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PREDISPOSITION AND POSITIVISM: THE FORGOTTEN FOUNDATIONS OF THE ENTRAPMENT DOCTRINE

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For the past eighty years, the entrapment doctrine has provided a legal defense for defendants facing federal prosecution, but only for those lacking criminal "predisposition" prior to the government's inducement. The peculiar contours of this doctrine have generated significant academic debate, yet this scholarship has failed to explain why the entrapment doctrine developed as it did in the first instance. This Article addresses this gap by examining competing views on criminality and punishment in America during the doctrine's emergence, highlighting the significant, though largely forgotten, impact of positivist criminology on the early twentieth-century legal imagination. Though positivism has long since been discredited as a criminological school, positivist theory helped shape the entrapment doctrine, and this intellectual context helps explain several features of the modern defense that have puzzled legal scholars. Unraveling these forgotten theoretical underpinnings thus provides a novel historical perspective on the modern doctrine's formation and offers a path forward for entrapment law today.

INTRODUCTION

Since the terrorist attacks of September 11, 2001, the Federal Bureau of Investigation (FBI) has quietly built a network of over 15,000 "confidential human sources," including 3,000 operatives enlisted to help "prevent, disrupt, and defeat terrorist operations before they occur."[1] In

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[1] FEDERAL BUREAU OF INVESTIGATION, FY 2008 AUTHORIZATION AND BUDGET REQUEST TO CONGRESS 4-23, *available at* http://www.fas.org/irp/agency/doj/fbi/2008just.pdf

several high-profile cases, the FBI has paid these informants as much as $100,000 for helping identify and thwart would-be terrorist attacks, and the agency now spends $3.3 billion annually in the overall counterterrorism effort.[2] By many measures, the strategy has proven remarkably successful. Over the past decade, the Department of Justice has successfully prosecuted over 500 "terrorism-related" cases, and, of course, there has not been a single successful, large-scale terrorist attack on U.S. soil.[3]

But the extent to which many of these convicted terrorists ever posed any credible threat to the United States remains in dispute. Among the dozens of high-profile terrorism plots foiled in recent years, all but a few were, in fact, FBI sting operations.[4] Many of those caught up in the schemes appear to have been hopelessly naïve or inept, incapable of independently plotting (let alone consummating) a feasible attack.[5] In the popular press, the improbability of such plots has generated skepticism: several authors have suggested that the FBI, in its zeal to demonstrate tangible success in the fight against terrorism, has been improperly manufacturing nonexistent terrorist schemes.[6] Many of these criminal

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(requesting funding to update database "to help manage over 15,000 of the FBI's CHSs"); FEDERAL BUREAU OF INVESTIGATION, FY 2011 AUTHORIZATION AND BUDGET REQUEST TO CONGRESS 4-28, *available at* http://www.justice.gov/jmd/2011justification/pdf/fy11-fbi-justification.pdf ("The total volume of CT [counterterrorism] CHS's is 3,078"). For more on the federal government's shift to so-called preventive prosecution of terrorist threats, see DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE 26–28 (2007); Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Threat of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425 (2007).

[2] Trevor Aaronson, *The Informants*, MOTHER JONES, Oct. 2011, at 30, 32.

[3] *Id.* at 36.

[4] *Id.* at 32–33. Aaronson identifies three exceptions: Najibullah Zazi's aborted plan to detonate explosives in the New York City subway system in September 2009, Hesham Mohamed Hadayet's armed attack at Los Angeles International Airport in July 2002, and Faisal Shahzad's failed attempt to detonate a bomb in Times Square in May 2010.

