

ENTRAPMENT AND THE PROBLEM OF DETERRING POLICE MISCONDUCT

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ABSTRACT:

Many the states currently use a version of the entrapment defense known as the “objective test,” which focuses solely on the extent of police overreaching in the case, and seeks to deter police misconduct by acquitting the defendant. Acquitting defendants as a means of deterring undercover police misconduct, however, is a public policy fraught with problems, and these problems have not been adequately addressed in the literature to date. This article applies the insights of modern deterrence theory to wrongful activity by police in undercover operations. In doing so, three general problems emerge. First, the objective test relies on an indirect or inverted form of deterrence, where the wrongdoer’s punishment consists entirely of a benefit or windfall conferred on a third party, the defendant. It is uncertain how such indirect deterrence factors into the decisionmaking process of police. Second, the objective test breaks down at the individual level. Individual officers may be pursuing less noble ends than the ultimate conviction of an arrestee, in which case the intended deterrence is inoperative. Third, and most significant, entrapment is not a constitutional defense, unlike the exclusionary rules, and therefore does not trigger the “fruit of the poisonous tree” doctrine; this allows even conscientious police to risk a successful entrapment defense being raised by the accused, if there is the potential for “greater payoffs” in the form of discovering evidence of other crimes, deterring members of a criminal conspiracy, or incriminating third parties.

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The Book of Numbers treats us to a colorful story about a freelance prophet named Balaam whose donkey begins to talk one day, questioning a harsh and unjustified beating the seer had just inflicted.¹ The brief exchange centers on the donkey's query whether he had ever before disappointed his owner in their years together as beast and burden (Balaam rode the donkey). Balaam, fuming over his animal's behavior that day, concedes that indeed the donkey had never evinced such a predisposition, but stammers that he is mad enough to kill the donkey regardless.²

Balaam was riding that day to a business meeting with a new client; the account promised to be very lucrative. The local autocrat (of a small nation called Moab)³ was alarmed at the sudden arrival of hundreds of thousands of wandering Hebrews within his borders.⁴ The

¹ See NUMBERS 22:28-30. Numbers is the fourth book of the Old Testament, with authorship traditionally ascribed to Moses (thus including it in the Jewish Torah). It generally chronicles Israel's meandering journey through the arid wilderness of Sinai. The character Balaam appears suddenly in Ch. 22 as a mysterious figure who seems to have direct communication with the God of Israel, but is not himself part of the Israelite community. The New Testament refers to him alternately as a prototype of spiritual leaders who exploit their position for financial gain (see II PETER 2:15; JUDE 1:11), and of spiritual leaders who dilute the faith by condoning moral compromise (see APOCALYPSE 2:14).

Other commentators consistently use another biblical story—that of Eve blaming the serpent for beguiling her into eating the forbidden fruit in Genesis 3:3—as the original example of the entrapment defense, but I dislike this particular analogy. See, e.g., PAUL MARCUS, *THE ENTRAPMENT DEFENSE* 7 (1989) (Marcus' book, incidentally, appears to be the only treatise devoted entirely to the entrapment defense); Rebecca Roiphe, *The Serpent Beguiled Me: A History of the Entrapment Defense*, 33 SETON HALL L. REV. 257 (2003); Gregory Deis, *Economics, Causation, and the Entrapment Defense*, 2001 U. ILL. L. REV. 1207, 1211 (2001); David Elbaz, *The Troubling Entrapment Defense: How About An Economic Approach?*, 36 AM. CRIM. L. REV. 117, 118 (1999); Christopher Moore, *The Elusive Foundation of the Entrapment Defense*, 89 NW. U. L. REV. 1151, 1153 (1995); Fred Warren Bennett, *From Sorrels to Jacobson: Reflections on Six Decades of Entrapment Law and Related Defenses in Federal Courts*, 27 WAKE FOREST L. REV. 829, 831 (1992). The original reference to Eve and the Serpent in the context of entrapment doctrine comes from a New York case, *Board of Commissioners v. Backus*, 29 How. Pr. 33 (N.Y.Sup.Ct. 1864), which rejected the defendant's attempt to use the entrapment defense (before it was accepted by any court). The reason I do not find this story very relevant is that it involves mere temptation (not a terribly aggressive inducement, unlike most entrapment cases), and says little about the predisposition of the supposed victim (Eve). These are the two issues that generate most of the controversy in modern entrapment law. The Balaam story is rich with both of these themes. I begin with this story not because it has any historical connection to the evolution of the common-law defense of entrapment, but because it provides an excellent introduction to the troubling policy issues involved.

² See Numbers 22:30-31 ("I wish I had a sword in my hand, for now I would kill you!"). An angel then appears, explaining to Balaam that the donkey had been trying to save him from an unseen danger on the way. Numbers 22:31-34.

³ See Numbers 22:4 ("Balak the son of Zippor was the king of the Moabites at that time.").

⁴ See Numbers 22:2, 5. Stories preceded them: tales of plagues and pestilence befalling their enemies elsewhere.

Moabite ruler thought to hire a mystic to place a curse on the intruders. Enormous sums were waiting as a reward, so Balaam set off;⁵ the strange experience with the donkey occurred along the way.⁶

After several unsuccessful attempts to curse the people, Balaam used an alternate strategy: he tricked the people into doing something evil, so they bring a curse on themselves.⁷ This plan worked *very* well; within days, the Israelite camp lay in the throes of plague and pestilence.⁸ The curse they brought on themselves was worse than anything Balaam could have uttered himself.⁹ A homily on this story might focus on the idea of sin as a latent evil within that can be more dangerous to us than the evils without.¹⁰ The entrapment scheme, which was very effective, highlighted the innate proclivity of the individuals—even the “chosen people” in the story— toward evil. Perhaps Balaam had learned something from his donkey’s speech on the way there. Predisposition, argued the donkey, should exonerate the innocent. Predisposition, realized Balaam, would make it easy to entrap the not-so-innocent.¹¹

⁵ See Numbers 22:16-17.

⁶ When Balaam finally arrives, his host is peeved that he is late and implores him to set to work with the cursing immediately. The next few hours do not go well: as Balaam offers animal sacrifices and prepares to prophesy, his lips involuntarily pronounce a glorious blessing upon the Israelites instead of the curse. The king is furious; Balaam suggests they retry the procedure on another hilltop nearby, with the same result. And so goes the rest of the day. The plan backfires, and Balaam explains, in so many words, that he is dealing with spiritual forces out of his league.

⁷ He and the king sent some Moabite “bad girls,” into the Israelite camp to peddle sex and food that was dedicated to pagan idols. See Numbers 25:1-2.

⁸ See Numbers 25:9 (“And those who died in the plague were twenty-four thousand.”). In the nick of time, a young up-and-coming priest intervened (rather aggressively) and saved the day; but that really *is* another story.

⁹ Balaam’s inability to cast a spell, as it were, highlighted Israel’s privileged status as a people group; they had omnipotent deity on their side.

¹⁰ A few other commentators have used the story to illustrate or explain various points. See, e.g., Clifford S. Fishman, *The Mirror Of Justice Lecture*, 51 CATH. U. L. REV. 405, 408-9 (2002) (discussed because a later Rabbinic gloss stated that the Israelites escaped cursing that day due to the way their tents were arranged, preventing anyone from seeing inside); Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127, 149-50 (1998) (the story is explained because another passage is cited that mentions it); Lawrence Zelenak, *Thinking About Nonliteral Interpretations Of The Internal Revenue Code*, 64 N.C. L. REV. 623, 670 n. 281 (1986).

¹¹ Balaam himself also illustrates the theme of entrapment and predisposition running through the story. When first approached by the king via messengers, Balaam refuses to go because God forbid him. The king responds by sending more prestigious dignitaries as messengers and a caravan with carts full of treasure. Balaam really wants to go; he obtains spiritual “permission,” but his decision was still displeasing to God. The way Balaam

“Predisposition” was adopted by most common law judges as the test for the validity of an entrapment defense.¹² In a nutshell, the criminal defendant who is caught red-handed by police may argue that she is the victim of a “sting” operation that has gone too far—that the authorities had managed to corrupt an otherwise good person into a criminal.¹³ The harm envisioned by this doctrine (which is an affirmative defense) occurs when there is overreaching by police, but the real concern in most jurisdictions is protecting the innocent from police operations that should only ensnare the unwary wrongdoer.¹⁴ In practice, then, the inquiry under the majority rule focuses on the defendant’s “predisposition” as the determinative factor.¹⁵ Like Balaam’s donkey, if the defendant’s history leading up to the misdeeds contains no hint of dishonesty or corruption, the defendant becomes a victim, a helpless but loyal subject under the weight of corrupt authorities. If, on the other hand, the evidence reveals the defendant’s proclivity for the offense, the craftiness of the state’s agents is irrelevant; it merely provided an opportunity, through the occasion or through temptation, for the offender to show his true disposition. There is no question in the biblical narrative that the judgment was just; a surface reading of the story leaves the reader wondering what those Israelites were *thinking*, as they

refuses the first invitation hints to his solicitors that he really wants to go and appears to invite the sweetened deal offered the second time.

Balaam’s own tainted legacy teaches the same moral: later biblical authors remembered him as a morally flawed spiritual figure who lunged at the opportunity to go astray when the right enticement came, chafing at admonitions from the highest source. Balaam understood how easy it can be to entrap someone predisposed to fall, because he knew himself.

¹² See Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163 (1976) (hereinafter “Park”), for 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. His article became one of the seminal works in the area for over two decades—if not *the* seminal article, in any case—as evidenced by the heavy reliance placed on it by the only book-form treatise on the subject, MARCUS, *supra* note 1, and Wayne LaFave’s treatise, CRIMINAL LAW § 5.2 (3rd ed. 2000).

¹³ See, e.g., Park, *supra* note 12 at 164.

¹⁴ See MARCUS, *supra* note 1, at 55 (“The overwhelming concern is with the ‘otherwise innocent’ person, not with the nature of the government activity.”).

¹⁵ See Park, *supra* note 12 at 165. 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

jumped at the chance to engage in crimes of moral turpitude and to dabble in the dark arts, all under the watchful gaze of their omniscient deity. The story elicits conflicted moral reactions: pity for the people for their acute suffering, but frustration at their self-sabotage, and unbelief that the protagonists of the book would nearly spoil everything for themselves in spring-break style revelry. These are the chosen people, after all, not the cast from *Animal House*.

Balaam is no hero, either, and this makes the story even more unsettling. That one could have the spiritual perceptiveness to moral hazard posed for his adversaries, and at the same time the impiousness to carry out the plan, is rather devilish. Intelligent evil, or insidious genius, triumphs over gullible—almost juvenile—partymongering. It is Balaam's presence in the story that ambiguates its moral message. The Israelites' headlong plunge into disobedience is somewhat shocking, but the fact that they were set up so effectively evokes some degree of sympathy—or perhaps empathy. Balaam spins the moral compass.

A similar type of compass-spinning has prompted a substantial number of courts—now over a dozen states¹⁶—to switch to a different rule for entrapment, one that focuses on the conduct of the authorities.¹⁷ If the defendant claims to be simply a guest player in a crime mostly perpetrated by the police themselves, these courts acquit a defendant in light of the state's dirty hands. Under this approach, the inquiry focuses on the actions of state agents.¹⁸ The policy goal is to deter police misconduct, even if this means letting some genuine criminal types go

commentators universally use the original terms. Readers of his article, however, will have to adjust to his unique nomenclature.

¹⁶ See Note, “*The Government Made Me Do It*”: A Proposed Approach to Entrapment Under *Jacobson v. United States*, 79 CORNELL L. REV. 995, 1002 (1994)(listing thirteen; but the rules are constantly changing in the state courts and legislatures, with sometimes the courts 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 (Ala. 1969).

¹⁷ See MARCUS, *supra* note 1, at 42-47, 83-113; Park, *supra* note 12, at 171-76 (Park uses the terminology “hypothetical person defense” for what everyone else calls the “objective test” for entrapment); LAFAVE, CRIMINAL LAW 456-58.

¹⁸ *Id.*

free. The acquittals are used to punish the rogue police.¹⁹ The emphasis is not on protecting the innocent, but on reigning in the state when it begins to overreach. The idea seems to be that police engage in sting operations in the first place because they want to catch criminals and have them go to jail, and that the police will not risk having this objective (conviction/incarceration) thwarted.²⁰

The former approach, deciding the case based on the defendant's predisposition, is usually called the "subjective" approach, and has the United States Supreme Court as its most celebrated sponsor.²¹ The latter approach, deciding a case based solely on the presence of police misconduct, is called the "objective" approach, and it has the pedigree of overwhelming support from the law review articles on the subject,²² and, significantly, the drafters of the Model Penal

¹⁹ It is not clear if the implicit value judgment is that rogue police are more dangerous than rogue criminals, either because they have betrayed the public trust or because their evil is combined with the state's coercive power, or if there is an unspoken belief that rogue criminals will be back in court soon enough for us to be able to spare one occasion for teaching the bad cop a lesson. While other commentators have addressed this type of moral complaint—that the objective test lets the guilty go free—this is completely outside my scope. My concern is entirely pragmatic in this article.

²⁰ Model Penal Code § 2.11 comment 406-7, 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. Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 Oxford J. Leg. Stud. ____ (2004) (forthcoming, manuscript on file with author).

²¹ That is, a consistent majority on the Court, although the early cases had consistent dissenters favoring the other approach. See *infra* note 66 and corresponding text; see also *Sorrells v. United States*, 287 U.S. 435, 53 S.Ct. 210 (1932); *Sherman v. United States*, 356 U.S. 369 (1958), *U.S. v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). The importance of Supreme Court endorsement of a particular criminal defense should not be underestimated; with the increasing federalization of criminal law in the United States, the federal rules (including this, which is really a federal common-law rule) take on correspondingly greater importance. See William J. Stuntz, *The Pathological Politics Of Criminal Law*, 100 MICH. L. REV. 505, 517-19, 525 (2001). Federal criminal law may incorporate more crimes that are conducive to enforcement via sting operations (for example, drug laws, laws about importation of illegal aliens, other smuggling laws, regulation of weapons sales, etc.), further increasing the important of federal rules for the area of entrapment.

²² See, e.g., MARCUS, *supra* note 1, at 106 ("[T]he vast majority of legal scholars regard the objective test favorably."); Deis, *supra* note 1, at 1218 (Deis himself does not favor the objective test but acknowledges that he is in the minority in the academy); Park, *supra* note 12, at 167. When Park wrote in 1975, he could only find one lone 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 DeFeo, *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 notes that there had been over one hundred student notes from the same period almost uniformly advocated for the objective test (my own research indicates that this continues to be a disproportionately popular subject for student

Code.²³ In some cases, the facts are such that either approach would yield the same result;²⁴ in the cases where the differing approaches would yield different outcomes, the subjective approach may be less favorable to defendants, and the objective approach more “merciful.”²⁵

This article provides a new contribution to the fields of deterrence theory and civil libertarian concerns about police misconduct by looking at the interplay between the two. The thesis is that using a defendant’s acquittal to deter police misconduct—the purported purpose of the “objective test”—is unlikely to work. Whatever the other relative merits of the two approaches may be (in terms of accuracy in fact finding, fairness and justice, etc.), the stated pragmatic purpose of the objective test is illusory.

While the last three decades have seen the development of a rich body of literature on deterrence theory,²⁶ mostly from the “law and economics” field, the literature focuses almost

comments and case notes). Justice Stewart noted the clear tilt of the academy to his side when he dissented in *United States v. Russell*, 411 U.S. 423, 445 n.3 (1973)(Stewart, J., dissenting).

²³ See Model Penal Code § 2.13 (1980).

²⁴ Where the accused had no predisposition to commit the crime, and is generally an innocent, upstanding citizen, the scheme used to entrap the individual is often so extreme that it would fail under either test, resulting in an acquittal. On the other hand, in many cases where the defendant *did* have a predisposition to commit the crime, the police will not have to resort to such drastic measures to catch the individual, thus resulting in a conviction under either rule. Unfortunately, cases are not always so clear-cut.

²⁵ This is not to say that the defendant always loses under the subjective approach or always wins under the objective approach. The results under either approach can go both ways; about half the Supreme Court cases on point have favored the defendant, even though the subjective approach was used. And some courts may be difficult to shock when it comes to underhanded police work, which is the challenge of the objective test. Overall, though, the subjective test puts the defendant’s character at issue, after it is a settled matter that the defendant actually committed the crime charged; a defendant with a spotty past can escape the spotlight in a court using the objective test; the spotlight instead is on the police. It is worth noting at the outset that a few courts try to use both approaches in tandem, a hybrid approach, which will be discussed later.

²⁶ See e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 69 (1968); RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 218-27 (6th ed. 2003) (describing deterrence in terms of the equation $D=pL$, where D represents the deterrent value, p represents the likelihood of detection and punishment, and L represents the sanction or liability itself). Most of the modern approaches to deterrence focus on the rational mind and calculating decision-making mechanisms, instead of primal emotions like fear (or even morality). See DAVID FRIEDMAN, *PRICE THEORY* 459-65 (1986); George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970); Floyd Feeney, *Robbers as Decisionmakers*, in *THE REASONING CRIMINAL* 53-71 (Cornish & Clarke, eds. 1986); Maurice Cusson & Pierre Pinsonneault, *The Decision to Give Up Crime*, in *THE REASONING CRIMINAL* 72-81 (Cornish & Clarke, eds. 1986); the oldest work in this area seems to be CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* (1764). See also the recent work of Hashem Dezhbakhsk, Paul H. Rubin, and Joanna Shepherd, in *Does Criminal Punishment Have a Deterrent Effect? New Evidence from Postmortality Panel Data*, 5 AMER. L.

entirely on criminals and their responses to sanctions, but not on the judiciary's attempts to keep the *police* in line. Entrapment provides fertile grounds for beginning this inquiry; the implications may reach other areas, such as the exclusionary rules.²⁷ The literature on the entrapment defense also needs more development; many articles have analyzed important Supreme Court cases on the subject, or have argued for one test or another (or a mixture). There is a need to address the practical problems with achieving the results the objective test is designed to produce, that is, with using the entrapment defense to deter police misconduct.²⁸

Of course, no one likes police misconduct; no citizen, honest or not, wants to find herself entangled in a web of overreaching by duplicitous authorities.²⁹ That being said, the academic literature on entrapment—as well as many well-written, well reasoned court opinions adopting the objective test—have mostly ignored the question of whether it actually deters bad police work effectively. Entrapment may be unfair, unjust, and verging on totalitarianism; it may be

& ECON. REV. 344 (2003), assessing the effects of the death penalty by analyzing fluctuations in crime rates immediately after a death sentence is carried out. The authors conclude there is a strong deterrent effect.

²⁷ Some of these arguments, or at least related arguments, have in fact been used by a few commentators against the Fourth Amendment exclusionary rules; but the exclusionary rules themselves are outside the scope of this article, and there is not a perfect overlap in issues (given the lack of constitutional treatment for entrapment). See, e.g., Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363 (1999) (hereinafter Slobogin, *Why Liberals Should Chuck*) (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”).

²⁸ Park touched on some of the points I discuss regarding the problems of controlling police behavior through the objective test, but he focused almost entirely on the problem of formulating clear rules and getting officers to understand them. See Park, *supra* note 12, at 225-34. This article adds to his work substantially.

²⁹ For a wonderful discussion of the problems with police misconduct in general (not just sting operations), and institutional problems of deterrence, see Barbara E. Armacost, *Organizational Culture and Police Misconduct*, available at <http://ssrn.com/abstract=412620>. In general, Armacost details several cases of departments with chronic abuse (excessive force, coerced confessions, corruption) and argues that effective solutions must take the form of sweeping institutional changes instead of deterrents targeted at individual officers, whether disciplinary sanctions or individual tort actions.

Entrapment, however, seems ill-suited for §1983 actions, given that such claims are reserved for “constitutional” torts. See, e.g., *Monell v. New York City Dep’t of Social Services*, 436 U.S. 658, 691-692 (1978) (“... Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.”). Entrapment is a defense, but not a constitutional matter; it is questionable whether it should qualify as a “constitutional tort.” For a criticism of the Monell rule in the context of the exclusionary rules, see Slobogin, *Why Liberals Should Chuck*, *supra* note 27 at 397.

wasteful,³⁰ or an unsound use of public resources; and it may violate the Constitution in one or more ways.³¹ All of these may be valid reasons to allow a generous entrapment defense to the accused. Acquitting defendants as a means of deterring police misconduct, however, is a public policy fraught with problems, and these problems have not been adequately addressed in the literature to date.

The first problem with using the entrapment defense to deter police misconduct is simply put as follows: it may be only a small discomfort to the cop that the defendant goes free.³²

³⁰ This is an important point but is generally outside the scope of this article, which focuses instead on the costs and benefits that an entrapment-based acquittal produces for wayward police. On the point of efficiency in sting operations as the appropriate test for entrapment, *see, e.g.*, Ronald J. Allen, *Clarifying Entrapment*, 89 J. CRIM. L. & CRIMINOLOGY, 407, 415 (“the most fruitful criterion of government inducement . . . is whether the inducements exceeded real world market rates . . .”); Deis, *supra* note 1, at 1209-1210, 1226 (suggesting that entrapment is “merely the name we give to a particularly unproductive use of law enforcement resources”); Richard Posner, *An Economic Theory of Criminal Law*, 85 COLUM. L. REV. 1193, 1220 (“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.”); Paul Marcus, *Presenting, Back from the (Almost) Dead, the Entrapment Defense*, 47 FLA. L. REV. 205, 233 (1995) (“[T]he federal government should not use its resources to increase the criminal population by inducing people to commit crimes who otherwise would not do so.”).

Even if the police activity in a given case was wasteful or inefficient, it does not necessarily follow that judges should remedy the situation by acquitting the defendant. Acquitting the defendant certainly does not recoup any of the resources already wasted (they are sunk costs); acquittals can impose additional costs on society by releasing a criminal. This makes the approach espoused by the commentators above problematic. If it were certain that such acquittals would deter all future inefficient sting operations, this approach would make sense, but there is no good or predictable mechanism for deterring the police through acquittals.

³¹ Several courts in earlier decades and innumerable commentators have expressed the view that excessive police entrapment methods violate the procedural due process rights of the defendant. *See, e.g.*, *Greene v. United States*, 454 F.2d 783, 787 (9th Cir. 1971) (defendant’s due process rights violated where the government was “enmeshed” in the criminal enterprise, “from beginning to end.”); *United States v. Twigg*, 588 F.2d 373 (3rd Cir. 1978). Whatever the merits of this position, the United States Supreme Court has avoided it so far. While there may be a theoretical appeal to imbuing entrapment with constitutional significance, there would still remain a rather pragmatic problem of how a defendant’s acquittal would deter future police transgressions—if indeed such deterrence were the point of such a jurisprudential position, as opposed to simply honoring the rights of individual citizens in court.

One might argue, though no one has, that entrapment violates the vesting clause of the Constitution by overstepping the limited police power that the Constitution invests in the Executive branch. An argument could be made that entrapment encroaches on the right against self-incrimination, if entrapment is seen as merging the investigatory and accusatory stages of criminal procedure; the difference between self-incrimination at trial and during an overdone sting operation may be formalistic. More adventuresome would be the argument that entrapment violates the 5th or 6th Amendment right to counsel, again along the lines that investigatory and accusatory phases are blended under certain circumstances. Perhaps it also violates the Establishment Clause, by putting the state in the position of the devil.

³² *See* Stuntz, *supra* note 21, at 538 (“With some qualifications, prosecutors maximize convictions; police are more likely to maximize arrests.”); *see also* Park, *supra* note 12, at 232, arguing that police sometimes find enough satisfaction in harassing or inconveniencing suspects with arrests that the final outcome of the case is not

Normally, when we adopt a policy of deterrence, policymakers use more direct methods: sanctions attached to the forbidden behavior. The prescribed sanction raises the “cost” for individuals contemplating the proscribed activity, hopefully outweighing its perceived benefits.³³ Deterrence means making an activity less appealing by increasing the risk of unpleasant consequences.³⁴ There is an underlying assumption that would-be criminals, for example, feel the prevent pain of a looming potential for prison time or impoverishing fines. The cost, or unpleasant consequence, falls directly on the wrongdoer.

critical to them. This may explain, in part, why some law enforcement agencies have much higher declination rates from the prosecutors’ office than others. *See infra* note __. Another relevant consideration in this regard is that the newer models of “community policing,” which seems to be the current fad in law enforcement, seem to focus less on solving crimes and maximizing convictions and more on preserving general order and pleasantness in neighborhoods. *See, e.g.,* Alafair S. Burke, *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 WASH. L. REV. 985, 992-1003 (2003)(explaining in depth the history and development of the “new policing” model and analyzing its strengths and weaknesses). Other commentators have observed that prosecutors seem to 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 (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*, 189 W.Va. 369, 432 S.E.2d 39 (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.”).

³³ *See supra* note 26 and sources cited therein. “Cost” in the literature on deterrence theory does not necessarily refer to monetary costs—in fact, it seldom does because so few crimes involve simple fines as their penalty—but instead refers to a variety of “costs” the criminal faces in the perpetration of each crime: opportunity cost (the criminal could be doing some other lawful and perhaps profitable activity with her time), costs of the crime trade (burglar’s tools, purchasing weapons, taking steps to avoid detection or conceal one’s identity, or commissions paid to those who “fence” stolen goods); psychic costs of guilt, stigma, fear, etc., and the cost of the sanction (detection/arrest/imprisonment), discounted by the probability of getting caught.

³⁴ Technically, deterrence can also take the form of simply lowering the possible payoffs from wrongdoing, but this typically happens more by happenstance than policymaking. For example, robberies or muggings may decrease in areas where a significant proportionate of people use mostly credit cards and carry very little cash with them; credit cards are less fungible than straight cash, and using stolen credit cards leaves a trail that law enforcement can follow. A similar phenomenon is where 24-hour convenience stores post signs saying that the cash register has no more than x amount at any given time, basically warning that holdups will be relatively unprofitable. Again, while these measures help deter crime by lowering its profitability, they blur the line into simple crime prevention (because the same measures usually also deprive would-be criminals from even having an opportunity to cause significant losses), and are more often the result of self-help or consumer preferences than state-directed policy.

This is not the case with the entrapment defense. The supposed sanction, or unpleasant consequence, comes not in the form of direct harm to the bad cop, but indirectly, as a (possibly) undeserved³⁵ benefit to a third party, the defendant. Deterrence here assumes that the cop feels a personal loss at the defendant's gain or good fortune, as in a zero sum game, although here there is no common prize for which the parties compete. Subjectivity and speculation are inherent in this approach.³⁶ There is a prerequisite assumption of a "utility" for the cop that is something like the inverse of altruism, from a rational-choice standpoint. I am not aware that this "anti-altruism" has been defined or discussed in the relevant literature; it is like spite, but more impersonal.³⁷

³⁵ The objective approach punishes the police misconduct regardless of the defendant's criminality or predisposition.

³⁶ See Slobogin, *Why Liberals Should Chuck*, *supra* note 27, at 373, suggesting an analogous argument regarding the validity of the exclusionary rules.

³⁷ Richard Posner speaks of "interdependent negative utilities" with regards to crimes of violence, portraying this class of crimes as ones where the benefit to the perpetrator is found in the actual suffering experienced by the victim. See Richard A Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1196-97 (1985) ("An example is murdering someone because you hate him rather than because you want his money."). Posner goes on to characterize (somewhat tenuously) crimes of passion and the like as bypassing implicit markets for voluntary exchanges; he also observes that such crimes typically inflict harm on the victim that far outweighs any corresponding happiness the perpetrator receives at such suffering. *Id.* This is analogous to the presumed inverse utility in the objective entrapment test, but not exactly on point. Posner is speaking of crime, first of all, not conduct that is merely discouraged, but still not criminalized, by our legal system (police overreaching). More importantly, even if this distinction in legal classification were irrelevant, Posner is talking about the wrongdoer deriving positive utility from the suffering, while the objective entrapment defense seeks the opposite: the wrongdoer suffers because his victim succeeds. Intuitively, at least, this seems like more of a stretch; Posner's gain-from-another's-pain seems to be a more commonplace in our society, at least when explicit in a wrongdoer's actions, than the pain-from-another's-gain model implicit in the objective test. See also Ward Farsworth, *The Economics of Enmity*, 69 U. CHI. L. REV. 211, 224 (2002) (discussing Posner's view approvingly but in passing). For a discussion of negative interdependent utilities in the context of intentionally injurious bequests, see Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH & LEE L. REV. 33, 110 n.135 (1999). Some commentators find Posner's model of interdependent negative utilities attenuated and tautological. See, e.g., Kenneth W. Simons, *Rethinking Mental States*, 72 B.U.L. REV. 463, 509 (1992).

There is, of course, a rich body of literature on spite itself, reciprocity, and tit-for-tat behaviors where individuals incur costs to themselves in order to punish others they perceive to be "cheaters" in some social arrangement. See generally LAWRENCE C. BECKER, *RECIPROCITY*, 252-310 (1986) (applying reciprocity as a sociologically descriptive and philosophically normative model to the legal system, focusing on criminal justice issues). There is almost always some interpersonal gaming or cooperation, however, preceding such anti-altruistic motivation; in any case, it seems rather inapplicable to a police officer's motivation with regard to a particular defendant. It is also not clear that a tit-for-tat motivation would be satisfied only by a conviction; the harassment of arrest and interrogation may satisfy the supposed anti-altruistic motivation.

A second problem: even if police in general *do* feel a loss indirectly when the defendant is acquitted, it easily breaks down at the individual level.³⁸ The very type of bad cop targeted by such a policy is that type of cop least likely to care about the outcome of his cases.³⁹ A good cop is supposedly concerned with justice and sending true criminals to jail; a bad cop could be concerned with something else.⁴⁰ There is no reason to assume that the type of cop who would engage in an illegitimate sting operation is the sort who would be troubled by the defendant going free; in fact, the opposite seems more likely to be the case. When courts use the phrase “overzealous law enforcement,” they confer a benefit of the doubt on the officers, assuming that they have good intentions but have taken things too far.⁴¹ Suppose instead that a misanthropic constable is one year from retirement, jaded and weary from years of working with society’s worst element, and fed up overall. It is not hard to imagine some apathy over whether an arrestee gets off after trial, which could take place in a year or two, after the officer’s retirement. It was this same bad attitude, perhaps, that led to carelessness or recklessness in the undercover

³⁸ See *infra* notes 214-64 and corresponding text for the development of this argument. Whereas the first problem on which I focus is the upside-down reasoning of inverse deterrence (benefiting one person to punish another), this second problem is the complex and highly varied set of attitudes and values that individual officers bring to their work, which will in turn affect how they respond to rules as well as incentives to keep the rules.

³⁹ As will be discussed at length later, this is not to suggest, simplistically, that rules do not work because bad people will break them anyway. Rather, the point is that individual officers approach their jobs with a variety of motivators and priorities, as well as varying levels of diligence, and certain types of officers are more likely than others to break court-imposed rules. From a purely pragmatic standpoint, the rules will be more effective and efficient in achieving their desired ends if tailored for the target group that generates most of the problems in this area. Currently, the rules are not tailored to do that.

⁴⁰ “Something else” could be racial animus, personal vendetta, carelessness about proper procedure due to a poor work ethic, or even low intelligence or other deficiencies. An interesting but perhaps isolated example of “something else” that may motivate the state agent, there is an entrapment case from Alaska, *State v. Vaden*, 768 P.2d 1102 (1989), which is sometimes included in Criminal Law casebooks. The case involves two agents who posed as hunting/fishing guides and then charged their clients (successfully) with numerous violations of hunting and fishing regulations. In the process, the agents themselves shot numerous animals and caught numerous fish. Students in my classes have repeatedly commented on how much “fun” this sting operation must have been for the agents, if they themselves enjoyed hunting and fishing.

