendant cannot meet the test — where there was either no assurance or no reasonable reliance.[154] Although the cases cover a wide range of crimes,[155] by its nature the defense is best-suited for regulatory offenses, especially firearms violations.[156] It is

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obtain a permit for the weapon, indicating truthfully that he was not a citizen on the forms. He provided additional materials requested by the gun store owner, a firearms licensee, and assurances from the store owner that he was completing the license application properly. The statute prohibiting certain aliens from possessing firearms, however, was amended before the defendant's gun purchase, making it illegal for him to consummate the purchase, although the instructions on the application forms were not updated to reflect this change. When prosecuted, Batterjee claimed that the form and the store owner (a federal licensee) had misled him. The district court rejected this defense, but his conviction was reversed on appeal. He reasonably relied on the licensee's representations as to his eligibility to possess a firearm. In state courts, entrapment by estoppel seems to have succeeded only twice in the last few years, and in one of these cases the acquittal was reversed on an appeal by the state. People v. Chacon, 12 Cal. Rptr. 3d 211 (2004) (successful defense at trial reversed on appeal); State v. Hagan-Sherwin, No. CR 03-249, 2004 WL 743808 (Ark. Apr. 8, 2004) (successful estoppel defense where defendant was charged with appropriating insurance premiums for own use, where state regulators had tacitly condoned the practice).

154. *See* MARCUS, *supra* note 1, at 49 ("Defendants have had a difficult time demonstrating that these elements are present.").

155. *See* United States v. Young, 350 F.3d 1302, 1303 (11th Cir. 2003) (recent entrapment by estoppel cases include tax fraud); United States v. Lagrou Distrib. Sys., Inc., No. 03 CR 605, 2004 WL 524438, at *1 (N.D. Ill. Feb. 2, 2004) (food and dairy regulations); United States v. Kapp, No. 02-CR 418-1, 2003 WL 23162408, at *1 (N.D. Ill. Nov. 6, 2003) (trafficking in endangered animals/animal products); United States v. Westover, No. 02-40012-01-SAC, 2003 WL 1904046, at *1 (D. Kan. Mar. 6, 2003) (defrauding HUD); United States v. Greyling, No. 00CR.631(RCC), 2002 WL 424655, at *1 (S.D.N.Y. Mar. 18, 2002) (securities fraud); State v. Hagan-Sherwin, No. CR 03-249, 2004 WL 743808, at *1 (Ark. Apr. 8, 2004) (violation of insurance regulations); People v. Micheau, No. 241076, 2003 WL 22358874, at *1 (Mich. Ct. App. Oct. 16, 2003) (operation of pyramid scheme); Commonwealth v. Cosentino, No. 2122 C.D.2003, 2004 WL 1103678, at *1 (Pa. Commw. May 13, 2004) (election code violations); White v. White, 564 S.E.2d 700 (Va. Ct. App. 2002) (violation of alimony orders); United States v. Whitecloud, No. 02-50206, 2003 WL 1459508, *1 (9th Cir. Mar. 18, 2003) (welfare fraud); Poppell v. City of San Diego, 149 F.3d 951, 953 (9th Cir. 1998) (operation of nudist club); United States v. Hilton, 257 F.3d 50, 52 (1st Cir. 2001) (child pornography); United States v. Guevara, No. 02-1426, 2004 WL 1147091, at *1 (2d Cir. May 21, 2004) (drug possession); United States v. Marshall, 332 F.3d 254, 257 (4th Cir. 2003) (importation and sale of drug paraphernalia); United States v. George, 266 F.3d 52, 54 (2d Cir. 2001) (immigration violations); United States v. Alba, No. 01-2510, 01-2907, 2002 WL 522819, at *1 (3d Cir. Apr. 8, 2002) (holding that the defendant's entrapment by estoppel failed to meet the elements); United States v. Mendoza, No. 03-10070, 2004 WL 385678, at *1 (9th Cir. Mar. 2, 2004) (rejecting the defendant's claimed ineffective assistance of counsel based on his attorney's failure to recognize the entrapment by estoppel defense); United States v. Miranda-Ramirez, 309 F.3d 1255, 1257 (10th Cir. 2002) (concerning an immigration violation). The most common crime charged is firearm violations.

156. A few of the cases involve former government informants who had temporary authority to go along with illegal activities as part of a sting operation (or so it was claimed), but this authorization expired while the defendant continued. *See, e.g.*, United States v. Hilton, 257 F.3d 50, 55-56 (1st Cir. 2001) (arguing that the defendant's previous collaboration with the government

exceedingly rare, of course, that an official would encourage a citizen to commit some common-law crime of violence or theft. The entrapment by estoppel defense would probably not apply such a case anyway, because acting on such a suggestion would probably seem "unreasonable" to a court.

Firearms violations dominate this field.[157] Convicted felons purchase guns, a rather predictable violation of federal law, under a blithe or simplistic hope that the prohibitions do not apply in their case. The purported assurances usually come in the form of written instructions on the permit application form,[158] verbal instructions about the application from gun shop owners, who in rare cases held to be agents of the state, because of their special role in administering the federal applications.[159]

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misled him to believe that collecting child pornography was legal as long as he turned over the material to a government agent).

157. *See, e.g.*, United States v. Bunnell, 280 F.3d 46 (1st Cir. 2002) (holding that there was no basis for a defense of entrapment by estoppel); United States v. Emerson, 2004 WL 180360, No. 03-10104, at *1 (5th Cir. Jan. 28, 2004) (ruling that there was no basis for entrapment by estoppel defense or for ineffective assistance of counsel claim); United States v. Ormsby, 252 F.3d 844 (6th Cir. 2001) (holding that the defendant could not present an entrapment by estoppel defense); United States v. Haire, No. 02-2162, 2004 WL 406141, at *3 (6th Cir. Mar. 2, 2004) (affirming judgment against the defendant that claimed he was not aware that felon-in possession laws have been revised); Hood v. United States, 342 F.3d 861, 863-64 (8th Cir. 2003) (rejecting the defendant's ineffective assistance of counsel claim pertaining to his unlawful possession of a firearm charge); United States v. Batterjee, 361 F.3d 1210 (9th Cir. 2004) (accepting the entrapment by estoppel defense because the defendant reasonably relied on the advice of a government agent); United States v. Scott, No. 01-7124, 2002 WL 1150819, at *2 (10th Cir. May 30, 2002) ("Defendant has failed to establish a reasonable probability that this [entrapment] defense would have changed the outcome of his case and thus failed to establish the prejudice required for a showing of ineffective assistance of counsel"); United States v. Kubowski, No. 02-6343, 2003 WL 23033199, at *4 (10th Cir. Dec. 30, 2003) (denying the defendant's entrapment by estoppel defense because there was no evidence the statements actively misled him); Swartz v. Iowa, No. C00-2065, 2003 WL 32173383, at *1 (N.D. Iowa Aug. 30, 2002); Fehr v. Coplan, No. Civ. 03-59-M, 2003 WL 22489735, at *1 (D.N.H. Nov. 4, 2003); People v. Babich, No. A098521, 2003 WL 21958615, at *1 (Cal. Ct. App. Aug. 18, 2003); People v. Sparazynski, No. 243381, 2004 WL 345371, at *1 (Mich. Ct. App. Feb. 24, 2004); State v. Krzeszowski, 24 P.3d 485, 489-90 (Wash. Ct. App. 2001) (denying the entrapment by estoppel defense because appellant was not affirmatively misled); State v. Leavitt, 27 P.3d 622 (Wash. Ct. App. 2001) (holding that the defendant was misled when he failed to receive notice of the statute prohibiting firearms); State v. Morley, No. 21357-9-III, 2004 WL 171587, at *1 (Wash. Ct. App. Jan. 29, 2004). These are all recent cases; surveys going back further reveal a similar predominance of firearms violations as the underlying substantive offense.

158. *See, e.g.*, United States v. Scott, No. 01-7124, 2002 WL 1150819, at *2 (10th Cir. May 30, 2002) ("Defendant has failed to establish a reasonable probability that this defense would have changed the outcome of his case and thus has failed to establish the prejudice required for a showing of ineffective assistance of counsel"); United States v. Batterjee, 361 F.3d 1210, 1217 (9th Cir. 2004) (accepting the defendant's entrapment by estoppel defense because the defendant reasonably relied on the advice of a government agent).