[5] *See, e.g.*, *id.* at 38 (describing many of those arrested by the FBI as "Broke-ass losers[,] Big talkers[, and] Ninja wannabes"); Ryan J. Reilly & Brian Fung, *The Five Most Bizarre Terror Plots Hatched Under the FBI's Watch*, TALKING POINTS MEMO (Oct. 3, 2011, 6:00 AM), http://tpmmuckraker.talkingpointsmemo.com/2011/10/the_five_most_bizarre_terror_plots_hatched_under_the_fbis_watch.php (noting several improbable plots, including the "Liberty City Seven" plan to attack Chicago's Sears Tower and Rezwan Ferdaus's alleged plan to fly an explosive-laden model airplane into the Capitol dome).

[6] *See, e.g.*, Aaronson, *supra* note 2; Ted Conover, *The Pathetic Newburgh Four: Should the FBI Really be Baiting Sad-Sack Homegrown Terrorists?*, SLATE (Nov. 23, 2010, 12:21 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/11/the_pathetic_newburgh_four.html; Glenn Greenwald, *The FBI Successfully Thwarts Its Own Terrorist Plot*, SALON (Nov. 28, 2010, 5:29 AM), http://www.salon.com/2010/11/28/fbi_8/; Paul Harris, *Fake Terror Plots, Paid Informants: The Tactics of FBI 'Entrapment' Questioned*, THE GUARDIAN (Nov. 16, 2011), http://www.guardian.co.uk/world/2011/nov/16/fbi-entrapment-

defendants have advanced similar arguments in court,[7] but to date, legal claims of "entrapment" have not prevailed in a single post-9/11 terrorism prosecution.[8]

The difficulty in successfully asserting the entrapment defense—both in terrorism cases and more quotidian criminal prosecutions—stems from the unique contours of the doctrine itself. Under the "subjective test" employed in the federal courts and the majority of states, entrapment excuses criminal liability where two key conditions are satisfied: (1) government agents *induce* the charged offense, and (2) the defendant is not otherwise *predisposed* to commit the crime.[9] While the distinction between an improper inducement and a mere opportunity is occasionally disputed at trial, the predisposition element "has come to dominate the entire entrapment dilemma."[10] Factors like the nature or size of the inducement, the complexity of the government artifice, or the independent capacity of the defendant to commit the crime are largely irrelevant under this approach; rather, "the controlling question" is "whether the defendant is a person otherwise innocent" (rather than one prone to criminality).[11] The

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fake-terror-plots; Paul Harris, *The Ex-FBI Informant With a Change of Heart: 'There is No Real Hunt. It's Fixed'*, THE GUARDIAN (March 20, 2012), http://www.guardian.co.uk/world/2012/mar/20/fbi-informant; Rick Perlstein, *How FBI Entrapment is Inventing 'Terrorists' – and Letting Bad Guys Off the Hook*, ROLLING STONE (May 15, 2012, 3:10 PM), http://www.rollingstone.com/politics/blogs/national-affairs/how-fbi-entrapment-is-inventing-terrorists-and-letting-bad-guys-off-the-hook-20120515; Eric Schmitt & Charlie Savage, *In U.S. Sting Operations, Questions of Entrapment*, N.Y. TIMES, Nov. 30, 2010, at A23; David K. Shipler, *Terrorist Plots, Hatched by the F.B.I.*, N.Y. TIMES, April 29, 2012, at SR4.

[7] *See* Jon Sherman, *"A Person Otherwise Innocent": Policing Entrapment in Preventative, Undercover Counterterrorism Investigations*, 11 U. PA. J. CONST. L. 1475, 1481–82 (2009) (listing cases); Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125, 125 n.1 (2008) (same).

[8] Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687, 715–31 (2010) (discussing ineffectiveness of entrapment defense in post-9/11 terrorism cases); Schmitt & Savage, *supra* note 6. However, relatively little legal scholarship has focused on the issue of entrapment in terrorism prosecutions generally. In addition to Professor Said's piece and those cited in the previous note, see Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429 (2012); Kent Roach, *Entrapment and Equality in Terrorism Prosecutions: A Comparative Examination of American and European Approaches*, 80 MISS. L.J. 1455 (2011).

