

NOTES

ENTRAPMENT, PUNISHMENT, AND THE SADISTIC STATE

*Andrew Carlon**

INTRODUCTION.....	1082
I. THE ENTRAPMENT DEFENSE DESCRIBED.....	1087
A. <i>The Tests</i>	1087
1. <i>The Subjective Test</i>	1087
2. <i>The Objective Test</i>	1090
3. <i>A Distinction Without a Difference?</i>	1093
B. <i>Previously Advanced Justifications Fail to Explain the Defense Adequately</i>	1095
1. <i>“Culpability”</i>	1096
2. <i>Controlling the State: The Quasi-Constitutional Argument</i>	1099
3. <i>Efficiency</i>	1102
4. <i>Civil Rights</i>	1106
5. <i>“Autonomy”</i>	1108
II. TOWARD A PUNISHMENT-CENTERED VIEW OF ENTRAPMENT.....	1112
A. <i>Punishment Defined—and Distinguished</i>	1112
B. <i>The Sadistic State</i>	1117
C. <i>Culpability and Desert</i>	1121
D. <i>Proper and Improper Sting Operations</i>	1124
III. A FEW EXAMPLES.....	1126
A. <i>Sorrells v. United States</i>	1126
B. <i>Sherman v. United States</i>	1127
C. <i>Jacobson versus Gendron</i>	1128
D. <i>Sentencing Entrapment</i>	1129
CONCLUSION.....	1132

* J.D., 2007, University of Virginia School of Law; B.S.F.S., 2003, Georgetown University School of Foreign Service. I would like to thank Professor Kim Forde-Mazrui for his insightful supervision and support, and Angela Harris, Peter Hawkins, Britt McClung, Jim Zucker, and the participants in the *Virginia Law Review* Note Workshop for their comments and assistance.

In a matter of this kind the Court should not rest on the first attempt at an explanation for what sound instinct counsels. It should not forego re-examination to achieve clarity of thought, because confused and inadequate analysis is too apt gradually to lead to a course of decisions that diverges from the true ends to be pursued.¹

From a legal point of view, even more interesting . . . is the totalitarian replacement of the suspected offense by the possible crime.²

INTRODUCTION

LAW review articles on entrapment typically begin with a reference to the temptation in the Garden of Eden.³ This is frustrating, because the story is not one of entrapment at all: it was not God who tempted the “nonpredisposed” Eve, but the serpent.⁴ To

¹ *Sherman v. United States*, 356 U.S. 369, 379 (1958) (Frankfurter, J., concurring).

² Hannah Arendt, *The Origins of Totalitarianism* 551 (Schocken Books 2004) (1951).

³ See, e.g., Paul Marcus, *The Entrapment Defense* § 1.03, at 6 (3d ed. 2002); Fred Warren Bennett, *From Sorrells to Jacobson: Reflections on Six Decades of Entrapment Law, and Related Defenses*, in *Federal Court*, 27 *Wake Forest L. Rev.* 829, 831 (1992); Gerald Dworkin, *The Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime*, 4 *Law & Phil.* 17, 17 (1985); David J. Elbaz, *The Troubling Entrapment Defense: How About an Economic Approach?*, 36 *Am. Crim. L. Rev.* 117, 118 (1999); Rebecca Roiphe, *The Serpent Beguiled Me: A History of the Entrapment Defense*, 33 *Seton Hall L. Rev.* 257, 257 (2003); J. Gregory Deis, *Note, Economics, Causation, and the Entrapment Defense*, 2001 *U. Ill. L. Rev.* 1207, 1211–12; Brian Thomas Feeney, *Note, Scrutiny for the Serpent: The Court Refines Entrapment Law in Jacobson v. United States*, 42 *Cath. U. L. Rev.* 1027, 1027 (1993); Christopher D. Moore, *Comment, The Elusive Foundation of the Entrapment Defense*, 89 *Nw. U. L. Rev.* 1151, 1152–53 (1995); Scott C. Paton, *Note, “The Government Made Me Do It”: A Proposed Approach to Entrapment Under Jacobson v. United States*, 79 *Cornell L. Rev.* 995, 996 (1994); *Note, “The Serpent Beguiled Me and I Did Eat”—The Constitutional Status of the Entrapment Defense*, 74 *Yale L.J.* 942, 942 (1965). This is not original to law review articles; indeed, most mention it by way of quoting *Board of Commissioners v. Backus*, 29 *How. Pr.* 33, 42 (N.Y. Sup. Ct. 1864), an early case which rejected the entrapment defense. The argument in *Backus* is that there is no difference between the Garden narrative and police entrapment. *Id.* The attitude, before the entrapment doctrine was formulated, was that “courts do not look to see who held out the bait, but to see who took it.” *People v. Mills*, 70 *N.E.* 786, 791 (N.Y. 1904).

⁴ While the theologian may quibble as to whether the serpent’s temptation was part of “God’s plan” or not, it would not be quite orthodox to say that the serpent acted as

2007]

Entrapment and the Sadistic State

1083

find something resembling entrapment in the Bible, one might, conceivably, turn to the book of Job. In Job, Satan, acting at the behest of God,⁵ afflicts Job in the hope that Job will curse God, and thereby merit punishment. Satan, predictably, fails,⁶ so perhaps we might consider this a case of “attempted entrapment.”

The reason the Eden narrative is not one of entrapment, and the story of Job might be, is that in Eden, although there was certainly both temptation and punishment, the tempter and the punisher were not working together—indeed, the former was working at cross purposes with the latter. Only in Job has the one seeking to induce the wrong been *commissioned by the one who would punish it*. Similarly, in our temporal justice system, only when the one inducing or prompting the crime is working as an agent of the state does entrapment even enter into the picture.⁷ The same actions that would merit acquittal if done by the state, provide no defense if done by a private citizen. As one court put it:

Private entrapment is just another term for criminal solicitation, and outside the narrow haven created by the defense of necessity or compulsion, the person who yields to the solicitation and commits the solicited crime is guilty of that crime. All crime is a yielding to temptation, the temptation to obtain whatever gains, pecuniary or nonpecuniary, the crime offers. The temptation is a cause of the crime but not a cause that exonerates the tempted from criminal liability if he yields, just as poverty is not a defense to larceny. Cause and responsibility are not synonyms.⁸

God’s agent. See St. Thomas Aquinas, *Summa Theologica*, pt. I, question 49, art. 2 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1920) (“[I]t is manifest that the form which God chiefly intends in things created is the good of the order of the universe. Now, the order of the universe requires . . . that there should be some things that can, and do sometimes, fail. And thus God, by causing in things the good of the order of the universe, consequently and as it were by accident, causes the corruptions of things”); id. at pt. I, question 114, art. 1 (“[Demons] are not sent by God to assail us, but are sometimes permitted to do so according to God’s just judgments.”)

⁵ Job 1:12, 2:6.

⁶ Id. at 1:22, 2:10.

⁷ See Marcus, *supra* note 3, § 5.10, at 197–200; 21 Am. Jur. 2d Criminal Law § 248 (1998).

⁸ *United States v. Manzella*, 791 F.2d 1263, 1269 (7th Cir. 1986).

It is not immediately obvious why this should be. If *A* puts a gun to *B*'s head, and commands him to commit a crime, the question of whether *A* is an agent of the police or not is irrelevant in determining *B*'s guilt. Likewise, if *A* drugs *B* without *B*'s permission, and in *B*'s drug-induced frenzy he injures someone, the identity of *A*'s employer matters little. If *A*, a private citizen, repeatedly offers *B* increasingly large amounts of money to commit a crime, and *B* at length succumbs, *B* is guilty. But if *A*, *completely unbeknownst to B*, happens to be a police informer, then *B*, despite the fact that he is knowingly and willingly committing a proscribed act, might not be guilty. Why?

This “problem of private entrapment”⁹ is perhaps the most puzzling feature of entrapment law, and it is one that anyone trying to justify the entrapment defense must explain. It is, indeed, one of the main reasons that almost no other country in the world offers an entrapment defense.¹⁰ Perhaps this is why there has not been a satisfactory explanation put forward for the doctrine. The case law and scholarly literature on entrapment dwell at great length on the *what* of entrapment (what constitutes entrapment and what legal test ought to be applied), and sometimes on the *who* (who should rule on entrapment, the judge or jury, and who qualifies as a state actor), but have comparatively neglected the *why*.¹¹

⁹ Gideon Yaffe, “The *Government* Beguiled Me”: The Entrapment Defense and the Problem of Private Entrapment, *J. Ethics & Soc. Phil.*, Apr. 2005, at 2, 2–3, http://www.jesp.org/PDF/efca_Yaffe-vol-1-no-1.pdf.

¹⁰ See *The Entrapment Defense: An Interview with Paul Marcus*, 30 *Ohio N.U. L. Rev.* 211, 225–28 (2004) [hereinafter Interview]. The English House of Lords roundly rejected the entrapment defense in 1980 for this exact reason:

Many crimes are committed by one person at the instigation of others. . . . The fact that the counsellor and procurer is a policeman or a police informer, although it may be of relevance in mitigation of penalty for the offence, cannot affect the guilt of the principal offender; both the physical element (*actus reus*) and the mental element (*mens rea*) of the offence with which he is charged are present in his case.

R v. Sang, [1980] A.C. 402, 432 (H.L. 1979) (appeal taken from Eng.). The author has found only one other country, Canada, that recognizes entrapment as a complete defense to a crime. See *The Queen v. Mack*, [1988] 2 S.C.R. 903, 942 (Can.) (“[T]he rationale for recognition of the entrapment doctrine lies in the inherent jurisdiction of the court to prevent an abuse of its own processes.”); *Amato v. The Queen*, [1982] 2 S.C.R. 418, 447, 463 (Can.).

¹¹ This is not to say that the problem is never addressed—others have certainly asked this question, and this Note will address some of those arguments. The point is simply that the vast bulk of the commentary, and almost without exception all of the

2007]

Entrapment and the Sadistic State

1085

The entrapment defense is also not a per se rule against police inducement generally. Entrapment is intimately tied to the idea of the “sting”—the use of trickery and deceit to entice individuals to engage in specific crimes for the purpose of detection and punishment.¹² This can involve posing as a potential coconspirator or as a potential victim.¹³ But while nearly all entrapments result from stings, not all stings result in entrapment. Different jurisdictions use various tests to determine whether the defendant has in fact been entrapped by an improper sting. In effect, the doctrine divides the universe of stings into two categories: those that are acceptable and those that have gone too far. Any justification for the entrapment defense must explain not only why some police inducements are wrong but also why others are right.

This Note will advance a justification for the entrapment defense that not only accounts for the intuitive sense of injustice we identify with entrapment—in Judge Hand’s words, the “spontaneous moral revulsion against using the powers of government to beguile innocent . . . persons into lapses which they might otherwise resist”¹⁴—but also accounts for the problem of private entrapment. This justification also explains why acquittal is the proper remedy. Moreover, this Note will demonstrate that, far from being a procedural technicality that protects a value extrinsic to the substantive criminal law, the roots of the entrapment doctrine run right to its heart: our reasons for punishment.

case law, has simply *assumed* entrapment’s wrongfulness—and the appropriateness of the remedy of acquittal—without serious examination. On the case law, the comments of the Australian High Court are especially apt:

Analysis of the majority judgments in the United States Supreme Court discloses that they provide no satisfactory conceptual basis for the acceptance of entrapment as a substantive defense to a criminal charge under our law. In particular, those judgments do not identify any common law principle which is capable of sustaining the proposition that an otherwise guilty person is not guilty if, lacking previous intent or purpose, that person was induced or persuaded to do what he or she did by some government officer.

Ridgeway v. The Queen (1995) 184 C.L.R. 19, 29 (Austl.).

¹² See also Black’s Law Dictionary 1454 (8th ed. 2004) (defining “sting” as “[a]n undercover operation in which law-enforcement agents pose as criminals to catch actual criminals engaging in illegal acts”).

¹³ Bruce Hay, *Sting Operations, Undercover Agents, and Entrapment*, 70 Mo. L. Rev. 387, 390–91 (2005).

¹⁴ *United States v. Becker*, 62 F.2d 1007, 1009 (2d Cir. 1933).

This Note takes as its starting point a deontological, retributivist approach to punishment. Justification of this decision could be a Note, if not an entire library, in itself and this Note will not rehash the arguments over retributivism versus deterrence, incapacitation, rehabilitation, etc. There are, of course, myriad ideas about, metaphors for, and explanations of what “retribution” means,¹⁵ some of which treat “desert” as both necessary and sufficient to justify punishment,¹⁶ others who treat it as merely necessary—a limiting principle which admits of other justifications, such as deterrence.¹⁷ The justification in this Note attempts to be agnostic to all of these variations—merely presupposing the necessity of desert, however defined, to justify punishment.

Part I of this Note will describe the entrapment discourse as it now stands. It will first describe the two prevalent tests used to determine whether the defendant has been entrapped. It will then introduce some of the justifications, both explicit and implicit, for the entrapment defense, and explain why they are insufficient to fully explain the existence of the doctrine. Part II will introduce a “punishment-centered” view of entrapment—one that finds the gravamen of the entrapment doctrine not in the perpetration of an overly aggressive sting, but in the decision to punish someone before that person has committed a crime. It will note that the practice of entrapment is in fact an undermining of the principle of *actus reus*, turning the state from an arbiter of justice to a totalitarian punishment machine—what I call the “sadistic state.” Finally Part III will, by examining actual federal entrapment case law, demonstrate how the punishment-centered view of entrapment can explain the holdings and language of classic entrapment cases—and how it can be applied to a current controversy in entrapment law.

¹⁵ See, e.g., John G. Cottingham, *Varieties of Retribution*, 29 *Phil. Q.* 238 (1979) (describing nine varieties of retributivism); R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 *Crime & Just.* 1, 25–45 (1996) (discussing several “Retributivist Themes and Variations”).

¹⁶ See, e.g., Michael Moore, *Placing Blame: A General Theory of the Criminal Law* 159–60 (1997).

¹⁷ See, e.g., H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, in *Punishment and Responsibility* 8–13 (1968) (admitting deterrence as a “General Justifying Aim” and retribution as a limiting principle of “Distribution”).

I. THE ENTRAPMENT DEFENSE DESCRIBED

It is logical to preface any explication of the underlying rationale for a legal doctrine with a brief definition and description of it. Unfortunately, with entrapment, this becomes difficult. The entrapment doctrine, simply put, is “a mess.”¹⁸ In part, this may be the result of its independent adoption in the modern period by the Supreme Court and by all fifty states through both judicial and legislative action. In part, however, this may be because we have not been able to properly articulate what lies beneath our intuition that entrapment is wrong and why it should constitute a complete defense.

A. The Tests

Although there are probably as many entrapment doctrines as there are jurisdictions that recognize the defense,¹⁹ the primary discourse of entrapment law consists of the debate between the two tests used to identify whether or not the defendant has been entrapped. This dichotomy has existed almost since the doctrine’s formation, and is embodied in the two seminal U.S. Supreme Court cases on the matter, *Sorrells v. United States*²⁰ and *Sherman v. United States*.²¹ In both, the majority adopted what is now known as the “subjective test,” and a significant concurring minority endorsed what we now call the “objective test.”

