THE ANOMALY OF ENTRAPMENT

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ABSTRACT

Now in our second decade after 9/11, we are firmly in the prevention era of law enforcement. Faced with the unacceptable consequences of identifying threats too late, government agents are moving aggressively to identify potential terrorists before they strike. Undercover agents and confidential informants necessarily play a large role in such efforts. As a result of such operations, we have seen a number of cases brought to trial in the federal courts in which defendants have asserted the entrapment defense. To date, the defense has not succeeded. However, as a consequence of these cases, the United States Supreme Court may be required to reconsider the defense for the first time in over twenty years. Thus, now is a good time to re-examine the entrapment defense that the Supreme Court first recognized eighty years ago. This Article argues that the federal entrapment defense represents a doctrinal anomaly that straddles the line between criminal procedure and criminal substance. Understanding how and why the entrapment defense evolved as it did may engender greater sympathy for this much-maligned corner of the criminal law. It could also lead to reforms in the way the defense is administered that would better serve the interests that animate the defense—some sounding in the traditional concerns of substantive criminal law (culpability and dangerousness) and others in the traditional concerns of criminal procedure (deterring overzealous and unwarranted intrusions by government agents).

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> I do believe that on the present course, there will come a tipping point . . . such that al Qaeda as we know it . . . has been effectively destroyed. At that point, we must be able to say to ourselves that our efforts should no longer be considered an "armed conflict" against al Qaeda and its associated forces; rather a counterterrorism effort against *individuals* . . . for which the law enforcement and

> intelligence resources of our government are principally responsible . . . .[1]
>
> There isn't a business of terrorism in the United States . . . . You're not going to be able to go to a street corner and find someone who's already blown something up . . . . [T]he . . . goal is not to find somebody who's already engaged in terrorism but find somebody who would jump at the opportunity if a real terrorist showed up in town.[2]

INTRODUCTION

In the post-9/11 world, government agents are under tremendous pressure to find terrorists before they strike. The consequences of allowing terrorists to succeed are simply unacceptable. As part of a comprehensive prevention strategy,[3] law enforcement agents have devoted considerable resources to undercover operations aimed at identifying potential terrorists. Although undercover operations have long comprised an important part of law enforcement agents' toolkit, post 9/11, the goals and methods of such undercover operations—as applied in the anti-terrorism context—have appreciably shifted. Instead of seeking solely to identify individuals who are actively engaged in criminal conduct, now agents also have deliberately sought to identify individuals who might be *willing* to aid acts of terrorism, even if they are not currently involved in such activities. As one former F.B.I. agent told the *New York Times*, "[p]rior to 9/11 it would [have been] very unusual for the F.B.I. to present a crime

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1. Jeh Johnson, former Gen. Counsel of the U.S. Dep't of Def., Speech at the Oxford Union, Oxford University (Nov. 30, 2012). On Dec. 23, 2013, Johnson was sworn in as Secretary of the U.S. Dep't of Homeland Security.

2. David K. Shipler, *Terrorist Plots, Hatched by the F.B.I.*, N.Y. TIMES, Apr. 29, 2012, at SR4 (quoting David Raskin, former federal terrorism prosecutor).

3. *See* John C. Richter, *Counter-Terrorism: A Federal Prosecutor's View*, 33 OKLA. CITY U. L. REV. 297, 306–07 (2008) ("Following the September 11 attacks, it became clear that this country, and the Department of Justice specifically, had to implement changes to better protect us from attack. . . . [T]he Department developed what it called a prevention strategy to combat terrorist threats."); Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 429 (2007) ("It has been clear for some time that the Department of Justice ("DOJ") has made the prevention of terrorist attacks a top strategic priority, and thus will intervene before an attack occurs whenever it is possible to do so."); David J. Gottfried, *Avoiding the Entrapment Defense in a Post-9/11 World*, FBI L. ENFORCEMENT BULL., Jan. 2012, at 25, 26, *available at* http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/january-2012 ("In the aftermath of 9/11, it no longer proves sufficient to solve crimes after people have committed them. . . . The American people expect federal, state, and local law enforcement officers to proactively prevent another terrorist attack . . . . ").

opportunity that wasn't in the scope of the activities that a person was already involved in . . . ."[4] Suspects would be solicited to commit crimes of the same type that they were already suspected of having committed.[5] But in the new world order, as one former terrorism prosecutor recounted, the "goal . . . is not 'to find somebody who's already engaged in terrorism but find somebody who would jump at the opportunity if a real terrorist showed up in town.'"[6] The notion, in effect, is that law enforcement and the real terrorists are competing to find those who would be willing to join the terrorist cause. If government agents find those individuals first, they will be unavailable to assist the real terrorists.

Simply being willing to commit a crime, however, traditionally is not a sufficient basis upon which to impose criminal liability. Generally speaking, our criminal laws require an *act* accompanied by a guilty mind.[7] Our laws prohibiting criminal attempts and criminal conspiracies move up the point in time at which criminal liability will attach, on the theory that the attempt—usually defined as taking a substantial step toward commission of the underlying crime[8]—or the agreement to commit the crime[9] satisfy the act requirement. If accompanied by the requisite culpable mental state, or *mens rea*, the attempt or agreement suffices. The very purpose of recognizing such inchoate offenses is to permit law enforcement to intervene earlier, without risking the social harm that would result from allowing the criminal plan to proceed further.[10] But what if the attempt or conspiracy is the product of a law enforcement sting? Does the involvement of law enforcement agents provide a defense? The answer that American criminal law has settled on, over the past eighty-plus years, generally is "no." Undercover operations are recognized as permissible and often necessary tools of law enforcement, and the fact that undercover government agents were involved in the offense is not *per se* a bar to conviction for a criminal caught in the sting. However,

4. Shipler, *supra* note 2 (quoting Mike German, former F.B.I. agent).
5. *See id.*
6. *Id.* (quoting a former terrorism prosecutor).
7. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.01 (6th ed. 2012).
8. *See, e.g.*, MODEL PENAL CODE § 5.01(1)(c) (Official Draft 1962) (setting forth the "substantial step" formulation); DRESSLER, *supra* note 7, § 27.06 (reviewing the actus reus of attempt formulations in various jurisdictions). Most federal courts have embraced the substantial step test for the actus reas of attempt. *See* Braxton v. United States, 500 U.S. 344, 349 (1991) (attempt requires proof of a substantial step); United States v. Redd, 355 F.3d 866, 873 (5th Cir. 2003) (same); Pascual v. Holder, 723 F.3d 156, 159 (2d Cir. 2013) (same); United States v. Evans, 699 F.3d 858, 867 (6th Cir. 2012) (same).
9. *See* DRESSLER, *supra* note 7, § 29.04.
10. *See id.* § 29.02.

American law has carved out a limited defense, entrapment, whereby the involvement of government agents will provide a basis for an acquittal.

The entrapment doctrine, as applied in federal court and in most states, involves two elements—inducement and predisposition. The defendant bears the burden of persuasion as to the first element.[11] Thus, a defendant asserting entrapment must show that he or she was induced to commit the offense by an (undercover)[12] government agent.[13] If inducement has been shown, the burden shifts to the government to show that the defendant nevertheless was "predisposed" to commit the offense.[14] In other words, if the government can establish that the defendant was predisposed to commit similar offenses before being induced by a government agent to commit the offense charged in the particular case, the entrapment defense fails. Like other defenses, entrapment is categorized as a matter of substantive criminal law and is submitted to juries for decision.[15]

Perhaps not surprisingly, as law enforcement agents have devoted more resources to undercover terrorism investigations, we have seen some

11. PAUL MARCUS, THE ENTRAPMENT DEFENSE §§ 4.04 (4th ed. 2009).

12. The undercover nature of the government agent's involvement distinguishes such cases from the different situation in which defendants sometimes raise the defense of "entrapment by estoppel." Although both defenses share the word "entrapment" they actually mean very different things. Entrapment by estoppel is premised on the notion that a defendant has been misled by a government agent, apparently acting in an *official* capacity, into believing that the conduct the defendant thereafter engages in is lawful. In such a situation, the defendant's *mens rea* is lacking, because he or she reasonably may have believed the conduct to be lawful. *See* United States v. Baker, 438 F.3d 749, 753 (7th Cir. 2006) (quoting United States v. Neville, 82 F.3d 750, 761 (7th Cir. 1996) ("The entrapment by estoppel defense applies 'when, acting with actual or apparent authority, a government official affirmatively assures the defendant that certain conduct is legal and the defendant reasonably believes that official.'"). Another related, but again different, defense is what is known as the "public authority" defense. A defendant asserting a public authority defense asserts that he or she was led to believe by a government agent, acting in an official capacity, that the defendant was authorized to engage in conduct that would otherwise be unlawful, as part of an undercover operation. *See* Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155, 169–71 (2009) (explaining public authority defense). Again, in such a situation, the defendant would not possess the requisite *mens rea* for the offense. The entrapment defense that is the subject of this Article is that which applies when a defendant does not know he or she is dealing with a government agent, or—as in rare cases where a government agent poses as a corrupt government agent—does not know that the government agent is acting.

13. There is general agreement in the courts applying the subjective test today that "inducement" requires more than merely furnishing a defendant with an opportunity to commit a crime or soliciting him to commit a crime. *See* MARCUS, *supra* note 11, §§ 2.03A, 6.02. Inducement requires "further overreaching" by the government, in the nature of some kind of above-market offer, appeal to sympathy or personal relationships, or repeated solicitation amounting to harassment. *See id.* §§ 4.04, 6.02.

14. MARCUS, *supra* note 11, §§ 4.04, 6.02.

15. *Id.* § 6.05.

notable assertions of the entrapment defense,[16] albeit as a defense of last resort.[17] This is also true in cases involving child enticement over the Internet,[18] another law enforcement priority of recent years,[19] in the pursuit

16. *See, e.g.*, United States v. Amawi, 695 F.3d 457 (6th Cir. 2012) (defendant convicted of conspiracy to provide material support to terrorists), *cert. denied sub nom.* Amawi v. United States, 133 S. Ct. 1474 (2013); United States v. Al Kassar, 660 F.3d 108 (2d Cir. 2011) (defendant convicted of conspiring to kill U.S. officers, acquiring and exporting anti-aircraft missiles, and proving material support to a known terrorist organization), *cert. denied sub nom*. Al Kassar v. United States, 132 S. Ct. 2374 (2012); United States v. Jayyousi, 657 F.3d 1085 (defendant convicted of conspiring to provide material support to terrorist organizations), *reh'g and reh'g en banc denied by* 452 F. App'x 943 (11th Cir. 2011), *and cert. denied sub nom*. Jayyousi v. United States, 133 S. Ct. 29 (2012); United States v. Farhane, 634 F.3d 127 (2d Cir.) (defendant convicted of providing material support to terrorist organization), *cert. denied sub nom*. Sabir v. United States, 132 S. Ct. 833 (2011); United States v. McDavid, 396 F. App'x 365 (9th Cir. 2010) (defendant convicted of conspiring to bomb various targets in U.S.), *cert. denied sub nom*. McDavid v. United States, 131 S. Ct. 2469 (2011); United States v. Al-Moayad, 545 F.3d 139 (2d Cir. 2008) (defendants convicted of conspiring and attempting to provide material support to terrorist organizations); United States v. Aref, 285 F. App'x 784 (2d Cir. 2008) (defendants convicted of conspiracy to provide material support to terrorist organizations), *cert. denied sub nom.* Aref v. United States, 556 U.S. 1107 (2009); United States v. Bout, No. 08 Cr. 365(SAS), 2011 WL 2693720 (S.D.N.Y. July 11, 2011) (defendant convicted of conspiracy to provide material support to terrorist organization, kill United States nationals, and acquire antiaircraft missiles) *aff'd*, 731 F.3d 233 (2013); United States v. Cromitie, No. 09 CR 558(CM), 2011 WL 2693297 (S.D.N.Y. June 29, 2011) (defendants convicted of conspiring to destroy a Bronx synagogue and military aircraft at a National Guard base in Newburgh), *aff'd*, 727 F.3d 194 (2d Cir. 2013); United States v. al Ghazi, No. S3 07 CR 354(JSR), 2009 WL 1605741 (S.D.N.Y. June 9, 2009) (defendant convicted of conspiring to purchase anti-aircraft missiles and provide funds to terrorist organizations); United States v. El-Hindi, No. 3:06CR719, 2009 WL 1373270 (N.D. Ohio May 15, 2009), *aff'd sub nom.* United States v. Amawi, 695 F.3d 457 (6th Cir. 2012), *and cert. denied*, 133 S. Ct. 1474 (2013). For additional cases addressing claims of entrapment in the terrorism context, see Dru Stevenson, *Effect of the National Security Paradigm on Criminal Law*, 22 STAN. L. & POL'Y REV. 129, 160–62 nn. 199–200 & 206 (2011) (collecting cases), and Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125, 125–26 n.1 (2008) (same).

17. Although rarely supported by empirical data, the "convention wisdom is that [entrapment] is rarely raised and that it rarely succeeds . . . ." Dru Stevenson, *Entrapment by Numbers*, 16 U. FLA. J.L. & PUB. POL'Y 1, 15–16 & n.36 (2005) (collecting authorities citing the defense's rare successes). *See also* Joh, *supra* note 12, at 172–73; Collecting data on the frequency with which the defense is successful is particularly difficult. Among other reasons, double jeopardy principles preclude the government from appealing an acquittal. Therefore, the reported cases do not include cases where a defendant was acquitted on the basis of entrapment. *See* Stevenson, *supra*, at 15. Moreover, the practice of asking juries to return a general verdict obscures whether an acquittal was based on a finding of entrapment or another basis such as insufficiency of the evidence as to the charge more generally. However, by all accounts of interested observers, the defense has not prevailed in a single terrorism case since 9/11. *See* CTR. ON LAW & SEC., TEN YEARS LATER: TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2011 26 (2011); Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687, 711 (2010). *See also* Francesca Laguardia, *Terrorists, Informants, and Buffoons: The Case for Downward Departure As a Response to Entrapment*, 17 LEWIS & CLARK L. REV. 171, 205 & n.174 (2013) (reporting that a search of news reports revealed "95 successful acquittals based on an entrapment defense, over 80 cases, in 20 years, only 20 of which involved any level of violence").

18. *See, e.g.*, United States v. Shinn, 681 F.3d 924 (8th Cir. 2012); United States v. Hackworth, 483 F. App'x 972 (6th Cir. 2012), *cert. denied sub nom*. Hackworth v. United States, 133 S. Ct. 841 (2013); United States v. Helton, 480 F. App'x 846 (6th Cir.), *cert. denied sub nom*. Helton v. United

of which savvy law enforcement agents have leveraged their ability to catch would-be child sex abusers by posing as underage victims online. In both contexts, it is critically important that our criminal justice system sort those who likely would engage in such crimes absent the intervention of law enforcement agents from those who would not. Absent appropriate sorting, we waste scarce resources investigating, trying and potentially confining those who do not present a real threat.[20] We also run a significant risk of undermining the public's respect for the criminal justice system,[21] with a particular risk of alienating communities whose ongoing

States, 133 S. Ct. 562 (2012); United States v. Cooke, 675 F.3d 1153 (8th Cir. 2012); United States v. Herbst, 666 F.3d 504 (8th Cir. 2012); United States v. Schuttpelz, 467 F. App'x 349 (6th Cir. 2012), *cert. denied sub nom*. Schuttpelz v. United States, 133 S. Ct. 2366 (2013); United States v. Dávila-Nieves 670 F. 3d 1 (1st Cir.), *cert. denied sub nom*. Dávila-Nieves v. United States, 132 S. Ct. 2407 (2012); United States v. Knope, 655 F.3d 647 (7th Cir. 2011), *cert. denied sub nom*. Knope v. United States, 132 S. Ct. 1060 (2012); United States v. Leightey, 432 F. App'x 836 (11th Cir.), *cert. denied sub nom*. Leightey v. United States, 132 S. Ct. 534 (2011); United States v. Douglas, 415 F. App'x 271 (2d Cir.), *cert. denied sub nom.* Douglas v. United States, 131 S. Ct. 1024 (2011); United States v. Abarca, 402 F. App'x 494 (11th Cir. 2010); United States v. Godwin, 399 F. App'x 484 (11th Cir. 2010); United States v. Orr, 622 F.3d 864 (7th Cir. 2010), *cert. denied sub nom*. Orr v. United States, 131 S. Ct. 2889 (2011); United States v. Young, 613 F.3d 735 (8th Cir. 2010), *cert. denied sub nom*. Young v. United States, 131 S. Ct. 962 (2011); United States v. Al-Cholan, 610 F. 3d 945 (6th Cir. 2010); United States v. Ross, 379 F. App'x 683 (9th Cir. 2010); United States v. Gates, 351 F. App'x 362 (11th Cir. 2009); United States v. Myers, 575 F. 3d 801 (8th Cir. 2009); United States v. Chaudhry, 321 F. App'x 119 (3d Cir.), *cert. denied sub nom*. Chaudhry v. United States, 558 U.S. 924 (2009), *mandamus denied sub nom*. *In re* Chaudhry, 441 F. App'x 955 (3d Cir.), *and post-conviction relief denied sub nom*. Chaudhry v. United States, No. 10-3119(FSH), 2011 WL 4729010 (D. N.J. Oct. 5, 2011); United States v. Duke, No. 4:07-cr-65-RH-GRJ, 2013 WL 336719 (N.D. Fla. Jan. 10, 2013); United States v. Ziolkowski, No. 1:12cr12-SPM, 2012 WL 5944271 (N.D. Fla. Nov. 28, 2012); United States v. One 2007 Toyota FJ Cruiser, VIN JTEBU11F670023522, 824 F. Supp. 2d 1369 (N.D. Ga. 2011); United States v. Montgomery, Nos. 07-CR-122-GKF, 08-CV-687-GKF-TLW, 2010 WL 1486941 (N.D. Okla. Apr. 12, 2010); United States v. Mikoloyck, No. 09-00036-01-CR-W-GAF, 2009 WL 4798900 (W.D. Mo. Dec. 7, 2009); United States v. Doerr, No. 09-00031-01-CR-W-FJG, 2009 WL 4042759 (W.D. Mo. Nov. 20, 2009); United States v. Young, No. 3:08-cr-00122-JAJ, 2009 WL 1383791 (S.D. Iowa May 13, 2009); United States v. Yakoob, No. 07-20084, 2009 WL 270161 (E.D. Mich. Feb. 3, 2009).

