

Pace University

DigitalCommons@Pace

Pace International Law Review Online
Companion

School of Law

8-1-2009

To Catch an Entrapper: The Inadequacy of the Entrapment Defense Globally and the Need to Reevaluate Our Current Legal Rubric

Paul W. Valentine

Follow this and additional works at: <https://digitalcommons.pace.edu/pilronline>



Part of the [International Law Commons](#)

Recommended Citation

Paul W. Valentine, To Catch an Entrapper: The Inadequacy of the Entrapment Defense Globally and the Need to Reevaluate Our Current Legal Rubric, Pace Int'l L. Rev. Online Companion, Aug. 2009, at 22.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace International Law Review Online Companion by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

PACE UNIVERSITY
SCHOOL OF LAW

INTERNATIONAL LAW REVIEW
ONLINE COMPANION

Volume I, Number 2

August 2009

**TO CATCH AN ENTRAPPER: THE
INADEQUACY OF THE ENTRAPMENT
DEFENSE GLOBALLY AND THE NEED TO
REEVALUATE OUR CURRENT LEGAL
RUBRIC**

Paul W. Valentine

SECTION I

Introduction

It is fair to say that a majority of us have either seen or been exposed to the hit television show *To Catch a Predator* on NBC. *To Catch a Predator* is a series of hidden investigations by the television newsmagazine *Dateline NBC* devoted to the subject of identifying and detaining potential child sexual abusers who contact children over the internet.¹ The show is important because those caught by the investigators oftentimes raise the entrapment defense, but to no avail. Given the emergence of internet sting operations and covert government investigations, it is now more important than ever that the defense be given some credence by courts throughout the world. However, recent case law and the general international skepticism of the defense are slowly eroding this important procedural protection.

¹ For those who are not familiar with the series, here is a brief snapshot of how it works: Off the air, Perverted-Justice volunteers build profiles of clearly underage individuals on social networking websites, and enter chat rooms as decoys. Would-be predators are invited to an undercover house used by Dateline for the duration of the operation; in accordance with Perverted-Justice policy, phone contact is always established with a suspected predator before any appointment is set up. The visitors are led to believe that the supposed minor is home alone, and, upon coming inside the house, are soon confronted by host Chris Hanson. At this point the individual is excoriated on hidden camera for all of America to see, where he is interviewed by Hanson, and eventually arrested.

Black's Law Dictionary² provides us with entrapment's most cursory definition: "a law enforcement officer's or government agent's inducement of a person to commit a crime, by means of fraud or undue persuasion, in an attempt to later bring a criminal prosecution against that person." In the early 1900's, American courts began to conceptualize entrapment as a criminal defense that "strikes a balance between criminal predisposition and overzealous law practices."³ Courts and commentators alike have applied two strands of analysis to the entrapment defense: the subjective approach and the objective approach. While the subjective approach focuses on the state of mind of the accused, the objective approach concentrates on the involvement of government agents in the commission of the crime in question.⁴ This broad ideology has driven the development of the entrapment defense throughout the world.

Internationally, there is limited interest in the entrapment defense.⁵ Until very recently, the entrapment defense was available only in the United States; it was not a feature in English common law, and no other industrialized nations traditionally recognized it. Entrapment's absence from these other legal traditions is due partly to other devices in their legal systems for regulating police activity, such as outright criminal liability for government agents who overreach.⁶ A second possible factor is the cultural difference regarding privacy expectations, as Europeans seem to have a greater tolerance for more invasive government surveillance.⁷ Although some countries have begun to recognize the entrapment defense for the first time, they are generally far less judicious than U.S. courts in awarding the entrapment defense.⁸

² BLACK'S LAW DICTIONARY 573 (8th ed. 2004). Note that entrapment needs a government nexus; it cannot be committed by private actors acting privately.

³ PAUL MARCUS, THE ENTRAPMENT DEFENSE 1 (3d ed., Lexis 2002).