⁴¹ A similar problem—police planting evidence—is discussed in a new article on the Social Science Research Network, Dharmapala, Dhammika and Miceli, Thomas J., “Search, Seizure and (False?) Arrest: An Analysis of Fourth Amendment Remedies when Police can Plant Evidence” (September 2003), available at <http://ssrn.com/abstract=449340>. Many of the points made there would be applicable to police overreaching in sting operations as well.

operation in the first place, which furnishes the basis for the defendant's claims of entrapment. This may not be a conscientious law officer. The same attitudes giving rise to inappropriate conduct before arrest can make one impervious to indirect deterrence.⁴²

Perhaps the biggest problem for the "objective" approach to entrapment, however, is that it does not implicate the "fruit of the poisonous tree" doctrine.⁴³ Entrapment is traditionally not a constitutional defense, but a statutory or common-law defense; more precisely it is considered an "excuse" rather than a "justification."⁴⁴ Some day entrapment may be a clear-cut

⁴² Excessive methods in sting operations that would give rise to an entrapment defense are simply one of several categories of police misconduct, which sometimes seems ubiquitous. All forms of police misconduct—excessive force, coerced confessions, racial profiling, bribery/extortion, planting of evidence, and entrapment (which usually does not involve any of these other areas) are complex and defy simple solutions. For a recent analysis of some of the methods of keeping the police in line, with suggestions for improvement, see Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFF. U. L. REV. 1 (2001) (hereinafter Levinson). Her holistic approach is captured in her introduction: "In particular, police misconduct and corruption must be viewed as symptoms of greater ailments in both society and the organs of our criminal justice system. Unless the whole body is treated, one particular injury may be healed, but the body will remain diseased." *Id.* at 3. This would apply to entrapment as well; it is but one form of unbecoming police behavior, and policies addressing it should keep in mind the larger picture of problems.

⁴³ This phrase was coined by Justice Frankfurter in *Nardone v. United States*, 308 U.S. 338 (1938), and refers to evidence tainted by an illegal search, seizure, arrest, or coerced confession. The true origin of the "taintedness" doctrine seems to have been an earlier case, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (federal officers illegally seized documents, court ordered them returned, and prosecutor subsequently attempted to subpoena same documents). See generally WAYNE R. LAFAYE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 9.3-9.6, pp. 467-498 (2nd ed. 1992). "The 'poisonous tree' can be an illegal arrest or search, illegal interrogation procedures or illegal identification practices." *Id.* at 471.

⁴⁴ See, e.g., Adav Noti, *The Uplifted Knife: Morality, Justification, And The Choice-Of Evils Doctrine*, 78 N.Y.U. L. REV. 1859, 1861 (2003) ("Insanity and entrapment are examples of legal excuses."). There is some debate about this classification, although it is not exactly a controversial issue. See, e.g., PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 209(b), p. 513 (1984):

It has been argued that there are two alternative theories of entrapment: entrapment as an excuse, similar in some respects to duress, which provides a defense because the defendant's actions were not fully his own, and entrapment as a nonexculpatory defense designed to deter police misconduct, even at the expense of allowing a culpable defendant to go free.

This seems to correlate roughly to the subjective and objective divide. Robinson concludes, however, after some discussion, that entrapment under either scheme should really be classified separate from other "excuses":

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

Id. at 516. His nomenclature is worth mentioning because his treatise on criminal defenses is almost unparalleled; but as can be seen from Adav Noti's quote, there is not unanimity on this point.

constitutional issue, but today it is not. Exclusionary rules, in contrast, spring out of the Constitution, mostly from the prohibitions against unwarranted search and seizure and the more general right to procedural due process.⁴⁵ If the police obtain incriminating evidence from a warrantless search, or a confession violating the Fourth Amendment, both could be thrown out of court.

If the incriminating evidence comes out of an illegitimate sting operation, however, the evidence is immune to the exclusionary rules. Even if the defendant is acquitted of the charge related to the original entrapment scheme, evidence of other crimes, if gathered in the process, will be fully admissible. The potential payoffs for police can be great, especially if the unlawful sting operation targets someone vaguely suspected of being a “big fish” for a criminal enterprise that is otherwise inherently hard to detect or investigate.⁴⁶ If these potential payoffs are great enough to outweigh the “cost” of letting the defendant off of the original charge, then the police would have an incentive to concoct truly devious plots. Deterrence would not work.

The remainder of this article develops these points in more detail. Some of the arguments presented would be applicable to the broader field of exclusionary rules, which are often touted as necessary instruments for restraining overzealous law enforcement. Indeed, there is a growing body of literature presenting empirical evidence that exclusionary rules are ineffective in this

⁴⁵ See *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914)(often cited as the origin of the exclusionary rules in general); see also LAFAVE & ISRAEL, *CRIMINAL PROCEDURE* 103-120; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 1081 (1961) (applying federal constitutional exclusionary rules to the states).

⁴⁶The same applies, of course, to the issue of the exclusionary rules and the requirement of standing—a defendant cannot assert Fourth or Fifth Amendment violations for searches conducted on another person or another’s property that led to incriminating evidence against the defendant as a third party. This point is noted by other commentators. See, e.g., *Levenson* at 18 (“The person against whom the evidence is admitted does not necessarily have standing to challenge the evidence.”); see also *Rawlings v. Kentucky*, 448 U.S. 98 (1980)(defendant had no standing to contest admissibility of drugs seized from friend’s purse). Park mentions the possibility of greater payoffs but not referring to the fruit of the poisonous tree doctrine; rather, he emphasizes what I would consider “side benefits” of harassing defendants with pretextual arrests, addressed in a my section on how deterrence would break down on an individual level. See *Park, supra* note 12 , at 232.

respect.⁴⁷ Proponents of the rules point to counter-examples, such as the now universal practice of administering Miranda warnings and the careful implementation of “Terry” stops by the police after the Supreme Court case by that name.⁴⁸ Taking on the exclusionary rules is outside my scope here. My focus is entirely on the entrapment defense.

Some of the arguments here apply only to the entrapment defense, and not to other rules or doctrines used by courts to check the police. The fact that entrapment is a common law defense, not a procedural, constitutional, or evidentiary issue, makes it distinct. If courts begin to treat entrapment consistently as a constitutional issue, as some commentators advocate,⁴⁹ then some of the problems I discuss will disappear.

Part II of this article presents some background on the two approaches to entrapment. I do not review the historical development of the doctrine, which others have done quite well, nor do I analyze the four leading Supreme Court cases in this area. Instead, I select some well-

⁴⁷ The classic work in this area (and perhaps still the most exhaustive) is Dallin Oak’s article, *Studying the Exclusionary rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) (Oaks rejected the idea that the rules “handcuff” the police; instead, he saw them as generally ineffective); for a recent discussion of Oak’s work and its place in the scholarship on this point, see Yale Kamisar, *The Writings Of John Barker Waite And Thomas Davies on the Search And Seizure Exclusionary Rule*, 100 MICH. L. REV. 1821, 1845-46 (2002). See also Levenson at 18-19, arguing that the numerous exceptions to the exclusionary rules have “gutted” their effectiveness. Christopher Slobogin moves beyond such empirical arguments to present behavioral science evidence that the rules are unlikely to work against individual officers or departmental institutions, besides the unpleasant “dirty hands” issues facing judges asked to release defendants who were indisputably guilty of the crime charged. See generally Slobogin, *supra* note 27.

⁴⁸ It is not only proponents of the exclusionary rules that argue their effectiveness. Critics have presented empirical arguments that the advent of the exclusionary rules led to significant increases in crime rates nationwide, ranging from three percent to thirty percent, especially in the wake of *Mapp v. Ohio*, 367 U.S. 643 (1961). See, e.g., Raymond Atkins and Paul Rubin, *Effects on Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rules*, 48 J. L. & ECON. 1 (2003). Richard Posner cites statistics that the “crime index” compiled by the FBI grew sevenfold between 1960 and 1996; for reasons he links to exclusionary rules, the number of federal prosecutions during the same period increased only by a third. See RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 369 n. 61 (2001) (hereinafter POSNER, *FRONTIERS*). Of course, many theories explaining the rise in crime rates in the 1960’s and 1970’s are in circulation. See, e.g., discussion of Durkheim’s influential social anomie theory, in GEORGE B. VOLD & THOMAS J. BERNARD, *THEORETICAL CRIMINOLOGY* 157-58 (3rd ed. 1986); or social conflict theories, *id.* at 287-98.

⁴⁹ See, e.g., Andrea B. Daloia, *Sexual Misconduct and the Government: Time to Take a Stand*, 48 CLEV. ST. L. REV. 793 (2000); *Greene v. United States*, 454 F.2d 783, 787 (9th Cir. 1971) (defendant’s due process rights violated where the government was “enmeshed” in the criminal enterprise, “from beginning to end.”); *United States v. Twigg*, 588 F.2d 373 (3rd Cir. 1978); see *supra* note 30; see also *infra* note 71 (addressing this point more in depth and citing the most recent commentators taking this position).

known cases on each side, which contain fact patterns that are particularly illustrative of the alternative approaches.

Part III begins the discussion of the problems with using entrapment to deter police misconduct, starting with the issue of indirect deterrence and the subjective or speculative nature of the endeavor. Part IV continues the discussion, looking at the inherent contradiction involved when the “objective approach” is applied on the individual level. This part also addresses some problems with time delays and discounted future values that would occur on the individual level. Part V is an investigation of the fruit of the poisonous tree problem and the huge potential payoffs for law enforcement that could offset any deterrent value. Part VI is an objections section, and Part VII ties the observations together into a conclusion.

Certain assumptions are at play in each of my three argument sections. All three sections argue, ultimately, that police may pursue other goals besides the maximization of convictions.⁵⁰ The first section assumes that we have only a murky understanding of what motivates police behavior generally, and that our understanding is too imprecise—or the motivations may be too complex and varied—to play around with something as tenuous as indirect or inverse deterrence, especially in an area as serious as criminal law. The second section’s argument assumes that the

⁵⁰ See *supra* note 33 and sources cited therein. For example, police may prioritize maximizing arrests over convictions (that is, arresting as many people as possible and letting the prosecutor worry about which ones are ultimately convicted), or even maximizing investigations over both (that is, investigating as many crime as possible may be more important than getting arrests or convictions). Holding off on explaining “why” this may be the case until later—which is really the point of each of the three sections—the point is that the concept of deterring police misconduct via acquittals of defendants assumes that convictions are the police’s priority over anything else; otherwise, police would ignore the rule whenever there were more important things to achieve than conviction. I argue that this is exactly what they do. See *e.g.*, Slobogin, *Why Liberals Should Chuck*, *supra* note 27, at 377-378 (arguing in the context of exclusionary rules):

This is not just the oft-repeated point that the pain of exclusion is visited most directly on the prosecutor, but the recognition that the objective of police who conduct searches is, first and foremost, evidence to support an arrest, not a conviction. Yes, police want convictions. 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. Furthermore, if the prosecutor manages to convict in any event (which occurs a good proportion of the time), even this tenuous aversive impact may disappear.

police we most want to deter might be “bad cops,”⁵¹ in which case the means of deterrence must fit with the goals and utility of such individuals. The final argument allows for the opposite assumption—that perhaps the police who run “bad” sting operations may be loyal, noble, and civic-minded, but that even in this case the police may ignore the threat of an entrapment defense if some greater good seems to outweigh the defendant’s possible acquittal.

Naturally, there is much to be said against overbearing police behavior, and measures should be in place that deter it;⁵² but these should be effective measures, not ineffective. I should also note at the outset that there are also colorable arguments in favor of abolishing the defense completely and using others features of our legal system to accomplish the same ends.⁵³ My

⁵¹ For a discussion of the “good cops”/ “bad cops” problem regarding deterring police from planting phony evidence, see Dharmapala, Dhammika and Miceli, Thomas J., “*Search, Seizure and (False?) Arrest: An Analysis of Fourth Amendment Remedies when Police can Plant Evidence*” (September 2003), available at <http://ssrn.com/abstract=449340>.

⁵² See, e.g., Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies By The Police*, 76 OR. L. REV. 775, 779-780 (1997) (hereinafter Slobogin, Deceit). Slobogin argues that unfettered police discretion to use deception can victimize the innocent, invade citizens’ privacy, and should be subject to ex ante judicial supervision/permission, much like warrants for searches or arrests:

These potential harms are much greater, however, when the undercover operation takes on an active mode by going after a specific target or targets thought to be criminal rather than seeking to lure criminals out of the general population. The propriety of infiltrating a particular organization or establishing an intimate relationship with a particular individual cannot be the subject of an abstract public debate. Moreover, there is no guarantee that the direct impact of such covert deception will be visited only on those who are clearly criminals, making the potential for the discrimination that Bok fears much greater. Thus, where active undercover operations are contemplated, judicial authorization should be obtained. The police should not be able to use such techniques unless the public, in the form of the judge, decides that good reason to do so exists and that more straightforward methods are not likely to work. . . . Further, the distinction between passive and active undercover operations jibes with the privacy notions that theoretically underlie Fourth Amendment jurisprudence. If the police merely set out a “honey pot,” they are likely to discover only criminal aspects of a person’s life. If, on the other hand, they use covert operations to surveil a person’s everyday actions and learn his or her thoughts, they are practicing a significant invasion of privacy which, like electronic surveillance, should be regulated judicially, both in cause and necessity terms.

Id. at 806-07. Slobogin goes on to suggest that this would make the entrapment defense, which he views as “cumbersome,” much less necessary. *Id.* See also Daloia, *supra* note 38, discussing throughout her article the widespread and problematic use of sexual relationships to manipulate the targets of sting operations.

⁵³ No other country uses the United States approach of allowing entrapment as a substantive defense resulting in the defendant’s acquittal. See, e.g., Jacqueline 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 U.S.); Ian Walden & Anne Flanagan, *Honeypots: A Sticky Legal Landscape?* 29

goal is not to resolve all these issues, but to contribute to the discussion by tackling an area traditionally neglected.

II. BACKGROUND

The problem with opening this article using a biblical story—besides the risk that ancient stories can easily sound corny if not presented just right—is that the reader could get the impression that “entrapment” is an ancient legal doctrine. It is not. Traps, tests, and snares by authorities are reasonably common in ancient literature,⁵⁴ but entrapment as a defense was not a feature of English common law, and came into usage in this country only in the twentieth century.⁵⁵ Other commentators have chronicled the leading cases in this area, sometimes in amazing degrees of detail;⁵⁶ I will summarize instead, and point the reader to individual cases in the footnotes.

The more compelling cases began to emerge in the early twentieth century with the advent of Comstock laws, Prohibition, the Mann Act, narcotics regulation, restrictive

RUTGERS COMP. & TECH L. J. 317 (comparing entrapment rules for the U.S., England, Canada, and Australia, particularly with regards to computer-crime decoys known as “honeypots”).

⁵⁴ There is another rather elaborate biblical story in the prophetic writings, in which the prophet Jeremiah pressures a family called the Recabites to violate a generations-old vow that their clan would abstain from all alcohol, and then praises them when they stand firm and resist his repeated overtures. The Recabites then become a moral example to contrast how quick the inhabitants of Jerusalem were to abandon more serious laws and commandments. See Jeremiah ch. 35.

⁵⁵ There are a handful of 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 1970’s. Some of the English cases did include dicta or dissenting opinions sharply criticizing police overreaching, but they did not acquit the defendant. There are also three or four (perhaps more) American cases from the nineteenth century, but the courts did not begin to recognize the defense until the early 1900’s. See MARCUS, *supra* note 1, at 2-14; for a discussion of recent material from the House of Lords, see Andrew Ashworth, *Re-Drawing the Boundaries of Entrapment*, 2002 CRIM. L. REV. 161 (U.K. 2002). This article focuses on the modern use of the defense as a method of deterring police misconduct, so the historical origins are terribly relevant.

⁵⁶ See generally Park, *supra* note 12, at 171-211 for a simply breathtaking survey of cases up to the mid-1970’s. His labyrinthine footnotes span his entire article, but alas the cases are all from before 1973, and the field has developed since then. A newer history, done with a Foucault-based anthropological viewpoint, is Roiphe, *supra* note 1, at 260-92 (most of her article is a history of the defense, as well as the social context preceding its advent).

immigration laws, etc.—the so-called “victimless crimes,”⁵⁷ usually involving transactions in contraband or services where both parties were willing participants, like buyers and sellers.

Widespread regulation of such matters seems to be a distinguishing feature of modern criminal law, although the country was, in a sense, birthed in the context of conflict over the regulation of imports and crimes of possession, as seen in the colonial-era spats with England and the Whiskey Rebellion in Kentucky.⁵⁸ These regulations were less moralistic and more economic; of course, most regulations are a mixture of moral judgments and economic regulation.

Such crimes produce two parallel effects:⁵⁹ they tend to involve group activity instead of individual perpetrators, and they lend themselves to enforcement methods that involve informants, infiltrators, and sting operations.⁶⁰ The first effect helps explain the centrality or

⁵⁷ This is not to say that these crimes do not have “victims” in the sense of the lives wasted through vice. They are conceptually different that the victim of a crime against the person (rape, murder, battery, mayhem), which involve an interpersonal assault, and crimes against property (larceny, embezzlement, robbery, and burglary), which leave the victim unjustly deprived. Such traditional crimes are less conducive to enforcement by sting operations, and less conducive still to the defense of entrapment. Most cases where entrapment would be asserted as a defense to one of these traditional crimes (against the person or property) would involve problems with proving an element of the crime or the defense of consent, which were tidier defenses at common law. For more discussion of the history and evolution of entrapment, especially as it correlates to the development of these more transactional-type crimes, see Michael DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory, and Application*, 1 U.S.F. L. REV. 244, 250-251 (1967); 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 21, at 573-76. 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 permits legislatures to define criminal liability in ways that might otherwise be politically impossible.

Id. at 573.

⁵⁸ See Roiphe, *supra* note 1, at 260-70. Her history begins immediately after the Civil War.

⁵⁹ *But see id.* for an argument that there is more to this than increased aggressiveness and federalization of crime-fighting; Roiphe’s thesis is that entrapment reflects an evolving notion of individualism in our legal system generally.

⁶⁰ Just as entrapment arose in our legal system contemporaneously with the advent of modern regulations of “vice” crimes, another evolution in the doctrine may take place in the next few years as our criminal justice system goes through another transition period adjusting to tech crimes and greater concerns about national security. See, e.g., Walden & Flanagan, *supra* note 53, at 318, (“A honeypot or deception host is a designated area within a

conspiracy in modern criminal law,⁶¹ and conspiracy-like crimes such as racketeering. The commercialized nature of many of the proscribed acts (like distribution and possession) not only requires buyers and sellers, but also invites distributional and production organizations, as in any market, because economies of scale and efficiencies from specialization benefit the participants.⁶² The result is increasingly large groups working in concert in the criminal enterprise. This effect complements the second result: law enforcement agents posing as any one of the individuals in the enterprise can help catch everyone involved. The fact that the crimes often involve exclusively willing participants means that no one will report violations.⁶³ There is no victim to run to the police asking for justice. Thus, not only does the criminalization of such activities lend itself to sting operations due to the collective nature of the prohibited acts, but also

computer system or network that has been designated specifically that it will be attacked by unauthorized users, whether internal or external to the organization operating the honeypot; it is a resource ‘whose value is in being [sic] attacked or weakened.’”). Honeypots are configured with security weaknesses familiar to hackers, but they are really a decoy. They allow the host to entrap hackers and anyone else the hacker communicates with while visiting the site. The legal controversy around the use of such decoys involves other laws regarding privacy rights online. *See id*; *see also* Slobogin, Deceit, *supra* note 52, at 807 (contrasting honeypots with undercover operations that invade the personal lives of people in the general population, and suggesting that different legal rules should apply in each case).

⁶¹ Conspiracy’s usefulness to prosecutors, especially in a world of restrictions imposed by modern exclusionary rules, also explains the centrality of conspiracy in the modern criminal docket. Conspiracy often provides prosecutors with an alternative charge that requires less burdensome elements to prove, strategic advantages (pitting defendants against each other so they incriminate one another in court), evidentiary loopholes, and enhanced sentencing potential, without excluding traditional substantive charges at the same time.

⁶² *See* POSNER, *supra* note 27, at 230 (“But conspiracies are also more dangerous in being able to commit crimes more efficiently. . . by being bale to take advantage of the division of labor—e.g., posting one man as a sentinel, another to drive the getaway car, another to fence the goods stolen, etc.”). Examples as disparate as cocaine and anthrax would be applicable. Bodyguards are useful for illegal transactions, but so are production specialists, suppliers of raw materials, distributors, marketers, and other agents.

⁶³ Justice Rehnquist observed this point with eloquence:

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

Russell, 411 U.S. at 21. An interesting twist on this paradigm is the modern problem of computer crime directed at corporations (hacking, theft, point of service denials, vandalism of corporate websites, etc.), and for which decoys called “honeypots” are now in use to trap would-be hackers. Corporations, although not willing parties to a hacking transaction, are often loathe to report that their systems have been breached by unauthorized users. *See* Walden & Flanagan, *supra* note 53, at 338. First, corporations do not want the rest of the hacking community to be aware of

the lack of victims to report crimes nearly requires infiltration by government agents to enforce the laws.⁶⁴

As American law enforcement has used sting operations more often, perhaps by necessity, defendants claiming to have been tricked into a crime by the authorities themselves also became more prevalent. State courts and some federal courts in the early twentieth century faced a rather novel defense: entrapment.⁶⁵ The Supreme Court issued about five key decisions on the entrapment defense in the twentieth century;⁶⁶ state supreme courts have had to lay down definitive guidelines as well.

There is no evidence of any court accepting the defense, in America or England, much before the twentieth century.⁶⁷ Despite its lack of historical pedigree, it is a common-law defense, created by judges, as opposed to being a constitutional issue. Many states have now incorporated the defense into their criminal statutes, in various permutations.⁶⁸ Its common-law genesis, and non-constitutional status, has important implications for the thesis of this article; it

security weaknesses in their systems, which would invite more intrusions. Second, corporations are also concerned about shareholder value, and public reporting about the crime could have negative repercussions in this respect.

⁶⁴ Of course, a perfect and universal system of surveillance might be an alternative to sting operations for these crimes, but society would have to sacrifice a tremendous amount of individual privacy for that to happen, even if it were technologically feasible. The government does not have the means with present technology to be truly omniscient about the behavior of the citizenry.

⁶⁵ The first federal court to uphold an entrapment defense (at least with a published decision) was *Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915), 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. The recruitment process had taken eighteen months; the court focused on the lack of evidence that the criminal intention had originated in the defendant's mind. *Id.* at 415.

⁶⁶ The Supreme Court cases are as follows (listed in chronological order for readers' convenience): *Sorrels v. United States*, 287 U.S. 435, 53 S.Ct. 210 (1932); *Sherman v. United States*, 356 U.S. 369 (1958), U.S. v. Russell, 411 U.S. 423, 93 (1973); *Hampton v. United States*, 425 U.S. 484 (1976); *Mathews v. United States*, 485 U.S. 58, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988); and *Jacobson v. United States*, 503 U.S. 540 (1992).

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 Supreme Court reversed, stating that the defense should be available, at least in a pre-trial 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.

⁶⁷ Its newness sets it apart from most of the common law crimes and defenses, which have ancient and often quaint cases behind them.

⁶⁸ All states have the entrapment defense, but half have codified it. For a list, see Note, 37 B.C. L. REV. 743, 747 n.26 (1996).

also means that entrapment is usually grouped together with defenses like duress,⁶⁹ necessity,⁷⁰ self-defense,⁷¹ insanity,⁷² impossibility,⁷³ and mistake of fact,⁷⁴ the parameters of which have been set and adjusted by courts and (more recently) legislatures to meet the demands of new circumstances as they arose. It does not, however, implicate the Fourth Amendment, or any other constitutional right, despite the fact that the United States Supreme Court has ruled on the entrapment defense—adopting a particular version of it and rejecting another—several times. It is the Supreme Court, in fact, that has held entrapment is not a constitutional matter, although the

⁶⁹ Duress refers to circumstances where the defendant's life—or perhaps the life of an immediate family member—was in immediate danger to coerce the individual to commit the crime in question. Coercion is key; extenuating circumstances do not constitute a defense of duress, although they might constitute “necessity” instead. Duress requires coercion from another person; danger in any other sense is insufficient, and the danger must have threatened the defendant herself or a family member, not other bystanders. Duress is an “excuse,” not a “justification,” meaning the defendant receives an acquittal but not a moral affirmation. *See generally* LAFAVE, CRIMINAL LAW 467-76 (§ 5.3).

⁷⁰ Necessity is where the defendant is faced with extreme forces of nature and must make a choice between two evils, violate the law to preserve life or property or comply with the law and allow greater harm to result than the law sought to prevent. Unlike duress, which is an “excuse,” necessity is a “justification,” meaning it carries a higher level of moral approval in the courts. *See generally* LAFAVE, CRIMINAL LAW 476-86.

⁷¹ Self-defense was recognized by common-law courts where a reasonable amount of force was used to ward off an attacker. Some jurisdictions include a requirement that the individual try to retreat first, if possible, before using deadly force. *See generally* LAFAVE, CRIMINAL LAW 491-500.

⁷² There are three or four main variations on the insanity defense, although all but one (the *Durham Rule*) can be used together without internal inconsistency. The *M'Naughten Rule*, named after a Victorian-era case from England, has been and continues to be the dominant paradigm, although judges and courts are prone to tinkering in this area, due to its controversial nature and general disconnect from modern concepts of mental illness.

⁷³ Impossibility is a defense to charges of attempt. Wayne LaFave comments that “scholars in the field of substantive criminal law appear to be more fascinated with the subject of impossibility in attempts than with any other subject,” and cites dozens of articles on the subject. *See* LAFAVE, CRIMINAL LAW 552. For purposes of this article, it is worth noting that impossibility is perhaps the defense most likely to overlap with entrapment, given that there is a conceptual problem with whether the “crime” committed could have been a real “crime” if the property involved belonged to the government all along, or if the only other parties to a criminal conspiracy were government agents. This seems to come up particularly often in the context of computer crimes and entrapment, where the crime charged is often solicitation of a minor in Internet chat rooms, the minor being in fact a government agent. *See* Audrey Rogers, *New Technology, Old Defenses: Internet Sting Operations and Attempt Liability*, 38 U. RICH. L. REV. 477, 502-7 (2004). The point is that some defendants, especially in Internet cases, could raise an impossibility defense as an alternative to the entrapment defense. A discussion of the precise overlap between the impossibility defense and entrapment is outside the scope of this article, but it is a fertile ground for discussion. Of course, in many entrapment/sting operation cases the crime is completed before charges are brought, making impossibility a harder defense to use. For a well-thought student note analyzing the relationship between predisposition, inability, and impossibility, *see* John F. Preis, *Witch Doctors and Battleship Stalkers: the Edges of Exculpation in Entrapment Cases*, 52 VAND. L. REV. 1869 (1999)(arguing generally that the entrapment defense should be available where the defendant would have been unable to commit the crime due to impossibility, albeit in a small number of cases); the overlap is also noted in R.A. Duff, *Estoppel and Other Bars to Trial*, 1 OHIO ST. J. CRIM. L. 245, 253 (2003).

Court has not permanently foreclosed the idea that entrapment could be tied to a generic procedural due process claim at some point.⁷⁵ The fact that entrapment is not constitutional also means that states are free to ignore the U.S. Supreme Court in this area and adopt alternative approaches. Roughly a third of the states have done just that, as well as the Model Penal Code.⁷⁶

The Supreme Court decisions are still central in this area, though, because the Court laid out two possible approaches to the defense, called the “subjective” and “objective” tests. The first case to set forth the dichotomy was *Sorrells*,⁷⁷ which, like the next few cases, contains a forceful dissent arguing in favor of the objective test,⁷⁸ but staunch adherence to the subjective test by the majority. These two tests still define the field. Most states followed the Supreme

⁷⁴ Mistake of fact is a common-law defense in certain situations; it is most likely to prevail in cases of specific intent crimes. See generally LAFAVE, CRIMINAL LAW 431-49. Mistake of law is generally not an excuse or defense to crimes, unless the statute requires awareness of the law as part of the grading of the violation.

⁷⁵ A few courts have tried this, but the idea has not caught on; nor has it ever been adopted by the Supreme Court. See, e.g., *Greene v. United States*, 454 F.2d 783, 787 (9th Cir. 1971) (defendant’s due process rights violated where the government was “enmeshed” in the criminal enterprise, “from beginning to end”); *United States v. Twigg*, 588 F.2d 373 (3rd Cir. 1978). See also Eric L. Muller, *Constitutional Conscience*, 83 B.U. L. Rev. 1017 (2003) (lamenting the passing of the “outrageous government conduct” defense from the government system and proposing its revival); John David Buretta, *Reconfiguring the Entrapment and Outrageous Government Conduct Doctrines*, 84 GEORGETOWN L. J. 1945 (1996) (urging that entrapment be merged into an “outrageous government conduct” test under constitutional due process analysis); Daloia, *supra* note 38, at ___ (proposing a similar approach is needed particularly in cases where the sting operation involves a deceptive sexual relationship between the government agent and the defendant); Kenneth M. Lord, *Entrapment And Due Process: Moving Toward A Dual System Of Defenses*, 25 FLA. ST. U. L. REV. 463 (1998) (arguing that courts should use both an entrapment defense and a related due process defense, depending on the case); Molly Kathleen Nichols, *Entrapment and Due Process: How Far is too Far?* 58 TUL. L. REV. 1207 (1984) (advocating a due process dimension to entrapment defense).

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

⁷⁶ See Model Penal Code § 2.13 (1980). The Model Penal Code’s (MPC) position on entrapment is particularly interesting when taken together with its approach to conspiracies, especially in light of the fact that entrapment and conspiracy crimes are interrelated. The MPC allows a conspiracy conviction even where the only other conspirator besides the defendant was a government agent. See MPC § 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 (non-government agent) members of a conspiracy before any member may be convicted of the charge. For a detailed discussion of this plurality requirement, see LAFAVE, CRIMINAL LAW 605-10 (§ 6.5(g)). 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.

⁷⁷ *Sorrells v. United States*, 287 U.S. 435.

⁷⁸ *Sorrells*, 287 U.S. at 457 (Roberts, J. dissenting); see also *Sherman*, 356 U.S. at 382 (Frankfurter, J. dissenting).

Court's lead, while a significant minority followed the objective test set forth by the dissenters. An insignificant minority (four or five jurisdictions)⁷⁹ have tried to combine the approaches into a hybrid, which is harder on defendants because it makes them pass through both sets of hurdles.⁸⁰

No one has really taken a third path besides the two original approaches,⁸¹ although other possibilities are certainly conceivable. For example, England and other European countries simply do not allow the entrapment defense, a road not taken here.⁸² The defense could have been treated as an entirely constitutional issue, perhaps as a procedural due process matter, which would have shaped its parameters differently and would trigger different consequences when

⁷⁹ 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 (Burns 1985); *State v. Little*, 435 A.2d 517 (N.H. 1981); N.J. Stat. Ann. 2C:2-12 (West 1982); *Baca v. State*, 742 P.2d 1043 (N.M. 1987); *see discussion in* MARCUS, *supra* note 1, at 180-84 (“A misreading of the objective test can cause inclusion of the predisposition element.”).

⁸⁰ 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 (1981); *see generally* Note, *supra* note 17; Lord, *supra* note 63 (arguing for both a hybrid entrapment defense to be available as well as a separate due process type defense).

⁸¹ This is not counting, of course, the four or five jurisdictions combining the two approaches. Several commentators have made proposals for the entrapment defense, but within the framework of the objective/subjective tests or some combination of the two. R.A. Duff has recently argued that it should function as a type of estoppel at trial, but it is not clear if that may simply be one way of explaining how the defense already operates. *See* Duff, *supra* note 73 at 252.

⁸² For a thoughtful comparative-law analysis of entrapment, contrasting the approaches used in Europe with the United States, *see generally* Ross, *supra* note 53. Ross notes that entrapment is a defense to criminal liability almost 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 systems treat such conduct as criminal unless a law expressly exempts the investigator from liability for specified acts.” *Id.* at 1521-22.

One explanation of why the entrapment defense emerged in this country and not elsewhere may lie in the view that 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 Constitution. For an interesting argument along these lines, *see* Nancy Y. T. Hanewicz, *Jacobson v. United States: The Entrapment Defense and Judicial Supervision of the Criminal Justice System*, 1993 WIS. L. REV. 1163 (1993) 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 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

invoked (like exclusion of evidence instead of automatic acquittal, or ratcheting down the charge). It could also have been a mandatory mitigating factor in sentencing.⁸³ Finally, as suggested by English courts (and the rest of Europe), it could have been irrelevant to the defendant's own case,⁸⁴ but it could have automatically triggered criminal charges for the police misconduct, if truly present. The fact that there would be no direct benefit to the defendants would not keep them from raising the issue, if revenge on the police provided them with some consolation for their convictions. Commentators claim that entrapment has not entered the civil arena yet (torts or breach of contract), but it could have done so, and perhaps has already in limited forms as tortious interference with contract, alienation of affections, etc. Entrapment by

operations. See Stuntz, *supra* note 21, at 572-73. Many countries also simply lack the resources for elaborate sting operations.

