

**TO CATCH THE LION, TETHER THE GOAT¹:
ENTRAPMENT, CONSPIRACY, AND SENTENCING
MANIPULATION**

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1. JOHN LECARRE, *THE LITTLE DRUMMER GIRL* 302 (Knopf Press 1983).

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I. INTRODUCTION

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

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

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

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

5. See *People v. Claypool*, 684 N.W.2d 278, 280 (Mich. 2004) (stating that “if it can be objectively and verifiably shown that police conduct or some other precipitating cause altered a

the end, “sentencing entrapment” is a subset of the greater entrapment defense where the government creates or induces a far greater crime than the suspect originally intends.⁶ Once a *reticent* suspect agrees to commit a greater crime, then the suspect’s sentence, which is frequently mandatory, is increased dramatically.⁷ The government’s primary motivation is to increase their bargaining power over the suspect’s charges and sentence.⁸

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

defendant’s intent, that altered intent can be considered by the sentencing judge as a ground for a downward sentence departure”).

6. See Robert S. Johnson, *The Ills of the Federal Sentencing Guidelines and the Search for a Cure: Using Sentence Entrapment to Combat Governmental Manipulation of Sentencing*, 49 VAND. L. REV. 197, 198, 215 (1996).

7. See, e.g., *United States v. Cannon*, 88 F.3d 1495, 1506 (8th Cir. 1996) (increasing defendant’s sentence by 25 years for briefly possessing an unloaded machine gun), *abrogated by* *Watson v. United States*, 128 S. Ct. 579 (2007). In *Watson*, the Supreme Court held that trading drugs for a firearm does not constitute “use” of that firearm under a statute setting mandatory minimum sentences for use of a firearm during a drug trafficking crime. *Watson*, 128 S. Ct. at 586. In so holding, the Supreme Court abrogated Federal Appellate Court holdings to the contrary, including *Cannon. Id.*

8. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL PROCEDURE* 675 (3rd ed. 2005) (noting some claim that “prosecutors typically divide a criminal transaction into as many offenses as they can and charge them all”).

9. See *United States v. Miller*, 71 F.3d 813, 815 (11th Cir. 1996). The crack-powder cocaine bifurcation has been diminished with a recent Supreme Court decision that allows a judge the discretion to take the discrepancy into consideration, but the statute still allows a greater sentence for crack cocaine. See *Kimbrough v. United States*, 128 S. Ct. 558, 572 (2007) (holding that federal sentencing judges are not bound by the United States Sentencing Guidelines’ 100:1 crack-to-powder ratio); see also *Gall v. United States*, 128 S. Ct. 586, 595 (2007) (holding that federal sentencing judges are not required to find “extraordinary circumstances” before significantly deviating from the guidelines range).

10. See *Cannon*, 88 F.3d at 1500-501, 1506, *abrogated by* *Watson v. United States* 128 S. Ct. 579 (2007). For an explanation of the abrogation of *Cannon*, see *supra* note 7.

11. See *United States v. Campbell*, 935 F.2d 39, 44-45 (4th Cir. 1991) (holding that the school-zone statute, 21 U.S.C. § 860(a), which doubles the punishment if drugs are sold within one thousand feet of a school, is constitutional, regardless of whether the drug transaction affects the children); see also *United States v. Cross*, 900 F.2d 66, 69 (6th Cir. 1990) (holding that the school zone statute does not require the defendant to have knowledge that a school building exists one thousand feet from the drug transaction); see generally, William G. Phelps, *Validity and*

undercover agent places more drugs in the bundle than the initial agreement.¹² The suspect's ignorance of the specific amount is immaterial and the suspect is sentenced based on the higher amount of drugs.¹³

There is, admittedly, little sympathy for a criminal suspect who is willing to commit a crime, and with some inducement, is willing to commit an even greater crime. Such a suspect has illustrated his or her susceptibility and has established empirical proof of dangerousness. On the other hand, undercover agents and undercover informants are frequently motivated by financial rewards, by job promotions, by commissions, by reduced charges, by reduced sentences, by contingent fees, and by favorable treatment to corral the suspect(s) into a higher grade of offense(s).¹⁴ One of the most indelible characteristics of many prosecutors' offices is the basic drive for excessive charges, in part to stimulate guilty pleas.¹⁵ The pay-off in "shock and awe" headlines alone is worth re-election.¹⁶

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

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

12. *United States v. Ekwunoh*, 12 F.3d 368, 369 (2d Cir. 1993).

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

14. See George E. Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203, 286-91 (1975); see also Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 805-15 (1997) (assessing investigative lies in undercover work, searches and seizures, and interrogation).

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

16. M. Daniel Gibbard, *5-Year Drug Sting Yields 15 Arrests in Evanston: Disciples' Brass Quietly Removed*, CHI. TRIB., Apr. 21, 2004; Ralph Blumenthal, *A Zealous Prosecutor of Drug Criminals Becomes One Himself*, N. Y. TIMES, Feb. 15, 2005, at A14 (noting how a self-righteous law and order prosecutor was stealing drugs from the property room – discovered through undercover investigation).

undercover operation ensnares perpetrators who intend factually impossible crimes, as long as an overt step is taken.

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

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

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

17. See *Apprendi v. New Jersey*, 530 U.S. 466, 468-69 (2000) (examining racial hatred sentencing enhancement statute).

18. *Id.* at 494-95.

19. See, e.g., *United States v. Lora*, 129 F. Supp. 2d 77, 89-90 (D. Mass. 2001) (discussing sentencing entrapment and sentencing manipulation).

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

21. *United States v. Miller*, 71 F.3d 813 (11th Cir. 1996). In *Miller*, where the accused who sold powder cocaine was predisposed to sell crack, the court held that sentencing entrapment is a defunct doctrine and impermissible in the 11th Circuit. *Id.* at 818. In addition, the defense theory of partial entrapment is not permissible either. *Id.* A number of federal courts do not recognize a partial entrapment defense. In the federal arena, the First, Seventh, Eighth, and Ninth Circuits accept the

Part VI considers entrapment through the lenses of conspiracy and governmental influences on the suspect's *mens rea*. Conspiracy prosecutions for imaginary crimes are abundant, where impossibility is no defense. Internet pornography and fantasy speech are convenient targets for high-tech sting operations. Part VII unravels Corruption of Police forces and disreputable undercover operations which have lead to the faulty incarceration of hundreds of minorities. Tulia, Texas is a model example of jurisprudential corruption invoking Civil Rights remedies, Reconciliation Committees, statutory changes, and Standards for Undercover Operations. The Article concludes with the overlay of entrapment and manipulation on our body politic.

II. COMMON LAW ENTRAPMENT: PRINCIPLES OF EQUITY

A. Entrapment by Estoppel

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

doctrine of sentencing entrapment, which focuses on the defendant's predisposition. *See, e.g.*, *United States v. Searcy*, 233 F.3d 1096, 1101 (8th Cir. 2000) (accepting doctrine as defense; proper analysis focuses on defendant's predisposition). They accept sentencing entrapment, but few courts find it under the facts. Typically, there are other facts indicative of the accused's willingness to engage in a higher crime. *See, e.g.*, *United States v. Lacey*, 86 F.3d 956, 962-63, 966 (10th Cir. 1996) (finding sufficient evidence of defendant's engagement in large drug deals to overcome his argument of sentencing entrapment or manipulation).

22. *Sorrells v. United States*, 287 U.S. 435, 445 (1932). (stating that "[n]either courts of equity nor those administering legal remedies tolerate the use of their process to consummate a wrong." *Id.* at 455 (Roberts, J., concurring).

23. *Topolewski v. State*, 109 N.W. 1037, 1039, 1040-41 (Wis. 1906); *see also Johnson, supra* note 6.

24. DAN DOBBS, *LAW OF REMEDIES* 84 (2d ed. 1993).

25. *Id.*

26. *See generally Johnson, supra* note 6; *State v. Ragan*, 288 P. 218, 219-20 (Wash. 1930) (holding evidence not to show entrapment, but merely furnishing an opportunity to commit bootlegging offense in illicit traffic in intoxicating liquor); *City of Seattle v. Gleiser*, 189 P.2d 967, 967, 971-72 (Wash. 1948) (affording opportunity to aid and abet prostitution is not entrapment).

A variation of the estoppel claim is the mistake of law doctrine of reliance.²⁷ A person may raise a mistake of law defense, if actions were induced by government solicitation or interpretation.²⁸ In *Raley v. Ohio*,²⁹ for instance, the Supreme Court held that a defendant's conviction for refusing to answer questions about Communist activities before a State Commission violated the Due Process Clause of the 14th Amendment because defendants were entrapped by being assured that the exercise of the 5th Amendment privilege against self-incrimination would shield them from liability.³⁰ Under mistake of law principles, a person's crime is excused if that person reasonably relied on an official inducement or official interpretation.³¹ The entrapment by estoppel defense similarly applies where a person acts on reasonable governmental assurances or inducements that the actions are proper.³² Undercover operations, however, fall short of estoppel unless the implicit conduct of the undercover operative is so brazen as to create the crime.³³ If so, the government has forfeited its right to prosecute.³⁴

B. Entrapment as Unclean Hands

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

27. See DRESSLER, *supra* note 8, at 168 (discussing Reasonable-Reliance Doctrine (entrapment by estoppel)).

28. *Id.* at 169.

29. *Raley v. Ohio*, 360 U.S. 423, 423 (1959).

30. *Id.* at 441.

31. *Id.* at 425-26.

32. *United States v. Levin*, 973 F.2d 463, 468 (6th Cir. 1992) (citing *United States v. Smith*, 940 F.2d 710, 714 (1st Cir. 1991)). In California, the entrapment by estoppel defense allows private citizens to contest criminal charges because they had been told by the authorities in advance they could not be prosecuted for certain acts. *People v. Chacon*, 150 P.3d 755, 761-62 (Cal. 2007). This is a type of Mistake of Law defense. Interestingly enough, the entrapment by estoppel defense is not available to a public official who acts in reliance upon advice provided by a government lawyer who serves at his or her pleasure. *Id.* at 763. The Court explains that, "[i]f permitted to rely on the defense of entrapment by estoppel, such an official could insulate herself from prosecution by influencing an appointee to provide the advice she seeks." *Id.*

33. *U.S. v. Healy*, 202 F. 349, 349 (D. Mont. 1913) (stating that "[d]ecoys are permissible to entrap criminals, but not to create them . . . Where a statute . . . makes an act a crime regardless of the actor's intent or knowledge, ignorance of fact is no excuse if the act be done voluntarily; but when done upon solicitation by the government's instrument to that end ignorance of fact stamps the act as involuntary, and . . . estopps the government from a conviction."); See also *Johnson, supra* note 6.