⁴ See generally Scott C. Patton, *The Government Made Me Do It: A Proposed Approach to Entrapment Under Jacobson v. United States Introduction*, 95 CORNELL L. REV. 995, 996 (1994) (discussing the development of the entrapment defense in the United States).

⁵ Australia, for example, imposes only an exclusionary rule on evidence or testimony related to police overreaching. See Paul Marcus & Vicki Waye, *Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds*, 12 TUL. J. INT'L & COMP. L. 27, 73-78 (2004). Singapore does not recognize the defense at all.

⁶ See Jacqueline E. Ross, *Tradeoffs in Undercover Investigations*, 69 U. CHI. L. REV. 1501, 1521 (2002) (explaining that in Europe the general rule is for the defendant to be found guilty but for the police to be charged as accessories to the crime that would be analogous to entrapment situations in the U.S.).

⁷ *Id.* at 521-22.

⁸ It is important to remember that most civil law countries do not recognize the entrapment defense. However, in the countries that do recognize the defense, the majority take an objective view of it. I have chosen to focus on some of the

Because there is no universal entrapment test, it has become especially difficult for law enforcement agents to make *ex ante* determinations about the legal consequences of their investigations. According to a recent study conducted in the United States, entrapment claims appear to be decreasing in almost every state and in the federal courts from the peak years in the 1980s and early 1990s.⁹ This trend leaves us more questions than answers.

In the following comment, I provide a critique of the subjective and objective approaches to entrapment which have become the two approaches adopted world-wide. Within this context, I discuss the inherent problems of both approaches, which are even more pronounced in cases of suspected terrorists. This comment will conclude by suggesting that every country should treat the entrapment defense as a due-process issue and should have a carefully designed order and allocation of proof in such trials.

SECTION II

The Development of the Entrapment Defense in the United States

The entrapment defense in the United States has evolved mainly through oscillating case law. At first, there was a genuine judicial distrust of the entrapment defense.¹⁰ However, courts in the early twentieth century began to recognize the validity of a doctrine that protected people from overreaching government investigations. The court in *Woo Wai v. United States* was the first to officially recognize the defense.¹¹ As entrapment jurisprudence

more well-known countries in the world. In English law, entrapment is not a substantive defense because it does not automatically negate the prosecution's case. *See, e.g.,* R v. Sang, [1980] A.C. 402 (U.K.) [hereinafter Sang]. Likewise, the German Federal Court of Justice has established that entrapment by undercover police agents is not a reason to drop the case *per se*. 1 STR 148/54 (May 23, 1984).

⁹ Dru Stevenson, *Entrapment by Numbers*, 16 U. FLA. J. L. & PUB. POL'Y 1, 2-3(2005) (discussing how entrapment claims are disproportionately raised in California, Florida, Michigan, Ohio, Tennessee, Texas, Virginia, and Washington).

¹⁰ *See* Board of Comm'ns v. Backus, 29 How. Pr. 33, 42 (1864) (stating that the entrapment defense "has never availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say Christian, ethics, it never will").

¹¹ 223 F. 412 (9th Cir. 1915) [hereinafter Woo]. In *Woo*, the defendant was urged by undercover immigration officers to transport Chinese immigrants into the United States. Although he at first rebuffed the government's suggestions that he illegally transport the immigrants, the defendant finally acted after several months of government persuasion. *Id.* at 413. Despite his actions, the Ninth Circuit eventually precluded Woo Wai from liability because they felt that "the

progressed throughout the twentieth century, the theoretical dichotomy of the defense took shape in the seminal *Sorrells v. United States* decision.¹² The Hughes majority found that the government entrapped the defendant as a matter of law. The court opined:

“[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, there is a need for an entrapment defense.”¹³