⁸³ This has occurred in a few instances, but it is not a general rule, although it could be. In *State v. Abbey*, 109 Iowa 61, 80 N.W. 225 (1899), the court lowered a sentence from three years to six months because a local constable had suggested the plan for a burglary to the defendant. This was done, however, at the court's discretion.

"Sentencing entrapment" is developing into a general rule, however, where agents intentionally supply higher quantities of contraband in the sting operation in order to "ratchet up" the sentence under the sentencing guidelines; the sentence is lowered proportionately, but the court does not go as far as acquitting the defendant. See, e.g., *United States v. Calva*, 979 F.2d 119, 122 (8th Cir. 1992); *United States v. Rogers*, 982 F.2d 1241, 1254 (8th Cir. 1993). In a similar vein, the federal sentencing guidelines have incorporated a mitigating factor related to entrapment in the 1993 Amendments:

If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the courts finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.

1993 Amendments to United States Sentencing Commission Guidelines, Commentary to § 2D1.1. This is a very specific circumstance (including market price analysis, the resources available to the defendant, etc.), and does not rise to the level of a general entrapment sentencing reduction.

Canada has taken an approach that resembles this (but it is a more stark variation). In *Queen v. Mack*, 2 S.C.R. 903 (1988), the Supreme Court of Canada defined its rule on entrapment in light of the Canadian Charter of Rights and Freedoms, a Constitutional Act passed in 1982. The Canadian high court does not recognize entrapment as a defense to a crime, in the sense that the defendant can obtain a complete acquittal; nonetheless, it empowered the judiciary to use its discretion in rejecting "the spectacle of an accused'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. For more discussion of this approach related to computer crimes, see Walden & Flanagan, *supra* note 53, at 324-27.

⁸⁴ At the other extreme, it is possible that a society could simply prohibit all sting operations, acquitting the defendant at the slightest hint of government solicitation or involvement, which would obviate the need for either

private parties, as opposed to government agents, has not made inroads into criminal law jurisprudence;⁸⁵ this is another possible direction courts could have gone.⁸⁶

The subjective test, as mentioned in the introduction, focuses on the willingness of the particular defendant to commit the crime charged. It is really a “but-for” test: “but for” the government’s inducement, the defense must show, the culprit would never have pursued such a course of action.⁸⁷ It is important to keep this idea distinct from the notion of opportunity. The subjective test does not ask whether it was wrong for the government to provide an opportunity; sometimes the “opportunity” includes the means. It is a question of predisposition, which relates to both character and willingness,⁸⁸ not opportunity. The subjective test looks at the defendant’s subjective preferences, choices, and history.

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,

test. This would force the police to rely instead on surveillance *ex ante* and investigation *ex post* the commission of crimes.

⁸⁵ See *U.S. v. Hollingsworth*, 9 F.3d 593 (7th Cir. 1993).

⁸⁶ There is a developing area of “derivative entrapment” and “vicarious entrapment,” as seen in *U.S. v. Valencia*, 669 F.2d 37 (2nd Cir. 1981), and *Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994); see also LAFAYE, CRIMINAL LAW 452-54 (§ 5.2(a)); 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, as in *United States v. Washington*, 106 F.3d 983 (D.C. Cir. 1997).

⁸⁷ Although many courts have used similar words, David Elbaz provides a prototypical quote: “Society derives no benefits from the use of entrapment strategies which lead to prosecution of crimes which would likely not occur but for the government’s offer of extraordinary benefits.” Elbaz, *supra* note 1, at 137. Gregory Deis urges that causation should be the determining factor for the entrapment defense, using an economic analysis. See Deis, *supra* note 1. See also MARCUS, *supra* note 1, at 101-05.

⁸⁸ See Deis, *supra* note 1, at 209 (“The challenge of law enforcement is to identify these predisposed persons.”). Sometimes willingness is used interchangeably with predisposition, and perhaps even I slip and interpose the terms occasionally, but it seems to me that “willingness” could be bounded by a person’s lethargy, laziness, or general lack of perception or initiative, without lessening one’s “predisposition” to do bad acts, from a moral or legal perspective. For example, the fact that a government agent has to make several offers to solicit participation from someone may be due to the fact that the person is slow about everything, or doesn’t “get it” the first few times.

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. It is really the “atrocious government conduct” test.⁸⁹ The defendant’s guilt is not an issue—there is no question she committed the crime charged, in most of these cases—nor does the defendant’s predisposition or even eagerness to commit the crime matter, at least doctrinally.⁹⁰

Again, both tests are present early on in well-articulated opinions by Supreme Court justices.⁹¹ The majority, however, has never wavered from the subjective test, and the more recent cases⁹² indicate that the dissenters have given up or are no longer on the Court.⁹³

Differing policy concerns drive the adoption of one test or the other, at least in the courts’ rationalizations. Those preferring the subjective test are most concerned⁹⁴ about protecting “the

⁸⁹ There actually is (or perhaps was) a defense called the “outrageous government conduct test,” but this appears to have been put to rest by the two most recent Supreme Court cases. For discussion, see Daloia, *supra* note 38 (arguing that such a test, although currently not used anywhere, should be mandated legislatively for sexual enticement in sting operations); Burette, *supra* note 75 (suggesting merging entrapment and outrageous government conduct into a single constitutional due process test); Lord, *supra* note 75.

⁹⁰ Of course, in practical terms a very eager criminal would often not need sneaky government agents in order to find an opportunity for crime.

⁹¹ See Park, *supra* note 12, at 166.

Supreme Court Justices have been the oracles for both theories of entrapment. In two leading cases decided between 1932 and 1958-- *Sorrells 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.

⁹² See, e.g., *Matthews*, 485 U.S. at 66-67 (“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.”).

⁹³ As mentioned above, see *supra* note 21, the Supreme Court’s position on entrapment takes on special pragmatic importance for three reasons: 1) the increasing federalization of criminal law in the United States means that federal rules have an ever-greater relevance for law enforcement; 2) the federal criminal code comprehensively covers many of the so-called “victimless crimes” that lend themselves to enforcement via sting operations, and hence would naturally give rise to more entrapment claims; and 3) entrapment remains a common-law defense in the federal courts, meaning that the Court’s jurisprudence on the issue completely carries the day.

⁹⁴ The original Supreme Court case, *Sorrells*, also based its decision on a type of “legislative intent,” although this rationale is somewhat in the background of the debate. Some commentators have criticized this

rest of us” from government tempters and temptresses, which surely seem unwarranted—enough crime is committed without the government trying to generate more;⁹⁵ at the same time, adherents of the subjective test might argue that officers working within its parameters could reduce crime by catching true criminals who would not otherwise be caught. There is also a

rationale, complaining that the Court offered no evidence from legislative history to support this claim. *See, e.g., Sherman*, 356 U.S. at 379 (Frankfurter, J. concurring); *Russell* 411 U.S. at 442 (Stewart, J. dissenting); Elbaz, *supra* note 1, at 118. Park responds to this by arguing that once the entrapment defense was well-entrenched in American law, it was clearly in the background of an legislative action regarding codification of new crimes. Park, *supra* note ___, at 246-47. On the other side, R.A. Duff has recently argued that the legislative intent implies a preference for the objective test. *See* Duff, *supra* note 73 at 253. This point is not terribly important for the argument in this article, so I will confine my comments on this point to a footnote.

Much ink has flowed over the question of whether “legislative intent” has a place in statutory interpretation, especially since Justice Scalia published a controversial book decrying any use of legislative history whatsoever. *See generally* ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997). It would be nearly impossible to cite or survey all the recent contributions to this area here. It seems to me, though, that the phrase “legislative intent” can refer to at least two completely distinct things, one of which could be further divided into two separate concepts. The division I would make would be between “necessary” and “contingent” legislative intent. I use “necessary” intent to refer to truths implied necessarily by the existence of the statute itself. Regardless of what the legislators were thinking, individually or collectively, during the process of enacting a law, its presence in the code book means, *de facto*, that the legislative body intended to adopt the act as law. That is not very interesting so far. Other *de facto* or necessary implication also follow, however: a criminal statute was obviously intended to criminalize some kind of behavior (even if the parameters of the prohibited behavior are fuzzy at the conceptual boundaries), not to invite the judges to play intramural basketball during their recess. New taxes are necessarily intended to mulct some money from somebody; and so on.

What I call “contingent” intent refers to the more detailed information about whether particular cases should come within the scope of the statute; these are contingent because more than one intent could lie behind the words. Take the example of whether the legislature intended “carry a firearm” to include keeping a gun stowed in the trunk of one’s car when driving to a drug deal. *See Muscarello v. United States*, 524 U.S. 125 (1998). Maybe “carry” is supposed to mean that, and maybe it is not. The answer to this question does not flow necessarily or syllogistically from the existence of the statute, but must be derived somewhat inductively, either by looking at transcripts of legislative floor debates (which Scalia eschews), or one’s favorite dictionary (which Scalia loves), or other perhaps other sources, such as similar but clearer laws from other places.

I would further divide contingent legislative intent into two further categories: historical and constructive. A historical approach accepts *a priori* the reliability of legislative histories as indicia of the intended meaning of a statute’s terms. Others reject these as either unreliable—noting that they may represent only the views of individual speakers, which others may not have shared—or as conceptually impossible, because it is philosophically uncertain that a group of people can all have a common “subjective” anything. “Constructive intent” is what I call the process of deciding on a contingent view of the intended meaning of the words based on the weight of evidence, which is always chosen selectively, conceding a certain agnosticism about the “historical” fact of what every legislator thought. This process is the same as statutory construction overall, which employs a variety of interpretive rules and conventions to yield results that vary but have some predictability. The legislative intent (in any of the three senses described) is one tool in the traditional kit for statutory construction. A similar kit could be used to “construct” a tenable, or at least usable, contingent legislative intent, for those averse to the more absolutist historical approach.

The Supreme Court’s entrapment cases offer a nice illustration of “necessary” legislative intent put to good use. The Court’s point in *Sorrells*, for example, is that when the legislature enacts criminal codes it must intend to sanction “criminals,” not randomly-selected citizens on the street. The logical step taken here may be a little tenuous, but it is a logical inference nonetheless, not something suited for “evidence,” as Elbaz and others suggest.

growing trend for the inquiry to focus on the inherent blameworthiness of the defendant, mostly in an intangible sense, especially following the *Jacobson* case.⁹⁶ This is interesting, because this type of moral judgment was historically the domain, and perhaps the purpose, of juries of one's peers.⁹⁷ The policy driving the adoption of the objective test is a concern about monstrous government.⁹⁸ If the police conduct in the case was truly offensive to the court, an acquittal will result, regardless of whether the defendant is Mr. Rogers or the Son of Sam.

It is difficult or impossible, of course, to divine which test is actually more favorable to the defendant;⁹⁹ the cases that eventually give rise to high court opinions naturally tend to have sensational or troubling facts, perhaps skewing the picture of which approach generates

⁹⁵ This is not entirely true, as will be shown later, because the public awareness of sting operations as a regular activity of law enforcement can deter crime in society overall by making illegal enterprise riskier and more uncertain.

⁹⁶ This is one problem with some of the law and economics literature on entrapment as well: the typical cost-benefit analysis used to evaluate whether the police are squandering public resources inevitably has the relative value of the crime itself creep into the equation. For example, J. Gregory Deis argues that "First, encouragement techniques result in 'harmless' crimes." Deis, *supra* note 1, at 1227. The concept of "harmless" crimes easily blurs with the idea of "victimless" crimes, which is what most sting operations target. The cost-benefit analysis will more often than not make the sting operation seem excessive in this case. The fallacy, besides the blurring of the two similar but distinct concepts, is that even Deis' "harmless" crimes are ones that may involve very little harm in one particular instance, but could create significant harm in the aggregate. This could be true even of crimes induced by the police. On the other hand, Deis may be referring to the fact that the undercover is often in the role of the person the statute was designed to protect, as in the case where the agent poses as a minor being seduced in an Internet chat room (*see infra* notes 252-54 for examples from cases, and the Sentencing Guidelines position on this). This is akin to an "impossibility" defense, which sometimes overlap with entrapment. The answer, however, is the same in either case; in this case, mimicking another transaction that is indeed a serious social problem, such as sexual predation on minors, may be the only effective means of enforcement.

⁹⁷ It is also interesting because it rings much more of retribution as the underlying policy of criminal law rather than deterrence, although courts focused on "incapacitation" of dangerous elements in society would tend to chose the subjective test, which exonerates those who are not criminals at heart and condemns those who are. For a recent discussion of the ethics of incapacitation, *see* Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L.REV. 1 (2003) (arguing that preventative detention is most justified when the "dangerous person" is fairly impervious to deterrence or the threat of punishment, for whatever reason—mental illness, ideological fanaticism, or extreme impulsiveness).

⁹⁸ As noted above, some commentators believe that the entrapment defense as a unique feature of American criminal law is the product of a judicial desire to have the role of monitoring and regulating police activities overall. *See* Hanewicz, *supra* note 70; for more discussion of the concern about "monstrous government" (my phrase not theirs), *see* Daloia, *supra* note 38; Buretta, *supra* note 75.

⁹⁹ Park, *supra* note 12, argued both ways: he states on p. 170 that the objective test "creates a greater risk of unjust treatment of individual defendants than does the federal defense," but then admits on p. 199 that the objective test is "more favorable to predisposed defendants who have been subjected to improper inducements."

acquittals more frequently.¹⁰⁰ The Supreme Court does not always affirm convictions when applying its favored test.¹⁰¹ The most recent case is *Jacobson*,¹⁰² where federal agents spent two years sending child pornography catalogs and promotions (all fictitious, published by the government itself) to a rural farmer, finally enticing him to order something illegal. The agents had been relentless, very deceptive, and had arguably cultivated the taste in the defendant by bombarding him with smut.¹⁰³ The Court found that he was not predisposed to purchase child pornography through the mail, although the Court's opinion has strong hints of skepticism about his blameworthiness even if he had been so disposed.¹⁰⁴

¹⁰⁰ It should be noted that there is undoubtedly a type of "silent" entrapment defense working in the background, in the sense that the police's deceptiveness and outright lying throughout the sting operation is likely to undermine some of their credibility for the jury if the case depends on testimony from the agents. One poll indicated that one-third of jurors believe that police usually lie. See Levenson at 17, citing a Gallup Poll at <http://www.gallup.com> (June 22-25, 2000). For a similar point about juries being sympathetic to certain types of defendants in the entrapment arena, see Anthony Chase, *True Crime: Albert Borowitz, Blood and Ink: An International Guide to Fact-Based Crime Literature*, 27 Legal Stud. Forum 449, (2003)(discussing Marion Barry and John DeLorean cases); see also Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUSTICE 283 (2003)(emphasizing the inability of the criminal justice system to operate effectively when there is a public perception of unfairness or underhandedness in law enforcement).

¹⁰¹ In *Sherman v. United States*, 356 U.S. 369 (1958), the Warren Court used the subjective test to acquit a defendant who sold narcotics to an agent after persistent, badgering requests. The defendant's two previous drug convictions (one for sales and one for possession) were discounted as irrelevant to the issue of the defendant's predisposition to sell drugs (!) because they were a few years in the past. The case is interesting because it seems that the pro-defendant Warren Court was narrowing the evidence admissible to rebut an entrapment claim, thereby making the subjective test even more favorable to the defendant than an objective test would be in many cases.

¹⁰² *Jacobson*, 503 U.S. 540.

¹⁰³ The advent of computers, email, and the Internet have provided law enforcement with a level of anonymity and tools of deception never before conceived. Earlier sting operations usually required face-to-face contact, which not only strained the resources of agencies (agents could only be in one place at one time), but gave the targets of the sting the opportunity to look the person over. To the extent that the Internet provides a level of anonymity or impersonality that emboldens individuals, which seems to be a widely accepted view, it presumably makes it easier to recruit people into illicit online activities that they would not have attempted in their real-world persona. At the same time, while entrapment may be "easier" in this forum, one could view it as a necessary mitigation against the anonymity of the Internet that arguably enables computer crime; the anonymity may lower the normal social inhibitions that counter criminal impulses. The prevalence of undercover agents in the forum could generate a new level of cautiousness that serves as a proxy for the social inhibitions present in face-to-face interactions, thereby re-establishing the type of equilibrium that occurs in normal human interactions. See Slobogin, *Deceit*, *supra* note 52, at 807, suggesting that online undercover operations like "honeypots" are more fair because "they are likely to discover only criminal aspects of a person's life."

¹⁰⁴ *Jacobson* called for a somewhat more stringent "predisposition" test: "The prosecution must prove . . . that the defendant was disposed to commit the criminal act prior to being approached by Government agents." *Jacobson*, 503 U.S. at 549. Justice O'Connor dissented, claiming that this adds a new "reasonable suspicion" requirement for sting operations. *Id.* at 556 (O'Connor, J., dissenting). Subsequently, a split has emerged in the federal circuits as to whether the government must prove more than it had to previously. See *discussion in Deis*, *supra* note 1, at 1223. Several circuits have held that nothing has changed since *Jacobson*. See, e.g., *U.S. v.*

Probably a more typical example of the subjective test at work, however, is the Supreme Court's *Russell* case,¹⁰⁵ in which an undercover agent supplied the defendants with an essential ingredient for making methamphetamine, in exchange for supplies of the final product.¹⁰⁶ A jury returned a guilty verdict, but *Russell* contended on appeal that despite his clear predisposition to commit the crime (he had been making the stuff for months before the agent appeared), the government's involvement required an acquittal.¹⁰⁷ The Court found that the agent himself had committed no crime, but merely provided an opportunity to willing criminals.¹⁰⁸

An illustrative example of the objective test is *State v. Powell*,¹⁰⁹ a "drunken decoy" case.¹¹⁰ The undercover cop posed as a slumbering drunk in an alleyway of a busy downtown sidewalk, with cash visibly poking out of a brown bag.¹¹¹ When passersby would stop to help themselves to the money, other police would spring out from their hiding places and arrest the

Aibejeris, 28 F.3d 97, 99 (11th Cir. 1994); *U.S. v. Harvey*, 991 F.2d 981, 992 (2nd Cir. 1993); *U.S. v. Kusssmaul*, 987 F.2d 345, 349 (6th Cir. 1993). For a recent critique of the *Jacobson* test, at least as applied in some circuit courts, see James F. Ponsoldt & Stephen Marsh, *Entrapment When the Spoken Word is the Crime*, 68 *FORDHAM L. REV.* 1199 (2000)(the title of this article is somewhat misleading—it is not really about entrapment in the context of a very specific set of speech-based crimes, as one might expect, but rather more of a case note on *Jacobson* and *Hollingsworth*).

¹⁰⁵ *Russell*, 411 U.S. at 423.

¹⁰⁶ See *id.*

¹⁰⁷ Indeed, the appellate court had reversed his conviction finding "entrapment as a matter of law." See *Russell v. United States*, 459 F.2d 671, 673 (9th Cir. 1972). The Supreme Court reversed and reinstated the conviction.

¹⁰⁸ Some commentators consider this the "opportunity-'plus'" test: that the defendant was given more than a mere opportunity to commit a crime, and the "plus" part is what constitutes entrapment. See, e.g., Deis, *supra* note 1, at 1215.

A strident dissent from Justices Stewart, Brennan, and Marshall argued that the "predisposition" test was unworkable: it is too vague and too circular. See *Russell*, 411 U.S. at 441-42 (Roberts, J., concurring) ("[T]o say that such a defendant is 'otherwise innocent' or not 'predisposed' to commit the crime is misleading at best. 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."). The dissent also emphasized the subjective test's vulnerability to prejudicial evidence about past crimes and out-of-court statements. ("[A] test that makes the entrapment defense depend on whether the defendant had the requisite predisposition permits the introduction into evidence of all kinds of hearsay, suspicion, and rumor—all of which would be inadmissible in any other context—in order to prove the defendant's predisposition."). *Id.*

¹⁰⁹ 68 *Hawaii* 635, 726 P.2d 266 (1986).

¹¹⁰ There is at least one older case, *People v. Hanselman*, 76 Cal. 460, 18 P. 425 (1888), that still found the defendant guilty (see also *State v. Long*, 216 N.J. Super. 269, 523 A.2d 672 (1987)), but most cases where the decoy feigns drunken slumber with money protruding from a pocket have pushed the court over the edge to acquittal. See, e.g., *Moreland v. State*, 101 Nev. 455, 705 P.2d. 160 (Nev. 1985); *Cruz v. State*, 465 So.2d 516 (Fla. 1985).

thief.¹¹² The Hawaii Supreme Court found that this was bait that would tempt almost anyone; including many people who generally pose no threat to society (even children might have tried for the cash).¹¹³

The first case provides the type of factual scenario often envisioned by those favoring the subjective test: real criminals are out there, but given the nature of their crime, they may be almost impossible to catch unless set up for a trap. The sting operation in that case was not terribly shocking; no one's rights were compromised; no law-abiding person is left with the feeling that they might be next. The drunken decoy case, in contrast, at least makes one feel like the agents had too much time on their hands; that we have high crime areas where we could really use their efforts to help solve more serious crimes; and that a lot of people more or less "just like us" might fall for this ruse and sincerely regret it later.

Indeed, both approaches have some problems. 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.¹¹⁴ Also, "predisposition" is a sticky subject to sort out in black-and-white terms, especially for a jury.¹¹⁵ There is some

¹¹¹ *Powell*, 726 P.2d at 267.

¹¹² *Id.* The defendant in this case pilfered nine dollars.

¹¹³ *Id.* at 268.

¹¹⁴ See LA FAVE, CRIMINAL LAW at 458 (§ 5.2(d)) ("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 predisposed to engage in criminal behavior."). Of course, there may be other safeguards against police misconduct, making it less important that the entrapment defense does not solve such problems. As mentioned above, in other nations the entrapment defense is not available to defendants at all, but law enforcement officers can face criminal charges themselves for excessive involvement or complicity in a criminal enterprise. See generally Ross, *supra* note 53.

¹¹⁵ 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"); Posner, *supra* note 30, at 1220. This begs the question, of course. Does "likely to commit the crime" mean more than 50% (i.e., "probable")? Or could it mean likely enough to be "not remote" (i.e., 25%)? It is an unanswered question how much "likelihood" is enough to make the person dangerous enough to be a burden to society.

A more interesting question, but one hitherto not addressed in the literature on entrapment, is the role of race and racial prejudice in the decisionmaking process. If judges or juries (whoever is making the decision about predisposition in that case or jurisdiction) believe African Americans, Hispanics, Muslims, etc. are more violent or

debate about what exactly the term means,¹¹⁶ and whether the inquiry is at least partly circular where the person in question has already done the delict.¹¹⁷ Proving it provides the prosecutor with the opportunity to introduce all sorts of evidence about previous crimes and bad acts that would normally be too prejudicial to be admissible at trial.¹¹⁸ This, in turn, gives law enforcement too much latitude in targeting people with previous convictions, rather than looking for actual perpetrators of the latest unsolved crimes.¹¹⁹ The subjective test allows more room for stereotyping, prejudice, and bigotry generally, due to the intangible nature of the inquiry,¹²⁰

lawless than the population generally, the prosecution will have a much easier time pitching its case that there was a predisposition to commit the crime charged. The subjective test allows more room for racial prejudice because it requires an evaluation and judgment of the character of the defendant.

¹¹⁶ See, e.g., Elbaz, *supra* note 1, at 131. Elbaz' unique twist on this argument is that the concept of "predisposition" is incompatible with the "rational choice" model assumed in a law and economics approach (which he takes), because he believes economics does not allow for preset inclinations at all. It seems to me that he mischaracterizes the rational choice model—which certainly can accommodate tastes and preferences, as seen by Gary Becker's work in this area—and distorts the idea of "predisposition" as well. Predisposition does not have to mean a latent inclination or instinct-driven response to stimuli; it can also refer to the more subtle concept of waiting for the right opportunity. It seems that all Elbaz is really saying is that there is no obvious bright-line test for predisposition; but certainly courts could assign a bright line arbitrarily (for example, by saying that where the inducement offered was equal to an entire lifetime's average wages is automatic evidence that the individual was not predisposed). Most bright-line tests are somewhat arbitrary, but still useful in many cases. The fact that this would have to be done for entrapment does not make the subjective test incompatible with a behavioral economics analysis.

¹¹⁷ 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." *Russell*, 451 U.S. at 442 (Stewart, J., dissenting).

¹¹⁸ *Sorrells*, 287 U.S. at 458 (Roberts, J. dissenting); LAFAVE, *supra* note 12 at § 5.2(d), such evidence may often be admissible anyway, to impeach the character of the defendant if she testifies on her own behalf, and to impeach the reliability of other character witnesses for the defense ("Did you know your "trusted friend" had three felony convictions? Are you sure you know this person very well?").

Another possible advantage to prosecutors of the subjective test, which some would see as unfair, is that the question of predisposition almost always goes to the jury, whereas the objective test allows the court to consider the defense in a pretrial proceeding (but this does not always occur). The subjective test, therefore, may put the defendant in the position of having to decline a plea bargain and proceed to trial, which means gambling with a potentially heftier sentence; the objective test may not require such a tragic choice on the part of the defendant. (I am indebted to Professor Dan Richman for this helpful insight). While such procedural differences are very important for a discussion of the merits or fairness of each test; this article is focused more narrowly on the pragmatic question of whether the objective test successfully deters police misconduct, as its supporters claim.

¹¹⁹ See *Sorrells*, 287 U.S. at 458. 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 Levenson at 40.

¹²⁰ As noted above, preconceived notions or stereotypes are likely to influence the assessment of whether the individual defendant was "predisposed" to commit crimes generally, especially with defendants belonging to a

although this point has not been emphasized at all in the literature or cases on entrapment. Finally, providing a check on aggressive law enforcement activity was clearly behind the Supreme Court's original endorsement of the entrapment defense in the first place, and this is the basis for the objective test—which seems to argue against its alternative.¹²¹

The usual criticisms of the objective test are not the ones raised in this article.¹²² Rather, friends of the “subjective test” argue that the defendant's predisposition has an important bearing on whether the police activities were indeed proper.¹²³ Another way of saying this would be that the subjective test accomplishes everything the objective test sets out to do, except for letting plainly guilty defendants go free; if the police have to resort to really atrocious methods to trap someone, the victim clearly did not have the predisposition to commit the crime.¹²⁴ In addition, some argue that kinder, gentler sting operations are less likely to fool actual criminals, who are

group the majority considers to be lawless or dangerous. The second way that the subjective test allows prejudice to enter is in the assessment of the defendant's response to the specific offer received from the undercover agent in the case at bar. Subcultural morays about etiquette when interacting with strangers, awareness or concern about the legality of actions, seriousness of verbalized promises, etc., can affect the way an individual will respond to an agent, and can be interpreted negatively by the court. This could become increasingly important as law enforcement shifts toward a focus on national security rather than vice squad work, and the victims of prejudice or stereotypes are increasingly immigrants instead of inhabitants of bad neighborhoods. Generally, though, I would argue that the subjective test is less favorable to minorities overall, even though other commentators or courts have not discussed this problem.

¹²¹ See Elbaz, *supra* note 1, at 133. Elbaz also criticizes the subjective test by attacking the rationale that it is more congruent with legislative intent, a point discussed *supra* note 1; see also *Sherman*, 356 U.S. at __ (Frankfurter, J., dissenting) (arguing that the legislative intent theory is “sheer fiction.”). LAFAVE, *CRIMINAL LAW*, lists this first in his section of objections to the subjective test, §5.2(d), p. 458, but it is not a major theme in the academic literature on the entrapment defense, so I have not included it in the body of my text.

¹²² This article is very focused on the specific issue of using acquittals under the entrapment defense as a means of deterring future police misconduct. I should also note that (in general) commentators in the law and economics tradition tend to favor the subjective test for entrapment, although they are in the minority on this issue, at least as far as the academic literature is concerned.

¹²³ See LAFAVE, *CRIMINAL LAW* §5.2(e), p. 459; MARCUS, *supra* note 1, at 108.

¹²⁴ Of course, this is also an argument used by those who say there is no practical difference in the results under the two tests. 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 109; see also *Pascu v. State*, 577 P.2d 1064 (Alaska 1978) (complaining that the test is unmanageable for the same reason). Justice Scalia stated in his concurrence in *Matthews* that “the defense of entrapment will rarely be genuinely inconsistent with the defense on

savvy and suspicious, but may fool the simple-hearted and guileless, who are presumed to be more naïve or innocent.¹²⁵ Some have also argued that it puts the police on trial and simply stalls the proceedings against the defendant, bogging down in a swearing match between the police and the defendant about what really happened;¹²⁶ others express skepticism about the courts acting as the morality police for law enforcement agencies,¹²⁷ the self-appointed conscience of society, instead of fact-finders and constitutional interpreters.¹²⁸ Another problem with the objective test is that it allows factfinders to discriminate against minority police officers, especially where those officers are pitted against white defendants.¹²⁹ This is especially true

its merits,” which perhaps hinting that he views the defense as mostly unnecessary. *Matthews*, 485 U.S. at 67 (Scalia, J., dissenting).

¹²⁵ LaFave puts this objection as follows: “A second major criticism of the objective approach is that the ‘wrong’ people end up in jail is a dangerous, chronic offender may only be offered those inducements which might have tempted the hypothetical, law-abiding person.” LAFAVE, CRIMINAL LAW §5.2(e), p. 459. Park’s version of this, if I understand him correctly, is that the objective test can result in the conviction of non-predisposed defendants. The police might be able get to their shenanigans past a judge in a given case, but if the court is looking solely at the police conduct, the defendant’s general lack of culpability could get lost in the confusion, so to speak. *See Park, supra* note 12, at 217. Yet another way of thinking about this is that the police may have used an inducement that would not ensnare the average person—which is the baseline of inquiry under the objective test—but in this particular case they may have used it on an otherwise law-abiding person who was usually weak that day or week, or confused, or simply unusually gullible. This could occur due to a temporary personal crisis, a hormonal imbalance, a sudden financial bind, or any number of reasons. We all have days or weeks when we are more vulnerable generally.

¹²⁶ *See Park, supra* note 12, at 221. Park believes that the swearing match will usually favor the state, given the burden of proof on the defendant to prove entrapment, but he does not substantiate this claim. Paul Marcus identifies as a major objection that the objective test is rather unworkable in its application, which seems to be another way of saying the same thing.

¹²⁷ *See LAFAVE, CRIMINAL LAW §5.2(e)*, p. 459 (“It is questioned whether the ‘purity’ of the courts is itself a sufficient justification, and whether the objective approach can be expected to serve deterrence in a meaningful way.”)

¹²⁸ *See generally Hanewicz, supra* note 70.

¹²⁹ I am not aware of any commentators who are concerned about this, but it seems to be worthwhile to ask the question of whether courts (judges or juries) engage in racial profiling against minority officers. Are minority officers more likely to be snubbed under the exclusionary rules, or under the entrapment defense? There are relatively frequent lawsuits against police departments and federal agencies for discriminating against minority officers in matters of disciplinary sanctions, promotions, etc. Yet police receive a significant share of their affirmation or correction in the courts when the defendants they arrest are brought to trial—or at least that is the underlying assumption of the objective test’s attempt to dissuade police from misconduct through the results they get in court. The topic would require its own article—and some helpful empirical research—but it is an important question whether minority officers receive the same treatment when testifying in criminal trials as white officers. This issue is really the mirror image of the racial/stereotyping problem with the subjective test. The subjective test allows more room for prejudice against defendants; the objective test allows more room for prejudice against minority officers. It would seem that both of these problems would be more pronounced where there is a racial difference between police and defendants. Under the objective test (as well as the exclusionary rules), a judge or jury that believes a certain minority group is more aggressive, less honest, more lazy, etc., is more likely to believe

given the focus the objective test places on officer conduct and the lack of clear rules for evaluating the merits of the officers' actions.¹³⁰

There are some additional points that provide helpful background to the discussion that follows. Some commentators insist that the two tests produce identical results in nearly every case, so the difference is without distinction.¹³¹ We can see why this would often be true: a citizen with no predisposition to commit crime is unlikely (we hope!) to engage in illegal activity without an extraordinary, practically irresistible inducement—the police offer a temptation so outrageous that it would satisfy the objective test as well.¹³² Conversely, a government trap excessive enough to trigger the objective test might be extreme enough to ensnare almost anyone, so that the victim in an “objective” jurisdiction would also have prevailed under the subjective test.