1. The Subjective Test

The subjective test has been adopted by the federal courts and the majority of the states.²² This test first asks whether the defendant was induced to commit the offense by a government agent. Once the defendant demonstrates this by a preponderance of the

¹⁸ John David Buretta, Note, Reconfiguring the Entrapment and Outrageous Government Conduct Doctrines, 84 Geo. L.J. 1945, 1945 (1996) (“The entrapment and outrageous government conduct doctrines are a mess.”).

¹⁹ If not more: the defense, as we will see, is not always administered consistently within individual jurisdictions.

²⁰ 287 U.S. 435 (1932).

²¹ 356 U.S. 369 (1958).

²² See 2 Wayne R. LaFare et al., Criminal Procedure § 5.2(a), at 407 n.4 (2d ed. 1999) (listing states that have adopted the subjective test, either by statute (fourteen) or judicial decision (nineteen), and the relevant statute or case adopting it).

evidence, the burden is shifted to the prosecution to prove that the defendant was “predisposed” to commit the crime.²³ In Chief Justice Warren’s pithy phrase, the entrapment defense exists to draw “a line . . . between the trap for the unwary innocent and the trap for the unwary criminal.”²⁴ The prosecutor must prove that the sting operation was the latter, and that the defendant is therefore a criminal.

The exact definition of predisposition is somewhat unclear (and is the subject of many criticisms of the subjective approach). The federal courts ask whether the defendant was “ready and willing to commit the crime” when approached by the police.²⁵ One circuit court has adopted a five-factor test to evaluate predisposition:

- (1) the character or reputation of the defendant;
- (2) whether the suggestion of the criminal activity was originally made by the government;
- (3) whether the defendant was engaged in criminal activity for a profit;
- (4) whether the defendant evidenced reluctance to commit the offense, overcome by government persuasion; and
- (5) the nature of the inducement or persuasion offered by the government.²⁶

Importantly, to many critics of the subjective test, factors one and three have the potential to make admissible evidence of the defendant’s character, prior bad acts, and other otherwise traditionally irrelevant and prejudicial evidence.²⁷ By raising the entrapment defense, the defendant has “opened the door,” putting character in play.²⁸

There have been several rationales put forth for this test. The one advanced in *Sherman* and *Sorrells* is one of “legislative intent”—although the defendant committed the acts criminalized in the statute, the legislature could not have intended that the defen-

²³ Marcus, *supra* note 3, § 4.02, at 112–13, § 6.02, at 216–17.

²⁴ *Sherman*, 356 U.S. at 372.

²⁵ *United States v. Ortiz*, 804 F.2d 1161, 1165 (10th Cir. 1986).

²⁶ *United States v. Fusko*, 869 F.2d 1048, 1052 (7th Cir. 1989).

²⁷ See 21 Am. Jur. 2d Criminal Law § 264 (1998).

²⁸ *Sorrells*, 287 U.S. at 451–52 (“[I]f the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense.”).

dant be punished if those actions were taken at the instigation of the government.²⁹ Another is that, since the evil in entrapment is the *manufacture* of crime by the police, the most relevant inquiry is whether the police did in fact manufacture a crime in the instant case, or simply presented an opportunity for a crime that was going to happen, one way or another, such that it could best be detected.³⁰ Finally, defenders of the subjective approach assert that, in examining the defendant's actual predisposition, they are better able to maintain the emphasis on culpability that undergirds the substantive criminal law doctrine of excuse.³¹

Opponents, such as Justice Frankfurter, author of the *Sherman* concurrence, deride the Supreme Court majority's legislative intent doctrine as "sheer fiction."³² They object to the admissibility of evidence that would otherwise be inadmissible as prejudicial.³³ They dislike the implication that the permissibility of police conduct varies according to the defendant, which seems to violate the principle of equality under the law.³⁴ They further assert that, if a defendant is deemed "predisposed," that the police are given virtually "carte blanche"³⁵ to do anything they want, however obscene, to convince that person to commit a crime.³⁶ Finally, they point to the problem of private entrapment: the fact that the governmental status of the

²⁹ Id. at 448 ("We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them.").

³⁰ See Roger Park, *The Entrapment Controversy*, 60 Minn. L. Rev. 163, 217–20 (1976).

³¹ See, e.g., John D. Lombardo, Comment, Causation and "Objective" Entrapment: Toward a Culpability-Centered Approach, 43 UCLA L. Rev. 209, 260–61 (1995) (advocating the subjective test as just such a "culpability-centered approach"). "Entrapment as excuse" will be discussed more fully infra Subsection I.B.1.

³² *Sherman*, 356 U.S. at 379 (Frankfurter, J., concurring).

³³ Id. at 382.

³⁴ Id. at 383 ("Permissible police activity does not vary according to the particular defendant concerned . . .").

³⁵ Dru Stevenson, *Entrapment and the Problem of Deterring Police Misconduct*, 37 Conn. L. Rev. 67, 97 (2004).

³⁶ *Sherman*, 356 U.S. at 383 (Frankfurter, J., concurring) ("Past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing his repeated conviction, from which the ordinary citizen is protected."). The U.S. Supreme Court has stated in dicta that there may be undercover police tactics that are so extreme and offensive that they constitute a violation of Due Process, but they have never found any inducement tactic to rise to that level. See infra note 90.

tempter matters should prove to us that the central actor in entrapment is the government, on whom we must fix our critical gaze.³⁷

2. *The Objective Test*

The objective test does just that. By contrast with the subjective test, which, after proving inducement focuses almost entirely on the defendant and whether he is “otherwise innocent,” the objective test focuses exclusively on the government’s actions and the *nature* of the inducement. This approach has the support of the vast majority of commentators,³⁸ and has been adopted by the Model Penal Code³⁹ and a significant minority of states, both by judicial decision and statute.⁴⁰ As phrased in the Model Penal Code:

A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by . . .

(b) employing methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.⁴¹

The inducement element under the objective test is largely the same as under the subjective test (and, in some states, has been expanded to encompass some subjective elements such as causa-

³⁷ See Yaffe, *supra* note 9, at 7. Professor Yaffe, an advocate of the subjective test, later takes issue with this argument, *id.* at 15–23, but notes its initial appeal.

³⁸ Indeed, one survey in 1976 could find only one article from the previous twenty-five years favoring the subjective test over the objective test, and this article actually favored abolishing the entrapment defense altogether. Park, *supra* note 30, at 167 n.13.

³⁹ Model Penal Code § 2.13 (1962).

⁴⁰ See LaFave et al., *supra* note 22, § 5.2(b), at 410 n.21 (listing states that have adopted the objective test, either by statute (twelve) or judicial decision (five), and the relevant statute or case adopting it).

⁴¹ Model Penal Code § 2.13(1) (1962).

tion).⁴² The key difference is that the defendant is never personally scrutinized as to his predisposition. Instead, the question is whether the inducement would have tempted a *hypothetical* individual to crime. The description of this hypothetical individual varies, from “normal [and] law-abiding”⁴³ to “of average resistance”⁴⁴ or even “reasonable.”⁴⁵

Principal justifications for the objective test are grounded in public policy: courts must refuse to convict entrapped defendants not because punishing them fails to advance the traditional ends of the criminal law (deterrence, incapacitation, retribution), but rather because the methods employed on behalf of the government to bring about the crime “cannot be countenanced.”⁴⁶ Rather, the methods must be resisted to deter police misconduct and preserve the “purity of [the] courts.”⁴⁷ Entrapment, on this view, is not quite a doctrine of substantive criminal law but is likened to a doctrine of criminal procedure, an investigatory limit analogous to Fourth and Fifth Amendment exclusionary rules.⁴⁸

Subjective test advocates maintain that the objective test as typically conceived fails to account for the fact that the reasonableness of the level of inducement often depends on individual characteristics of the target.⁴⁹ They fear that persons who are actually criminals might be acquitted merely because a court has already decided that the inducement offered them was a priori improper.⁵⁰ Alternatively, they argue that courts, themselves cognizant of this danger, will give “blanket approval” to broad classes of techniques, placing such high bars to establishing entrapment as to essentially eviscerate the defense.⁵¹ Critics also point out that if the ultimate facts concern the nature of the inducement, the evidence will inevitably

⁴² See Marcus, *supra* note 3, § 3.04, at 100–01; Lombardo, *supra* note 31, at 234–48; Louis Michael Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 *Sup. Ct. Rev.* 111, 120.

⁴³ *State v. Martinez*, 848 P.2d 702, 706 (Utah Ct. App. 1993) (citing *State v. Wright*, 744 P.2d 315, 318 (Utah Ct. App. 1987)).

⁴⁴ *Barnes v. State*, 70 S.W.3d 294, 307 (Tex. App. 2002).

⁴⁵ *State v. Anderson*, 572 P.2d 159, 162 (Haw. 1977).

⁴⁶ *Sherman*, 356 U.S. at 380 (Frankfurter, J., concurring).

⁴⁷ See, e.g., *Sorrells*, 287 U.S. at 446.

⁴⁸ LaFave et al., *supra* note 22, § 5.2(b), at 413.

⁴⁹ See Park, *supra* note 30, at 202–04.

⁵⁰ See *id.* at 220.

⁵¹ See *id.*

reduce to a “swearing match” between two perhaps unsavory witnesses: one the defendant who has admitted to acts normally defined as criminal, the other often a paid informant who is himself a member of the criminal underworld.⁵² They are skeptical of efforts to create universal rules for police stings—better simply to attempt to do justice in the instant case.⁵³

The two tests are phrased quite differently, but they share a structural similarity. In both, the first element is typically an essentially identical factual question of causation: did the police induce the defendant to commit the crime? The next element in each test is a critical hypothetical: in the subjective version, the question is whether the crime would have occurred if this particular defendant had not been encouraged by the police; in the objective version, the question is whether the crime would have occurred if the particular encouragement offered by the police had been offered to a nonpredisposed person. As one commentator observes, “[t]he tests are the mirror images of each other.”⁵⁴

While the tests share structural similarities, there is a critical difference in the procedural implication of the conceptual styling of the two approaches. The subjective approach sees itself rooted in the substantive criminal law and therefore sees the second, hypothetical question about the defendant as a question for the jury, just as the jury must make the decision as to duress, insanity, or other excuses.⁵⁵ The objective approach, posing as a quasi-procedural rule, frames the entrapment defense as a pre-trial motion decided by the judge, much like a *Miranda* motion to exclude

⁵² Id. at 221 & n.193. See also Alexandra Natapoff, Snitching: The Institutional and Communal Consequences, 73 U. Cin. L. Rev. 645 (2004) (describing the corrosive effects of the institution of criminal informants). Of course, since the nature of the inducement and the defendant’s response to it are often relevant to the determination of predisposition, the swearing match may proceed under either test. This argument also ignores the beam in the subjectivists’ eye: the evidentiary nightmare of determining a defendant’s predisposition.

⁵³ Park, *supra* note 30, at 226–29.

⁵⁴ Anthony M. Dillof, Unraveling Unlawful Entrapment, 94 J. Crim. L. & Criminology 827, 838 (2004).

⁵⁵ See LaFave et al., *supra* note 22, § 5.3(b).

2007]

Entrapment and the Sadistic State

1093

or a motion to dismiss on the basis of the running of the statute of limitations.⁵⁶

3. *A Distinction Without a Difference?*

Doctrinally, the two tests are typically described as separate and relatively irreconcilable. In practice, however, the two tests actually tend to converge. Some states have fashioned self-consciously “hybrid” tests that examine both the defendant and the police conduct,⁵⁷ but even jurisdictions that are formally in one camp or the other often have hybrid statutory language or judicial interpretations. That is, nominally objective-test jurisdictions tend to allow some “subjective” judgments about the individual defendants,⁵⁸ and ostensibly subjective-test jurisdictions nonetheless often examine quite critically the role of the police in prompting the crime.⁵⁹

Some commentators go even further to state that even the formal doctrines themselves are not as different as they seem. For example, of the five factors in the federal (subjective) test,⁶⁰ two factors, whether the suggestion was made by the government and the nature of the inducement, would be at least somewhat relevant under any objective approach. Although the subjective approach claims to look exclusively at the defendant, even doctrinally the nature of the government’s conduct is quite relevant as *evidence* of predisposition—the success of a slight inducement indicates great predisposition; the resort to an extremely powerful inducement militates for a finding of less predisposition.⁶¹ So the difference between the two tests comes down to one question: is the police con-

⁵⁶ See *Sherman*, 356 U.S. at 385 (Frankfurter, J., concurring) (“[The entrapment defense], aimed at blocking off areas of impermissible police conduct, is appropriate for the court and not the jury.”).

⁵⁷ See Marcus, *supra* note 3, § 1.15 (describing various states’ “hybrid” tests).

⁵⁸ Courts accomplish this, for example, through the use of the “causation” element. See *supra* note 42 and accompanying text.

⁵⁹ See Paul Marcus, Presenting, Back from the [Almost] Dead, the Entrapment Defense, 47 Fla. L. Rev. 205, 218 (1995) (“The central issue is clearly the defendant’s state of mind. Yet, both these [U.S. Supreme Court] quotes establish that no decision as to predisposition can be made without looking fully at the extent of government involvement in the criminal enterprise—its inducement activities.”).

⁶⁰ *Supra* note 26 and accompanying text.

⁶¹ See Seidman, *supra* note 42, at 118–19.

duct *itself* the determining factor, or is it merely the *main piece of evidence* of the determining factor?

The confluence of the two tests becomes especially clear when authors attempt to identify or conceive of individuals who would be convicted under one scheme but acquitted under another.⁶² For example, it is said that a nonpredisposed individual who responds to a minimal inducement would be convicted under the objective test but acquitted under the subjective test. But can one really imagine such an individual actually existing—one who would jump at the chance to commit an illegal act with minimal prompting but could be said not to be “predisposed?” In any case, would we really want to acquit such a person?⁶³ By contrast, a predisposed person offered an unreasonable inducement would be acquitted under the objective test but convicted under the subjective test.⁶⁴ Indeed, it is this “windfall” that subjectivists most dislike about the objective test.⁶⁵ It seems highly unlikely, however, that police agents would need to resort to extreme or improper inducements to encourage someone predisposed to crime. One of the most common patterns seen in “objectively” improper inducements is repeated requests, with the police typically increasing the stakes each time (in terms of reward or attempts to play on sympathy).⁶⁶ If someone successfully resisted numerous escalating requests, it is difficult to say he was truly predisposed.

⁶² See, for example, the useful chart in Park, *supra* note 30, at 199.

⁶³ See Seidman, *supra* note 42, at 131–32.

⁶⁴ See Park, *supra* note 30, at 199 (chart).

⁶⁵ See *id.* at 216.