The court’s soaring statement “implant in the mind of an innocent person the disposition to commit the alleged offense” has been dubbed the “subjective” approach because it emphasizes the state of mind of the accused and allows the prosecution to defeat the claim by proving that the accused was independently predisposed to committing the crime. The court grounded its holding in the supposition that Congress did not intend for criminal statutes to apply when the government has actively lured an innocent person into the commission of a crime.¹⁴ Today, the state courts or legislatures of 37 states have adopted the subjective test.¹⁵ States that have overtly espoused the subjective approach codify it by using language such as “predisposed” or “an otherwise unwilling person.”¹⁶ The factors the court will consider as proof of

suggestion of the criminal act came from the officers of the government.” *Id.* at 415.

¹² 287 U.S. 435 (1932).

¹³ *Id.* at 442.

¹⁴ David J. Elbaz, *The Troubling Entrapment Defense: How About an Economic Approach*, 36 AM. CRIM. L. REV. 117, 124 (1999) (discussing the history of the entrapment defense in America).

¹⁵ See Patton, *supra* note 4, at 1002, n.45. See also *Sherman v. United States*, 356 U.S. 369, 376 (1958) (Chief Justice Warren gave the most emphatic definition of subjective entrapment of his time by describing that a defendant is entrapped when “the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes he otherwise would not have attempted.” *Jacobson v. United States*, 503 U.S. 540 (1992) [hereinafter *Jacobson*] was the Supreme Court’s last major ruling on entrapment and reaffirmed the influence of the subjective standard in American jurisprudence.

¹⁶ See, e.g., TENN. CODE ANN § 39-11-505 (1989) (This is a paradigm of a subjective approach. The statute provides: “It is a defense to prosecution that law enforcement officials, acting either directly or through an agent, induced or persuaded an otherwise unwilling person to commit an unlawful act when the person was not predisposed to do so); PA. STAT. ANN § 313 (providing “ 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 offenses by either: 1) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or 2) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are

predisposition are prior acts, later acts, reputation, and eagerness. Although the law of evidence traditionally bars bringing into evidence prior acts, in cases where entrapment is used as a defense, the defendant has “opened the door” of his character thereby allowing his prior acts to be admitted.¹⁷

Conversely, Justice Roberts, who gave little deference to the majority’s rationale (although in agreement with their substantive result) focused on the conduct of the government rather than the state of mind of the accused.¹⁸ According to Justice Roberts, the entrapment doctrine should protect society from government overreaching by denying convictions instigated by government’s own agents.¹⁹ Justice Robert’s approach has been dubbed the “objective” approach because it focuses on the actions of government agents. Today, the minority of U.S. jurisdictions use the objective approach. To eschew focusing on the state of mind of the accused, state statutes use language such as “committed by *a* person not otherwise disposed to commit it.”²⁰ In effect, the objective approach focuses on the outrageousness of law enforcement conduct and focuses on whether a hypothetical reasonable law abiding citizen would be induced to commit a crime he would not have otherwise committed.²¹

ready to commit it); P.R. PENAL CODE ART. 31 (providing “[w]hoever commits an offense act, the criminal intention being induced in his mind through contrivance, persuasion or fraud of a public officer or by a private person acting in collaboration with the public officer, shall not be held liable.”).

¹⁷ See FED. R. EVID. 404(a)(1).

¹⁸ See Patton, *supra* note 4, at 999 (discussing Justice Robert’s opinion: He argued that the entrapment defense did not rest upon a “strained and unwarranted construction of . . . criminal statutes.” Rather, it rests upon “a fundamental rule of public policy” which grants exclusive power to (and imposes a duty upon) a court to protect its own functions and preserve “the purity of its own temple.”).

¹⁹ *Id.*

²⁰ See, e.g., N.Y. PENAL LAW § 40.05 (1967) (providing “In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because he was induced or encouraged to do so by a public servant, or by a person acting in cooperation with a public servant, seeking to obtain evidence against him for purpose of criminal prosecution, and when the methods used to obtain such evidence were such as to create a substantial risk that the offense would be committed by *a* person not otherwise disposed to commit it. Inducement or encouragement to commit an offense means active inducement or encouragement. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.”).