34. *Healy*, 202 F. at 349; see also *Johnson, supra* note 6.

the prosecution.³⁵ The courts' jurisdictional moral standing is jeopardized if a court aids a prosecution initiated from corrupt practices. "It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law."³⁶

Early American cases concerning entrapment distinguished active versus passive participation as the determining line whether the government created the criminal intent.³⁷ These cases concerned the distribution of intoxicating liquors, pornography, and theft – similar to issues of today.³⁸ Government over-reaching violates the equitable due process principles, exemplified in such cases as *United States v. Jacobson*,³⁹ where the government so sullied itself as a pornographic agent as to demean the entire prosecution with unclean hands.⁴⁰

C. Entrapment as Consent

Entrapment principles, argued as consent, extend to those prosecutions which invite crimes and lure potential offenders in order to prosecute tempted individuals.⁴¹ In *Topolewski v. State*,⁴² for instance, the manager of a meat packing company intentionally left meat on the loading platform as bait.⁴³ The employees encouraged the suspect to take the meat and they arranged a wagon for the suspect's escape.⁴⁴ The court found such actions amounted to entrapment and consent.⁴⁵ Similarly, equitable entrapment principles of consent applied to slaves in early America, when slaves were induced by their owners to sell and buy liquor for the owners, who belatedly claimed the slaves committed theft.⁴⁶

35. See Craig E. Davis, *Equity: Clean Hands Doctrine: Tradename Infringement: Relief Awarded on Condition That Complainant Cleanse His Hands*, 43 MICH. L. REV. 409, 409 (1944).

36. *Sorrells v. United States*, 287 U.S. 435, 457 (1932).

37. *Grimm v. United States*, 156 U.S. 604, 610-11 (1895) (concerning pornography sent through the mails, where the Court recognized that the participation of the detectives was passive investigation).

38. See generally Johnson, *supra* note 6.

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

40. *Id.* In *Jacobson*, the government created several fictitious pornographic sites and through the years lured a farmer to finally subscribe to *Bare Boys* magazine. *Id.* at 542-43.

41. See Jonathan C. Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 VA. L. REV. 1011, 1014 (1987).

42. *Topolewski v. State*, 109 N.W. 1037, 1039 (Wis. 1906).

43. *Id.*

44. *Id.*

45. *Id.* (stating that "the purpose on the part of the latter being to entrap and bring to justice one thought to be disposed to commit the offense of larceny . . .").

46. *State v. Geze*, 1853 WL 4169 at *1 (La. 1853) (holding it constitutes entrapment to sell liquor to a slave).

Early entrapment principles sought to remedy manipulations which undermined the “social contract” established between the government and its people to encourage social benefits, not create societal harms.⁴⁷ “The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it.”⁴⁸ If a crime originated in the mind of the government and the defendant was lured into the criminal act, then no prosecution was valid.⁴⁹ Undercover investigations are necessary tools to unravel surreptitious and intricate crimes. A certain leeway is granted where the government must infiltrate the criminal mind and expose those bent on clandestine and specialized offenses.⁵⁰ “Artifice and stratagem may be employed to catch those engaged in criminal enterprises.”⁵¹ “You want to catch the lion, first you tether the goat.”⁵²

III. UNDERCOVER OPERATIONS AND CURRENT ENTRAPMENT DOCTRINE

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

47. *Butts v. United States*, 273 F. 35, 38 (1921).

48. *Id.* (holding that defendant’s prosecution for the sale of morphine amounted to entrapment).

49. *Id.*

50. *Sorrells v. United States*, 287 U.S. 435, 441 (1932).

51. *Id.*

52. LECARRE, *supra* note 1, at 302 (providing a fictional account of a prolonged pursuit by Israeli intelligence agents to capture a deceptive Palestinian terrorist leader).

53. *See generally* CHARLES BOWDEN, *A SHADOW IN THE CITY, CONFESSIONS OF AN UNDERCOVER DRUG WARRIOR* (2005) (providing a literary account of an undercover drug agent, who orchestrates “take downs” with imagination and obsessive precision. Years have eroded the certainty about the meaning of his work, yet the “bust goes down” in a clatter of broken lives).

54. Every crime must have a *mens rea*, intent component, and *actus reus*, voluntary act component. *In re Winship*, 397 U.S. 358, 364 (1970); *see also* DRESSLER, *supra* note 8, at 115.

Undercover investigations are embedded in our criminal and literary folklore.⁵⁵ There are intricate, sophisticated, and surreptitious crimes that only the deceptive undercover police informant can unravel. The informant may be a police agent with a dramatic skill or an informant who fears criminal prosecution.⁵⁶ Police officials, behind the scenes, direct the agent or informant on the objectives and progress of the operation.⁵⁷ In theory, the undercover operation is a conspiratorial action. In deed, the undercover operation is the lie that tells the truth.⁵⁸

When the undercover operation promotes excessive inducements on reluctant suspects, therein lies the defense of entrapment.⁵⁹ The government, through its manipulative acts, may create the crime or prey upon natural human weaknesses.⁶⁰ Depending on a person's status, needs, addictions, or desires, "the only salient question is whether a person's price has been met" to accommodate his or her weakness, be it money, sex, drugs, or any of the deadly sins.⁶¹

As previously stated, the entrapment doctrine is a product of equitable common law principles. It is also a judicial creation through the court's supervisory role to deter governmental excessiveness, to constrain outrageous police behavior, and to promote judicial integrity.⁶² "Congress could not have intended criminal punishment for a defendant who has

55. See, e.g., BOWDEN, *supra* note 53.

56. See Slobogin, *supra* note 14, at 805-08 (assessing investigative lies in undercover work, searches and seizures, and interrogation).

57. *Id.*

58. *Id.* at 776.

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

60. See *Lively*, 921 P.2d at 1048-49; *Cuervelo*, 949 F.2d at 568-69.

61. Ronald J. Allen, Melissa Luttrell, & Anne Kreeger, *Clarifying Entrapment*, 89 J. CRIM. L. & CRIMINOLOGY 407, 413 (1999) (stating that "[t]he only salient question is whether a person's price has been met, not whether he has one, since by hypothesis everyone but the saintly does . . . [T]he person who does not take the bait almost surely would take a higher, even if greatly higher, bait. The failure to take this one is evidence of his price, but not of predisposition."); see also Louis Michael Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111, 146 (1981). The seven deadly sins are "pride, covetousness, lust, anger, gluttony, envy, and sloth." Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/deadly%20sin>.

62. *Lively*, 921 P.2d at 1044-45; see also *Sorrells v. United States*, 287 U.S. 435, 457 (1932), where Justice Roberts, concurring, invoked the court's supervisory role and identified entrapment as a legitimate defense in order to protect "the purity of [the court's] own temple . . ."

committed all the elements of a proscribed offense but was induced to commit them by the government.”⁶³

In determining entrapment, the courts consider (1) whether the police instigated the crime or merely infiltrated an ongoing criminal activity, (2) whether the undercover agent was a passive or active accomplice in the criminal offense, (3) whether the undercover informant overcame defendant’s reluctance through pleas of sympathy, promises of excessive profits, or persistent solicitations, and (4) whether the overall police conduct was “repugnant to a sense of justice.”⁶⁴ Some states have adopted statutory entrapment defenses.⁶⁵ The Washington legislature, for instance, provides:

“(1) In any prosecution for a crime, it is a defense that:

- (a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and
- (b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.

(2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.”⁶⁶

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

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

The entrapment defense causes weak people to make strong excuses. In the majority of jurisdictions, entrapment is governed by the subjective test, which focuses on whether a person is "predisposed" to commit the criminal transaction.⁶⁷ If a person is predisposed, or inclined, to commit the criminal transaction, then the police inducement or offer is acceptable.⁶⁸ Predisposition is quite informal and may be based on suspicion, hearsay,

63. United States v. Russell, 411 U.S. 423, 435 (1973); *see generally* Anthony M. Dillof, *Unraveling Unlawful Entrapment*, 94 J. CRIM. L. & CRIMINOLOGY 827, 859 (2004).

64. *Lively*, 921 P.2d at 1046.

65. *Id.* at 1040-41. *See also* Wash. Rev. Code Ann. § 9A.16.070 (West 1975).

66. RCW 9A.16.070.

67. *See, e.g., Sorrells*, 287 U.S. at 442; *Sherman v. United States*, 356 U.S. 369, 372 (1958); *Russell*, 411 U.S. at 435-36 (being the trifecta of Supreme Court cases affirming the subjective test).

68. *Russell*, 411 U.S. at 436.

rumor, reputation, prior record, or the suspect's eagerness to commit the offense.⁶⁹ To determine entrapment, a vague line is drawn separating the unwary innocent person from the unwary criminal.⁷⁰ Frequently, sting operations for prostitution, drugs, theft, and other vices ignore labels of innocence and ensnare all who take the bait.⁷¹

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

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

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

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

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

71. *See, e.g.*, 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, 1211 (1985).

72. *Id.*

73. *Id.* at 1211-12.

74. *Id.* at 1211.

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

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

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

78. *Id.* at 68.

as the investigation is generally the province of the prosecution under the Separation of Powers doctrine.⁷⁹

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

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

79. See, e.g., *United States v. Allibhai*, 939 F.2d 244, 249 (5th Cir. 1991) (rejecting even a requirement that government agents must have reasonable suspicion that a person is engaged in illegality before targeting him in a sting operation).

80. See, e.g., *State v. Mullens*, 650 S.E.2d 169, 190 (W. Va. 2007).

81. *Id.*

82. *Id.* This ruling is contrary to the prevailing federal standard enunciated in *United States v. White*, where the federal government does not need a warrant for in-house participant monitoring. 401 U.S. 745, 754 (1971).

83. *United States v. Russell*, 411 U.S. 323, 424, 436 (1973) (concerning entrapment where a government undercover agent supplied the defendant with the necessary ingredients to make methamphetamine). The courts typically instruct the jury on entrapment as follows:

If the defendant was entrapped he [or she] must be found not guilty. The government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped. If the defendant before contact with law-enforcement officers or their agents did not have any intent or disposition to commit the crime charged and was induced or persuaded by law-enforcement officers or [r] their agents to commit that crime, then he [or she] was entrapped. On the other hand, if the defendant before contact with law-enforcement officers or their agents did have an intent or disposition to commit the crime charged, then he [or she] was not entrapped even though law-enforcement officers or their agents provided a favorable opportunity to commit the crime or made committing the crime easier or even participated in acts essential to the crime.

Jacobson, 503 U.S. at 547, footnote 1.

84. Whelan, *supra* note 71, at 1198. The Delorean is a gull-winged car made famous in the movie trilogy of *BACK TO THE FUTURE* (Universal Pictures 1985, 1989, 1990), starring Michael J. Fox.

85. Whelan, *supra* note 71, at 1198.

86. *Id.*

agents convinced DeLorean to sign over the entire voting stock of his fledgling company to federal agents posing as drug dealers in order for DeLorean to save his company.⁸⁷ The Detroit jury found that DeLorean was not predisposed and the government preyed on his need to keep the company afloat.⁸⁸

B. The Objective Test – Outrageous Conduct by the Government

A minority of jurisdictions assess entrapment under the objective test, which focuses on whether the government's outrageous behavior induced the suspect to commit the crime.⁸⁹ In the case of *People v. Turner*,⁹⁰ for instance, the police repeatedly badgered Turner to sell heroin.⁹¹ The police investigator, who befriended defendant Turner, pretended to be addicted and begged for help.⁹² The investigator convinced Turner to travel long distances to buy heroin for his girlfriend.⁹³ The Michigan Supreme Court applied the objective test and found the government's conduct in coaxing a reluctant defendant to travel long distances and in preying on his friendship and drug weakness was outrageous police conduct.⁹⁴

Jacobson,⁹⁵ decided on due process grounds, illustrates a case of outrageous government behavior. Here, the federal government, under several pseudonyms, engaged in a long campaign to steer a former veteran turned farmer into soliciting pornographic boy magazines.⁹⁶

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

87. *Id.*

88. *Id.* at 1199.