⁶⁶ See, e.g., *Jacobson v. United States*, 503 U.S. 540, 550 (1992) (“By the time petitioner finally placed his order, he had already been the target of 26 months of repeated mailings and communications from Government agents and fictitious organizations.”); *Sherman*, 356 U.S. at 371 (“From the first, petitioner tried to avoid the issue. Not until after a number of repetitions of the request, predicated on Kalchinian’s presumed suffering, did petitioner finally acquiesce.”); *Sorrells*, 287 U.S. at 439 (defendant acquiesced only on third request); *Commonwealth v. Lucci*, 662 A.2d 1, 8 (Pa. Super. Ct. 1995) (holding appellant entrapped as a matter of law where a “very close friend . . . approached appellant repeatedly about selling drugs”); cf. *United States v. Gendron*, 18 F.3d 955, 964 (1st Cir. 1994) (distinguishing *Jacobson* because, *inter alia*, the government had not “‘graduated’ its responses . . . from innocent lure to frank offer”); *People v. Jamieson*, 461 N.W. 2d 884, 893 (Mich. 1990) (refusing to find entrapment because, *inter alia*, the “transaction involved very limited contact and was a one-time occurrence”).

Thus, on closer examination, the substantive difference between the two tests seems to collapse. The tests are not only mirror images of each other, but also are two ways of asking the same question: were the police detecting ongoing or imminent criminal activities or creating them? The only remaining issues are largely evidentiary and procedural, namely whether the introduction of more general character evidence should be admitted (under the subjective test only) and whether the judge or jury is the proper decisionmaker. These too are not insoluble. For example, some subjective-test jurisdictions do not automatically allow the admission of broad character evidence against the defendant merely because he has pleaded entrapment.⁶⁷ Similarly, because of the potentially prejudicial nature of the evidence of predisposition, some subjectivists have advocated placing the question before the court, presumably because the judge would be better able to put prejudice aside.⁶⁸ With the sting of the subjective test's evidentiary and procedural corollaries removed, the practical difference between the tests seems to vanish entirely.

The similarity—if not identity—of the two tests suggests that they are actually motivated by the same underlying concerns. The next Section examines various justifications of the entrapment doctrine that all are, to one extent or another, applicable to both tests. Further, the punishment-centered view of entrapment that this Note ultimately advances is agnostic as to the two different tests, and one who adopts it is not impelled necessarily to accept either. If, indeed, the two are functionally identical, we need not choose one over the other in order to examine the principle motivating both.

B. Previously Advanced Justifications Fail to Explain the Defense Adequately

Having (largely) addressed the “what” of entrapment, we now turn to the “why”: the policy justifications advanced for the entrapment defense. Some of these, typically in scholarly works, are

⁶⁷ See *Lambeth v. State*, 562 So.2d 575, 578 (Ala. 1990) (citing “a substantial number of jurisdictions [that] refuse to permit reputation or hearsay evidence to establish predisposition”).

⁶⁸ E.g., *Park*, supra note 30, at 269.

put forth explicitly; others, especially in judicial opinions and legislative history, tend to be more in the form of unstated assumptions.

1. “Culpability”

Entrapment is often described as an “excuse,” like duress or incapacity. The language used by courts is telling—they talk of agents implanting ideas of crime into the mind of law-abiding citizens,⁶⁹ as if the agents had employed some kind of mind-control chip, rather than merely offering money to peddle drugs. In *Sherman*, for example, Chief Justice Warren writes about separating the “unwary innocent” from the “unwary criminal”⁷⁰—the “innocent” being the one entrapped and meriting acquittal.

The problem is that “predisposition” has nothing to do with “culpability” as it has been traditionally understood.⁷¹ Strictly speaking, we do not punish people for “being criminals,” we punish them for *committing crimes*. Apart from our criminal acts, we are all “otherwise innocent.”⁷² Once one has performed certain actions with a certain mental intention, however, one is no longer “innocent;” one has *become* a criminal, no matter where the idea to commit those acts came from. Yet the traditional “culpability” discourse seems to describe people who are *essentially* “innocent” or “criminal,” and the optimal amount of government encouragement is that which merely brings out the latent criminality of the latter while leaving the former uncorrupted. The “good” sting merely makes manifest the evil that lay in the “criminal’s” heart all along; the “entrapping” sting turns the “innocent” into a criminal. The equation of predisposition with culpability implies that we punish people for their character, rather than their acts.⁷³

Ultimately, the culpability argument founders on the problem of private entrapment—why are those tempted by the police less cul-

⁶⁹ E.g., *Sorrells*, 287 U.S. at 442.

⁷⁰ *Sherman*, 356 U.S. at 372.

⁷¹ Jonathan C. Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 Va. L. Rev. 1011, 1043 (1987) (“[C]riticism of the distinction between nondisposed and predisposed defendants is based upon the fact that the distinction does not comport with our usual method of assessing moral blameworthiness in the law.”); Seidman, *supra* note 42, at 135–36.

⁷² *Sorrells*, 287 U.S. at 448.

⁷³ See Park, *supra* note 30, at 257 (“The issue is precisely whether [the defendant] was a ‘bad man’ who was predisposed to commit the type of crime charged.”).

pable than those tempted by anyone else? Perhaps the easiest solution to this problem is to deny its existence altogether. Professor Roger Park, for example, claims that the victims of private entrapment are just as innocent as those of police entrapment, but we excuse one and not the other for evidentiary and procedural reasons, chiefly the possibility of collusion and false claims.⁷⁴ He draws an analogy to the mistake of law defense, under which a person who relies upon an official misstatement of law may be, under some schemes, acquitted, but another who reasonably relies upon the diligent advice of private counsel will be convicted.⁷⁵ The official misstatement excuse to *ignorantia legis non excusat*, however, is not merely an administrative expediency; in general, individuals who rely on official statements are, subjectively, less culpable than those who rely on private counsel, insofar as knowing reliance on official statements is itself more reasonable than reliance on private counsel.⁷⁶ By contrast, the entrapped defendant has no idea he is interacting with an agent of the state.⁷⁷ More profoundly, however, this does not square with the fact that conspiracy is a crime, not an excuse. Reducing the problem to one of evidentiary convenience gives up too easily. Even with perfect knowledge, we would still never find the familiar childhood plea that “it was *his* idea” to exculpate in a criminal context, any more than God (presumably endowed with perfect knowledge) excused Eve in the Garden.

Professor Jonathan Carlson, by contrast, shifts the locus of exculpation from *mens rea* to *actus reus*. He states that the difference between police and private entrapment is in the harm risked.⁷⁸ Most sting operations are carefully managed so that the harm which justifies the punishment is never in any real danger of occurring. The drugs will never be sold to end users, the Congressman

⁷⁴ Id. at 241–42. Unfortunately, Professor Park “never attempts to defend what he takes to be the ‘obvious’ fact that those who are entrapped (governmentally or privately) are nonculpable.” Dillof, *supra* note 54, at 847 (internal citation omitted).

⁷⁵ Park, *supra* note 30, at 241.

⁷⁶ Dillof, *supra* note 54, at 847.

⁷⁷ In this respect, to make the official misstatement defense like entrapment, one would have to imagine, for example, a man who addresses a question to his personal attorney, not knowing that his attorney has just been sworn in as the state Attorney General, and who receives in reply the text of an official opinion letter, thinking it to be a memo personally addressed to him.

⁷⁸ Carlson, *supra* note 71, at 1061.

will never get to vote on the bill for which he has been bribed, etc.⁷⁹ Since no harm was caused—or even risked—there is no justification for punishment.⁸⁰

The problem with this sort of “objective retributivism” is that it elides the difference between “harmful action,” on the one hand, and “wrongful action,” on the other.⁸¹ Not all harms are wrongs, as in an accident due to no one’s negligence, and not all wrongs are harms, as in an attempted murder of which the victim is unaware.⁸² The criminal law addresses, in the main, wrongs; tort law, harms.⁸³ Under nearly all theories of criminal culpability, it is the actor’s guilty state of mind combined with corresponding actions that makes him worthy of punishment.⁸⁴

This response does not account for the problem of “moral luck” generally⁸⁵ or the more specific question of why we often punish attempts and other inchoate crimes less than we do completed acts.⁸⁶ This is indeed a valid question but is beyond the scope of this Note. Fortunately, the question is irrelevant for our purposes: even if noncompletion somehow *mitigates* the crime, it does not *acquit* the

⁷⁹ *Id.*

⁸⁰ *Id.* at 1062.

⁸¹ See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 *UCLA L. Rev.* 1659, 1661–66 (1992) (elaborating on the distinction between “wrong” and “harm”).

⁸² *Id.* at 1661–62.

⁸³ *Id.* at 1661. This oversimplifies matters, of course; much of tort law requires that the harm be the result of a wrongful act or omission, and many crimes have result elements that require actual harm. As a general matter, though, this distinction holds. A murder attempt of which one is unaware typically creates no common law cause of action, and an accident not due to fault may still trigger tort liability under a strict liability regime but will not generally lead to criminal sanctions.

⁸⁴ See Herbert L. Packer, *The Limits of the Criminal Sanction* 105–07 (1968) (describing “two analytic approaches to the question of mens rea,” both of which rely on state of mind).

⁸⁵ The problem of moral luck describes the difficulty in justifying the intuition that an individual deserves at least some moral blame based on his acts and their consequences, even if neither is completely under his control. See, e.g., Moore, *supra* note 16, at 211–12.

⁸⁶ See Dillof, *supra* note 54, at 844. But see Moore, *supra* note 16, at 211–47 (elaborating a retributivist philosophy accounting for the problem of “moral luck”). There are also some approaches that reject moral luck entirely: the Model Penal Code, though largely not motivated by retributivism, see Model Penal Code § 1.02 (1962), punishes attempts as seriously as completed offenses, with the exception of capital or first-degree felonies. *Id.* § 5.05(1).

defendant the way entrapment does.⁸⁷ Even a mistake of fact that renders the crime impossible does not render the defendant completely unworthy of punishment the way that entrapment seems to.

The critique of the equation of predisposition with culpability applies most directly to the justifications of the subjective test, but the objective test also seems to equate predisposition with culpability by focusing on the risk that a hypothetical, nonpredisposed person would have succumbed to the police inducements. To condemn risking a thing is necessarily to assert the undesirability of the thing itself.⁸⁸ Either test, then, would be justified if the presence of predisposition were what justified punishment of the target of a sting, and, consequently, both are implicated by the hollowness at the heart of the culpability justification.

2. *Controlling the State: The Quasi-Constitutional Argument*

Unlike the subjective test, which focuses largely on the defendant, the objective test focuses its scrutiny on the government. The government focus is based on a belief that we cannot countenance the police's actions in this case, and so, to protect the purity of the courts and deter future misconduct, we must acquit the defendant.⁸⁹ Entrapment becomes not so much a criminal defense as an administrative or quasi-constitutional limit on governmental power.⁹⁰ But

⁸⁷ It is possible that a court might find that a punishment should be mitigated because of the use of "entrapping" techniques by private citizens (that is, inducements that might, if practiced by police, amount to entrapment). But see *United States v. Hollingsworth*, 27 F.3d 1196, 1203 (7th Cir. 1994) (describing some inducements, offered by private citizens, as "actually an argument for a heavier sentence, in order to offset the inducement. . . . [T]he more profitable a crime, the more costly must the punishment be to the criminal in order to deter him from committing it.").

⁸⁸ Yaffe, *supra* note 9, at 18 ("[I]f there is something bad about *risking* ensnaring the unprejudiced, it must be because there is something bad about *actually* ensnaring the unprejudiced.").

⁸⁹ See, e.g., Model Penal Code § 2.13 cmt. 1 (1962) ("It is therefore the attempt to deter wrongful conduct on the part of the government that provides the justification for the defense of entrapment, not the innocence of the defendant.").

⁹⁰ In some instances, as in the doctrine of outrageous government conduct, the argument is explicitly fixed on constitutional provisions, such as the Due Process Clause of the Fourteenth Amendment. See *United States v. Russell*, 411 U.S. 423, 431–32 (1973). The Supreme Court, despite its subjectivist jurisprudence, has in dicta allowed that entrapping activities might reach this level, but has never actually found a case to rise to that level. See, e.g., *id.*; *Hampton v. United States*, 425 U.S. 484, 490–91 (1976). I therefore call the objective state-controlling argument a "quasi-constitutional" ar-

this only begs the question—what is wrong with the government *risking* inducing otherwise law-abiding people to commit crimes?

Objective test advocates occasionally draw an analogy between entrapment and the evidentiary exclusionary rules,⁹¹ but there exists a critical difference. When we exclude evidence under the Fourth or Fifth Amendments, we are protecting the values of, for example, privacy,⁹² equality,⁹³ and due process.⁹⁴ Similarly, other nonexculpatory defenses, like the running of the statute of limitations or diplomatic immunity, are “technicalities” that entitle one to acquittal despite wrongdoing.⁹⁵ These defenses protect “an important public policy other than that of convicting culpable offenders . . . by foregoing trial or conviction and punishment.”⁹⁶ Any justification for such defenses must necessarily justify them by reference to that greater public policy, even as it concedes that we really do want to punish these defendants.⁹⁷ The entrapment defense, by contrast, merely protects the right not to be entrapped. Yet there is a sense that, even in the instant, individual case, it would be wrong or unfair to punish the entrapped defendant. In this limited sense, the defense does more closely resemble tradi-

gument, a restriction on government conduct that does not rise to the level of constitutional doctrine. Either way, the constitutional status of the doctrine is irrelevant for our purposes since, as then-Justice Rehnquist argued, due process protections “come into play only when the Government activity in question violates some protected right of the *defendant*.” *Id.* at 490. It is therefore necessary to ask what that right is and why it should be protected—regardless of the source of law from which the protection is drawn.

⁹¹ See, e.g., *Sherman*, 356 U.S. at 381 (Frankfurter, J., concurring) (“A statute prohibiting the sale of narcotics is as silent on the question of entrapment as it is on the admissibility of illegally obtained evidence.”).

⁹² See 1 Wayne R. LaFare et al., *Search and Seizure* § 1.1 (4th ed. 2004).

⁹³ See 1 LaFare et al., *Criminal Procedure* § 1.4(j) (2d ed. 1999).

⁹⁴ Used here in the strictest sense, due process is an assurance that individuals’ dignity will be treated with respect by the criminal justice system. See *id.* § 1.4(h).

⁹⁵ See generally 2 Paul H. Robinson, *Criminal Law Defenses* § 201 (1984).

⁹⁶ *Id.* Note that many objective test advocates do in fact believe entrapment to be just such a defense. See *infra* Subsection I.A.2.

⁹⁷ Although this is phrased in utilitarian terms (for example, the benefits of diplomatic immunity outweigh the costs), one can present deontological reasons against punishment for nonexculpatory defenses as well. For example, a violation of diplomatic immunity would be to violate the state’s promise of immunity to those diplomats and the nations they represent. Of course, *ex ante*, the justification for such a promise may well be that the benefits (intercourse between nations) outweigh the costs.

tional excuses than it does nonexculpatory defenses—punishment would be “*intrinsically* improper.”⁹⁸ We may recognize the necessity of a double jeopardy dismissal, even as we regret the individual injustice in letting a wrongdoer go free, but we feel sorry for the entrapped individual: to convict him would itself constitute injustice.