19. *See* U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION, A REPORT TO CONGRESS (Aug. 2010) (explaining the Department of Justice's strategy to combat and prevent child sexual exploitation, as required by the Providing Resources, Officers, and Technology to Eradicate Cyber Threats to Our Children Act of 2008, Pub. L. No. 110-401, 122 Stat. 4229 (2008)).

20. The waste of scarce police resources has long been a primary concern of many critics of entrapment. *See, e.g.*, Richard H. McAdams, *The Political Economy of Entrapment*, 96 J. CRIM. L. & CRIMINOLOGY 107, 114 (2005) ("absent regulation, police will use undercover operations wastefully, diverting resources from better uses"); United States v. Kaminski, 703 F.2d 1004, 1010 (7th Cir. 1983) (Posner, J., concurring) (arguing that one of the purposes of the entrapment defense is to discourage police from wasting scarce resources generating crime that otherwise not occur).

21. *See, e.g.*, Shipler, *supra* note 2 (questioning the legitimacy of law enforcement tactics in terrorism stings); Andrew F. March, *A Dangerous Mind?*, N.Y. TIMES, Apr. 22, 2012, at SR1 (questioning the legitimacy of a material support conviction of a Pittsburgh-born pharmacist, observing "I don't trust prosecutors with [the] jurisdiction [to decide 'the differences between the

cooperation with law enforcement is critical.[22] Moreover, given the types of statutes typically used in the anticipatory prosecution of terrorism,[23] which are among the most inchoate of offenses to begin with,[24] if we fail to take seriously the need to engage in this sorting, then our criminal justice system runs the risk of unacceptably bleeding into a system of preventive detention.[25] Ideally, law enforcement agencies, working in

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thoughts in our heads and the feelings in our hearts'"]); CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, TARGETED AND ENTRAPPED: MANUFACTURING THE "HOMEGROWN THREAT" IN THE UNITED STATES 39 (2011) (arguing that the FBI's use of informants in terrorism stings "raise serious concerns about the U.S. government's compliance with its international human rights obligations," including its obligations pursuant to various international treaties to guarantee, among other rights, the right to "a fair trial, non-discrimination, and freedom of expression and religion").

22. *See* Said, *supra* note 17, at 735 ("Unfortunately, important segments of the Muslim community in the United States feel alienated already and their future cooperation with the FBI is in jeopardy."); David A. Harris, *Law Enforcement and Intelligence Gathering in Muslim and Immigrant Communities After 9/11*, 34 N.Y.U. REV. L. & SOC. CHANGE 123, 130 (2010) (warning of the dangers to the FBI's relationship with Muslim communities if it uses "informants in Muslim religious and cultural contexts too frequently and casually"). *See also* Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities*?, 6 OHIO ST. J. CRIM. L. 231, 264 (2008) (concluding that the public is more likely to cooperate with law enforcement efforts if "the police strive to exercise their authority in ways that members of the public evaluate as fair").

23. The majority of the federal prosecutions brought against would-be terrorists in recent years have been brought under the attempt and conspiracy provisions of the statute criminalizing the provision of material support to a terrorist organization, 18 U.S.C. § 2339B (Supp. IV 2011). *See* CTR. ON LAW & SEC., *supra* note 17 (collecting information on the approximately 300 terrorism-related prosecutions from 2001 to 2011 and observing that, since 2009, the material support charge contained in 18 U.S.C. § 2339B is the most commonly charged, followed by the material support for terrorists charge contained in 18 U.S.C. § 2339A (Supp. IV 2011), which was enacted in 1994). Section 2339B was enacted in 1996 as part of the Antiterrorism and Effective Death Penalty Act of 1996, "in the midst of growing concern about the problem of terrorism," with its passage "helped considerably by the 1995 Oklahoma City bombing." Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1102 (2008). The material support statute requires proof that the defendant knowingly provided support to an organization that the United States Secretary of State has designated as a Foreign Terrorist Organization (FTO). The government need not show that the defendant intended to further the terrorist activities of the organization, only that the defendant either knew of the organization's designation as an FTO or that it previously had engaged in, or was presently engaged in, terrorist activities. *See* 18 U.S.C. § 2339B. The United States Supreme Court upheld the constitutionality of 2339B against a vagueness and First Amendment challenge in *Holder v. Humanitarian Law Project*. *See* Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

24. For an excellent discussion of the way that terrorism stings often result in "stacked inchoate offenses"—in that a defendant may be convicted of "acts taken in preparation of a conspiracy," see Jon Sherman, *"A Person Otherwise Innocent": Policing Entrapment in Preventative, Undercover Counterterrorism Investigations*, 11 U. PA. J. CONST. L. 1475, 1485 (2009). On the unique and potentially troubling aspects of material support laws in the sense of their departure from our usual notions of criminal wrongdoing, see David Cole, *Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror,' in* COUNTERTERRORISM: DEMOCRACY'S CHALLENGE 233 (Andrea Bianchi & Alexis Keller eds., 2008).

25. *See* Chesney & Goldsmith, *supra* note 23, at 1081 (noting the convergence between the criminal justice system and the military detention model for dealing with suspected terrorists, as the

tandem with prosecutors, would do this sorting *ex ante*, before commencing or continuing an investigation or, at the very latest, before commencing a prosecution—and there are strong institutional incentives for agents and prosecutors to do so.[26] But such incentives are not perfect.[27]

Because the entrapment defense is the primary mechanism that the judicial system has developed for policing undercover operations,[28] it is important that the defense have bite. And yet the conventional wisdom is that the entrapment defense is quite toothless. This is a good time, then, for a reassessment. This Article argues that entrapment has been weakened by its continued categorization as a matter of substantive criminal law,

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"criminal justice system has diminished some traditional procedural safeguards in terrorism trials and has quietly established the capacity for convicting terrorists based on criteria that come close to associational status"). *See* Stevenson, *Effect of the National Security Paradigm*, *supra* note 16, at 137 ("[W]e are witnessing a shift toward focusing on incapacitation and prevention of crime rather than traditional deterrence or retribution."); *see also* David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693 (2009) (arguing in favor of a national discussion and legislation authorizing a system of preventive detention subject to explicit criteria); Paul H. Robinson, Commentary, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001) (discussing the need to keep our criminal justice and preventive detention systems distinct).

26. *See* Louis Michael Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111, 144 (observing that "one would expect the police themselves to be motivated to use scarce resources in a manner that maximizes the number of criminals apprehended").

27. *See id.* at 144 n.127 (observing that some officers may be more motivated to make arrests, and less concerned about whether such arrests lead to convictions, because their career advancement is determined by the former but not the latter); Dru Stevenson, *Entrapment and the Problem of Deterring Police Misconduct*, 37 CONN. L. REV. 67, 120 (2004) (same). Even those officers and prosecutors who care about convictions may have some difficulty objectively analyzing whether a defendant was entrapped if they have already expended significant resources on the investigation. *See* Laguardia, *supra* note 17, at 201 (discussing the pressures on law enforcement agencies post 9/11 to convict terrorists and the tremendous resources devoted to terrorism sting investigations). All of these factors may exacerbate what some social science studies have found to be the greater "punishment preferring" tendencies of those who seek out law enforcement jobs—*i.e.*, a tendency to perceive culpability where an average person would not. *See* Dhammika Dharmapala et al., *Punitive Police? Agency Costs, Law Enforcement, and Criminal Procedure* (Coase-Sandor Inst. for Law & Econ., Working Paper No. 644 (2d series), 2013), *available at* http://www.law.uchicago.edu/files/file/644-rma-punitive.pdf (suggesting that those attracted to law enforcement jobs, including policing and prosecution, will be more "punishment-preferring" than the average citizen and therefore will be more likely than would the average citizen to see a reason to punish a particular individual in a particular set of circumstances).

28. *See* McAdams, *supra* note 20, at 115 (noting that although "[a] few other doctrines marginally affect undercover operations . . . entrapment is the main event") (footnote omitted); Jacqueline E. Ross, *Tradeoffs in Undercover Investigations: A Comparative Perspective*, 69 U. CHI. L. REV. 1501, 1527 (2002) (Unlike in Europe, where undercover operations are regulated directly, "Americans treat the entrapment defense as a sufficient legal constraint on undercover conduct."); *see also* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 592 (2009) (explaining that, while undercover operations are not regulated ex ante, entrapment doctrine regulates undercover operations ex post by giving the jury a basis upon which to acquit a defendant if it finds that the police practices abusive).

without sufficiently accounting for the extent to which it shares the concerns of criminal procedure—namely, the rules governing the collection of evidence by law enforcement agents and the process of prosecution.[29] Entrapment's categorization as a matter of substantive criminal law is responsible for many of the aspects of entrapment doctrine that are unsatisfying as a theoretical matter, including why, if it is an affirmative defense grounded in the actor's lack of culpability,[30] it is available only when a defendant is induced to commit an offense by a governmental actor. It may also help explain why the defense is so rarely successful, in that it tasks the criminal jury with a determination that the jury may not be particularly well-suited to make given the current allocation of decision-making between judges and juries in our criminal justice system overall. Taking entrapment's procedural traits into account could help courts administer the defense more effectively, by, among other things, providing the space for an initial pre-trial ruling by judges on claims of entrapment.

The remainder of this Article proceeds as follows. Part I shows how entrapment wound up in the criminal substance category by historical happenstance, on account of the timing of when the United States Supreme Court first considered the defense, before the Warren Court's revolution in criminal procedure. It analyzes the foundational decisions of the United States Supreme Court in *Sorrells v. United States*,[31] and *Sherman v. United States*,[32] which created the modern defense of entrapment. This part shows how the way in which the Court framed entrapment in these cases was attributable mainly to the primary dilemma

29. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 12 (1997) (explaining that the rules of criminal procedure "are really the system's rules, rules that regulate the conduct of the various actors who take part in the process by which some criminal defendants are convicted and punished"). Of course, the line between procedure and substance can in some cases be elusive. *See* Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 816 (2010) ("The assumption that categories of substance and procedure are mutually exclusive and exhaustive simply seems to defy reality."); D. Michael Risinger, *"Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebutable Presumptions*," 30 UCLA L. REV. 189, 189 (1982) ("One would think that, considering the commonness of the distinction and its practical impact in many actual cases, there would have emerged some consensus about what constitutes procedure and what constitutes substance.").

30. *See* Jonathan C. Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 VA. L. REV. 1011, 1019 (1987) (noting that an entrapped defendant "lacks culpability is simply indefensible under the criminal law's traditional methods of assessing culpability" because that individual has committed a criminal act with the requisite mental state, and the police involvement is insufficient to afford a defense of duress).

31. 287 U.S. 435 (1932).

32. 356 U.S. 369 (1958).

that the Court faced in recognizing the defense at all—namely, it had to locate a source of its authority for doing so. Because of the way in which the Court resolved this dilemma (it divined in the statutes pursuant to which the defendants were convicted a Congressional intent to exclude from the statutes' coverage those who were the victims of entrapment) certain other consequences flowed—although with fairly little analysis—including that entrapment would be treated as a substantive law question and submitted to the jury. This part demonstrates that, when the Court first established the doctrinal framework for the defense, there was no precedent for the Court to view entrapment as raising an issue of criminal procedure or evidence law.

Part II analyzes developments in constitutional criminal procedure and the exclusionary rule for evidence obtained in violation of defendants' constitutional rights in the era that followed. In the 1960s, the Court incorporated most of the Bill of Rights to the states through the Due Process Clause of the Fourteenth Amendment and expanded the exclusionary rules of evidence as part of that process. The Court did not, however, revisit entrapment during that period. In the next two decades, the 1970s and 1980s, the Court returned to entrapment in a pair of cases, but by then it was too late. The Warren Court was over and the exclusionary rule was in retreat. The window for the Court to recast entrapment as a candidate for application of the exclusionary rule had closed. But in the process of first expanding and then chipping away at the exclusionary rule, the Court created a large body of jurisprudence that, in terms of its animating concerns and its mode of analysis, is very similar to the predisposition test for entrapment that the Court articulated in *Sorrells* and *Sherman*. It was in this era that the truly anomalous nature of entrapment was set: although the defense was still nominally a substantive defense, it now shared many characteristics of doctrines arising out of the courts' criminal procedure docket.

Part III analyzes the Court's sole entrapment case from the 1990s to the present, *Jacobson v. United States*,[33] and recent developments in the Circuit Courts of Appeals. *Jacobson* largely left the Court's entrapment doctrine intact but added refinements that brought the defense into the modern era—most notably requiring (in the context of long-term undercover operations) that the government prove a defendant's predisposition at the point at which government contact with the defendant began. Part IV explores the practical consequences of taking into account

33. 503 U.S. 540 (1992).

entrapment's criminal procedure characteristics, particularly as applied to today's long-term sting operations.

I. THE EVOLUTION OF THE ENTRAPMENT DEFENSE

A. Beginnings

The concept of "entrapment" as a legal defense emerged in the United States at the end of the 19th century.[34] Until recently, it was only an American concept—it had no roots in the English common law or analogue in the law of other nations.[35] The doctrine dates back to the post-Civil War period when America's urban populations grew, and along with them, criminal syndicates. At the same time, law enforcement went through a period of growth and professionalization, with the state and federal governments pouring unprecedented resources into the investigation and prosecution of crime. New federal laws like the Prohibition Act, the Narcotics Act, and other laws aimed at "vice" crimes like obscenity and prostitution gave the new law enforcement agents, especially federal agents, many tools to use and seemingly unlimited potential targets.[36] Undercover techniques became particularly important. Taken altogether, these developments caused courts to grow concerned

34. *See generally* Rebecca Roiphe, *The Serpent Beguiled Me: A History of the Entrapment Defense*, 33 SETON HALL L. REV. 257, 271 (2003) ("No state or federal court recognized entrapment as a valid defense prior to 1870."). Prior to end of the nineteenth century, "most state courts would not excuse the defendant merely because the detective initiated, induced, or precipitated the events if the prosecution could prove that all the formal elements of the crime were present." *Id*. at 272; *see also* MARCUS, *supra* note 11, §§ 1.01–03; McAdams, *supra* note 20, at 110–11; Lester B. Orfield, *The Defense of Entrapment in the Federal Courts*, 1967 DUKE L.J. 39; Seidman, *supra* note 26.

35. *See* MARCUS, *supra* note 11 § 1.03; Stevenson, *Effect of the National Security Paradigm*, *supra* note 16, at 146–47; Kent Roach, *Entrapment and Equality in Terrorism Prosecutions: A Comparative Examination of North American and European Approaches*, 80 MISS. L.J. 1455, 1455 (2011) (explaining the fairly recent adoption of variations on the entrapment defense in Canada and various European jurisdictions, declaring that "[t]he entrapment defense is no longer peculiarly American"). *See also* Ross, *supra* note 28, at 1521 (describing the different approach taken to undercover policing in Western Europe, where police involvement in a crime traditionally "fails to excuse the target but implicates the investigator in the crime").

36. As Sara Sun Beale has recounted, between 1901 and 1932 the number of federal prosecutions increased five-fold, due largely to Prohibition, the Mann Act, and the Harrison Narcotics Act. Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1441 n.48 (1984) (citing Edward Rubin, *A Statistical Study of Federal Criminal Prosecutions*, 1 LAW & CONTEMP. PROBS. 494, 497 (1934)). See also Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds–The Center Doesn't*, 117 YALE L.J. 1374, 1397–98 (2008) (discussing the effect of Prohibition on federal prosecutions); Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1 (2006); Roiphe, *supra* note 34, at 258.

about abuses of power.[37] Between 1870 and 1932, a number of state courts and the majority of the federal courts recognized a defense to prosecution where government agents had instigated the crime, with various justifications.[38] Previously, the government's involvement in a crime was not viewed as affording a defense to an individual who was enticed into committing a crime, although it may have provided the basis for a prosecution of the government agent.

The United States Supreme Court did not consider this emerging defense until 1932. However, four years earlier, in 1928, Justice Louis Brandeis laid the groundwork for the Court's eventual recognition of the defense. In *Casey v. United States*,[39] Justice Brandeis wrote a dissent from the Court's decision upholding the conviction of a lawyer for violating the federal narcotics laws. Casey smuggled morphine into a county jail upon the request of a prisoner who was a government informant. Although the case was presented on a sufficiency of the evidence claim, Brandeis

37. *See* KENNETH M. MURCHISON, FEDERAL CRIMINAL LAW DOCTRINES: THE FORGOTTEN INFLUENCE OF NATIONAL PROHIBITION 41–46 (1994).