89. According to Justice Frankfurter's concurring opinion in *Sherman v. United States*, "the crucial question . . . is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power." *Sherman*, 356 U.S. at 382 (Frankfurter, J. concurring). The Courts of Alaska, in *Grossman v. State*, 457 P.2d 226, 230 (Alaska 1969), Michigan, in *People v. Turner*, 210 N.W.2d 336, 341 (Mich. 1973), and Iowa, in *State v. Mullen*, 216 N.W.2d 375, 381 (Iowa 1974) have adopted the objective test. Hawaii, North Dakota, and New Hampshire have adopted the objective test by statute. See HAW. REV. STAT. ANN. § (1972)702-237; N.D. CENT. CODE § 12.1-05-11 (1983); N.H. REV. STAT. § 626:5 (1974).

90. 210 N.W. 2d. 336 (Mich. 1973).

91. *Id.* at 12.

92. *Id.* at 12-13.

93. *Id.* at 13.

94. *Id.* at 22-23. With a reluctant defendant, the police should prevent the commission of the offense and elevate the criminal, rather than tend to further debase him. *Id.* at 16 (citing *People v. Sinclair*, 194 N.W.2d 878, 888 (Mich. 1972)).

95. *Jacobson v. United States*, 503 U.S. 540, 540 (1992).

96. *Id.* at 542-43.

to participate in the criminal transaction, whether there were disproportionate inducements like extreme monetary discounts, and whether the accused had an opportunity to withdraw from the illegal transaction.⁹⁷ The subjective test emphasizes the defendant's predisposition to commit the crime, which is decided by a jury. The objective test emphasizes the police conduct and is decided by the trial judge at a pre-trial hearing. If the judge decides there is no entrapment, then the defendant cannot raise the entrapment issue at trial.⁹⁸ This is similar to a Fourth Amendment claim: if the evidence is suppressed as an unconstitutional search, the jury never hears it.⁹⁹ The subjective and objective tests frequently overlap and lead to the same conclusion.¹⁰⁰ Occasionally, the two tests may lead to different conclusions.¹⁰¹ In *United States v. Searcy*,¹⁰² for instance, the court held that the sale and possession of crack cocaine was not entrapment under the objective, outrageous conduct test, but it was entrapment under the subjective, predisposition test because the accused was not predisposed.¹⁰³

C. A Hybrid Test

Several states employ a hybrid test, a combination of the subjective and objective tests, where the judge initially adjudicates the claim under the objective test at a pretrial hearing and, if the entrapment defense fails at this stage, the jury is then given the opportunity at trial to adjudicate the claim under the subjective test.¹⁰⁴ This is similar to a Fifth Amendment confession issue. If a court rules that a confession is proper in a pretrial hearing, the defense can still argue the confession was involuntary to the jury.

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

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

99. *Id.*

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

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

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

103. *Id.* at 1098, 1100.

104. *State v. Vallejos*, 945 P.2d 957, 961 (N.M. 1997) (holding that a judge may first rule as a matter of law; then the accused has a second opportunity to argue the defense before a jury).

There are other hybrid configurations. One can imagine the objective test concerning outrageous police conduct, decided by a jury. In civil rights cases, for instance, jurors are frequent arbiters of improper police conduct.¹⁰⁵ One can also imagine the subjective test on predisposition being decided by a judge in a pre-trial hearing.

Through dramatic acting and artifices,¹⁰⁶ undercover agents have posed as seductive, mini-skirted prostitutes,¹⁰⁷ as Arab sheiks,¹⁰⁸ as male prostitutes,¹⁰⁹ as drug dealers,¹¹⁰ as con-artists,¹¹¹ as war veterans,¹¹² as Wall Street brokers,¹¹³ as racketeers,¹¹⁴ and as politicians.¹¹⁵ Rogue informants commit an unbridled array of crimes and offer their status as

105. See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 393, 397 (1971) (permitting actions for damages pursuant to violations of the Fourth Amendment by federal agents to proceed in federal court).

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

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

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

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

110. *United States v. Russell*, 411 U.S. 423, 424 (1973) (undercover agent supplied an essential chemical for manufacturing methamphetamine to seller, without which the seller could not make the drug). The drug business concerns addictions. It is very easy for the police to prey on the needs of those addicted in the drug trade to sell a higher amount. *People v. Turner*, 210 N.W.2d 336, 342-43 (Mich. 1973).

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

112. *Sorrells v. United States*, 287 U.S. 435, 439 (1932) (posing as friendly addicted war veteran).

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

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

115. Matt O’Connor, *Life as an FBI Mole in Berwyn: Former Alderman Brings Bribery to Light, but He Lost His Job and Faced a Mental Breakdown*, CHI. TRIB., Nov. 23 2006, at 1 (telling the story of how former alderman Alex Bojovic went undercover and became an FBI “mole”).

“undercover informants” as a defense. They are immune from prosecution because of the prosecutor’s dependency on the informant in greater cases. In one situation in New York, a defendant caught on a robbery charge in an adjacent county argued that he was an undercover agent for the Drug Enforcement Agency because his instructions were open-ended to engage in any nefarious activity.¹¹⁶

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

IV. SENTENCING ENTRAPMENT AND MANIPULATION

A. Sentencing Entrapment

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

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

117. See *United States v. Kelly*, 707 F.2d 1460, 1461-67 (D.C. Cir. 1983) (being the famous Abscam case where FBI agents posed as wealthy Arab sheiks, interested in making certain investments in return for favorable congressional legislation).

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

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

120. *Leech*, 66 P.3d at 990-91 (holding that the defendant became “ready and willing” to commit the greater crime during the course of the transaction).

for the simple reason that a person who commits an offense is predisposed to commit additional features related to the offense.¹²¹

Criminal behavior implies an inherent deviant indoctrination. Many social criminal behaviorists recognize that criminals evolve from singular misdemeanors to aggravated felonies.¹²² A person who is initially predisposed to commit a crime is no longer an “innocent” person as to that entire species of crime. Such a person has tasted the fruits and allure of criminal behavior. Indeed, predisposition is the basis of the venerable *Similar Acts* rule, where evidence of crimes of the same general nature may be admitted at trial to show motive, intent, scheme, and manner of action.¹²³ The similar acts rule is predicated on the notion that a pattern of similar conduct may be indicative of the suspect’s intent.¹²⁴ One cannot be entrapped when one engages in a reign of similar conduct.

On the other hand, an individual who commits an underlying crime may be unwilling to commit a greater crime or unwilling to commit additional acts related to the crime. People commit daily acts of venial sins or misdemeanors, yet are unwilling to commit mortal sins or aggravated felonies related to their acts. A person may commit an assault, but may be unwilling to kill. A person may cheat on her taxes, but never cheat in her business accounting practices. A person may deal in small amounts of drugs, but never traffic in large amounts.¹²⁵

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

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

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

124. *Id.*

125. See, e.g., *United States v. Staufer*, 38 F.3d 1103, 1108 (9th Cir. 1994).

A venial sinner may be impervious to mortal sins. It is, of course, possible that a small crime may be indicative of a person's predisposition to commit a greater offense – like the young boy who brutalizes dogs and then kills his friend.¹²⁶ Yet, criminal behavior is no forgone conclusion of predisposition. Many police officers, prosecutors, and judges have personally experienced wild and sordid pasts and have avoided criminal predisposition.

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

B. Sentencing Manipulation

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

126. Another example would be a small time drug dealer who escalates the amount of drugs he or she deals. See, e.g., *United States v. Golding*, 742 F.2d 840, 841-42 (5th Cir. 1984) (charging a defendant with a previous narcotics conviction with “multi-hundred thousand dollar cocaine deals”).

127. See, e.g., *Miller*, 71 F.3d at 817-18.

128. *Id.* at 814-15. The accused, who sold powder cocaine, was predisposed to sell crack. *Id.* at 816-17. While the defense argued that the government manipulated the transaction from powder to crack to achieve a greater sentence against the accused, the *Miller* court abstained from this finding because there was plenty of other evidence indicating the accused was trafficking in cocaine and because the trial jury rejected the accused's defense to entrapment. *Id.* See also *Searcy*, 233 F.3d at 1101 (accepting doctrine as defense; proper analysis focuses on defendant's predisposition). The *Searcy* court accepted sentencing entrapment, but few courts find it under the facts. Typically, there are other facts indicative of the accused's willingness to engage in a higher crime. See also *United States v. Lacey*, 86 F.3d 956, 962-63, 966 (10th Cir. 1996) (finding sufficient evidence of defendant's engagement in large drug deals to overcome his argument of sentencing entrapment or manipulation).

129. *United States v. Cannon*, 88 F.3d 1495 (8th Cir. 1996), *abrogated by* *Watson v. United States* 128 S. Ct 579 (2007). For an explanation of the abrogation of *Cannon*, see *supra* note 7.

130. *Id.* at 1500-01, 1506.

131. See *United States v. Lora*, 129 F. Supp. 2d, 77, 89 (D. Mass. 2001) (explaining the difference between sentencing manipulation and sentencing entrapment).

exposure.¹³² Or, the accused agrees to deliver drugs, but is steered into delivering it near a playground, where mandatory sentences attach. A defendant's conduct is manipulated towards greater punitive schemes for no other "legitimate law enforcement purpose."¹³³

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

132. *Id.* at 89-90.

133. *People v. Smith*, 120 Cal. Rptr. 2d 831, 857 (2002), *rev'd on other grounds*, *People v. Smith*, 80 P.3d 662 (Cal. 2003).

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

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

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

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

138. As the court in *Baker* noted, "[s]uch a rule 'would unnecessarily and unfairly restrict the discretion and judgment of investigators and prosecutors. Police . . . must be given leeway to probe the depth and extent of a criminal enterprise, to determine whether coconspirators exist, and to trace [the drug] deeper into the distribution hierarchy.'" *Baker*, 65 F.3d at 1500 (quoting *United States v. Calva*, 979 F.2d 119, 123 (8th Cir. 1992)). "[I]t is legitimate for police to continue to deal with someone with whom they have already engaged in illicit transactions in order to establish that person's guilt beyond a reasonable doubt." *United States v. Lora*, 129 F.Supp.2d 77, 89, n. 15. (D. Mass 2001). *See also* *United States v. Estrada*, 256 F.3d 466, 476 (7th Cir. 2001) (holding that defendant did not present sufficient sentencing entrapment claim).

its own judgment in determining when the investigation is sufficient.¹³⁹ The Separation of Powers doctrine guarantees to the prosecution the discretion to decide the breadth and conclusion of the investigation.¹⁴⁰ “[T]he defense of entrapment . . . was not intended to give the federal judiciary a ‘chancellor’s foot’ veto over law enforcement practices of which it did not approve.”¹⁴¹

C. Reverse Sting Operations

Reverse sting operations exemplify manipulations. Reverse sting operations occur when a government agent controls the supply of contraband and offers attractive inducements to potential buyers, who are frequently addicted, poor, or distressed.¹⁴² A typical “sting” operation requires the government to operate as a passive party waiting for criminal encounters.¹⁴³ A reverse sting operation requires the government to undertake an active role, like being the seller, in inducing criminal activity.¹⁴⁴ The government may, for instance, sell guns or drugs at artificial prices to make arrests. In such operations, it is common to encounter government informants or government agents who are more blameworthy than the buyers.¹⁴⁵ State and federal courts are uniformly

139. *Baker*, 63 F.3d 1478 at 1500 (stating, “[m]oreover, since the government bears the burden of proving its case beyond a reasonable doubt, it must be permitted to exercise its own judgment in determining at what point in an investigation enough evidence has been obtained.”).