159. *See, e.g.*, Fehr v. Coplan, No. Civ. 03-59-M, 2003 WL 22489735, at *1 (D.N.H. Nov. 4, 2003); *Batterjee*, 361 F.3d at 1217 (holding that the entrapment by estoppel defense was successful

Some claims assert assurances or tacit approval from courts, police, or probation officers who fail to admonish the defendant properly.[160]

Eligibility requirements — like the no-felon rule for gun licenses — are particularly suited for creating the scenarios where this defense arises. Misstating one's eligibility or hiding disqualifying factors on federal forms are commonplace transgressions, but can still trigger criminal sanctions.[161] This offense, in turn, can constitute a probation violation, and the consequences for some defendants are quite severe.[162] If one thinks of "entrapment by estoppel" primarily in terms of fudging on gun license applications and the like, the limited usefulness of the defense becomes apparent. There is only one academic article devoted to the subject from

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because the defendant reasonably relied on the advice of a government agent); *Scott*, 2002 WL 1150819, at *2 ("Defendant has failed to establish a reasonable probability that this defense would have changed the outcome of his case and thus failed to establish the prejudice required for a showing of ineffective assistance of counsel"); People v. Sparazynski, No. 243381, 2004 WL 345371 (Mich. Ct. App. Feb. 24, 2004).

160. *See, e.g.*, United States v. Haire, No. 02-2162, 2004 WL 406141, at *5 (6th Cir. Mar. 2, 2004) (defendant told by state police he could own firearms; not valid defense on federal charges); United States v. Kubowski, No. 02-6343, 2003 WL 23033199, at *1 (10th Cir. Dec. 30, 2003) (assurances from judge); Hood v. United States, 342 F.3d 861, 865 (8th Cir. 2003) (rejecting the unlawful ineffective assistance of counsel claim for possession of a firearm); Swartz v. Iowa, No. C00-2065, 2003 WL 32173383, at *5 (N.D. Iowa Aug. 30, 2002); Swartz v. Mathes, 291 F. Supp. 2d 861, 872 (N.D. Iowa 2003) (stating that the record shows that the prisoner failed to present his entrapment by estoppel claim as a constitutional issue, and did not overcome this failure by showing cause, prejudice, or a fundamental miscarriage of justice); State v. Johnson, 83 P.3d 772 (Haw. Ct. App. 2004) (manslaughter plea/violation of probation); People v. Babich, No. A098521, 2003 WL 21958615, at *1 (Cal. Ct. App. Aug. 18, 2003) (sheriff returned guns to defendant's possession after confiscation); United States v. Ormsby, 252 F.3d 844, 851 (6th Cir. 2001) (reliance on probation officer); Miller v. Commonwealth, 492 S.E.2d 482, 491 (Va. Ct. App. 1997) (defense successful where probation officer authorized gun possession).

161. *See, e.g.*, United States v. Yermian, 468 U.S. 63 (1984).

162. *See, e.g.*, United States v. Spires, 79 F.3d 464, 466 (5th Cir. 1995) (affirming the trial court's refusal to instruct on the entrapment by estoppel defense because there was no evidenciary basis in the record to support the defense); State v. Howell, No. 97C1824, 1998 WL 807800, at *8 (Ohio Ct. App. Nov 17, 1998); People v. Dingman, 55 Cal. Rptr. 2d 211, 217 (Cal. Dist. Ct. App. 1996); *see also* United States v. Whitecloud, No. 02-50206, 2003 WL 1459508, at *1 (9th Cir. Mar. 18, 2003) (welfare fraud violates probation); State v. Johnson, 83 P.3d 772 (Haw. Ct. App. 2004) (plea agreement in homicide case violated probation in another jurisdiction); Poppell v. City of San Diego, 149 F.3d 951, 965-66 (9th Cir. 1998) (operation of nudist club).

the last ten years,[163] and only two bar journal articles,[164] indicating the small amount of interest this doctrine generates. Eligibility requirements arise in many non-firearms cases as well, especially with certain immigration and illegal re-entry cases.[165]

Like other entrapment defenses, the number of cases in this area has been decreasing for the past few years.[166] The U.S. Supreme Court addressed the doctrine in three cases,[167] the third being in 1973 when the Court actually used the term "entrapment by estoppel." Previous cases

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163. *See* Connelly, *supra* note 152 (arguing that the defense should only apply to crimes not requiring proof of culpable intent, and that the applicability of the defense in a given case should be decided by a judge, not the jury). Two older articles provided some of the conceptual framework for courts addressing this issue before it took on its present name. *See* Recent Case, *State Estopped to Prosecute Criminal Conduct Suggested by Police,* 81 HARV. L. REV. 895 (1968) (discussing *People v. Donovan,* 279 N.Y.S. 2d 404 (Ct. Spec. Sess. 1967)); Note, *Applying Estoppel Principles in Criminal Cases,* 78 YALE L.J. 1046 (1969).

164. Michael S. Pasano et al., *Using the Defense of Entrapment by Estoppel,* 26 CHAMPION 20 (2002); Mark S. Cohen, *Entrapment By Estoppel,* 31 COLO. LAW. 45 (2002). Both articles are descriptive law summaries designed to aid practitioners, without advocating for a significant change in policy.

165. *See, e.g.,* United States v. Mendoza, No. 03-10070, 2004 WL 385678 (9th Cir. Mar. 2, 2004) ("Defendant did not demonstrate that his asserted defense of entrapment by estoppel had a "reasonable probability" of success, so he has not demonstrated prejudice based on his previous attorney's failure to recognize it."); United States v. Alba, No. 01-2510, 2002 WL 522819, at *1 (3d Cir. Apr. 8, 2002); United States v. Miranda-Ramirez, 309 F.3d 1255, 1257 (10th Cir. 2002); United States v. George, 266 F.3d 52, 62 (2d Cir. 2001) (holding that jury instructions were erroneous); United States v. Santana Cruz, 216 F.3d 1074 (2d Cir. 2000); United States v. Ramirez-Valencia, 202 F.3d 1106, 1110 (9th Cir. 2000) (holding that the entrapment by estoppel defense failed because defendant had no reasonable basis to rely on the advice given); United States v. Gutierrez-Gonzalez, 184 F.3d 1160, 1168 (10th Cir. 1999) (holding that the defendant was not entitled to entrapment by estoppel defense because the legal conseling organization he consulted was not a government agency); United States v. Ortegon-Uvalde, 179 F.3d 956, 960 (5th Cir. 1999) (holding that the defendant could not avail himself of the entrapment by estoppel defense because he did not rely on the Immigration and Naturalization Service's erroneous warning); United States v. Aquino-Chacon, 109 F.3d 936, 939 (4th Cir. 1997) (Active misleading did not occur unless the government affirmatively told a citizen that an activity was lawful. The court held that defendant was not actively misled because the notice did not affirmatively state that it was legal to re-enter the United States after five years without the consent of the Attorney General.); United States v. Thomas, 70 F.3d 575, 576 (11th Cir. 1995) (affirming the defendant's sentence because he failed to show that reliance upon the erroneous form when he re-entered the United States).

166. From 1994-1997 the entrapment defense, in federal courts, was raised in forty-two reported cases, from 1998-2001, it was raised forty-nine, and from 2002-2004 only twenty-nine times.

167. United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 675 (1973) (remanding case to allow the corporation to present evidence of its reliance to satisfy the defense of entrapment by estoppel); Cox v. Louisiana, 379 U.S. 559, 572-73 (1965) (holding that the defendant's conviction could not be sustained based on his reliance of the sheriff's dispersal order); Raley v. Ohio, 360 U.S. 423, 440-42 (1959) (finding that the convictions of three defendants were precluded because they were instructed by a government agent that they had a right to refuse to answer questions).

simply called it a due process violation.[168] The federal cases peaked around 1995[169] and have declined since then.[170] This is a rapid rise and fall for a criminal defense. It is very difficult to find any estoppel cases at all before 1981 in the federal district or circuit courts;[171] and there were fewer than five reported cases per year, nationwide, until the early 1990s.[172]

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168. *Pa. Indus. Chem. Corp.*, 411 U.S. at 674.