38. *See id.* at 23–31; O'Brien v. United States, 51 F.2d 674 (7th Cir. 1931) (reversing defendants' conviction for conspiracy to violate the Prohibition laws, finding that civil law principles of estoppel applied to government's conduct in criminal cases and that there was no evidence that defendants previously had any disposition to commit the offenses that were the object of the charged conspiracy); Capuano v. United States, 9 F.2d 41, 42 (1st Cir. 1925) (reversing bribery conviction of defendant who owned business making hair tonics and toilet preparations where jury was not adequately instructed on entrapment; facts suggested that federal Prohibition agents extorted defendant into paying bribes to keep his license. Court suggested that government would be "estopped" from prosecuting where defendant "never conceived any intention of committing these offenses or any similar offenses."); Newman v. United States, 299 F. 128, 132 (4th Cir. 1924) (affirming narcotics conviction of a physician who provided morphine to undercover agent under Narcotics Act where jury was accurately instructed on entrapment as precluding conviction if defendant was not "willing" to violate the law prior to being asked to do so by the undercover agent and "would not otherwise have violated the law"); Butts v. United States, 273 F. 35, 38 (8th Cir. 1921) (reversing defendant's conviction for selling morphine to a friend where trial court failed to instruct jury on entrapment; facts suggested that agents, using defendant's friend, had induced defendant to procure and sell morphine whereas he otherwise never would have conceived of committing such a crime. Court stated conviction under such circumstances would be "unconscionable, contrary to public policy, and to the established law of the land . . . ."); Peterson v. United States, 255 F. 433 (9th Cir. 1919) (reversing defendant's conviction for selling liquor to soldiers where jury was not adequately instructed on defense of entrapment as centering on whether defendant was induced into selling the liquor by the officers); Woo Wai v. United States, 223 F. 412 (9th Cir. 1915) (reversing as against public policy conviction of defendants for conspiring to unlawfully transport Chinese persons into the United States where trial court refused to instruct jury on defense of entrapment; criminal design originated with officers rather than defendant). In general, the state courts were slower to recognize entrapment as a defense than were the federal courts of appeals. *See* MARCUS, *supra* note 11, § 1.03.

39. 276 U.S. 413 (1928).

argued that the Court should have thrown out the indictment in order to "preserve the purity of [the] courts."[40] He explained:

> The obstacle to the prosecution lies in the fact that the alleged crime was instigated by officers of the Government; that the act for which the Government seeks to punish the defendant is the fruit of their criminal conspiracy to induce its commission. The Government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature.[41]

Although the reported facts of the case do not suggest that Casey was offered any extraordinary inducement to smuggle in the morphine, Justice Brandeis evidently was convinced that Casey was an otherwise law-abiding man who would not have been involved in the drug trade had the government never approached him. It was this evaluation of Casey's character that led him to deem the government's conduct "unjustifiable."[42]

B. Sorrells*: The Supreme Court Recognizes the Defense*

Four years after *Casey*, a majority of the Court for the first time explicitly recognized a defense of entrapment, although not on the basis of the legal reasoning urged by Justice Brandeis. In *Sorrells v. United States*,[43] the Court vacated the defendant's conviction for violating the Prohibition Act because the trial court had refused to instruct the jury on the defense of entrapment. Sorrells was a World War I veteran whom a government prohibition agent persuaded to sell him liquor during a visit to the defendant's home. The agent was posing as a tourist and (truthfully) told the defendant that they had served in the same Division in the military.[44] The agent repeatedly stated that he wanted to bring a half-gallon of liquor home with him when he left town. Initially, the defendant responded that he did not have any whiskey. However, after several additional requests–intermingled with a discussion about the war–the defendant left and returned with the requested half-gallon of liquor.[45] Although several government witnesses testified that Sorrells had "the general reputation of a rum runner,"[46] the government offered no evidence

40. *Id.* at 425.
41. *Id.* at 423.
42. *Id.*
43. 287 U.S. 435 (1932).
44. *Id.* at 439.
45. *Id.*
46. *Id.* at 441.

that the defendant had ever previously possessed or sold liquor. To the contrary, witnesses for the defendant testified that he was of good character and had maintained steady employment.[47]

Reviewing the evidence, the Court made clear that it found the agent's methods unsavory—particularly his appeal to the defendant's sympathy as a fellow veteran—calling these methods "a gross abuse of authority," "deserv[ing] the severest condemnation."[48] But whether the Court's disapproval of such methods "precludes prosecution or affords a ground of defense, and, if so, upon what theory,"[49] was, for the majority of the Court, a difficult question. In a concurring opinion, Justice Roberts, joined by Justice Brandeis and Justice Stone, urged the Court to reverse for the reasons set forth in Justice Brandeis's *Casey* dissent—on the grounds of "public policy," to protect the "purity of [the Court's] own temple" from "such prostitution of the criminal law."[50] But the majority was not persuaded that it had the authority to preclude a prosecution on that basis. "Where defendant has been duly indicted for an offense found to be within the statute, and the proper authorities seek to proceed with the prosecution, the court cannot refuse to try the case in the constitutional method because it desires to let the defendant go free."[51] Decisions of public policy in the nature of what conduct was deserving of punishment were entrusted to the Legislative Branch. The decision to grant clemency in the individual case was entrusted to the Executive Branch. Was it not usurping the authority of these other branches to bar prosecutions or grant immunity to a particular defendant because the Court disagreed with the police methods used?[52]

The Court found a way out of this dilemma by resort to the judiciary's authority to construe criminal statutes and the tradition of construing statutes so as to avoid "absurd consequences or flagrant injustice."[53] Chief

47. The Government's brief in *Sorrells* included the following facts which were not included in the Supreme Court's opinion: that a few weeks after this sale, the agent returned to Sorrells' home with another agent, to whom Sorrells made a sale of whiskey; and that two weeks after that second sale, agents returned with a search warrant and found eleven, one-half gallon fruit jars full of whisky in a thicket about 100 yards below Sorrells' house and a ten-gallon keg containing three to four gallons of wine in a field just above the house. Brief for the United States at 4–5, Sorrells v. United States, 287 U.S. 435 (1932) (No. 177).

48. *Sorrells*, 287 U.S. at 441.

49. *Id.*

50. *Id.* at 457 (Roberts, J., concurring).

51. *Id.* at 450.

52. *See* Carlson, *supra* note 30, at 1026 ("At the time of the *Sorrells* case, the Court was preoccupied with a dispute over the Court's power to control the general administration of criminal justices in the federal courts.").

53. *Sorrells*, 287 U.S. at 446.

Justice Hughes wrote that the very same reasons of public policy cited by Justice Roberts counseled in favor of holding that Sorrells was not guilty because his actions did not fall within the National Prohibition Act, properly construed. He wrote:

> If the requirements of the highest public policy in the maintenance of the integrity of administration would preclude the enforcement of the statute in such circumstances as are present here, the same considerations justify the conclusion that the case lies outside the purview of the Act and that its general words should not be construed to demand a proceeding at once inconsistent with that policy and abhorrent to the sense of justice.[54]

Thus, according to the Court's analysis, Congress could not have intended to criminalize conduct engaged in at the instigation of government agents, where the defendant "had no previous disposition to commit it."[55] Although Justice Roberts called this interpretive device "strained and unwarranted,"[56] it solved the majority's problem of locating the authority for the recognition of the defense.

As for the content of the standard for entrapment, the majority focused explicitly, as Justice Brandeis had implicitly in *Casey*, on the character of the defendant. The defense would only be available, according to Chief Justice Hughes' opinion, if the defendant was an "otherwise innocent."[57] That is, the Court did not divine in the Prohibition Act a congressional purpose to exclude certain investigative techniques *per se*, but rather their use to ensnare and prosecute the wrong people.[58] The Court used the language about the "otherwise innocent" person several times, emphasizing that the difference between the appropriate use of "[a]rtifice and stratagem . . . to catch those engaged in criminal enterprises," and entrapment was whether the criminal design originates with the target of the investigation or instead the officials of the government.[59] The Court explained:

> The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the

54. *Id.* at 448–49.
55. *Id.* at 441.
56. *Id* at 456 (Roberts, J., concurring).
57. *Id.* at 451.
58. *Id.* at 448.
59. *Id.* at 441.

> fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law. A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.[60]

In these passages, the "predisposition" test that remains the central component of the federal entrapment defense to this day was born.[61] Under this approach, the test of entrapment is not whether the conduct of the law enforcement officers is objectively reasonable. Rather, it is whether that conduct caused a non-predisposed person to commit the offense. For this reason, it is also called the "subjective" test, because it focuses on the defendant's subjective state of mind or character.[62] To succeed on an entrapment claim under this standard, the defendant must prevail on two elements: first, that the government induced him to commit the crime; and second, that he was not predisposed to do so.[63]

Having spent most of its opinion establishing the legal authority for the entrapment defense and its content, the *Sorrells* Court devoted little attention to practical aspects of the defense's administration. Thus, the Court did not discuss at all who would bear the burden of proving entrapment (or what that burden was). Nor did the Court analyze at length whether entrapment was a judge or jury question. But in reversing and remanding on account of the trial court's failure to instruct the jury on entrapment, the Court implicitly held that the defense was to be decided by the jury.[64] This was consistent with the practice of most Courts of Appeals that had considered entrapment to that point,[65] as well as the general practice of submitting affirmative defenses to the jury. It also made sense to submit the defense to the jury, given the Court's finding that a lack of predisposition rendered the defendant not guilty of the offense defined by the statute. By contrast, Justice Roberts thought the decision should be

60. *Id.* at 441–42.

61. For an interesting account of the development of the subjective test, which suggests that the Court was influenced by positivist criminology, see T. Ward Frampton, *Predisposition and Positivism: The Forgotten Foundations of the Entrapment Doctrine*, 103 J. CRIM. L. & CRIMINOLOGY 111 (2013).

62. *See* Roiphe, *supra* note 34, at 257–58; Paul Marcus, *Presenting, Back from the [Almost] Dead, The Entrapment Defense*, 47 FLA. L. REV. 205, 214–15 (1995); Ronald J. Allen et al., *Clarifying Entrapment*, 89 J. CRIM. LAW & CRIMINOLOGY 407, 408–09 (1999); WAYNE R. LAFAVE, CRIMINAL LAW 535–36 (5th ed. 2010).

63. *See* LAFAVE, *supra* note 62, at 535–36; MARCUS, *supra* note 11, § 2.02.

64. *Sorrells*, 287 U.S. at 452.

65. *See supra* text accompanying note 38.

entrusted to the court, unless the court was in doubt as to the historical facts, in which case it could seek a recommendation from the jury. But whatever the jury might report to the judge, according to Justice Roberts' view, "the power and the duty to act [on a finding of entrapment] remain with the court and not with the jury,"[66] since the duty to protect the "purity" of the court was the Court's alone.

The *Sorrells* majority did, however, address directly two other points touching on the administration of the entrapment defense, albeit briefly. The first was whether the defense would be available with respect to offenses other than those set forth in the Prohibition Act. On this point, the Court recognized that, given the stated rationale of its holding, the availability of entrapment in other contexts would have to be considered on a case-by-case basis in light of the particular statute at issue and implied Congressional intent.[67] But, in dicta, the Court suggested that entrapment ought to be available as a defense to most statutes, except for "crimes so heinous or revolting that the applicable law would admit of no exceptions."[68] To date, no Court has held that entrapment is not available as an implied affirmative defense to a particular statute.

The second administrative point that the *Sorrells* Court addressed squarely was the admissibility of evidence of the defendant's character and prior criminal acts. On this issue, the majority spoke clearly, answering objections raised by Justice Roberts: such evidence was admissible and was not collateral. In the Court's view, evidence on such matters was central to the question at the heart of the entrapment defense: "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials."[69] If the defendant was disadvantaged by introduction of evidence of his character and background, he could not complain, for he would have "brought it upon himself by reason of the nature of the defense."[70] Thus, when entrapment was asserted, evidence regarding the activities of the government's agents *and* evidence bearing on the defendant's predisposition was properly placed before the finder of fact. This aspect of the *Sorrells* ruling has had a profound effect on the

66. *Sorrells*, 287 U.S. at 457.

67. *Id.* at 450–51 ("The conclusion we have reached upon these grounds carries its own limitation. We are dealing with a statutory prohibition and we are simply concerned to ascertain whether in the light of a plain public policy and of the proper administration of justice, conduct induced as stated should be deemed to be within that prohibition.").

68. *Id.* at 451.

69. *Id.*

70. *Id.* at 451–52.

administration of the entrapment defense, in effect forcing many defendants to choose between asserting the defense and availing themselves of the usual rules of evidence[71] that would keep such character evidence from the jury when it decides whether the government had met its burden of proof as to the essential elements of the offense.

C. Sherman*: The Court Reaffirms* Sorrells*' Doctrinal Framework*

The Supreme Court did not decide another entrapment case for twenty-five years, until *Sherman v. United States*.[72] Sherman was a recovering drug addict who was seeking medical treatment for his addiction when a government informant approached him.[73] As the Court described the events that ensued, "[s]everal accidental meetings followed, either at the doctor's office or at the pharmacy where both filled their prescriptions from the doctor."[74] The two men discussed their experiences trying to overcome their addiction.[75] Eventually, the informant asked Sherman to help him obtain narcotics, claiming that he was not responding to treatment.[76] After initially resisting the topic, Sherman relented, obtained narcotics, and shared them with the informant, who reimbursed Sherman for part of his expenses.[77] As a consequence of these events, Sherman himself returned to the use of narcotics.[78]

After several such transactions, the informant alerted federal agents with whom he was already working on other matters.[79] The agents, in turn, orchestrated several additional transactions with Sherman. Sherman was charged with violating the federal narcotics laws. His case went to trial, at which the jury was charged on the defense of entrapment as framed by the majority opinion in *Sorrells*—i.e., "whether the informer had convinced an otherwise unwilling person to commit a criminal act or whether [Sherman] was already predisposed to commit the act."[80] On the question of

71. Federal Rules of Evidence 404(a) and (b) generally preclude the use of evidence of a defendant's character or prior bad acts, respectively, to provide action in conformity therewith on a particular occasion. Although the Federal Rules of Evidence only took effect in 1975, they codified long-standing common law practice in this regard. *See* FED. R. EVID. 404(a), Advisory Comm. note; MCCORMICK ON EVIDENCE § 186 (Kenneth S. Braun et al. eds., 6th ed. 2006).

72. 356 U.S. 369 (1958).

73. *Id.* at 371.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 373.

79. *Id.* at 371.

80. *Id.* at 371–72.

predisposition, the government argued that Sherman "evinced a 'ready complaisance' to accede to [the informant's] request."[81] The jury also heard evidence that Sherman had two prior narcotics convictions, one for illegally selling narcotics some nine years prior to the events in question, and one for illegally possessing narcotics some five years beforehand.[82] The jury rejected the entrapment defense and convicted Sherman.