²¹ See Patton, *supra* note 4, at 1003.

SECTION III

The Emerging Forms of the Objective Approach Overseas

A. The Canadian Two-Pronged Objective Test

If *Jacobson*²² is the portrait of entrapment jurisprudence in America, *R. v. Mack* is its twin-brother in Canada.²³ The ringing words of *Mack* have echoed in Canadian courts for nearly two decades because the court for the first time developed a two-pronged test to approach the entrapment defense. The courts first look at if “the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a *bona fide* inquiry.”²⁴ The second inquiry occurs after the court has found that the police acted in the course of a *bona fide inquiry*, and looks to see if the police went beyond providing an opportunity and induce the commission of an offense.²⁵ In determining whether police conduct goes further than providing an opportunity, a court will assess the following non-exhaustive list of factors: The type of crime being investigated, whether an average person would have been induced, the persistence and number of attempts made by police, and the type of inducement used.²⁶ Like the objective approach adopted by the minority of U.S. courts, Canadian courts have found the state of mind of the defendant inconsequential. In effect, Canada uses an expanded American objective test where the “reasonable person” is only one part of the inquiry. As the *Mack* court made unequivocally clear, the conduct of the police is often determinative.

B. The United Kingdom’s Loosely Test: A Unique Variation of the Objective Approach

As recently as twenty-seven years ago, the court in *Sang*²⁷ brusquely disposed of the entrapment defense by stating that it was not recognized in English law. However, *Sang*’s grip began to weaken in the following decade when the doctrine of entrapment

²² See *Jacobson*, 503 U.S. 540.

²³ *R. v. Mack*, [1988] 2 S.C.R. 903 (Can.) [hereinafter *Mack*].

²⁴ *Id.* ¶ 115. For example, random virtue testing arises when a police officer, merely looking to increase his arrest statistics, places a wallet in an obvious public location. *Id.*

²⁵ *Id.* See also *R. v. Amato*, [1982] 2 S.C.R. 418 (Can.) (the court held that police’s two month request for drugs at defendant’s home and work was merely solicitation and did not rise to the level of inducement).

²⁶ *Id.* ¶ 133.

²⁷ See *Sang*, [1980] A.C. 402.

slowly developed.²⁸ In 2000, *Regina v. Loosely*²⁹ built on the earlier entrapment cases, and contained the most detailed examination of the applicable legal framework to the defense.³⁰ Lords Hoffman and Hutton expressly held that the predisposition of the defendant to commit such a crime was not a determinative factor, effectively rejecting U.S. Supreme Court's subjective approach.³¹ Further, they proposed certain factors to be considered in deciding whether the sale of heroin to undercover police officers constituted entrapment. These factors included: whether the police had reason to suspect the accused or a particular place as being involved in illegal activities; the nature of the offense; the secrecy and difficulty of detection; the manner in which the particular criminal activity is carried on; and whether the undercover officers presented the accused with an "unexceptional opportunity to commit an offense."³² On this final factor, they went on to explain that "[u]ltimately the overall consideration is always whether the conduct of the police or other law enforcement agency was so seriously improper as to bring the administration of justice into dispute."³³

C. The German Scalar Objective Approach

Germany is one of the few civil law countries that recognize the entrapment defense.³⁴ Thus, it should come as no surprise that their concerns with entrapment are much different than common-law countries. Instead of treating the defense as a safe haven for individual rights, Germany treats the doctrine as one that encourages undercover agents to minimize their facilitation of

²⁸ See, e.g., *R v. Keith*, [1994] 98 Cr. App. R. 437 (U.K.) (court recognized that defendants' could have plausible entrapment claim with respect to tape recordings by undercover officers posing as contract killers); *Williams and O'Hare v. DPP*, [1994] 98 Cr. App. R. 209 (U.K.) (defendants arrested using a van to prepare for a robbery could be precluded from liability if the police had left the van for the defendants to stumble upon); *Nottingham City Council v. Amin*, [2000] 1 W.L.R. 1071 (U.K.) (police officers posing as individuals could legally check whether taxi-drivers were properly licensed only if they conducted their investigations randomly).