The exclusionary rules and nonexculpatory defenses protect identifiable extrinsic interests that are thought to outweigh the interest in convicting the culpable. To be effective, a “government deterrence” justification of entrapment must identify what extrinsic value the entrapment defense protects. Failing to do so inevitably returns us to tautology. Although the focus of this approach is different than that of the subjective test, the underlying question remains: what’s wrong with entrapment?

A similar argument is that the police must not entrap people because such activity will only lead to public disillusionment with our police and criminal justice system and a decrease in respect for the law.⁹⁹ Certainly, many of us are repelled by entrapment at a visceral level¹⁰⁰—the classic entrapment decisions are replete with vivid language of disgust.¹⁰¹ This revulsion does not answer the question, though; it only sets it back further still—why should the *public* have a problem with entrapment?¹⁰² Even if we posit that they do—oftentimes, the public finds the individuals entrapped to be quite

⁹⁸ R.A. Duff, “I Might Be Guilty, But You Can’t Try Me”: Estoppel and Other Bars to Trial, 1 Ohio St. J. Crim. L. 245, 252 (2003); cf. *Sorrells*, 287 U.S. at 452 (“The [entrapment] defense is available, not in the view that the accused though guilty may go free, but that the Government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct.”).

⁹⁹ E.g., *Sherman*, 356 U.S. at 380 (Frankfurter, J., concurring) (“Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake.”); Model Penal Code § 2.13 cmt. 1 (1962) (“Perhaps most important of all, however, is the injury to the reputation of law enforcement institutions that follows the employment of methods shocking to the moral standards of the community.”).

¹⁰⁰ See *Sherman*, 356 U.S. at 378 (Frankfurter, J., concurring) (describing the “feeling of outrage at conduct of law enforcers that brought recognition of the defense in the first instance”).

¹⁰¹ See, e.g., *Sorrells*, 287 U.S. at 444 (“unconscionable”); id. at 452 (“a gross perversion”); see also id. at 455 (Roberts, J., separate opinion) (“violation of the decencies of life”); id. at 459 (“foul means”).

¹⁰² Dillof, *supra* note 54, at 860–63.

unsympathetic, notwithstanding the government's actions¹⁰³—this answer does not tell us what about this practice is so illegitimate that it could place a taint upon the actors who carry it out.

3. Efficiency

Some argue that the policy behind the entrapment defense is that entrapping practices are not so much a wrong against the defendant as a waste of resources—are there insufficient real crimes that the police need to spend our tax dollars creating them?¹⁰⁴ Essentially, the argument goes, since the defendant (or, under the objective test, the hypothetical target) would never have committed the crime absent the police inducement, the state has expended resources that could have gone toward preventing actual crimes that will happen anyway—the crimes it has been commissioned with preventing and punishing. This argument is often advanced by those promoting the objective test but is sometimes given by more consequentialist-minded judges in subjective test jurisdictions, such as the always rigorously utilitarian Judge Richard Posner:

If the police entice someone to commit a crime who would not have done so without their blandishments, and then arrest him and he is prosecuted, convicted, and punished, law enforcement resources are squandered in the following sense: resources that could and should have been used in an effort to reduce the nation's unacceptably high crime rate are used instead in the entirely sterile activity of first inciting and then punishing a crime. However, if the police are just inducing someone to commit sooner a crime he would have committed eventually, but to do so in controlled circumstances where the costs to the criminal justice

¹⁰³ Indeed, this is why, in the comments for the same section cited in *supra* note 99, the Model Penal Code drafters find it necessary to have the entrapment defense evaluated by a judge. Model Penal Code § 2.13 cmt. 6, at 418 (1962) (“[T]he rights of persons accused are little understood or respected in the community at large. Juries are apt to give great latitude to the police, at least in relation to an otherwise guilty defendant.”).

¹⁰⁴ See, e.g., Hay, *supra* note 13, at 397 (“There is already more than enough crime in our society without the police adding to it . . .”); Marcus, *supra* note 59, at 210 (expressing incredulity that “[f]ederal law enforcement officers truly did use resources, time, and energy to target these prosecutions and set up long-term sting operations in order to achieve convictions of individuals, some of whom were not already engaged in criminal activity”).

2007]

Entrapment and the Sadistic State

1103

system of apprehension and conviction are minimized, the police are economizing on resources. . . .

Thus in my view “entrapment” is merely the name we give to a particularly unproductive use of law enforcement resources, which our system properly condemns.¹⁰⁵

The thrust of the utilitarian argument is that those who respond to improper government inducements have not demonstrated any real need to be deterred/incapacitated/rehabilitated. Put in the language of economics, presumably most, if not all, individuals have a “price” at which they would commit most crimes *mala prohibita*.¹⁰⁶ Police stings are designed to find those who are already engaging in criminal activities because their price is at or below the market price. Those whose price is *above* the market price would not ordinarily commit crimes because it is not worth the cost. Stings lose their value, therefore, when the inducements they offer are above market rate because they risk catching the latter group—those who would not commit crimes without the inflated price.¹⁰⁷ “That a person responds to extra-market prices is uninformative of how he will respond to market prices, and thus is uninformative on the justification for incapacitation” and “provides [no] evidence . . . that this person is in need of rehabilitation.”¹⁰⁸

¹⁰⁵ United States v. Kaminski, 703 F.2d 1004, 1010 (7th Cir. 1983) (Posner, J., concurring). In the decade following this decision, Judge Posner seemed to change his mind, or at least to shift his emphasis somewhat, and no longer advanced a purely economic—or, at any rate, a purely fiscal—rationale. See United States v. Hollingsworth, 9 F.3d 593, 598 (7th Cir. 1993) (Posner, J.) (“The reason that [entrapment] is a matter of judicial concern rather than of unreviewable prosecutorial discretion is not that the courts want to economize on the costs of running the criminal justice system—the responsibility for the efficient allocation of resources to criminal prosecution is lodged elsewhere in our governmental system . . .”), *aff’d en banc*, 27 F.3d 1196 (7th Cir. 1994).

¹⁰⁶ Ronald J. Allen et al., Clarifying Entrapment, 89 J. Crim. L. & Criminology 407, 413 (1999) (“We assume that there are a few people who would not commit any criminal acts no matter what the provocation or enticement. We will not refer further to such saintly, or misguided, individuals. Everyone else, we assume, has a price.”). To further address the moralists, this “price” need not be strictly monetary: imagine a friend has approached you, saying that he needs money to pay for his sick child’s medical costs, and would you please help him engage in this one illegal transaction that will just cover the cost? See, e.g., United States v. Collins, No. 94-5108, 1995 U.S. App. LEXIS 2887, at *4 (4th Cir. Feb. 15, 1995).

¹⁰⁷ Allen, *supra* note 106, at 415–17; Deis, *supra* note 3, at 1231–33.

¹⁰⁸ Allen, *supra* note 106, at 415–16.

But while sting operations are certainly costly to mount, one could argue that even entrapping stings produce benefits. Entrapment may be a useful way of flushing out those individuals who might eventually commit crimes. It may be that entrapment helps identify and incapacitate those who, if not sufficiently “predisposed” under current market conditions to warrant punishment, may nonetheless be *more* disposed (or manipulable) than others. If entrapment nets those who have a price above market price and are thus not likely to commit crimes in the current market, it may, at least in marginal cases, serve as a “hedge” against increases in that market price—if drug dealing becomes that much more attractive, the population is still safe because those likely to change their behavior in response to the new price are already behind bars.¹⁰⁹

Even if we grant that the practice of entrapment fails at specific deterrence or incapacitation (utilitarian objectives relating to the individual defendant), it may still serve the principle of *general* deterrence, that is, punishing some individuals as a warning to other would-be criminals.¹¹⁰ We need not haul out the hoary, done-to-death “utility of punishing the innocent” argument: entrapment may have more narrowly tailored benefits. Widespread use of police informants would force those in the underground market to waste resources vetting their counterparts to insure that they are not informants. The resulting increase in cost, as well as the increase in the probability of arrest, might cause some criminals to curtail their activities and others to choose more legitimate lines of work entirely.¹¹¹ The knowledge that even the most aggressive advocate of illegal activities may himself be an informant will surely act as a still greater inhibitor. As Professor Seidman has noted, “the few well-publicized cases of Arab sheikhs who turned out to be FBI agents are likely to make members of Congress think twice before accepting a bribe.”¹¹²

¹⁰⁹ Of course, at a certain point, the hedge will eventually become too costly, but derivative valuation being what it is, are judges—or juries—the ones to make this determination? See *infra* notes 113–116 and accompanying text.

¹¹⁰ See generally Hay, *supra* note 13, at 411–15 (describing the deterrent value of stings).

¹¹¹ See *id.* at 412–13 (describing the general deterrent effect as a “lemons” problem by analogizing the hidden informants to substandard automobiles hidden amongst otherwise good cars in the car market).

¹¹² Seidman, *supra* note 42, at 142.

This is not to say that entrapment is necessarily cost-effective, only that it conceivably might be.¹¹³ Categorical rules are useful, but it is not at all clear that some classes of stings are so inherently wasteful that they require a judicially enforced exclusion. Should it, then, fall to the courts, rather than the administrators of the police agencies, to determine the most efficient way of spending police resources? Where the entrapment defense has been adopted by statute, rather than by judicial decision, this is marginally less problematic; because, presumably, the legislature has the right to oversee and direct the executive to encourage efficiency by forbidding certain practices generally. We still lack an explanation, however, as to why the legislature would choose to delegate case-by-case determination of the efficiency of police tactics to the judiciary, much less to juries. Moreover, the entrapment doctrine, in either subjective or objective guise, hardly resembles a bright-line rule. It is not immediately obvious that the resources conserved by prohibiting excessive sting operations are necessarily greater than the increased costs of litigation that occur when the focus shifts from a decision regarding the typically cut-and-dry ultimate facts of a particular offense¹¹⁴ to the debate over the appropriateness of the police's tactics (in an objective-test jurisdiction) or the "appropriate and searching inquiry into [the defendant's] own conduct and predisposition"¹¹⁵ (in a subjective-test jurisdiction) that the entrapment defense entails. Certainly efficiency may well be a good reason not to entrap, but that does not explain why we have created an a priori rule, enforced by judicial process, against entrapment generally.¹¹⁶

Finally, while the argument from efficiency is probably the most convincing exclusively utilitarian case against entrapping techniques, it does not explain the defense of entrapment, as it fails to explain why acquittal is the correct remedy for a waste of resources

¹¹³ As with most utilitarian arguments, this debate ultimately founders on a lack of data. But see *id.* at 141 n.119 (describing instances where aggressive sting operations have apparently resulted in concrete decreases in crime).

¹¹⁴ Especially one conducted under the controlled, monitored environment of an undercover sting, which, as Judge Posner noted in *United States v. Kaminski*, 703 F.2d 1004, 1010 (7th Cir. 1983) (Posner, J., concurring), is designed to economize on resources by making the facts as easy to establish as possible.

¹¹⁵ *Sorrells*, 287 U.S. at 451.

¹¹⁶ See *id.* at 441–43.

in the individual defendant's case. Of course, acquittal, like exclusion of evidence, might be seen as a deterrent to police misconduct, but surely releasing the prisoner is a drastic measure for mere profligacy. We would never free someone because ten detectives were assigned to her case when only three would have sufficed, or even because her prosecution was sought at the cost of foregoing prosecution of other, more serious crimes.¹¹⁷ A police department that, through waste or incompetence, permitted a high crime rate in its jurisdiction would not find the indictments of those they did manage to catch dismissed as "punishment" for all the crimes they did not manage to stop. Other exclusionary rules and nonexculpatory defenses protect values, like privacy or equality, that are at the heart of what it means to live in a free society—and even now they are not uncontroversial.¹¹⁸ If the entrapment defense protects the value of efficiency—certainly valuable, but rarely the predominant concern in the criminal justice system¹¹⁹—then why is the extreme remedy of acquittal treated in the cases as an obvious afterthought? Something more than efficiency must be at stake here.

4. Civil Rights

Some have advanced the argument that the entrapment defense exists not because entrapment is per se wrong, but rather because entrapping tactics, like vague laws, grant the police unacceptable discretion in targeting, which could be used in a discriminatory manner.¹²⁰ The police could target political enemies, or racial or ethnic minorities, or make other illegitimate targeting decisions. The use of *agents provocateurs* against unpopular or dissident

¹¹⁷ See *Oyler v. Boles*, 368 U.S. 448, 455–56 (1962) (holding constitutional the exercise of selectivity in prosecution absent invidious discriminatory motive); P. H. Vartanian, Annotation, Duty and Discretion of District or Prosecuting Attorney as Regards Prosecution for Criminal Offenses, 155 A.L.R. 10 (1945).

¹¹⁸ See LaFave et al., *supra* note 92, § 1.2 (summarizing the ongoing debate over the Fourth Amendment exclusionary rule).

¹¹⁹ *United States v. Booker*, 543 U.S. 220, 289 (2005) (Stevens, J., dissenting in part) ("This may not be the most efficient system imaginable, but the Constitution does not permit efficiency to be our primary concern."); see also *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) (describing the importance of the jury system: "[i]t has never been efficient; but it has always been free").

¹²⁰ Carlson, *supra* note 71, at 1089–90.

2007]

Entrapment and the Sadistic State

1107

groups has long been a tactic of authoritarian regimes,¹²¹ and indeed of the more authoritarian elements of our own government.¹²² Entrapment, then, should be made illegal as a prophylactic measure to prevent these kinds of abuses.¹²³

The fact that entrapping techniques can be applied selectively, however, does not mean that they should be banned outright. As we know, enforcement of the law generally can be applied in a racist manner, yet it does not necessarily follow that we should never enforce it at all. Moreover, similar to efficiency arguments, while entrapment's susceptibility to abuse might reasonably lead to blanket administrative policies or statutory directives against the practice, it is unclear that that risk alone would merit the extreme remedy of acquittal absent evidence that abuse has actually taken place. While the prophylactic argument might suffice to explain what is wrong with entrapping techniques, it too fails to explain the existence of a complete defense.

More importantly, however, it fails to get at what is wrong with entrapment. Even if we grant that entrapping techniques create the invitation for abuse, our intuition is that entrapment, like falsification of evidence, is *itself* an abuse. Discriminatory application would simply compound the evil. Entrapment may be likened to police brutality: it is always considered wrong, and it does not follow from condemnation of a practice of disproportionate brutalization of certain racial minorities that brutality in the abstract, or on an equal opportunity basis, is acceptable. Entrapment, similarly, would be wrong even if the targets were chosen with phone book pages and a dartboard—indeed, if anything, this might be even more chilling.¹²⁴ Enforcement generally, by contrast, permits the use of discretion, and even a degree of randomness (as with income

¹²¹ See Arendt, *supra* note 2, at 546–47 (describing the role of provocation under authoritarianism).

¹²² See generally S. Rep. No. 94-755, bk. II, at 10–12 (1976) (describing the FBI's COINTELPRO operations against “radical” organizations in the 1950s and 60s).

¹²³ Seidman, *supra* note 42, at 145 n.131.