The problem with this overall argument, although it is generally tenable, is the last condition or point: that a police sting excessive enough to violate the objective test would also be able to ensnare victims who could avail themselves of the subjective test just as easily. It would also ensnare dangerous criminals, however, and that is the problem or the difference between the

the minority officer unduly pressured the (white?) defendant to commit crimes, lie about the defendant's response, plant or tamper with evidence, and try to find inappropriate shortcuts in obtaining convictions. In general, one might expect the majority to be more afraid of aggressive law enforcement from minority officers than from other members of the majority. The objective test provides an outlet for such attitudes to manifest themselves. Again, this topic seems to have been ignored in the academic literature, but it is worthy of more investigation.

¹³⁰ Of course, some might argue that the lack of bright-line rules is an asset when evaluating government overreaching, because it gives courts more latitude in confronting new forms or versions of government misconduct. The use of high-tech tools such as honeypots, or the focus on national security-related stings instead of traditional vice crimes, could obviously lead to previously unknown forms of undercover operations.

¹³¹ See, e.g., Louis M. Seidman, *The Supreme Court, Entrapment, and our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111, 120 (1981) (“In virtually every case . . . the objective and subjective tests produce the same results, and those results turn on the defendant's predisposition.”). Justice Scalia went so far as to suggest in his concurrence in *Matthews* that the entrapment defense rarely produces a different result than simply challenging the accusations on the merits. *Matthews*, 485 U.S. at 67 (Scalia, J., dissenting).

¹³² See *Pascu v. State*, 577 P.2d 1064 (Alaska 1978) (“An ‘average person’ cannot be induced to commit a serious crime except under circumstance so extreme as to amount to duress. Yet it is clear that entrapment may occur with a degree of inducement that falls far short of duress.”).

tests.¹³³ However revolting the government’s sting operation may have been, if the arrestee turns out to be the serial murderer police have been hunting for years,¹³⁴ or a money launderer for terrorists, or the “other driver” witnesses saw with Timothy McVeigh at the Oklahoma City bombings, then the true difference between the two tests emerges. The dangerous, long-sought criminal goes free under the objective test, but goes to jail under the subjective test.¹³⁵ Of course, under the objective regime, if the police are ready to make an arrest and press charges on the spot for other crimes, they would presumably do so, a point I emphasize later to explain why police may ignore the possibility of an entrapment defense when doing sting operations.¹³⁶ There would be many cases, however, where the police or the prosecutors are *not* ready to go forward on the unrelated case, or where the evidence for the other crimes may be accurate but inadmissible. Al Capone’s tax-evasion conviction forever stands as a testimony to the fact that the government must sometimes make do with lesser charges in order to incapacitate a true menace to society.¹³⁷

¹³³ See, e.g., MARCUS, *supra* note 1, at 108; Park, *supra* note 12, at 216, 271, noting that the subjective test “has the virtue of focusing upon the culpability of the defendant. It attempts to distinguish between persons who are blameworthy and persons who are not. In the absence of extraordinary circumstances, that should be the goal of our law of crimes.”

¹³⁴ A famous counter-example, however, is *Gebardi v. United States*, 287 U.S. 112 (1932), where the defendant was charged under the Mann Act with taking a single young woman across state lines for immoral purposes; the Supreme Court held that conspiracy charges could not stand where the only co-conspirator besides the defendant was someone from the class the law in question intended to protect (this is a version of “Wharton’s Rule”). *Gebardi* was not an entrapment case, but it illustrates the willingness of courts— even the Supreme Court— to let the “big fish” go in certain circumstances. *Gebardi* was supposedly Al Capone’s lead gunman and had been indicted in all seven murders of the Saint Valentine’s Day Massacre. His female friend gave him an alibi that placed them both out of state on a romantic rendezvous at the time, allowing *Gebardi* to escape the murder charges. Frustrated to the point of embarrassment, the government next tried to turn *Gebardi*’s alibi—which no one really believed—into a criminal charge itself under the Mann Act. This also proved unsuccessful when the case finally reached the Supreme Court. By then, however, Al Capone had been convicted of tax fraud, and *Gebardi* had married the girl he had supposedly corrupted. For discussion, see PHILLIP E. JOHNSON & MORGAN CLOUD, CRIMINAL LAW: CASES, MATERIALS AND TEXT 669-70 (7th ed. 2002). Again, this was not about entrapment; but it does illustrate the problem of the occasional case where a big-time criminal is charged with a rather paltry offense, comparatively speaking, and still manages to slip through the prosecution’s fingers.

¹³⁵ See *id.*

¹³⁶ See *infra* notes ___ and corresponding text.

¹³⁷ To this extent, the predisposition test comports better with the goal in incapacitation, it may better suit the needs of modern criminal law, which focuses increasingly on prevention and incapacitation rather than retribution, rehabilitation, or even simple deterrence. See JOHNSON & MORGAN, CRIMINAL LAW 630 (“Although

Another point worth mentioning is that some commentators urge that the defense is largely irrelevant, supposedly because it almost always fails.¹³⁸ There is a problem with getting an accurate picture here; when the defense is successful, it would result in an acquittal at the trial level, and the prosecutor may have trouble appealing the case without encroaching on double jeopardy issues; an appeal by the government is unlikely.¹³⁹ Seldom are decisions reported in criminal cases at the trial level. The cases appealed will generally be ones where the defendant raised entrapment but lost and is arguing that a different legal standard would have helped his claim stand on all fours. Thus, useful empirical data on this subject is elusive; anecdotal evidence from the defense bar is interesting, but often little more than an expression of how frustrating their jobs are.

A final issue by way of background is that entrapment is inseparable from sting operations. Not all sting operations would constitute entrapment; but entrapment almost definitionally involves sting operations. No discussion of entrapment could have 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

retribution and deterrence are by no means irrelevant to modern criminal law, today we tend to emphasize the restraint or incapacitation of dangerous criminals.”). It enables the criminal justice system to retain the person who was likely to commit crime anyway. The objective test does not do this. Of course, the subjective test also serves a retributive goal, in that it punishes the defendant who is culpable and acquits the one who is not; and it arguably serves the goal of deterrence in that the innocent do not have to fear, but the criminals must be wary. The incapacitation function, however, is one of the clearest distinctions between the two tests in terms of their results. For a thoughtful discussion of the core attributes that should qualify a person as “dangerous” enough to merit preventative detention, namely imperviousness to deterrence, *see* Slobogin, *supra* note 27.

¹³⁸ John D. Lombardo, *Causation and Objective Entrapment: Toward A Culpability-Centered Approach*, 43 U.C.L.A. L. REV. 209, 213 (1996), citing Park’s article, *supra* note 12 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, CRIMINAL LAW 460 (§ 5.2 (f)).

¹³⁹ In fact, at least one judge has indicated, in contrast to the commentators cited above, that entrapment “has probably replaced ineffectiveness of counsel and challenged conduct of prosecutors as the most prevalent issue

surveillance to catch would-be offenders in the nick of time.¹⁴⁰ By the same token, badly done sting operations—ones that reach a new low of moral turpitude for law enforcement—are but part of an array of illegitimate activities from which we try to deter the police.

If the sanctions for some bad police activities are more likely or frequently imposed, but the sanction is the same, then police will tend to substitute the other activity.¹⁴¹ Similarly, if the sanction is perceived to be greater, perhaps where a more serious offender gets off or an offender is more likely to retaliate against the officer, there would also be a tipping effect.¹⁴²

For example, if the exclusionary rules are more likely to arise at trial, or are easier for defendants to wield as legal weapons than the entrapment defense, the police may devote more attention to avoiding actions that would trigger the exclusionary rules rather than entrapment.

This can occur unconsciously, if the police become so attentive to proper procedure for searches

in current appeals.” *Rivera v. State*, 846 P.2d 1, 11 n.6 (Urbigkit, J., dissenting); *see also* Deis, *supra* note 1, at 1212 (“Over time, it has become one of the most common issues presented in criminal appeals.”).

¹⁴⁰ *See* Ross, *supra* note 53, at 1508 (“Limiting the use of deception (by preventing the police from posing as drug dealers, fences, and the like) may entail greater reliance on conventional tactics . . .”).

¹⁴¹ *See* Neal Kumar Katyal, *Deterrence’s Difficulty*, 95 MICH. L. REV. 2385, 2391-2401 (1997). (hereinafter Katyal, *Deterrence’s Difficulty*). Katyal integrates long-established insights from economics about the phenomenon of substitution into the arena of deterrence and criminal law. The following quote helps set forth the theory:

Thinking about criminal law, it is not difficult to understand how crimes committed for profit are ripe candidates for substitution analysis, but it is hard to imagine how other crimes can be analyzed in such terms. Yet even crimes of passion may, perhaps, be examined in terms of substitution. Passion, after all, comes in different forms, and a penalty structure may induce people to act in particular ways by assigning costs to particular passionate activities. As Richard Herrnstein puts it, when husbands and wives start throwing dishes at each other, they do not usually throw the fine china . . . To take another example, imagine the potential consequences of the “three strikes you’re out” rule. If offenders know that, on their third offense, they will be jailed for life, they may be less likely to commit that third offense; but if they do, they might make it a drastic one. Indeed, they may even decide to kill the witnesses to their crimes because—at least in states without a death penalty—there is nothing more that the government can do to them.

Id. at 2393-4 (internal citations omitted). My point above is that the police may also engage in some form of substitution as certain activities are sanctioned. Courts should be aware of such possible substitution effects when adopting policies aimed at steering police away from their preferred course of action.

¹⁴² *See id.* Katyal discusses the problem with having extremely high sanctions for a variety of crimes, even presumably impulsive crimes like rape; a perpetrator dead-set on committing one crime with a dreadful sentence is more likely to be willing to commit other crimes if his situation cannot be worsened much by doing so. Katyal also discusses the substitution effect of drug laws, where stiff penalties for crack cocaine could actually lead to a commensurate increase in heroin consumption and distribution, as both consumers and sellers switch products to avoid the tougher sanctions. *See id.* at 2404-05.

and seizures that they become less watchful for a possible entrapment defense. On a more conscious level, police could actually come to consider an entrapment-based sanction more remote than one based on the exclusionary rules, and decide that if some rules must be “bent,” those rules will be in the area with the least likely consequences.

There can also be unintended consequences from disparities in sanctions for police, including disparities in probabilities. Some commentators see some newer categories of criminalization—such as conspiracy, which confers enhanced discretion, penalties, and power on prosecutors—as a reaction against the dramatic increase in pro-defendant exclusionary rules during the Warren Court era. The scales were rebalanced, so to speak.¹⁴³ Conspiracy, however, creates new opportunities to use government informants and sting operations, more so than traditional common-law crimes,¹⁴⁴ in two general ways. First, the modern trend of criminalization, which focuses increasingly on possession and distribution of various contraband (drugs, pornography, stolen data, false information, etc.), crimes that inherently lend themselves to group effort (at least a distributor and supply chain, besides the ultimate consumer-vendor transaction), and thus there would tend to be an increasing use of conspiracy charges, and an increasing usefulness for undercover agents. Conspiracy laws also enhance prosecutorial power

¹⁴³ Of course, criminal defense lawyers and prisoner advocates would argue that the scales have been anything but balanced, pointing to the vast asymmetry in resources available to the government as opposed to those of the individual defendant. Judge Posner notes that “[I]n cities with a population of a million or more, the average budget of the local prosecutor’s office exceeds \$25 million. . . . Annual appropriations for the offices of the U.S. Attorneys, which prosecute most federal crimes, aggregate some \$1 billion.” See POSNER, *FRONTIERS*, *supra* note ___, at 366 n. 57. Most commonly defendants cannot afford to hire their own lawyer and instead use court-appointed counsel, who are “kept on a short financial tether.” *Id.* at 367.

¹⁴⁴ I generally take a favorable view of criminalizing conspiracy, as discussed more in the following paragraphs. It should be mentioned, however, that some commentators have argued forcefully that conspiracy is completely unnecessary as a crime (especially given the modern breadth of laws of attempt and accomplice liability) and that it provides too much power to law enforcement. *See, e.g.*, Phillip Johnson, *The Unnecessary Crime of Conspiracy*, 61 CA. L. REV. 1137 (1973). Attempt, however, requires that the defendant have taken a “substantial step” toward the commission of the crime; conspiracy does not, but rather requires only that there was an agreement—sometimes somewhat tentative—to pursue a criminal enterprise. This is much easier for the prosecution to prove. Also, the usual rules against admitting hearsay evidence can be circumvented when the out-of

and discretion, so methods of law enforcement (like sting operations) that yield more conspiracy-based charges present special rewards for prosecutors.

To the extent that exclusionary rules interfere with the admissibility of confessions, law enforcement has two additional reasons for favoring conspiracy. First, conspiracies provide the opportunity to “flip” members into confessing against each other (but such incriminations are unlikely to trigger the exclusionary rules).¹⁴⁵ Second, the incriminating statements made and recorded by undercover agents in a group conversation, prior to a custodial interrogation, are far less likely to trigger exclusionary rules.¹⁴⁶ The police, therefore, have extra incentives to conceptualize law enforcement in terms of conspiracy, and to use sting operations, which set the stage for entrapment.¹⁴⁷

If law enforcement is tilted toward using conspiracy charges in as many cases as possible, then there may be more sting operations to offset the limitations or costs imposed by the

court testimony is offered to prove this criminal agreement, which is an element of the crime. *See generally id.* for discussion.

¹⁴⁵ For a discussion of how the criminalization of conspiracies generally provides a societal advantage through the phenomenon of “flipping,” see Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L. J. 1307, 1328-32 (2003). Richard Posner notes a similar point as an inherent weakness of conspiracies, but one that can lead to additional crimes: “While it is also true that a conspiracy is more vulnerable to being detected because of the scale of its activities, the scale may also enable the conspiracy to escape punishment by corrupting law enforcement officers.” POSNER, *supra* note 27, at 230. My focus is on the value of sting operations to police, but the insight in the same.

I would be remiss if I did mention in this context that “flipping” was one of the very features of conspiracy doctrine that Justice Jackson found so nefarious in his stinging concurrence in *Krulewitch v. United States*, 336 U.S. 440 (1949) (Jackson, J., concurring) (“[I]f, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other.” Jackson also attacked conspiracy charges on the grounds that they invite venue-shopping by federal prosecutors designed to inconvenience the defendants; evidentiary rules are relaxed to the point that prejudicial material is put before the jury; the charges are often circular; they lend themselves to mass trials, where relatively minor defendants will be viewed as guilty by association with the true bad apples; and the state is given over to overbearing tactics generally. *See id.* Justice Jackson, of course, had just returned from presiding over the Nuremberg war trials when he wrote his concurrence in *Krulewitch*, and the experience seems to have left him with vivid impressions.

¹⁴⁶ Justice Jackson also took issue with this advantage of conspiracy doctrine, arguing in *Krulewitch* that it leaves too much room for prosecutorial abuse. *See id.*

¹⁴⁷ *See also* Ross, *supra* note 53, at 1509 (“The Fifth Amendment invites the use of undercover tactics as a means of obtaining by deceptive stratagems prior to arrest what police may not elicit by coercion afterwards.”).

exclusionary rules.¹⁴⁸ The police will have a tendency to use an agent to either infiltrate an existing conspiracy or create a new one by recruiting members who would otherwise have acted alone (if they acted at all), or sometimes to recruit those who would have joined a different conspiracy otherwise.¹⁴⁹ In any case, the sting operation is the basic underlying scenario for an “entrapment” scheme.¹⁵⁰

Moreover, if cumbersome exclusionary rules surround mostly arrests and searches (to which most of the exclusionary rules pertain), then law enforcement is more likely to want a “controlled” setting for these particular phases of enforcement. They will reduce risk and uncertainty by “creating” the occasion for the crime.¹⁵¹ A scheduled crime enables law enforcement to carefully plan the timing and occasion of the arrest, and the timing, occasion, and method of obtaining incriminating evidence. This is a sting operation. Thus, the effort to avoid violating the exclusionary rules creates an incentive to use sting operations as the method of choice for law enforcement.

¹⁴⁸ The growth of crimes involving computer hacking, the Internet (like predatory pedophilia via chat rooms), and identity theft (which usually involves the use of computers), as well as the increased focus on ferreting out underground terrorist groups, will likely accelerate this trend even more. See Walden & Flanagan, *supra* note 53, at 317 (“With today’s enhanced focus on cybersecurity, governments and businesses are looking for effective tools to prevent and detect attacks on their critical information systems.”).

¹⁴⁹ A caveat applies here: there is to date little empirical evidence that undercover operations have come to dominate law enforcement, despite their increased prevalence. This may imply a limitation to what I have expressed in very general terms, or may indicate an ongoing need for uniformed cops or regular agents for a variety of criminological or political reasons.

¹⁵⁰ Not all such sting operations, however, involve deception directly perpetrated by an undercover agent herself. For example, in a recent Ninth Circuit case, *Bradley v. Duncan*, 315 F.3d 1091 (9th Cir.2002), involved undercover agents picking up a pedestrian who was visibly suffering from drug withdrawal symptoms; they drove him to the defendant and dropped him off to beg the prey for help getting a fix. The drug-sick pedestrian even vomited in front of the defendant, shook uncontrollably, and pleaded for help; the defendant eventually took him to a corner drug dealer and helped him purchase twenty dollars worth of cocaine, for which he was immediately arrested by the officers who had driven the pedestrian to the spot. The Ninth Circuit held that the defendant was entitled to a jury instruction on entrapment, which the trial court had denied.

¹⁵¹ I distinguish here between risk and uncertainty in law enforcement. Risk refers to (however imperfectly) quantifiable odds regarding the outcome of an investigation and/or arrest. Uncertainty refers to true unknowns. Even where the possible outcomes are clear and finite—say, for example, imprisonment or acquittal—there could be enough uncertainty that the odds of each possible result are impossible to predict. People tend to be more averse to uncertainty than to risk. Applying the distinction to public policy and law enforcement, uncertainty poses different issues for expenditures of public resources than quantifiable risk, and perhaps more steps should be taken to eliminate the former than the latter.

A truly original article about sting operations has been written by Professor Bruce Hay at Harvard Law School.¹⁵² Hay makes many of the observations above, but he notes that entrapment can serve two critical functions for law enforcement: information and deterrence.¹⁵³ “Information” is how laypeople—and so far every court—understand sting operations: they help us find out who and where the criminals are, without the costs and privacy invasions of more ubiquitous surveillance.¹⁵⁴ This is related to my discussion in the preceding paragraphs. “Deterrence” in this context, however, refers to the fact that criminals must be more cautious once they are aware that their clients—or even their recruiters and bosses—in criminal transactions could be government agents.¹⁵⁵ This may lead some criminals to abandon their profession. The pervasive use of sting operations raises the cost of doing business, because more resources must be devoted to security or detection of agents. Some golden opportunities are lost because they are indistinguishable from sting operations, and there is an increased risk of getting caught and punished.¹⁵⁶ These increased costs make the criminal enterprise less profitable, or at least and less appealing.¹⁵⁷ Of course, this would also be true of undercover operations that are not true “stings,” that is, offering inducement, but would also apply to undercover operations

¹⁵² Bruce Hay, *Sting Operations, Undercover Agents, and Entrapment*, available on the Social Science Research Network (www.ssrn.com), journal publication forthcoming.

¹⁵³ *Id.* Some other commentators have also mentioned the deterrence value of sting operations for would-be criminals, but not with the clarity and depth of Hay’s new piece. See, e.g., Elbaz, *supra* note 1, at 121; Seidman, *supra* note 131.

¹⁵⁴ Posner makes a similar point about sting operations, which he refers to as legal entrapment (which seems like a misnomer, technically): “[I]t is altogether likely that the dealer unless arrested will make illegal sales, and we arrest and convict him now because it is much cheaper to catch him in an arranged crime than in his ordinary criminal activities. . . . the costs of apprehension and conviction are much lower.” Posner, *supra* note 27, at 231.

¹⁵⁵ Hay, *supra* note 152. Richard Posner hints at this in a footnote. See POSNER, *supra* note 27, at 231 n. 7 (“[T]here is also a deterrence rationale [to entrapment]. Can you figure out what it is?”).

¹⁵⁶ This is basically an issue of transaction costs and information asymmetries. See, e.g., ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 91-96 (4th ed. 2004); A. MITCHELL POLISNKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 11-14 (2nd ed. 1989). Interestingly, Richard Posner discusses transaction costs related specifically to crime, but mostly to offer a rationalization for crimes against property (forced exchanges are forbidden where transaction costs are low) and the defense of necessity (transaction costs are prohibitive). See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 226, 262 (5th ed. 1998). He does not discuss the increased transaction costs for would-be perpetrators generated by undercover agents.

¹⁵⁷ See Hay, *supra* note 152.

involving mere informants;¹⁵⁸ but stings would seem to concentrate the heightened transaction costs on the essential transactions themselves,¹⁵⁹ whereas criminal entrepreneurs have other means of dealing with the contingency of undercover surveillance.¹⁶⁰

Hay observes that these two benefits of sting operations can sometimes run counter to each other, especially in terms of how aware of the existence of stings the government would want criminals to be.¹⁶¹ If using sting operations to ferret out the criminal element in society, the job will be easier if the criminals are caught completely off guard.¹⁶² If sting operations instead are used to scare criminals out of business, which may be a very useful thing, the government would want to maximize awareness of stings, or at least to create a maximized or (even exaggerated) perception of the risk of encountering undercover agents.¹⁶³ Hay then offers an illuminating but complex calculus to derive the optimal level of stings for either purpose.¹⁶⁴

A fascinating point he makes is that under either goal (identification of criminals or deterrence), there would be a natural tendency, over time, for the sting operations to mimic true criminal enterprises more and more closely.¹⁶⁵ A more convincing decoy serves both ends and

¹⁵⁸ I am indebted to Chris Slobogin for this insight, which he contributed as a comment on an earlier draft.

¹⁵⁹ Whereas crime leaders must surely monitor and test their ranks for undercover informants, the strongest evidence for criminal charges will come from the actual transactions themselves; the informants may provide tips that lead to conspiracy charges or discovery of a stash or hideout, but criminals have some chance of outwitting authorities if they discover the security breach in time, or are simply using some decoys themselves. The transactions, however, are essential to the enterprise, and risks concentrated on the transactions present special hazards (and therefore special costs) for the criminals. This is an argument in favor of permitting inducement-type undercover work (stings) instead of limiting undercover work to information-gathering; to that extent, it argues for a less liberal defense of entrapment as well.

¹⁶⁰ For example, crime leaders can monitor their associates to try to catch informants passing information to regular agents; or may simply keep minions ignorant of critical aspects of the operation besides their own tasks, operating on a “need to know” basis. The threat of retaliation may serve more effectively to deter informants than inducers, as there is less certainty that the undercover informant’s tips will lead to arrests, or how soon. Inducers are more in control of the “schedule” of the operation and timing of arrests, it would seem, and run less risk that their prey will remain at large after the undercover agent’s identity is discovered.

¹⁶¹ *See id.* at ___.

¹⁶² *See id.* at ___.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at ___. Park made a similar point, noting that targets of undercover operations eventually become aware of the “rules” police work within and take precautions accordingly. “Thus a person involved in a criminal

becomes increasingly necessary as real criminals devise new signals¹⁶⁶ to avoid undercover agents.¹⁶⁷

At the same time, knowledge of the “risk” or prevalence of sting operations would spread in the criminal underworld. It seems that the awareness of the risk of sting operations would grow faster among true criminals than among the general (law-abiding) public; this knowledge, in fact, would be increasingly disproportionate on the side of the lawless. This could produce an effect where the innocent citizens make up an ever-increasing proportion of those being ensnared.¹⁶⁸ Entrapment (under either test) thus increases naturally over time, within a closed system, and entrapment defenses would be raised more and more often. Also, the defendants

enterprise could attempt to immunize himself by requiring a suspected target to break on the rules during negotiations leading to an offense.” Park, *supra* note 12, at 228. This problem may argue in favor of some sort of policy that hinders this process or stalls it; it is not clear that the objective entrapment defense, however, effectively achieves such a goal.

¹⁶⁶ For example, Hay notes that real mobsters may use coercion to recruit minions. This serves as a signal if the government does not use some coercion as well when approaching someone with an illicit proposition. Similarly, professional drug dealers may trust no one if they do not imbibe in narcotics together with them; government agents would then be forced to do this in order to make a sting operation effective at all.

¹⁶⁷ Justice Rehnquist observed this point in the *Russell* case: “. . . the supply of some item of value that the drug ring requires must, as a general rule, also be permissible. For an agent will not be taken into confidence of the illegal entrepreneurs unless he has something of value to offer them.” *Russell*, 441 U.S. at 432. This is one problem with Daloia’s proposal, *supra* note 38, to have a clear-cut due-process prohibition against the police using sex in a sting operation, as much as I agree that there is something inherently revolting about the practice. Apart from the fact that special prohibitions against police sex may be a tough sell in our permissive society, there is the problem that real criminals would respond by using sex as the invariable test of loyalty and dissociation from the government for accomplices and co-conspirators. In this way, most or all sting operations could become defunct very quickly, if there were some universal signaling mechanism that one was *not* a government agent—as long as that signal was completely off-limits to the government.

Park actually offers some anecdotal evidence in this regard in his section critiquing the idea of “per se” rules like Daloia suggests.

For example, police in one Midwestern city had a policy of never allowing a prostitute to touch them, and of never “setting the price.” Consequently prostitutes would seek to discover whether a customer was an officer by attempting to kiss him, or by asking him how much he would pay. Narcotics sellers sometimes take similar precautions, as by requiring potential buyers to use narcotics in the seller’s presence.

Park, *supra* note 12, at 228 (internal citations omitted).

¹⁶⁸ Park hints at something like this but did not develop the idea very far. In his section discussing the infeasibility of creating bright-line rules for what is permissible in undercover operations, he notes that such rules would inevitably become known to the targets of such operations, who will simply demand that new contacts break one of the known rules before entrusting themselves to the other party. He continues: “For example, if agents were prohibited from persisting after an initial refusal, a drug dealer could simply refuse to sell to new customers on first request. Ironically, *professional criminals are the ones most likely to be sophisticated enough to take such precautions.*” Park, *supra* note 12, at 228 (emphasis added).

may become increasingly sympathetic. Again, it is supremely difficult to obtain hard empirical data in this area.

Another subtle problem with sting operations is the screening effect it has for law enforcement.¹⁶⁹ Honest and moral women and men might shun careers in law enforcement as those careers increasingly involve lying, ingesting narcotics,¹⁷⁰ engaging in sexual acts with criminals,¹⁷¹ viewing and disseminating child pornography,¹⁷² and seducing teenagers in Internet chat rooms. Talented individuals, who would otherwise have been wonderful cops, but who are seriously religious, ethically cautious, or have any sort of strong moral fiber will go into other careers. A self-selection process can occur, leading eventually to a police force comprised entirely of individuals who are morally ambivalent, irreligious, ethically impulsive, and

¹⁶⁹ By this I mean a form of adverse selection; over time, law enforcement would increasingly draw the least desirable element to its ranks. Some commentators have suggested that the type of work will also corrupt officers who were relatively honest when they started. *See, e.g.*, Slobogin, Deceit, *supra* note 52, at 800 (“In the undercover context, [there are reports of] officers whose undercover role is so all-consuming that they become criminals themselves. Police are clearly not immune from the corrupting influence of deceit that Bock describes.”).

¹⁷⁰ *See* Park, *supra* note 12, at 219 n. 186 (“With the necessity of future transactions in mind, the undercover agent must be able to transport the narcotics away from the seller. Frequently the seller will demand that they be ‘shot up’ right there.”).

This aspect of undercover work might be helped significantly by the advent of the cocaine vaccine, now in its final stages of testing and development. *See, e.g.*, Thomas Kosten, Marc Rosen, Julian Bond, Michael Settles, John St.Clair Roberts, John Shields, Lindsay Jack, & Barbara Fox, *Human therapeutic Cocaine Vaccine: Safety and Immunogenicity*, 20 VACCINE 1196 (2002); Barbara S. Fox, *Development of a Therapeutic Vaccine for the Treatment of Cocaine Addiction*, 48 DRUG AND ALCOHOL DEPENDENCE 153-158 (1997); Peter J. Cohen, *Immunitization for Prevention and Treatment of Cocaine Abuse: Legal and Ethical Implications*, 48 DRUG AND ALCOHOL DEPENDENCE 167-174 (1997); M.W. Johnson, et al., *Active Cocaine Immunization Attenuates the Discriminative Properties of Cocaine*, EXP.CLIN.PSYCHOPHARMACOL 2000 May; 8(2):163-7; *see also* Dru Stevenson, *Should Addicts Get Welfare? Addiction and SSI/SSDI*, 68 BROOK. L. REV. 185, 239 (2002) (hereinafter Stevenson, *Addicts*) (discussing the potential use of the vaccine as a condition for federal welfare benefits for drug addicts). Scientists have recently developed a successful vaccine for cocaine, and tests on human subjects have been underway at Yale University for over two years. The vaccine functions through antibodies, rendering the cocaine molecules ingested in the body completely inert; it cannot pass through the blood-brain membrane, and simply passes out of the system. It appears to be completely safe (there are no known side effects); it also completely prevents overdose. As the cocaine vaccine becomes more widely available, and similar vaccines are developed for other addictive substances, undercover agents could be immunized against the effects of narcotics they must ingest as part of their work; this not only protects them from developing addictions or suffering other deleterious health effects from the drugs, but also would enable the agents to stay completely in their right mind during the feigned drug use, which could further enhance law enforcement technique.

¹⁷¹ *See* Daloia, *supra* note 38, for a general assessment of this practice and its pervasiveness.

¹⁷² This was clearly in the background of the *Jacobson* case, where the government actually published the child pornography that it mailed to the defendant; the images became more and more graphic and included younger and younger boys, as time went on—as if the agents were trying to cultivate a taste for the stuff in their target.

unreflective.¹⁷³ It is one thing when the police act in a way that does not reflect the values of the community; it is another when the entire police force does not share the values of the community, as the community generally relies on the police to preserve “order” in a sense laden with values.¹⁷⁴

There are several theoretical underpinnings for conspiracy doctrine, which is often in the background of sting operations, that bear upon the entrapment defense itself. In Professor Neal Katyal’s article, *Conspiracy Theory*, he explains the pragmatic value of modern conspiracy laws; civil libertarians see in them a foreshadowing of conservative totalitarianism.¹⁷⁵ Katyal’s subtle analysis goes beyond the usual Hegelian explanation that conspiracy doctrine emerged in the 1970’s to restore the equilibrium of power (I say equilibrium, not necessarily equality) between prosecutors and defendants that had been disturbed by the Warren Court and its exclusionary rules. Instead, Katyal draws on insights from the social sciences about the effects that group membership can have on decisionmaking by the individual members; there is a danger in numbers.¹⁷⁶ People are emboldened to attempt criminal endeavors they would not have tried on

¹⁷³ The following paragraph from Park is illustrative, although he does not substantiate his assertion: It has been said that police departments seldom employ policemen as such. They employ the best available men and then try to make policemen of them. . . . In drug cases, it would be more accurate to say that the worst available men are chosen and then turned into quasi-policemen.

Park, *supra* note 12, at 231 (internal quotations omitted).

¹⁷⁴ Indeed, some commentators see our modern police departments as rife with corruption, unnecessary violence, abuses, and cover-ups. For a review of numerous incidents in recent history where police were caught involved in actual crimes—theft, drug distribution, sexual offenses, illegal gambling, extortion, embezzlement, physical brutality, and even murder, see Levenson at 6-13.

¹⁷⁵ See Katyal, *Conspiracy Theory*, *supra* note 145.