169. *See, e.g.*, United States v. Achter, 52 F.3d 753, 755 (8th Cir. 1995) (finding that the defense of entrapment by estoppel is excluded because the elements were not satisfied); Roberts v. State, 48 F.3d 1287, 1292 (1st Cir. 1995) (holding that defendant would be given a sentencing hearing with no mandated minimum sentence because his arresting officer failed to tell him all of the consequences that could result from his refusal to take the blood/alcohol test); United States v. French, 46 F.3d 710, 718 (8th Cir. 1995) (affirming the lower court's determination of the length of defendant's sentence and his past criminal history.); United States v. Abcasis, 45 F.3d 39, 43-44 (2d Cir. 1995) (defining all elements of entrapment by estoppel); United States v. Sims, 68 F.3d 476 (6th Cir. 1995); United States v. Kyle, 67 F.3d 309 (9th Cir. 1995); United States v. Light, 64 F.3d 660 (4th Cir. 1995); United States v. Campbell, 65 F.3d 962 (D.C. Cir. 1995) (holding that the defendant was not entitled to entrapment by estoppel because he did not demonstrate any basis for the defense); United States v. Caron, 64 F.3d 713, 719 (1st Cir. 1995) (finding that the petition for rehearing en banc granted but limited to certain issues); United States v. Collins, 61 F.3d 1379, 1383 (9th Cir. 1995) (holding that the defendant's prior felony convictions were properly used as predicate offenses for his conviction and sentencing); United States v. Heavilin, 60 F.3d 835 (9th Cir. 1995); United States v. Valentine, 59 F.3d 171 (6th Cir. 1995); United States v. Neufeld, 908 F. Supp. 491, 498-99 (S.D. Ohio 1995) (holding that entrapment by estoppel barred prosecution); United States v. Indelicato, 887 F. Supp. 23 (D. Mass. 1995).

170. A growing number of these cases, interestingly, have the procedural posture of being ineffective assistance of counsel claims, indicating that the defense functions sometimes as an afterthought or last resort. *See, e.g.*, United States v. Strube, No. 01-3526, 2003 WL 21246540, at *2 (3d Cir. May 30, 2003) (holding that the defense of entrapment by estoppel and outrageous conduct by the government not available to the defendant); United States v. Emerson, No. 03-10104, 2004 WL 180360, at *1 (5th Cir. Jan. 28, 2004) (finding that the defendant had not shown that he had a valid defense of entrapment by estoppel, so he could not have shown that his attorney's failure to request an instruction or to object to the lack of an instruction was professionally unreasonable or that he was prejudiced); Hood v. United States, 342 F.3d 861 (8th Cir. 2003); United States v. Lewis, No. 01-10270, 2003 WL 722128 (9th Cir. Feb. 28, 2003) (finding that a partially redacted article that gave some evidence that defendants were guilty, was not unfairly prejudicial, and thus did not adversely affect the jury's attitude toward defendants apart from their judgment of guilt as to the crimes charged); United States v. Mendoza, No. 03-10070, 2004 WL 385678 (9th Cir. Mar. 2, 2004); United States v. Scott, No. 01-7124, 2002 WL 1150819 (10th Cir. May 30, 2002); *Ex Parte* Dwyer, No. 08-01-00059-CR, 2002 WL 28018 (Tex. App. Jan. 10, 2002).

171. The cases up to 1988 were concentrated in the Ninth Circuit. United States v. Clegg, 846 F.2d 1221, 1223-24 (9th Cir. 1988) (holding that the defense of reliance on government officials was available to defendant); United States v. Burke, 863 F.2d 886 (9th Cir. 1988); United States v. Tallmadge, 829 F.2d 767, 773-74 (9th Cir. 1987) (holding that the prosecution and conviction of defendant for the receipt and possession of firearms violated due process, because he was misled by the government agent who sold him the weapons into believing that his conduct would not be contrary to federal law); United States v. Chen, 754 F.2d 817 (9th Cir. 1985).

172. United States v. Mandel, No. 90-50414, 1991 WL 268719, at *1 (9th Cir. Dec. 16, 1991); United States v. Hurst, 951 F.2d 1490, 1492 (6th Cir. 1991) (finding that defendants were not

The state patterns are different. They are still increasing,[173] although they got off to a much slower start. There are almost no reported state cases before 1988,[174] and then only one or two per year nationwide from 1992 to

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entitled to an entrapment by estoppel instruction because there was no evidence that they were ever told by a state official that their actions were legal); United States v. Brebner, 951 F.2d 1017, 1019 (9th Cir. 1991) (holding that the defendant was not permitted to offer evidence as to his mindset for the defense of entrapment by estoppel because the defense focused on the mindset of the government official); United States v. Fauls, Nos. 90-5554, 91-5385, 1991 WL 206293, at *1 (4th Cir. Oct. 16, 1991); United States v. Mitran, No. 90-1316, 1991 WL 130221, at *1 (7th Cir. 1991); United States v. Smith, 940 F.2d 710, 711 (1st Cir. 1991) (finding that the proposed evidence did not justify a finding of entrapment by estoppel); United States v. Ham, No. 90-5367, 1991 WL 186858, at *1 (4th Cir. Sept. 24, 1991); United States v. Etheridge, 932 F.2d 318, 319 (4th Cir. 1991) (affirming that the district court properly excluded evidence of the defendant's claim that he relied on advice by a state court judge because the government that prosecuted him was not the government that mistakenly and misleadingly interpreted the law); United States v. McErquiaga, No. 90-10242, 1991 WL 45291, at *1 (9th Cir. Mar. 27, 1991); United States v. Hedges, 912 F.2d 1397, 1398 (11th Cir. 1990) (finding that the trial judges refusal to give the requested charge on the theory of the defense of entrapment by estoppel was reversible error); United States v. Austin, 915 F.2d 363, 364 (8th Cir. 1990) (finding that the sales clerk at the pawn shop was not a government official for purposes of an entrapment by estoppel defense); Mount v. Cooperman, No. 89-56193, 1990 WL 125346, at *1 (9th Cir. Aug. 29, 1990); United States v. Reyes Vasquez, 905 F.2d 1497, 1498 (11th Cir. 1990) (holding that the district court properly excluded evidence related to appellant's public authority defense); United States v. Jones, Nos. 89-10127, 89-10128, 1990 WL 94971, at *1 (9th Cir. July 10, 1990); United States v. Hawkins, No. 88-1289, 1990 WL 56143, at *1 (9th Cir. May 2, 1990); United States v. Tapuvae, No. 88-1285, 1990 WL 15093, at *1 (9th Cir. Feb. 14, 1990); United States v. Collamore, 751 F. Supp. 1012, 1014 (D. Me. 1990) (finding that the factual predicates for defendant's assertions were lacking, so his due process claim based on vindictive prosecution failed); United States v. Marcos, No. 555587CR598(JFK), 1990 WL 16161, at *1 (S.D.N.Y. Feb. 15, 1990); United States v. Rodriguez, No. 88-1125, 1989 WL 69934, at *1 (9th Cir. June 23, 1989); United States v. Evans, 712 F. Supp. 1435, 1437 (D. Mont. May 16, 1989); United States v. Brady, 710 F. Supp. 290, 291 (D. Colo. Apr. 6, 1989) (finding that the defendant could not be convicted because his possession of a revolver was in reasonable reliance of a state court judge's erroneous order that he could possess a firearm while hunting); Burkett v. State, 518 So. 2d 1363 (Fla. Dist. Ct. App. 1988) (holding that the "lack of knowledge defense" to a violation of the possession of a firearm by a convicted felon statute, was available only to a defendant who was not aware of his possession of a firearm, not to a defendant who asserted he did not know he was a convicted felon); United States v. Tallmadge, 829 F.2d 767, 768 (9th Cir. 1987); United States v. Hsieh Hui Mei Chen, 754 F.2d 817, 821 (9th Cir. 1985).

173. *Supra* text accompanying note 171. The defense was raised three times from 1994-1997, ten times from 1998-2001, and twelve times from 2002-2004, at least in the cases (published and unpublished) available on Westlaw.