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

141. *United States v. Russell*, 411 U.S. 423, 435 (1973).

142. See Damon D. Camp, *Out of the Quagmire after Jacobson v. United States: Towards a More Balanced Entrapment Standard*, 83 J. CRIM. L. & CRIMINOLOGY 1055, 1056 (1993).

143. *Id.*

144. *Id.* (stating that “[u]nlike the traditional ‘sting’ operation, where undercover officers pose as buyers of illicit goods or services, in the ‘reverse sting’, law enforcement personnel act as sellers.”).

145. These reverse sting operations frequently amount to outrageous government conduct, even under the federal sentencing guidelines, allowing a reduction in sentence. Under Application Note 14, a downward departure is warranted when a form of sentencing entrapment occurs. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, comment (n. 14). Any court will *sua sponte* modify a sentence in cases concerning reverse sting operations. In *Leech v. State*, 66 P.3d 987, 990 (Okla. Crim App. 2003), the Oklahoma Court of Appeals modified the sentence, stating, “[i]n a reverse sting operation such as this, it is not unusual to encounter informants who are more blameworthy than the defendant. We find, under

suspicious of reverse sting operations because of deplorable police conduct which induces the weak and vulnerable.¹⁴⁶ If the inducement preys on addictions, poverty, or other allures, then the reverse sting operation is subject to manipulation or entrapment arguments.¹⁴⁷

D. Sentencing Escalation – Altering Specific Intent

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

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

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

all the facts of this case, that the sentence should be modified to ten (10) years imprisonment." Challenges to the reverse sting method of police investigation have been rejected on many occasions. *See, e.g.,* United States v. Savage, 701 F.2d 867, 869 (11th Cir. 1983); United States v. Gianni, 678 F.2d 956, 960 (11th Cir. 1983); United States v. Nicoll, 664 F.2d 1308, 1314 (5th Cir. 1982), *cert. denied*, 457 U.S. (1982), *rev'd on other grounds*, United States v. Henry, 749 F.2d 203 (5th Cir. 1984), *rejected by* United States v. Jones, 839 F.2d 1041 (5th Cir. 1988).

146. Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1111 (1951).

147. *Id.*

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

149. *Id.* at 281. A Michigan statute allowed sentencing downward departure "if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MICH. COMP. LAWS ANN. § 769.34(3)

150. *Claypool*, 684 N.W.2d at 281.

151. *Id.*

substance abuse treatment.¹⁵² The trial court reduced the defendant's sentence by two years.¹⁵³

The Michigan Supreme Court recast the sentencing entrapment argument as *sentencing manipulation* or *sentencing escalation*.¹⁵⁴ Defendant's intent was altered by the manipulative acts of the undercover agents.¹⁵⁵ Moreover, the crime was a *specific intent* crime, where intent was paramount.¹⁵⁶ Defenses which alter a defendant's *mens rea* are readily admissible with specific intent offenses.¹⁵⁷ The Claypool court continued:

The element of intent to sell drugs is left untouched; indeed, defendant himself admitted that he sold drugs. However, defendant's intent concerning the amount of drugs he sold may have been altered in this case when the police repeatedly returned to him to buy ever-increasing amounts, if those amounts were in fact greater than what defendant originally intended to sell.¹⁵⁸

The specific intent formula derived from the fundamental incongruity of a heightened intent on one hand, and the exclusion of evidence that might defeat that heightened intent.¹⁵⁹ If the specific intent to commit a crime is vigorously massaged by an undercover officer, then the defendant's intent is reduced.¹⁶⁰

E. Piercing the Prosecutorial Veil of Discretion

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

152. *Id.*

153. *Id.* at 282.

154. *Id.* See also *People v. Fields*, 448 Mich. 58, 79 (Mich. 1995). "[T]he Court found that the government's actions, although not rising to the level of entrapment, purposefully *escalated* the crime. This last factor is of particular importance in our approval As a mitigating circumstance surrounding the offense, it weighs heavily in favor of a deviation from the statutory minimum." *Id.* (discussing *People v. Shinholster*, 196 Mich. App. 531 (1992)) (emphasis added).

155. *Claypool*, 470 N.W.2d at 283-84 (permitting downward departures based on police conduct, but remanding to the trial court to provide its reasons for doing so on the record). But see the dissent, which argues that the *mens rea* element is really motive, not intent. *Id.* at 289 (Corrigan, C. J., concurring in part and dissenting in part).

156. See Derrick Augustus Carter, *Bifurcations of Consciousness: The Elimination of the Self-Induced Intoxication Excuse*, 64 MO. L. REV. 383, 403-09 (1999) (discussing defenses to general and specific intent crimes).

157. *Id.*

158. *Claypool*, 470 N.W.2d. at 286.

159. *Id.*

160. *Id.*

methods through the Fourth Amendment concerning search and seizure,¹⁶¹ the Fifth Amendment concerning confessions,¹⁶² and Sixth Amendment concerning speedy trial.¹⁶³ There are additional due process constraints on investigative methods concerning eyewitness identification,¹⁶⁴ vindictive and selective prosecution,¹⁶⁵ overcharging,¹⁶⁶ and investigative methods.¹⁶⁷ The courts will impose their supervisory powers over abusive investigative tactics that taint the administration of justice.¹⁶⁸

Some courts identify malicious investigations as those where the police manipulate the charges "for no legitimate law enforcement purpose[, but solely] to increase the severity of the defendant's sentence."¹⁶⁹ In *United States v. Staufer*,¹⁷⁰ for instance, the government agent preyed upon the suspect's poverty and depression to encourage a reluctant suspect to sell more LSD than the suspect originally intended.¹⁷¹ In determining whether the government improperly prolonged its investigation for no legitimate purpose, courts examine several factors, such as the length of time between the first offense and the arrest, whether there was an immediate need to arrest the suspect, whether the suspect had committed a violent offense, whether continued investigation would ensnare a co-conspirator, and whether delay would provide a greater understanding of the nature of the enterprise.¹⁷² A hearing on the objectives of the undercover operation is required.

161. See *Mapp v. Ohio*, 367 U.S. 643, 648-49 (1961); *Payton v. New York*, 445 U.S. 573, 603 (1980) (stating that arrest warrant needed to make arrest at home).

162. See *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966) (extending rights before interrogation).

163. See *Barker v. Wingo*, 407 U.S. 514, 536 (1972) (concerning speedy trial rights).

164. See *United States v. Wade*, 388 U.S. 218, 242 (1967) (concerning due process rights in lineups).

165. See *North Carolina v. Pearce*, 396 U.S. 711, 725-26 (1969).

166. See *Santobello v. New York*, 404 U.S. 257, 261 (1971) (noting that the concept of plea bargaining "presuppose[s] fairness in securing agreement between an accused and a prosecutor"); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (prosecutor may threaten to bring greater charges to convince an accused to plead guilty to lesser charges, but only if the prosecutor has probable cause to believe that the accused committed the offense).

167. See, e.g., *Rochin v. People of California*, 342 U.S. 165, 166, 174 (1952) (holding it is a due process violation to pump defendant's stomach to retrieve drug capsules); *McNabb v. United States*, 318 U.S. 332, 344-45 (1943) (delay in arrest); *Mallory v. United States*, 354 U.S. 449, 455 (1957) (delay in arraignment).

168. *Sorrells v. United States*, 287 U.S. 435, 448, 452 (1932).

169. See e.g., *People v. Smith*, 120 Cal. Rptr.2d 831 (2001) (*rev'd on other grounds*, 80 P.3d 662 (Cal. 2003)).

170. *United States v. Staufer*, 38 F.3d 1103, 1105 (9th Cir. 1994).

171. *Id.* at 1105.

172. *United States v. Garcia*, 79 F.3d 74, 75-76 (7th Cir. 1996). In *Garcia*, however, the Court held that "there is no defense of sentencing manipulation in this circuit," at least to instances of prolonged

In *United States v. Ramirez-Rangel*,¹⁷³ the court held that:

[I]t was error for the district court to deny the motion to reveal the identity of the informant without holding an in camera hearing to determine whether the informant's testimony would be relevant and helpful to the defendants on the question of sentencing entrapment. . . . If the district court concludes that the testimony is relevant, . . . then the district court must conduct a hearing to resolve that claim[.]¹⁷⁴

Several cases illustrate that, depending on their rewards and commissions, undercover agents advantageously manipulate charges against their prey.¹⁷⁵ The manipulation powers of the undercover investigator or informant coincide with mandatory sentences, which enhance punishment for slight factual variances.¹⁷⁶ In short, the prosecution very frequently delegates its charging powers to a salacious informant. The agent or informant can approach a suspect, suggest a drug deal, name the amount and place, engage in suggestive selling techniques, provide the drugs, determine the mandatory sentence scheme, and reap a reward.¹⁷⁷ Most confidential informants seek great incentives to arrange large scale drug transactions.¹⁷⁸ Prosecutorial discretion is undermined when the investigation is steered by an undercover agent or informant of

police investigations. *Id.* at 76. "A suspect has no constitutional right to be arrested when the police have probable cause." *Id.* These various terms refer to the same notion of objective entrapment, where the police allow the investigation to unnecessarily continue in order to enhance and manipulate the charges and mandatory sentences against the suspect. *See United States v. Lora*, 129 F.Supp.2d 77, 89 (D.Mass 2001).

173. 103 F.3d 1501 (9th Cir. 1997).

174. *Id.* at 1508.

175. *See Defense Presses Agent in DeLorean Case*, N.Y. TIMES, June 23, 1984, at 16. In the John DeLorean case, one agent testified "that it was 'possible' he had once referred to the informer who proposed John Z. DeLorean for a narcotics investigation as his 'meal ticket'." *Id.*

176. *See United States v. Blakely*, 542 U.S. 296, 300 (2004). In the underlying case, the trial court increased the defendant's sentence because of victim's statements rendered at sentencing. The Supreme Court ultimately reversed the defendant's sentence. *Id.* at 313-14. For further discussion of *Blakely*, *see infra* notes 201-202 and accompanying text.

177. As the Eighth Circuit discussed in *United States v. Stavig*, 80 F.3d 1241, 1247 (8th Cir. 1996), "sentencing discretion is delegated all the way down to the individual drug agent operating in the field." (quoting *United States v. Staufer*, 38 F.3d 1103, 1107 (9th Cir. 1994)). "Because of the great potential for abuse, these cases require the most careful scrutiny and a probing examination by the district court." *Id.* *See also United States v. Staufer*, 38 F.3d 1103, 1107-08 (9th Cir. 1994) (noting that "[d]rug agents can decide, apparently without any supervision by anybody to negotiate with somebody for an ounce, a pound, a kilo, 100 kilos, a million kilos of a substance and, of course, if the defendant bites at the bait, then that amount chosen by the drug agent will determine his drug sentence.>").