¹⁷⁶ See Neal Kumar Katyal, *Danger in Numbers: Why it Makes Sense to have Harsh Punishments for Conspiracy*, 2003-APR LEGAL AFF. 44 (2003); see also Katyal, *Conspiracy Theory*, *supra* note 145, at 1316-24. Katyal describes some specific features of group psychology that come to bear on criminal collaborations. First, social scientists have shown that groups are more prone to polarized decision-making and greater risk-taking than individuals. This leads criminals to pursue their illicit ends more aggressively when in groups than if working alone. Second, group members are more likely to act against their own self-interest in furtherance of the group’s interests as a whole, making them so loyal as to be undeterred by personal liability that may be incurred in service to the group project (this provides an interesting insight into the felony murder rule as well). Third, Katyal discusses how group members are more impervious to dissuasion generally due to the psychological reinforcement they receive from the others. This makes sanctions generally less effective as a deterrent once people begin working in groups to commit crimes.

their own. Reinforcement takes place not only in the form of lookouts, bodyguards, and specialists in safe-cracking (or whatever),¹⁷⁷ but in the psyche as well. There is validity to having laws tailored to offset the negative reinforcement of conspiracies with specific deterrence. As people become aware of the hidden presence of sting operations in their environment, the “strength in numbers” effect grows weaker, because there is generally more suspicion between members.¹⁷⁸

All this may also apply in a more unfortunate way to entrapment. There is a danger in numbers. If people are emboldened to commit crimes only by the encouragement of others, what if the “others” are government agents?¹⁷⁹ Nevertheless, sting operations are probably necessary to enforce contraband laws and stop the stem the tide of organized crime. They are conceptually problematic, though, for the same reason that crime groups are troublesome—and in part this conceptual circularity drives entrapment doctrine.

The defense of entrapment, therefore, plays an important role in balancing some uncomfortable, but seemingly unavoidable, tensions in law enforcement policy. It is valid for policymakers and judges to be concerned about the directions sting operations may tend to go. Some courts, however, respond to these troubling issues by wielding the entrapment defense as a

¹⁷⁷ See Katyal, *Conspiracy Theory*, *supra* note 145, at 1323-26. Katyal explains the extra value criminals obtain through cooperation, such as economies of scale, specialization, and the greater likelihood of success.

¹⁷⁸ See Park, *supra* note 12, at 219. Park observes that undercover operations almost universally depend on earning the trust of the suspects, whether through appeals to friendship, profiteering, or even sympathy. Invariably this trust is broken when the operation ends and arrests take place. Those left behind learn to be more cautious and less trusting, making it more difficult to work together. Overall, I would argue that this raises the transaction costs of crime significantly, because members of criminal groups must test and monitor each other’s loyalty and genuineness (in the criminal enterprise), as well as go to extra lengths to earn the trust of the other members, by demonstrations of loyalty and genuine lawlessness. Existing crime consortiums will more easily fracture, and new ones will be harder to cement.

¹⁷⁹ The problem of people emboldening one another to do socially undesirable acts seems to meet with inconsistent attention in the legal system. Certainly conspiracy focuses on this, as well as accomplice liability. A version of this may be part of the justification for criminalizing hate speech; not only do hate crimes harm the victims (individually and collectively), they risk fomenting more of the same from others. Tortious inference with contract also creates liability (civil, of course) for emboldening another person to breach a contract, which

type of weapon, or perhaps a rod of correction, against police whom they feel have crossed some unmarked line. The objective test for entrapment explicitly seeks to deter police misconduct by acquitting the defendant. It is to this policy of deterrence that I now turn.

PART III: INDIRECT DETERRENCE

Using the entrapment defense to deter police misconduct is an indirect form of deterrence.¹⁸⁰ Instead of making the wrongdoer pay, as criminal sanctions do with fines and prison terms, indirect deterrence threatens the wrongdoer by conferring benefits on a third party.¹⁸¹ The third-party effect can produce costs for wrongdoers, as when corporations face vicarious liability for employees. The entrapment defense, however, is not a sanction imposed on third parties that indirectly threatens the police officer, but rather a benefit conferred on another that is supposed to dismay the wrongdoer himself.¹⁸²

Acquitting a defendant to punish misbehaving police is problematic. The mechanism for making misbehavior unappealing to police is indirect, and therefore inherently subjective and

theoretically they may have *wanted* to do before but lacked encouragement and opportunity. On the other hand, free speech concerns, and the right to assembly, tend to run in the other direction.

¹⁸⁰ See Slobogin, *Why Liberals Should Chuck*, *supra* note 27, at 373, suggesting an analogous argument regarding the validity of the Fourth Amendment exclusionary rules:

At first glance, the exclusionary rule might seem to fare well as a behavior- changing mechanism. It appears to punish the officer who engages in illegal conduct (by preventing conviction or making it more difficult), reward the officer who obeys the Constitution (by permitting prosecution to go forward), and withdraw reward from the misbehaving officer (by taking away illegally discovered evidence). In fact, however, the exclusionary scheme does not feature reward withdrawal at all, and is both a weak punishment and a weak reward.

¹⁸¹ Other commentators have expressed similar concern, albeit in passing, with using acquittals to enforce the exclusionary rules. See, e.g., Levenson at 19 (“Finally, the exclusionary rule does not remedy police misconduct because it does not punish an officer directly for his or her misconduct.”); 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.”).

¹⁸² Part of the conceptual problem here is that using acquittals to deter police assumes that the police are both “disinterested” and “interested” parties at the same time, which seems like a contradiction. It assumes they are disinterested to the extent that they want what is best for the public good, rather than simply thinking about themselves, completing another day’s work, and collecting a paycheck. Yet they are imagined to be simultaneously

speculative.¹⁸³ There is great potential for the deterrent effect to be weak, subject to interference when special factors are present, and susceptible to backfire.

For example, it is unclear whether the defendant's acquittal in an entrapment case would be perceived by police as imposition of a cost or deprivation of a benefit—these two incentives are not identical for deterrence purposes. A thief is less deterred by the possibility of an empty safe than the risk of a jail cell.¹⁸⁴ With the entrapment defense, police conducting a sting operation can consider the risk of a fruitless endeavor, but this is much less of a deterrent than is the imposition of a true cost on the officer.

Moreover, indirect deterrence assumes the police have a personal stake in the final outcome of each case. It is difficult to pinpoint the nature of this personal stake; the following paragraphs hypothesize three possible models to explain this. Each of the three models contains internal problems.

In the first model, the benefit conferred on the defendant (acquittal) punishes the out-of-line police by making them feel that their own labor and efforts have been frustrated. Perhaps they will feel their time and energy have been devalued. This model depends on the police officer associating her own success with the number of convictions to which she contributes,

self-interested, to the extent that the defendant's acquittal will pain them personally and deter them from overreaching in the future.

¹⁸³ This is always a concern with deterrence, including deterrence of criminals, *see generally* Robinson & Darley, *supra* note 20; but it seems to be more of a problem as the incentives are less related to the actor's immediate pain or pleasure. Such indirect incentives are rarely deployed to sanction criminals, however, so there is little or no literature on this idea.

¹⁸⁴ Of course, the comparison is imperfect because the cost of jail is certainly much greater than simple failure in a given criminal attempt—except that the cost of jail will be discounted by its perceived probability. I would argue, however, that even if the possibility were perceived to be very remote, so remote that the discounted value of the sanction is far lower than the loss of wasting an evening on an empty safe, the prospect of incurring jail time would bother most individuals more than the possibility of coming up with nothing. Gambling or lottery tickets seem to illustrate the same point.

rather than the number of arrests she executes or crimes she solves.¹⁸⁵ If this is the case, then the officer may find plea bargains, the daily prosecutorial routine,¹⁸⁶ extremely demoralizing.¹⁸⁷ The number of cases carried by the officers in question in their workload would also affect the level of deterrence here. If this one acquittal is a minuscule percentage of the cop's overall caseload, presumably the dismay felt by the cop will be much smaller than for an officer carrying far fewer cases.¹⁸⁸ This factor means that the entrapment defense would have the greatest deterrent effect

¹⁸⁵ There seems to be a growing consensus among commentators, however, that police maximize arrests, not convictions. For a review of the relevant literature, see Stuntz, *supra* note 21, at 538 n. 133. Stuntz himself concludes:

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 Slobogin, *Why Liberals Should Chuck*, *supra* note 27, at 377-378 (“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.”).

As mentioned above, this is an underlying issue with all of my arguments. Pragmatically speaking, the objective test must assume that police prioritize obtaining convictions, or else the police would be undeterred from using questionable methods any time there were other priorities outweighing the conviction goal. As Stuntz suggests, it makes more sense to think that the police focus on things that are actually under their control—making arrests, or making important arrests—than simply getting convictions. I think it is also possible that police in a “community policing” precinct might prioritize giving warnings, gathering information, and discouraging or preventing crime rather than “solving” crimes post facto by making arrests. See *id.* at 539; see also Donald L. Brown, *Crooked Straits: Maritime Smuggling Of Humans From Cuba To The United States*, 33 U. MIAMI INTER-AM. L. REV. 273, 289 (2002). Brown addresses the specific problem of enforcement efforts against human smuggling from Cuba, and notes that the relevant enforcement agencies simply do not have resources to focus on maximizing arrests. Instead, they prioritize investigation and information gathering so that the various agencies involved can better understand the networks that smuggle immigrants illegally; Brown suggests this model is borrowed from the war on drugs. *Id.*

¹⁸⁶ See, e.g., *id.* at 536 n. 129: “By 1992, the plea rate in felony cases was ninety-two percent.” (citing various official statistics). 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.” POSNER, *FRONTIERS*, *supra* note __, at 367.

¹⁸⁷ See Slobogin, *Why Liberals Should Chuck*, *supra* note 27, at 383, discussing a similar phenomenon in the context of the exclusionary rules. (“[Most officers surveyed] simply stated they were ‘upset,’ ‘frustrated,’ ‘disappointed,’ or ‘pissed off’ at the exclusion, or were simply fatalistic about the outcome (e.g., ‘It is part of the job’). Very few sounded contrite or apologetic.”).

¹⁸⁸ This is basically a principle of diminishing marginal utility; each additional case an officer carries in her caseload means less resources can be devoted to all of them together. An officer with few cases can devote greater resources and attention to each case. A counter-argument to this point might be that the more diligent workers are often the ones carrying the greatest workload, either because their supervisor trusts them with more responsibility, or they are more proactive in getting new assignments; this diligent attitude could also translate into more conscientiousness about the outcome of each case.

on police who work the least. Perhaps these are the type of police most likely to engage in misconduct (if a lighter caseload is a function of the cop's laziness or bad attitude), but it seems significant that the deterrence is inherently weighted toward the cops who pose a threat the least often.¹⁸⁹

In the second model, the defendant's acquittal punishes the cop even more indirectly by frustrating the efforts of the prosecutor, whose job it is to press charges and obtain convictions.¹⁹⁰ This, in turn, penalizes the bad cop, who is aligned with the prosecutor in the enterprise of fighting crime. One could imagine scenarios in which working relationships are strained, or where the prosecutor accuses the officer of wrecking his case.¹⁹¹ Presumably the

¹⁸⁹ On the other hand, there is the possibility that if the officer transgresses more often, there is an increasing probability of getting caught at some point. Again, though, this is offset by the number of times the officer got away with it.

¹⁹⁰ Some courts and commentators see prosecutors as having several goals at once:

The role of the prosecutor must also be considered. He has at least four different and possible functions: (1) to act as an administrator and dispose of cases in the fastest, most efficient manner; (2) to act as an advocate for the state to maximize convictions and severity of sentences; (3) to judge the individual's social circumstances and ensure fairness, (4) to act as a quasi- legislator, granting concessions because the law is too harsh.

Government of Virgin Islands v. Scotland, 614 F.2d 360, 364 (3d Cir. 1980) (citing older journal articles for the same); *see also* *People v. Barnett*, 113 Cal.App.3d 563, 571, 170 Cal.Rptr. 255 (1981).

The discussion here focuses on deterrence on an individual level, even though the individuals function within a larger law enforcement institution. Certainly institutions are goal-oriented and somewhat sensitive to incentives and sanctions, but it is not clear how the institutional behavior ties in with the incentives and costs for individual members; their interests do not overlap perfectly. For a discussion of the complex interrelationship between prosecutors and enforcement agents on the federal level, see Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003) (describing the virtues and pitfalls of current models and proposing a "working group" model where the two sides work together by "monitoring each other."). The FBI issues advisories for its agents with recommended guidelines for sting operations. These include: 1) being prepared to articulate a legitimate law enforcement purpose for beginning the operation; 2) avoiding using persistent or coercive techniques (but these terms are not defined precisely); and 3) being prepared to articulate factors demonstrating the defendant's predisposition to commit the criminal act prior to government conduct. *See* CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION* 510-11 (2nd ed. 1998)(this text reprints some valuable excerpts from the manual and offers some valuable discussion); Deis, *supra* note 1, at 1223-1224, citing Thomas Kukura, *Undercover Investigations and the Entrapment Defense*, FBI Law Enforcement Bull., Apr. 1993, at 27, 32 (these materials cited by Deis seems somewhat more recent than Slobogin's, but not very different). Similar warnings are found in the Internal Revenue Service Manual for Undercover Operations, available at www.irs.gov/irm/part9/ch04s10.html.

¹⁹¹ Daniel Richman discusses many factors, however, that influence whether a case is fully prosecuted, at least in the federal system, besides the relative "strength" or "weakness" of the case, such as political/public relations considerations, allocation of resources, conflicts in overall priorities between the prosecutor's office and the enforcement agency. *See* Richman, *supra* note 190 at 762-65, discussing federal prosecutorial declination rates

officer would feel embarrassed.¹⁹² Perhaps a prosecutor would even retaliate by using his influence to have the officer's superiors impose disciplinary measures, or the prosecutor could retaliate by refusing to prosecute some future arrestees of the officer.¹⁹³ This would frustrate the officer's future work as a tit-for-tat in response to jeopardizing the present case through a bad entrapment scheme.

Each of these scenarios, however, plausible, is both conditioned on a set of pre-existing circumstances, and subject to countervailing forces. For example, if the prosecutor retaliates by frustrating the officer's future arrests,¹⁹⁴ not only does the current defendant go free, but future defendants may as well, meaning each "lesson" the prosecutor teaches the cop puts more arrestees back on the street. This seems counter to the prosecutors' self-interest;¹⁹⁵ he would be

and the reasons behind them. ("High declination rates can reflect a disjunction between an agency's agenda and those of U.S. Attorney's Offices.")

¹⁹² Chris Slobogin presents evidence counter to this notion, at least in the context of the Fourth Amendment exclusionary rules. See Slobogin, *Why Liberals Should Chuck*, *supra* note 27, at 383:

[T]he extent to which the exclusionary rule can bring about compliance with the Fourth Amendment depends significantly upon its ability to promote a positive view of the judiciary's legitimacy in its endeavors to enforce the Fourth Amendment. Unfortunately, the rule appears to have the opposite effect. Myron Orfield's study describing the reaction of twenty-five officers to suppression of their evidence, although presented in support of retaining the rule, is instructive in this regard. Three of the officers talked about exclusion as a 'learning experience' or in moral terms. But most simply stated they were 'upset,' 'frustrated,' 'disappointed,' or 'pissed off' at the exclusion, or were simply fatalistic about the outcome (e.g., 'It is part of the job'). Very few sounded contrite or apologetic. All also appeared to advocate some type of good-faith exception, a refrain found in the only other survey that obtained information about this issue.

¹⁹³ See *id.* at 765-67, noting that "[a]t its core, prosecutorial power is primarily negative. . ." In other words, the gatekeeping authority that the prosecutor's office exerts over the enforcement officers has less to do with directing the investigation of cases, and more to do with refusing to prosecute cases after the investigation is fairly complete. This is not necessarily a rare occurrence or one that happens only as retaliation; there was a 61% declination rate for terrorism cases in the months following Sept. 11, 2001; the FBI had a declination rate of 43% in 1998-99.

¹⁹⁴ Richman notes that there a widely divergent declination rates on the federal level depending on the enforcement agency; as mentioned above, the FBI declination rate from the U.S.A.'s Office in 1998-99 was 43%, but the DEA's declination rate was only 18.3%, and the INS declination rate was a mere 3.4%. There are many factors contributing to such statistics, of course, besides retaliatory motives. *Id.*

¹⁹⁵ Of course, the prosecutor may not act out of self-interest in a given case, because unlike the private defense bar, prosecutor's incomes are not tied directly to winning the case. See POSNER, *FRONTIERS*, *supra* note ___, at 367. Posner notes, however, that "economic theory, as well as common sense and observation, suggests that the desire to win, weighted by the stakes of the case (roughly, the sentence is the defendant is convicted), is the most important argument in the prosecutorial utility function and thus that prosecutors have incentives similar to those of private lawyers." *Id.* He adds that prosecutors often view their jobs as stepping stones to more prestigious positions, and that their success as prosecutors will be measured largely in terms of the cases they have won;

subjecting himself to failure in his own objectives in order to retaliate against the bad cop for frustrating the prosecutor's efforts in the first place.¹⁹⁶ Even if the prosecutor is so unprofessional and puerile to act out of spite in the workplace, it seems contradictory that he would cause his law enforcement efforts to fail because he is frustrated that his law enforcement efforts have already failed in one instance.

Nor is it clear that the prosecutor can or will make trouble for the officer at his workplace as a salvo for his frustration over the present entrapment case.¹⁹⁷ There is an empirical question about whether the prosecutor would have the requisite influence, and another problem with the prosecutor's self-interest. The cop may prove less co-operative in their combined efforts henceforth,¹⁹⁸ out of resentment, or may be taken off the beat and confined to desk duty. The latter can result in fewer police on the streets, fewer crimes being investigated, fewer arrests, and

Richman makes a similar point: "But a great many [federal prosecutors] view the job as a way station, a means of acquiring human capital (litigation experience, familiarity with local legal practices and personalities) that will facilitate their representation of private clients thereafter." Richman, *supra* note 749 at 787-88. He also notes that prosecutors who do stay with the government for their entire career tend to "orient themselves toward their professional counterparts through participation in local bar activities and the like." *Id.* at 788.

¹⁹⁶ Laurie Levenson has made a similar point regarding problems with the exclusionary rules: "[P]rosecutors often enjoy too close of a relationship with local police and are therefore reluctant to turn against those with whom they have worked." Levenson at 22, citing John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 803 (2000).

¹⁹⁷ Park opines that the most critical decisions of police work must be made by the cop on the beat without much input from supervisors. See Park, *supra* note 12, at 229. There is a growing body of literature on the motivations of civil servants and how they differ from (or in some cases overlap with) their counterparts in the private sector. It does seem that supervisors in the public sector do not have the same incentives to push their subordinates, given that profits are not at stake; although other considerations may be pressing at times. See, e.g., JOHN D. DONAHUE, *THE PRIVATIZATION DECISION* 90 (1989):

Civil servants also much prefer efficiency to waste, to be sure, but their interest in policing the details of subordinate's performance is usually less tangible and less focused. More importantly, public managers usually lack the rights to select and direct subordinates that private owners enjoy. Civil service regulations, established as barriers against favoritism and corruption, often make it difficult to control public workers through seductive incentives or sanctions.

¹⁹⁸ While the prosecutor's main retaliatory device would be case declination, see *supra* note ____, an agency wanting to snub the prosecutor's office could retaliate by presenting a series of half-baked cases that prove troublesome to prosecute. Richman discusses this problem, but explains that the harm would be mitigated by the prosecutor's latitude in negotiating a plea bargain in the case, and with their freedom to conduct some additional discovery or investigation post-indictment, thereby filling in the gaps of bad cases handed to them. Richman, *supra* note 190, at 774-75.

fewer convictions overall.¹⁹⁹ The point is that the prosecutor may be more dependant on the police than vice-versa, even if he holds a more prestigious and powerful position.²⁰⁰ The cop is in the supply chain for the prosecutor's work.²⁰¹

This is not to say that the police may not feel some pressure to keep the prosecutor happy. It is, however, a complicated working relationship,²⁰² and we cannot predict with much certainty how the possibility of a defendant's acquittal will play into the cop's incentives and priorities.²⁰³

¹⁹⁹ This could be especially true if the officers or agents who conducted the sting operation (that was bad enough to produce an acquittal) are a small, subset of officers who comprise a specialized force of undercover agents—which seems anecdotally to be the case with undercover law enforcement. If there are only a handful of specialized agents conducting the sting operations, the prosecutor may be particularly dependent on their work; they are not easily replaced if removed from the beat. Of course, a small number of such agents also means they are more easily identified for purposes of sanctioning (as opposed to other forms of police misconduct, which may be too endemic to address easily on the individual level. This seems countered, however, by the likelihood that a specialized group of agents would be removed from the prosecutor's office by an additional degree of separation, compared to the regular police.

²⁰⁰ Richman notes this dependence on several levels, for example, noting that in most cases, "the U.S. Attorney's Office generally will not know a crime has been committed until the [law enforcement] agency informs it." *Id* at 768.

²⁰¹ *See id.*, at 771-74, discussing the two major schools of thought about how law enforcement agencies come to exert control over prosecutors. One traditional view is that the political scene behind the creation of new law enforcement agencies—especially on the federal level—shapes the agency's internal concept of its turf, areas of expertise, and methods of investigation. A somewhat competing school of thought is that such agencies often take on a life of their own and push into areas unforeseen by the legislature that created the entity, citing postal inspectors, originally put in place to enforce Comstock laws, moving into the area of mail fraud and making it a central part of federal prosecution in the early twentieth century.

²⁰² This is Richman's main thesis in his *Prosecutors and Their Agents* article: to propose a model of iterated interactions between federal enforcement agents and federal prosecutors, with some power-sharing (and some power struggles) over important decisions regarding investigations and adjudication of arrestees. The conventional view, which sees police as decision makers about whom to investigate and arrest, and prosecutors as merely deciding whom to charge, is overly simplistic and static. *See id.* at 751.

²⁰³ There are obvious reasons for a clash of cultures between prosecutors' offices and enforcement agencies, despite their common commitment to fighting crime. The educational requirements are significantly different in most cases; the work environments are worlds apart (one group spends their days in a government law office or courthouse, while the other group is out on the street, or something analogous). There are very different turnover rates in terms of careers; most agents spend their career in law enforcement, while many prosecutors move after a few years to the private sector or a more prestigious political appointment. *See supra* note _____. Conversely, prosecutors tend to spend their stint as the state's lawyer in one office, working with the same colleagues, the same judges, and the same opposing counsel. Enforcement agents, at least in the federal agencies, are reassigned frequently, whether to different beats or even different regions of the country, sometimes for their own safety. *See generally* Richman, *supra* note 190 at 788-89. This latter point would seem to be especially relevant for the issue of entrapment, which almost invariably involves undercover operations of some sort: it must be particularly necessary for undercover agents to be unknown in the community where they conduct their operation, because detection could either foil the operation, or in the worst case, prove deadly.

Richman comments further on the cultural clash between these two working groups:

These cultural differences can drive a powerful wedge between agents and prosecutors. Agents or even agencies seeking to justify their refusal to share information about sources and methods with

A third model would posit that the cop we seek to deter has an anti-altruistic utility in seeing harm befall the defendant, and therefore feels a corresponding loss at the defendant's good fortune. This is different than talking about a truly bad cop with an attitude problem, which is the subject of the next section.²⁰⁴ Rather, it is an attempt to take seriously the incentive structure involved here. Punishing excessive police actions by acquitting the defendant gives the impression that the police and perpetrators are parties competing in a zero sum game.²⁰⁵ If this were the case, deterrence here would be subject to another variable that presents an internal contradiction. The psychological disutility for the cop caused by acquittal must outweigh the utility the cop presumably obtains from subjecting the defendant to the inconvenience and embarrassment of arrest, arraignment, waiting for trial (in jail for at least part of the time), and the expense of litigating the trial itself. I am not speaking here about a cop with malicious

prosecutors will assert a fear that such data will be misused once the prosecutors enter private practice. This tendency toward non-disclosure is bolstered by concerns that prosecutors have far less "on the line" when it comes to investigative security. An agent's promise to an informant is bonded by his and his agency's professional reputation. The prosecutor who will soon move into another world is not so bound. Agents may worry that prosecutors looking for lucrative private practice berths will be too quick to compromise cases with, or extend professional courtesies to, prospective professional allies, or alternatively, too quick to tax agency resources by taking cases to trial unnecessarily in order to gain marketable litigation experience. Agents may also see prosecutors as all too ready to credit defense allegations of agent misconduct. Part of the problem may be sheer resentment on the part of agents at the rewards that private practice will bring prosecutors, and perhaps some disdain for the unworldliness of the prosecutors' law school experience. Prosecutors, for their part, may tend to identify with professional adversaries and see their job as reining in "cowboy" line agents who pay little heed to the niceties of due process.

Id. at 789-90.

²⁰⁴ One would hope, of course, that this is not the case. We do not want law enforcement activities driven by officers' personal vendettas against individual defendants, but rather by an impartial loyalty to the public interest itself.

²⁰⁵ That is, the picture is of two parties fighting over a pie, so to speak; however much of the pie one party obtains, is that much the other party cannot have, and it is a winner-takes-all contest. Justice Jackson said something like this in his famous quote in *Johnson v. United States*, 333 U.S. 10, 12, 68 S.Ct. 367, 369, 92 L.Ed. 436, 439 (1948), that "officer [is] engaged in the often competitive enterprise of ferreting out crime." I confess I have always wondered what sort of "competition" he was talking about—competition between the criminal and the cop? Or did he mean competition between officers trying to catch the criminals? It seems in the original case that he meant the former, especially since he footnotes the sentence with a reference to *United States v. Lefkowitz*, 285 U.S. 452, and its demeaning and sarcastic remarks about "the sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime...." *Id.* n.3. It is somewhat troubling, though, to think of law enforcement as a type of sport; the stakes for society are rather high, and the criminal law is imbued with strong notions of morality and public security. Apart from the aesthetic problem I have with Justice Jackson's phrase, it is

motivations knowingly breaching his duty; that is the subject of the next section. Rather, I am saying that the assumption of perfectly inverse utilities, even if correct, does not directly tell us which penalty the cop would seek for his “enemy,” whether he operates from good motives or bad.²⁰⁶

All three models attempt to hypothesize some kind of personal stake police would have in the final outcome for the defendant, but all three models reveal variables that make predictions murky. It is not clear that police in general—even good police—feel a strong personal stake in the final outcome of every case, especially once the file has left the precinct and moved to the prosecutor’s office.²⁰⁷ On the contrary, the nature of police work as a form of civil service would tend to remove any personal stake in the final results, at least when compared to the incentives motivating workers in the private sector.²⁰⁸

Civil servants generally have an incentive to seek “rents” in the form of intangible benefits, such as job perks, relaxed work schedules, etc.,²⁰⁹ unlike private sector counterparts, who generally seek rents in dollarized terms like higher profits or bonuses.²¹⁰ Where police do not have the option to provide themselves with more luxurious offices or job benefits, rent-

simply not clear that officers conceive of themselves as competitors, as opposed to enforcers, or perhaps legitimized vigilantes.

²⁰⁶ If we assume that the good cop has utilities roughly inverse to the defendant’s, which the objective approach implies, then even the good cop would need to weigh the overall picture and the total utilities and disutilities for each party. It could be in that case that a good cop honestly concludes it is consistent with his duty to use extreme measures to entrap the defendant, if the whole process disserves the defendant enough to make the acquittal itself simply an offset.

²⁰⁷ One could view this problem either as the police caring mostly about arrests, and not caring about the “end” of the case (about obtaining sentences for the accused), or as the police believing that the end of the case from their standpoint is actually the arrest, as investigation and arrest are their real job. Police do not necessarily seek to maximize convictions, but rather arrests or investigatory knowledge.

²⁰⁸ This is not to suggest that police are generally not conscientious about their work—there is not much empirical data on that point—but that they do not operate under the production-and-profit based constraints of the market. Cf. Luna, *supra* note 218 at 195 (“Employees (agents) will tend to maximize their own self-interest, often to the detriment of the institution or those it is intended to benefit.”).

²⁰⁹ See Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83, 93 (2003) (discussing the similarities and differences between private sector and public sector employees, at least as far as their motivations and work ethic); DONAHUE, *supra* note 197, at 92.

seeking would tend to take the form of carrying fewer cases, or doing less work generally.²¹¹

This is not meant to suggest that police themselves are lazy; rather, the nature of public sector jobs engenders a specialized form of the universal problem of rent-seeking; for police,²¹² rent-seeking incentives generally (and perhaps vaguely) run counter to overzealous effort in fighting crime. This phenomenon weakens any deterrent effect conditioned on a personal stake the police are thought to have in the results of law enforcement activities.²¹³

IV. BREAKDOWN ON THE INDIVIDUAL LEVEL

Let us assume for the moment that the very type of bad cop who would use questionable methods to entrap the unwary is also the type of cop least likely to care about the outcome of his cases. A good cop is supposedly concerned with justice and sending true criminals to jail;²¹⁴ his evil counterpart must be concerned with something else. There is no reason to assume that

²¹⁰ *See id.* When private sector employees work several steps removed from the firm owners, however, they have less access to such rents and resemble civil servants more and more closely.

²¹¹ *See* Stuntz, *supra* note 21, at 535:

That prosecutors (and police) have some incentive to keep a low ceiling on their dockets follows naturally from the way they are paid. Prosecutors and police are paid salary; their paychecks do not rise, at least not directly, with the number of arrests made or convictions obtained. This is surely a good thing; were it otherwise, prosecutors and police would find it in their interest to trump up charges in order to inflate their pay. But note the problem it creates. Because prosecutors are not paid by the case, they can work less--or fail to work more where circumstances seem to demand doing so--while keeping pay constant.

See also Stevenson, *supra* note 209 at 107-09, discussing a similar phenomenon with government contractors who are paid a flat fee for their services rendered over a period of time; such workers maximize their payment per work unit expended by doing as little as possible during that time.

²¹² Of course, if the police or agents conducting sting operations are a specialized subset of the agency or precinct, they could have unique motivators, interests, or forms of rent-seeking that are different than those influencing regular officers and agents.

²¹³ This seems relevant to the earlier point about Justice Jackson's description of officers "engaged in the often competitive enterprise of ferreting out crime," *Johnson*, 333 U.S. 10, 12, discussed *supra* note 205. I have no doubt that certain moments of crime-fighting may be exciting—the moment of a chase or an arrest—but the fact that officers are but one breed of *Homo Economicus* runs counter to the notion that cops are on a moment-by-moment safari, as Justice Jackson's comment indicates.

²¹⁴ Indeed, there is an official Law Enforcement Code of Ethics, which includes the affirmation that the officer's "fundamental duty is to serve mankind," that officers will "never act officiously or permit personal

officers engaged in unconscionable activity would be troubled by the defendant going free; in fact, the opposite seems more likely to be the case, if the opposite means the officer is apathetic or indifferent.

It would be overly simplistic to argue that rules generally fail to deter because rule-breakers are going to break the rules anyway. The point is that the undesirable behavior in this case triggers a (less-than-deserved) benefit on a third party as the penalty for breaking the rule. This is not the same as saying a rule will not work simply “because it will be broken anyway.” Rather, the particular sanction applied is too tangential to successfully or predictably influence the decision of the individuals who comprise the group of possible offenders—in this case, the police.²¹⁵ If certain police activities are unjust, or intolerably inefficient,²¹⁶ our society should

feelings, prejudices, political beliefs, or aspirations, animosities or friendships to influence decisions.” See Daloia, *supra* note 38, at 811.

²¹⁵ A somewhat different interrelation between sanctions and efficiency, in the criminal context, is set forth by Omri Ben-Shahar. Ben-Shahar acknowledges that knowledge about the law seems to be highest among those who have been incarcerated, even for a short time. Omri Ben-Shahar, *Playing Without A Rulebook: Optimal Enforcement When Individuals Learn The Penalty Only By Committing The Crime*, 17 INT’L REV. L. & ECON. 409 (1997). Ben-Shahar suggests that greater enforcement with shorter sentences would thus foster more widespread knowledge of criminal laws, and thereby produce more deterrence. More individuals would have the enlightening experience of incarceration, and shorter sentences would place the inmates back in the general population more quickly, where their knowledge could be shared and disseminated to others.

Applied to police misconduct, it may be that more frequent reprimands of deviant officers (such as an embarrassing rebuke from a judge in open court) that are less costly than acquitting a potentially dangerous criminal may achieve more of the desired result. More frequent but less severe sanctions would also help with the problem of “cliffing,” where the ultimate penalty is already triggered, leaving a culprit no incentive to avoid additional injuries or crimes. It is possible that such repeated lessons would also have an overall institutional effect.

²¹⁶ This is Judge Posner’s concern, that certain police sting operations are excessively wasteful of scarce public resources because they do not remove “dangerous individuals from circulation,” but instead generate new crimes so there are easy arrests to be made:

If the police entice someone to commit a crime who would not have done so without their blandishments, and then arrest him and he is prosecuted, convicted, and punished, law enforcement resources are squandered in the following sense: resources that could and should have been used in an effort to reduce the nation’s unacceptably high crime rate are used instead in the entirely sterile activity of first inciting and then punishing crime.