¹²⁴ See, e.g., Subcomm. on Civil and Constitutional Rights of the H.R. Comm. on the Judiciary, 98th Cong., 2d Sess., Report on FBI Undercover Operations 77 (Comm. Print 1984) (“The issue of targeting is important . . . because indiscriminate targeting . . . [is] more the hallmark of a police state than a free society.”); Bennett L. Gershman, Entrapment, Shocked Consciences, and the Staged Arrest, 66 Minn. L. Rev. 567, 612 (1982) (“Absent a factual predicate, government interference by undercover methods leads directly to a police state.”).

tax audits),¹²⁵ but it does not permit selection on impermissible bases. Entrapment is more like evidence-tampering or brutality than it is like enforcement of the law—something that should not happen at all, not just against certain individuals or groups.

5. “Autonomy”

More thoughtful critiques of entrapment law have come up with what I call the “argument from autonomy”: in short, entrapment unnecessarily interferes with the autonomy of the individual, who should be free to choose to obey the law.¹²⁶ Most such analyses of entrapment leave autonomy more or less undefined, or define it in an almost semi-mystical fashion, making it difficult to refute precisely.¹²⁷ Surely it cannot mean that the state must be absolutely neutral as to the individual’s choice between obeying and breaking the law. Even the most hard core retributivist may be aware, and find it unobjectionable, that the institutions of law, punishment, and police investigation may have the happy effect of deterring crime, even if she does not believe that to be their purpose.

At any rate, it is difficult to see how improper inducements really reduce anyone’s autonomy. Unlike those under duress, en-

¹²⁵ IRS audits are not conducted completely at random, but there is a random component in selection of returns for auditing, both as a direct enforcement mechanism and as a sampling mechanism to further calibrate the nonrandom component. See IRS, Publication 556, Examination of Returns, Appeal Rights, and Claims for Refund 1, 2 (2005), available at <http://www.irs.gov/pub/irs-pdf/p556.pdf>; U.S. Gen. Accounting Office, GAO/GGD-98-40, Tax Administration: IRS’ Use of Random Selection in Choosing Tax Returns for Audit 5 (1998), available at <http://www.gao.gov/archive/1998/gg98040.pdf>.

¹²⁶ See Carlson, *supra* note 71, at 1086 (“The most objectionable feature of encouragement . . . is that the government . . . is no longer in a neutral position vis-à-vis its citizens and the choices that they make. Rather than giving an individual full freedom to comply with the law, and thereby respecting the individual’s autonomy and ability to avoid crime, by offering encouragement the government tries . . . to persuade the individual to violate the law.”).

¹²⁷ Roiphe, *supra* note 3, at 298 (describing predisposition as among the “pockets of the law [that] remain myths that we, as a community, need to believe in”). This is not mentioned by way of outright dismissal; this Note bases its analysis on the idea of retributivism, which is just as open to criticism as “quasi-mysticism.” See, e.g., David Dolinko, *Some Thoughts About Retributivism*, 101 *Ethics* 537, 538–39 (1991). Indeed, I might go so far as to say that retribution itself is among the “myths that we . . . need to believe in.” I only mention this by way of excuse—as the definitions are often vague, so my refutation also risks imprecision.

trapped individuals still have a meaningful choice to obey the law—they simply now have a greater incentive to break it.¹²⁸ Indeed, the nonpredisposed person is, by definition, still less likely than the predisposed person to have seriously considered breaking the law to be a viable option. Entrapment actually increases his universe of choice, albeit by adding illicit choices.

Certainly, too, potentially entrapping inducements could consist of threats (genuinely reducing choice) of a severity not rising to that of duress. For example, an emotional appeal to a friendship or sexual relationship probably contains, at least implicitly, the threat that failure to respond would jeopardize the relationship. Similarly, some individuals may be in such desperate straits (medically, financially, psychologically) that they would be susceptible to what some term “coercive offers.”¹²⁹ For example, a police agent might target a man fearing imminent foreclosure on his home, figuring he might be financially desperate enough to engage in anything, including drug trafficking.¹³⁰ But it is difficult to see how many other kinds of inducements, such as repeated commercial offers of child

¹²⁸ Seidman, *supra* note 42 at 133, 139. Of course, the individual under duress still has a choice, at least in the ultimate, Sartrean sense that, given the choice between committing a crime and being killed, one may choose to be killed. See Dillof, *supra* note 54, at 850. The slipperiness of “choice” is one of the reasons the duress defense is so sharply limited. “There is no bright line between free and unfree choices. Harder and easier choices are arranged along a continuum of choice: there is no scientifically dictated cutting point where legal and moral responsibility begins or ends.” Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. Cal. L. Rev. 1247, 1253 (1976). For this reason, this Note emphasizes the idea of “meaningful” choice.

¹²⁹ See Vinit Haksar, *Coercive Proposals [Rawls and Gandhi]*, 4 *Pol. Theory* 65, 69 (1976) (defining “coercive offers” as offers that “attempt to take an unfair advantage of the recipient’s vulnerability”). Traditionally the debate concerning coercive offers is whether they constitute sufficient coercion to constitute or excuse a crime. Should they fall short of “duress,” they could quite conceivably be ruled either unacceptable for police stings (under the objective test), or sufficient to motivate an otherwise undispensed person to turn to crime (under the subjective test).

¹³⁰ This seems to be one of the factors at work in the infamous John Z. DeLorean case, in which the agents seemed to prey upon the serious financial jeopardy of DeLorean’s company. See Maura F. J. Whelan, Comment, *Lead Us Not into (Unwarranted) Temptation: A Proposal to Replace the Entrapment Defense with a Reasonable-Suspicion Requirement*, 133 U. Pa. L. Rev. 1193, 1197–1200 (1985) (recounting the DeLorean prosecution and acquittal).

pornography through the mail,¹³¹ could reduce someone's autonomy.

Even if we grant, however, that an offer could be so sweet as to become coercive, we still wind up back at the question of why *private* inducements do not similarly coerce. After all, a nonagent friend could plaintively appeal to one's friendship, or repeatedly offer increasingly vast sums of money to a desperate man, or do something else such that, if he were a government agent, it would amount to entrapment.

The autonomist may reply that in the case of police entrapment, it is the all-powerful state that is providing the inducement, an intervention utterly unlike that any private citizen could perpetrate. Of necessity, however, the defendant doesn't know this; from his perspective, the forces acting on him are indistinguishable from those of a nonagent friend. Were it otherwise—were the inducement the kind of influence that only the state could wield—surely the target would either have a valid duress claim (if the inducement constitutes a threat of imminent, overwhelming force), have a valid mistake of law defense (if the inducement is of an official nature, for example, wrongful advice or direction), or never fall for the ruse in the first place (since it would become obvious that the inducer was working for the state).

A more refined variant of the argument from autonomy, advanced by Professor Gideon Yaffe, points out that, in practice, police entrapment is different from private entrapment in that the former "tracks" the defendant (the analogy is to a heat-seeking missile "tracking" its target).¹³² If a defendant first rejects a temptation, the state will try another, and another, and so forth, until it achieves its results.¹³³ It can even do this without seeming suspicious, as in *United States v. Jacobson*, in which the defendant was repeatedly sent mailings ostensibly from several different organizations and individuals.¹³⁴ At least theoretically, the state will continue to tempt until it achieves its goal—essentially predetermining

¹³¹ E.g., *Jacobson v. United States*, 503 U.S. 540, 543 (1992).

¹³² Yaffe, *supra* note 9, at 34.

¹³³ *Id.*

¹³⁴ *Jacobson*, 503 U.S. at 543–47 (describing the numerous contacts from multiple fictitious organizations and individuals that preceded the defendant's order of child pornography).

that the target will engage in crime, and giving him no effective choice to do otherwise.¹³⁵ A private individual would never engage in such a lengthy process to convince another to commit a crime; eventually she would become discouraged and go find someone else. (Indeed, just soliciting someone who clearly does not want to engage in crime presents tremendous risk.) Professor Yaffe maintains, then, that it is this aspect—that, objectively, the target *does* have no choice, since the state will continue to try different ways to tempt until it finds the right price—that allows us to distinguish between police and private entrapment.¹³⁶

This version of the argument from autonomy, while more sophisticated, is still unsatisfying. First, the reality is that, while the state is far more powerful than the private tempter, it (or rather, its agents) will too eventually become discouraged. Police department budgets, and the patience of policemen, are not unlimited.¹³⁷ Second, the theoretic “tracking” possibility is not the only scenario in which we see entrapment. Not all stings are as elaborate as the multi-year operation in *Jacobson*, and many scenarios of entrapment involve private citizens acting as police informants working relatively independently, with little additional help from police.¹³⁸ Finally, this does not so much solve the problem of private entrapment as reduce it—Professor Yaffe explicitly concedes that a private individual who engaged in “tracking”-like behavior would also entitle the target to acquittal. Although such a scenario is unlikely, it is still possible—Lady Macbeth goads and prods her nonpredisposed husband¹³⁹ until he relents and commits a crime,¹⁴⁰ but we would never acquit Macbeth because of “entrapment.”

¹³⁵ Yaffe, *supra* note 9, at 34 (“Given that it is the defendant’s illegal conduct at which the government aims, and given the imagined unlimited capacity to provide temptation, eventually the government will get what it wants if the defendant’s entrapment defense is not honored.”).

¹³⁶ *Id.* at 40.

¹³⁷ Professor Yaffe addresses this reality—on his view, theoretical infinite temptation would yield *absolute* exculpation, whereas the kind of temptation that targets are likely to encounter in practice yield only *relative* exculpation—relatively less than absolute, see *id.* at 34, but relatively more than what defendants are likely to encounter from private individuals tempting them to crime. *Id.* at 38–40.

¹³⁸ See, e.g., *Sherman*, 356 U.S. at 373 (involving an “active government informer” who only “informed the authorities so that they could close the net”).

¹³⁹ See William Shakespeare, *Macbeth* act 1, sc. 3, ll. 143–44 (“If chance will have me king, why, chance may crown me/Without my stir.”), act 1, sc. 5, ll. 17–26 (describing

It is worth lingering in the argument from autonomy for a moment, however. While the temptation of the inducement may not itself constitute an unfair limitation of autonomy, there is certainly something to the intuition that one of the troubling things about entrapment is that it is the awesome power of the state arrayed against one individual. Certainly, too, the entrapped individual's autonomy is unquestionably placed in jeopardy. But this does not happen at the moment of temptation; it happens much later, when the state attempts to hold the entrapped individual accountable for the crime he has been lured into committing.

II. TOWARD A PUNISHMENT-CENTERED VIEW OF ENTRAPMENT

All the justifications described above share in common a focus on the crime itself and its attendant circumstances, most prominently, its inducement. This is, perhaps, understandable: acts, their attendant circumstances (including mens rea), and their results form the bulk of the elements of almost all crimes. They are also critical, under most tests of entrapment, to determining whether the defendant was in fact entrapped.¹⁴¹ As we have seen, however, they prove inadequate to explain the intrinsic injustice of entrapment. To resolve this problem, this Note suggests that we cast our minds simultaneously forward in time, after arrest, trial, and conviction, to the execution of punishment, and back in time, to when the decision to target someone is first made.

A. Punishment Defined—and Distinguished

This Note began by explicitly adopting retribution as the dominant rationale for punishment. Under any version of retributivism, punishment is justified by the presence of “desert.”¹⁴² Desert, in

Macbeth as “too full o’ the milk of human kindness” to kill the king without prod-
ding) (Charles W. French ed., MacMillan Co. 1918).

¹⁴⁰ See id. act 1, sc. 5, act 1, sc. 7.

¹⁴¹ Granted, by asking about predisposition we necessarily ask about a prior state, but, as we have seen, in practice, some of the surest evidence of predisposition comes with the various *res gestae* of the crime: the inducement, the defendant's response, knowledge, etc. See *supra* notes 23–28 and accompanying text. Perhaps it is more accurate to say that the subjective test does examine what comes before, but only with regard to the defendant.

¹⁴² See Moore, *supra* note 16, at 191.

2007]

Entrapment and the Sadistic State

1113

turn, comes into being as a result of having committed a wrong.¹⁴³ How this is accomplished, and what exactly this means, is a point of both contention and ambiguity among retributivists.¹⁴⁴ Retributivists agree, however, that there is the sense that a wrong is not only a *necessary condition* of desert, but that desert *proceeds from* the wrong, both in the chronological sense and in the causal sense of “issues from.” The “mystic bond between wrong and punishment”¹⁴⁵ is present from the moment of the wrong, which in turn brings into being the desert for punishment. “The Eumenides sleep, but crime awakens them; thus the deed brings its own retribution with it.”¹⁴⁶

Even definitionally, “punishment” presupposes a wrong. Take, for example, H.L.A. Hart’s classic definition of punishment:

- (i) It must involve pain or other consequences normally considered unpleasant.
- (ii) It must be for an offence against legal rules.
- (iii) It must be of an actual or supposed offender for his offence.
- (iv) It must be intentionally administered by human beings other than the offender.
- (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.¹⁴⁷

Three of the criteria make explicit reference to “an offence,” a wrong incurring desert.

The practice of entrapment turns this situation on its head: under entrapment, the punishment *precedes* the wrong, at least inten-

¹⁴³ “Wrong” here is used in the sense of “culpable action,” as distinguished from “harm.” Compare Hampton, *supra* note 81, at 1661–66 (elaborating on the distinction between “wrong” and “harm”), with Moore, *supra* note 16, at 45–55 (distinguishing between “wrongdoing” and “culpability,” with the former synonymous with the traditional notion of *actus reus*, and the latter synonymous with *mens rea*).

¹⁴⁴ See Yaffe, *supra* note 9, at 13 (“Retributivist views of punishment are notoriously vague. They say that legal punishment is justified just in case its recipient deserves it, but they are rarely coupled with anything more than a hand-waving attempt to explain what desert, in a legal context, really means.”).

¹⁴⁵ Oliver Wendell Holmes, Jr., *The Common Law* 42 (Little, Brown, & Co. 1948) (1881).

¹⁴⁶ G.W.F. Hegel, *Elements of the Philosophy of Right* § 101, at 129 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821).

¹⁴⁷ Hart, *supra* note 17, at 4–5.

tionally,¹⁴⁸ in the conception of the entrapping agent. That its actual execution occurs later in time is, to its creator, irrelevant—the punishment was already created, needing only someone to be placed into it and an excuse to place him there. Punishment has become the end in itself, and the human beings punished are means to that end. It is this essential and horrific perversity that troubles us about the practice of entrapment.¹⁴⁹

At this point, it is important to distinguish the problem here from the principle of legality: the requirement that crimes and their corresponding punishments be set out in advance.¹⁵⁰ For one, the definition of a crime and its punishment still deals in universals. By contrast, the entrapper has a particular punishment, often for a particular individual, before any particular crime is committed. Second, even in the abstract definitional context, the wrong precedes the punishment: we first conceive, in the abstract, of the crime, and then ask what punishment is suitable for it. When we do the opposite, we are deliberately working backwards. For example, in asking, for what crimes could the death penalty be an appropriate punishment, we may begin explicitly with the death penalty, but we are further presuming such a crime to exist already (if only to prove, by negation, that there is no such crime, and that the death penalty is never justified). To decide first that we need a death penalty, either a priori as an end in itself or a posteriori to a decision, (for example, that we need more bodies from which to harvest organs for transplant) and then define crimes merely as a selection mechanism to decide whom to execute, would be more analogous to the practice of entrapment, and equally unjustified from a retributivist point of view.