174. *See* Burkett v. State, 518 So. 2d 1363 (Fla. Dist. Ct. App. 1988). There are three or four cases from the early 1970s that discuss the scenarios now typical for this defense under the rubric of "entrapment OR estoppel," using traditional elements for the former and equitable estoppel analysis for the latter, very skeptically. *See, e.g.*, Cohen v. City of New York, 329 N.Y.S.2d 596, 598 (New York 1972); People v. Larson, 308 N.E.2d 148, 684 (Ill. App. Ct. 1974) (finding that elements of the entrapment defense were not met); State v. LeDent, 176 N.W.2d 21, 22 (Neb. 1970) ("[E]stoppel is no defense to a criminal action."); People v. Lawrence, 18 Cal. Rptr. 196, 197 (Cal.

1998.[175] Since then the defense has become more commonplace in the state courts, and the numbers are catching up to the federal cases. This is surprising, in a sense, given the continuing predominance of federal regulatory crimes.

The cases prior to 1981 involved fact patterns that actually blurred the lines between entrapment by estoppel and the traditional entrapment defense, such as bribery cases.[176] An agent posing as a government official pretending to accept a bribe is in some sense being open and explicit about their government status. Nonetheless there is a ruse at work, as with the traditional defense. This recurring fact scenario prevented entrapment by estoppel from developing as a distinct legal doctrine until the 1980s. It is somewhat unfortunate that the terminology choice did not settle on simple estoppel or government estoppel rather than including entrapment. It would have been less confusing, and more descriptive.

Entrapment by estoppel provides another illustration of legal uncertainty and differing levels of access to legal information. The interplay with these concepts differs somewhat from the previously discussed categories of defenses. Sentencing entrapment results from high levels of certainty in punishment rules; entrapment by estoppel results from high levels of certainty in conduct rules, such as eligibility or authorization rules.

Dist. Ct. App. 1962) (finding that the convictions were not erroneous due to the defendant's claim of entrapment).

175. *See* State v. Johnson, No. CA97-07-006, 1998 WL 1701, at *1 (Ohio Ct. App. 1998); Miller v. Commonwealth, 492 S.E.2d 482, 484 (Va. Ct. App. 1997); People v. Dingman, 55 Cal. Rptr. 2d 211, 212 (Cal. Ct. App. 1996) (affirming the trial court's judgment because the statute was not unconstitutionally vague); Commonwealth v. Twitchell, 416 Mass. 114 (Mass. 1993); State v. Fogarty, 607 A.2d 624 (N.J. 1992) (finding that the common law and constitutional entrapment defense was unavailable to defendant because the police had not coerced defendant into driving his vehicle, but instead had ordered defendant to leave in his vehicle, without knowledge of his intoxication, while they were attempting to break up a fight in a parking lot). There are no reported state cases using the phrase "entrapment by estoppel" for the years 1989-91, or 1994-95.

176. *See, e.g.*, United States v. Anderton, 629 F.2d 1044 (5th Cir. 1980) (reversing and remanding because the jury instructions misled the jury); State v. DeKay, 387 So. 2d 570 (La. 1980) (finding no evidence of entrapment); United States v. Sarno, 596 F.2d 404 (9th Cir. 1979); Harary v. Blumenthal, 555 F.2d 1113 (2d Cir. 1977) (affirming the lower court's conviction of public accountant that bribed a special agent of the Internal Revenue Service); People v. Strohl, 57 Cal. App. 3d 347 (Cal. Ct. App. 1976) ("[T]he evidence sufficiently supported the jury's finding that the criminal intent to commit the bribery originated in the mind of defendant, not the agent's or coroner's, and thus, there was no unlawful entrapment."); Johnston v. Nat'l Broad. Co., Inc., 356 F. Supp. 904 (E.D.N.Y. 1973) (finding that a claim of entrapment did not violate the accused's civil rights and was dismissed); United States v. Caracci, 446 F.2d 173 (5th Cir. 1971) (affirming the bribery conviction on June 2, 1971); United States v. Chisum, 312 F. Supp. 1307 (C.D. Cal. 1970).

First, the offenses that give rise to entrapment by estoppel are almost all technical violations of statutes.[177] Many of the defendants could not have been charged with a common-law crime having basic act-intent requirements; instead, the case turns on breaching a line drawn somewhat arbitrarily but still legitimately by the legislature. Licensing and eligibility regulations, such as those pertaining to firearms, sometimes serve an important public policy function, but the parameters themselves are not as much a matter of public morality as the need to have some sort of structure or framework in place. This means that the offenders are unlikely to have moral intuitions or inculcated social norms about the precise requirements of the law. If the rules were unclear, vague, or general, defendants would be better able to rebut the charges on the merits, arguing either that there was a lack of criminal intent or that their behavior did not rise to the level of the criminality contemplated by the statute. The certainty and precision of the rules at issue in these cases create a type of strict liability. Rules on the strict liability end of the continuum are the ones most likely to give rise to an entrapment by estoppel defense.

Greater certainty in legal rules is more likely to give rise to strict liability. There are a few exceptions where statutes have higher gradations of regulatory felonies for knowing or intentional violations, which is the case with some tax fraud regulations. It is not only a type of crime that

177. That is, violating firearm licensing requirements, etc. The main exception to this statement is the line of cases involving former government informants who claim to have had temporary authorization to engage in criminal activity (such as collecting child pornography or storing narcotics as part of a previous sting operation, who continued to do so after their period of authorization ended). *See, e.g.,* United States v. Fulcher, 188 F. Supp. 2d 627 (W.D. Va. 2002) (DEA agent acknowledged that he might have misled the defendant into believing he had authority to investigate drug dealing between guards and inmates, therefore the defense was valid);United States v. Hilton, 257 F.3d 50 (1st Cir. 2001) (arguing that the defendant's previous collaboration with the government mislead him to believe that collecting child pornography was legal as long as he turned over the material to a government agent); *see also* United States v. Clegg, 846 F.2d 1221 (9th Cir. 1988) (government knew and encouraged the defendant to sell firearms); United States v. Rosenthal, 266 F. Supp. 2d 1068 (N.D. Cal. 2003) (arguing that his deputization by the city reflected the federal government's approval of cultivating marijuana, but the defense failed because immunity under the controlled substance act was only granted when enforcing a law under the act); United States v. Guevara, No. 02-1426, 2004 WL 1147091 (2d Cir. May 21, 2004) (claiming that she was recruited by a government informant to distribute heroin, but in order to prevail on the defense the government, not the informant, had to give her actual authority to act as an informant); United States v. Strube, No. 01-3526, 2003 WL 21246540 (3d Cir. May 30, 2003) (claiming that an informant recruited him to help in a government drug trafficking investigation, however the defense failed because he was not directly authorized by the government); United States v. Parker, 267 F.3d 839 (8th Cir. 2001) (claiming he was compiling images of child pornography for government agents, however he did not have authorization by a government agent); United States v. Pickard, 278 F. Supp. 2d 1217 (D. Kan. 2003) (Defendant had a relationship with the DEA and other governmental agencies as an informant, but the defense failed because he could not prove that his conduct in manufacturing LSD was authorized).

lends itself to this defense, but also a level of verbal certainty and precision in the rule itself.

Technical violations also place the citizenry at the mercy of the government for adequate information or notice about the rules. It is harder to guess, for example, what might be the exceptions to the felon-firearm rule, much less the exceptions to the exceptions.[178] Ignorance of the law, however, is generally no excuse.[179] This is the case even with regulatory or technical offenses. Active misinformation or miscommunication might be a defense; and that is the essence of entrapment by estoppel defense.

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178. *See, e.g.*, People v. Dingman, 55 Cal. Rptr. 2d 211 (Cal. Ct. App. 1996); United States v. Tallmadge, 829 F.2d 767 (9th Cir. 1987); United States v. Clegg, 846 F.2d 1221 (9th Cir. 1988); United States v. Bunnell, 280 F.3d 46 (1st Cir. 2002); United States v. Emerson, No. 03-10104, 2004 WL 180360 (5th Cir. Jan. 28, 2004); United States v. Alba, Nos. 01-2510, 01-2907, 2002 WL 522819, at *1 (3d Cir. Apr. 8, 2002); United States v. Marshall, 332 F.3d 254, 257 (4th Cir. 2003); United States v. Ormsby, 252 F.3d 844, 846 (6th Cir. 2001); United States v. Haire, No. 02-2162, 2004 WL 406141, at *1 (6th Cir. Mar. 2, 2004); Hood v. United States, 342 F.3d 861, 862 (8th Cir. 2003); United States v. Batterjee, 361 F.3d 1210, 1212 (9th Cir. 2004); United States v. Gil, 297 F.3d 93 (2d Cir. 2002); United States v. George, 266 F.3d 52 (2d Cir. 2001); United States v. Strube, No. 01-3526, 2003 WL 21246540 (3d Cir. May 30, 2003); United States v. Miranda-Ramirez, 309 F.3d 1255 (10th Cir. 2002); Commonwealth v. Cosentino, No. 2122 C.D.2003, 2004 WL 1103678 (Pa. Commw. Ct. May 13, 2004).

179. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 47 (1991) Holmes noted that this "substantive principle is sometimes put in the form of a rule of evidence, that every one is presumed to know the law"). It is exactly this form of the rule that this section brings into question. *See also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 147-58 (2d ed. 2001); Model Penal Code § 2.02(9) (1996) ("Neither knowledge nor recklessness nor knowledge as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is a defense."). Holmes' explanation includes a strong dose of "tough luck" in typical Holmesian prose:

> The true explanation of the rule is the same as that which accounts for the law's indifference to a man's particular temperament, faculties, and so forth. Public policy sacrifices the individual to the general good. It is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder. It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.

HOLMES, *supra* at 48; *see also* PAUL H. ROBINSON, CRIMINAL LAW 545-53 (1997); DRESSLER, *supra* at 165-77 (summarizing the general rule and its traditional rationales). Dressler notes that ignorance of the law is more likely to constitute a defense if it somehow negates a *mens rea* requirement for the specific crime in question. Sometimes, of course, a mistake of law (which I believe is different from, but overlaps with, ignorance of the law, although Dressler treats them together) can be an excuse where the defendant in the case relied upon an official interpretation of the law, such as an Attorney General opinion letter. *See* Commonwealth v. Twitchell, 617 N.E.2d 609, 619 (Mass. 1993); Miller v. Commonwealth, 492 S.E.2d 482, 484-87 (Va. Ct. App. 1997).

Heightened legal certainty in eligibility or authorization rules creates a special, paradoxical situation: adequate communication of the rule is necessary for compliance but not for liability. Certain individuals — generally, those disqualified from the eligibility in question — could not know the exact parameters of the rule without being told.[180] Yet actual notice or effective communication from the government is not required for conviction, only "constructive notice," that is, some sort of token communication to the public.[181] This conundrum is true with many criminal laws, of course — most people do not know exactly what the laws in their jurisdiction say,[182] which is no defense to crime, while the

180. *See, e.g.*, Doctor's Hosp. of Hyde Park v. Appeal of Daiwa Special Asset Corp., 337 F.3d 951 (7th Cir. 2003) ("There are an enormous number of state laws, and it might be unreasonable to expect a person . . . to determine in advance the possible bearing of all of them."); Torres v. INS, 144 F.3d 472, 475 (7th Cir. 1998) (immigration laws changed without public announcement or publication).

181. *See, e.g.*, North Carolina v. White, 590 S.E.2d 448, 452-53 (N.C. Ct. App. 2004) (Jan. 20, 2004) (quoting State v. Young, 535 S.E.2d 380, 386 (N.C. Ct. App. 2000)) ("Although ignorance of the law is no excuse, . . . due process requires that the defendant have knowledge, actual or constructive, of the statutory requirements before he can be charged with its violation."); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 201, 206-12 (1985); *see also* WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW 217-18 (2003). Regarding strict liability, LaFave says that "some attention should be given here to the question of whether liability may be imposed for an omission when the defendant was . . . unaware of the existence or scope of the legal duty." Some courts refuse to hold defendants liable for crimes of omission without having knowledge of the statute creating the duty omitted, according to LaFave, but courts generally assume that defendants have (constructive) knowledge of statutes when they violate them with affirmative actions.

182. In a recent study of educated citizens in four different states, the results confirmed the hypothesis that "people do not have a clue about what the laws of their states hold on . . . important legal issues." John M. Darley et al., *The Ex Ante Function of the Criminal Law*, 35 LAW & SOC'Y REV. 165, 167 (2001).

government has some technical duty of generalized notice.[183] The tension is more evident, however, with eligibility requirements.

This tension is worse, perhaps, due to the nature of eligibility requirements. People are more likely to engage in wishful thinking or excessive optimism that they are part of an "included group" than they are to think that an act of violence, theft, possession of contraband, etc. is somehow legal. This seems especially true when the "included group" is the majority of the population, as with non-felons who want gun licenses.

Finally, the numbers of cases seem to reflect the changing levels of uncertainty pertaining to the defense itself. The scarcity of cases until recently is rather striking. It is hard to believe that government agents throughout history have managed to communicate better than they have in the last ten years. Rather, it seems that the idea of raising the defense simply occurs to more defendants now that the elements of the defense have been crystallized, as evidenced by the failure rate/weakness of the defense itself in the reported cases. The federal cases, however, did not increase in response to the crystallization of the rule in the early 1970s.

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183. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 264 (1994); *see also, e.g.*, Cambell v. Bennett, 212 F. Supp. 2d 1339, 1343 (M.D. Ala. 2002) (quoting *Landgraf*, 511 U.S. at 264) ("[T]he due-process concept of fair notice. . . . is central to the legitimacy of our legal system: Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."). Probably the most well-known case about the notice requirement in criminal law, at least from the U.S. Supreme Court, is *Lambert v. California*, involving a residency registration law for felons visiting Los Angeles. Lambert v. California, 355 U.S. 225 (1957). The defendant has lived in the city for seven years but did not know about the requirement; the U.S. Supreme Court held that her conviction under the ordinance violated due process rights. *Id.* at 229-30.It is not clear, however, that the Court was concerned entirely with the notice issue, although the opinion certainly relies on that in part; Lambert's crime also involved a simple omission or passive act (not registering), which would not have been a crime at all under common law. *See id.* at 225-30. Moreover, the Court may have simply disliked the residency registration requirement because of the general chilling effect that such requirements have on interstate travel. *See id.* The ambiguity of its holding, and the other complicating factors in the case, have caused it to have little value for precedent compared to other Supreme Court decisions in the criminal law area. *See generally* DRESSLER, *supra* note 179, at 152-54 (discussing *Lambert* and possible interpretations of its holding); LAFAVE, *supra* note 181, at 203.

> It is important to note, however, that the *Lambert* decision does not require legislative tampering with the doctrine that ignorance of the criminal law is no excuse. Ignorance of the law, after all, is an excuse when it negative [sic] a required mental element of the crime, so it would be fairly simple to redraft legislation of the kind condemned in Lambert so that guilt depends upon a knowing violation of a legal duty.

Id. Another reading of the case is that it stands for the notion that unlimited uncertainty – uncertainty in the rules (i.e., vagueness) severe enough to undermine the deterrent effect – is invalid. *See Lambert*, 355 U.S. at 7.

The jump in the number of cases is probably more related to changes in federal gun-licensing laws in the late 1980s or early 1990s, or a shift in focus of federal law enforcement to drug enforcement. The ongoing increase of estoppel cases in state court is probably attributable to the fact that it is a much newer defense at that level, and many states have yet to consider their first test case or apply the defense to a significant range of facts.[184]

V. ENTRAPMENT AND NEW TECHNOLOGY

As crime has gone on-line in recent years, so has law enforcement. Certain crimes, like identity theft, electronic money laundering, and attacks on web sites, depend inherently on the use of computers. It is not at all surprising that solving or preventing such crimes involves computer surveillance and enforcement.

What is more surprising is the use of computers and the Internet for one of the most base, impulse-driven, and unsophisticated sorts of crimes: sexual predation on children.[185] This section is devoted primarily to this crime, rather than on "core" computer crimes, such as hacking and denial of service attacks on web sites. Although these crimes present interesting issues for possible entrapment claims, the tech-entrapment cases themselves are almost entirely focused on pederasty.