²⁹ *R v. Loosely*, [2001] 1 W.L.R. 2060 (U.K.) [hereinafter *Loosely*], available at <http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd011025/loose-1.htm>.

³⁰ This wording is taken from Dan Squires, *The Problem with Entrapment*, 26 OXFORD J. LEGAL STUD. 351, 352 (2006).

³¹ *Id.* ¶ 22.

³² *Id.*

³³ *Id.* ¶ 25.

³⁴ "Entrapment" is known in Germany as "Tatprovokation" or "Deed provocation."

targets' crimes.³⁵ In other words, German courts care not about the person being investigated, but on the integrity of the investigations. Thus, entrapment is only a mitigating factor at sentencing and not a defense.³⁶ Unlike the United States, this is not a bi-modal or an all-or-nothing approach. It acts as a scalar concept, that is, a matter of degree; the greater the government involvement, the greater the sentencing discount.

SECTION IV

The Pitfalls of Both the U.S. Subjective and International Objective Approaches

A. The Subjective Approach Encumbers the Defendant's Right to a Fair Trial

Every subjective test lacks a well-principled legal grounding.³⁷ The concept of "predisposition" creates a quagmire in every case because it flows from no bright-line test and hinges on the prior acts of the defendant. Thus, in subjective jurisdictions, the prosecution is relying on factors and conditions which are temporally separate from the criminal act for which the defendant stands accused.³⁸ This thwarts not only many criminal law principles, but principles grounded in every legal system.³⁹ To establish "predisposition," the prosecution will, without fail, parade evidence of prior conduct before the jury.⁴⁰

In subjective jurisdictions, once evidence of prior conduct is admitted, the burden of persuasion pendulum swings heavily against the defendant, as he must somehow rebut the inference of predisposition. In cases involving traditional victimless crimes

³⁵ See Jacqueline E. Ross, *The Place of Covert Surveillance in Democratic Societies: A Comparative Study of the United States and Germany*, 55 A.M.J.C.L. 493, 557 (2007) (discussing the German entrapment doctrine).

³⁶ *Id.* at 539.

³⁷ For a further discussion of other disadvantages outside the scope of this comment see Patton, *supra* note 8 at 1029.

³⁸ Yale Law Journal Company, *The Serpent Beguiled Me and I Did Eat: The Constitutional Status of the Entrapment Defense*, 74 YALE L.J. 942 (1965).

³⁹ See Stephen E. Leidheiser, *Out of the Quagmire After Jacobson v. United States: Towards a More Balanced Entrapment Standard*, 83 J. CRIM. L. & CRIMINOLOGY 1055, 1068 (1993). In addition, note that it is impermissible under the Federal Rules of Evidence, in both criminal and civil cases, to use evidence of particular conduct to show a greater than average propensity to commit a crime. FED. R. EVID. 404.

⁴⁰ See, e.g., *United States v. Brand*, 467 F.3d 179 (2d Cir. 2006) where the prosecution was unfairly able to parade evidence of prior conduct unrelated to the crime at issue. If we are to take the *Brand* ruling seriously, the prosecution needs only to establish some link between the prior act and the crime at issue to satisfy 404(B)'s requirement.