United States v. Kaminski, 703 F.2d 1004, 1010 (7th Cir. 1983) (Posner, J. concurring).

It is certainly deplorable to squander public resources. At the same time, acquitting the defendant does nothing to regain resources already spent (these are sunk costs), and little to prevent such squandering in the future. I do not disagree with Judge Posner’s policy position that some sting operations may be truly wasteful and/or inefficient, but he never explains how acquitting the defendant solves the problem in any way.

discourage these activities, but should do so efficiently. Acquitting defendants under the entrapment defense is not an efficient way to do this.

When courts use the phrase “overzealous law enforcement,”²¹⁷ they confer a benefit of the doubt on the officers, assuming that they have good intentions but have taken things too far. Suppose instead that a misanthropic constable is not motivated by overeagerness to do the right thing, but rather by intentional malice or unintentional negligence, stupidity, or hyperbolic discounting. If the misconduct is intentional, based on prejudice,²¹⁸ personal vendetta,²¹⁹ or indulgence in a power trip, the eventual acquittal of the defendant may have some disutility for

²¹⁷ See, e.g. (it would be impractical to cite every case that used this phrase, but here is a representative sampling), *Hampton*, 425 U.S. at 495; *Sherman*, 356 U.S. at 381 (Frankfurter, J. concurring); *United States v. Wilson*, 31 F.3d 510, 515 (7th Cir. 1994); *United States v. Tucker*, 28 F.3d 1420, 1422 (6th Cir. 1994); *Hollingsworth*, 27 F.3d at 1213; *United States v. Ventura*, 936 F.2d 1228, 1232 (11th Cir. 1991); *United States v. Hunt*, 749 F.2d 1078, 1090 (4th Cir. 1984); *United States v. Oquendo*, 490 F.2d 161, 167 (5th Cir. 1974); *People v. Barraza*, 23 Cal. 3d 675, 691, 591 P.2d 947, 956 (Cal. 1979); *Harrison v. Delaware*, 442 A.2d 1377, 1385 (Del. 1982); *Kansas v. Van Winkle*, 254 Kan. 214, 217; 864 P.2d 729, 733 (Kan. 1993); *Michigan v. Fabiano*, 464 Mich. 878, 886; 633 N.W.2d 339, 346 (Mich. 2001); *State v. Grilli*, 304 Minn. 80, 92; 230 N.W.2d 445, 454 (Minn. 1975); *Oregon v. Korelis*, 21 Ore. App. 813, 820; 537 P.2d 136, 140 (Ore. 1975); *Washington v. Emerson*, 10 Wisc. App. 235, 240; 517 P.2d 245, 248 (Wash. 1973); *Janski v. Wyoming*, 538 P.2d 271, 277 (Wyo. 1975).

²¹⁸ Historically, the vice crimes that lend themselves best to sting operations, and hence would most naturally give rise to claims of entrapment, have the effect (whether intended or unintended) of focusing enforcement on the poor and minorities. See Stuntz, *supra* note 21, at 575-76 (“Yet class-based, and hence to some degree race-based, enforcement remains common. Thus, crack markets in urban black neighborhoods are targeted, while more upscale, and whiter, drug markets receive less law enforcement attention.”); Stuntz acknowledges that there is a split in the academic literature over whether the brunt of such targeted vice enforcement falls along class lines or racial lines. *Id.* n. 261. For a recent discussion of the problem of racist motivations among police, see Erik Luna, *Race, Crime, and Institutional Design*, 66 L. & CONTEMP. PROBS. 183 (2003) (proposing the implementation of several institutional safeguards against racism).

²¹⁹ See, e.g., *Dixon v. District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968) (defendant not ticketed initially when stopped for traffic violation; when defendant proceeded to file a complaint against officers involved, police subsequently issued a ticket for two offenses); Duff, *supra* note 73 at 253; see also *Atwater v. City of Lago Vista*, 195 F.3d 242, 248 (5th Cir. 1999)(WIENER, Circuit Judge, dissenting), *aff’d* 532 U.S. 318 (2000)(arguing that evidence supported the contention that seatbelt-based stop and subsequent search and seizure was based on personal vendetta); *Coates v. Daugherty*, 973 F.2d 290, 294 (4th Cir. 1992)(jury could have inferred that the police had a vendetta against the defendant).

An officer’s personal vendetta also does not violate the exclusionary rules so long as the conduct was objectively justified as well. See, e.g., *Graham v. Connor*, 490 U.S. 386, 397 (1989); *Caballero v. Concord*, 956 F.2d 204, 206 (9th Cir. 1992)(“An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable arrest; nor will an officer's good intentions make an objectively unreasonable [arrest] constitutional.”).

the offending officer; but then again, subjecting the “victim” to arrest and indictment may be satisfying enough.²²⁰

Anger²²¹ and hatred seem to operate more like hunger than like greed: the appetite to see harm come to another is often sated once some harm is inflicted.²²² Once the object of personal

²²⁰ See Park, *supra* note 12, at 232 (“Arrest in itself is a substantial punishment, particularly if the defendant must remain in jail pending trial. Also, aggressive searches and frisks may in themselves manifest authority and serve certain policy goals.”). Racial profiling, especially in traffic stops and searches, may reflect this phenomenon at least in part. This is not to deny that racist police use profiling to increase the number of minorities incarcerated, and perhaps because they are suspicious of all minorities. Clearly, however, there is also a harassment factor present, and profiled stops could be used simply to frighten minorities away from certain parts of town.

²²¹ There is a small but growing body of literature on anger and how it functions in organizational and occupational settings. See, e.g., Ronda Roberts Callister et al., *Organizational Anger Contexts and their Relationship to Outcomes of Anger Expressions in the Workplace*, available at <http://ssrn.com/abstract=399780>. This study hypothesizes that anger functions differently in different occupational settings; whereas anger is commonly considered negative and counterproductive, and is suppressed in most settings, there are certain places where anger is tolerated, or even legitimized and encouraged. In these latter settings, anger is harnessed and channeled as energy into productivity or camaraderie. Examples offered in the study are labor organizations and college sports teams (anger legitimized), and surgical units (where it is tolerated but not suppressed). The authors also categorize manifestations of anger into three types: “authentic” (where the expression of anger matches the actual level of emotion felt by the individual), “controlled” (where expressions of anger are restrained to a level lower than true feelings), and “suppressed” (where any expression of anger is discouraged as inappropriate or even punished). “Silent” anger appears to serve no constructive purpose from a productivity or organizational standpoint in any context, according to the study; it is present most often, naturally, in workplaces where anger is deemed inappropriate. Interestingly, contexts where anger is “legitimized” have similar levels of both controlled anger and authentic anger; contexts where it is merely “tolerated” have a far greater level of authentic anger compared to controlled anger (but the control group in this case was too small to make a strong generalization). In any case, the study works with a model of anger as generally episodic.

This study did not evaluate anger in law enforcement organizations, but such data would certainly be interesting. Purely anecdotally, it seems that police departments may also be contexts where anger is either “tolerated” or even “legitimized” and encouraged, despite the fact that this would never be articulated as the official policy or ethical stance of an agency or precinct. This would especially be true in departments that see themselves increasingly as paramilitary organizations, or in any context where the officers see themselves in a battle between “good” and “evil” or “justice vs. crime.” If authentic expressions of anger are indeed tolerated or legitimized among the ranks of law enforcement, one might expect to see an episodic, rather than continuous, approach to “productivity.” Applied to the criminal justice system, this would focus more on arrests than then long-term outcome of each case. It also poses questions about the level of rule-based decisionmaking in such a setting. This is an area, however, needing further research; my hypothesis is mostly conjecture.

²²² See Posner, *supra* note 36, at 1196-97, discussing interdependent negative utilities, such as hatred, in the context of criminal behavior and law. Posner notes, somewhat speculatively, that crimes of violence are inefficient and socially costly because they impose more costs on the victim than gains to the perpetrator:

The whole idea is to inflict as much disutility on the victim as possible, and it is unlikely that every disutility experienced by the wretched victim confers an equal and opposite utility on the offender. Indeed, there would seem to be a fundamental asymmetry between the pleasure that one would obtain from killing another person who has sullied one's honor, and the victim's pain, broadly defined to include the disutility to him of losing his life.

Id. at 1197. I do not think that interdependent negative utility (hereafter INU) would necessarily have the goal of inflicting “as much disutility on the victim as possible” (I assume Posner simply did not bother to qualify his statement carefully because he was making a point in passing); certainly the INU could come in degrees, sometimes being satisfied by only moderate suffering in one's enemies.

animus receives at least some harm, lost opportunities to inflict additional harm are not felt very acutely, compared to lost opportunities for direct personal gain. Anger and hatred are episodic in their manifestations. Hatred and anger therefore look like hunger; once I have eaten enough to take the edge off my appetite, the unavailability of some of my favorite foods seems less lamentable than when I was starving.²²³ This is increasingly true the more I eat. Other vices, like greed or avarice, do not seem to work this way; winning modestly in one transaction does not provide much consolation when compared with a lost opportunity for greater gains shortly thereafter. At risk of sounding too adventuresome, it appears that the types of intentional motivations that would drive police misconduct are generally the types of motivations satisfied by immediate, though modest, results.²²⁴ The immediate satisfaction of inconveniencing one's enemy outweighs any regret that the enemy could have been made to suffer even more.

One would hope that most police, even those engaging in obvious misconduct, are not driven by actual malice or animus. Assume instead that the motivation is more passive and subtle.²²⁵ One example would be a cop who is being careless or reckless about his methodologies because he is "fed up" or near retirement (or about to be fired anyway).²²⁶ This

²²³ Of course, this is an appetite that returns frequently, as evidenced by people with life-long animus toward certain groups or individuals. And like hunger, hatred and anger grow in their capacity and verve when indulged over time; but this is true of nearly every vice or character flaw.

²²⁴ This may be especially true where it takes months or sometimes years to obtain even the initial disposition of a case at trial. In a jurisdiction where the docket is clogged, or where trials for certain types of crimes take a very long time to consummate (one thinks of securities fraud cases and other white collar crimes), the eventual conviction or acquittal of arrestees could become so remote that police naturally focus on more immediate consequences, and think in terms of arrests or searches as the end instead of the means. Park cites sources to the effect that police targeting illegal gamblers employ a policy of frequent arrests, searches, and temporary confiscations of property as a means of harassing the clientele, to the extent that this slowly replaces conviction as the goal of law enforcement. See Park, *supra* note 12, at 232 n.232.

²²⁵ See, e.g., Luna, *supra* note 218, at 196 (discussing a variety of motivations that could drive police misconduct).

²²⁶ Rookie officers may be more prone to rash decisions, excessive aggressiveness, and overreacting; but those in the twilight of their careers in law enforcement would seemingly be more prone to other failings, such as shirking work, cynicism about serving the public good or the outcome of the cases, or losing respect for superiors, arrestees, etc. An interesting question would be which set of personal issues is more likely to lead to conduct that might constitute entrapment. A corollary question would be which type of bad attitudes the rules should address; they are divergent enough that it would be difficult to craft singular rules to meet both types of predispositions.

individual is similarly unlikely to care much about the final outcome of the case at trial. He is no longer a conscientious law officer. The same attitudes giving rise to inappropriate conduct before arrest are likely to make one impervious to indirect deterrence.²²⁷

Another example is the cop who is a hyperbolic discounter—misperceiving unpleasant future consequences as excessively remote or small.²²⁸ This tendency on the part of the officer would lead to both imprudent policing methods and deafness to judicial warnings that the arrestee could therefore go free. Hyperbolic discounting is a general problem with deterrence: the more an individual discounts the likelihood or severity of future sanctions, the more impervious the individual will be to the threat of sanctions.²²⁹ This creates a special category of the least-deterred, the hyperbolic discounters, who are relatively impervious to normal (and perhaps optimal) levels of sanctions. Normally we could work around this problem by adjusting the sanctions proportionately to the discounting, so that discounters still perceive the costs to outweigh the immediate benefits of the discouraged activity.²³⁰ This remedy is unavailable in

²²⁷ Barbara Armacost discusses the connection between bad attitudes and bad police behavior, and the problem of using individualized deterrence to address this problem. See Armacost, *supra* note 29, at 9-12.

²²⁸ See, e.g., *The Hyperbolic Consumption Model: Calibration, Simulation, and Empirical Evaluation*, 15(3) J. ECON. PERSP. 47-68 (Summer 2001); see also Stevenson, *Addicts*, *supra* note 170, at 209-10 (discussing the problem of hyperbolic discounting and drug addiction). Other commentators have observed the problem with individuals who engage in too much future discounting in the criminal context. See, e.g., Baker, et al, *supra* note 32 at ■ (“For example, a criminal who is more present-oriented and who assigns a greater disutility to the first year of imprisonment than to subsequent years will be deterred more effectively by increasing the probability than the size of a sanction.”); see also Steven Shavell & A. Mitchell Polinsky, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1, 1-13 (1999); see also Michael K. Block & Robert C. Lind, *An Economic Analysis of Crimes Punishable by Imprisonment*, 4 J. LEG. STUD. 479, 481, 489-90 (1975). Even a limited degree of future discounting would be a reason for police in general to focus on maximizing arrests, which win immediate recognition and congratulations from the officer’s peers and supervisors, over convictions, which are always more remote.

²²⁹ Conventional wisdom is that most crimes are committed by young people, for whom future consequences seem more remote than for older people. See generally, e.g., Steven D. Levitt, *Juvenile Crime and Punishment*, 106 J. POL. ECON. 1156 (1998); see also Robert Cooter & Thomas Ulen’s discussion of “Juvenile Crime and Punishment” available at <http://www.cooter-ulen.com>.

²³⁰ Robinson and Darley, however, argue that it is very difficult, or perhaps infeasible, to work around hyperbolic discounting in the criminal arena, given factors such as the impulsivity of most criminals, the unlikelihood of getting caught (usually less than ten percent, according to their sources), and the time that would indeed elapse before the sentence would be upon them. See Robinson & Darley, *Does Criminal Law Deter*, *supra* note 20.

the entrapment arena. The defendants are either acquitted or not,²³¹ and we cannot easily increase his benefit in order to grade up the sanction for the bad police. We could do something to increase the likelihood of the sanction, perhaps, or its immediacy, as by using a “per se” test for entrapment claims (which makes the outcome more certain) or allowing the defense to be raised at arraignment or indictment. These options may be the only alternatives if the goal is to deter bad policing, and the bad police in question tend to be discounters. A similar problem—some would argue a complete overlap, in fact, is with those who are simply very impulsive.²³²

Suppose, instead of being a hyperbolic discounter, that the individual officer is simply unintelligent.²³³ Some states, in fact, intentionally screen out the most intelligent applicants for the police academy on the theory that they will find the job boring and leave before they have earned their keep; this anti-intellectual discrimination has been the subject of protracted litigation

²³¹ As mentioned elsewhere, some courts employ a sentencing mitigation that is akin to entrapment and operated along a continuum, but this is not the classic entrapment case and appears rather uncommon. It is also even more uncertain that the possibility of a defendant obtaining an acquittal by raising the entrapment defense, and therefore less of a factor in the officer’s decisionmaking ahead of time.

²³² Richard Posner discusses this problem in the context of impulsive crimes, noting that impulsive criminals are less deterrable than others; he suggests that one response is to simply raise the sanction enough so that even the impulsive will take it seriously,; the reflective take it even more seriously, so it is a win-win situation. He also notes that incapacitation could or should take on a more prominent role with individuals who are more difficult to deter. See POSNER, *ECONOMIC ANALYSIS OF LAW* 257-58. This is similar to the solution I mention above for discounters. Again, it is not as easy to apply this to police, especially where the primary “sanction” is simply acquittal of the defendant in a single case. The problem of impulsiveness, however, harkens back to the patronizing Supreme Court verbiage in *United States v. Lefkowitz*, 285 U.S. 452, 464, referring to “petty officers” “acting under the excitement that attends to the capture of persons accused of crime.” Notwithstanding the general predisposition of the officer, it does seem that the context of an arrest would be an occasion when impulsiveness might be at its peak, making the adherence to rules perhaps more difficult in the law enforcement profession than in most others, ironically. This would apply equally to exclusionary rules and the rules of entrapment, of course. In either case, “deterrence” may be particularly ineffective when the occasion for arrest comes up, and more systematic “preventative” measures may do more good. Professor Christopher Slobogin contends that extreme impulsiveness, like that of the defendant in *Kansas v. Hendricks*, 521 U.S. 346 (1997), may justify a course of preventative detention because the impulsiveness makes the individual impervious to deterrence. See Slobogin, *supra* note 27, at 2.

²³³ Some criminologists link criminal activity to inbred lower intelligence, manifested in a lower ability to perceive consequences of actions. This analysis, which is certainly controversial, is usually applied to criminals, however, not to misbehaving police. See, e.g., VOLD & BERNARD, *supra* note 48 at 74-83. Robinson & Darley, *supra* note 20, argue that lower aptitude among some offenders can undermine the effectiveness of criminal deterrence. See also Park, *supra* note 12, at 229 (“The difficulty of attracting intelligent and competent recruits has also been a pervasive obstacle to adequate understanding of appellate court doctrine”).

in the Second Circuit.²³⁴ A morally insensitive or unintelligent cop may fail to categorize his own behavior as the type likely to be sanctioned—intelligence being in part the ability to make abstract associations and categorizations.²³⁵ Lack of intelligence can make a person more impervious to deterrence, because it takes a certain amount of perceptiveness to apply known

²³⁴ See *Jordan v. City of New London*, 225 F.3d 645 (2nd Cir. 2000) (Unpubl. Opinion avail. at 2000 U.S.App. LEXIS 22195). In this case, the plaintiff sued the local police department for refusing to hire him because he had scored too *high* on an aptitude test; the police department justified the “upper-cut” discrimination based on costly job turnover rates among overqualified officers. The Second Circuit questioned the wisdom of this approach but found it perfectly legal, using a rational basis analysis. See *id.*

Some background may be helpful here, because it is unclear how widespread this practice may be—the academic literature does not seem to have picked this up at all so far. The Law Enforcement Council of Southeastern Connecticut had administered a written police entrance examination for a substantial region of that state; local police departments in turn used this as an initial screening for applicants to the force. See *id.* at *1-2. The testing materials, which included material called the “Wonderlic Personnel Test and Scholastic Level Exam,” came with a manual that lists recommended scores for various professions. Significantly, it cautioned that overqualified candidates often become bored with unchallenging work and quit, which of course increases administrative costs for the employer significantly. Jordan, the plaintiff in the case, scored a 33 on the test, well above the median of 21 suggested for a police officer. The City of New London, where he had applied for a job, rejected his application because it would only interview candidates scoring between 20 and 27 on the exam. The plaintiff brought a civil rights action; the district court granted the City summary judgment, and the Second Circuit affirmed. This case, of course, does not suggest that all police are unintelligent; merely that the screening materials currently in use in a number of precincts seek to limit how intelligent officers might be.

The implications of this case, assuming it is indicative of practices not confined to Connecticut, are that officers are not only self-selected for unimpressive intellect, but are also subject to intentional screening by superiors within law enforcement agencies. The point is that this must put some limits on the effectiveness of a complex system of rules, enforced by the subtle sanction of providing a windfall acquittal to occasional defendants, in modifying police conduct and decisionmaking. Members of the academy, as well as the judiciary, cannot assume that law enforcement officers will grasp or properly apply the subtleties of rules as complex as the exclusionary rules or the parameters of the entrapment defense, both of which have confounded first-year law students for generations. In any case, it would seem that more investigation and discussion of this case and the issues it presents would be worthwhile. In this sense, I must say the evidence contradicts Park’s point, *supra*, that it is difficult to attract “intelligent and competent recruits,” in that it seems law enforcement agencies are trying to do the opposite.

²³⁵ For example, in *Beier v. City of Lewiston*, 354 F.3d 1058 (9th Cir. 2004), a 1983 action was brought against police officers for an improper arrest made over what the officers believed was a violation of a restraining order; their mistake was that they took the victim’s word for it that the restraining order was being violated at the time of the emergency call, and failed to read the text of the order themselves upon arriving at the scene. They were mistaken. The Ninth Circuit imposed liability on the officers for the mistake for failing to read the legal text, even though the Court admitted that the officers may very well have misunderstood the text and taken the same course of action in either case. The general rule for police tort liability, then, appears to be that ignorance of the law is an excuse, as long as the officers read the relevant legal document for themselves. While there is certainly some value in rewarding police for a good-faith effort to determine the controlling legal rule in a situation (reward in the sense of shielding from 1983 liability), there is also almost infinite tolerance (according to this ruling, at least) for police getting the rule completely wrong when they do read the text. The first part of the rule is understandable, and seems to imply some faith that the police are more likely to get the rule right if they read it; the second part, at least as expressed by the Court, indicates a very high tolerance for police misunderstanding complex legal rules. With entrapment, of course, there is no simple legal text they can read to determine *ex ante* where the boundaries lie between permissible and impermissible behaviors.

rules to new sets of facts.²³⁶ A rule against armed robbery is fairly straightforward; most would-be criminals can grasp the notion that pointing a gun in someone's face and demanding their money is forbidden behavior. Using the entrapment defense as a deterrent is much more complicated, because it operates with a sliding scale of reprobation instead of a bright-line rule.²³⁷

Most court opinions about entrapment—even those ruling to acquit the defendant—acknowledge that undercover sting operations are necessary for effective police work; the judiciary endorses these methods generally.²³⁸ If the sting operation goes too far, however, the court will acquit the defendant to teach the cops a lesson. The police thereafter understand that the precise approach taken in that case went too far, but there is no clear line in most jurisdictions. Where the rule is not clear-cut it will be less effective as the individual cop in question is less intelligent.

These last two points—referring to individuals who are prone to hyperbolic discounting and those with less intelligence than their colleagues—could be summed up as the simple observation that people who make bad decisions may not respond to incentives and disincentives the way the rest of us would.²³⁹ This is especially true where the disincentive is inherently unsuited for grading or customizing to compensate for the propensities of these sub-groups.

²³⁶ See Park, *supra* note 12, at 226, discussing the infeasibility of developing clear-cut rules for officers to follow, and 229, noting the difficulty police have grasping and following the search and seizure rules, which he feels would be less complicated than the rules of entrapment (“These [exclusionary rule] problems seem petty when compared with the problems of educating agents about rules of entrapment.”).

²³⁷ Of course, on the theory that uncertainty may have more deterrent value than a proportional amount of quantifiable risk, see Baker, et al. *supra* note 32, one might argue that *not* having a bright-line test generates more uncertainty for officers and therefore will lead them to be more cautious than if the rules were crystal clear. Clear rules can invite circumvention as the “loopholes” are also clear. The point about sliding-scale reprobation, however, is not just that it generates uncertainty, which it may, but that it makes the rules terribly difficult to keep track of and apply for an officer on the beat—especially officers on the beat where Robert Jordan applied, see *supra* note 234. In any case, it would be very hard to quantify and measure whether the value of uncertainty in deterrence for police outweighs the cost of confusion, or vice-versa.

²³⁸ See, e.g., *supra* note 63, quoting Justice Rehnquist's commentary in the *Russell* case.

²³⁹ See Robinson & Darley, *supra* note 20.

Given the strategic nature of the criminal prosecutions, individuals with exogenous traits or talents (from the standpoint of the entrapment test itself) can still come out ahead, regardless of the entrapment rule. In such a case, the deterrent effect will again be weaker, proportionate to the “other talents” of the officer. In practice, police have the opportunity to present their own defense to the defendant’s entrapment claims.

All the rules—whether about entrapment or exclusionary rules for searches and seizures—as well as the threatened sanctions, will have a tendency to create “greater profits”²⁴⁰ for police with a higher tolerance for risk, assuming there is some feeling of competition between officers in a given locale.²⁴¹ Assume Officer Abel always goes by the book, being a cautious soul, and makes sure he never breaches the rules. In his precinct, however, is Officer Cain, a gambler. Suppose both officers know there will be lots of recognition and honors for whoever apprehends a particular notorious criminal. Both know there are risks involved in bending the rules (the criminal could go free), but both know there is some uncertainty or luck involved in whether their breach would be detected or have serious consequences.²⁴² Officer Cain is more likely to catch the criminal, because he will be less cautious than Officer Abel. There is a chance that he will blow the whole thing, of course, but there is also less chance of Officer Abel

²⁴⁰ The use of quotation marks for this phrase reflects my hesitation in using these words, especially given that this is not a commercial context at all. The concept of profits, however, such as monopoly profits, is useful even in contexts where the benefits or rewards for which parties compete are less tangible or at least less associated with dollar values. If there is some degree of competition among officers for recognition, awards, bonuses, and promotions, then the games people play in any competitive situation would start to manifest themselves. It may also be that officers believe a risky but high-profile arrest and conviction may earn them leniency when their risky activities do not work out so well.

²⁴¹ This is not the same as the more significant “greater payoffs” point made in the next section, which looks at the fact that even benevolent police may find greater overall success by forging ahead with a sting operation that they know could result in an entrapment defense. The point here is that if there is any degree of competition between officers in a precinct, the risk-loving officers (or those willing to take on more uncertainty) can come out ahead of the more cautious officers, if they get lucky.

²⁴² Under the theory that most people are more averse to uncertainty than to quantifiable risks, those willing to accept more uncertainty in the outcomes of their actions have opportunities for greater returns than most of their counterparts. Applied to law enforcement, police who are less risk-averse may get in trouble more often but may get

producing results because he must limit himself.²⁴³ Over time, Officer Cain will either be disgraced (which he may not care about, but this is another section) or get promoted more than Officer Abel. His willingness to bet in the presence of uncertain results increases his chances of getting the big fish, and if he gets him, he outshines Officer Abel.

Convictions of defendants may also function as Giffen goods²⁴⁴ for police. Assuming, *arguendo*, that the true goal of police is to maximize the number of convictions,²⁴⁵ acquitting defendants when the police break a rule raises the cost of convictions. Deterrence always seeks

more illustrious breakthroughs; those willing to accept more uncertainty may get the most sensational breakthroughs of all.

²⁴³ This is not to suggest, as some do, that the exclusionary rules or the entrapment defense necessarily handcuff the police; in fact, I am arguing almost the exact opposite, that police have myriad reasons to ignore the potential for an entrapment defense and forge ahead with a sting operation and arrest. The point I am making here, however, is that within a given agency or law enforcement division there are likely to be some officers or agents who lean toward the conscientious side, and others who are more rash by nature; this would be true in most workplaces, except those that self-select for a high degree of homogeneity among employee personalities. In the law enforcement setting, a conscientious officer may get in trouble less frequently, but may also be less likely to produce a sensational result from time to time, at least compared to risk-preferring agents officers.

²⁴⁴ See Katyal, *Deterrence's Difficulty*, *supra* note 141, at 2434-38. Katyal explains the origin of the concept:

The classic example, used by Victorian economist Robert Giffen, concerned the Irish potato blight. Before the blight, the typical Irish family ate a diet consisting mostly of cheap potatoes and a little bit of meat, which was considerably more expensive than potatoes. When the blight hit, potato prices rose and the real income of the Irish plummeted. Had potatoes been superior goods, one would expect that the consumption of potatoes would have decreased because their price increased. But Giffen observed that potato consumption increased; the Irish ate more potatoes than they did before the blight, because the high potato price reduced income to the point where meat had become prohibitively expensive. Because there were no available substitutes for meat besides potatoes, the price increase led the Irish to become more dependent on potatoes than they were previously. The positive income effect of the potato price increase had dwarfed the negative substitution effect. There are, therefore, three types of goods: superior goods, where a price increase in the good will reduce consumption of the good; inferior goods, where a decrease in income will increase consumption of the good; and Giffen goods, where an increase in the price of a good will increase consumption of the good.

Id. at 2435-36. Katyal explains that this could help explain why sometimes illegal drug use seems to increase at the same time that sanctions for the drug increase. See also Stevenson, *Should Addicts Get Welfare?*, *supra* note 170, at 219, discussing Giffen goods in the context of using the termination of welfare benefits as a misguided policy tool for forcing drug addicts to rehabilitate; Jensen, Robert T. and Miller, Nolan, "Giffen Behavior: Theory and Evidence" (January 2002), KSG Working Paper No. RWP02-014. <http://ssrn.com/abstract=310863> (discussing empirical data of rice and noodles functioning as Giffen goods in certain regions of China); Kris De Jaegher "Understanding Giffen Behavior as an Extreme Case of Asymmetric Substitutability" (November 2003). <http://ssrn.com/abstract=474860> (demonstrating that "Giffen behavior can be obtained by considering it as an extreme case of asymmetric substitutability").

²⁴⁵ This is the conventional wisdom, but I argue elsewhere in the article that this might not be the case; see *supra* notes 32, 187; See Stuntz, *supra* note 21, at 538 ("With some qualifications, prosecutors maximize convictions; police are more likely to maximize arrests.").

to raise costs for the actor. The police then have more cumbersome or limiting rules within which to operate. This makes each conviction all the more valuable. Suppose the police have no substitute for convictions. Paradoxically, their demand for convictions (whether legitimate or illegitimate, I assume there is no difference for the police) does not go down when the price increases—making convictions a Giffen good. Thus, the police will be inclined to use more desperate measures to obtain convictions as the cost is raised. If legitimate convictions are more costly, they will consume more illegitimate ones.

Assume now instead that convictions are not a Giffen good, and the demand for convictions actually *does* decrease as the price is raised. This means the police will be more focused on other things, like the simple number of arrests,²⁴⁶ or harassing potential offenders, than the final outcome of their cases. This will also undermine the deterrence effect with respect to entrapment—the police can obtain their substituted results through the same means.

“Cliffing” is also a general problem in deterrence theory;²⁴⁷ when the penalty is the same for varying degrees of abuse, there is no incentive for the wrongdoer to limit the extent of her wrongdoing. If the police sense that their sting operation has already gone too far, there is no

²⁴⁶ Slobogin, *Why Liberals Should Chuck*, *supra* note 27, at 377-378:

This is not just the oft-repeated point that the pain of exclusion is visited most directly on the prosecutor, but the recognition that the objective of police who conduct searches is, first and foremost, evidence to support an arrest, not a conviction. Yes, police want convictions. 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. Furthermore, if the prosecutor manages to convict in any event (which occurs a good proportion of the time), even this tenuous aversive impact may disappear.

²⁴⁷ See Katyal, *Deterrence's Difficulty*, *supra* note 141, at 2389-90. Katyal discusses the variations on this concept among classic theorists from the philosopher Beccaria to the economist George Stigler. Richard Posner generally refers to the same notion as the problem of marginal deterrence. See POSNER, *supra* note 27, at 222 (“For example, if the punishment for bicycle theft is raised to the same level as for automobile theft, the incidence of automobile theft will rise.”). David Elbaz also discusses “cliffing” (but without using that term) in his article on entrapment, but not as applied to the incentives for misbehaving police—rather, he focuses on it from the criminal’s standpoint (as do the previous sources cited) and factors this into his analysis of how sting operations and the entrapment defense might affect the expected rewards or costs of committing a crime. See Elbaz, *supra* note 1, at 136; see also Ian C. Weiner, Note, *Running Rampant: the Imposition of Sanctions and the Use of Force against Fleeing Criminals*, 80 GEO. L. J. 2175, 2181 (1992) (also focused on this issue from the standpoint of the would-be criminal).

incentive to cut their losses and move on. Instead, the temptation will be to cheat or bend the rules even more; the worst consequence that could happen from more misconduct (say, planting evidence or luring the defendant into a more serious, less sympathetic crime) is no worse than what is already likely to happen, and the best result is possibly undoing the damage.²⁴⁸ As mentioned parenthetically, “worse still” misconduct for police, beyond the “creation of the crime” malfeasance that forms the basis of entrapment, might be as follows: 1) planting false evidence to incriminate the prey of the sting operation;²⁴⁹ 2) hiding evidence of previous police misconduct, such as destroying recorded conversations in which the police pressured the victim to join in the criminal enterprise,²⁵⁰ and 3) “ratcheting up” the crime involved,²⁵¹ sometimes called “sentencing entrapment.”²⁵²

²⁴⁸ See Park, *supra* note 12, at 233 (“The goal of the [objective test] is to punish agents who have used improper inducements, but an agent who has used an improper inducement is likely to lie about what he did. Even a relatively conscientious police officer may lie if he perceives that otherwise a hardened criminal will escape on a “technicality.”).