The Court set aside the conviction and held that Sherman had been entrapped as a matter of law. Chief Justice Earl Warren, who had joined the Court in 1953, wrote the relatively brief opinion for the Court, holding that the intervening twenty-five years since *Sorrells* had not in any way "detracted from the principles underlying that decision."[83] Although law enforcement may and frequently must use "stealth and strategy" to prevent crime and apprehend criminals, "[a] different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."[84] In that case, Chief Justice Warren wrote, "stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search."[85] This latter statement suggested that the Court might hold that entrapment implicated the Constitution. But, in the very next sentence, the Court made clear that it would reaffirm *Sorrells*' dubious legislative intent rationale: "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations."[86] Reviewing the evidence in total, the Court found that Sherman was clearly induced into obtaining the narcotics by the informants' repeated requested and "resort to sympathy,"[87] and that he was not predisposed. Specifically, the Court noted that, although Sherman had two prior narcotics convictions, the last one was five years before the conduct in question and there was no evidence that Sherman was actively involved in the trade of narcotics at the time that the informant approached him.[88] For example, when the police searched Sherman's apartment following his arrest, they did not find any narcotics.[89] Nor did Sherman

81. *Id.* at 375.
82. *Id.*
83. *Id.* at 372.
84. *Id.* (quoting Sorrells v. United States, 287 U.S. 435, 442 (1932)).
85. *Id.* at 372.
86. *Id.*
87. *Id.* at 373.
88. *Id.* at 375.
89. *Id.*

make any profit from the transactions with the informant.[90] Absent such additional evidence, the Court did not find Sherman's alleged "ready complaisance" to accede to the informant's request sufficient to prove predisposition.[91] The Court concluded:

> The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. Selecting the proper time, the informer then tells the government agent. The set-up is accepted by the agent without even a question as to the manner in which the informer encountered the seller. Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this.[92]

Notwithstanding the majority's resounding rejection of the police methods used against Sherman, and its reversal of his conviction in spite of the jury's verdict, four Justices did not join Chief Justice Warren's opinion. Rather, they filed a concurring opinion, this time authored by Justice Frankfurter, reiterating many of the arguments made by Justice Roberts in *Sorrells*. The concurring justices in *Sherman*—consisting of Justices Frankfurter, Douglas, Harlan and Brennan—urged the Court to jettison the *Sorrells* legislative intent rationale, which they compellingly called a "sheer fiction."[93] Instead, they argued that the Court should ground the bar to conviction in the courts' "supervisory jurisdiction over the administration of criminal justice"[94]—a source of authority that the Court had recognized in the intervening years since *Sorrells*, but which was for all practical purposes the same authority to which Justice Roberts appealed in his *Sorrells* concurrence. On this view, courts, not juries, should make the decision about entrapment because the responsibility to protect its functions and "the purity of its own temple belongs only to the court."[95] In addition, only the courts "through the gradual evolution of explicit standards in accumulated precedents" can give specific guidance for official conduct in the future, which "the wise administration of criminal

90. *Id.*
91. *Id.*
92. *Id.* at 376 (footnote omitted).
93. *Id.* at 379 (Frankfurter, J., concurring).
94. *Id.* at 381 (Frankfurter, J., concurring).
95. *Id.* at 385 (Frankfurter, J., concurring) (quoting Sorrells v. United States, 287 U.S. 435, 457 (Roberts, J., concurring)).

justice demands."[96] The concurring justices also worried, as had Justice Roberts in his *Sorrells* concurrence, about submitting the entrapment defense to the jury rather than the court given the evidentiary consequences. Under the *Sorrells* framework, they argued, a defendant faced the choice of either foregoing an entrapment defense or "run[ning] the substantial risk that, in spite of instructions, the jury will allow a criminal record or bad reputation to weigh in its determination of guilt of the specific offense of which he stands charged."[97]

As for the substance of the entrapment standard, the concurring justices in *Sherman* set forth a much more coherent statement of an alternative to the *Sorrells* predisposition test than had Justice Roberts in his *Sorrells* concurrence. They argued that entrapment should focus on the conduct of the law enforcement officers rather than the predisposition of the defendant, because the latter standard "loses sight of the underlying reason for the defense of entrapment"—i.e., that no matter what crimes a person may have committed in the past, "certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society."[98] In the following paragraph, Justice Frankfurter crystallized what has become known as the "objective" test for entrapment and its rationale:

> [T]he police may . . . act so as to detect those engaged in criminal conduct and ready and willing to commit further crimes should the occasion arise. Such indeed is their obligation. . . . [But] in holding out inducements they should act in such a manner as is likely to induce to the commission of crime only these persons and not others who would normally avoid crime and through self-struggle resist ordinary temptations. This test shifts attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime.[99]

Scholars generally have favored Justice Frankfurter's "objective test" for entrapment.[100] It was adopted, with some modification, in the Model Penal

96. *Id.*
97. *Id.* at 382.
98. *Id.* at 382–83.
99. *Id.* at 383–84.
100. *See* Seidman, *supra* note 26, at 115 n.13 (stating "[t]he commentators have overwhelmingly favored an objective approach focusing on the propriety of the government's conduct" and collecting representative commentary); Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 167 n.13 (1975–76) (same); LAFAVE, *supra* note 62, at 538 ("The objective approach is favored by a majority of the commentators . . . ."). While the two tests are animated by different concerns, they do not necessarily lead to different outcomes in any particular case. *See* Seidman, *supra* note 26, at 120

Code promulgated by the American Law Institute in 1962.[101] A number of states have adopted the objective test, either by statute or through their courts' common lawmaking.[102] The objective test was incorporated into the proposed revised federal criminal code that Congress considered in the 1980s.[103] However, the objective test has never become federal law. More than eighty years since the Court decided *Sorrells*, notwithstanding sustained criticism from the academy[104] and by some jurists, *Sorrells*' framework still controls in federal court and in the majority of states that modeled their entrapment defense on the federal standard.[105]

D. Why Didn't the Court Treat Entrapment as a Procedural and Evidence Law Question?

For a lawyer trained in the post-Warren Court era, it is difficult to hear the concerns about police methods that were raised repeatedly in the opinions in *Sorrells* and *Sherman* and not immediately start thinking about the exclusionary rule. *Sorrells* may have cast entrapment as an affirmative defense, and thus a matter of substantive criminal law, but surely it is not *solely* a matter of substantive criminal law in the sense of measuring individual criminal culpability. After all, government inducement is a necessary precondition to assertion of the entrapment defense; the defense is simply unavailable to one who was induced to commit a crime by a private agent.[106] Although the predisposition of the defendant is the usual

("In virtually every case . . . the objective and subjective tests produce the same results . . . ."); Ronald J. Allen et al., *Clarifying Entrapment*, 89 J. CRIM. L. & CRIMINOLOGY 407, 409 (1999) ("The controversy over the two versions of the test—the subjective and objective—is quite beside the point, because the two tests will virtually never lead to different results . . . ."); Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies By the Police*, 76 OR. L. REV. 775, 779–80 n.19 (1997) ("in practice these tests are almost indistinguishable").

101. *See* MODEL PENAL CODE § 2.13 (Official Draft 1962).

102. *See* MARCUS, *supra* note 11, § 1.05; LAFAVE, *supra* note 62, at 539 (noting that the objective approach was adopted by judicial decision in Alaska in 1969 and several other states have now adopted it by statute or judicial decision).

103. *See* NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, A PROPOSED NEW FEDERAL CRIMINAL CODE § 702(2) (1971).

104. The literature criticizing the Court's entrapment doctrine as lacking a coherent theoretical foundation is voluminous. *See, e.g.*, Frampton, *supra* note 61, at 115 (reviewing the literature); Roiphe, *supra* note 34, at 293–98 (same); Carlson, supra note 28, at 1018-19; Seidman, *supra* note 26, at 115 nn.12–13, 128; Park, *supra* note 100, at 167 (1976); Notes & Comments, *The Serpent Beguiled Me and I Did Eat, The Constitutional Status of the Entrapment Defense*, 74 YALE L.J. 942 (1965).

105. *See* MARCUS, *supra* note 11, § 1.05; LAFAVE, *supra* note 62, at 535 n.47 (noting that the subjective test is adhered to by the federal courts and the majority of state courts); Eda Katherine Tinto, U*ndercover Policing, Overstated Culpability*, 34 CARDOZO L. REV. 1401, 1410 (2013) (same).

106. *See* Richard H. McAdams, *Reforming Entrapment Doctrine in* United States v. Hollingsworth, 74 U. CHI. L. REV. 1795, 1796–97 n.10 (2007) ("There is no entrapment defense unless

focus of entrapment litigation, that fact should not obscure the important sense in which the defense is also animated by concerns about perceived misconduct by law enforcement actors. The "evil which the defense of entrapment is designed to overcome"[107] is the persuasion of an otherwise innocent person to commit a crime *by government agents*. Entrapment thus presents the same kinds of concerns that we have grown accustomed to having courts, not juries, weigh in a pretrial setting when they must decide whether to admit evidence allegedly obtained in contravention of a defendant's constitutional or statutory rights.[108] Indeed, juries routinely are instructed that the means by which evidence was obtained are not properly the subject of their review.[109] The predisposition question also requires the same kind of counterfactual analysis in which courts often engage in the context of pretrial evidentiary hearings, namely evaluating the effect of police action on a particular individual's behavior or on a course of events. For example, courts frequently must decide whether the police action in a particular instance caused a defendant to confess or consent to a search voluntarily,[110] whether police would have inevitably discovered evidence through untainted means, and whether an eyewitness had a sufficient basis to make a reliable identification notwithstanding having been exposed to suggestive police identification procedures.[111] These are not the kinds of question we typically submit to juries in criminal trials, although they are now routine for federal judges.

So why is it that the *Sorrells* Court treated entrapment as an affirmative defense to be submitted to the jury, rather than a procedural and evidence law question for the judge, when the latter characterization seems at least equally, if not more, compelling? The short answer is that entrapment may sound like a procedural and evidence law question from our vantage point today, but it did not appear that way to the Court in 1932. The struggle that the *Sorrells* Court engaged over the source of its authority even to recognize entrapment at all—in any form—was real. As set forth below,

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government agents induced the crime. No matter how unwilling or reluctant a defendant is, no matter what pressure is brought to bear short of duress, if those who tempt him are purely nongovernmental actors, there is no defense."). *See also* Seidman, *supra* note 26 at 128; United States v. Squillacote, 221 F.3d 542, 573 (4th Cir. 2000); United States v. Hollingsworth, 27 F.3d 1196, 1203 (7th Cir. 1994); United States v. Gendron, 18 F.3d 955, 962–63 (1st Cir. 1994); United States v. Emmert, 9 F.3d 699, 703 (8th Cir. 1993); United States v. Maddox, 492 F.2d 104, 106 (5th Cir. 1974).

107. Sherman v. United States, 356 U.S. 369, 376 (1958).

108. *See infra* Part II.

109. *See, e.g.*, United States v. Brand, 467 F.3d 179, 206 (2d Cir. 2006) (approving use of such a charge even in combination with an entrapment charge).

110. *See infra* Parts II.A–B.

111. *Id.*

there was no precedent at that time for the Court to halt a prosecution based on unsavory police methods or to exclude evidence that satisfied generally applicable rules of evidence, unless it was obtained in violation of an express constitutional right. And entrapment did not violate any express constitutional right.

Moreover, the principle that otherwise admissible evidence could be excluded from a criminal trial because it was obtained in violation of an express constitutional provision was still of relatively recent vintage and was narrowly applied. The common law rule, infamously repeated in *Olmstead v. United States*[112] in 1928, had long been that the "admissibility of evidence is not affected by the illegality of the means by which it was obtained."[113] The one well-established exception to this rule was for involuntary confessions induced by federal agents, which since the end of the nineteenth century, the Court had found to be inadmissible in federal court pursuant to the Fifth Amendment's guarantee against compelled self-incrimination.[114] Thus, to ask why the *Sorrells* Court did not treat entrapment as a procedural and evidence law question is to misunderstand the historical context in which the issue first arose.

1. The Exclusionary Rule Prior to 1932

The first Supreme Court case arguably expanding the exclusionary rule for evidence beyond involuntary confessions was *Boyd v. United States*,[115] decided in 1886. *Boyd*, however, was an unusual case.[116] It was a forfeiture proceeding arising out of a failure to pay customs duties on imported goods. In the course of the proceeding, the government obtained an order compelling Boyd and his fellow owners to produce the invoices for the goods; the Government then introduced the invoices as evidence in the forfeiture proceeding. The Supreme Court held that this entire procedure violated the owners' Fourth and Fifth Amendment rights to be

112. 277 U.S. 438 (1928).

113. *Id.* at 467.

114. In *Bram v. United States*, drawing upon both English and American cases, the Court held that the Fifth Amendment right against compelled self-incrimination applied to out-of-court confessions, such that a confession would not be admissible unless it was "free and voluntary—that is, not produced by inducements engendering either hope or fear." Bram v. United States, 168 U.S. 532, 557–58 (1897). The Court "adhered to this reasoning" thereafter. Miranda v. Arizona, 384 U.S. 436, 462 (1966). *See, e.g.*, Ziang Sung Wan v. United States, 266 U.S. 1, 14–15 (1924) ("[A] confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise.").

115. 116 U.S. 616 (1886).

116. For a discussion of *Boyd*'s unusual posture, see William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 422–24 (1995).

free from unreasonable searches and seizures and from providing testimony (in the form of the invoices) against themselves.[117] For many years, it was the *combined* nature of the Fourth and Fifth Amendment violation present in *Boyd* that was thought to justify its holding.[118] Thus, *Boyd* was not immediately viewed as creating a new exclusionary rule of evidence in criminal cases. Indeed, in 1904, the Supreme Court held in *Adams v. New York*[119] that the admission of evidence seized pursuant to a warrantless search raised no constitutional problem, distinguishing *Boyd* on the grounds that *Boyd* concerned the compulsory production of evidence.[120]

It was not until *Weeks v. United States*[121] that the Court held that evidence should have been excluded principally because the evidence was obtained in violation of the defendant's Fourth Amendment rights. And yet, although *Weeks* has long been widely cited as "fashioning a novel exclusionary rule for federal criminal trials,"[122] *Weeks* actually resolved a property law question: the authority of the government to hold onto a person's property obtained during an unlawful search for subsequent use as evidence at a trial.[123] Weeks was accused of running an unlawful lottery scheme through the mails.[124] At his trial, the government introduced items, including lottery tickets, seized during a warrantless search of his home.[125] Repeatedly prior to and during his criminal trial, Weeks unsuccessfully petitioned for the return of his property. The Supreme Court held that this was error; the government's desire to use the property as evidence did not supersede Weeks' right to have the property returned to him.[126] Notwithstanding this property law cast, *Weeks* ultimately did lead to the more generally applicable exclusionary rule that is more familiar to us.[127] In a series of cases decided between 1920 and 1925, the Court firmly established that any evidence seized during an unlawful search of a

117. *Boyd*, 116 U.S. at 638.

118. *See* Mapp v. Ohio, 367 U.S. 643, 661–66 (1961) (Black, J., concurring); *see also* Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983).

119. 192 U.S. 585 (1904).

120. *Id.* at 596–97.

121. 232 U.S. 383 (1914).

122. Sina Kian, *The Path of the Constitution: The Original System of Remedies, How it Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 170 (2012).

123. *Id.* at 172.

124. *Weeks*, 232 U.S. at 386.

125. *Id.*

126. *Id.* at 393.

127. In *Wolf v. Colorado*, the Supreme Court described *Weeks* as having announced the exclusionary rule for the first time. *See* Wolf v. Colorado, 338 U.S. 25, 28–29 (1949).

defendant's home or place of business must be excluded from his or her criminal trial, as well as any evidence derived therefrom (including copies made of the evidence), even if the defendant did not petition for its return beforehand.[128]

The foregoing chronology demonstrates that, in 1932, when the Court decided *Sorrells*, the exclusionary rule in federal court for violations of the Fourth Amendment right to be free of unreasonable searches and seizures in federal criminal trials was still relatively new. There was *no* precedent for excluding evidence that was not obtained in violation of an express constitutional right, and limited authority for exclusion even where an express provision *was* violated (*i.e.* thus far, the exclusionary rule had only been applied for violations of the Fifth Amendment right against self-incrimination and the Fourth Amendment right against unreasonable searches and seizures). If any part of the Constitution were implicated by what the police had done in *Sorrells*, it could only be the Due Process Clause of the Fifth Amendment, with its promise of fundamental fairness in the relationship between the individual and the government.[129] But the Court did not see entrapment as raising an issue under the Due Process Clause—understandably, given that there was no precedent to view it as such—nor had the Court extended the exclusionary rule to violations of the Due Process Clause. Given this historical context, it is understandable that the *Sorrells* Court did not view entrapment as raising a question about the admissibility of evidence. The only options before the Court, if it were to provide relief to the defendant, were the legislative intent rationale adopted by the *Sorrells* majority, or the "public policy" rationale adopted by the minority. Yet, neither of the parties in *Sorrells* provided the Court with any authority for the proposition that the courts could bar the Executive branch from using the courts to enforce the criminal laws based on public policy. The majority's approach may have seemed logically strained, but the minority's approach apparently struck most of the justices as lawless.

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128. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Gouled v. United States, 255 U.S. 298 (1921); Agnello v. United States, 269 U.S. 20 (1925).

129. *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98, 113 (1977) (citing the standard of "fairness as required by the Due Process Clause of the Fourteenth Amendment"); Chambers v. Florida, 309 U.S. 227, 235–36 (1940) ("[I]n view of its historical setting and the wrongs which called it into being, the due process provision of the Fourteenth Amendment—just as that in the Fifth—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority.") (footnote omitted).

*2. The Exclusionary Rule from 1932 to 1958 (*Sorrells *to* Sherman*)*

Between the Court's decision in *Sorrells* and the next time the Court considered entrapment, in *Sherman* (1958), there was considerable change in the Court-made exclusionary rules of evidence. First, the Court started to apply the exclusionary rule to state prosecutions pursuant to the Due Process Clause of the Fourteenth Amendment. Second, the Court articulated a doctrine of its own "supervisory power" from which the Court divined the authority to exclude evidence obtained in violation of a defendant's statutory, rather than constitutional, rights. But, for the reasons set forth below, neither development was sufficient to cause the Court to reframe entrapment when it had the opportunity to do so.

The Court's extension of the exclusionary rule to state criminal prosecutions pursuant to the Fourteenth Amendment's Due Process Clause started, as the exclusionary rule first did, with coerced confessions. In *Brown v. Mississippi*,[130] the Court held that a state capital murder conviction based upon a confession that clearly was the result of torture violated the Due Process Clause of the Fourteenth Amendment.[131] The Court reaffirmed this principle in *Chambers v. Florida*,[132] another capital case, where the evidence of physical abuse was less clear, though not the extent of the psychological coercion.[133] In both instances, the Court grounded its decision in the Due Process Clause of the Fourteenth Amendment because the Court had not yet incorporated the Fifth Amendment's self-incrimination clause to the states.[134] Thus, the standard that the Court applied in determining whether a constitutional violation had occurred in *Brown* and *Chambers* was the fundamental fairness substantive due process test, which asked whether the official conduct "'offends some principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[135] The Court

130. 297 U.S. 278 (1936).

131. *Id.* at 287. The defendants in *Brown* had been brutally whipped and beaten until they confessed. *Id.* at 281.

132. 309 U.S. 227 (1940).

133. *Id.* at 239–41. The defendants in *Chambers* were interrogated over the course of five days until they finally confessed. During that time, they were not allowed to speak with counsel, and were frequently surrounded by angry members of the community. *Id.*

134. In the 1960s, the Court incorporated "almost all of the criminal procedure guarantees found in the Bill of Rights." Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 304 (2001). *See also* WAYNE R. LAFAVE ET AL., 1 CRIM. PROC. § 2.4 (3d ed. 2011). In *Malloy v. Hogan*, the Court formally incorporated the Fifth Amendment privilege against self-incrimination. 378 U.S. 1 (1964).