178. *Stavig*, 80 F.3d at 1247.

dubious credibility and great manipulative skills.¹⁷⁹ Sentencing defenses are essential to unravel the inherent due process failings related to enhancements and manipulations.

F. Imperfect Sentencing Defenses

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

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

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

179. *McNabb v. United States*, 318 U.S. 332, 341-42 (1953). This amounts to prosecutorial misconduct in the investigation stage. *Id.* The court cannot be an accomplice to police misconduct. *Id.*

180. *See, e.g.*, TENN. CODE ANN. § 40-35-113(3) (2008).

181. *Id.*

182. *People v. Claypool*, 684 N.W.2d 278, 286 (Mich. 2004).

183. *See Elson v. State*, 659 P.2d 1195, 1205 (Alaska 1983) (holding illegal evidence is admissible only where it is clear that the evidence was not obtained for purposes of influencing the sentencing judge). *See also Smith v. State*, 517 A.2d 1081, 1085 (Md. 1986) (holding any evidence the court deems to have probative force may be received regardless of its admissibility under the exclusionary rules of evidence).

184. Ind. Code Ann. § 35-38-1-7.1, Considerations in Imposing Sentence.

185. *See id.* at (b)(3).

186. In setting up bogus undercover operations, there is no private victim.

187. *See Joseph A. Colquitt, Rethinking Entrapment*, 41 AM. CRIM. L. REV. 1389, 1403, 1416-22 (2004) (employing "quasi-entrapment" on the use of community policing).

not recognize partial sentencing defenses such as sentencing entrapment or sentencing manipulation.¹⁸⁸

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

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

V. THE PROSECUTOR’S ENHANCEMENT PACKAGE

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

188. *Id.* at 1411-15.

189. *See Oregon v. Guzek*, 546 U.S. 517, 523, 527 (2006) (holding that neither Eighth nor the Fourteenth Amendment granted capital murder defendant a right to present additional alibi evidence at resentencing, because such evidence was inconsistent with prior conviction).

190. *Id.* at 524; *See also Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978), where the plurality of the Court held that evidence that accused played minor role in crime is admissible at the sentencing stage, because it is relevant to any aspect of defendant’s character or record and any of the circumstances of the offense that the defendant proffers for a reduced sentence; *see also Green v. Georgia*, 442 U.S. 95, 97 (1979) (*per curiam*) (holding it proper for defendant to introduce hearsay evidence at sentencing proceedings that a third party admitted to the murder).

191. *See Apprendi v. New Jersey*, 530 U.S. 466, 469-70 (2000) (concerning sentencing enhancement statute for racial hatred).

192. *Harmelin v. Michigan*, 501 U.S. 957, 961, 996 (1991) (holding that mandatory sentence of life imprisonment with no parole for possessing over 650 grams of cocaine is constitutional).

193. *See Ewing v. California*, 538 U.S. 11, 17-18, 30-31 (2003) (affirming a mandatory sentence of twenty five years-to-life in prison imposed under California’s three strikes law for the theft of three golf clubs).

194. *Blakely v. Washington*, 542 U.S. 296, 313-14 (2004). During the factual basis portion of the guilty plea, Blakely admitted to the elements of second-degree kidnapping and domestic-violence and the firearm allegation. *Id.* at 299. After hearing Blakely’s wife describe additional horrible facts and cruelty, the judge rejected the forty nine to fifty three month range and increased Blakely’s sentence to ninety months (seven years and six months), an increase of three years and one month. *Id.* at 300. On appeal, the Washington Court of Appeals affirmed his sentence, but the United States Supreme Court ultimately reversed it. *Id.* at 301, 314. For further discussion of *Blakely*, *see infra* notes 201-202 and accompanying text.

variances.¹⁹⁵ A judge may find additional *res gestae* facts at sentencing, which may import a higher sentencing range.¹⁹⁶ Previously, a judge could determine these factors by a preponderance of the evidence.¹⁹⁷ A trilogy of cases has changed the sentencing enhancement landscape.¹⁹⁸ In *Apprendi v. New Jersey*,¹⁹⁹ concerning a racial hatred sentencing enhancement statute, the court found the racial hatred aspect must be proven beyond a reasonable doubt before a sentencing jury.²⁰⁰ Similarly in *Blakely v. Washington*,²⁰¹ where the judge increased the sentence beyond the

195. Many wrongful convictions are caused by intentional prosecutorial manipulation and police conduct. See Richard Moran, Op-Ed., *The Presence of Malice*, N. Y. TIMES, Aug. 2, 2007, at A21 (stating, “[m]y recently completed study of the 124 exonerations of death row inmates in America from 1973 to 2007 indicated that 80, or about two-thirds, of their so-called wrongful convictions resulted not from good-faith mistakes or errors but from intentional, willful, malicious prosecutions by criminal justice personnel . . . [W]hen a police officer manufactures or destroys evidence to further the likelihood of a conviction, then it is deceptive to term these conscious violations of the law.”).

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

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

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

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

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

201. *Blakely*, 542 U.S. at 296.

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

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

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

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

202. *Id.* at 303-04.

203. *Booker*, 543 U.S. at 220.

204. *Id.* at 230-31.

205. *Id.* at 243-44.

206. *See supra* notes 199-205 and accompanying text.

207. *Harris, v. United States*, 536 U.S. 545, 545 (2002).

208. *Id.* at 557.

209. *Id.* at 566-67.

210. *Id.* at 557.

211. *Apprendi v. New Jersey*, 530 U.S. 466, 485-86 (2000).

212. *United States v. Sanchez*, 138 F.3d 1410, 1414 (11th Cir. 1998).

213. *Blakely v. Washington*, 542 U.S., 296, 311 (2004).

214. *Jones v. United States*, 526 U.S. 227, 232-34, 237-41 (1999) (holding that the Due Process Clause of the Fifth Amendment and the Notice and Jury Trial guarantees of the Sixth Amendment require enhancers that increase the maximum punishment to be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt).

conspiratorial influences would affect Apprendi's actions.²¹⁵ Due process would demand that Apprendi be afforded a fair opportunity to present a sentencing entrapment defense on the racial hatred element.²¹⁶

A. Sentencing Enhancement as Cell Reproduction

Another way of understanding the phenomenon of sentencing enhancement is through biology and cell reproduction. Each cell has a membrane and cell wall.²¹⁷ Inside the cell is a nucleus, which is the control center of the cell.²¹⁸ Imagine a cell as a criminal offense. There are many elements in the cell, and the nucleus is the intent element and the heart of liability. The jury must decide on each element of the cell beyond a reasonable doubt.

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

B. A Unitary v. Bifurcated Trial on Sentencing Enhancements

When sentencing enhancement elements are integrated within the transaction, it is difficult to reserve the element for sentencing adjudication. For instance, in the *Apprendi* case, the reason for the series of assaults was racial hatred.²¹⁹ If *Apprendi* had elected to go to trial on the assault charges, the prosecutor could not excise the evidence of hate crimes from the liability portion of the trial.²²⁰ The absence of information about the

215. Many courts hold that sentencing entrapment, not sentencing manipulation, may be a basis for a downward departure at sentencing. *United States v. Baker*, 63 F.3d 1478, 1500 (9th Cir. 1995). In Civil Rights cases, the F.B.I. encouraged informants to assist in assaults against the freedom riders in order not to blow their cover. *See RAYMOND ARSENAULT, FREEDOM RIDERS 151-53 (2006)*.

216. *See Montana v. Egelhoff*, 518 U.S. 37, 62 (1996) (O'Connor, J., dissenting). While the legislature may be able to eliminate defenses that bear on intent, such as intoxication in *Montana v. Egelhoff*, the elimination must undergo a grueling test to determine its constitutionality. The court must determine whether the defense is fundamental and historical, whether it is relevant to mens rea, and the public policy implications. *Id.* at 43-44, 55.

217. *See DONNA RAE SIEGFRIED, BIOLOGY FOR DUMMIES 22-35 (2001)*.

218. *Id.*

219. *Apprendi v. New Jersey*, 530 U.S. 466, 469 (2000).

220. *See id.* at 469-72.

motive for the assaults would cause the jurors to doubt the coherence of the prosecution's case.²²¹ The New Jersey hate crimes statute was strictly a sentencing enhancement statute, but the hate evidence was material to the trial stage.²²²

There is prejudice, however, in a unitary proceeding, where evidence of the sentencing enhancement is introduced at trial, because once the jury hears the aggravating sentencing evidence, they will be materially prejudiced to convict the accused as a "bad person," and no jury instruction can cure the prejudice.²²³ Joinder of the sentencing enhancement element at the trial stage may confuse the jury and lead the jury to rely on one offense as corroborative of the other.²²⁴ Prejudice may develop if the accused wishes to testify at the trial phase, but not the sentencing phase.²²⁵ A defendant's silence at the trial phase would be damaging in the face of

221. See, e.g., *State v. Brown*, 853 A.2d 260, 268 (N.J. 2004), where the New Jersey Supreme Court held that the potential for unfair prejudice from proof of a prior conviction element does not justify bifurcating a trial on a single count of being a felon in possession of a firearm.

222. See *United States v. Tavares*, 21 F.3d 1, 6 (1st Cir. 1994) (holding that the absence of information about all of the elements of the crime during trial might cause the jury to question the criminality of the defendant's conduct and raise reasonable doubt).

223. *Brown*, 853 A.2d at 269 (Albin, J., dissenting) (arguing that juries cannot eliminate the prejudice of a case even with limiting jury instructions). Despite this chance for prejudice, courts often refuse to bifurcate. Several courts hold, for instance, that a felon in possession of weapons charges should be tried in one proceeding, not a bifurcated proceeding. See, e.g., *United States v. Dean*, 76 F.3d 329, 332 (10th Cir. 1996) (adopting the reasoning of *United States v. Collamore*, 868 F.2d 24 (1st Cir. 1989), and three other circuits); *United States v. Koskela*, 86 F.3d 122, 126 (8th Cir. 1996) (rejecting defendant's bifurcation of felon-in-possession charges without analysis); *United States v. Milton*, 52 F.3d 78, 80-81 (4th Cir. 1995) (rejecting defendant's request to prevent jury from hearing evidence of his prior felony convictions because prosecution has burden of proving to the jury that defendant was, in fact, a felon at the time he possessed the firearm).

224. See *Brown*, 853 A.2d at 269 (Albin, J., dissenting) (discussing the difficulty many jurors will have in using evidence only for a specific purpose).

225. *Drew v. United States*, 331 F.2d 85, 88 (D.C. Cir. 1964).

The justification for a liberal rule on joinder of offenses appears to be the economy of a single trial. The argument against joinder is that the defendant may be prejudiced for one or more of the following reasons: (1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one.

Id.

his denial at the sentencing phase.²²⁶ Multiple counts induce improper inferences of combined guilt.²²⁷

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

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

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

226. See, e.g., *Cross v. United States*, 335 F.2d 987, 991 (D.C. Cir. 1964) (finding improper joinder of offenses at trial).