We should also distinguish other situations where punishment is contemplated before investigation. Imagine a prosecutor who, upset with recent corporate accounting scandals (and anxious to pla-

¹⁴⁸ “Intentional” is used in the sense of scholastic “intentionality,” meaning “[p]ertaining to the operations of the mind; mental; existing in or for the mind.” 7 *The Oxford English Dictionary* 1080 (2d ed. 1989) (“The thought of man is a spirituall or intentionall motion and action, and not a substantiall thing.”).

¹⁴⁹ Cf. *Sorrells v. United States*, 287 U.S. 435, 452 (1932) (describing the practice of entrapment as “a gross perversion of [the] purpose” of criminal statutes); *id.* at 457 (Roberts, J., separate opinion) (calling entrapment a “prostitution of the criminal law”).

¹⁵⁰ See Packer, *supra* note 84, at 79–87.

2007]

Entrapment and the Sadistic State

1115

cate her constituents' distress over them), decides that she is going to engage in some high-profile prosecutions of white-collar crime in order to demonstrate that her jurisdiction (and her office) takes these crimes seriously. The prosecutor has first contemplated punishing someone, and then goes out to find someone to punish. The essential difference between the crusading prosecutor and the entrapping officer is that, while their personal motives may resemble each other, their actions—and underlying intent—are entirely different. The crusading prosecutor, as described, contemplates punishment, but only for existing crimes. Hers is principally an investigatory zeal (the idea that we must *discover* these criminals and their crimes), combined with a shift in prosecutorial discretion (the notion that we now make the decision to prosecute them, or deal with the defendant only under harsh terms). She does not contemplate punishment divorced from crime. One can easily imagine how the crusading prosecutor's deputy, under pressure to please her boss but unable to unearth readily provable white-collar crimes, might contemplate entrapping someone in order to demonstrate that her office takes the crime seriously. It is at that point that she has crossed the critical line: she has turned from righting existing wrongs to creating wrongs she can "right."

The wrong of entrapment, by contrast, does not occur when the actual sting is transpiring. It is, rather, before the crime, when a punishment is conceived with no corresponding crime, and after the crime, when that same punishment is enacted. The act of punishing the defendant, rather than the act of setting him up, is the evil, the *actus reus*, in a manner of speaking that the entrapment defense seeks to avoid. Acquittal is neither the protection of the purity of the courts from a wrong previously committed¹⁵¹ nor an attempt to dissuade the police from such tactics in the future (as with Fourth and Fifth Amendment exclusions). Instead, it is actu-

¹⁵¹ See *Sorrells*, 287 U.S. at 446 ("[I]t is the duty of the court to stop the prosecution in the interest of the Government itself, to protect it from the illegal conduct of its officers and to preserve the purity of its courts.") (citing *Casey v. United States*, 276 U.S. 413 (1928)).

ally a prevention of a wrong's fulfillment: the enactment of a punishment conceived before the crime.¹⁵²

The reason, then, that police entrapment acquits and private entrapment does not, is that private entrapment does not flow from the perversion of punishment without wrong. A criminal who solicits another to join him, even offering considerable inducements, is contemplating a crime as his end, not its punishment. When the crime is committed, the solicited party, now an accomplice, incurs desert for punishment, which then (ideally) is meted out. This is precisely the order in which crime and punishment should occur.¹⁵³

This unitary conception of a wrong, through contemplation, decision, and action is not unprecedented. From the other side, criminal law hypothetical narratives will often begin with the criminal's decision to commit the crime.¹⁵⁴ Procedurally, too, contemplation and action are treated as unitary for the purposes of jurisdiction. A conspiracy formed in one state, whose effects and overt acts take place in another, may be prosecuted in either state,¹⁵⁵ as may a murder premeditated in one state and committed in another.¹⁵⁶

It is sometimes stated that retributivism values punishment as an end in itself,¹⁵⁷ but this can only be true when "punishment" retains

¹⁵² See *Sorrells*, 287 U.S. at 455 (Roberts, J., separate opinion) (comparing punishment of an entrapped defendant to "the use of [courts'] process to *consummate* a wrong" (emphasis added)).

¹⁵³ The Garden of Eden story presents an interesting wrinkle on this scenario, since the serpent's aim in persuading Eve to eat the fruit is precisely *in order for God to punish her*. Were a similar scenario to play out today, the state should indeed refuse to ratify this wrong, of course, but it is a wrong that demands not the acquittal of Eve, but the additional punishment of the serpent—which is precisely what happens. Genesis 3:14–15.

¹⁵⁴ See, e.g., 1 Wayne R. LaFare, *Substantive Criminal Law* § 6.3 (2d ed. 2003).

¹⁵⁵ See, e.g., *Taylor v. State*, 682 So. 2d 359, 362 (Miss. 1996) (asserting Mississippi jurisdiction over conspiracy allegedly formed in Louisiana to rob someone in Mississippi); *State v. Kaiser*, 526 N.W.2d 722, 724–25 (S.D. 1995) (asserting South Dakota jurisdiction over conspiracy formed in South Dakota to murder someone in North Dakota).

¹⁵⁶ See, e.g., *State v. Willoughby*, 892 P.2d 1319, 1328–29 (Ariz. 1995) (granting state power to prosecute crime where evidence existed of premeditation in Arizona, even though victim was actually killed in Mexico).

¹⁵⁷ See, e.g., Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 Cal. L. Rev. 323, 365 n.190 (2004); Stephen P. Garvey, *Lifting the Veil on Punishment*, 7 Buff. Crim. L. Rev. 443, 449–50 (2004); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 Harv. L. Rev. 961, 1254 (2001).

its proper sense, as the fulfillment of desert. Even setting aside the argument over “conceptual consequential retributivism,”¹⁵⁸ it is hardly true that retributivism values the infliction of “pain or other consequences normally considered unpleasant,”¹⁵⁹ full stop. The infliction of pain is good only if it is deserved: “what *is* distinctively retributivist is the view that the guilty *receiving their just deserts* is an intrinsic good.”¹⁶⁰ Indeed, without desert, punishment loses its punishing character—strip out all reference to an offense in Professor Hart’s definition, and all that remains is the infliction of pain by one human being on another. To value *this* as an end in itself is not retributivism. It is sadism.

B. The Sadistic State

This is not to imply that the individual agents who participate in entrapment do so out of purely malevolent motives, twirling their mustaches and laughing wickedly. They are not, in most cases, acting out of any particular vindictiveness toward the target, but rather are merely responding to the incentives the system has constructed to motivate them. The police informant is hoping to earn money or get a plea bargain,¹⁶¹ the police officer to increase his arrest rate, and the district attorney to look like she is “doing something” before next November’s election. These motives are not necessarily wrong—we have instituted these incentives in the hopes that they will align these agents’ interests with the people’s in pursuing criminals. All, indeed, may be acting in good faith, be-

¹⁵⁸ That is, that punishment is justified because of consequences that “are abstract or are claimed to necessarily follow as a result of punishment” such as “negation of the crime, avoidance of society’s complicity with the crime, vindication of the victim of the crime and, reallocation of the wrongdoer’s balance of society’s benefits and burdens.” Russell L. Christopher, *Detering Retributivism: The Injustice of “Just” Punishment*, 96 Nw. U. L. Rev. 843, 867 n.126 (2002).

¹⁵⁹ Hart, *supra* note 17, at 4.

¹⁶⁰ Moore, *supra* note 16, at 157 (second emphasis added). See also Alan Brudner, *Commentary: In Defence of Retributivism*, in *Retributivism and Its Critics* 93, 93 (Wesley Cragg ed., 1992) (“A retributivist maintains, however, that punishment can be coherently distinguished from arbitrary force only if it is grounded independently of desire or interest . . .”).

¹⁶¹ Indeed, sometimes police even enter into so-called “contingent fee arrangements” with informers, with fees escalating with, for example, the quantity of drugs seized. See generally Marcus, *supra* note 3, § 7.09 (describing contingent fee arrangements and their general permissibility in the courts).

lieving that those they have entrapped “really are criminals,” and may be all the more effective at the practice of entrapment for that belief.

The fear that entrapment doctrine embodies is that of a system where these incentives and motives have short circuited: the emergence, irreducible to its individual components,¹⁶² of a state run amok. It is a state that has decided that, since its unique function is the power to punish, it must pursue punishment as an intrinsic good, independent of desert (or, indeed, of the other, more consequentialist aims of punishment), transforming itself into a “punishment machine.” But as we have seen, punishment without desert reduces to sadism. We get the “sadistic state,” which wields power, most fully realized through the infliction of pain, as an end in itself, the human beings in its power merely means to that awful end.¹⁶³

The sadistic state raises the specter of totalitarianism. As Professor Hannah Arendt writes, the totalitarian criminal justice system is marked by, among other things, the “replacement of the suspected offense by the possible crime.”¹⁶⁴ Classical totalitarianism *predicts* possible crimes on the basis of one’s status as an “‘objective’ enem[y].”¹⁶⁵ Entrapment, in manufacturing crimes, instead *instantiates* the possible crime in order to justify punishment.

The characterization of entrapment as “totalitarian” should be distinguished from the use of *agents provocateurs* to radicalize subversive or unpopular groups and provide an excuse to punish them, a common feature of authoritarian regimes generally. As stated above, entrapment’s wrongfulness goes well beyond the scope of

¹⁶² See Timothy O’Connor & Hong Yu Wong, Emergent Properties, Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2006), <http://plato.stanford.edu/archives/win2006/entries/properties-emergent/> (defining “emergent entities” as those that “‘arise’ out of more fundamental entities and yet are ‘novel’ or ‘irreducible’ with respect to them”). Human institutions are especially appropriately described in terms of “emergence,” and it is in this sense that we may speak of “state sadism”—a corporate attribute, similar to other attributes of “the market” or “the state” that rarely describe in any useful way any particular member.

¹⁶³ George Orwell, *Nineteen Eighty-Four* 270 (1949) (“Power is in inflicting pain and humiliation.”).

¹⁶⁴ Arendt, *supra* note 2, at 551; cf. Carlson, *supra* note 71, at 1075 (“[T]he *punishment* of encouraged acts is . . . a form of anticipatory punishment, imposed not on account of the harmfulness or wrongfulness of the actor’s past conduct, but because of his predicted future dangerousness.”).

¹⁶⁵ Arendt, *supra* note 2, at 547.

“political” crimes and targetings, where the motive of the state is to terrorize in order to remain in power,¹⁶⁶ or to attack certain groups.¹⁶⁷ Totalitarian “punishment” (the word completely decoupled from its offense-response character, now synonymous with infliction of terror and pain) exists as an end in itself.

At the height of Stalin’s purges, just as factory managers were given quotas for the required output of material they were expected to produce, so NKVD officials were given quotas for the number of people they were to sentence to forced labor, and the number to execute immediately.¹⁶⁸ Sometimes these quotas would detail how many of each different, virtually imaginary, group of subversives were to be arrested;¹⁶⁹ other times, the quota was even expressed as a function of the total population.¹⁷⁰ The Great Terror was not meant to cow any potential rival of the regime into submission—at that point, there was none.¹⁷¹ The GULAG did provide a slave labor force—but the economic gain from the use of slave labor was paltry compared to its cost.¹⁷² The Great Terror was a self-perpetuating end in itself.

Neither is the characterization of entrapment as totalitarian a “slippery-slope” argument that the practice of entrapment leads to the institution of a totalitarian state. There are many who suggest that the tactics of the prosecution of “victimless crimes,” most notably in the war on drugs, have led to a dramatic erosion of civil liberties,¹⁷³ an assertion quite different from the one made here.

¹⁶⁶ Professor Hannah Arendt calls this “[d]ictatorial terror—distinguished from totalitarian terror insofar as it threatens only authentic opponents but not harmless citizens without political opinions.” *Id.* at 427.

¹⁶⁷ See *id.* at 558 (contrasting “persecution of the objective enemy, which may be the Jews or the Poles (as in the case of the Nazis) or so-called ‘counter-revolutionaries’” with the “last and fully totalitarian stage” where “the victims [are] chosen completely at random and, even without being accused, declared unfit to live”).

¹⁶⁸ See Robert Conquest, *The Great Terror: A Reassessment* 260, 321 (1990); Marc Jansen & Nikita Petrov, *Stalin’s Loyal Executioner* 79–93 (2002); Donald Rayfield, *Stalin and His Hangmen* 299–305 (2004).

¹⁶⁹ See Conquest, *supra* note 168, at 284.

¹⁷⁰ Arendt, *supra* note 2, at 554 & n.110.

¹⁷¹ *Id.* at 426–27.

¹⁷² *Id.* at 573–74.

¹⁷³ See, e.g., Francis A. Allen, *The Habits of Legality: Criminal Justice and the Rule of Law* 41 (1996); Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 *Vill. L. Rev.* 851, 893–94 (2002); Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on*

While it is not inconceivable that entrapment, if practiced widely enough, might contribute to the magnitude of terror sufficient to establish a state we might call totalitarian, the argument made here is that even an isolated incident of entrapment *itself* resembles a totalitarian act, transmuting the punishing entity into the sadistic state, if only for that limited instance. Entrapment, as argued above, is an intrinsic injustice—we do not have an entrapment doctrine as a prophylactic against turning into a police state, but to avoid doing injustice in the particular case.

The obvious difference between the entrapping state and the totalitarian one is that the latter has effectively done away with the act requirement altogether. This is not easily dismissed—the act requirement is indeed an important barrier to the full onslaught of totalitarian misuse of the criminal law.¹⁷⁴ But this is precisely the point: entrapment is in fact an undermining of the act requirement, for it views the act requirement as a mere “technicality” to satisfy any way one can.¹⁷⁵ The mindset of entrapment¹⁷⁶ is a totalitarian one, even if it is still bound by the outward, now hollow formalities required by principles of liberalism.

This is a grim depiction indeed, and I do not maintain that it describes perfectly most actual cases of entrapment. The sadistic state, in its purest form, represents a worst-case scenario, a potential evil that lurks in every system of punishment. We find a sting wrong *to the extent that it resembles* state sadism. The judge or jury, in finding entrapment, does not necessarily allege that

Drugs, 66 S. Cal. L. Rev. 1389, 1390 (1993); David Rudovsky, The Impact of the War on Drugs on Procedural Fairness and Racial Equality, 1994 U. Chi. Legal F. 237, 237–40; Steven Wisotsky, Crackdown: The Emerging “Drug Exception” to the Bill of Rights, 38 Hastings L.J. 889, 890, 906–07 (1987); Lynne M. Pochurek, Comment, From the Battlefield to the Homefront: Infrared Surveillance and the War on Drugs Place Privacy Under Siege, 7 St. Thomas L. Rev. 137, 139, 143–44 (1994).