135. *Brown*, 297 U.S. at 285 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). *See also Chambers*, 309 U.S. at 238 ("This requirement—of conforming to fundamental standards of procedure

had no difficulty determining that the right against compelled self-incrimination was so fundamental.

In the context of confessions coerced by state actors, this Due Process standard merged relatively soon with the Fifth Amendment voluntariness standard.[136] But in other contexts, the Court was slower to find that rights made applicable to the states by the Fourteenth Amendment were essentially equivalent to those guaranteed by the Bill of Rights against the federal government.[137] It also was slower to impose the exclusionary rule on the states for violations of rights guaranteed by the Fourteenth Amendment. Thus, for example, in *Wolf v. Colorado*[138] the Supreme Court held that the Fourteenth Amendment Due Process Clause protected individuals from unreasonable searches and seizures by state actors, much like the Fourth Amendment protected individuals from similar action by federal officials, finding that this right was "implicit in the concept of ordered liberty."[139] Yet in the very same opinion, the Court declined to require that state courts exclude evidence obtained in violation of this Due Process right. Rather, implicitly finding the exclusionary rule was not constitutionally mandated, the Court left the appropriate remedy to the states.[140] It was not until *Mapp v. Ohio*[141] that the Supreme Court overruled this portion of *Wolf* and held that the Due Process Clause *also*

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in criminal trials—was made operative against the States by the Fourteenth Amendment."). In the pre-incorporation decades, the Court did not settle on any one single description of the Due Process fundamental fairness test, but offered a number of different descriptions of what kinds of state action would fail it. *See* LAFAVE ET AL., *supra* note 134; *see also* Israel, *supra*, note 134, at 351–53.

136. "The marked shift to the federal standard in state cases began with Lisenba v. California . . . ." *Malloy*, 378 U.S. at 7 (referencing Lisbena v. California, 314 U.S. 219, 239 (1941)). *See also id.* at 6–7 (noting that the distinction between the *Brown* Due Process test and the Fifth Amendment standard "was soon abandoned, and today the admissibility of a confession in a state prosecution is tested by the same standard applied in federal prosecutions").

137. *See, e.g.*, Betts v. Brady, 316 U.S. 455 (1942) (holding that Fourteenth Amendment Due Process Clause provided state criminal defendant with right to counsel in some circumstances, but not to the same extent as the right afforded by Sixth Amendment), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963). *See generally* McDonald v. City of Chi., 130 S. Ct. 3020, 3032 (2010) ("[E]ven when a right set out in the Bill of Rights was held to fall within the conception of due process, the protection or remedies afforded against state infringement sometimes differed from the protection or remedies provided against abridgement by the Federal Government."); Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 281 (1982) ("In applying the fundamental fairness doctrine from the early 1930s through the early 1960's, the Court . . . viewed due process as encompassing many of the same basic principles as the Bill of Rights guarantees, but generally assumed that due process limits on state action derived from these principles were narrower than the limits imposed on the federal government by the Bill of Rights.").

138. 338 U.S. 25 (1949).

139. *Id.* at 27–28 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

140. *Id.* at 28.

141. 367 U.S. 643 (1961).

required the exclusion at criminal proceedings of evidence obtained in violation of this right.[142]

The period between *Sorrells* and *Sherman* also saw the Court exclude evidence obtained in violation of federal statutes. In *Nardone v. United States*,[143] the Court held that evidence obtained in violation of the Federal Communications Act, pursuant to an unlawful wiretap, was inadmissible.[144] And in *McNabb v. United States*,[145] the Court excluded a confession obtained by federal agents who failed to comply with federal statutes requiring that an arrested individual promptly be presented before a neutral magistrate.[146] In *McNabb*, the Court articulated a theory of its authority for excluding such evidence, which it dubbed the Court's inherent "supervisory authority."[147] The Court viewed this authority as the power to formulate rules of evidence and procedure for federal criminal trials not "derived solely from the Constitution" nor "limited to the strict canons of evidentiary relevance."[148]

Although these statements by Justice Frankfurter (who would go on to write the concurring opinion in *Sherman*) sound like a sweeping assertion of authority, in the context of the *McNabb* case, the Court's invocation of the supervisory authority was actually rather modest. It was tethered to particular federal statutes requiring a prompt presentment that were silent as to what consequence, if any, followed if their terms were violated. Citing the legislative policy reflected in these statutes to protect against the abuses associated with the "third degree"[149]—and also the particularly egregious facts of the case[150]—the Court reversed the convictions to remedy the unlawful introduction of the confessions.[151] But signaling perhaps that the Court's agenda was indeed to expand its authority to

142. *See id.* at 656 (describing the exclusionary rule as "constitutionally necessary"); *see also* Walter E. Dellinger, *Of Rights and Remedies: The Constitution As a Sword*, 85 HARV. L. REV. 1532, 1561 (1972) ("By requiring [in *Mapp*] that the rule of exclusion be followed in state criminal cases, the Court was necessarily making a judgment that the rule was constitutionally based.").

143. 302 U.S. 379 (1937).

144. *Id.* at 384–85.

145. 318 U.S. 332 (1943).

146. *Id.* at 342. This requirement is now codified in FED. R. CRIM. P. 5(a).

147. *Id.* at 341.

148. *Id. See generally* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 328–32 (2006) (reviewing history of Supreme Court's exercise of its supervisory power, beginning with *McNabb*); Beale, *supra* note 36, at 1435–55 (same).

149. *McNabb*, 318 U.S. at 344.

150. The three *McNabb* defendants were convicted of the murder of a federal agent, largely on the basis of their post-arrest statements made during lengthy periods of interrogation, without access to friends or counsel. *See id.* at 338.

151. *Id.* at 347.

exclude evidence beyond constitutional violations, the Court made clear that it was not reversing because the confessions were involuntary under the Fifth Amendment standard.[152] The Court did not reach that issue. Rather, the basis for the Court's decision was the violation of the federal statutes.[153] The Court offered a fig-leaf, however, to those who might read its opinion as purporting to directly regulate the practices of federal law enforcement agents: the opinion stated that the Court's only concern with such practices arose at the point when the "courts themselves become instruments of law enforcement."[154] Justice Frankfurter wrote, "a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law."[155]

McNabb thus reads like a vindication of Justice Roberts' view in *Sorrells* (and Justice Brandeis' view in *Casey*)[156] that the courts have the authority to protect the purity of their own functions from becoming tainted by improper conduct committed by officers of the Executive Branch. Indeed, had the Court revisited entrapment immediately following *McNabb*, there is a chance that the Roberts/Brandeis/Frankfurter view might have garnered more support. But the *McNabb* aura, if there was one, did not last long. Many lower courts, and Congress, greeted *McNabb* with hostility.[157] The Court's narrow holding regarding the requirements of the federal statutes requiring prompt presentment was challenged repeatedly in a number of cases between 1943 and 1958, and Congressional opponents of *McNabb* made a serious, although ultimately unsuccessful, effort to overrule it by legislation in 1958.[158] Although the Court invoked the

152. *Id.* at 340.
153. *Id.* at 345.
154. *Id.* at 347.
155. *Id.* at 345.
156. *See supra* text accompanying notes 39–40.
157. *See* James E. Hogan & Joseph M. Snee, *The McNabb-Mallory Rule: Its Rise, Rationale, and Rescue*, 47 GEO. L.J. 1, 5 (1958).
158. *Id.* at 34–39, 42–46. There were several versions of the legislation to overrule *McNabb*, some focusing on the content of Federal Rule of Criminal Procedure 5(a) and others on the rule of exclusion announced in *McNabb*. *See id.* at 35. The legislation that passed the House of Representatives would have done away with *McNabb*'s rule of exclusion. The proponents of that legislation backed away from the proposal, however, after amendments in the Senate undermined it significantly. *McNabb* was later superseded by *Miranda v. Arizona*, in which the Supreme Court held that the Fifth Amendment privilege against self-incrimination required police to advise those in custody of their constitutional rights before commencing interrogation, and that any statements obtained in the absence of such warnings would be inadmissible. *See* Miranda v. Arizona, 384 U.S. 436 (1966). In 1968, Congress passed legislation to overrule both *McNabb* and *Miranda*. *See* Beale, *supra* note 36, at 1454. The Supreme Court ultimately held this measure unconstitutional. *See* Dickerson v. United States, 530 U.S.

supervisory authority articulated by Justice Frankfurter's opinion to announce various procedural rules for the federal courts in the years following *McNabb*,[159] it did not invoke its supervisory authority to expand the exclusionary rule further until *Elkins v. United States*,[160] decided two years after *Sherman*.[161]

During this same period (the post-*Sorrels*, pre-*Sherman* era) the Court also decided *Rochin v. California*.[162] Like *Brown*, *Chambers*, *Wolf*, and *McNabb*, *Rochin* reflected the Court's increasing concern with overly aggressive police practices. In *Rochin*, police officers broke into a man's home, tried to force out of his mouth several morphine capsules that he had swallowed, and ultimately took him to a hospital where a doctor pumped his stomach.[163] As a consequence, the police obtained the capsules, which were introduced into evidence at Rochin's trial. Justice Frankfurter wrote the opinion for the Court holding that Due Process Clause of the Fourteenth Amendment required the exclusion of this evidence.[164] In the Court's view, this conduct "shock[ed] the conscience"[165] and "'offend[ed] those cannons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.'"[166] The methods used by the officers were "too close to the rack and the screw to permit of constitutional differentiation."[167]

Two decades later, the Court would cite *Rochin* to suggest that the Due Process Clause provided an independent limit on undercover governmental action, on top of the entrapment defense, such that a conviction could not stand if the conduct of government officials was so outrageous as to "shock the conscience," even if the defendant were

428, 437–38 (2000) (holding that *Miranda* was a constitutional decision and therefore could not be overridden by Congress).

159. *See* Thiel v. S. Pac. Co., 328 U.S. 217 (1946) (invoking supervisory powers to hold that district courts could not dismiss wage earners from juries solely on that basis); Jencks v. United States, 353 U.S. 657 (1957) (holding that defense in federal criminal prosecution was entitled to obtain for impeachment purposes statement made by witnesses to government agents).

160. 364 U.S. 206 (1960).

161. In *Elkins*, the Court abrogated the so-called "silver platter doctrine." *Id.* at 208. Further, the Court held that evidence obtained by state actors in circumstances that would violate the Fourth Amendment if engaged in by federal agents was inadmissible in federal court—a holding that was rendered moot the next year by *Mapp*. *Id.* at 223–24.

162. 342 U.S. 165 (1952).

163. *Id.* at 166.

164. *Id.* at 174.

165. *Id.* at 172.

166. *Id.* at 169 (quoting Malinski v. New York, 324 U.S. 401, 416–17 (1945)).

167. *Id.* at 172.

predisposed.[168] As set forth below, the existence of this Due Process limit remains a matter of dispute—a dispute that largely has been papered over by the fact that (with one exception) courts have never found that it was breached.[169] Today, defendants asserting entrapment frequently also assert (unsuccessfully) a government misconduct Due Process claim. And yet neither party in *Sherman* even cited *Rochin* in its brief—a testament to the fact that, by the time *Sherman* was before the Court, *Rochin* was not understood as a major expansion of Due Process protection but instead as an instance of case-specific error correction driven by its rather unique and brutal facts.[170]

In sum, although there were significant developments in the Supreme Court's application of the exclusionary rule for violations of defendant's constitutional and statutory rights between 1932 (*Sorrells*) and 1958 (*Sherman*), those developments were not sufficient to cause a majority of the Court to view entrapment doctrine through that lens—or even to cause the parties in *Sherman* to ask the Court to reassess the principles articulated in *Sorrells*. In 1958, the Due Process Clause of the Fifth Amendment was not understood as an independent source of authority to exclude evidence that resulted from police action unless those actions met the high "shock the conscience" standard or violated some other specific constitutional guarantee. The Court had shown a willingness to exclude evidence obtained in violation of a defendant's statutory rights, and had articulated a theory of a supervisory authority in *McNabb* and its progeny that might allow courts to shut their doors to cases and evidence in an even broader range of circumstances. But the Court had not yet applied the entrapment doctrine to exclude a case or evidence without a basis for doing so in an express provision of law. It is thus not surprising that a majority of the Court—even in an opinion authored by Chief Justice Warren, who had joined the Court in 1953 but by 1958 had not yet

168. *See* United States v. Russell, 411 U.S. 423, 432 (1973); *see also* Part II.B.2, *infra*.

169. *See infra* text accompanying notes 262–63.

170. *See* Irvine v. California, 347 U.S. 128, 133 (1954) (refusing to extend *Rochin* to hold that the use of evidence obtained through the warrantless installation of eavesdropping equipment in a defendant's home was violative of Due Process and distinguishing *Rochin* on the grounds that it "presented an element totally lacking here—coercion . . . applied by a physical assault upon [the defendant's] person") (citation omitted); Breithaupt v. Abram, 352 U.S. 432, 435 (1957) (refusing to extend *Rochin* to hold that the use of evidence derived from by taking a defendant's blood while he was unconscious was violative of Due Process, and distinguishing *Rochin* on the grounds that the officer's conduct overall in *Rochin* was "brutal" and "offensive," whereas "there is nothing 'brutal' or 'offensive' in the taking of a sample of blood when done, as in this case, under the protective eye of a physician").

assumed the activist role for which he would later become known[171]—saw no reason, strategically or doctrinally, to revisit the basic premises of *Sorrells* when it had the opportunity to do so. The agents in *Sherman* had violated no constitutional or statutory right belonging to Sherman. The entire Court agreed that Sherman's conviction must be reversed. Thus, in Justice Warren's view, revisiting *Sorrells*' doctrinal framework, as the minority of Justices urged, especially without the benefit of briefing, would "entail both overruling a leading decision of this Court and brushing aside the possibility that we would be creating more problems than we would supposedly be solving."[172]

II. ENTRAPMENT AND THE EXCLUSIONARY RULE IN THE 1960S, 1970S, AND 1980S

A. The 1960s: The Missing Decade for Entrapment; The Decade of the Exclusionary Rule

The Court did not issue a major entrapment decision again until 1973.[173] The 1960s were, however, the decade of incorporation and of expansion of the exclusionary rule. As noted above, in *Elkins v. United States*, citing its supervisory authority, the Court abrogated the "silver platter doctrine" and held that evidence obtained by state actors in circumstances that would violate the Fourth Amendment if engaged in by federal agents was inadmissible in federal court.[174] Then, in *Mapp v. Ohio*, the Court abrogated *Wolf* to hold that the exclusionary rule did apply to evidence seized by state agents in violation of a defendant's Fourth

171. *See* BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 127 (1983) (noting that in his first few years on the Court, Warren exhibited authoritarian tendencies and a reluctance to vote against a majority of the Court); Yale Kamisar, *The Warren Court and Criminal Justice*, *in* THE WARREN COURT: A RETROSPECTIVE 116 (Bernard Schwartz ed., 1996) ("[W]hen we speak of the 'Warren Court,' we mean the Warren Court that lasted from 1962 (when Arthur Goldberg replaced Felix Frankfurter) to 1969 (when Earl Warren retired).").

172. Sherman v. United States, 356 U.S. 369, 377–78 (1958).

173. In *Lopez v. United States*, the Supreme Court briefly considered a claim of entrapment but held that there was no evidence that the government induced the commission of the offense. *See* Lopez v. United States, 373 U.S. 427 (1963). It therefore did not reach the predisposition inquiry. Similarly, in *Osborn v. United States*, the Court succinctly rejected a claim that the defendant had been entrapped as a matter of law. *See* Osborn v. United States, 385 U.S. 323 (1967), The Court found that the evidence at most showed that the government informant had provided the defendant with the "opportunity or facilities" to commit the offense, "a far cry from entrapment." *Id.* at 331–32.

174. 364 U.S. 206, 208 (1960).

Amendment rights in state court prosecutions (thus rendering *Elkins* moot).[175] As the Court stated in *Mapp*,

> [t]o hold otherwise is to grant the right [to be free from unreasonable searches] but in reality to withhold its privilege and enjoyment. . . . [T]he purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'[176]

In *Gideon v. Wainright*,[177] the Court incorporated the Sixth Amendment right to counsel in all criminal prosecutions. In *Malloy v. Hogan*,[178] the Court incorporated the Fifth Amendment right against self-incrimination. And in *Miranda v. Arizona*[179] and *Massiah v. United States*,[180] the Court applied the exclusionary rule to hold inadmissible statements taken in violation of these Fifth and Sixth Amendment rights.

This was also the era in which the Court was most receptive to novel claims under the Due Process Clause, like those based on unduly suggestive eyewitness identification procedures. For example, in *Foster v. California*,[181] the Court held that the Due Process Clause required the exclusion of an eyewitness identification that was the product of unduly suggestive police procedures, even though such procedures did not necessarily implicate any other more specific guarantee in the Constitution and did not necessarily "shock the conscience."