227. See, e.g., *id.*

228. Laura G. Dooley, *National Juries for National Cases: Preserving Citizen Participation in Large-Scale Litigation*, 83 N.Y.U. L. REV. 411, 436-43, 447 (2008).

229. See generally Laura G. Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325 (1995).

230. FED. R. CRIM. P. 8(a). The court rules allow joinder when several offenses are not part of a single scheme or plan and are committed at different times and places. *Id.*

231. *Drew v. United States*, 331 F.2d 85, 88 (D.C. Cir. 1964).

232. *State v. Brown*, 853 A.2d 260, 269 (N.J. 2004) (Albin, J., dissenting) (arguing that issues should be bifurcated because juries cannot eliminate the prejudice of a case with limiting jury instructions).

233. FED. R. CRIM. P. 404. An intriguing question is presented whether a sentence enhancement offense may be admissible under the similar acts doctrine. Evidence of other crimes is admissible when relevant to (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so relegated to each other that proof of the one tends to establish the other, and (5) the identity of the person charged with the

evidence of the second cell can be excised from the determination of liability at the first trial. The second cell is then litigated at the sentencing stage.²³⁴

C. Pretrial Notice of Sentencing Enhancement Charges

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

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

commission of the crime on trial. *Id.* When the evidence is relevant and important to one of these five issues, it is generally conceded that the prejudicial effect may be outweighed by the probative value. *Id.*

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

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

236. See, e.g., Richard Mills, *The Prosecutor: Charging and "Bargaining,"* 1966 U. ILL. L.F. 511, 514-15 (discussing options when an offender's conduct violates more than one criminal statute).

237. See the trifecta cases: *Apprendi*, *Blakely*, and *Booker*, discussed *supra* notes 199-206.

238. Perhaps, the accused should know the sentencing consequences by the preliminary examination stage or indictment.

239. If the liability and sentencing enhancement issues are litigated in one unitary trial, the defense may wish to sanitize the predicate offense by stipulating to the initial offense, and litigate

required under the Constitution and to avoid any appearance of vindictiveness.²⁴⁰

VI. CONSPIRACY IN IMAGINARY CRIMES AND INTERNET PORN

A. Conspiratorial Manipulation

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

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

the sentence enhancer. This is essentially what the accused did in *Apprendi*. *Apprendi*, 530 U.S. 466 at 470. The accused pled guilty to the predicate assault, but litigated the hate crimes provision at sentencing. *Id.*

240. *Jones v. United States*, 526 U.S. 227, 232-34, 237-41 (1999) (holding that the Due Process Clause of the Fifth Amendment and the Notice and Jury Trial guarantees of the Sixth Amendment require enhancers that increase the maximum punishment *must be charged in an indictment*, submitted to a jury, and proven beyond a reasonable doubt).

241. See DRESSLER, *supra* note 8, at 424-26.

242. Donnelly, *supra* note 146, at 1092-94, 1111

243. See BLAKESLEE, *supra* note 11, at 17-18 (describing the rogue undercover agent assigned to render as many drug convictions as possible in a small Texas town).

244. Donnelly, *supra* note 146, at 1092-94.

245. See DRESSLER, *supra* note 8, at 425.

246. Donnelly, *supra* note 146, at 1092-94, 1111.

247. *Callanan v. United States*, 364 U.S. 587, 593-94 (1960).

248. *Id.* at 594.

249. *Claypool*, 684 N.W. 2d 278, 286 (Mich. 2004).

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

B. Undercover Operations Which Induce Imaginary Crimes

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

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

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

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

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

254. See Daniel L. Abelson, *Sentencing Entrapment: An Overview and Analysis*, 86 MARQ. L. REV. 773, 786-94 (2003).

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

256. See DRESSLER, *supra* note 8, at 424-26.

257. *Id.*

258. *State v. Bridges*, 628 A.2d 270, 281 (N.J. 1993) (holding defendants liable for accidental murders reasonably foreseeable as the natural consequences of the drug conspiracy transaction); see also *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946) (holding conspirators are liable for all acts done in furtherance of a conspiracy).

offset the special dangers that group action entail regarding more sophisticated crimes.²⁵⁹

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

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

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

259. See DRESSLER, *supra* note 8, at 425-26.

260. See, e.g., *Garcia v. State*, 394 N.E. 2d 106, 108-09 (1979). In *Garcia*, a police informant conspired with the defendant wife to kill her husband. *Id.* at 107. The court found the defendant guilty of conspiracy even though the informant had no intent to accomplish the act. *Id.* at 110. The court ruled that this was a unilateral conspiracy, replacing the traditional bilateral conspiracy concept. *Id.*

261. See *id.* at 107-09. A number of states operate under the bilateral doctrine, where there must be at least two legitimate people agreeing to commit the offense. See *id.* at 108.

262. See DRESSLER, *supra* note 8, at 452. The majority rule is that factual impossibility is no defense to a criminal conspiracy. *Id.*

263. *Id.* An overt step is essential to separate imaginary offenses from a purposeful intent. *Id.* A step by any of the co-conspirators towards the commission of the crime applies to all of the co-conspirators. *Id.*

264. State statutes generally require an overt step towards the commission of the substantive offense to decipher "talk" from actual dangerousness. In the federal arena, however, an overt step is unnecessary to prove conspiracy in many instances. Many federal statutes have eliminated the overt step requirement. See Model Penal Code § 5.03(5) (providing that "[n]o person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.") (emphasis added).

265. 138 F.3d 1410.

266. *Id.* at 1412.

267. *Id.*

268. *Id.*

imagined drugs did not, in and of itself, amount to the type of manipulative government conduct warranting a downward sentencing departure.²⁶⁹

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

C. Internet Porn and Fantasy Speech

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

269. *Id.* at 1414.

270. David Kocieniewski, *Informer's Role Draws Praise and Questions*, N. Y. TIMES, May 10, 2007, at A1.

271. *Id.*

272. See 18 U.S.C. § 2422(b), which imposes criminal liability on anyone who “knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so.” See also *United States v. Gagliardi*, 506 F.3d 140, 146 (2d Cir. 2007) (stating that “[a]t the time of § 2422(b)’s 1998 amendment, the House Judiciary Committee pointed out that law enforcement plays an important role in discovering child sex offenders on the Internet before they are able to victimize an actual child. Those who believe they are victimizing children, even if they come into contact with a law enforcement officer who poses as a child, should be punished just as if a real child were involved.”).

273. See, e.g., *id.* at 143 (describing a 62-year-old man’s conversations through instant messaging with an adult informant he believed to be a 13-year-old girl).

274. See Abby Goodnough, *Town is Shaken After Prosecutor’s Arrest in a Child-Sex Sting*, N. Y. TIMES, Sept. 29 2007, at A8 (a popular Federal prosecutor from Florida, J. D. Roy Atchison, an involved father and devoted coach, was arrested in Detroit as he arranged with an undercover agent to have sex with a five-year-old girl. Online, the former prosecutor posing as “fldaddy04,” stated that he was sexually gentle with young girls and had done it plenty of times. *Id.* “I adore everything about young girls,” the profile says, ‘how they talk, think, act, walk, look.’” *Id.* “The police in Michigan said Mr. Atchison had been chatting online for two weeks with an undercover detective for the Macomb County Sheriff’s Department, who posed as a mother offering to let men have sex with her young daughter. *Id.* When she expressed concern that sex could injure the girl, according to court documents, Mr. Atchison responded, ‘I’m always gentle and loving; not to worry; no damage ever; no rough stuff ever ever.’ He added, ‘I’ve done it plenty.’”). *Id.*

The fantasies and vulnerabilities engendered by the Internet world supplant traditional relationships.²⁷⁵ For many, online attractions are the sole source of companionship and fulfillment.²⁷⁶ Those involved in Internet flirting are usually incognito, and they masquerade by age, appearance, orientation, desire, and fantasy.²⁷⁷ Persons assume extra-dimensional roles, pretending to be their super alter-egos.²⁷⁸ As a comical dog once stated, “On the Internet, nobody knows you’re a dog.”²⁷⁹

It is very difficult to decipher truly dangerous predators without engaging in orchestrated activity that presses the buttons of criminal fantasies. Once such a person leaves the seductive illusion and visits a child to fulfill a fantasy, an overt step has breached into the real world.²⁸⁰ In *United States v. Jacobson*,²⁸¹ for instance, the entrapment claim succeeded because the government, through several fictitious organizations, persisted for two years to seduce a lonely farmer into the joys, protected by the First Amendment, of pornographic magazines depicting naked young boys.²⁸²

If less extreme than *Jacobson*, undercover operations may discover who is predisposed to commit child sex crimes.²⁸³ It does not matter if the decoys are adults, rather than children.²⁸⁴ Legal impossibility is no defense.²⁸⁵ Nor can the accused successfully defend his actions on the basis of *fantasy speech*.²⁸⁶ Internet porn incitement statutes require sufficient overt steps towards the fulfillment of the crime to separate

275. See DAVID LEVY, LOVE + SEX WITH ROBOTS: THE EVOLUTION OF HUMAN- ROBOT RELATIONSHIPS 42 (2007).

276. See *id.* (addressing how humans will expand their horizons of love and sex with the development of highly sophisticated humanoid robots).

277. *Id.*

278. *Id.*

279. *Id.*

280. See Model Penal Code, Section 5.03(5); see also Goodnough, *supra* note 274, at A8.

281. *United States v. Jacobson*, 503 U.S. 540 (1992)

282. *Id.* at 542-43.

283. See, e.g., *United States v. Gagliardi*, 506 F.3d 140, 144, 151 (2d Cir. 2007) (holding defendant properly convicted of attempting to entice a minor to engage in illegal sexual activity through adult undercover operations).

284. See *id.*

285. *Id.*; see also *United States v. Tykarsky*, 446 F.3d 458, 466 (3d Cir. 2006) (stating that “Congress did not intend to allow the use of an adult decoy, rather than an actual minor, to be asserted as a defense to § 2422(b).”); *United States v. Weisser*, 417 F.3d 336, 352 (2d Cir. 2005) (holding that factual impossibility is not a defense to a charge of attempt in substantive criminal law).

286. See, e.g., *Gagliardi*, 506 F.3d at 144, 150.

intended harm from fantasy.²⁸⁷ The ease of the Internet lures risky sex adventures, which implicates First Amendment privacy joys, and teases one into action, which implicates Fifth Amendment self-incrimination woes. Fantasies morph into semi-reality. With a little nudge, the government jostles the semi-reality into the overt step of complete reality and the macabre world of doom.²⁸⁸

D. Sting Operations v. Visible Police Presence

In a celebrated case, Senator Larry Craig, from Idaho, was arrested in June 2007 at a Minnesota Airport by a plainclothes police officer investigating lewd conduct complaints in a men's public restroom.²⁸⁹ The news reports stated that Senator Craig made homosexual advances in the stalls to the undercover officer.²⁹⁰ Senator Craig pled guilty to a misdemeanor solicitation,²⁹¹ but unsuccessfully attempted to withdraw his guilty plea based on weak entrapment claims.²⁹² Under intense pressure, the Senator announced his retirement after years of public service based on this misdemeanor offense and his prior sanctimonious stance against homosexuals.²⁹³

Senator Craig's entrapment claim presents interesting policy perspectives comparing investigative subterfuge against a visible police presence in preventing public nuisance crimes.²⁹⁴ Sting operations are frequently used to catch the unwary innocent, as well as the predisposed, in prostitution, drugs, and other lascivious crimes. A traffic officer can hide behind a billboard to catch a speeder or openly travel along the highway amidst traffic, which encourages safe driving. The very presence of the

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

288. *Jacobson v. United States*, 503 U.S. 540, 542-43 (1992).