[9] Sherman, *supra* note 7, at 1478–80. A minority of states (and the Model Penal Code) embrace an alternative "objective test" for entrapment. Under this standard, the court considers only whether the government's encouragement exceeded acceptable limits by considering how a hypothetical reasonable person would respond to the inducement offered. *Id.* at 1480.

[10] PAUL MARCUS, THE ENTRAPMENT DEFENSE 60 (2d ed. 1995).

[11] Sorrells v. United States, 287 U.S. 435, 451 (1932).

defendant's liability for the underlying substantive offense thus hinges on the personality, reputation, and criminal history of the accused—and, in terrorism cases, often on the defendant's political or religious views.[12] Ultimately, where the government succeeds in inducing a "nonpredisposed" defendant into criminal wrongdoing, the court infers that Congress did not intend the relevant criminal statute to support such a prosecution. Thus, purely as a matter of statutory interpretation, the entrapped party is deemed not guilty of the substantive offense.[13]

The development of the entrapment doctrine presents something of a historical puzzle. Although entrapment was unknown at common law, it rapidly entered into American law (and *only* American law[14]) during the first few decades of the twentieth century.[15] "In retrospect," one leading scholar has observed, "it is somewhat remarkable that the entrapment doctrine won credibility in America in such a short time."[16] The defense is unusual because it makes a searching inquiry into the defendant's character or criminal propensities the centerpiece of the criminal trial. This stands in marked contrast to the traditional focus of Anglo-American criminal jurisprudence, which generally spurns such evidence as irrelevant to the central issue of moral blameworthiness for a particular, volitional criminal act.[17] The development of the subjective test is odder still given that it

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[12] *See* Said, *supra* note 8, at 697 ("In the context of a terrorism prosecution, it is not difficult to imagine how a defendant's statements can be used to prove predisposition, given the typical ideological and political nature of terrorism charges. Demonstrating predisposition can therefore become a referendum on a defendant's political or religious views when the inquiry focuses on how sympathetic the defendant is to terrorist objectives. An analysis of predisposition to commit a given crime entails an inquiry into an individual's general character, something the law normally rejects.").

[13] This somewhat dubious "statutory construction" rationale has "particularly incensed" critics of the subjective test. MARCUS, *supra* note 10, at 62; *see, e.g.*, Sherman v. United States, 356 U.S. 369, 379 (1958) (Frankfurter, J., dissenting) ("It is surely sheer fiction to suggest that a conviction cannot be had when a defendant has been entrapped by government officers or informers because 'Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations' . . . . [T]he only legislative intent that can with any show of reason be extracted from the statute is the intention to make criminal precisely the conduct in which the defendant has engaged."). A theory for why the Court initially adopted this approach appears *infra* Part II.B.2 (*Pathology*).

[14] Stevenson, *supra* note 7, at 130–31 ("Until very recently, the entrapment defense was available only in the United States—it was not a feature of common law, and no other industrialized nations (e.g., Western Europe, Canada, Australia) traditionally recognized the entrapment defense.").

[15] MARCUS, *supra* note 10, at 12.

[16] *Id.*

[17] Jonathan C. Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 VA. L. REV. 1011, 1038 (1987).

emerged at the precise moment that Progressive Legal Thought was successfully pulling other areas of the law away from such inquiries, promoting instead objective standards in tort, contract, and property.[18] In the eighty years since the Supreme Court first recognized the defense in *Sorrells v. United States*,[19] jurists and legal commentators have regularly criticized the entrapment doctrine's emphasis on predisposition as "confus[ing],"[20] "[in]coherent,"[21] and even "meaningless."[22] But none of these scholarly treatments has provided a satisfactory genealogy for the defense. In short, we lack a compelling account of why such a peculiar doctrine first emerged as it did.