¹⁷⁴ See Packer, *supra* note 84, at 73–75.

¹⁷⁵ See Carlson, *supra* note 71, at 1065–66. I owe a great debt to Professor Carlson for this key insight. Where Professor Carlson and I differ is in our characterization of the act produced by entrapment: he views it as fundamentally not wrongful (since no harm is risked), *id.* at 1062, whereas I view its wrongfulness as irrelevant as to whether the state may punish or not.

¹⁷⁶ This mindset refers to the corporate “motive” of the sadistic state and not necessarily to that of the individual actors, who may be seeking money or popular acclaim, or may even be convinced that they are doing the right thing. Of course, mere economic and reputational self-interest is not unheard of for individual actors in a true totalitarian state either. See Arendt, *supra* note 2, at 552–53.

2007]

Entrapment and the Sadistic State

1121

the state has acted solely out of a self-sufficient desire to punish, only that it has come too close to that extreme—that the urge to punish has sufficiently overwhelmed other justifications for prosecution. It is for this reason that, even in objective-test states, the determination is so often fact-driven, and that subjective-test jurisdictions think the jury an appropriate body to determine the question of entrapment. The entrapment defense draws a line between liberty and totalitarianism: the point at which the state has lost its legitimacy in its use of coercive power.

C. Culpability and Desert

Even if the punishment contemplated is inherently unjust when the plan for entrapment is being made, one might still reply that it does not mean that the punishment is undeserved when it is ultimately carried out. Even granting the execution of punishment without desert to be sadistic and unjust, in the time between contemplation and execution the defendant has actually committed the crime, thereby incurring desert. The state then metes out punishment in accordance with that desert. What is the problem with this?

The answer to this question requires that we examine further the role of the state in the scheme of retribution. Desert and punishment do not exist in a vacuum. Retributivist philosophers most often tend to focus on whether or not punishment is deserved, ignoring the further question of what gives the state the right to inflict that punishment.¹⁷⁷ I must confess I have no satisfactory complete

¹⁷⁷ As Tolstoy puts it:

He asked a very simple question: “Why, and with what right, do some people lock up, torment, exile, flog, and kill others, while they are themselves just like those whom they torment, flog, and kill?” And in answer he got deliberations as to whether human beings had free will or not. Whether signs of criminality could be detected by measuring the skulls or not. What part heredity played in crime. Whether immorality could be inherited. What madness is, what degeneration is, and what temperament is. How climate, food, ignorance, imitative-ness, hypnotism, or passion act. What society is. What are its duties, etc., etc.

....

... [B]ut what he did not find was an answer to the principal question: By what right [do] some people punish others?

Leo Tolstoy, *Resurrection* 362–63 (Louise Maude trans., Dodd, Mead & Co. 1900) (1899). See also Mirko Bagaric & Kumar Amarasekara, *The Errors of Retributivism*,

answer for this. A tentative suggestion, however, is that the answer relies, at least in part, on the state's role as a neutral arbiter among citizens. The state is given authority to do justice because that is what the state (at least in its judicial capacity) is *for*: to itself embody the principles of justice. As Professor Douglas Husak puts it, "the punishment of a deserving offender *C* is justified if the state more closely approximates the ideal of justice, and thus adds value to the world, by actually punishing *C*."¹⁷⁸ Whatever else is required to sufficiently justify punishment, this much is necessary. The sadistic state, by contrast, embodies injustice, and thereby loses whatever right it has to inflict even deserved punishment.

The principle that forbids this kind of punishment is the principle of estoppel. This is not meant in the narrow doctrinal sense of a preclusion from litigating a matter that has already been decided.¹⁷⁹ Instead, there is a far more analogous parallel to civil estoppel in criminal law: the so-called doctrine of "entrapment by estoppel," in which the defendant's objectively reasonable reliance on a government agent's representations that certain criminal conduct is in fact legal can excuse the defendant's commission of that crime.¹⁸⁰ This version of estoppel, I advance, however, is "a broader moral idea: that one's prior conduct towards another person can undercut one's right to make what would otherwise have been a legitimate demand on them."¹⁸¹ This is hardly an original idea; indeed, the Court in *Sorrells v. United States* uses the very language of estoppel: "When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement

24 Melb. U. L. Rev. 124, 164–65 (2000) ("[H]owever one elects to prop up intrinsic retributivism, the claim that punishment should be administered by the state does not follow from intrinsic retributivism: even if it shows that the guilty deserve to suffer, it cannot support the claim that the suffering should be deliberately inflicted on wrongdoers by the state.").

¹⁷⁸ Douglas N. Husak, *Why Punish the Deserving?*, 26 *Noûs* 447, 454 (1992). Indeed, Professor Husak is skeptical of retributivism precisely for its failure to explain the problem of why the state punishes a deserving offender. *Id.* at 448.

¹⁷⁹ See 31 C.J.S. Estoppel and Waiver § 2 (1996).

¹⁸⁰ See 21 Am. Jur. 2d Criminal Law § 245 (1998); Mark S. Cohen, *Proof of Defense of Entrapment by Estoppel*, in 53 Am. Jur. 3d Proof of Facts 249, 253–54 (1999); John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 Am. J. Crim. L. 1, 2–3 (1997).

¹⁸¹ Duff, *supra* note 98, at 251.

lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor.”¹⁸² Justice Roberts’s objectivist separate opinion, too, while rejecting the word “estoppel,” draws precisely such an analogy from civil proceedings.¹⁸³ The language or idea of estoppel appears in numerous state cases as well.¹⁸⁴

Entrapment, then, does not properly deny desert for punishment—it simply finds the question irrelevant.¹⁸⁵ The court never reaches the question of desert because the state, in effect, lacks “standing” to prosecute the defendant. In its unjust desire to punish, the state has ceased to embody the principles of justice; in many ways, it is still more base than the defendant, who is presumably motivated by money, or sympathy, or whatever inspired him to commit the induced crime, rather than the desire to inflict pain as an end in itself. The state thus loses that right of prosecution.

Because the court does not reach the issue of culpability, we cannot say that the entrapped individual does not deserve punishment generally—only that he does not deserve *this punishment*, the one unjustly created without (that is, prior to) desert, and that effectively finds desert irrelevant. But if the state cannot punish him, can anyone? Imagine the following scenario: the police, in a sting designed to catch thieves, set up a false “fencing” storefront, soliciting stolen goods. Overzealous agents offer such extreme inducements that they persuade an individual who would not otherwise commit larceny to steal, in order to sell to the police storefront.

¹⁸² 287 U.S. 435, 445 (1932) (quoting *Newman v. United States*, 299 F. 128, 131 (4th Cir. 1924)).

¹⁸³ *Sorrells*, 287 U.S. at 455 (Roberts, J., separate opinion).

¹⁸⁴ See, e.g., *People v. Strohl*, 129 Cal. Rptr. 224, 237 (Cal. Ct. App. 1976); *State v. Marquardt*, 89 A.2d 219, 221 (Conn. 1952); *Campbell v. District of Columbia*, 32 A.2d 394, 396 (D.C. 1943); *State v. Mullen*, 216 N.W.2d 375, 379–80 (Iowa 1974); *State v. Hardy*, 715 So. 2d 466, 470 (La. Ct. App. 1998); *Sparks v. State*, 603 A.2d 1258, 1267 n.21 (Md. Ct. Spec. App. 1992); see also *Peters v. Brown*, 55 So. 2d 334, 336 (Fla. 1951) (“[T]he doctrine of clean hands is the counterpart of entrapment in criminal procedure, but the rule in either case springs from decency, good faith, fairness and justice.”).

¹⁸⁵ See *Sparks*, 603 A.2d at 1267 n.21 (“More sophisticated analysis makes it indisputably clear that even a successful entrapment defense does *not* in any way diminish the defendant’s criminal *mens rea* or blameworthiness or guilt. It simply estops the State from succeeding with the prosecution.”).

The individual breaks into a private home, steals some valuable jewelry, sells it to the agent, and is arrested for larceny, but is acquitted on the basis of entrapment. The state has no right to punish the defendant—but the homeowner may have a private remedy. In a private suit for, say, the torts of conversion and trespass, the state's entrapping role should be no defense,¹⁸⁶ either to the causes of action themselves, or to the imposition of punitive damages,¹⁸⁷ whose function and purposes are often likened to those of criminal law punishments.¹⁸⁸

D. Proper and Improper Sting Operations

At this point, perhaps we should ask: can there be such a thing as a proper sting operation? We need not go as far as Gerald Dworkin, who states that “it is not proper to solicit, encourage, or suggest crime even if this is done by no stronger means than verbal suggestion.”¹⁸⁹ As long as we want to prosecute crimes that have no complaining witness, the police will need to use trickery.¹⁹⁰ What is critical, however, is that we are prosecuting *existing crimes*, rather than crimes that we have created for the purpose of punishment. We must be careful that the “suspected offense” is not replaced by the “potential crime.”

But don't all sting operations necessarily “create” crimes? Certainly some undercover operations involve police officers or informants infiltrating transactions or operations that would have transpired whether the police agent was there or not—these situations are simply a more active form of surveillance. A true sting, however, involves more than that—it entails, at a minimum, the undercover operative's active creation of an opportunity for crime. A

¹⁸⁶ The state and its agents may, however, find themselves independently liable for such recklessness in their crime-prevention techniques.

¹⁸⁷ See 18 Am. Jur. 2d Conversion § 114 (2004) (noting that punitive damages are sometimes an appropriate remedy for conversion).

¹⁸⁸ See 22 Am. Jur. 2d Damages § 541 (2003) (exploring the analogy of punitive damages to criminal penalties).

¹⁸⁹ See Dworkin, *supra* note 3, at 31.

¹⁹⁰ These crimes need not be limited to those that are entirely “victimless”; in fact, they may include crimes that are ancillary to crimes with identifiable victims, such as child pornography. Indeed, this category could include even the crime of conspiracy, which, while uncompleted, has no actual *complaining* victim, even if it has an *intended* victim.

2007]

Entrapment and the Sadistic State

1125

strict but-for test is bound to fail: surely if the undercover detective had not been present, the drug dealer would not have made *that specific* transaction, nor would he have reached out and released the drugs in midair had the detective not been there to receive them. The undercover officer was instrumental in the creation of the specific crime.¹⁹¹

It must not be that *specific* suspected offense that we mean, but others like it.¹⁹² If the dealer had not sold the drugs to the officer, he would have sold them to someone else. Although the criminal law describes primarily individual isolated acts, we know that there are in fact operations and conspiracies that consist of either preparations culminating in a crime, or of an ongoing series of criminal acts. Because of their secretive nature, the only way to investigate such crimes without a massive increase in government surveillance (which would be neither cost-effective nor otherwise desirable) is through stings. While these activities may themselves constitute an indictable offense (such as conspiracy or racketeering), typically the law defines only isolated acts. Therefore, when we talk about proper targeting of stings, what we are really talking about is a sort of status—that of *being* a drug-dealer/professional thief/bootlegger. This is not an elimination of the act requirement, however, because the target is not charged with “being” but with one of those individual acts. This reasoning explains the culpability approach’s concern with distinguishing the “unwary innocent” and the “unwary criminal.”¹⁹³ We, too, want to make this distinction, but the point of distinction is not the defendant’s culpability—after all, the crime charged is not sale of narcotics in furtherance of a conspiracy to sell narcotics. The difference, rather, is in the investigative technique and corporate motive of the police.

The proper sting, then, is an investigative tactic used to infiltrate or identify ongoing or imminent criminal activities.¹⁹⁴ It is proper,

¹⁹¹ See *United States v. Gendron*, 18 F.3d 955, 962 (1st Cir. 1994) (“[W]ithout the government’s having presented *that* opportunity, the defendant, no matter how ‘pre-disposed,’ would likely not have acted *then*.”).

¹⁹² Cf. *Park*, supra note 30, at 245 (“[A] defendant should not be excused if he was ready and willing to commit the *type* of offense charged.”).

¹⁹³ See supra notes 24, 70–73 and accompanying text.

¹⁹⁴ *Park*, supra note 30, at 220 (“The proper role of a crime detection method that uses police agents to instigate offenses should be the detection of persons who are already involved in the type of criminal activity solicited by the agent.”).

for instance, for a police officer to approach a drug dealer, knowing that if the dealer does not sell the drugs he has stashed in the house to the officer, he will sell them to the next person who approaches him. The result elicited by the sting constitutes merely an instance in a series of crimes. Entrapment can be seen as an artifact of this active criminal investigatory process—a false positive. This, of course, is wasteful, but it is also an abuse of the investigative technique. “To encourage the commission of a crime in the absence of any reason to believe the individual is already engaged in a course of criminal conduct is to be a tester of virtue”¹⁹⁵

III. A FEW EXAMPLES

To retreat a moment from abstraction and hypotheticals, let us examine a few cases in which courts have examined the entrapment problem. Note that this Part does not attempt a strict doctrinal analysis. It does not argue that the specific analysis of the facts, or the “tests” the opinions create and refine, mirror that of the punishment-centered view of entrapment, only that this view may help bring to light the unstated assumptions as to why we think and feel the way we do about the facts of the cases. The holdings, and indeed the very language, of these opinions betray an underlying concern about the prospect of state sadism.

A. *Sorrells v. United States*

In *Sorrells v. United States*, an undercover prohibition agent induced the defendant to purchase liquor for him following repeated requests and an appeal to shared service in the same unit in World War I.¹⁹⁶ The Court makes much of the repetition of the requests, as well as the techniques used by the undercover officer.¹⁹⁷ Both the majority opinion and the concurrence find the intent of the officers the most offensive. The Court repeatedly uses the language of purpose. It defines entrapment as occurring “when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may

¹⁹⁵ See Dworkin, *supra* note 3, at 33.

¹⁹⁶ 287 U.S. 435, 439–40 (1932).

¹⁹⁷ *Id.* at 439–41.

2007]

Entrapment and the Sadistic State

1127

prosecute,”¹⁹⁸ and it also describes the crime prosecuted as “the creature of [the officer’s] purpose.”¹⁹⁹ Entrapment is an abuse of the investigatory process because it instigates “an act on the part of persons otherwise innocent *in order to* lure them to its commission and to punish them.”²⁰⁰

Justice Roberts, in his separate opinion, also employs this teleological perspective. Justice Roberts refers to entrapment as done “for the sole purpose of obtaining a victim through indictment, conviction and sentence.”²⁰¹ The essential difference between the two seems to be how to best infer purpose: through an exclusive focus on the act element of the police’s techniques (Justice Roberts’s objective approach) or through the result element of whether or not an “innocent” was actually ensnared (the majority’s subjective approach).

B. *Sherman v. United States*

In *Sherman v. United States*, the contrasting opinions focus more narrowly on the difference between the subjective and objective tests.²⁰² The majority, at one point, states that “an evil which the defense of entrapment is designed to overcome” is that the technique “beguiles [the defendant] into committing crimes which he otherwise would not have attempted,”²⁰³ and the concurrence bemoans the fact that this technique “promote[s] rather than detect[s] crime and . . . bring[s] about the downfall of those who, left to themselves, might well have obeyed the law.”²⁰⁴ Nevertheless, the Court reveals that *purpose* still underlies what it finds most offensive about entrapment. The Court quotes at length the testimony of the undercover informant who lured the defendant back into a life of drugs through their mutual acquaintance at an addiction clinic, which establishes that the informant believed his job was “to go out and try and induce a person to sell narcotics.”²⁰⁵

¹⁹⁸ Id. at 442.