289. *Senator, Arrested in an Airport Bathroom, Pleads Guilty*, Aug. 28, 2007, N. Y. TIMES, at A19.

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

291. *Id.*

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

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

294. *See id.*

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

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

VII. CORRUPTION OF POLICE FORCES

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

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

295. *See id.* (detailing Senator Craig's public admonishment by his Senate colleagues).

296. *See e.g.*, Andy Newman, *Lawmaker Found Guilty of Corruption*, N. Y. TIMES, April 9, 2008, at B1 (stating, "State Assemblywoman Diane M. Gordon of Brooklyn was convicted on Tuesday of receiving a bribe for offering to help a developer acquire a parcel of city-owned land [through an undercover investigation]."). The councilwoman's entrapment defense was unsuccessful. *Id.*

297. *See* United States v. Kelly, 707 F.2d 1460, 1461-67 (D.C. Cir. 1983).

298. *Id.* The Abscam operation employed a convicted confidence man to spread the word that wealthy Arabs were willing to bribe members of Congress to ensure that they would introduce private immigration legislation. *See id.* at 1462.

299. *Id.* at 1461-67.

300. *See, e.g.*, Jamie Reno & Dirk Johnson, *'These Guys Had To Be Taken Down': Four pounds of Cocaine. Fifty Pounds of Marijuana. Inside the San Diego State University Drug Raid*, NEWSWEEK, May, 19, 2008, at 40 (stating, "[t]he highly organized, widespread drug dealing at a university with a solid academic reputation astonished seasoned prosecutors and narcotics officers . . . The raid provoked some protest among students who saw it as overly aggressive.").

301. *See* BLAKESLEE, *supra* note 11, at 80 (stating, "the growth of the task force system coincided with a massive acceleration in prison construction in the state [of Texas] . . . [T]he state more than tripled its prison capacity—from 40,000 to 150,000 beds—in just ten years. Texas [in 2007] has

for instance, one undercover agent worked for eighteen months, during which time he netted forty-seven drug dealers, approximately thirteen percent of the adult, black male population.³⁰³ Sentences for small or repeat offenses ranged from five to 361 years.³⁰⁴ Several of those convicted were former high school football stars, with no prior record, convicted for selling small amounts of cocaine and sentenced to mandatory 20 years.³⁰⁵ One 60-year-old so-called “drug kingpin,” who had prior convictions of small drug offenses, lived in a shack and was sentenced to ninety years for allegedly selling a single eight ball of cocaine.³⁰⁶ Belated habeas evidentiary hearings revealed that much of the drugs were diluted eight balls mixed by the undercover officer.³⁰⁷

Unknown to the defendants, the undercover officer faced theft charges from another county and was in serious debt.³⁰⁸ The undercover

more inmates than California, even though Texas has forty percent fewer people. Only Louisiana and Mississippi incarcerate a greater percentage of their populations than Texas.”).

302. Tulia, Texas is located in the panhandle, a farming and ranching community of five thousand people. *Id.* at pictures following page 230. In the summer of 1999, authorities in Tulia, Texas conducted a massive raid over the town after an undercover operation spearheaded by a police officer, Tom Coleman. *Id.* at 10-11.

303. *Id.* at 4, 18. Coleman was named officer of the year following the busts in Tulia. Attorney General John Cornyn presented the award to Coleman. *Id.* at 4, pictures following page 230. John Cornyn is now a U.S. Senator. *Id.*

304. *See id.* at 381, 409-17, Joe Moore, a so-called “drug kingpin,” who lived in a shack, was sentenced to ninety years for allegedly selling a single eight ball of cocaine to Tom Coleman. *Id.* at pictures following page 230. Moore’s trial lasted seven hours. *Id.* Belated habeas corpus petitions filed by the NAACP Legal Defense Fund, A.C.L.U., and private attorneys offering pro bono assistance discovered that the local prosecution offices and the courts suppressed evidence revealing the undercover officer’s lies. *Id.* at 241-43. Coleman had no experience in undercover narcotics operations prior to coming to Tulia. *Id.* at 4. He had been fired or quit two prior deputy positions. *Id.* at 4-5. He also had a series of unpaid debts. *Id.* at 98.

305. *Id.* at pictures following page 230, 411, 415 (stating, “Freddie Brookins Jr. was the starting tailback for Tulia High’s football team in the mid-1990’s. Though he had no prior offenses, he was given the maximum sentence of twenty years for allegedly selling an eight ball (less than 3.5 grams) of cocaine to undercover agent Tom Coleman . . . Donnie Smith was named Tulia High’s male athlete of the year in 1988. He was sentenced to twelve and a half years in the Coleman sting. Three of his siblings were also indicted.”).

306. *Id.* at pictures following page 230.

307. *Id.* at 292.

308. *Id.* at 98-99. After a lengthy habeas evidentiary hearing, a settlement agreement was reached. Both sides stipulated that Tom Coleman was a false witness and every single conviction would be vacated. *Id.* at 386. Tom Coleman was subsequently convicted of perjury. *Id.* at 371, 386-87. The Judge stated that “Tom Coleman is the most devious, nonresponsive law enforcement witness that this court has encountered in twenty-five years on the bench.” *Id.* at 387. Prosecutor Terry McEachern’s bar license was suspended. *See* Jennifer Emily and Steve McGonigle, *Dallas County District Attorney Wants Unethical Prosecutors Punished*, DALLAS MORNING NEWS, May 4, 2008 (noting that “[i]n 2005, the bar gave the former district attorney of Hale and Swisher counties, Terry McEachern, a two-year probated suspension of his law license for hiding evidence at trial in

officer was ill-tempered,³⁰⁹ suffered mental problems,³¹⁰ and was a suspected racist.³¹¹ The habeas hearings revealed that the prosecutor and trial judge suppressed evidence of the undercover officer's background.³¹² The undercover officer kept few reports by scrawling information on his leg and based his testimony of 18 months of investigation on memory.³¹³

The criminal justice system in Tulia, Texas, like the criminal justice system throughout the country, ignored the detention of the town's Black male residents for trivial and questionable drug offenses.³¹⁴ The prosecutor charged small amounts of drugs before all white juries, comparing trace amounts of drugs to a rattlesnake: "It doesn't matter if it's a little rattlesnake or a big rattlesnake; if a rattlesnake bites you, it's going to kill you."³¹⁵

the discredited Tulia drug bust."), available at <http://www.november.org/stayinfo/breaking08/TX-Unethical.html>.

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

310. *Id.* at 329-30.

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

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

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

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

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

Chicago police officers are the subject of more brutality complaints per officer than the

The willingness of several pro bono attorneys, attorneys from the NAACP Legal Defense fund, attorneys from the American Civil Liberties Union, the keen investigative reporting of several news agencies, and *60 Minutes* televised news shows finally prompted the legislature, the Governor, and the courts to act.³¹⁶

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

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

national average, and the Police Department is far less likely to pursue abuse cases seriously than the national norm', a legal team at the University of Chicago reported Wednesday. The report [is] 'The Chicago Police Department's Broken System.' . . . According to the new report, rogue police officers abuse victims without fear of punishment, and the lack of accountability has tainted the entire department Patterns of abuse and disciplinary neglect were worst in low-income minority neighborhoods, said the authors, Craig B. Futterman, H. Melissa Mather, and Melanie Miles.

Id.

316. BLAKESLEE, *supra* note 11, at 241-43, 420.

317. *Id.* at 201.

318. *Id.*

319. *Id.*

320. *Id.* at 401.

321. *Id.* at 201-02. One example is the Edward Byrne Memorial State and Local Law Enforcement Assistance Grant. *Id.* The grant funds drug task forces in mostly rural and suburban areas across the country. The program was named in memory of Edward Byrne, a New York City police officer shot dead by drug dealers in 1988. *Id.*

322. *Id.* at 204. The Byrne Grant provided federal money; the manpower came from local police forces, county sheriffs, and district attorney's offices, which combined with neighboring counties to form new drug outfits. *Id.* at 203. The money was distributed to the states by the Department of Justice's main grant-making arm, the Bureau of Justice Assistance. *Id.*

323. *Id.* at 206. Republican State Representative Terry Keel stated the problem with the heavily funded task force operations,

[t]he officers in the narcotics task forces do not have a chain of command that watches

Many states rewrote their respective asset forfeiture laws to allow greater percentages of assets seized during drug busts to be funneled to law enforcement agency budgets.³²⁴ The lucrative drug trade incites police corruption throughout the nation.³²⁵ There are rogue officers, missing drugs, stolen cash, fabricated cases, failed drug tests, and profitable financial arrangements in every county.³²⁶ Many undercover agents have psychological problems.³²⁷

Defendants filed civil rights actions against the cities and counties, funded by the federal grant, for the unmonitored investigations and discovery violations, which imprisoned hundreds of men and left fatherless hundreds of children.³²⁸

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

Id.

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

Id.

325. See David Heinszmann, *Bar Tape Refutes Cops: Video of '04 Raid Casts New Doubts On City's Elite Police Unit*, CHI. TRIB., Sept. 18, 2007, at 1. The city of Chicago is infamous for its police corruption, even of its elite police units. *Id.*

The video contradicts the arresting officer's version of what happened that night, but it also raises constitutional issues about whether officers improperly searched dozens of people. The video also adds to a list of questions about [Special Operating Section] officers' conduct, which is the focus of state and federal investigations.

Id.

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

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

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

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

B. Civil Rights Remedies to Unmonitored Investigations

The actions of unmonitored undercover agents who falsify charges instigate civil rights actions under 42 U.S.C. §1983.³²⁹ The idea that cities and counties could be liable for misdeeds of undercover agents simply by virtue of being a member of a regional task force set an alarming precedent that rippled through the states.³³⁰ Many of the civil rights cases were settled for millions of dollars and the disbanding of the federal task forces.³³¹

Prosecutors are held liable for failing to adequately train and supervise undercover agents,³³² and for the administrative functions concerning sharing of information of informants and promises made to informants.³³³ Personnel decisions concerning undercover agents are administrative functions.³³⁴ Prosecutors are not given immunity for conspiring to fabricate evidence.³³⁵ The undercover agent in the Tulia case

Id.

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

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

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

331. *Id.* at 403-04.

332. *See, e.g.,* Goldstein v. City of Long Beach, 481 F.3d 1170, 1176 (9th Cir. 2007) (holding that prosecutor is not immune from civil rights charges which allege incompetence for the administrative functions of the office), *cert. granted*, Van De Kamp v. Goldstein, (14 Apr. 14, 2008) (No 07-854); *See also* Rachel Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law* (Public Law & Legal Theory Research Paper Series, Working Paper No. 08-10, 2008), available at <http://ssrn.com/abstract=1114172> (addressing viable administrative corrective approaches on prosecutorial overreaching to curb prosecutor’s enormous power).