By the end of the decade—the "heyday" of the Warren Court—almost all of the provisions of the Bill of Rights had been incorporated.[182] Each time the Court incorporated a new right that pertained to police investigatory practices and pretrial procedures, it also applied the exclusionary rule, generally citing the same rationale: that to hold otherwise would render the right meaningless because there would be no

175. Mapp v. Ohio, 367 U.S. 643, 656–60 (1961).
176. *Id.* at 656 (quoting *Elkins*, 364 U.S. at 217).
177. 372 U.S. 335 (1963).
178. 378 U.S. 1 (1964).
179. 384 U.S. 436 (1966).
180. 377 U.S. 201 (1964).
181. 394 U.S. 440 (1969). *Foster* built on the Court's prior identification decisions, including *Stovall v. Denno*, which recognized the possibility of a Due Process right to preclude identifications that were the product of unduly suggestive identification procedures. *See* Stovall v. Denno, 388 U.S. 293 (1967).
182. *See* McDonald v. City of Chi., 130 S.Ct. 3020, 3031–38 (2010); George C. Thomas III, *The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence*, 3 OHIO ST. J. CRIM. L. 169, 171–74 (2005).

incentive for the police to honor it.[183] The exclusionary rule applied not only to evidence obtained directly in contravention of one of the newly-recognized rights, but also to any fruits thereof.[184] In sum, the 1960s marked the zenith of the Court's exercise of its constitutional and supervisory authority to exclude evidence. But it was a decade in which the Court showed little interest in revisiting entrapment. That bridge had been crossed, and the Court was busy with other pressing matters. In the decade that followed, the tone and content of the Court's criminal procedure decisions would change, as a new Chief Justice, Warren Burger, took over from Earl Warren and the Court faced political backlash in the face of rising crime rates. Cases explicating the exclusionary rule would remain an important part of the Court's criminal law docket, although the outcome of those cases would more often result in the recognition of an exception to the exclusionary rule than an extension of its application. It was in this decidedly more conservative era that the Court took up entrapment once again.

B. The 1970s: The Exclusionary Rule in Retreat; Retrenchment in Entrapment Doctrine

1. Developments in the Exclusionary Rule

If the 1960s were the decade in which the Court took an expansive view of criminal defendants' constitutional rights and of the exclusionary rule, the 1970s were the decade in which the Court assessed the consequences of what it had wrought and began to carve out exceptions. For example, in *Schneckloth v. Bustamonte*,[185] the Court recognized a consent exception to the requirement of a warrant before a search of a suspect's home, such that evidence obtained pursuant to a consent search could be admitted at a defendant's trial.[186] The Court posited that the exception presupposed consent *voluntarily* given, but it had not previously addressed what voluntary meant in this context. The Court turned to its confessions jurisprudence for guidance, finding there its "most extensive

183. *See Mapp*, 367 U.S. at 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

184. Wong Sun v. United States, 371 U.S. 471, 488 (1963) (holding that an unlawful search or seizure required suppression of any physical evidence or statements unless the government could show that the evidence had been obtained "by means sufficiently distinguishable to be purged of the primary taint") (quotations omitted).

185. 412 U.S. 218 (1973).

186. *Id.* at 248–49.

judicial exposition of the meaning of 'voluntariness.'"[187] That case law, in turn, articulated a concept of voluntariness that was very much a legal construct, designed to balance the needs of effective law enforcement with the desire to deter unwarranted intrusions on individual rights.[188] It asked not what the defendant would have chosen to do absent the police request for consent or whether the defendant experienced some coercion from the police, but whether the consent was "the product of an *essentially* free and unconstrained choice by its maker[.]"[189] That inquiry required taking into account the totality of the circumstances of the encounter and the defendant's individual characteristics, such as age, education, and prior interactions with the criminal justice system.[190] If the government, as the proponent of the evidence, persuaded a judge at a pretrial hearing that the consent was voluntarily given (assuming an initial showing by the defendant sufficient to trigger a hearing), the resulting evidence could be admitted at trial.

Similarly, in *Neil v. Biggers*[191] and *Manson v. Brathwaite*,[192] the Court established a framework for the admissibility of eyewitness identifications that explicitly balanced the needs of effective law enforcement and reliable adjudications with the desire to deter police misconduct. Conceptually, the Court downgraded the due process right it had articulated in the prior decade's identification cases to an "evidentiary interest."[193] In *Biggers*, the Court explained that "[i]t is the likelihood of misidentification which violates a defendant's right to due process . . . . Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous."[194] "Unlike a warrantless search," the *Manson* Court noted, "a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest."[195] Thus, the standard required of eyewitness identification evidence is "that of fairness as required by the Due Process

187. *Id.* at 223.
188. *Id.* at 224–25.
189. *Id.* at 225 (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)) (emphasis added).
190. *Id.* at 226.
191. 409 U.S. 188 (1972).
192. 432 U.S. 98 (1977).
193. *Id.* at 113 n.14 ("[i]n essence what the *Stovall* due process right protects is an evidentiary interest. . . .").
194. *Biggers*, 409 U.S. at 198.
195. *Manson*, 432 U.S. at 113 n.13.

Clause of the Fourteenth Amendment."[196] If the identification was, in the end, sufficiently reliable, that standard of fairness was satisfied.[197]

The Court articulated a two-part test to assess whether an identification met the Due Process fairness requirement. The first prong of the test focused on the police conduct and asked whether the pretrial identification procedure had been unduly and unnecessarily suggestive, taking into account all of the circumstances of the encounter.[198] The second part of the test asked whether the witness's identification was nevertheless reliable, again taking into account the totality of the circumstances, including the "opportunity of the witness to view the criminal at the time of the crime."[199] The Court refused to limit the test to only the first prong, an approach that the Court called a "*per se*" approach that had been adopted by several of the courts of appeals.[200] Although the *per se* approach served the ends of deterrence, it went "too far since its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant."[201] The Court reasoned that the totality approach also would serve as a deterrent to police misconduct because the police still would guard against unnecessarily

196. *Id.* at 113.

197. *Manson*'s emphasis on the reliability of a witness' identification as the linchpin of admissibility led some to believe that the decision could be read as affording a defendant a due process right to exclude unreliable evidence, or at least unreliable eyewitness identifications, even if in the absence of suggestive conduct by law enforcement. In *Perry v. New Hampshire*, the Supreme Court rejected that argument, holding that state action was a necessary condition for a due process challenge to an eyewitness identification. *See* Perry v. New Hampshire, 132 S. Ct. 716 (2012). The Court explained that a key premise of *Manson* and the cases that preceded it was that exclusion is necessary in certain circumstances "to deter law enforcement use of improper lineups, showups, and photo arrays." *Id.* at 726. If no law enforcement personnel were involved in a pretrial identification, no deterrence purpose would be served by exclusion.

198. *See Biggers*, 409 U.S. at 198.

199. *Manson*, 432 U.S. at 114. The other factors that the Court identified are the "witness' degree of attention" at the time of the crime, "the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation"—all to be measured against the suggestiveness of the identification procedure. *Id.* Many social scientists have since demonstrated that the *Biggers/Manson* factors are not necessarily correlated with the reliability of an identification, and recent scholarship has shown that mistaken identifications are a leading cause of wrongful convictions. *See, e.g.*, BRANDON L. GARRETT, CONVICTING THE INNOCENT WHERE CRIMINAL PROSECUTIONS GO WRONG 45–83 (2011). Some courts now allow expert evidence on the fallibility of eyewitness identifications, give jury instructions about the fallibility of such evidence, and have altered the *Manson* framework for admissibility, citing their state constitutions or supervisory powers. *See, e.g.*, State v. Henderson, 27 A.3d 872 (N.J. 2011) (relying on supervisory powers and due process protections of New Jersey Constitution to require certain police procedures in conducting identification procedures and to alter the *Manson* framework for admissibility of identifications in New Jersey courts). Nevertheless, the *Biggers/Manson* framework still provides the governing test in federal court and in many state courts.

200. *Manson*, 432 U.S. at 110–11.

201. *Id.* at 112.

suggestive procedures for fear that their actions would lead to the exclusion of the evidence.[202] But it would not preclude identifications (frequently the most important evidence in a case) where the identification could otherwise be shown to be reliable. Thus, under *Biggers* and *Manson*, a defendant challenging the admissibility of an identification first must demonstrate that the identification proceeding was unduly or unnecessarily suggestive. If such a showing is made, then the burden shifts to the government to demonstrate that the identification nevertheless was reliable.

2. Developments in Entrapment

The Supreme Court's two decisions involving entrapment from the 1970s reflect the Burger Court's more conservative approach to criminal justice. Justice Rehnquist wrote both opinions for the Court. First, in *United States v. Russell*,[203] the Court rejected the defendant's invitation to revisit the *Sorrells-Sherman* framework for entrapment, describing *Sorrells* as "a precedent of long standing that has already been once reexamined in *Sherman* and implicitly there reaffirmed."[204] Russell argued that the "same factors that led [the] Court to apply the exclusionary rule" in *Weeks*,[205] *Mapp*,[206] and *Miranda*[207] should counsel in favor of barring his prosecution, because the law enforcement methods used in his case (namely, the government agent's provision to Russell of a key ingredient for manufacturing methamphetamine, the crime for which he subsequently was charged) violated "the fundamental principles of due process."[208] The Court found this argument unpersuasive, noting that, unlike those other cases, "the Government's conduct here violated no independent constitutional right of the respondent."[209] But, recalling *Rochin*, the Court held out the possibility that it might "some day be presented with a situation . . . so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a

202. *Id.*

203. 411 U.S. 423 (1973). Justices Douglas, Brennan, Stewart, and Marshall dissented in two separate opinions, again urging that the Court adopt the objective test as articulated by the minority in *Sorrells* and *Sherman*. *Id.* at 438–39, 450.

204. *Id.* at 433.

205. Weeks v. United States, 232 U.S. 383 (1914).

206. Mapp v. Ohio, 367 U.S. 643 (1961).

207. Miranda v. Arizona, 384 U.S. 436 (1966).

208. *Russell*, 411 U.S. at 430.

209. *Id.*

conviction."[210] However, this was not that case. The Court held that the agent's contribution of a legal chemical to a criminal enterprise already underway was "scarcely objectionable,"[211] let alone outrageous.

The Court decided *Hampton v. United States*[212] just three years later. Hampton argued that the facts of his case (which involved a government agent on both sides of a narcotics transaction, one supplying Hampton with the narcotics and the other buying it from him) constituted precisely the type of outrageous government conduct that *Russell* suggested would violate the Due Process Clause.[213] The Court held that the difference between the government's conduct in *Russell* and *Hampton* was "one of degree, not of kind."[214] Writing for a plurality of the Court as to this issue, Justice Rehnquist went on to suggest that *Russell* was wrong to intimate that such a due process claim existed:

> The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the *defendant*. . . . If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law.[215]

This particular passage cost Justice Rehnquist the votes of two members of the Court, Justices Powell and Blackmun, for his opinion. Although they concurred in the judgment of the Court, seeing no distinction between the facts of *Russell* and *Hampton*, they thought the foregoing language went too far in foreclosing the possibility that the Court might, in appropriate circumstances, utilize its supervisory authority over the courts or the Due Process Clause to bar a prosecution presenting more egregious facts.[216] Three members of the Court, Justices Brennan, Stewart, and Marshall,[217] dissented, reprising their support for the objective test advocated in the minority opinions in *Sorrells* and *Sherman*.[218]

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210. *Id.* at 431–32 (distinguishing Rochin v. California, 342 U.S. 165 (1952)).
211. *Id.* at 432.
212. 425 U.S. 484 (1976)
213. *Id.* at 489.
214. *Id.*
215. *Id.* at 490 (citations and quotations omitted).
216. *Id.* at 492–93 (Powell, J., concurring).
217. Justice Stevens did not participate in the decision in *Hampton*. *Id.* at 491.
218. *Id.* at 496 (Brennan, J., dissenting).

In sum, entrapment doctrine emerged from the 1970s essentially unchanged, but with one new added feature: the possibility that the Due Process Clause might be the source of an independent limitation on the government's use of undercover operations. *Russell* suggested that, where the government's conduct was so outrageous as to shock the conscience, it would not matter whether a defendant was predisposed—the courts would not countenance such a prosecution.

C. The 1980s: The Court Again Reaffirms the Sorrells-Sherman *Framework for Entrapment and Expands the Exceptions to the Exclusionary Rule*

In the 1980s, the Court continued on the conservative trajectory charted by the Burger Court of the 1970s with respect to criminal justice and the exclusionary rule in particular.[219] In *Nix v. Williams*,[220] the Court adopted "the ultimate or inevitable discovery exception to the exclusionary rule."[221] Then, in *United States v. Leon*,[222] it adopted the "good faith" exception, holding that evidence need not be excluded if obtained in good faith reliance on a subsequently invalidated search warrant.[223] In both contexts, the Court weighed the costs and benefits of recognizing the exceptions, much as it had in *Schneckloth* regarding consent searches and in *Manson* regarding eyewitness identifications.[224] Finding in each case that the benefit in terms of deterring police misconduct was outweighed by the cost to the judicial system's search for truth, the Court recognized the exception.[225] In *Nix*, for example, the Court observed that allowing the government to use evidence derived from an unlawful search, seizure, or confession put the government in a better position that it would have been in had the defendant's rights not been violated, thus encouraging such violations.[226] But if the government could establish that it would have obtained the evidence from an independent, untainted source, suppression

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219. *See generally* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996) (reviewing the ways in which the Burger Court cut back the application of the exclusionary rule).

220. 467 U.S. 431 (1984).

221. *Id.* at 444.

222. 468 U.S. 897 (1984).

223. *Id.* at 925–26.

224. *See supra* Part II.B.1.

225. *See Leon*, 468 U.S. at 922; *Nix*, 467 U.S. at 443–44. During this same era, the Court also narrowed its view of standing to contest an unconstitutional search and expanded the government's ability to use unconstitutionally obtained evidence for impeachment purposes. *See* Steiker, *supra* note 219, at 2505–27.

226. *Nix*, 467 U.S. at 443.

put the government "in a worse position simply because of some earlier police error or misconduct."[227] Officers still would be deterred from engaging in unlawful behavior because generally they would not be in a position to know whether evidence inevitably would be discovered through independent means. If they did have reason to believe that the evidence could be obtained through independent means, their incentive would be to avoid "any questionable practice" lest the evidence be excluded as a consequence, or the officers face "departmental discipline and civil liability."[228] In *Leon*, the Court applied similar reasoning and held that the deterrent benefits of excluding evidence "obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."[229] The Court noted that the exclusionary rule was a remedy, not a right in and of itself, and that "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."[230]

The Court's sole entrapment decision during this decade was *Mathews v. United States*.[231] Handed down twelve years after *Hampton*, *Mathews* again left the *Sorrells-Sherman* framework intact, and clarified that a defendant need not concede all of the elements of an offense in order to receive a jury instruction on entrapment.[232] Thus, a defendant could claim, for example, that he did not possess the requisite *mens rea* for the offense, but that, if the jury found that he did, he was entrapped. Chief Justice Rehnquist wrote the opinion for the Court, asserting that, in the absence of any Congressional action on entrapment, the courts were left to decide what, if any, limitations should be placed on the availability of the defense.[233] Beyond this relatively modest addition to entrapment doctrine, *Mathews* also signaled the official end to the ongoing debate on the Court over the proper test for entrapment: Justice Brennan wrote a brief concurrence accepting that the Court had "spoken definitively on this point" and that—notwithstanding his ongoing disagreement—the subjective test was now a matter of *stare decisis*.[234]

227. *Id.* (emphasis omitted).
228. *Id.* at 445–46.
229. *Leon*, 468 U.S. at 922.
230. *Id.* at 908 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).
231. 485 U.S. 58 (1988).
232. *Id.* at 62.
233. *Id.* at 66.
234. *Id.* at 66–67 (Brennan, J., concurring).

D. Concluding Observations

In the past three decades, the exclusionary rule has been further eroded.[235] But the essential categories of pretrial suppression motions that courts routinely decide today are based on the Court's decisions from the 1960s through the 1980s. These motions typically include efforts to suppress evidence on account of a violation of *Miranda*, an unlawful search, or a suggestive identification. In deciding many of these motions, courts must evaluate the effect of police action on a particular individual, not a hypothetical reasonable person. The courts must determine whether the defendant's action—*e.g.* his consent to speak or to search—was the product of inherent coercion or was instead "an essentially free and unconstrained choice by its maker[.]"[236] They also frequently must answer a counterfactual question. For example, in the context of challenged eyewitness identification, the court must decide whether the witness would have been able to identify the defendant if he or she had not been exposed to law enforcement's unduly suggestive tactics.[237] In the context of evidence that is arguably tainted by an unlawful search or interrogation, the court must decide whether the police inevitably would have found the evidence through independent means.[238] These questions are analytically similar to the predisposition question at the heart of the entrapment defense, which asks whether the defendant would have been willing to commit the offense absent government inducement. Like the exclusionary rule, the entrapment doctrine under the subjective test strikes a balance between the needs of effective law enforcement and individual rights. Aggressive police methods are not objectionable unless they overbear an individual's will. And even methods that are deemed objectionable will not preclude a conviction if we are confident that the person would have

235. *See, e.g.*, Davis v. United States, 131 S. Ct. 2419, 2427 (2011) (tracing the Court's trajectory away from automatic application of the exclusionary rule for every constitutional violation and holding that exclusionary rule does not apply to evidence seized when police conduct search in objectively reasonable reliance on binding appellate precedent); Herring v. United States, 555 U.S. 135 (2009) (exclusionary rule did not apply where officer reasonably believed there was an outstanding warrant for defendant's arrest but officer's belief was based on negligent bookkeeping error by another police employee); Hudson v. Michigan, 547 U.S. 586 (2006) (violation of "knock and announce" rule for executing search warrant did not require suppression of evidence); Arizona v. Evans, 514 U.S. 1 (1995) (exclusionary rule did not apply where police reasonably relied on mistaken information in a court's database that an arrest warrant was outstanding).