like drugs and alcohol, this pendulum has less momentum because the defendant can plausibly rebut this inference by showing that he has been rehabilitated. He can do this through some type of tangible evidence, namely a negative test result, or a membership to a rehabilitation clinic. However, in suspected terrorist cases, this is no simple task. What if an individual is of a certain descent or his parents were (at one time) affiliated with terrorist organizations? Suppose this individual is now an adult, wants to live the American dream and has no intent whatsoever to harm civilians? Is this linkage to his parents' sufficient predisposition as to warrant law enforcement to entrap this individual? Probably. Or, what about using a Russian scientist to sell nuclear blueprints to Iran (as the U.S. did in 2002) to try to entrap Iran? Even with no prior acts, courts have sometimes assumed that a defendant or defendants(s) were already headed down an "iniquitous path."⁴¹ This is alarming. Judges have considerable discretion to impart their personal view to decide predisposition. This is not good news for children now in the United States born of Middle-Eastern descent.

B. No Matter the Variation, All Objective Approaches are Flawed

Most objective standards [as evinced by the U.S. minority and Canadian models] require the court to determine whether "the conduct of the law enforcement agent was likely to induce a normally law-abiding person to commit the offense."⁴² In his book The Entrapment Defense, Paul Marcus vehemently criticizes the practical application of this inquiry.⁴³ He argues that it is a standard that is difficult to apply because "the conceptual difficulty is that such reasonable individuals generally do not commit crimes."⁴⁴ Child pornography and suspected terrorism are demonstrative of the difficulty of a successful entrapment defense in cases of unusually abhorrent crimes. The failure of precedent

⁴¹ *Marreel v. Florida*, 841 So. 2d 600, 603 (Fla. Dist. Ct. App. 2003) (the court ignored the fact that law enforcement agents initiated nineteen of the emails and seven of the chat sessions of forty-seven total communications).

⁴² *See People v. Barraza*, 591 P.2d 947 (Cal. 1979) (the court concluded that the proper entrapment test should ask whether "the conduct of the law enforcement agent is likely to induce a normally law-abiding person to commit the offense).

⁴³ *See* MARCUS, *supra* note 3.

⁴⁴ *Id.* This was also a dilemma articulated by the Alaska Supreme Court in *Pascu v. State*, 577 P.2d 1064 (Alaska 1978) (holding "Since announcing our decision in *Grossman*, we have come to realize that there are probably certain difficulties in applying the foregoing standard. An "average person" probably cannot be induced to commit a serious crime except under circumstances so extreme as to amount to duress. Yet it is clear that entrapment may occur with a degree of inducement that falls far short of actual duress.).

reflects the long-term judgment of courts that *no reasonable person, regardless of police activity, would ever engage in an act of child pornography, or terrorism*. In other words, if we are to take this seriously, objective individuals accused of these crimes theoretically can never prevail. Although public policy should tip the scales in favor of government when there are pedophiles and terrorists on trial, there are inherent risks involved in giving law enforcement unfettered discretion to apprehend these individuals as they please.

To illustrate the above point, here is an example of investigators acting as recruiters for a terror cell. Their plan is to target individuals of Muslim descent. The investigators hatch a fake plan to kill an untold number of civilians. To recruit, they contact these Muslim individuals six hours a day for a span of over three months, constantly badgering them at work, bribing them, and threatening the safety of these individuals and their families. Eventually, after several months, some succumb and commence training. Upon arrest, they predictably raise an entrapment defense. In an objective jurisdiction (New York, for example), it is uncertain that these Muslim men who underwent months of badgering will have a viable defense

At this point, it is necessary to evaluate the merits of the hypothetical vis à vis some of the objective jurisdictions discussed thus far. In the United States, no judge would find that a “reasonable law abiding citizen,” would ever engage in terrorist activities, as no level of government inducement justifies yielding to such a temptation. In the United Kingdom, the type of crime being investigated [one of the factors from *Loosely*] would work heavily against the defendant. Furthermore, the court would likely state that the defendant was not presented with an “unexceptional opportunity” because the law enforcement agents conducted their investigations through an intermediary, the telephone, and the defendants always had the option to simply hang up. In Germany, the court would consider the difficulty in detection of terrorism and would give great deference to law enforcement agents. At best, the defendants would have a mitigated punishment. Australia and Singapore and many other nations would give absolutely no credence to this defense whatsoever. Does this seem fair?⁴⁵ In