Pedophiles find the Internet particularly suited for pursuing their ends; it allows anonymity, freedom from normal social inhibitions, and a wide range in which to search for "consenting" youth to victimize.[186] Apart from

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184. *See, e.g.*, State v. Hagan-Sherwin, No. CR 03-249, 2004 WL 743808, at *1 (Ark. Apr. 8, 2004) (state claimed the defense was not available because it was not a recognized defense in the state, but it was allowed by the court.).

185. An interesting historical observation was made by a federal court in New York:

> The interest of federal law enforcement officers in the flow of child pornography over the Internet was evidently piqued by the much-publicized case involving the abduction of a ten-year old Maryland boy . . . Bureau agents investigating the matter discovered that computer on-line services were being used to entice children into sexual encounters with adults, and that child pornography was being distributed regularly by computer. The Baltimore office of the FBI subsequently spearheaded an investigation wherein law enforcement agents would sign on to computer services and attempt to identify traffickers of image files containing child pornography. Evidence against defendant in the case at bar originated from the Florida Department of Law Enforcement.

United States v. Lamb, 945 F. Supp. 441, 445 (N.D.N.Y. 1996).

186. *See* Gregg, *supra* note 16, at 161-66 (discussing ways in which computers and the Internet facilitate child-related sex crimes); *see also* Yamagami, *supra* note 15, at 550.

recruitment efforts, pedophiles who like to associate with others sharing the same preferences and desires are able to find one another much more easily, to communicate freely across long distances, and to share child-porn images or stories instantly.[187] In rational-choice terms, the transaction and search costs for pedophilia, which once were quite high outside the extended family, have been drastically reduced. While some may contend that on-line sex-related activities simply reflect the real-world of sexual enterprise, pedophilia is a special case that has almost always carried severe social stigma, limited opportunities, and complications with finding cooperative victims. The on-line environment is particularly conducive to the commission of this type of crime.

The Internet is also particularly conducive to certain types of sting operations. To the extent that the Web has altered the landscape for pedophilia, it has also altered law enforcement.[188] It is easy, both in the sense of being simple and cheap, for officers or agents to troll on-line chatrooms posing as adolescents seeking sexual experimentation to lure pedophiles into extended correspondence while accumulating incriminating evidence from conversations and e-mailed images. Eventually they arrange a real-life sexual rendezvous, which usually becomes the occasion and location of the arrest.[189]

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187. *See* Gregg, *supra* note 16, at 161-66.

188. *See* Hanson, *supra* note 16, at 536 ("The ease with which law enforcement officials can assume false identities in cyberspace and the suitability of cyberspace for consensual or victimless crimes indicate a probable increase in undercover sting operations.").

189. *See, e.g.*, United States v. Mitchell, 353 F.3d 552, 555 (7th Cir. 2003) ("Mitchell left his home in Elkhart, Indiana on December 15, 2001, and drove to the pre-arranged meeting spot in the parking lot of a Holiday Inn in Hillside. Once there, he called Dena to let her know that he had arrived. . . . Shortly thereafter, a Sheriff's Deputy posing as Dena approached Mitchell and he was arrested."); United States v. Poehlman, 217 F.3d 692, 697 (9th Cir. 2000) (meeting at hotel in another state, surprised by agents); Commonwealth v. Zingarelli, 839 A.2d 1064 (Pa. Super. 2003) (defendant arrested while waiting at ice cream stand for supposed victim, with a box of condoms, a key to a hotel room prepared with bottle of wine, etc.); State v. Canaday, 641 N.W.2d 13 (Neb. 2003) (finding that the defendant was induced to commit the offense because the undercover agent repeatedly tried to encourage defendant to have sexual relations with her young daughter); State v. Ryerson, 2004 WL 1433672, 2004-Ohio-3353, (Ohio Ct. App. June 28, 2004) ("Appellant arrived at the restaurant at the designated time, stayed there a short while, and then traveled to a nearby gas station . . . [The police] who had been watching appellant from his squad car, followed him into the gas station. There, he arrested appellant and transported him to the police department."); State v. Cunningham, 808 N.E.2d 488 (Ohio Ct. App. 2004) ("arrested by . . . police while attempting to meet 'Molly,' the other supposed fourteen-year-old virgin. Molly was actually a policeman . . ."); State v. Turner, 805 N.E.2d 124, 127 (Ohio. Ct. App. 2004) (involving a minister that arranged through the Internet to commit unlawful sexual acts with a minor); Laughner v. State, 769 N.E.2d 1147, 1152 (Ind. Ct. App. 2002) (arrested at gas station rendezvous).

The rules regulating sting operations, of which the entrapment defense is a major part,[190] have not adapted fully to this new environment.[191] These cases proceed under traditional rules for entrapment in the given jurisdiction, generally resulting in an unsuccessful defense. Those more concerned about overly aggressive law enforcement could see this as a bad trend;[192] those more concerned about the seriousness of this particular crime tend to see the trend of a broken-down entrapment defense as a miniscule move in the right direction.[193]

Traditional rules for entrapment are becoming inapplicable. There are five major problems with applying the traditional rules, which have made the entrapment defense unworkable in these cases to the point of becoming nearly obsolete. First, "predisposition," usually the critical element under the subjective test, is a foregone conclusion in almost all of the cases because the defendants actively log onto certain chat rooms and engage in repeated, typed communications with their intended victims.[194] Second, in states using the objective test, the conduct and conversations of the agents can be very difficult to trace or verify. There is less accountability for government where the enforcement method is cheap and relatively invisible when orchestrated.[195] Traditional stings typically require a host of armed "backup" agents nearby in case the primary undercover operative encounters trouble. Catching pedophiles can be done mostly from a cubicle in an office.[196] In addition, the Internet enables a single officer to entrap multiple individuals at once, as through on-line bulletin board postings.

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190. Apart from internal procedural guidelines for undercover operations, of course.

191. *See generally* Hanson, *supra* note 16, at 536 ("[T]he current entrapment doctrines as applied to cyberspace do not effectively address the concerns behind the entrapment defense . . . [r]equiring law enforcement to meet a reasonable-suspicion standard before engaging in undercover operations would better address those concerns.").

192. *See generally id.*; Graham, *supra* note 15, at 480-83.

193. *See, e.g.*, Gregg, *supra* note 16, at 188-93.

194. *See* Hanson, *supra* note 16, at 541-43 (arguing that the subjective test is inadequate for protecting the innocent in cyberspace).

195. *See id.* at 544-47 (arguing that the objective test is also inadequate to protect innocent individuals from police setups on-line). Hanson's argument on this point is different than the one offered here; he argues that the rules for the objective test are too unclear and unsettled to apply to this new context. I would contend, on the contrary, that the objective test makes it easy for courts to generate bright-line rules, but that the inexpensive on-line setting makes it easy for police to work around these clear rules.

196. There is an underlying assumption in my reasoning that costs contribute to the sense of "reasonableness" for a court evaluating law enforcement methods; questionable methods that involve exorbitant costs are more likely to evoke the ire of the judiciary, I assume, than questionable methods whose cost-benefit justification is readily apparent. Even for those who disassociate rights from efficiency concerns, costs in the real world can function as a proxy for "reasonableness" on the part of the government, because grossly disproportionate devotion of resources to an individual target is likely to evince something unfair and undemocratic.