236. Schneckloth v. Bustamonte, 412 U.S. 218, 225–26 (1973) (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

237. Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

238. Nix v. Williams, 467 U.S. 431, 443–44 (1984).

committed the crime anyway—or at least would have been willing to do so as soon as an opportunity presented itself.

In sum, the ways of thinking about police misconduct and its consequences that the Court developed in the 1970s and 1980s for purposes of applying the exclusionary rule grew to resemble the test for entrapment articulated in *Sorrells* and *Sherman* several decades earlier.[239] Yet, the two bodies of law inhabit different realms in our criminal justice system. The exclusionary rule, with its various exceptions, is administered by judges as part of their application of the rules of criminal procedure and evidence. Entrapment, notwithstanding its substantial similarities to the exclusionary rule's balancing of interests and modes of analysis, is considered a doctrine of substantive criminal law. It is an affirmative defense that defeats culpability, which is decided by juries. Only its minor satellite, the *Russell* Due Process claim, is considered a procedural matter for the court to decide. No other substantive affirmative defense derives its rationale at least in part from the desire to deter police misconduct. This is what makes entrapment such an anomaly.

III. THE 1990S TO THE PRESENT: DEVELOPMENTS IN ENTRAPMENT

In the 1990s, the Court decided only one entrapment case, its final entrapment decision to date: *Jacobson v. United States*.[240] Jacobson was the target of a twenty-six month sting operation conducted by various governmental agencies, who contacted Jacobson repeatedly through the mail to solicit his interest in pornography.[241] Some of the mailings purported to be from organizations protesting government censorship of pornography. Others were questionnaires querying Jacobson's sexual interests.[242] When government agents finally sent Jacobson a catalogue of child pornography, he placed the order for the magazine that ultimately resulted in his conviction for receiving child pornography through the mail. Upon his arrest, police found no other child pornography in Jacobson's home, except a single magazine that was lawful at the time it was purchased.[243] The government offered no other evidence of

239. *See supra* Parts I.B–C.

240. 503 U.S. 540 (1992).

241. *Id.* at 542–48.

242. *Id.* The actions of the law enforcement personnel involved in the Jacobson case have long bewildered commentators, who question how and why so many resources were focused on Jacobson. For an interesting account, see Gabriel J. Chin, *The Story of* Jacobson*: Catching Criminals or Creating Crime?*, *in* CRIMINAL LAW STORIES 299 (Donna Coker & Robert Weisberg eds., 2013).

243. *Id.* at 547.

Jacobson's prior receipt or possession of child pornography. Yet at trial, the jury rejected Jacobson's claim of entrapment.[244]

In a 5–4 decision, the United States Supreme Court reversed the conviction. Justice White wrote the opinion for the Court[245] holding that Jacobson had been entrapped as a matter of law because the government had created his predisposition through its twenty-six month mail campaign. In the Court's view, there was insufficient independent evidence that Jacobson was predisposed before the government's investigation, or that his predisposition when he ordered the magazine could be disentangled from the government's actions.[246] The Court concluded:

> Law enforcement officials go too far when they implant in the mind of an innocent person the *disposition* to commit the alleged offense and induce its commission in order that they may prosecute. . . . When the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene.[247]

The dissenting members of the Court (in an opinion authored by Justice O'Connor and joined by Chief Justice Rehnquist and Justices Kennedy, and Scalia) would have upheld the jury's determination that Jacobson was predisposed. In their view, it was "the jury's task, as the conscience of the community, to decide whether Mr. Jacobson was a willing participant in the criminal activity here or an innocent dupe."[248] Moreover, the dissenters disagreed with the majority as to the relevant point in time for measuring predisposition. It was, in their view, when the government first solicited the offense, not when its agents "came on the scene."[249] The dissenters worried that the Court's refinement of the timing question would be interpreted as requiring a "reasonable suspicion" requirement before agents could initiate contact with a defendant.[250]

Notwithstanding the *Jacobson* dissenters' fears, in the twenty years since *Jacobson* was decided, no federal court has held that *Jacobson* requires police to establish that they had reasonable suspicion before

244. *Id.* at 548.
245. Justice White's opinion was joined by Blackmun, Stevens, Souter, and Thomas.
246. *Id.* at 550.
247. *Id.* at 553–54 (citations and quotations omitted).
248. *Id.* at 560–61.
249. *Id.* at 557.
250. *Id.*

initiating an undercover investigation of a target.[251] However, *Jacobson* has had a significant impact on the point in time at which predisposition must be measured, with particular salience for today's complex long-term investigations. Following *Jacobson*, courts have consistently held—and have altered their jury instructions to make clear—that the government must show that the defendant was predisposed before coming into contact with government agents, and must make this showing beyond a reasonable doubt.[252]

Jacobson also has prompted a debate about whether the decision altered the meaning of "predisposition." The vast majority of circuits have held that it did not, and that predisposition means simply that a defendant is mentally "ready and willing" to commit an offense if presented with an opportunity—the generally accepted understanding of predisposition prior to *Jacobson*.[253] However, the Court of Appeals for the Seventh Circuit, in a 6–5 opinion for the *en banc* court written by Judge Posner, interpreted *Jacobson* as adding a "positional" readiness component to the predisposition test.[254] In *United States v. Hollingsworth*, the Seventh Circuit held that predisposition requires a showing that a defendant is "so

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251. Even though the courts have not embraced the idea, a number of commentators have argued that agents should be required to demonstrate probable cause to a neutral magistrate before initiating an undercover investigation. *See* MARCUS, *supra* note 11, §§ 8.04, 8.13–17; Maura F.J. Whelan, *Lead Us Not Into (Unwarranted) Temptation: A Proposal to Replace the Entrapment Defense with a Reasonable-Suspicion Requirement*, 133 U. PA. L. REV. 1193 (1985). As a matter of internal policy, the F.B.I. does require that agents have reasonable suspicion before undertaking an undercover operation in most circumstances. *See* U.S. DEP'T OF JUSTICE, THE ATTY GEN.'S GUIDELINES ON FBI UNDERCOVER OPERATIONS (May 30, 2002), *available at* http://www.justice.gov/ag/readingroom/undercover-fbi-operations.pdf. These internal guidelines do not, however, have the force of law. They also do not apply to cases involving threats to national security or foreign intelligence. *See* U.S. DEP'T OF JUSTICE, THE ATTY GEN.'S GUIDELINES FOR DOMESTIC FBI OPERATIONS 31 (Sept. 29, 2008), *available at* www.justice.gov/ag/readingroom/guidelines.pdf. Undercover operations involving religious or political organizations must be reviewed by FBI Headquarters with participation of the Department of Justice's National Security Division. See *id.*

252. *See, e.g.*, LEONARD B. SAND ET AL., 3–8 MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL ¶ 8.07 (Matthew Bender rev. ed. 2008) (encouraging courts to instruct juries that "a defendant may not be convicted of a crime . . . *if he was not ready and willing to commit the crime before the government officials or agents first spoke to him*) (emphasis added). *See also* PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DIST. CTS. OF THE FIRST CIR. 5.06 Cmt.1 (1997); United States v. Burt, 143 F.3d 1215, 1218–19 (9th Cir. 1998) (reversing for failure to explicitly instruct jury on *Jacobson*'s timing element).

253. *See, e.g.*, United States v. Ulloa, 882 F.2d 41, 44 (2d Cir. 1989) ("Although we have consistently approved the phrase 'ready and willing' as an appropriate definition of the requisite predisposition, we have never distinguished 'readiness' from 'willingness.' The focus of the entrapment inquiry, once inducement by the Government is established, is on the defendant's state of mind.") (citations omitted).

254. United States v. Hollingsworth, 27 F.3d 1196, 1200 (7th Cir. 1994) (en banc) (noting predisposition "has positional as well as dispositional force").

situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so."[255] Reflecting the law-and-economics orientation of its author, *Hollingsworth* suggests that stings which trap positionally ready defendants create no new offenses, but merely "affect[] the timing" of offenses, and therefore constitute a legitimate use of law enforcement resources.[256] But operations that generate new offenses by "exploiting the susceptibility of a weak-minded person" otherwise unlikely to offend represent a waste of scarce government resources.[257] Notwithstanding the appeal of *Hollingsworth*'s introduction of a present dangerousness component to the predisposition test,[258] most other circuits have held that *Jacobson* did not, in fact, work such a refinement of entrapment doctrine.[259] Thus, in most of the United

255. *Id.* at 1200. The Seventh Circuit's view that predisposition implies a positional readiness component grows out of the *Jacobson* Court's observation that a non-predisposed defendant is "an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law." *Id.* at 1199 (quoting *Jacobson*, 503 U.S. at 553–54). The defendants in *Hollingsworth* were an Arkansas dentist and a farmer who owned a foreign banking license. They placed an advertisement in a newspaper offering to sell the license. *Id.* at 1200. A United States Customs agent answered the advertisement and proposed a number of unlawful financial transactions. *Id.* at 1200–01. The defendant with whom he spoke expressed reluctance and broke off contact. *Id.* at 1201. Five months later, the agent again reached out with the same proposition. This time, that defendant agreed and proceeded to engage in a number of money laundering transactions. *Id.* According to Judge Posner, writing for the *en banc* court, the defendants failed the predisposition test on the positional prong because, absent the efforts of the government agent, they were unlikely ever to be presented with the opportunity to engage in the crimes of which they were convicted. *Id.* at 1202. The court observed: "to get into the international money-laundering business you need underworld contacts, financial acumen or assets, access to foreign banks or bankers, or other assets. [The defendants] had none." They were "objectively harmless," unlikely if left to their own devices to run afoul of the law. *Id.*

256. *Id.* at 1203.

257. *Id.* ("The defense of entrapment reflects the view that the proper use of the criminal law in a society such as ours is to prevent harmful conduct for the protection of the law abiding, rather than to purify thoughts and perfect character.").

258. *See* Paul Marcus, *Presenting, Back From the [Almost] Dead, The Entrapment Defense*, 47 FLA. L. REV. 205 (1995) (embracing *Hollingsworth's* readiness test); David D. Tawil, Note, *"Ready? Induce. Sting!": Arguing for the Government's Burden of Proving Readiness in Entrapment Cases*, 98 MICH. L. REV. 2371 (2000) (same).

259. *See* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.8 n.60 (2d ed. 2012) (noting that most other courts have not embraced the *Hollingsworth* "positional predisposition" inquiry). The Fifth Circuit briefly embraced the *Hollingsworth* test but promptly vacated that decision on rehearing en banc. *See* United States v. Knox, 112 F.3d 802 (5th Cir. 1997), r*ehearing en banc granted in part, opinion vacated in part by* United States v. Knox, 120 F.3d 42 (5th Cir. 1997) *and on rehearing in part*, United States v. Brace, 145 F.3d 247 (5th Cir. 1998). Most recently, the Second Circuit rejected *Hollingsworth*'s positional readiness test. *See* United States v. Cromitie, 727 F.3d 194, 217 (2d Cir. 2013) ("A person who has a pre-existing design to commit terrorist acts against United States interests or who promptly agrees to play a part in such activity should not escape punishment just because he was not in a position to obtain Stinger missiles and launch them at United States airplanes. The Government need not leave him at large until a real terrorist suggests such action and supplies real missiles.").

States courts, predisposition refers solely to the defendant's *mental* readiness to commit the crime.[260] Consistent with the Court's approach since *Sorrells*, in all of the Circuits the jury is entrusted with the decision as to whether the defendant was entrapped, with courts retaining the authority "to police the outer limits of the jury's role by ruling in an extreme case, like *Jacobson*, that entrapment has been established as a matter of law."[261] Yet the reported cases suggest that juries generally reject claims of entrapment, even in cases where there is little or no evidence of a prior criminal design, and where government agents played a dominant role in planning and orchestrating the offense, including offering large sums of money.[262] These verdicts are seldom overturned on appeal. The separate due process claim that *Russell* articulated also lives on, at least as a theoretical matter, as a basis for dismissal to be determined solely by the court. However, the bar for such a claim has been raised over time, with most courts suggesting that only conduct involving the infliction of pain or physical or psychological coercion would suffice.[263] Although defendants

260. The model jury instructions in various circuits reflect this formulation. For example, the influential Modern Federal Jury Instructions authored by Southern District of New York Judges Leonard Sand and Jed Rakoff, among others, recommend instructing the jury as follows about the predisposition prong of entrapment:

> While the law permits government agents to trap an unwary criminally-minded person, the law does not permit the government agents to entrap an unwary innocent. Thus, a defendant may not be convicted of a crime if it was the government who gave the defendant the idea to commit the crime, if it was the government who also persuaded him to commit the crime, and *if he was not ready and willing to commit the crime* before the government officials or agents first spoke to him. . . . If you find beyond a reasonable doubt that the defendant was predisposed, that is, ready and willing to commit the offenses charged, and merely was awaiting a favorable opportunity to commit them, then you should find that the defendant was not the victim of entrapment. On the other hand, *if you have a reasonable doubt that the defendant would have committed the offenses charged* without the government's inducements, you must acquit the defendant.

SAND ET AL., *supra* note 252, ¶ 8.07. Some of the Courts of Appeals have further refined their tests for predisposition, identifying particular methods of proving predisposition that will suffice. For example, the First Circuit has held that predisposition may be established by showing a defendant's likely response to an "ordinary" inducement—*i.e.*, one lacking those "special features of the government's conduct" that may have made it improper and overreaching. United States v. Gendron, 18 F.3d 955, 962 (1st Cir. 1994). The Second Circuit has held that predisposition may be established by showing (1) an existing course of similar criminal conduct; (2) an already formed "design" to commit the crime or similar crimes; *or* (3) a willingness to commit the crime, as evidenced by ready response to the government's inducement. *See Cromitie*, 727 F.3d at 227 (Dennis, C.J., dissenting); United States v. Brand, 467 F.3d 179, 191 (2d Cir. 2006); United States v. Brunshtein, 344 F.3d 91, 101–02 (2d Cir. 2003).

261. *Cromitie*, 727 F.3d at 205 n.5.

262. *See* Sherman, *supra* note 24, at 1489–99 (discussing representative cases).

263. *See, e.g.*, *Cromitie*, 727 F.3d at 221; United States v. Al Kassar, 660 F.3d 108, 121 (2d Cir. 2011); United States v. Kelly, 707 F.2d 1460, 1476–77 (D.C. Cir. 1983). *But see* United States v.

who claim entrapment under the *Sorrells-Sherman* framework often concurrently assert the *Russell* due process claim, to date there is only one reported case in which a court ruled for a defendant based on the *Russell* due process claim.[264]

Thus, we are at the point where judicial administration of entrapment doctrine (through the decisions of juries and courts reviewing jury decisions on appeal) does not appear to be doing much work to sort among offenders whom the government has elected to charge. This is so even as members of the press and public, and even some judges, express concern that the government's undercover operations are being abused.[265] It is worth asking, then—since entrapment is the primary mechanism our judicial system has developed for policing undercover operations[266]—whether the courts might adjust their administration of the entrapment defense so as to make it more a more robust check, even without changing the content of the subjective test.

IV. SEMI-PROCEDURALIZING ENTRAPMENT

Recognizing that the entrapment defense reflects concerns sounding *both* in substantive criminal law and in criminal procedure (and understanding how, as a historical matter, entrapment wound up in the substantive criminal law category) points toward one possible modification of current practice: having courts make an initial pretrial ruling on claims of entrapment, much as they routinely rule pretrial on the

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Black, 733 F.3d 294 (9th Cir. 2013) (articulating a more liberal view of the due process outrageous government misconduct test but nevertheless finding that it was not met).

264. *See* United States v. Twigg, 588 F.2d 373 (3d Cir. 1978). For a discussion of *Twigg* and how most due process claims fail, see MARCUS, *supra* note 11, §§ 7.03–04. *See also* United States v. Cromitie, 781 F. Supp. 2d 211, 225 (S.D.N.Y. 2011), *aff'd*, 727 F.3d 194 (2d Cir. 2013) (rejecting outrageous government conduct due process claim in context of terrorism sting and noting that "*Twigg* is *sui generis*: it has never been followed, even in the Third Circuit . . . . The trajectory of the law is away from *Twigg*, not toward it").

265. *See, e.g.*, *Black*, 733 F.3d at 313–18 (Noonan, J., dissenting) (finding government's conduct sufficiently outrageous to warrant dismissal of case); *Cromitie*, 727 F.3d at 227–30 (Jacobs, Chief J., concurring in part and dissenting in part) (finding that defendant was entrapped as a matter of law and was "comically incompetent, possibly the last candidate one would pick as the agent of a conspiracy"); United States v. Cromitie, 2011 WL 1842219, at *8 (S.D.N.Y. May 10, 2011) ("There is not the slightest doubt in my mind that James Cromitie could never have dreamed up the scenario in which he actually became involved."); United States v. Cromitie, 781 F. Supp. 2d 211, 221 (S.D.N.Y. 2011) (rejecting claim of outrageous government misconduct but observing that "the Government appears to have done minimal due diligence"). *See also supra* notes 21–22 and accompanying text; MARCUS, *supra* note 11, § 10.06 (observing that courts have grown more concerned about government entanglement in crime).