⁴⁵ Worse yet, this problem is compounded because of the procedure raising and adjudicating the defense. In most of these jurisdictions, an entrapment claim is frequently presented to the court with no jury, as it is decided as a matter of law. *See, e.g.*, MODEL PENAL CODE § 2.13(2) (objective test and issue determined by the court); *People v. Roy*, 265 N.W.2d 20 (Mich. Ct. App. 1978) (objective entrapment is a legal question for the trial court); *State v. Pfister*, 264 N.W.2d 694 (N.D. 1978) (objective entrapment presents a jury question if there is a factual dispute). In contrast, where the entrapment is based on the defendant’s lack of predisposition, the issue is typically raised at trial, and the issue is one for

essence, the objective approach is leading to the erosion of the doctrine because courts throughout the world are only providing defendants who commit the less serious crimes an escape hatch.

SECTION VI

A Due Process Approach to Entrapment

A. A Due- Process Approach

Applying a due process standard to the entrapment defense is admittedly something that is not entirely new. Paul Marcus in his 2002 book, The Entrapment Defense, allocates an entire chapter, dubbed *The Future of Entrapment*, to explain that due process will be more easily accepted and commonly made in cases of entrapment.⁴⁶ Even prior to this, over thirty years ago in *United States v. Russell*, the court noted “[we] may some day find a case in which the conduct of law enforcement is so outrageous that due process principles would absolutely bar the government from invoking judicial proceedings.”⁴⁷ That day has come.

A due-process approach would also provide a better means of deterrence. At present, the problem with using the entrapment defense to deter misconduct is simply put as follows: it may be only a small discomfort to the cop that the defendant goes free.⁴⁸ There is no reason to assume that the type of cop who would engage in an illegitimate sting operation is the sort who would be troubled by the defendant going free; in fact, the opposite seems more likely to be the case.⁴⁹ Normally, when we adopt a policy of deterrence, policymakers use more direct methods: sanction attached to the forbidden behavior.⁵⁰ This is not the case with the entrapment defense. The supposed sanction, or unpleasant consequence, comes not in the form of direct harm to the bad cop, but indirectly, as a (possibly) undeserved benefit to a third party, the defendant.⁵¹ Furthermore, entrapment is not a constitutional

the jury. See, e.g., *State v. Stanley*, 597 P.2d 998 (Ariz. Ct. App. 1979) (adopts subjective test; entrapment established as a matter of law only when evidence of lack of predisposition is undisputed); *Chambers v. State*, 269 S.E.2d 42 (Ga. Ct. App. 1980) (adopts subjective test; conflict in defendant’s and state’s evidence presented a jury question).

⁴⁶ See also *Farley v. State*, 848 So. 2d 393 (Fla. Dist. Ct. App. 2003) (the court used due process language to make its decision).

⁴⁷ 411 U.S. 423 (1973).

⁴⁸ Dru Stevenson, *Entrapment and the Problem of Deterring Police Misconduct*, 37 CONN. L. REV. 67 (2004) (discussing the inadequacy of entrapment as a deterrent).

⁴⁹ *Id.* at 78.

⁵⁰ *Id.* at 76.

⁵¹ *Id.*

defense, unlike the exclusionary rules, and therefore does not trigger the “fruit of the poisonous tree” doctrine; this allows even conscientious police to risk a successful entrapment defense being raised by the accused, if there is the potential for “greater payoffs” in the form of discovering evidence of other crimes, deterring members of a criminal conspiracy, or incriminating third parties.⁵²

It would be more effective and efficient to deter improper police conduct through a sanction placed directly on the officers. Section 1983 actions may be more likely to influence individual decisions than an indirect deterrence.⁵³ This type of deterrence works as a perfect complement to a due process approach because it would not deter the “good” law enforcement agents from zealously investigating. To offend due process is no simple task. The conduct of the police officer must be “so outrageous and prejudicial to offend due process.” Officers who enforce the law properly will not cross this high threshold. In other words, only the officers who deserve to be punished will be.