This Article aims to fill that gap by revisiting the intellectual context in which the entrapment defense arose and, in particular, by linking the doctrine's development to the contributions and arguments of positivist criminology. Widely credited with ushering in the modern discipline of criminology, the positivist school first emerged in late nineteenth-century Italy, where its chief exponents trumpeted the need for a scientific approach to exposing, studying, and combating the causes of criminality.[23] Italian legislators and lawyers were wary of many of the movement's more iconoclastic contributions, but in the United States, positivism encountered a far more receptive audience.[24] Indeed, recent legal scholarship has begun to rediscover the profound importance of Italian positivism in early

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[18] *See* MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 33–64, 145–67 (1992); Rebecca Roiphe, *The Serpent Beguiled Me: A History of the Entrapment Defense*, 33 SETON HALL L. REV. 257, 258–59 (2003).

[19] 287 U.S. 435 (1932).

[20] Said, *supra* note 8, at 696–97.

[21] Carlson, *supra* note 17, at 1038.

[22] Ronald J. Allen et al., *Clarifying Entrapment*, 89 J. CRIM. L. & CRIMINOLOGY 412, 413 (1999); *see also* Roiphe, *supra* note 18, at 293 ("[M]ost contemporary commentators suggest that courts abandon the impractical, and arguably even futile, subjective test.").

[23] *See generally* EUGENE MCLAUGHLIN ET AL., CRIMINOLOGICAL PERSPECTIVES: ESSENTIAL READINGS 1–13 (2003) (providing general overview); Jennifer Devroye, *The Rise and Fall of the American Institute of Criminal Law and Criminology*, 100 J. CRIM. L. & CRIMINOLOGY 7 (2010) (describing spread of positivist theory in the United States in 1910s and 1920s); David Garland, *The Criminal and His Science*, 25 BRIT. J. CRIMINOLOGY 109 (1985) (examining development of discipline of positivist criminology in late nineteenth century).

[24] *See* Nicole Hahn Rafter, *Criminal Anthropology: Its Reception in the United States and the Nature of Its Appeal*, *in* CRIMINALS AND THEIR SCIENTISTS: THE HISTORY OF CRIMINOLOGY IN INTERNATIONAL PERSPECTIVE 159, 166 (Peter Becker & Richard F. Wetzell eds., 2006); Jonathan Simon, *Positively Punitive: How the Inventor of Scientific Criminology Who Died at the Beginning of the Twentieth Century Continues to Haunt American Crime Control at the Beginning of the Twenty-First*, 84 TEX. L. REV. 2135, 2136 (2006).

twentieth-century legal thought in the United States,[25] as well as the enduring importance of these ideas in contemporary criminal law and policy.[26] Jonathan Simon has argued, for instance, that many aspects of American penal policy today—support for the death penalty as incapacitation, pretrial preventative detention, civil commitment for sexual offenders, and a renewed interest in rehabilitation—all bear the imprint of this positivist legacy.[27] The central argument here is that the modern entrapment doctrine, which formed while positivist criminology was gaining purchase in the American legal imagination, must be added to the list. The entrapment doctrine is unique, however, in that it represents an area where positivist ideas not only inform contemporary policy, but also have embedded themselves into the substantive law itself.

Part I of this Article introduces positivist theory—with particular emphasis on the works of Cesare Lombroso, Enrico Ferri, and Raffaele Garofalo—and traces positivism's reception in the United States. Distinctive features of the positivist project, particularly "differentiation," "pathology," and "interventionism," are then explored in greater detail. Part II connects these ideas to the development of the entrapment doctrine in American courts in the early twentieth century, when the notion of criminal predisposition became the dispositive feature of the entrapment inquiry. Part II.A traces the development of the entrapment doctrine in American courts from the Civil War to the Supreme Court's recognition of the defense in 1932. Part II.B then offers a closer reading of these cases, emphasizing the distinct influence of positivist assumptions throughout these opinions. The contours of the modern entrapment doctrine—chiefly

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[25] *See* Mary Gibson & Nicole Hahn Rafter, *Introduction* to CESARE LOMBROSO, CRIMINAL MAN 1–36 (Mary Gibson & Nicole Hahn Rafter eds., 2006) (1876); Devroye, *supra* note 23, at 12–19 (discussing influential publication in United States of the works of Cesare Lombroso and Enrico Ferri); Solomon J. Greene, *Vicious Streets: The Crisis of the Industrial City and the Invention of Juvenile Justice*, 15 YALE J.L. & HUMAN. 135, 152–57 (2003); Rafter, *supra* note 24; Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 655–61 (2010).