This feature of on-line entrapment may not be undesirable from a policy perspective, but it is a significant change from the traditional arrangement that the entrapment defense contemplated. Third, the inexpensive, relatively invisible nature of such operations also permits private entrapment to become rampant, which is not the case in off-line settings or with other crimes. On-line vigilantism against pedophiles, in fact, has taken on unexpected proportions. Traditional entrapment rules do not allow consideration of "private entrapment." Individuals tempted, induced or set up by anyone besides a state agent cannot raise an entrapment defense to criminal charges.[197] Historically this was not a problem because most individuals, even if they had the motivation to entrap others, did not have the resources to orchestrate a sting while protecting themselves from retaliation if caught. Private entrapment was therefore a rare occurrence. The Internet has changed this, for better or worse, at least for the crimes perpetrated partly on-line. Fourth, traditional entrapment rules have tended to relax certain evidentiary rules, particularly about the admission of "past crimes."[198] On-line stings present special, new evidentiary problems because the on-line conversations, although recorded on a computer's storage system, are out of context when later submitted as evidence in

197. This is true except in cases of "derivative entrapment," where the private party who entrapped the defendant was in turn entrapped by an agent. United States v. Valencia, 669 F.2d 37, 38 (2d Cir. 1981); United States v. Hollingsworth, 27 F.3d 1196, 1204 (7th Cir. 1994); *see also* LAFAVE, *supra* note 27, § 5.2(a), at 452-54; John E. Nilsson, *Of Outlaws and Offloads: A Case for Derivative Entrapment,* 37 B.C. L. REV. 743 (1996). "Vicarious entrapment" refers to the situation where the original targets of the sting operation act on their own to recruit additional members of the conspiracy; the Valencia court held that if the original party had a valid entrapment defense, the spouse who was subsequently recruited could also use the defense. "Derivative entrapment" refers to situations where the undercover agent uses an unsuspecting middleman as a means of passing on an inducement to a distant target. In rare circumstances, an entrapment defense has succeeded for the distant target. United States v. Washington, 106 F.3d 983, 993-97 (D.C. Cir. 1997). So far, the cases are still quite rare and usually unsuccessful. *See, e.g.,* United States v. Hsu, 364 F.3d 192 (4th Cir. 2004) ("[W]e have expressly refused to recognize derivative entrapment as a basis for an entrapment defense."); United States v. Turner, No. CRA 99-10098-RGS, 2003 WL 22056405, at *1 (D. Mass. Sept. 4, 2003) (derivative entrapment defense held unavailable where intermediary was not found to have been entrapped); United States v. Squillacote, 221 F.3d 542, 573-74 (4th Cir. 2000) ("[I]n the Fourth Circuit, a defendant cannot claim an entrapment defense based upon the purported inducement of a third party who is not a government agent if the third party is not aware that he is dealing with a government agent.").

198. *See* Sorrells v. United States, 287 U.S. 435, 458 (1932) (Roberts, J., dissenting); LAFAVE, *supra* note 27, § 5.2(d), at 458-59. For example, North Carolina has codified this evidentiary exception in its Rules of Evidence. North Carolina Rules of Evidence. Rule 404(b) (2001) makes evidence of "other crimes, wrongs, or acts" inadmissible "to prove the character of a person in order to show that he acted in conformity therewith," but admissible for other purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *See, e.g.*, Di Frega v. Pugliese, 596 S.E.2d 456, 460 (N.C. Ct. App. 2004); State v. Bush, 595 S.E.2d 715, 719 (N.C. Ct. App. 2004).

court. This is essentially a hearsay problem. Unlike physical evidence, these records are easily altered, redacted, and otherwise manipulated after the arrest, without detection or evidence of the alteration.[199] In addition, agents can structure their on-line conversations linguistically to elicit particularly incriminating statements that the defendant may not have made otherwise.[200] Finally, many of these cases frame the charges as "attempt" crimes,[201] with exclusion of a few cases where the charges include the completed crime of sending sexually explicit images to a minor.[202] Attempt

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199. *See, e.g.*, United States v. Poehlman, 217 F.3d 692, 695 n.1 (9th Cir. 2000) ("The government was unable to produce the text of the original e-mail at trial, but Poehlman offered undisputed testimony as to its substance."); State v. Bolden, No. 19943, 2004 WL 1043317, at *7-*9 (Ohio Ct. App. 2004) (State's alleged failure to preserve missing logs of Internet conversations did not constitute *Brady* violation).

200. *See, e.g., Poehlman,* 217 F.3d at 696, n.2:

> Much of the evidence in this case is in the form of e-mail messages sent back and forth between Sharon and Poehlman. In the breezy, informal style of e-mail, there are numerous grammatical, spelling and syntax errors in the messages. Because indicating each mistake with a [sic] would be too distracting, and correcting all of the errors poses the risk of altering the meaning of the messages, we reproduce the messages in their original form, warts and all.

201. Solicitation, closely related to attempt and conspiracy, also appears in these cases, although more often with a "real" child victim. *See, e.g.,* United States v. Dhingra, 371 F.3d 557 (9th Cir. 2004); United States v. Root, 296 F.3d 1222, 1224 (11th Cir. 2002) (attempt to entice minor to engage in sexual activity); *Poehlman*, 217 F.3d at 697 (referring to his initial state-court charges of attempt); United States v. Crow, 164 F.3d 229 (5th Cir. 1999) (involving Internet child exploitation); Commonwealth v. Zingarelli, 839 A.2d 1064 (Pa. Super. Ct. 2003) (refusing to hold that public policy required the elimination of undercover sting operations); Laughner v. State, 769 N.E.2d 1147 (Ind. Ct. App. 2002) (finding that impossibility to commit the crime because the child was actually an undercover agent was not a valid defense); Hatch v. Superior Court, 94 Cal. Rptr. 2d 453 (Cal. App. 2000). Conspiracy charges can be used in jurisdictions allowing a "unilateral" approach to conspiracy (where the only "conspirators" besides the defendant are government agents). State v. Canaday, 641 N.W.2d 13 (Neb. 2002) (where the entrapment defense happened to be successful).

202. *See, e.g.,* People v. Martin, No. 231621, 2001 WL 1699653, at *1 (Mich. Ct. App. Dec. 28, 2001). At least one court considers attempted sex crimes with children to be a completed crime of sexual abuse of a minor, even though the "minor" was a middle-aged undercover agent in an Internet chat room. *See* People v. Chow, No. 229036, 2002 WL 857763, at *1 (Mich. Ct. App., May 3, 2002). There are several other examples where the statute at issue allows the prosecution to charge the defendant with a completed crime. *See, e.g.,* United States v. Mitchell, 353 F.3d 552 (7th Cir. 2003) (defendant charged with federal crime of traveling across state lines for sex with a minor, pursuant to 18 U.S.C. § 2423(b)); United States v. O'Brien, 2001 WL 1609763 (9th Cir. 2001) (same); State v. Snyder, 801 N.E.2d 876, 880 (Ohio Ct. App. 2003) (soliciting underage female on-line and going to prearranged meeting place constituted crime of "importuning" under Ohio law). Some cases, of course, include charges for both types of offenses. *See, e.g.,* State v. Ryerson, No. CA 2003-06-153, 2004 WL 1433672, at *1 (Ohio Ct. App. June 28, 2004) (attempt and "importuning"); Kirwan v. State, 96 S.W.3d 724, 725 (Ark. 2003) (attempted rape and

charges have a strange interplay with certain defenses. Most jurisdictions use a test requiring only that the defendant take some "substantial step" toward the commission of an offense in order to be convicted of attempt. This step itself does not necessarily have to be an illegal action.[203] Not having to wait for a completed crime or transaction allows law enforcement to use simplified stings, and prosecutors to muster less evidence than with some substantial offenses that require proof of harm or injury. The abbreviated fact pattern of an attempt charge gives the defense less with which to work in concocting an entrapment defense.

Under the subjective test, it may be easier to prove that a defendant was "predisposed" to attempt a crime than to complete it since it often takes more resolve and planning to guarantee one's criminal goal than to simply take a substantial step in that direction.[204] Under an objective test, it may take somewhat less government inducement to prompt an attempt, as opposed to a completed crime, for the same reasons; thus thee is less likelihood of objectionable activity by the agents. In addition, the best defense to attempt charges traditionally was "factual impossibility. Situations where the crime went uncompleted are often ones where completion became impossible for some reason. Yet an "impossibility" theory for the defendant may be mutually exclusive with an entrapment defense. This is particularly true where the latter requires an ex ante admission of committing the crime charged. Thus, it can greatly complicated or weaken a defense to argue alternatively both impossibility and entrapment.

There may be good reason to leave the entrapment defense behind in on-line pedophile cases. As discussed above, the Internet drastically reduces the search and transaction costs for sexual predation on minors, creating an artificially conducive environment for the crime. On-line sting operations offset this effect, not only by catching perpetrators, but also by creating a chilling effect in the chat rooms generally. The uncertainty introduced by the presence of an unknown number of undercover agents on-line can function as a deterrent that is not only healthy, but perhaps necessary in order to re-establish a balance. If the entrapment defense is both infeasible and undesirable in one particular area such as this, then

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"pandering" obscenity via e-mail); People v. Superior Court, No. #024495, 2003 WL 21246774, at *1 (Cal. Ct. App. 2003) (included both charges of attempt and charges of the completed crime of distributing harmful material to a minor over the Internet, a violation of California Criminal Statutes § 288).