333. Giglio v. United States, 405 U.S. 150, 154 (1972) (concerning prosecutor’s obligation to train and supervise informants and inform parties of promises).

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

335. Buckley v. Fitzsimmons, 509 U.S. 272, 278 (1993); *see also* Broam v. Bogan, 320 F.3d 1023, 1033-34 (9th Cir. 2003) (holding that prosecutors do not have absolute immunity when they withhold exculpatory evidence before probable cause exists to arrest a defendant); *see also* Maurice

was indicted and convicted of perjury charges.³³⁶ The prosecutor was sanctioned.³³⁷ In remedial fashion, the Texas legislature passed statutes granting bond to several defendants imprisoned.³³⁸ Governor Rick Perry pardoned all of the defendants convicted in the Tulia drug sting.³³⁹

1. The Fair Defense Act of 2001

The Texas legislature passed the *Fair Defense Act of 2001*,³⁴⁰ which opened the files of police officers in bad standing.³⁴¹ The Act raised the standards for undercover narcotics operations by requiring that evidence elicited by confidential informants be corroborated, by audio or video, or other means.³⁴² The Act revised the entire attorney appointment process, requiring attorneys for the indigent within four to six days of arrest.³⁴³ The greatest attribute of this act is the appointment of attorneys at the very early stages of arrest who will address the probable cause determinations and false claims.³⁴⁴

2. The Fallacy of Reconciliation Committees

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

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

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

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

338. BLAKESLEE, *supra* note 11, at 390, 399.

339. *Id.* at 399.

340. TEX. CODE CRIM. PROC. Art. 15.16-15.17.

341. See TEX. CODE CRIM. PROC. Art. 15.16-15.17; see also website on Tulia, Texas and the justice system, <http://www.hr95.org/tulia.htm>.

342. BLAKESLEE, *supra* note 11, at 401-02. The task force system was also amended to place them under the auspices of the state police, and Department of Public Safety, which discovered that many of the task forces were in disarray. *Id.* at 401-03. The Department of Public Safety crafted new rules for the task forces concerning the control of evidence and record keeping, and tightening procedures for forfeiture proceedings, which had accumulated hoards of money. *Id.*

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

344. *Id.*

formed in Tulia, though unsuccessfully, after the release of the defendants to give the community and the new police personnel a chance to open a dialogue.³⁴⁵ Successful reconciliation efforts typically include a process of accountability, an opportunity for the citizens to be heard, forthright compensation,³⁴⁶ and a historical accounting of the events.³⁴⁷ The community in Tulia and other communities around the nation suffer significantly for a *mass class* of wrongful incarcerations. Besides substantial economic losses and loss of familial consortium, there is the “loss of society” and the impact to their community roles.³⁴⁸ The reconciliation efforts failed to provide community standing on the pivotal policy issues which implemented a massive undercover operation in the first place. The police were only doing the bidding of the policy makers, which dictated a political course of action directed against minorities caught in the throes of a wayward drug policy.³⁴⁹ In short, reconciliation committees fail to reach the chief policy makers.³⁵⁰

An English study regarding public confidence in the police noted that trust and confidence are not necessarily shaped by the sentiments about risk and crime, but by evaluations of the values and morals that underpin community life.³⁵¹ The police must not replicate criminal behavior in the name of the “law.”³⁵² The maintenance of peace and harmony in a neighborhood can be as effectively achieved by a benign gang as by the police.³⁵³ Citizens complain that “racial profiling, police corruption and the excesses of the war on drugs have made them suspicious of virtually any arm of the government.”³⁵⁴ Viable reconciliation committees require standing to address policy questions fomented by administrators and government personnel.

345. BLAKESLEE, *supra* note 11, at 404; *see, e.g.*, Penelope E. Andrews, *Reparations for Apartheid's Victims: The Path to Reconciliation?*, 53 DEPAUL L. REV. 1155, 1171-80 (2004) (addressing standards and problems regarding South Africa's Reconciliation committee).

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

347. Andrews, *supra* note 345, at 1158.

348. Lind, *supra* note 346, at 302.

349. *Id.*

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

351. *See* Jonathan Jackson & Jason Sunshine, *Public Confidence in Policing*, 47 Brit. J. Criminology 214, 230 (2007).

352. *Id.*

353. *See* David Kocieniewski, *So Many Crimes, and Reasons to Not Cooperate*, N. Y. TIMES, Dec. 30, 2007, at 19.

354. *Id.*

C. Standards Posed for Undercover Operations

There are several brands of undercover investigations: sting operations; long protracted investigations; passive operations; rogue task force; and the use of confidential informants.³⁵⁵ Several police agencies have established guidelines for undercover operations.³⁵⁶ Standards culled from points raised in this Article include:

1. The police must seek prosecutorial approval before an undercover operation, which invades all manners of privacy, speech, association and self-incrimination protections.³⁵⁷
2. The objectives of the investigation must be articulated. The undercover operation must identify the target of the operation and substantiate the target's importance.³⁵⁸
3. The undercover agent must undergo a psychological profile and testing. The agent must receive psychological review during a protracted assignment. Playing dual roles and engaging in anti-social behavior requires psychological strength and stamina. As one literary investigator stated when the political climate changed in favor with Columbia, "all this time I thought I was a cop pretending to be a drug dealer, when all the time I was a drug dealer pretending to be a cop."³⁵⁹
4. The investigating officer must take clear, unequivocal notes of each transaction and record the matter.
5. Undercover agents must avoid sexual deception and involvement during the investigation.³⁶⁰
6. In protracted investigations, the role of the agent or informant must be systematically monitored and reviewed.³⁶¹ Occasionally,

355. See The Attorney General's Guidelines on Federal Bureau of Investigation Undercover Operations at 2-8, <http://www.usdoj.gov/olp/fbiundercover.pdf>. (discussing the standards for undercover investigations).

356. See generally DENNIS FITZGERALD, *INFORMANTS AND UNDERCOVER INVESTIGATIONS: A PRACTICAL GUIDE TO LAW, POLICY, AND PROCEDURE* (2007) (discussing guidelines of operations by the U.S. Attorney, F.B.I., and I.R.S regarding types of informants and their motivations).

357. See on a comparative basis, *First Plainclothes Police Station in China*, http://www.China.org.ch/government/local.governments/2007-11/02/content_1230607.htm.

358. See e.g., Rhode Island Department of Attorney General Rules and Regulations for Reverse Undercover/Proprietary Operations, <http://www.rules.state.ri.us/rules/released/pdf/AG/4383.pdf> (1999); see, e.g., Reno & Johnson, *supra* note 301, at 40 (stating, "[t]he raid, which included crackdowns on several fraternities, came a year to the day after the overdose death of Jenny Poliakoff, a 19-year-old student at San Diego State. It was the tragedy that triggered the undercover drug operation.").

359. This quotation is uttered by Lawrence Fishburne's character in the film *Deep Cover* (News Line Productions 1992).

360. See generally Gary T. Marx, *Under-The-Covers Undercover Investigations: Some Reflections on the State's Use of Sex and Deception in Law Enforcement*, 11 *Crim. J. Ethics* 13 (1992).

undercover agents become ringleaders of the very group they are monitoring.³⁶² If the objectives change in light of new circumstances, then the operation must be reviewed.

7. There should be time limitations to the investigations.³⁶³

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

9. If the agent participates in crimes and induces others to commit crimes in order to fulfill a higher objective, what is called *derivative entrapment*, then the deliberative influences must be articulated in discovery to the defense and all third persons, who are affected by the agent's participation.³⁶⁴

10. The agent's participation and conspiratorial encouragement of crimes must be a factor weighted in the accused's sentence.³⁶⁵

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

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

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

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

362. See GARY MAY, *THE INFORMANT: THE F.B.I., THE KU KLUX KLAN, AND THE MURDER OF VIOLA LIUZZO IX* (2005) (recounting the murder of Detroit citizen Viola Liuzzo by the K.K.K., wherein an undercover informant assisted in her murder in Selma, Alabama). F.B.I. informant Gary Thomas Rowe was an informant from 1960-1965 and was present when Ms. Liuzzo was shot. *Id.* Rowe was involved in a number of murders during the civil rights movement. *Id.* To protect Rowe's true identity, the F.B.I. allowed Rowe to attack Blacks and Freedom Riders without fear of arrest or prosecution. *Id.*

363. The Attorney General Report requires an investigation of 6 months and no longer than one year. See The Attorney General's Guidelines on Federal Bureau of Investigation Undercover Operations (Attorney General's Guidelines), <http://www.usdoj.gov/olp/fbiundercover.pdf>.

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

365. "The undercover employee shall be instructed in the law of entrapment." Attorney General's Guidelines, *supra* note 363, at 17.

VII. SUMMARY

Entrapment succeeds through conspiracy, and conspiracy breeds manipulative influences. Entrapment is a defense against mandatory sentences, against exploitive enhancement statutes, and against excessive police inducements.³⁶⁶ Manipulation is a common fact of life. Public relations, advertisements, media sound-bites, socialization, and even tax laws induce societal behavior. Aggravating criminal behavior through manipulative means, however, imperils a government's equitable standing. The entrapment defense compares whose hands are dirtiest: the predisposed suspect or the predetermined government, which feeds from the coffers of crime. Lucrative forfeiture practices and incarceration of large minority groups feed the conspiratorial paranoia.³⁶⁷

Undercover operations are lies that tell the truth. But the truth frequently presents conflicting policy objectives. Through the criminal processes in the drug wars, as in Tulia, Texas, the most desperate citizens are demonized, isolated, incarcerated, and denied a role in the American dream.³⁶⁸ In truth, undercover operations in the drug effort have acted as a venal war on the underclass. Yet, corporations bent on fraud and bribery are free-spirited with deferred prosecutions.³⁶⁹ Crime is a capital investment and the government is the major stockholder.

Undercover investigations intrude on our Bill of Rights, our freedom of association, of speech, of fantasies. Yet, such investigations are necessary as solid, empirical proof of present and future dangerousness. As with Beelzebub, the characters of good and evil become indistinguishable. When the government feeds at the trough of criminality, then the government has breached its social contract with its citizens and lost its moral imperative.³⁷⁰

366. See Attorney General's Guidelines, *supra* note 363, at 2-16.

367. "Just because you're paranoid, doesn't mean they're not out to get you." Quote from unknown source available at <http://www.rpi.edu/~markhn/quotes.html>.

368. See generally BLAKESLEE, *supra* note 11.

369. See Eric Lichtblau, *In Justice Shift, Corporate Deals Replace Trials*, N.Y. TIMES April 9, 2008, at A1. The companies are legion: Monsanto on bribing millions of dollars with Indonesian officials, American Express, mortgage companies, and the sub-prime mortgage debacle. *Id.*

370. See generally MAURICE PUNCH, CONDUCT UNBECOMING: THE SOCIAL CONSTRUCTION OF POLICE DEVIANCE AND CONTROL 1-7 (1985). Police deviance elicits a special feeling of betrayal. Something extra is involved when public officials and policemen in particular deviate from accepted norms. That something more is the violation of a fiduciary relationship, the corruption of a public trust and public virtue. *Id.*