[26] Garland, *supra* note 23, at 109 (noting that the "concepts and recommended practices [of late nineteenth-century criminology], for better or worse, underpin many of the penal sanctions and institutions of nations throughout the world"); J.W. Looney, *Neuroscience's New Techniques for Evaluating Future Dangerousness: Are We Returning to Lombroso's Biological Criminality?*, 32 U. ARK. LITTLE ROCK L. REV. 301 (2010); Simon, *supra* note 24, at 2138 (arguing that "American crime control at the beginning of the twenty-first century remains deeply inscribed by the positivist project (albeit one transformed in some important respects)"). Similar scholarship seems to be under way in other countries as well. *See, e.g.*, Martine Kaluszynski, *Le retour de l'homme dangereux. Réflexions sur la notion de dangerosité et ses usages*, 5 CHAMP PÉNAL (2008), *available at* http://champpenal.revues.org/6183.

[27] Simon, *supra* note 24, at 2138–40.

the focus on predisposition, but also the strained "statutory interpretation" rationale upon which the doctrine has since rested—become intelligible only within this intellectual context.

This Article is primarily historical and descriptive, but it is animated by the belief that entrapment ought to play a more prominent role in discouraging highly invasive, abusive, or fundamentally misguided law enforcement practices. Critics of the federal courts' subjective test will find this historical background useful, insofar as it ties the entrapment doctrine to a criminological perspective that, in many respects, is now discredited and defunct. But this Article concludes, perhaps counterintuitively, by suggesting that the modern entrapment doctrine's primary weakness is not its underappreciated embrace of outmoded criminological assumptions. Rather, perhaps the trouble with the entrapment doctrine is that it fails to embrace positivist theory *enough*.

I. THE ITALIAN SCHOOL COMES TO AMERICA

The primary object of positivist criminology—or "criminal anthropology" as its leading exponents dubbed their new science—was the systematic and empirical study of the origins of crime (and the deployment of such knowledge "to preserve civil society from the scourge of criminality").[28] Champions of the new discipline viewed themselves as members of "a progressive movement in criminal science"[29] and vociferously opposed the "classical" approach that characterized earlier thinking about criminal law and justice. The classical predecessors of the positivists, beginning with eighteenth-century reformers like Cesare Beccaria and Jeremy Bentham, sought to eliminate barbarism and irregularity from the administration of criminal justice; their project was the development of a rational, systematic, and proportional means of delivering justice through law.[30] Classical jurisprudence thus focused more on the content and function of criminal law and less on the origins of crimes and criminals, but this work was necessarily predicated upon certain assumptions about criminality. Specifically, classicists conceived of the offender as a rational actor who had free will, was responsible for particular acts of wrongdoing, and responded to penal sanctions tailored to moral fault.[31]

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[28] ENRICO FERRI, CRIMINAL SOCIOLOGY, at xli (1917); *see* MCLAUGHLIN ET AL., *supra* note 23, at 1–13 (comparing classical and positivist perspectives); Devroye, *supra* note 23, at 11–18; Garland, *supra* note 23.

[29] FERRI, *supra* note 28, at 18.

[30] MCLAUGHLIN ET AL., *supra* note 23, at 1.

[31] Garland, *supra* note 23, at 122.