266. *See supra* note 28.

admissibility of confessions, evidence obtained pursuant to a search, or identifications. For the reasons set forth below, there is reason to believe that such pretrial rulings would make the entrapment doctrine a more meaningful check on law enforcement action that it is now.

Currently, in most federal courts, entrapment is submitted to the jury if a defendant raises the issue of government inducement by a preponderance of the evidence.[267] Once submitted to the jury, the government bears the burden of proving that the defendant was predisposed beyond a reasonable doubt.[268] A judge can direct an acquittal as a matter of law based on entrapment, if in the Court's opinion no reasonable jury could find beyond a reasonable doubt that the defendant was predisposed. But assuming *some* evidence of predisposition is adduced, such judicial intervention is rare. And it should be, if entrapment is viewed solely as a question of substantive criminal law and culpability, which is traditionally the province of the jury. However, if entrapment is also viewed as a procedural and evidence law question, it opens the door to a pre-trial ruling by a different standard: the burden would be on the government to prove by a preponderance of the evidence that the defendant was predisposed, just as prosecutors bear the burden of proving to a judge by a preponderance that a search, interrogation, or identification was lawful.[269] This is a subtle distinction, but it is meaningful.[270] Prosecutors would have to persuade a judge by a preponderance of the evidence that the defendant was predisposed to commit the offense prior to being approached by government agents, or else the case would not proceed to trial.

The threshold showing that would be required to trigger pre-trial judicial review of the entrapment claim would have to be substantial—like

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267. *See* MARCUS, *supra* note 11, § 6.02C (noting that, although the Supreme Court has never ruled definitively on the subject, the majority rule is to apply a preponderance standard); LAFAVE, *supra* note 62, at 546 (noting that most courts applying the majority, subjective test require defendant to come forward with "some evidence" or show government inducement by a preponderance of the evidence, at which point burden shifts to government to prove predisposition beyond a reasonable doubt).

268. *See id.*

269. *See* WAYNE R. LAFAVE ET AL., 3 CRIM. PROC. § 10.4(c) (3d ed. 2013); Colorado v. Connelly, 479 U.S. 157 (1986); United States v. Matlock, 415 U.S. 164 (1974); Lego v. Twomey, 404 U.S. 477 (1972); Nix v. Williams, 467 U.S. 431, 444 n.5 (1984); Stephen A. Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271, 296 (1975).

270. *See* Michael D. Pepson & John N. Sharifi, Lego v. Twomey*: The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful Convictions*, 47 AM. CRIM. L. REV. 1185 (2010) (discussing the significance of the standard of proof at suppression motions); Timothy J. Martens, Note, *The Standard of Proof for Preliminary Questions of Fact Under the Fourth and Fifth Amendments*, 30 ARIZ. L. REV. 119, 122 (1988); Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1309–11 (1977) (collecting empirical work demonstrating the significance of different burdens of proof to decision-makers).

the first prong of the *Manson* framework, the entrapment inquiry would require a showing that the government's conduct in inducing the offense was unduly suggestive. Here, the nature and extent of the government's inducement would likely be highly relevant. A "market-rate" inducement in the context of an offense for which there is a readily-identifiable market rate generally would be unlikely to be deemed unduly suggestive.[271] If a defendant established this first prong, then the burden would shift to the government to prove that the offense that the defendant committed in response to the inducement was nevertheless a reliable indicator of his predisposition. As courts now evaluate the various factors that inform the second prong of the *Manson* framework, they would take into account the various factors that bear on predisposition, including any relevant criminal history, the extent of the inducement, and the readiness of the defendant's response. Only if the court were satisfied that the defendant was predisposed to commit the offense would the case go to the jury, much as courts must decide in advance whether an allegedly suggestive identification is nevertheless sufficiently reliable to be presented to the jury.

This modification would focus the parties and the court on the entrapment issue, and the specific evidence bearing on it, at a significantly earlier stage in the proceedings than is presently the case. An important correlate would be that prosecutors would be required to provide discovery related to the entrapment issue, such as information about the defendants' prior acts suggestive of predisposition, and information about an informant's prior statements, payment, and criminal record, in conjunction with a pre-trial entrapment hearing—far earlier than such information normally would be provided.[272] Not only would the gathering and disclosure of such information flag at an early stage any potential problems with the government's case; it also would give a defendant a more meaningful opportunity to decide whether to plead guilty, or—if not—whether to pursue an entrapment defense at trial.

Just as in the case of other pretrial evidentiary rulings, it is not clear that the Constitution or any other legal constraint *requires* that a judge,

271. Many scholars have advocated looking at "market rates" as part of the entrapment inquiry. *See, e.g.*, Allen et al., *supra* note 62.

272. *See* 18 U.S.C. § 3500 (1970) (in any criminal prosecution, a witness's prior statements near not be produced prior to the witness's direct testimony at trial). Under the Federal Rules of Criminal Procedure, a witness's prior statement must be produced after a witness has testified on direct in connection with a motion to suppress evidence. *See* FED. R. CRIM. P. 26.2(a), 12(h).

rather than a jury, make this decision.[273] But practical considerations—chief among them the expense and waste of judicial resources associated with empanelling two different juries—strongly argue in favor of entrusting the decision to the trial judge. Moreover, on account of the Warren Court's revolution in criminal procedure (and the Burger Court's counterrevolution),[274] federal judges are accustomed to analyzing the type of counterfactual question and the balancing of interests presented by the predisposition inquiry in other contexts, especially other types of suppression motions.[275] Although juries routinely are asked to determine a defendant's mental state at the time of an offense, empirical studies suggest that juries may have difficulty applying highly nuanced categories of mental states,[276] of which predisposition surely is one.[277] To ask juries to determine a defendant's mental state at a *prior* point in time in addition to the defendant's mental state at the time of the offense may be assigning the jury a task that is outside of its core competency.

Given their Article III tenure, federal judges may also be less likely than jurors—who must face one another in the jury room and their communities afterwards—to be afraid to rule against the government in an unpopular case.[278] Although the criminal jury traditionally has served as

273. *See* Jackson v. Denno, 378 U.S. 368, 391 n.19 (1964) (holding that states could, if they choose, have the voluntariness of a confession be determined by a jury rather than a judge, so long as a different jury would determine guilt if the first jury held that the confession was involuntary). Some commentators have argued that juries should be substituted for judges in making initial pretrial rulings on the suppression of evidence. *See, e.g.*, George C. Thomas III & Barry S. Pollack, *Saving Rights from a Remedy: A Societal View of the Fourth Amendment*, 73 B.U. L. REV. 147, 150 (1993) (arguing that juries should replace judges in deciding pre-trial motions to suppress under the Fourth Amendment); Meghan J. Ryan, *Juries and the Criminal Constitution*, 65 ALA. L. REV. (forthcoming 2014), *available at* http://ssrn.com/abstract=2283393 (arguing for jury involvement in pretrial suppression motions under the Fourth Amendment because juries will be more competent than judges in determining whether an officer's conduct has violated society's reasonable expectation of privacy).

274. *See* Steiker, *supra* note 219.

275. Of course, judges also answer counterfactual questions in a number of other contexts, including when reviewing convictions for harmless error or prejudice in a number of contexts.

276. *See, e.g.*, Francis X. Shen et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306 (2011); Kevin Jon Heller, *The Cognitive Psychology of Mens Rea*, 99 J. CRIM. L. & CRIMINOLOGY 317 (2009).

277. *See* United States v. Cromitie, 727 F.3d 194, 208–09 (2d Cir. 2013) (discussing complexity of predisposition as a mental state).

278. Although scholars have questioned for years whether judges sitting as triers of fact are in fact better able to disregard inadmissible evidence than are juries, our entire evidentiary system, including the exclusionary rule, is predicated on an assumption that judges are able to make such independent judgments. A recent set of experiments found that "evidence obtained in violation of constitutional rights [is] the one category in which judges actually could reliably and deliberately disregard inadmissible information." Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 331 (2013) (referencing Andrew J. Wistrich et al., *Can Judges Ignore Admissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005)).

the "'defense against arbitrary law enforcement,'"[279] there is a compelling argument that entrapment, especially in highly sensational cases like those involving terrorism, is different and that the jury may not be the entity best suited to its application.[280] Indeed, studies have shown that most members of the public do not see entrapment as negating culpability, but instead would prefer to see it treated as a mitigating factor at sentencing.[281]

And in cases where the defense of entrapment is raised in the alternative to a claim that the defendant did not commit the offense—as, for example, in the complex terrorism conspiracy cases of recent years where there may be a real dispute about whether a defendant joined a conspiracy—there are additional reasons to be concerned about the ability of the jury to render a fair verdict on guilt when it is simultaneously presented with the evidence that bears primarily on predisposition.[282] This

279. Jacobson v. United States, 503 U.S. 540, 561 (1992) (O'Connor, J., dissenting) (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).

280. At least one other commentator has made a similar observation. *See* Laura Gardner Webster, *Building a Better Mousetrap: Reconstructing Federal Entrapment Theory from* Sorrells *to* Mathews, 32 ARIZ. L. REV. 605, 639–40 (1990) (arguing that juries are not well suited to decide entrapment because of their majoritarian tendencies and their inability to "recognize and express the values which are compromised by police overreaching"). Others have argued that, in general, the notion of juries as the bulwark against arbitrary or overzealous government is outdated, and that "in modern times neither criminal law doctrine nor criminal justice practices allow juries to function effectively in that role." Douglas A. Berman, *Should Juries Be The Guide for Adventures Through* Apprendi-*Land*, 109 COLUM. L. REV. SIDEBAR 65, 67 (2009). *See also* Kate Stith-Cabranes, *The Criminal Jury in Our Time*, 3 VA. J. SOC. POL'Y & L. 133, 139 (1995) ((tracing shrinking authority of criminal juries, as "courts increasingly distinguished between issues of law and issues of fact and sought greater certainty in the application of the law").

281. *See* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 152–55 (1995). *See also* Roach, *supra* note 35, at 1460–68 (explaining that entrapment is treated as a mitigating issue in sentencing in other countries).

282. When juries are simultaneously presented with evidence bearing on guilt and predisposition—and are simultaneously asked to decide both issues—there may be a tendency to conflate the one with the other. *See* Kevin A. Smith, Note, *Psychology, Factfinding, and Entrapment*, 103 MICH. L. REV. 759, 775–79 (2005) (raising concern that jurors will infer predisposition from defendant's commission of the offense); McAdams, *supra* note 20, at 181 (discussing the phenomenon of hindsight bias and the likelihood that, if a defendant accepts an inducement and commits an offense, "fact-finders will tend to over-attribute that behavior to the person's willingness to offend rather than the undercover temptation"). Recognizing this problem, courts could give specific instructions alerting jurors to the phenomenon of hindsight bias. But this seems like the kind of instruction that may not be a sufficient remedy for the problem it seeks to address. In a number of other contexts, we acknowledge the human limitations of the jury and the ineffectiveness of limiting instructions. *See, e.g.*, Bruton v. United States, 391 U.S. 123 (1968) (requiring at a joint trial that one defendant's confession, if facially incriminating of the other defendant, either be excluded or redacted); Jackson v. Denno, 378 U.S. 368 (1964) (requiring that voluntariness of defendant's confession be determined prior to trial); *see also* Old Chief v. United States, 519 U.S. 172 (1997) (district court abused its discretion under Federal Rule of Evidence 403 in admitting evidence of a defendant's prior conviction). If the jury's likely inability to follow instructions to disregard evidence, or consider it for a limited purpose, would result in an outcome that is unacceptable, we ought to consider alternatives, including removing the evidence from the jury's consideration. *See* David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65

is especially so in the context of long-term terrorism investigations, where such evidence may include not only a defendant's prior crimes, but also religious affiliation and political ideology.[283] In such cases, the *actus reus* of the offense—usually conspiracy—is already quite amorphous, making the question of predisposition even harder to separate from the defendant's commission of the crime itself. (What does it mean to be predisposed to agree to provide material support to a terrorist organization?) Moreover, in such cases, identifying the moment of first government contact with a defendant (as contrasted with the moment of solicitation), as *Jacobson* requires, is frequently difficult.[284] Finally, by issuing decisions that are specific to the entrapment question, judges can help build a body of law that may provide more useful guidance and more meaningful constraints for law enforcement than general jury verdicts.[285]

All of these are compelling reasons to incorporate a pretrial ruling by the trial judge on entrapment—not necessarily as a substitute for a jury decision at the conclusion of the case, but as a screening mechanism that, in appropriate cases, could prevent the case from going to the jury at all. This is similar to the approach that courts have followed for decades in the context of confessions, searches, and identifications. The rationale for such a pretrial ruling would be the same as that for eyewitness identifications—*i.e.*, that a defendant has a due process interest, inherent in the Due Process Clause's guarantee of basic fairness, that places limits on how the government can go about collecting evidence to be used in a criminal

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STAN. L. REV. 407, 446 (2013) (arguing in favor of a "context-specific weighing of the likelihood that an evidentiary instruction will work and the costs of it failing"). The remedy suggested here is a belt-and-suspenders approach: use careful limiting instructions, but also require a pretrial decision by the trial judge.

283. *See* Sherman, *supra* note 24, at 1504–07.

284. For example, in *Cromitie*, the confidential informant first met one of the defendants at his mosque approximately three months before the FBI opened a formal investigation, and four months before the FBI started recording their conversations. During that time, the defendant and the informant had approximately five unrecorded meetings. The sting then continued for another eighteen months, until the defendants were arrested after placing "bombs" at a synagogue. *See* United States v. Cromitie, 781 F. Supp. 2d 211, 215–20 (S.D.N.Y. 2011). In *United States v. Lakhani*, the informant's encounters with the defendant, who ultimately was convicted of attempting to provide material support to terrorists, brokering unlawful arms sales, and other charges, spanned nearly two years. *See* United States v. Lakhani, 480 F.3d 171 (3d Cir. 2007). In *United States v. Al-Moayad*, the informant knew the defendant in Yemen for six years prior to becoming a confidential informant for the FBI. *See* United States v. Al-Moayad, 545 F.3d 139 (2d Cir. 2008).

285. *See* Webster, *supra* note 280, at 641. Some commentators have suggested that this concern is overblown, in that the very fact-bound nature of any such decision will prevent the courts from developing consistent rules. *See, e.g.*, Park, *supra* note 100, at 269. Others have argued in other related contexts that consistency, even if it could be achieved, is less important than just adjudication, which a jury is more likely to achieve. *See* Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 735 (1993).

prosecution. Thus, a defendant would have a cognizable due process interest in excluding evidence obtained via entrapment only where he was induced to commit a crime by government agents.[286] Had the Supreme Court first considered entrapment a few decades later than it did, this might well be the approach we already would have today.

CONCLUSION

For over eighty years, federal courts have characterized entrapment as a matter of substantive criminal law rather than criminal procedure. But it has never been an easy fit. Because the entrapment defense is available only when government agents cause a person to engage in criminal conduct, it feels like a question of procedure rather than substance, analogous to whether government agents abided by the rules in conducting a search or interrogation. In point of fact, entrapment wound up in the substantive criminal law category largely by historical happenstance, on account of when the Supreme Court first considered the defense. The Supreme Court placed it there in *Sorrells* in 1932 as a consequence of the Court's decision to ground the doctrine in its interpretation of the Prohibition Act. Because the Court construed the statute as containing an implied exception, it assumed that a defense based on the application of the exception was in the nature of an affirmative defense to guilt. And affirmative defenses have traditionally been submitted to the jury.

Over time, the *Sorrells* view of entrapment became fixed as a matter of *stare decisis*. This remained so even as the Court developed its exclusionary rule jurisprudence for violations of defendants' criminal procedural rights, which came to resemble the test for predisposition the Court had developed in terms of its animating concerns and modes of analysis. Like the exclusionary rule, entrapment reflects an accommodation between two competing interests—on the one hand, a recognition of the need "for the effective enforcement of criminal laws," and, on the other, "society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness."[287]

Appreciating the similarities between the Court's entrapment doctrine and its exclusionary rule jurisprudence opens the door to a pre-trial judicial ruling on claims of entrapment. In the absence of any

286. *See* Perry v. New Hampshire, 132 S. Ct. 716 (2012) (explaining that the Due Process Clause gives individuals protections against efforts by law enforcement to collect evidence that do not apply to private actors).

287. Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973).

Congressional action on entrapment—and to date there still has been none—the courts are left to decide what, if any, limits and procedural rules should apply to the administration of the entrapment defense.[288] Now that we are in our second post-9/11 decade, with undercover operations as critical as ever but the legitimacy of such operations being called into question, it is important that the entrapment defense have a firm theoretical foundation and that it be implemented effectively. Recognizing entrapment's anomalous nature—partly a doctrine of substantive criminal law and partly a doctrine of criminal procedure—can help get us there.

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288. *See* Mathews v. United States, 485 U.S. 58, 66 (1988). *See also* Fred Warren Bennett, *From* Sorrells *to* Jacobson*: Reflections on Six Decades of Entrapment Law, and Related Defenses, in Federal Court*, 27 WAKE FOREST L. REV. 829, 846 (1992) ("Because of its longstanding preoccupation with the fundamental substantive nature of the defense, the Supreme Court has had little to say about entrapment's procedural incidents.") (emphasis omitted).