²⁴⁹ See, e.g., Dharamapal & Miceli, *supra* note 41, discussing the problem of acquitting defendants as enforcement of the exclusionary rules where police can plant evidence to cover their mistakes.

²⁵⁰ This also seems to be a mostly uncharted area of inquiry regarding sting operations: the unique position in which they place law enforcement officers with regards to the selectiveness of evidence that is generated, preserved, and brought forth from an investigation.

²⁵¹ That is, “The government ratchets up a defendant’s drug sales or other conduct merely to increase his sentence.” *United States v. Calva*, 979 F.2d 119, 122 (8th Cir. 1992). Some courts will deal with this through the “sentencing entrapment” approach—mitigating the defendant’s sentence, but not issuing an acquittal. See also *United States v. Rogers*, 982 F.2d 1241, 1254 (8th Cir. 1993) (“We have described sentencing entrapment as ‘outrageous official conduct [that] overcomes the will of an individual predisposed only to dealing in small quantities’ for the purpose of increasing the amount of drugs in the conspiracy and the resulting sentence of the entrapped defendant.”). It is not clear that there is a unified approach among courts to this problem to date. See also 1993 Amendments to United States Sentencing Commission Guidelines, Commentary to § 2D1.1, *supra* note ___, which allow for a downward departure in the very specific situation where agents have sold contraband to the defendant far enough below market price to account for the exact amount that the defendant bought above his usual quantity. The phrase “ratcheting up” seems to have first been used by the Fifth Circuit in *United States v. Richardson*, 925 F.2d 112, 117 (5th Cir. 1991), *cert. denied*, 501 U.S. 1237 (1991) in a money laundering case.

²⁵² This phrase seems to have been coined by the court in *U.S. v. Lenfesty*, 923 F.2d 1293, 1300 (8th Cir. 1991), *cert. denied*, 499 U.S. 968 (1991) (This was a novel argument from a defendant at the time and did not go over well: “We are not prepared to say there is no such animal as ‘sentencing entrapment.’”). A few days later, the Eighth Circuit dealt with the novel defense in another ruling, *U.S. v. Stuart*, 923 F.2d 607 (8th Cir. 1991), 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.” *Id.* at 614. A slow onslaught of cases ensued in various circuits over the next year; the first court to recognize “such an animal” as sentencing entrapment (the Eighth Circuit’s phrase was frequently repeated) was *United States v. Barth*, 788 F.Supp. 1055 (D.Minn.1992), where the court found that the Sentencing Commission had “failed to adequately consider the terrifying capacity for escalation of a defendant’s sentence based on the investigating officer’s determination of when to make the arrest.” *Id.* at 1057. A survey of

This third point needs some explanation. There may be a tendency for the entrapment defense to work best when the defendant is charged with a crime that caused relatively little direct harm, often the case with “vice” crimes, which as an isolated instance mostly threaten to harm only the willing participants. A court’s skepticism about the War on Drugs, for example, may be visible between the lines of an entrapment-based acquittal in a narcotics case. All crimes are not created equal; at any given period in our history, certain crimes are more likely to arouse the moral passions of judges and juries.²⁵³ Treason touches a nerve during wartime; violating the

reported cases on Westlaw indicates that this defense rarely works, as courts find it inapplicable in the defendant’s case. Of course, it may function as a defense in the background in plea bargain negotiations and unreported cases, which would be very difficult to track. Some federal circuits still do not recognize the defense of “sentencing entrapment” at all, despite the Sentencing Guideline provisions. *See, e.g.,* U.S. v. Mitchell, 353 F.3d 552, (7th Cir. 2003) (“Yet this circuit has disparaged the doctrine of ‘sentencing entrapment,’ and it is no more compelling in a sex case than in a drug case.”).

A growing number of commentators (almost all student writers, for whatever reason) are focusing on this issue, and it continues to be a pitfall for some defendants in criminal cases. *See generally* Daniel L. Abelson, Comment: Sentencing Entrapment: An Overview And Analysis, 86 MARQ. L. REV. 773 (2003); Jeff LaBine, Note: Sentencing Entrapment Under The Federal Sentencing Guidelines: Activism Or Interpretation?, 44 WAYNE L. REV. 1519 (1998); Joan Malmud, Comment: *Defending A Sentence: The Judicial Establishment Of Sentencing Entrapment And Sentencing Manipulation Defenses*, 145 U. PA. L. REV. 1359 (1997); 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); Suzanne Mitchell, Note, *Clarifying the United States Sentencing Guidelines’ Focus on Government Conduct in Reverse Sting Sentencing: Imperfect Entrapment as a Logical Incomplete Defense that Warrants Departure*, 64 GEO. WASH. L. REV. 746 (1996); Mark Thomas, Comment, *Sentencing Entrapment: How Far Should The Federal Courts Go?*, 33 IDAHO L. REV. 147 (1996); Todd E. Witten, Comment: *Sentence Entrapment And Manipulation: Government Manipulation Of The Federal Sentencing Guidelines*, 29 AKRON L. REV. 697 (1996); Jeffrey L. Fisher, Note, *When Discretion Leads to Distortion: Recognizing Pre-Arrest Sentence-Manipulation Claims Under the Federal Sentencing Guidelines*, 94 Mich. L. Rev. 2385 (1996) Amy Levin Weil, *In Partial Defense Of Sentencing Entrapment*, 7 FED. SENT. R. 172 (1995); Andrew G. Deiss, Comment: *Making The Crime Fit The Punishment: Pre-Arrest Sentence Manipulation By Investigators Under The Sentencing Guidelines*, 1994 U. CHI. LEG. F. 419 (1994); Eric P. Berlin, Comment, *The Federal Sentencing Guidelines’ Failure To Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 WIS. L. REV. 187 (1993).

²⁵³ 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 (10th Cir. 2003); United States v. Robertson, 350 F.3d 1109 (10th Cir. 2003); United States v. Dotson, 324 F.3d 256 (4th Cir. 2003). The Sentencing Guidelines explicitly state that for pedophilic 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

communal trust and peacefulness of the suburbs in peacetime may provoke similar outrage. An example from recent memory is the crack hysteria of the late 1980's.²⁵⁴ Suppose that the year is 1986, and the police are in the midst of a sting operation to nab a marijuana dealer (in a jurisdiction using the objective test). At some point, they become cognizant of the fact that they are teetering on the line, or may have crossed the line, making an acquittal likely.²⁵⁵ New strategy: entice the marijuana dealer to get in on the crack craze, where prices are much higher (creating the illusion of higher profits).²⁵⁶ The police know the local judiciary is swept up in the same frenzy about the new crack "epidemic" as everyone else who reads *Time* and *Newsweek*. Dragging the victim into something more shocking may turn the court's critical eye back onto the defendant's malevolent predisposition instead of the policeman's overreaching; the sentencing guidelines²⁵⁷ also provide clear steps for officers to "ratchet up" the offense or lay the groundwork for sentencing enhancements.²⁵⁸ One can imagine a number of more serious

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.

²⁵⁴ See, e.g., Craig Reinerman & Harry G. Levine, *Crack in Context: America's Latest Demon Drug*, in *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE* 1-18 (Craig Reinerman & Harry G. Levine, eds. 1997), discussing the attendant media frenzy and disproportionately harsh reaction from lawmakers. Such cultural phenomenon affect not only politicians, but judges and juries as well. The ratcheting up example here would probably relate not only to sentencing, as crack carries much harsher mandatory sentences than marijuana, but also to the likelihood of conviction.

²⁵⁵ This is related to the problem of "cliffing," where the penalty already due is so large that no additional deterrence or disincentive can be obtained.

²⁵⁶ But see Katyal, *Deterrence's Difficulty*, *supra* note 141, at 2404-07 (discussing the switching from crack to other drugs that occurred during this period).

²⁵⁷ Of course, it would be an anachronism to refer to the Federal Sentencing Guidelines before they were actually established; but many crimes had graded statutory penalties in the 1980's, and that is what I refer to here. For an example of pre-Guidelines manipulation of the defendant's sentence under statutory grading, which appears to have worked successfully, see *U.S. v. Byrd*, 31 F.3d 1329 (5th Cir. 1994) (pornographic mail case where the violation occurred in 1987).

²⁵⁸ Consider the commentary of the court in *United States v. Connell*, 960 F.2d 191 (1st Cir. 1992) (although this court, interestingly, did not give a sentence reduction to the defendant in that case):

It cannot be gainsaid that the sentencing guidelines, by their very nature, may afford the opportunity for sentencing factor manipulation, particularly in sting operations. We can foresee situations in which exploitive manipulation of sentencing factors by government agents might overbear the will of a person predisposed only to committing a lesser crime. This danger seems especially great in cases where the accused's sentence depends in large part on the quantity of drugs or money involved.

offenses that might make a defendant far less sympathetic in court than standard violations of drug laws. The police can imagine them, too.

Being sanctioned as a criminal offender carries not only the tangible cost of a fine or imprisonment; it also comes with long-lasting stigma in many cases.²⁵⁹ Another problem discussed in the literature on deterrence is that sometimes stigma can backfire.²⁶⁰ One problem with deterrence of criminals is the idea that sometimes the stigma of being a lawbreaker can actually lead to more crime, once the criminal already feels stigmatized. Either the threat of additional stigma may seem like a small cost, or the stigma may isolate the criminal from law-abiding society and lead to association only with others bearing the same stigma. A criminal underworld forms.

²⁵⁹ See generally Dan M. Kahan, What Do Alternative Sanctions Mean?, 63 U. CHI. L. REV. 591, 630-53 (1996) (arguing that shame-based sanctions can influence public norms that condemn criminality).; Note, *Shame, Stigma, And Crime: Evaluating The Efficacy Of Shaming Sanctions In Criminal Law*, 116 HARV. L. REV. 2186 (2003).

²⁶⁰ See Katyal, *Deterrence's Difficulty*, *supra* note 141, at 2399-2400. Katyal notes that the stigma cost of criminalization also have "cliffs":

When neighbors derogatorily say that someone is a "drug dealer," their disapproval generally is not adjusted to take account of the fact that he sold only one vial of crack last week. In other words, stigma itself has cliffs. The fact that a person is a drug dealer may impose fixed opportunity costs on that individual. Such costs may vary from individual to individual—for example, by how susceptible the individual is to internalization, or by how many people know about the person's status as a dealer. But for some people, at least, such costs may be fixed at a minimum floor amount. Increasing the amount of criminal activity one undertakes may raise these costs, but they won't drop below that floor. This suggests that once a lawbreaker faces stigma—either from the community, individuals, or the law—she may capitalize on her sunk cost and increase her criminal activity. A proper analysis of stigma requires knowledge about the interrelationships between law and social norms, raising issues that are well beyond the confines of traditional economics. . .

Id. at 2399. Katyal takes the analysis further, explaining that stigmatized individuals become marginalized from the mainstream of society and seek company with others like them, a phenomenon which could happen with an institution like a police precinct or federal agency as well:

The stigma imposed from outsiders is celebrated within this group, and their norms differ from the world of the nonstigmatized. They develop subnorms that may be antithetical to those of the law-abiding world. This may become both an inducement to further crime, as law breaking is seen as a socially positive act within the group, and a disincentive to noncriminal alternatives. As one criminal describes it, "I can remember . . . on more than one occasion . . . going into a public library near where I was living, and looking over my shoulder a couple of times before I actually went in, just to make sure no one who knew me was standing about and seeing me do it."

Id. at 2460.

An analogous phenomenon can happen within police departments. For example, suppose that acquitting a defendant genuinely stigmatizes the officer who broke the rules.²⁶¹ The officer may then feel “branded” as a bad cop; this label may become a self-fulfilling prophecy. It is certainly easy to imagine that Officer Cain, once branded as a bad cop by a court that releases an arrested wrongdoer, will feel like he has less to lose next time than Officer Abel, who still has an untarnished record he wants to retain. There may also form a clique within the department of the “bad boys,” who feel alienated from the “boy scouts” who have not yet blown a case by overreaching. Again, it is easy to imagine that members of the bad-boy club in the precinct fraternize together during their free time; they go out for drinks together after their shift; they call each other when they are in a jam. Over time, their misdeeds seem less wrong and more something they have in common with their friends on the force.²⁶² Instead of being deterred from doing it again, it is part of their identity; worse still, it is not only the individual’s identity, but his *group’s* identity.²⁶³ This phenomenon may explain why certain police departments seem to have periods where they are frequently featured in national news for abuses and misconduct.

²⁶¹ In this case, however, one assumes that the approbation felt for the behavior among judges would be similar to that felt among the general public, and in turn felt within the law enforcement agency itself. This is a string of assumptions that seems open to question. What judges may view as unseemly could, under the right circumstances, get one hailed as a hero in the office; or, less drastically, could simply be overlooked or ignored by those in charge of the enforcement agency or precinct.

²⁶² This section, of course, is focused on the effects of deterrence on the individual, not institutional level. Yet subgroup identification could affect the attitudes or values of individuals on the force.

²⁶³ To the extent that sting operations (or undercover operations in generally) are the conducted by a specialized subset of law enforcement, this problem would be exasperated. It seems that this work is, in fact, a specialty, and not simply an alternating duty of uniformed or plainclothes agents/officers. Such an undercover club or clique would tend to develop its own group dynamics, which would have a natural tendency to reinforce the ethical rationalizations undoubtedly necessary to perform such work (which requires not only inducements, betrayal, and sometimes participation in criminal activities for “initiation” purposes, but also simple but constant lying about one’s identity, whereabouts, background, loyalties, etc. This small-group reinforcement would presumably bear upon attitudes about legal rules regarding entrapment in a similar manner, and may be generally unavoidable. The fact that such specialized law enforcement groups would also necessarily require high levels of secrecy, mutual protection, etc., would negate the necessary transparency that would be required to ensure ongoing accountability or ethical input from outside the group.

²⁶⁴ The point is that the method of sanctioning officers publicly can backfire and create a thoroughly rotten precinct, or a rotten group within a precinct.

V. FRUIT OF THE POISONOUS TREE

Pre-trial hearings that address the admissibility of confessions, or of contraband discovered during an investigative search, are also more like golf than tennis. The police gain little or no advantage at that stage from the defendant's guilt (or even her apparent guilt).²⁶⁵ It is simply a matter of whether the police played their part of the game according to the rules; their "score" is independent of the other players'.²⁶⁶ Coerced confessions cannot come in, even if true.²⁶⁷ Contraband seized during an unwarranted search is inadmissible, even though the substance is definitionally illegal and was indisputably in the defendant's possession.

Exclusionary rules, however, are not the same as the entrapment defense. The real "bite" of the exclusionary rules is the "fruit of the poisonous tree" doctrine:²⁶⁸ once the police violate a constitutional rule in their investigation of a crime, courts will exclude evidence of other crimes

²⁶⁴ One wonders also how such group stigma would function in a workplace that tolerates or legitimized expressions of anger, if indeed law enforcement agencies fit into that category. *See supra* note _____. The combination of stigma and occupational–encouraged anger could be a potent force influencing individual decision processes.

²⁶⁵ *See, e.g.*, *Fellers v. United States*, 124 S.Ct. 1019 (2004), in which police used the fact that the suspect had already been indicted to elicit a confession, which the Supreme Court later held should be inadmissible as a violation of the defendant's Sixth Amendment rights.

²⁶⁶ Admittedly, sometimes the admissibility of a particular piece of evidence or a confession will turn on the officer's word against the defendant, as when they argue about whether permission was given to search. *See* Levenson, *supra* note 42, at 19, discussing how this presents problems for the effectiveness of the exclusionary rules as a deterrent.

²⁶⁷ This is not to say that coerced confession never do make their way into criminal adjudications, but rather that the official rule is that they should not.

²⁶⁸ *See supra* note 25; LAFAVE & ISRAEL, *CRIMINAL PROCEDURE* § 9.3-9.6, pp. 467-98 (2nd ed. 1992). As mentioned in the introduction, "The 'poisonous tree' can be an illegal arrest or search, illegal interrogation procedures or illegal identification practices." *Id.* at 471.

For a recent discussion of another problematic exception to the fruit doctrine, *see* Kirsten Lela Ambach, *Miranda's Poisoned Fruit Tree: The Admissibility of Physical Evidence Derived from an Unwarned Statement*, 78 WASH. L. REV. 757 (2003) (arguing that the exception to the "fruit of the poisonous tree" doctrine with regards to Miranda warnings and subsequently discovered physical evidence should be modified to produce greater consistency in the exclusionary rules paradigm).

(and often, therefore, obviate convictions),²⁶⁹ even more serious crimes, if there is a line of causation between the incriminating evidence and the police misdeeds.²⁷⁰ The game is over, so to speak, if Player A (law enforcement) loses the first round, but not if player B (defendant) loses first.

There is no fruit of the poisonous tree rule for entrapment. Entrapment is a common law defense, not a constitutional issue. If the police discover a “jackpot” of evidence of other crimes during a sting operation (or during post-arrest searches and discovery), the evidence is admissible.²⁷¹ Even if the sting is completely “over the top” and the initial charges would never

²⁶⁹ It is worth noting, however, that the “fruit” rules vary somewhat depending on whether the exclusionary rule in question stems from the Fourth, Fifth, or Sixth Amendment, and it remains an unsettled question of law whether violations of *Miranda* requirements connected to the Sixth Amendment even implicate a fruit of the poisonous tree rule. This was part of the issue in the recent Supreme Court ruling in *Fellers*, *supra* note 265, which was remanded to the Eighth Circuit to conduct the initial analysis on the question.

²⁷⁰ J. Gregory Deis argues in favor of a “causation” test for entrapment, which he says closely approximates the “subjective” test in practice, based on a law and economics analysis. *See* Deis, *supra* note 1 (this is the thesis of his overall article). In other words, he is concerned with whether the police actually “caused” the crime for which the defendant is charged; in such cases law enforcement is being wasteful of resources, Deis argues, and this is undesirable. Admittedly, this is often the very test courts use to settle the question of “predisposition,” or that it may be useful much of the time.

Deis does not explain well how acquitting the defendant will solve this problem. It does not replenish the wasted resources in that case, and it is not clear the acquittal will keep the police from doing the same thing again. Another problem that Deis does not explain well is that causation issues—whether in torts or criminal law—always involve a certain amount of arbitrary line-drawing. Otherwise, a line of causation for every misfortune in our present world can be traced directly to Adam and Eve, which solves nothing for present legal disputes. His argument also does not account for the police needing to use convincing decoys that resemble taking leadership in the criminal enterprise. Finally, Deis does not explain the role planning in which both parties engage, which can undermine the causation analysis significantly. The police know that they will have to hide or downplay their causative role; they will plan this into the operation. Criminals know that manipulating conversations and situations so that the other party could be accused of holding the key for causation—in case the other turns out to be an agent—will guarantee an entrapment defense under Deis’ model, so they will plan accordingly as well. Interestingly, the FBI Bulletin he cites giving guidelines for sting operations, *supra* note ____, noticeably does not tell officers to wait until they have reasonable suspicion, but rather to be able to “articulate” probable cause, etc. Perhaps this is a semantic coincidence, but it smacks of coaching on how to circumvent the very test Deis propounds, and some courts follow. Causation is a problematic when used as a determining factor in cases involving sting operations, where both parties are likely to be sophisticated at their art.

²⁷¹ For a similar point about the latest generation of criminal laws, and community policing models (as opposed to the entrapment defense, but still analogous), *see* Stuntz, *supra* note 21, at 539:

The Fourth Amendment requires that arrests be supported by probable cause to believe the arrestee has committed a crime. Street stops must be supported by reasonable suspicion of crime. In both instances, the operative word is “crime.” If that word includes enough behavior, if crime is defined broadly enough, police can stop or arrest whomever they wish. Thus, police benefit from laws that criminalize street behavior that no one wishes actually to punish, solely as a means of empowering them to seize suspects. This is the force that drives much of the current movement to expand the range of so-called “quality of life” offenses, crimes that cover low-level street behavior

stick under the objective test, the police can freely proceed with new charges based on the material gleaned during the sting. In this sense, entrapment is more like chess,²⁷² while the exclusionary rules are more like golf or bowling. A good chess player will often sacrifice a pawn or rook for the opportunity to place the opponent in check-mate.

Assume, for example, that the police engage in a scheme like that condemned by the Supreme Court in *Jacobson*. Suppose, however, that when the sting occurs (the solicited transaction) the police discover a vast collection of illegal videos, computer images, etc. We could make it more interesting: suppose they discover large quantities of illegal drugs, or clear indications of involvement in a terrorist organization. The police can drop the *Jacobson*-type charges and move ahead on the new incriminating evidence. There is a greater payoff.²⁷³

The “greater payoffs” problem is present, of course, for either entrapment defense (subjective or objective). It is less likely to become an issue under the subjective test, however, because the other incriminating evidence will significantly undermine the defendant’s claim to be without a predisposition to commit a crime. This is not to say that the objective test actually

that will only rarely be prosecuted, but that often serve as a convenient basis for an arrest and, perhaps, a search.

²⁷² See Park, *supra* note 12, at 221, arguing that the “prosecution usually has an advantage in a swearing match between an agent and a typical defendant, particularly when the defendant has the burden of proof. After all, the entrapment defense places the defendant in a rather unenviable position. Usually he must concede that he committed the criminal act.” For a discussion of the shifting burdens of proof in entrapment cases, which is outside the scope of this article, see Catherine A. Schultz, *Victim or the Crime? The Government’s Burden in Proving Predisposition in Federal Entrapment Cases*, 48 DEPAUL L. REV. 949 (1999) (urging adoption of a new two-tier approach to determining predisposition in the federal courts); LAFAVE, CRIMINAL LAW at 463-64; MARCUS, *supra* note 1, at 212-22.

²⁷³ This section generally focuses on greater payoffs in the form of convictions for other crimes, or convictions of more important criminal figures. If police are more focused on their number of arrests than their numbers of eventual convictions, of course, this would affect what they consider to be the greater payoffs. See, e.g., Slobogin, *Why Liberals Should Chuck*, *supra* note 27, at 377-378 (“[T]he sociological literature strongly suggests that the primary goal of officers in the field in the average case is to get a ‘collar.’”). There may, of course, be other “greater payoffs,” such as deterring future crime (which I suggest further on, see *infra* note __ and corresponding text) or gathering valuable information about how global criminal networks operate. Donald Brown has suggested that this is the priority for enforcement agencies coping with the problem of human smuggling operations from Cuba; rather than maximizing convictions, agents have a heightened concern to develop more intelligence about the human smuggling trade that can be shared with other government agencies; Brown suggest a similar model is at work among federal drug enforcement agencies. See Brown, *supra* note 185 at 288-89.

creates the incentive for greater payoffs. The problem is that it does not address the payoffs game at all. This undermines the supposed purpose of the objective test: to deter overdone sting operations.²⁷⁴ The sanction—acquitting the defendant on the charges related to the improper sting operation—may do little to achieve a subsequent greater payoff. Only if courts began to treat entrapment as a constitutional issue, triggering the fruit of the poisonous tree doctrine, would the greater payoffs problem resolve itself. This might occur through the creation of a due process test.²⁷⁵ Some courts have headed in this direction, but it is certainly not yet the trend. A roundabout way to reach the same result would be to hold the arrests and searches related to overdone sting operations to be false arrests and unwarranted searches for purposes of the exclusionary rules.

If the objective test for entrapment itself does little to deter, when combined with the exclusionary rules it may even create unfortunate incentives for police to forge ahead instead of hesitating before a sting operation. Police seeking greater payoffs are limited by the exclusionary rules. A sting operation, even done in less than good faith, provides a handy alternative for getting the same result. It is a loophole. By having search and seizure rules that trigger the fruit of the poisonous tree doctrine, but not applying the same strictures to evidence

²⁷⁴The point here could also be illustrated by using the “acoustic separation” model proposed in a famous article by Meir Dan-Cohen, in which he sees criminal laws as each containing two rules. One rule for the would-be offender (which he calls “conduct rules,” like “do not murder”), and one for the judiciary (“decision rules”) telling the judge how to handle the case. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984). Although I have disagreed somewhat with Dan-Cohen’s model elsewhere, see Stevenson, *To Whom Is The Law Addressed?* 21 YALE L. & POL’Y REV. 101 (2002), his model provides a way to clarify the problem with the objective test for entrapment. The objective test could be said to contain two rules or rule-like messages: a decision rule for the judge, mandating the defendant’s acquittal under the requisite circumstances, and a conduct rule for the police, mandating that they refrain from the proscribed variations of sting op methods. Normally, in Dan-Cohen’s model, the two messages are very congruent—the decision rule says to sanction a thief, and the conduct rule tells the thief not to steal. In the case of entrapment, the rules may be contradictory, given the “greater payoffs” problem. The decision rule for the judiciary says acquit the defendant. The conduct rule for police, however, is that it may not matter what happens in this round with the defendant, so do what results in the greatest payoff in the end. Dan-Cohen, of course, applied his model only to criminals, not to police; but there is no reason the model should not work in any context where the judiciary has a role in deterring certain bad behavior.

coming from “bad” entrapment schemes, police prone to excesses get a nudge in the direction of the latter.

Acquitting the defendant will then have little deterrent effect where the police are on a “fishing expedition” for a big breakthrough.²⁷⁶ This is also true where the police find incriminating evidence against third parties, such as the arrestee’s supplier in a narcotics chain; the third party has no standing to challenge the entrapment of the original defendant. Of course, third-party payoffs are also an issue for the traditional exclusionary rules, as third parties lack standing to bring a constitutional challenge to the search or seizure of another that led to the discovery of incriminating evidence.²⁷⁷ In both cases, the potential for third-party payoffs undermines the deterrent effect of acquitting the defendant.²⁷⁸

²⁷⁵ See generally Daloia, *supra* note 38; Buretta, *supra* note 75 (both arguing in favor of a constitutional entrapment defense as an “outrageous government conduct” test.).

²⁷⁶ See Brown, *supra* note 185 at 288-89, suggesting this is precisely the model currently in use by enforcement agents in Operation Barrier Reef (“Barrier Reef”), initiated in 2001 by the U.S. Attorney's Office for the Southern District of Florida. The primary goal seems to be gathering more information about the international networks for human smuggling that can be used by other government agencies as well. Brown suggests this model is borrowed from federal drug smuggling enforcement.

²⁷⁷ The Supreme Court offered a concise capsule summary of its rulings in this area in *Powers v. Ohio*, 499 U.S. 400, 428-429 (1991):

We do not, however, extend this special treatment of injury in fact in the litigation context to third-party standing. Indeed, we do not even recognize third-party standing in the litigation context—that is, permit a civil or criminal litigant to upset an adverse judgment because the process by which it was obtained involved the violation of someone else's rights—even when the normal injury-in-fact standard is amply met. If, for example, the only evidence supporting a conviction (so that the causality is not remotely speculative) consists of the fruit of a search and seizure that violated a third party's Fourth Amendment rights, we will not permit those rights to be asserted by the defendant. We would reach the same result with respect to reliable evidence obtained in violation of another person's Fifth Amendment right against self-incrimination. Likewise (assuming we follow the common law) with respect to evidence introduced in violation of someone else's confidentiality privilege. These cases can, to be sure, be explained on the basis that the rights in question are “personal,” rather than on the basis of lack of third-party standing, but the result comes to the same.

(internal citations omitted). See also *Rawlings v. Kentucky*, 448 U.S. 98 (1980) (no third-party standing for violations of Fourth Amendment rules); *United States v. Payner*, 447 U.S. 727 (1980) (same); *Rakas v. Illinois*, 439 U.S. 128 (1978) (same, plus the same principle applied to Fifth Amendment right against self-incrimination); *Commonwealth v. McKenna*, 206 Pa. 317, 322, 213 A. 2d 223, 226 (1965) (no standing to challenge third-party’s violated privileges of confidentiality); *Butz v. State*, 221 Md. 68, 73, 156 A. 2d 423, 426 (1959) (same).

²⁷⁸ La Fave mentions this point in passing, but he does not develop it or take it very seriously. See LAFAVE, *CRIMINAL LAW* §5.2(e), p.460.

As mentioned in a previous section, sting operations also serve a useful purpose as a deterrent to criminal activity.²⁷⁹ When criminals perceive that either their recruiters or their clients may be government agents, they must devise mechanisms for validating the genuineness of the other party.²⁸⁰ Police will learn these signals and match them, devising more and more convincing decoys or offering more and more attractive bait (the two may often be the same thing, especially in the minds of police).²⁸¹ This becomes costly for the criminal, at least in terms of inconvenience, if not in actual outlays of resources.²⁸² It also enhances the perception of the risk of getting caught; Alon Harel and Tom Baker have published profound articles recently demonstrating that uncertainty (as opposed to quantifiable “risk,”) is perhaps the most important deterrent factor in the mind of a criminal.²⁸³ It also costs the criminal in the form of lost opportunities—his increased cautiousness will lead him to reject some genuine offers that would have been profitable, and his risk aversion deprives him of the opportunity for the truest source of profit in crime (or any other enterprise).²⁸⁴ It introduces “lemons” into the market, as Hay says. “Just as the introduction of lemons into the auto market discourages the sale of even

²⁷⁹ See *supra* notes 154-60 and accompanying text.

²⁸⁰ *Id.*

²⁸¹ See Hay, *supra* note 152.

²⁸² This cost is a form of transaction costs: information asymmetries causing mistrust and excessive caution, monitoring, threats against possibly disloyal partners, etc., not to mention that co-conspirators must also employ these safety mechanisms, and treat the original conspirator with the same skepticism. In other words, the initiator of a criminal enterprise must do more both to ensure the loyalty of criminal partners, but also to gain their trust; as they will approach the leader with the same caution that the leader uses in approaching them. For a discussion of undercover agents needing to earn the trust of their prey, see Park, *supra* note 12, at 219.

²⁸³ Alon Harel and 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); Tom Baker, Alon Harel, & Tamar Kugler, *The Virtues Of Uncertainty In Law: An Experimental Approach*, (February 14, 2003) available at <http://ssrn.com/abstract=380302>

²⁸⁴ This is a point on which I depart from the traditional law-and-economics approach of deterrence, which assumes that deterrence is most successfully achieved when would-be perpetrators have precise, quantifiable certainties of being caught and punished. See, e.g., Elbaz, *supra* note 1, at 138-39. Elbaz’ discussion on this point also provides a good illustration of another problem in some of the existing literature on deterrence theory, which is to assume that sanctions vary depending on the crime, but that the likelihood of detection is the same for all crimes. This introduces into his model (and those of similar commentators) incongruence with the real world, where crimes are selectively enforced for policy and political reasons. There is a bigger manhunt for a serial killer than for

good cars, the presence of lemons in the market for crime discourages genuine criminal transactions.”²⁸⁵

This deterrent value of sting operations should not be underestimated. If the same resources must be devoted to a sting operation in order to ferret out existing criminals as would be devoted to one designed for deterring criminals, the latter is more efficient, because the former contains a higher risk that socially costly crime is already being committed. Crime prevented is more efficient than crime detected, if the costs of prevention and detection are the same. The

individual killers of the same number of victims, and certainly more than for peddlers of marijuana, bicycle thieves, etc. This is appropriate.

²⁸⁵ Hay, *supra* note 152. This raises an interesting question, outside the scope of this article, about the long-term societal effect of using women as undercover agents. Police departments and at least one court have maintained that female undercover officers are absolutely necessary in undercover operations “for the purpose of authenticity or genuineness.” *Button v. New York*, 351 N.Y.S.2d 488 (N.Y. Super., Sept. 7, 1973) (reverse-discrimination case brought by male applicant rejected by state police force in favor of four female troopers due to their unique usefulness as females on the force; held to be a legal form of discrimination). Contrary to what one might think, undercover female officers are not used in combating prostitution as much as other types of organized crime. See, e.g., Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S.CAL. L. REV. 523, 527 (2000) (“In nearly all prostitution prosecutions arrest occurs when a male undercover officer seeks out women he thinks are willing to offer sex for money. He either waits for them to offer to engage in sex in exchange for money or, more often, solicits them himself.”).