¹⁹⁹ Id. at 441.

²⁰⁰ Id. at 448 (emphasis added).

²⁰¹ Id. at 454 (Roberts, J., separate opinion).

²⁰² 356 U.S. 369 (1958).

²⁰³ Id. at 376.

²⁰⁴ Id. at 384 (Frankfurter, J., concurring).

²⁰⁵ Id. at 374 n.2 (Warren, C.J., opinion of the Court).

C. Jacobson *versus* Gendron

One instructive comparison is between the U.S. Supreme Court's most recent entrapment decision, *Jacobson v. United States*,²⁰⁶ and *United States v. Gendron*,²⁰⁷ a decision of the United States Court of Appeals for the First Circuit written by then-Chief Judge Stephen Breyer, which involved very similar facts but opposite outcomes. Both cases involved government stings designed to ferret out purchasers of child pornography through the mail, but whereas in *Jacobson* the Court found the defendant to have been entrapped as a matter of law,²⁰⁸ in *Gendron* the defendant's claim of entrapment was rejected.²⁰⁹

In *Jacobson*, two government agencies, the Postal Service and the Customs Service, conducted an elaborate sting operation targeting Jacobson. The sting involved multiple correspondences with three fictional organizations, two fictional companies, and a fictional pen pal. Only twenty-six months after the start of the campaign did the government send an actual catalogue for the purchase of child pornography.²¹⁰ The other mailings consisted of "questionnaires," political appeals, and the like—what then-Chief Judge Breyer, writing in *Gendron*, characterized as "a psychologically 'graduated' set of responses to Jacobson's own noncriminal responses, beginning with innocent lures and progressing to frank offers."²¹¹ The Court seemed especially offended by the baroque nature of the sting, the length of time over which it was carried out, the repeated nature of the communications, and the appeals to individual rights and civil liberties that many of the mailings included.²¹² The government's activities, it would seem, were almost designed to create a disposition to order child pornography, making the Court question what its real purpose was.

The *Gendron* court, by contrast, noted that "[t]he government neither 'graduated' its responses . . . nor, with one exception, did it appeal to any motive other than the desire to see child pornogra-

²⁰⁶ 503 U.S. 540 (1992).

²⁰⁷ 18 F.3d 955 (1st Cir. 1994).

²⁰⁸ *Jacobson*, 503 U.S. at 553–54.

²⁰⁹ *Gendron*, 18 F.3d at 964.

²¹⁰ *Jacobson*, 503 U.S. at 543–46.

²¹¹ *Gendron*, 18 F.3d at 963.

²¹² *Jacobson*, 503 U.S. at 546, 550, 552.

phy.”²¹³ The court also noted, by way of discussing Gendron’s state of mind, the interaction between the police and the target, who was an active and eager participant in the enterprise from the first, replying positively to three explicit solicitations and, at one point, even writing on his own initiative asking why his pornography order had not been filled.²¹⁴ Indeed, it was this final, unprompted request that ultimately led to the delivery and subsequent arrest. Although, unlike in *Jacobson*,²¹⁵ the opinion gives no details as to why Gendron was selected as a target, it would be difficult to infer from these facts that, in this case, the government was tempting people to commit crimes merely for the purpose of punishing them. The same cannot be said of the facts of *Jacobson*.

D. Sentencing Entrapment

Finally, we turn to a more subtle question, which the punishment-centered view of entrapment may help us answer. One artifact of circumstance-based mandatory minimums and nondiscretionary sentencing guidelines’ codified gradations of felonies and sentencing enhancements²¹⁶ is what Professor Stephen Schulhofer calls “cliffs,” dramatic changes in sentencing based on small changes in conduct.²¹⁷ In creating sting operations, undercover officers are able to exploit these cliffs to maximize the sentence the defendant receives, a practice sometimes called “sentencing manipu-

²¹³ *Gendron*, 18 F.3d at 964.

²¹⁴ *Id.*

²¹⁵ See *Jacobson*, 503 U.S. at 542–43 (noting that Jacobson was targeted because of prior purchase of two “nudist” magazines, “Bare Boys I” and “Bare Boys II”).

²¹⁶ Although *United States v. Booker*, 543 U.S. 220 (2005), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), have currently rendered the U.S. Sentencing Guidelines and their state equivalents to be “effectively advisory,” *Booker*, 543 U.S. at 245, the issue is still not entirely theoretical. First, the presence of *statutory* mandatory minimums based on arbitrary or relatively manipulable factors (for example, the crack/powder cocaine differential) still creates the potential for “cliffs,” even absent the Sentencing Guidelines’ complex formulae. Second, the Sentencing Guidelines may not be entirely dead, but only dormant—the Supreme Court seemed to leave open the possibility that, if the ultimate facts on which the Guidelines relied were also decided by the jury, that the Guidelines might be permissible. *Id.* at 250. Were legislatures to implement such a reform (for example, through the use of special verdicts, currently used in death penalty sentencing) and to return to mandatory sentencing guidelines, the question of sentencing entrapment would return as well.

²¹⁷ Stephen J. Schulhofer, Rethinking Mandatory Minimums, 28 Wake Forest L. Rev. 199, 209 (1993).

lation”²¹⁸ or “sentencing entrapment.”²¹⁹ For example, police may make multiple drug transactions with the same individual in order to exceed a weight limit;²²⁰ suggest that a suspect come to a transaction armed²²¹ or trade contraband for a gun instead of paying in cash²²² in order to draw a “use of a firearm” enhancement; or “ascribe an age to themselves” on anti-pedophile stings “that is just young enough to implicate the most serious category of attempted sexual predation, while not so young as to limit the appeal to the most radical perpetrators.”²²³ The threat of sentencing entrapment was even enough to motivate the U.S. Sentencing Commission to amend the Sentencing Guidelines to allow a downward departure “[i]f, in a reverse sting . . . , the court finds that the government agent set a price for the controlled substance that was substantially below the market value,” thus encouraging the defendant to “purchase . . . a significantly greater quantity” of drugs than he otherwise would.²²⁴

The facts of two cases from the D.C. Circuit, *United States v. Walls*²²⁵ and *United States v. Shepherd*,²²⁶ exemplify this issue, even though the appellate courts declined to find police abuse in both

²¹⁸ *United States v. Sanchez*, 138 F.3d 1410, 1414 (11th Cir. 1998).

²¹⁹ See Daniel L. Abelson, Comment, Sentencing Entrapment: An Overview and Analysis, 86 Marq. L. Rev. 773 (2003); Robert S. Johnson, Note, The Ills of the Federal Sentencing Guidelines and the Search for a Cure: Using Sentencing Entrapment to Combat Governmental Manipulation of Sentencing, 49 Vand. L. Rev. 197 (1996). Some federal courts have attempted to distinguish “sentencing entrapment” and “sentencing manipulation,” basing the former on traditional federal entrapment principles of predisposition and the latter on more objective-test government-conduct considerations. E.g., *Sanchez*, 138 F.3d at 1414. This Note combines the two, for while the two tests differ, the evil with which they are concerned is the same.

²²⁰ E.g., *United States v. Barth*, 990 F.2d 422, 423, 424 (8th Cir. 1993); *United States v. Lenfesty*, 923 F.2d 1293, 1295, 1300 (8th Cir. 1991).

²²¹ See Dru Stevenson, Entrapment by Numbers, 16 U. Fla. J.L. & Pub. Pol’y 1, 40 (2005).

²²² E.g., *United States v. Gibson*, 135 F.3d 1124, 1128 (6th Cir. 1998) (applying fire-arm enhancement to a drug transaction where, in response to the “persistent urgings” of an undercover detective, defendant entered into a drug transaction where a firearm was used as “quid pro quo”).

²²³ Stevenson, *supra* note 221, at 40.

²²⁴ U.S. Sentencing Guidelines Manual § 2D1.1 cmt. 14 (2004). The remedy is to sentence the defendant based on the quantity of drugs he could have bought on the open market, rather than the amount he actually bought. See *id.* § 2D1.1 cmt. 12.

²²⁵ 70 F.3d 1323 (D.C. Cir. 1995).

²²⁶ 102 F.3d 558 (D.C. Cir. 1996).

2007]

Entrapment and the Sadistic State

1131

cases. The underlying fact patterns are similar: both cases involved undercover agents manipulating the curious difference in weights required to trigger the mandatory minimum between powder cocaine and crack cocaine. In *Walls*, an undercover agent had contracted to buy crack cocaine, but when the target instead showed up with powder cocaine, the agent refused to accept and insisted that the dealer return with crack instead.²²⁷ In *Shepherd*, the agent making a buy on the street actually demanded that the dealer go back into the building where the contraband was stored and transform the proffered powder cocaine into crack before the exchange could continue.²²⁸ In both cases, the intent of the officers was clear: dealing in crack cocaine draws much stiffer penalties than dealing in powder cocaine, and the officers wanted more punishment for the targets.

There currently exists a split among the circuits as to whether and how to recognize sentencing entrapment.²²⁹ Even if it cannot give us a definitive answer to the question of doctrinal formulation, the punishment-centered view of entrapment can still provide us with some guidance on the issue. In *Walls*, the court quoted the trial testimony of one of the undercover agents, responding to a question as to why he insisted that the target process the powder cocaine into crack: “Well, crack cocaine is less expensive than [powder] cocaine, and we felt like through our investigation, that it takes fifty grams of crack cocaine to get any target over the mandatory ten years.”²³⁰

This is the quintessential entrapment mindset—the sadistic state in action. The punishment was preordained before the crime even existed. The goal was to get the target a sentence over ten years—the only question was how to go about doing it. The state’s sadism here manifested itself not in the decision to punish, but in the decision to maximize the punishment it may inflict on the thinnest of excuses, and in the manufacture of a required act in order to achieve that level of punishment. In *Walls*, the sadistic intent

²²⁷ *Walls*, 70 F.3d at 1328–29.

²²⁸ *Shepherd*, 102 F.3d at 560.

²²⁹ See Abelson, *supra* note 219, at 781–86; Jess D. Mekeel, Note, Misnamed, Misapplied, and Misguided: Clarifying the State of Sentencing Entrapment and Proposing a New Conception of the Doctrine, 14 Wm. & Mary Bill Rts. J. 1583, 1593–1603 (2006).

²³⁰ *Walls*, 70 F.3d at 1328–29.

needed no inference—there is, remarkably, direct testimonial evidence of it.²³¹ In *Shepherd* the sadism was instead manifest in the agent's otherwise inexplicable actions. As the trial court put it, "there was but one reason for the police insistence that the cocaine be cooked—to increase the defendant's punishment."²³² Unfortunately, in both *Walls* and *Shepherd* the D.C. Circuit, focusing on the manifest predisposition of the accused to deal drugs and their willingness and ability to comply with the agents' requests, refused to adjust the sentences downward,²³³ ensuring the sadistic state the punishment it desired.

CONCLUSION

The power to punish is simultaneously the most necessary and most terrifying power we give the state. The realities of the modern world have required that the state assume vastly greater degrees of control over our lives, requiring a corresponding growth in police powers. But that increase has not come without its own uncertainty that the state will not abuse those powers. It is no accident, then, that the entrapment doctrine first takes recognizable form in the context of the increase in police powers in the latter part of the nineteenth century,²³⁴ or that it is so often linked rhetorically to police states and tyranny.²³⁵

The entrapment defense exists because of that uncertainty—the fear of a state that has decided that, since its unique function is to punish, it ought to maximize punishment, heedless of other concerns. But punishment, divorced from any offense, reduces to sadism. That a state should adopt a policy of sadism is one of the great fears of the modern age—most fully realized by the totalitarian states. We recognize shades of totalitarianism when we see the

²³¹ This is indeed a rare event. Few criminal justice actors would openly admit—one supposes even to themselves—that punishment suffices as an end in itself. Detection of this hidden—or perhaps subconscious—motive is the reason for the "tests."

²³² *United States v. Shepherd*, 857 F. Supp. 105, 110–11 (D.D.C. 1994), rev'd, 102 F.3d 558 (D.C. Cir. 1996).

²³³ *Shepherd*, 102 F.3d at 567; *Walls*, 70 F.3d at 1329 ("Persons ready, willing and able to deal in drugs—persons like Walls and Jackson—could hardly be described as innocents.").

²³⁴ See generally Roiphe, *supra* note 3, at 270–92 (tracing the development of entrapment law and its link to increased police regulation).

²³⁵ See *supra* note 124 and accompanying text.

2007]

Entrapment and the Sadistic State

1133

state create crimes for no other purpose than to punish them—the only inference we can make in such a situation is that punishment has become an end in itself.

It may be that entrapment is primarily an academic doctrine, suitable more for student notes than the courtroom.²³⁶ Although one scholar has stated that the defense is raised often and frequently with success,²³⁷ the conventional wisdom is that it is more of a rarity, an academic ornament increasingly irrelevant to how criminal law is actually practiced and enforced in this country.²³⁸ I think otherwise. Even if the defense is a rarity in practice, it serves as an important limit to the use of the criminal sanction. The prohibition against *ex post facto* laws and bills of attainder, too, are rarely advanced as defenses at trial, and outside of the death penalty or confinement conditions contexts the prohibition on cruel and unusual punishment is rarely found to prohibit a given punishment.²³⁹ Of course, it may be that the reason the entrapment defense succeeds so rarely is because the police have been forced to modify their investigatory tactics—that is, the defense has succeeded in deterring a great deal of police misconduct. Even this justification, though, is not necessary to prove its worth.

The value of the entrapment defense lies not in the number of defendants acquitted each year, or in the man-hours spent constructing legally permissible stings, but in what it says about the role of punishment in a free society. It reinforces the act requirement and reminds the police and prosecutors that their job is to prevent and punish crimes, not merely to make arrests or achieve convictions—that human beings are the ends of the criminal justice system, not its means. Just as the act of entrapment is a totalitarian

²³⁶ Entrapment, it seems, is a particularly popular topic among student authors. Professor Park, *supra* note 30, at 167 n.13, found in 1976 over one hundred student notes on the subject since 1951.

²³⁷ Interview, *supra* note 10, at 223 (“Juries, I often find, react positively to the entrapment defense.”).

²³⁸ See, e.g., Stevenson, *supra* note 221, at 2 (“As the rules for entrapment become increasingly well-defined and established, the defense itself becomes less relevant.”), 75 (“[T]he defenses fail the vast majority of the time . . .”).

²³⁹ See, e.g., John E. Theuman, Annotation, Duration of prison sentence as constituting cruel and unusual punishment in violation of Federal Constitution’s Eighth Amendment—Supreme Court Cases, 115 L. Ed. 2d 1169, 1171–72 (1996).

1134

Virginia Law Review

[Vol. 93:1081

one, so the entrapment defense ultimately functions as an assertion of liberty.