203. *See generally* Audrey Rogers, *New Technology, Old Defenses: Internet Sting Operations and Attempt Liability*, 38 U. RICH. L. REV. 477, 502-07 (2004) (discussing the problems of applying attempt liability to Internet child-sex crimes, and suggesting a more robust *mens rea* requirement as a possible solution).

204. This would be a general problem with mixing entrapment under a subjective test with attempt charges for any crime, not just on-line sexual predation.

concerns of judicial economy may justify abandoning it in this narrow class of cases.

If there is a need to preserve the entrapment defense for innocent citizens who somehow become beguiled by sexual conversations with an apparent child on-line, two options exist. First, an exclusionary rule for on-line entrapment-related evidence would bolster the accuracy of the results in these cases,[205] even if exclusionary rules have doubtful effect on the police themselves.[206] Adoption of this rule across the board is not suggested — only for on-line sting operations, where the recorded text of conversations is particularly susceptible to tampering. The technology is widely available to automatically record on-line conversations from a given computer. A simple rule requiring certification that such recording was running all the time would suffice.[207]

The second proposal is to build entrapment safeguards into the elements of attempt, rather than having entrapment function as an affirmative defense. Audrey Rogers, for example, has suggested incorporating a clearer definition of the requisite intent for criminal

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205. Australia handles entrapment as an exclusionary rule rather than an affirmative defense. *See, e.g.*, Paul Marcus & Vicki Waye, *Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds*, 12 TUL. J. INT'L & COMP. L. 27, 72-79 (2004); Ridgeway v. Regina, 184 C.L.R. 19 (1995).

206. *See, e.g.*, Slobogin, *supra* note 34 (using behavioral and motivational theory to demonstrate why the rule is structurally unable to deter individual police officers from performing most unconstitutional searches and seizures, as well as showing that the rules present troubling dilemmas for judges due to defendants with "dirty hands"); Carol A. Chase, *Rampart: A Crying Need to Restore Police Accountability*, 34 LOY. L.A. L. REV. 767 (2001) ("Rather, the 'penalty' for police officer misconduct is suppression of evidence, which often renders a case unprosecutable, thus benefiting the criminal defendant while simultaneously failing to penalize the law-breaking police officer.").

207. Several commentators have argued for a modified entrapment defense for on-line crimes that requires a showing of individualized "reasonable suspicion" on the part of law enforcement to justify the sting operation — a concept borrowed from constitutionally-based exclusionary rules. *See, e.g.*, Hanson, *supra* note 16, at 547-51; Maura F.J. Whelan, Comment, *Lead Us Not Into (Unwarranted) Temptation: A Proposal to Replace the Entrapment Defense with a Reasonable-Suspicion Requirement*, 133 U. PA. L. REV. 1193, 1216 (1985); Jack B. Harrison, Note, *The Government as Pornographer: Government Sting Operations and Entrapment:* United States v. Jacobson *916 F.2d 467 (8th Cir. 1990)*, rev'd, *112 S. Ct. 1535 (1992)*, 61 U. CIN. L. REV. 1067, 1088-94 (1993); Zabriskie, *supra* note 72, at 244; Teri L. Chambers, Note, United States v. Jacobson*: A Call for Reasonable Suspicion of Criminal Activity as a Threshold Limitation on Governmental Sting Operations*, 44 ARK. L. REV. 493, 510 (1991). Entrapment is a common-law defense; the U.S. Supreme Court has not recognized it as a constitutional issue, like the exclusionary rules. Catching on-line pedophiles seems to be the worst possible scenario for implementing such a requirement (although government pandering of child pornography, as in *Jacobson*, is a different matter), where waiting for reasonable suspicion will often mean waiting for a child victim to be discovered.

liability on-line, to account for varying levels of user error or confusion.[208] Another approach would involve nothing more than specifying what qualifies as a "substantial step" for attempt, that is, something off-line and objective.[209] Almost all the cases involve stings that culminated in an arranged meeting at a motel or restaurant. Requiring some sort of incriminating statement at the supposed rendezvous confirming the defendant's continuing intention would not be particularly burdensome on the police and it would make the results of the cases more predictable and certain. Of course, such a move would make the entrapment defense unnecessary in these cases. Given the state of the defense, it is justifiable to develop a policy that wastes fewer judicial resources on doomed, declining defenses.

VI. CONCLUSION

Studying the entrapment defense in terms of the numbers and varieties of reported cases provides a fascinating glimpse into the trends in our criminal law system. The classic defenses studied in law school are not simply sets of rules and exceptions. Some go through long periods of disuse, then become popular issues of litigation, and then fade again toward disuse. It is also interesting to see that the "entrapment defense" is actually a number of conceptually distinct defenses or claims that are often clustered together.

The numbers of cases in which these defenses fail is also very telling. Studying a defense as a set of elements or rules often involves looking at

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208. Rogers, *supra* note 203, at 510-23; *see* Yamagami, *supra* note 15, at 570-78 (arguing that the intent rules are already too lax).

209. Attempt liability draws an imaginary line, so to speak, between "mere preparation" and a "substantial step" toward consummation of the offense; the latter triggers criminal liability, which is not present up to that point. The exact placement of this line, however, is somewhat uncertain in most jurisdictions, with courts defining "substantial step" mostly on a case-by-case basis. If we conceive the defendant as moving along a continuum from "mere preparation" to completion of the crime, whether the continuum consists of a series of steps or the passage of time, then sting operations present the troubling scenario of helping the criminal skip some of the steps or time that the crime would usually require, arriving at the line of a "substantial step" more quickly or easily. If the usual progression, however, is also a progression of accumulated culpability, then the defendant whose crime was facilitated in some way by undercover agents has arrived at the threshold of criminal liability without passing through the usual process of accumulating culpability or blameworthiness. One way to account for this accelerated blameworthiness may be to have a clearer, more objective line for "substantial steps." With computer-related crime, one obvious way to do this would be to have the step from on-line activity to real-world actions constitute a bright-line rule for liability. This would be less useful where the charges involve completed crimes of sending obscene material to minors, but more useful in situations where the defendant goes to a prearranged location to meet his supposed victim, and later denies having an intention to consummate the crime with a minor.

some exemplary cases or hypothetical situations where the requirements are met. This, in turn, can create the impression that the defense simply works when certain elements happen together. Recognizing that the defenses fail the vast majority of the time enriches our understanding by adding a functional dimension. The defenses are often a last resort for defendants in rather desperate situations. The procedural posture of a number of cases supports this conclusion. Studying entrapment by the numbers reveals a defense on the decline.

Mathematical, precise rules for matters such as sentencing or gradation of felonies influence this area in a very concrete way — particularly with sentencing entrapment, but also in other entrapment defenses. Issues of legal certainty and uncertainty affect all these cases in two ways. First, as legal rules become more detailed and enumerated, there arises a significant disparity in the legal information readily available to state agents as opposed to potential defendants. This informational disparity operates in the background of each of the scenarios that give rise to the entrapment defenses. Some legal rules become so precise and mechanical, numerical benchmarks take on increased importance, whether in specified amounts of contraband for certain sentencing factors or numbers of previous convictions. As seen in the foregoing discussion, there is a sense in which many defendants are entrapped by the numbers. Second, as courts rule on a larger number of cases asserting an entrapment defense, an individual defendant is better able to assess the chances of succeeding on the defense in quantifiable terms, which makes pleas more likely. The greater certainty in these numbers helps explain the decline of the defense, both in frequency and procedural strength.

New technology has changed the playing field for certain crimes, like sexual predation on children, and at the same time has transformed the nature of law enforcement efforts against these very crimes. The traditional rules of entrapment do not adapt well to this new environment, and change is needed. While it may be possible to revamp the existing defenses to address these developments, it may be more efficient to build entrapment principles into the elements of the crimes themselves, achieving the same goals with better judicial economy.

The approach taken in this Article, although novel, could be used for fruitful research in other areas of criminal law as well. It would enrich our understanding of all the classic criminal defenses to analyze their functional role in our justice system and their numerical relevance for defendants today. In addition, the effects of legal uncertainty on each defense could be an important consideration for future policy discussion.