It seems that most sting operations are used against males, however, not females; men are statistically more likely to be criminal entrepreneurs. See, e.g., Spencer De Li & Doris Layton MacKenzie, *The Gendered Effects of Adult Social Bonds on the Criminal Activities of Probationers*, 28 CRIM. J. REV. 278, 279 (2003). If this is true—I will assume it is for the moment—this means that when women are used as undercover agents, it is most often in the role of enticing men to join in the crime. This often takes the form of using romance or sex to beguile the men. See generally, Daloia, *supra* note 38. It would be interesting to investigate whether women are used as undercover agents against men because they can exploit the victims sexually, or because women are seen as more trustworthy and less likely to be undercover agents. It seems that both could be true at once. As such sting operations are used over time in a given high-crime community, men will become more suspicious of women they meet, and require more assurances or signals that the woman is not, in fact, planning to entice and betray them to authorities. Using the “lemons market” analogy, this introduces “lemons” into what an economist might call the social “market” for women: not that women are a commodity (which would be extremely demeaning), but that people engage in a selection process when deciding which people to trust out of all those they encounter.

This creates analogous problems to the lemons market for cars or other commodities: it devalues the original, makes transactions more costly for everyone, and tends to escalate. A government policy that makes people in a community more suspicious of women overall may hurt women in general, even if the women are helped initially by the extra employment opportunities, as seen in the *Button* case. To the extent that women in a poor, high-crime community are disadvantaged in terms of employment, financial resources, and educational opportunities, their social capital—the trust others have for them in their community—may be a significant asset for them. It is a worthwhile question, which unfortunately I cannot answer here, whether women in these communities are harmed by the prevalent use of sting operations, as men become more suspicious of all the women they encounter, and perhaps more demanding of signs of loyalty and trustworthiness. This issue seems to have been ignored by commentators until now, but deserves more consideration. Cf. POSNER, *supra* note 27, at 242 (observing that organized crime depends more heavily on trust than legal transactions do, as breaches of illegal

deterrence approach has another feature that makes it potentially more efficient than focusing on finding criminals: its effectiveness depends more on the criminal's *perceptions* of how widespread stings are, not how widespread they are in actuality. The reverse is true for informational-driven stings; they only work when they are actually implemented. Perceptions are subject to manipulation, however, and the government can use a variety of means to foster an exaggerated perception of risk among criminals. High-profile stings, ones that make headlines for weeks, should operate like any other headline: they distort public perceptions and make remote risks seem like clear and present dangers. Targeting certain individuals who are connected enough in the community to serve as information vanguards²⁸⁶ can disseminate information quickly within a given subculture.

Most importantly for this article, even *unsuccessful* stings can serve the deterrent purpose very well. First of all, the very fact that the sting worked well enough to lead to an arrest is likely to shake up the defendant—even though he is finally acquitted—and his circle of friends enough that they are much more wary in the future. Assume for sake of argument that the police engage in a particularly atrocious sting operation—one likely to sicken even the most anti crime

contracts are unenforceable, and therefore tends to organize around crime “families,” as well as lines of business that have lower turnover in their ranks, like brothels instead of streetwalkers).

²⁸⁶ See, e.g., Katyal, *Deterrence's Difficulty*, *supra* note 141, at 2449:

A small group of people may look at the sentencing structure and be influenced by its relative treatment of crimes. As time passes, the information this group possesses will trickle down, but now in a way no longer tied to sentencing. Instead, it may simply be said that activity X is worse than activity Y. This trickle-down theory leads me to posit the existence of information vanguards—people who “get the message” first and then transmit it to others. These information vanguards take in information, digest it, and pass it along to the rest of the world. They may relay the message as they first heard it—committing murder has a 20 year jail sentence—or they may pass it along in a processed form as lore—committing murder is simply bad.

Katyal draws his insights in part from the general educative theory of punishment espoused by Andenaes. See JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE (1974). I discuss this method of communicating knowledge of legal sanctions in an earlier article, but only in the context of would-be criminals discovering the sanctions for crimes, not the police themselves. See Drury Stevenson, *To Whom Is The Law Addressed?* 21 YALE L. & POL'Y REV. 105 (2003).

judge. Suppose it involves a truly shocking degree of government deception and initiative,²⁸⁷ outlandish inducements, intimate interpersonal involvement (like a sexual relationship)²⁸⁸—this is starting to sound more like the Balaam story all the time²⁸⁹— plus supply and take-back, and everything else the courts detest. From the standpoint of disseminating a frightening impression among would-be offenders, this is perfect: the sensational nature of the news makes it more likely to spread quickly, and to make a deeper impression on those who hear. Even the defendant’s acquittal can be useful; he will be able to tell his experience to more people if he is out on the street than he would from the penitentiary.²⁹⁰

Here is the hypothetical: the good, noble, civic-minded policemen become concerned about some serious criminal threat to the community, something with real potential to mushroom if left alone. One might try to find the bad apples at the root of it, but in some cases these are easily replaced, like Pablo Escobar was by the Cali cartels when he was eliminated from the Colombian drug scene. Besides, finding the bad apples sometimes proves exceptionally

²⁸⁷ See, e.g., Slobogin, *Deceit*, *supra* note 52, at 779-807.

²⁸⁸ A recent Florida case has produced a very unusual entrapment case, being referred to as “the Hotty Defense”. In *State v. Blanco*, 2004 WL 86646 (Fla.App. 4 Dist.). the defendant claimed he was entrapped by a very attractive undercover agent using the allure of the possibility of sex to badger the defendant into committing the non-sex related crime of purchasing narcotics. Not only did the defendant find the undercover agent attractive, the trial court judge, Susan Below, agreed, stating for the record, “The whole situation seemed very clear to me. I mean, the detective walked in dressed in a T-shirt and jeans, and for the record he was a very attractive man.”

²⁸⁹ And indeed, the Balaam story is recorded in the annals of Israel’s history, despite it being an embarrassment to the people themselves, because of its strong moral lesson—and therefore deterrent effect—for generations of Bible readers thereafter.

²⁹⁰ David Elbaz joins many courts in arguing that (to use his words) “no societal benefits arise when government conduct gives a rational individual an incentive to commit a crime that he likely would have no incentive to commit under ordinary circumstances.” Elbaz, *supra* note 1, at 119. I dispute this. Utilitarianism does not necessarily forbid punishing the innocent; morality does. Just as general societal deterrence does not depend on the actual guilt of a punished defendant, but only on the perceived association—even though justice forbids punishing the innocent—so also the police may achieve a net societal benefit (general deterrence) by making an example of someone through a sting operation, even if the person would have been otherwise law-abiding. This is not intended as a normative recommendation, just a descriptive observance.

My other criticism of Elbaz’s economic analysis of entrapment law is that his conclusions depend on the assumption that a borderline sting operation “sharply lowers an individual’s probability of conviction.” *Id.* at 137. This assumption is simply incorrect—entrapment defenses are not often successful, and while the cases where it is raised are not uncommon, they are not exactly plentiful, either.

difficult, if they are as savvy as they are sinister.²⁹¹ The civic-minded police then conceive of another option: find someone—anyone—to serve as an example. We do not even have to worry about an innocent citizen going to jail—if we overdo the sting operation, the defendant goes free, which is even better, because he can tell and retell his story to everyone in town.²⁹² The juicier the story, the better,²⁹³ as long as people understand that *they could be next*. Remember, this is the basic fear driving the adoption of the objection test: “we could be next, if the police are allowed to go *that far*.” The sting takes place; the court is shocked; the newspapers have a feeding frenzy; the victim goes free; and everyone is scared to death. It is a good day for law and order in that city. Crime rates drop.²⁹⁴

My point here is not to argue that this is a good thing—if it were, it would be an argument in *favor* of keeping the objective test. Under certain circumstances, the objective test could actually *encourage* stings, especially the ones done for their deterrent value, rather than deter them. Given that the objective test is always adopted under the auspices of deterring the very type of scenario I have described, its usefulness is subject to question. My other point is that even if we assume good intentions for the police involved, there may be a “greater good”

²⁹¹ There is an assumption that police have somewhat finite resources. If police are truly maximizing arrests, *see* Stuntz *supra* note 21, at 538-39, then they will find it more efficient to focus on offenders who are easier to arrest (that is, to locate and show probable cause for charging them with some offense); small time offenders, or the lower-level minions for a crime organization, would have less resources to insulate themselves from capture and therefore would be easier prey for the police (less consuming of resources). Of course, police may be pursuing not simply arrests, but a particular type of arrest that creates good publicity for the department. This would depend on the local situation.

²⁹² There is, of course, a philosophical objection to deterrence that the guilt or innocence of the “example” defendant is not important from a purely utilitarian standpoint, but only the resulting public perception of the sanction. The scenario I present here, though, is intended to be more refined: the arrestee does not have to be punished (which of course is manifestly unjust if she is innocent, despite the utilitarian value of making examples), but merely given a vivid experience that will be transmitted to others.

²⁹³ The salience heuristic would come into play here—the more shocking and vivid the story would-be criminals hear from their comrade, the higher the odds will seem to them that they are also at substantial risk.

²⁹⁴ Of course, this is partly rhetoric, but makes a point. A necessary qualification would be that the rate for *this* type of crime would drop. It is not clear how a drop in one type of crime correlates to the rates for other types; some types of crime may increase as a result (through substitution), while others that are somewhat incidental to the original class of crimes, like violence associated with transactions gone amok, could also decrease.

that leads them to keep using the same tactics the court sanctioned by acquitting the last defendant.

A similar effect was described in a previous section regarding the “strength in numbers” danger inherent in conspiracies.²⁹⁵ Public awareness that sting operations are in common use must increase suspicion between parties to a criminal transaction or between members of a crime group.²⁹⁶ This raises the transaction costs in general, making crime less profitable and appealing, and weakens the “strength in numbers” effect within a conspiracy, making the conspiracies weaker and easier to break overall: where there is more suspicion and mistrust, members will be more likely to defect, to shirk their respective duties, to have in-fighting between factions, etc.²⁹⁷ The leaders will have to monitor members to try to detect government

²⁹⁵ See *supra* notes ____ and corresponding discussion in the text.

²⁹⁶ For a discussion of the value of inter-racket mistrust generated by conspiracy laws, see Katyal, *Conspiracy Theory*, *supra* note 145, at 1347-69. The following excerpt, citing classic economic theory on the necessity of trust within a group endeavor, illustrates the point as applied to criminal law:

Perhaps the most important asset of a firm is its trust between members. Trust is the glue that allows diverse individuals to work together easily. As Kenneth Arrow has stated, "Virtually every commercial transaction has within itself an element of trust, certainly any transaction conducted over a period of time. It can be plausibly argued that much of the economic backwardness in the world can be explained by the lack of mutual confidence" More recent analysis has found that "[I]ow trust can also discourage innovation. If entrepreneurs must devote more time to monitoring possible malfeasance by partners, employees, and suppliers, they have less time to devote to innovation in new products or processes." While conspiracies themselves defect from the legal order, they seek to promote trust and cooperation among their members. To generate inefficiencies law should reduce this trust.

Id. at 1346-47 (internal citations omitted).

²⁹⁷ See *id.*; see also Park, *supra* note 12, at 219 (“Almost every inducement by an agent involves some degree of appeal to friendship, sympathy, or desire for profit. An agent seeking to simulate bribery of a corrupt official must cultivate the official’s friendship and trust.”). One unintended consequence of this approach to law enforcement, however, could be a general increase in mistrust and suspicion in high-crime communities targeted by sting operations; such communities are likely to overlap significantly with poor communities. Raising the mistrust and suspicion in the community can affect legitimate relationships and transactions as well as illegal ones, thus undermining the overall social cohesiveness of the community to some extent. I am not aware of any other commentators addressing this problem, but it merits more discussion. Groups that are marginalized from society generally, such as racial minorities or recent, unassimilated immigrants, are often disadvantaged in employment, educational, and moneymaking opportunities. Their social capital within their own marginalized community may be one of their more significant assets or sources of power in society; when the government undermines the social capital of these individuals by generating more distrust, it increases the overall poverty of the victims. Thus, generating too much distrust in a community through sting operations could have the unintended consequence of increasing crime in that community in the long run, as the individual members become more desperately marginalized and isolated.

agents, which is inconvenient, costly, and destabilizing to the group, and information will tend to become compartmentalized, which generates more group error.²⁹⁸ This is another positive effect of sting operations that may prompt even conscientious officers to ignore the possible “sanction” of an individual defendant going free.

VI. OBJECTIONS

This part tries to anticipate some of the most likely objections to the foregoing arguments to offer a modest response. Other objections will surely emerge as well, but the purpose of this section is to show that the most common ones for readers to have initially should not be fatal to the article’s thesis.

1. *INSTITUTIONAL DETERRENCE: When the courts acquit defendants, isn’t the deterrent effect institutional rather than individual?*²⁹⁹ In other words, the discussion above that focuses on individual motivations and decisionmaking by officers may not matter if the sanctions induce law enforcement agencies as a whole to refrain from the undesired activity. Arguably, the police chief and top prosecutor will find ways to discipline the wayward officer(s), and will train and admonish the rest to avoid such behavior.³⁰⁰ They will supervise and plan future sting operations to comply with the rules.

Even apart from an individual’s assets and livelihood, the marginalized group’s relative power in society depends in significant part on the marginalized group’s internal cohesiveness. It may be that generating distrust and suspicion in marginalized communities weakens their overall power in society by undermining the groups’ social cohesiveness. This topic is too grand for the scope of this article, but the inquiry would be worth pursuing in other contexts. Cf. POSNER, *supra* note 27, at 242 (noting that organized crime depends heavily on trust and therefore tends to organize around crime “families” and lines of business that have lower turnover in their ranks).

²⁹⁸ *Id.* at 1350-54.

²⁹⁹ For a recent discussion of the weaknesses in the “institutional deterrence” justification for the Fourth Amendment exclusionary rules, see Slobogin, *Why Liberals Should Chuck*, *supra* note 27, at 378-94 (focusing mostly on the problems of modifying police culture).

³⁰⁰ There is some doubt, empirically, about the extent of internal disciplinary activities. Levenson offers the following:

Even when a police department properly investigates complaints and charges officers, there is rarely significant discipline. One review of the Los Angeles Police Department concluded that of

But there are no rules³⁰¹—except where *per se* rules are used. The objective test works on a case-by-case basis in most jurisdictions. If the activities of the police strike the court as particularly revolting, the court acquits. It is difficult, therefore, to train and supervise officers to work within delineated boundaries when the boundaries are not clear.

Institutional deterrence is a tenet of faith among believers in the exclusionary rules.³⁰² Regarding the entrapment defense, institutional deterrence suggests the mental image of some impersonal entity engaging in decisionmaking about the details of undercover operations, as an entity without passion, pride, or prejudice. This may be an illusion. Police chiefs are sensitive to big payoffs as much as individual officers; perhaps more so.³⁰³ Roundabout methods for

the 254 officers who had three or more complaints against them, only 1.6% faced termination, and 11% faced suspension, usually for only a few days. The overwhelming number of officers faced no discipline at all. In fact, the most common method in dealing with police misconduct is to reassign officers to another unit. This, of course, does not make the problem officer change his ways; it only changes his potential victim pool.

Levenson, *supra* note 42, at 24.

³⁰¹ See Park, *supra* note 12, at 225-26, where he sets forth some proposed clear cut rules, which have never been adopted, and then admits: “The present formulations of [the objective test] do not provide much guidance to officers and informers. . . . Even with time and experience, development of detailed rules will probably prove quite difficult.” To this extent, he spoke prophetically. To analogize the case to 1983 actions for false arrest, the police would not be faulted for their inability to discern the rules properly, at least under *Beier v. City of Lewiston*, 354 F3d. 1058 (9th Cir. 2004).

³⁰² See, e.g., *United States v. Leon*, 468 U.S. 897, 953 (1984) (Brennan, J., dissenting) (“The chief deterrent function of the exclusionary rule is its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally.”); *State v. Carter*, 370 S.E.2d 553, 560 (N.C. 1988) (emphasizing the exclusionary rule’s “effective institutional deterrence” to police misconduct); Gretchan R. Diffendal, Note, *Application of the Good-Faith Exception in Instances of a Predicate Illegal Search: “Reasonable” Means Around the Exclusionary Rule?* 68 ST. JOHN’S L. REV. 217, 221 (1994) (“In addition, the efficacy of this deterrent function is measured by its institutional deterrent effect, rather than its effect on the individual officer.”); Sean R. O’Brien, Note: *United States v. Leon And The Freezing Of The Fourth Amendment*, 68 N.Y.U.L. REV. 1305, 1313 (1993) (“[S]ome believed that the exclusionary rule engendered a general respect for the interests protected by the fourth amendment and that it provided an “institutional” deterrence to violations of the amendment.”). See also Slobogin, *Why Liberals Should Chuck*, *supra* note 27, at 378-94 (focusing mostly on the problems of modifying police culture). Of course if the institution itself is corrupt, attempting to deter police by appealing to the assumed aspirations of integrity by the agency may be useless. See, e.g., Luna, *supra* note 218 at 186-87 (discussing institutional problems and the inability of institutions to deter police misconduct generally). Luna suggests that agencies should simply adopt other measures of police performance besides numbers of arrests, but does not explain how this could work given the specialized nature of this branch of the criminal justice system. See *id.* at 196. See also Slobogin, *Why Liberals Should Chuck*, *supra* note 27, at 378-94 (focusing mostly on the problems of modifying police culture).

³⁰³ See Slobogin, *Why Liberals Should Chuck*, *supra* note 27, at 378-379 (discussing institutional deterrence in the context of the Fourth Amendment exclusionary rules):

obtaining such payoffs depend on foresight and coordination. The chief's management position places her closer to the temptation, as it were, not further away. The cop on the beat feels pressure to make some arrests,³⁰⁴ as this is the best way to keep his employer convinced she is not indolent. The chief shows she is not indolent, however, by catching a big fish, something that will be on the evening news.

Institutional measures of compliance invite individual circumvention.³⁰⁵ The individual who circumvents can be at any level—on the street or the director's office. The effectiveness of institutional deterrence still depends on the values or utilities of individuals making decisions about a sting operation. It is not clear that the supposed disutility of the defendant's acquittal will outweigh competing interests of the individuals making decisions (and making arrests).³⁰⁶

Institutions do not think; individuals do. Individuals may take on special modes of decisionmaking when inside an organization, but decisions have an individual aspect nonetheless. Deterrence is influencing decisions.³⁰⁷ Its effectiveness must be a function of the

When the illegality is not egregious, police chiefs are as likely to protect their own as to sanction them. If superiors react in this way, peers are likely to be even more sympathetic, if not laudatory, toward a collar well done. In behavioral language, the reward of an arrest will often undermine the punitive aspect exclusion brings.

See also Levenson, *supra* note 42, at 14-18. Levenson details the epidemic problems with institutional police culture. Specifically she identifies the insulation of police departments from other government agencies, the code of silence and mutual protection within precincts, self-styled "crime-fighting" professionalism, an ineffective disciplinary system, and inadequate screening and training as primary contributors to the seemingly endless scandals in the media over genuinely criminal or brutal conduct by the police.

³⁰⁴ *See generally* Stuntz, *supra* note 21.

³⁰⁵ For discussion of a similar problem with other forms of police misconduct, *see id.* at 22 ("Not surprisingly, detailed studies of police disciplinary systems indicate that these systems can further the problem of police misconduct rather than serve as a solution to it.")

³⁰⁶ Barbara Armacost investigates the problem with institutional deterrence for police misconduct at length in her article. *See* Armacost, *supra* note 29. Her thesis is that more sweeping institutional changes are needed, and that courts may need to take on more of a role of monitoring and implementing these changes through injunctive actions under § 14141, as well as using peer review by other police departments.

³⁰⁷ The fact that the Supreme Court has restricted the scope of §1983 actions seems to contradict the value they place on institutional deterrence. *See, e.g.,* *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 691-692 (1978) ("In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor--or, in other words, a municipality cannot be held liable under §1983 on a *respondeat superior* theory."); *but see* *Richardson v. McKnight*, 521 U.S. 399, 401-02 (1997) (discussing how imposing liability on guards in private prisons may induce such government contractors to change hiring practices, etc.).

values, preferences, and motivations of the targeted individuals. When courts use deterrence as a policy move, without consideration of the individual utilities involved, they take a shot in the dark. The predisposition of the police will govern their behavior, not the rules and prohibitions. Rules and prohibitions merely provide an opportunity to see the predisposition.³⁰⁸

A final problem with institutional deterrence is the close connection between institutional transparency and incentives to control the behavior of officers.³⁰⁹ Undercover work in general, which includes sting operations and undercover information-gathering, require secrecy and subterfuge; transparency in this area would basically eliminate the operations (or at least the operatives). Assuming undercover work is socially useful, both as a means of detection and deterrence, the transparency element of institutional accountability runs counter to this.³¹⁰

OBJECTION #2: Should we have no restraints on police misconduct, just because the worst individuals are impervious to admonitions?

It would be more effective—and efficient—to deter unbecoming conduct by police through a sanction placed directly on the officers.³¹¹ Section 1983 actions may be more likely to influence individual decisions than indirect deterrence, although this remedy is not without

³⁰⁸ Park's response to the institutional objection seems to be along a different track, arguing that "most important police decisions—when to search, when to arrest, how to deal with informers—are left to lower level police officers without much guidance from police superintendents or other higher officials." Park, *supra* note 12, at 229.

³⁰⁹ See Luna, *supra* note 218, at 202-06, arguing that greater transparency would help keep police forces accountable.

³¹⁰ See, e.g., *People v. Kunkin*, 9 Cal.3d 245, 507 P.2d 1392, 107 Cal.Rptr. 184, 57 A.L.R.3d 1199 (Cal. 1973), in which a disgruntled former mail clerk from the state Attorney General's Office leaked an internal memorandum to a local newspaper; the document contained a list of local undercover agents with their home phone numbers and addresses, which the newspaper promptly published; the newspaper editors' convictions for receiving stolen property were overturned by the California Supreme Court. The case highlights the tension between government transparency (which is often interrelated with freedom of the press, as in this case), and the need to shroud undercover operations (and operatives) in secrecy.

³¹¹ See Slobogin, *Why Liberals Should Chuck*, *supra* note 27, at 394-97 (arguing that such direct deterrence would also work better than the exclusionary rules as a deterrent against violations of the Fourth Amendment).

problems.³¹² If the individual bears the brunt of the sanction, it is easier to predict its effect on individual decisions than simply conferring an undeserved benefit on some defendants.

Statutory or regulatory sanctions or discipline for wrongdoers—perhaps sanctions that a court could impose on its own motion—would more effectively achieve the goal of deterring police misconduct.

OBJECTION #3: Does any of this apply to the real world? Wouldn't most law enforcement agencies plan their activities so as to comply with legal requirements and (therefore) yield more fruitful results?

This is the “practical application” objection. Law enforcement is goal-oriented overall, or at least the citizenry hopes it is, and presumably, the members of the team would take steps rationally oriented toward their collective goal.³¹³ The agencies or entities involved—the prosecutor, police department, and, at least in a magistrate role, the judiciary—will plan sting

³¹² Some commentators see personalized civil actions against officers as the answer to the problems with the exclusionary rules. For discussion, see Jeffrey Standen, *The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct*, 00 B.Y.U. L. REV. 1443 (2000). Others have argued that this method is not an effective deterrent because the municipalities almost always defend and indemnify police officers who are sued for misconduct. See, e.g., Levenson, *supra* note 42, at 20-21 (“[E]ven when damages are recovered, officers are unlikely to be held accountable. Cities readily absorb the cost of actions against their police officers.”); see also Armacost, *supra* note 29 at 12-21 (arguing that institutional changes are needed because institutions generally shield individual officers from the brunt of such sanctions, or do nothing to prevent other officers from the doing the same thing).

It is not clear, however, that a §1983 action would prevail where the entrapment itself was set forth as the underlying tort; the controlling cases from the Supreme Court limit such claims to “constitutional” torts. See, e.g., *Monell v. New York City Dep’t of Social Services*, 436 U.S. 658, 691-692 (1978) (“... Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.”). Given that the Court has explicitly eschewed any constitutional element in entrapment, it seems doubtful that it could qualify as the requisite “constitutional tort.”

³¹³ As mentioned previously, however, there is doubt about whether the prosecutors or the law enforcement agencies are truly motivated by “conviction maximization,” as opposed to devoting resources to catching “the big fish,” or deterrence, or even preserving order under newer “community policing” models. See Richman, *supra* note 32 at 981-989; Burke, *supra* note 32 at 992-1003.

operations ahead of time in such a way as to maximize the outcome.³¹⁴ One would expect them to be sensitive to the deterrent effect of the entrapment defense, and to avoid actions that would lead to the defendant's acquittal. An acquittal would frustrate collective goal. The gist of this objection is that we do not need to worry too much about malevolent cops abusing the objective test, because even malevolent cops work in concert with others. The others could function as a safeguard against abuses.

Perhaps this is a variation on the "institutional deterrence" objection. Yet there is a different emphasis here: the institutional argument asserts that institutions, not individuals, are making the relevant decisions, and that individual decisionmaking is therefore less relevant. This objection, in contrast, focuses more on the driving goals of law enforcement, which would necessarily create sensitivity to sanctions (if the sanctions are related to frustrating those goals) among the individuals involved.³¹⁵

The main answer to this objection is in the bound volumes of case reporters on library shelves. Adjudication of entrapment defenses is not uncommon. If abuses were truly unlikely in

³¹⁴ The FBI guidelines and the IRS Manual containing cautious instructions about undercover operations indicate an institutional desire to "get it right the first time," so to speak. *See supra* note ___; *see also* Burke, *supra* note 32 (proposing that prosecutors have many goals besides simple maximization of convictions; Richman, *supra* note --- (also arguing that federal prosecutors, who decline many cases from the law enforcement agencies, must balance numerous considerations besides their conviction rates, such as political and public relations issues, the seriousness or dangerousness of the offender, the type of case, etc.); Slobogin, Deceit, *supra* note 52, at 806-808, suggesting that undercover operations should require ex ante judicial approval (which they currently do not), rather than mere internal approval, as is the case with the FBI; Slobogin contends this is necessary to protect the public from inappropriate infringements on privacy rights by undercover agents masquerading as friendly civilians, and would make the entrapment defense largely unnecessary. This is a very insightful suggestion, and he is probably right that it would cut down on the number of entrapment cases on the court dockets. At the same time, similar requirements are already in place regarding wiretaps, warrants for searches, and warrants for arrests, but the litigation over the validity of such warrants has not abated, despite the ex ante supervisory role of the judiciary.

but see Ferguson-Gilbert *supra* note 32 (arguing that prosecutors focus too much on winning and not enough on justice); Hagemann, *supra* note 32, arguing that in his experience as a prosecutor, winning cases was a priority; *State v. Rummer*, 189 W.Va. 369, 432 S.E.2d 39 (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.").

³¹⁵ One of my theses is that prosecutors and police can have numerous goals besides the successful prosecution of every arrestee, whether the publicity from nabbing a high-profile or dangerous criminal, to the grater payoffs discussed above.

the “real world,” it would be similarly unusual to encounter the entrapment defense in any of its permutations. One could also assume that only a fraction of the cases where real abuses occurred would end up in the text of published court opinions. Such examples, however, are not terribly difficult to find. In the “real world,” therefore, there are police who ignore or bend the rules, despite the collective goals of law enforcement.

Objection #4: If the subjective test is also fraught with problems, why not pick the lesser of two evils?

My purpose in this article is not to vindicate one test over the other.³¹⁶ Both have problems, and there are alternative solutions (such as the British approach or creating a constitutional issue here) that have not received adequate consideration in the courts. The purpose here is to point out the pragmatic problem with the notion of using a defendant’s acquittal to deter a specific form of police misconduct. If this is truly the only policy rationale supporting the objective test, however, it brings the efficacy of that approach into question.

I am sure that other commentators will have other objections to my argument, but these are the major ones I anticipate. None of these objections should prove fatal to the central thesis here. Acquitting the defendant to deter the police from excessive methods in sting operations

³¹⁶ This, in itself, is perhaps the greatest weakness of my discussion—it does not set forth a clear alternative to address the complicated problems of police overreaching in sting operations. Certainly it would be more satisfying to offer a clear policy directive that would resolve every issue. My hope is to contribute toward this goal by shedding some light on the faulty assumptions that using acquittals is a good way to modify police methods in undercover work. Given the likely ineffectiveness of either test as a deterrent against undesirable police conduct, I believe the choice between tests should be made based on considerations of justice and fairness to the defendant. At the same time, “inducement,” which distinguishes stings from investigatory undercover work (but is always unsettling) concentrates higher transaction costs on the very transactions that in themselves constitute the heart of the crime in question. More efficient law enforcement would seem to save not only valuable public resources, but the public freedoms that must be sacrificed when surveillance and post-incident investigation occupy center stage for the police instead.

requires either an assumption that the police being deterred are conscientious and sensitive enough to this “penalty” to make different choices, or that the police in question are of the bad sort who need extra incentives to behave properly. Under either assumption, however, the mechanism for this deterrent effect is in doubt.

VII. CONCLUSION

Justice Cardozo once quipped dryly, “The criminal is to go free because the constable has blundered.”³¹⁷ The context for this jab was an early case involving the exclusionary rules,³¹⁸ the humor, though, not only points toward the seeming unfairness of “punish-the-cops” acquittals (at least to those inclined to be tougher on crime).³¹⁹ “The constable has blundered” does sound like a pathetic reason any serious policy move, but it also contains a hint of the likely inefficacy of the remedy. “Blundering” by constables rings of inadvertence or negligence; the type of action least likely to be subjected to thoughtful consideration of larger issues and consequences.³²⁰ Cardozo’s now-famous quote pokes fun at both the questionable bias involved in such judicial policy—it favors defendants heavily—but also the shortsightedness of it as a useful solution.³²¹

Of course, Justice Cardozo lost the vote that day; the quote comes from his dissenting opinion.³²² Acquitting defendants to deter police misconduct has a long and respectable pedigree

³¹⁷ *People v. Defore*, 24 N.Y. 13, 150 N.E. 585 (1926). Judge Posner discusses this case, and this particular phrase, at length in his monograph on Cardozo’s writing style. See RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 55-56 (1990) (hereafter *CARDOZO*).

³¹⁸ See *id.*

³¹⁹ See *id.* at 56 (“More than notable, it is remarkable, because it packs into a single sentence of eleven words the entire case against the exclusionary rule.”).

³²⁰ See *id.*:

The substitution of “constable” for “policeman” is inspired. It not only improves the rhythm of the sentence and, by its faintly exotic air, makes the sentence even more memorable; it also makes the abuse of power by policemen seem trivial, almost comical. The “constable” puts us in minds of the unarmed British policeman, so different (in legend anyway) from his rough American counterpart. And Cardozo’s constable is not a deliberate overreacher but a blunderer—a Gilbert and Sullivan constable whose pratfalls are unlikely to strike anyone as a menace to the liberty of the subject.

³²¹ See *id.*

³²² See *id.*

and is almost a tenet of faith in American jurisprudence. In the area of entrapment, however, the idea must be reconsidered.

At best, we wade in murky waters when we adopt a sanction for deterrence that merely confers a benefit on another party, instead of imposing direct costs on the wrongdoer. This form of indirect deterrence is fraught with too many uncertainties to justify the social cost of freeing a defendant who may indeed be predisposed to repeat the offense, except in a less controlled setting.

Apart from this problem, we must make certain assumptions about the attitudes and preferences of the objects of a sanction in order to achieve effective deterrence. In this case, that would be the police. The possibility that individual officers have bad attitudes or motivations undermines a deterrence model that assumes the officers are conscientious and focused on a just final result in their case. The model breaks down if the officer is really pursuing other objectives through the sting operation. If the deterrence is completely ineffective in the cases that matter most, again it is hard to justify the social costs and risks of freeing a defendant caught red-handed in a criminal act.

Even if the officer in question is the epitome of the diligent public servant, other objectives may lead “good” police to ignore—repeatedly—the possibility of a successful entrapment defense and acquittal. The possibility of greater payoffs, especially when combined with the channeling/substitutionary effects of the exclusionary rules, could lead officers to carry out sting operations fully aware that the methods exceed all boundaries. Some defendants may *deserve* acquittals in such circumstances—the theory of the subjective test—but the acquittals will not prevent the proscribed activity from taking place. Finally, if the police are focusing on the deterrent effect of sting operations, rather than their usefulness for criminal roundups, an

acquittal may actually serve this purpose better than a conviction. The released defendant can take on the role of an information vanguard in the target community, with a first-hand account of severe and intimidating police activity to share with other would-be offenders.

We should favor effective policies over ineffective ones. If there is insufficient reason to believe that acquitting a defendant will modify the future behavior of law enforcement, other means should be sought. The majority of jurisdictions have shied away from the objective test in entrapment. About a third have not, however, and this is a substantial amount. It is time to reconsider the alternatives.