B. A Specified Order and Allocation of Proof

Much like employment discrimination claims in the United States, the process of evaluating the merits of an entrapment defense should include a defined order and allocation of proof. I suggest that this be a three-step test. The first step would require the person claiming entrapment to make a prima facie case by showing that but for the involvement of law enforcement, the crime would not have been committed in the exact circumstance it was committed. Put another way, it must be shown that if the police or government were in no way involved, the crime would not have been committed in the exact manner (e.g. same place, same time, and same participants) it was committed. Here, the claimant would have the burden of persuasion. This would not be a difficult burden to overcome, but is important that this is satisfied so as not to create a windfall of cases against the government.

Following this, the burden would shift to the investigator(s) to produce evidence that this investigation was a) legitimate, b) there were few, if any, alternatives, and c) that the decision was made in good faith. This step would evaluate the *outrageousness* of the government conduct. Subsequently, the government would have the burden of production, which would require the

⁵² *Id.*

⁵³ Some commentators see personalized civil actions against officers as the answer to the problems with the exclusionary rule. For a discussion, see Jeffrey Standen, *The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct*, 2000 B.Y.U. L. REV. 1443 (2000).

government to bring forth evidence of the type of crime being investigated, the difficulty of detection, other means available, and other mitigating factors. This second step resembles the objective theories we have seen in the U.S. minority and some international jurisdictions. If this were the standard, the defendants that were put behind bars in my hypothetical would prevail because of this step; it would be impossible for the government to legitimately argue that their incessant phone calls were made in good faith.

If the government satisfies this step, the court would proceed to the final inquiry, where the claimant still has the burden of persuasion. Here, the defendant would have to prove beyond a reasonable doubt that considering the totality of the circumstances, convicting him of the crime that was created by the government would *shock the judicial conscience*. Although this resembles the U.S. subjective test, there is a caveat embedded within: predisposition is not dispositive; it is only part of the inquiry. Public policy weighs in favor of this strict “shocking the conscience” test because we generally want to prevent crimes from happening. However, by considering the totality of the circumstances, defendants will not be unduly burdened by a single prior act, their heritage, or other factors that would normally weigh heavily in favor of a predisposition.

SECTION VII

Conclusion

Terrorism and its related crimes are without question despicable offenses. However, we should not as a society abandon our legal morals when investigating these crimes because, as is often the case, some individuals who are apprehended are coaxed into the committing the crime in the first place. At present, the two competing approaches to entrapment worldwide have left the defense in flux. With the increasing popularity of the internet and technologically advanced surveillance tactics, anti-terrorism and *To Catch a Predator*-type investigations will inevitably arise everywhere. While a due process approach is not the ultimate panacea, it is the complete overhaul of the defense that we have needed. Every country on our planet should view entrapment uniformly as a due process issue because it avoids the difficulty of predisposition, and the injustices created by the hypothetical reasonable person. Retributionists and utilitarians alike would support a due process approach.

Internet blogs and websites are currently littered with debates over the entrapment issue, and the end is seemingly nowhere in sight. I ask readers this: The next time you are with

acquaintances to watch the *To Catch a Predator* series, or hear how a suspected terrorist is apprehended, I hope you see the investigations from a new perspective and are, at the very least, more skeptical about the validity of some of them. The fact is that technology and entrapment are not mutually exclusive. Antiterrorism, child pornography, and the like are national priorities and highly technical undercover sting operations are a main tool to combat them. As our legal system's primary device for regulating undercover stings, the scope and vigor of the entrapment defense could impact all of our individual liberties.