The positivist school coalesced as an assault against many of these basic assumptions.[32] Whereas classical jurisprudence's understanding of crime lacked empirical foundations, the positivists boasted that their scientific approach was based on "the positive study of facts."[33] The positivists constructed a systematic body of knowledge regarding the criminal character—one that identified and categorized offenders by varying degrees of "dangerousness"—and concluded that traditional notions of "free will" and "moral fault" were largely illusory.[34] Positivist criminology thus viewed attempts to dispense justice commensurate with criminals' levels of moral culpability as quixotic, and they lampooned classical jurisprudence's commitment to notions of "guilt" and "responsibility" as "metaphysical pedantry."[35] Instead, the imperative of social defense required a new approach, one that tailored individual punishments to the (scientifically ascertained) dangerousness of the offender. Positivism, in its headiest incarnation, thus promised "an exact and scientific method for the study of crime, a technical means of resolving a serious social problem, and a genuinely humane hope of preventing the harm of crime and improving the character of offenders."[36]

First published in Italy in 1876, Cesare Lombroso's controversial *L'uomo Delinquente* (*Criminal Man*) launched the *scuola positiva*.[37] While Lombroso tempered and further developed many of his positions in subsequent editions of *Criminal Man*,[38] he remains best known for introducing the idea of the "born criminal" (*delinquente nato*).[39] Lombroso argued that he had identified certain defects (or "anomalies") among the criminal type through psychological and physiological examinations of convicted criminals. These "atavistic" traits distinguished the criminal from the noncriminal and could be the object of methodical, scientific study. Lombroso's disciples—most notably Enrico Ferri and Raffaele

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[32] *Id.* at 117 ("The assault upon this jurisprudence was pursued by virtually every text in the field, as much to establish the practical advantages of a penal system based on positive criminology as to demarcate the differences between the two forms of discourse. And one should emphasize that this was indeed an *assault*.").

[33] FERRI, *supra* note 28, at 14.

[34] *Id.* at 318–20.

[35] *Id.* at 2.

[36] Garland, *supra* note 23, at 110.

[37] Gibson & Rafter, *supra* note 25, at 1. Though *Criminal Man* was promptly translated into French, German, Russian, and Spanish, no English version was available until 1911, and even then only portions of Lombroso's work were translated. *Id.* at 3.

[38] *Id.* at 2–4.

[39] *Id.* at 1.

Garofalo[40]—followed in this tradition, though they modified some of Lombroso's more audacious claims by placing emphasis on social or environmental factors that generated criminality.[41] Positivists were unified, however, in their insistence on "reorient[ing] legal thinking from philosophical debate about the nature of crime to an analysis of the characteristics of the criminal."[42]

Positivists embraced a shared methodological commitment to the "scientific" study of crime and criminals, but they also converged around several theoretical positions. As David Garland explains, the tenets of "differentiation," "pathology," and "interventionism" were at the core of the positivist project.[43] These categories provide a useful framework for exploring positivist thought (and, as argued in Part II below, also help explain the development of the entrapment doctrine).

A. DIFFERENTIATION

Differentiation refers to the positivist school's core project of identifying a "criminal type" (or, more accurately, "criminal types"), distinct and apart from those who ordinarily abide by the law. As Garland argues, this position was directly at odds with classical jurisprudence, which posited:

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[40] At the time, Lombroso, Ferri, and Garofalo were regarded as the leaders of positivist criminology. *See* C.E.H., Jr., Book Review, 18 YALE L.J. 372 (1909) (reviewing MAURICE PARMELEE, ANTHROPOLOGY AND SOCIOLOGY IN RELATION TO CRIMINAL PROCEDURE (1908)) ("Several different schools have grown up, but the most modern and practical one is the 'positive' school, headed by Lombroso, Garofalo and Ferri."); E.R.K., Book Review, 25 HARV. L. REV. 398 (1912) (reviewing C. BERNALDO DE QUIRÓS, MODERN THEORIES OF CRIMINALITY (1911)) (describing Lombroso, Ferri, and Garofalo as the "three innovators").

[41] *See* H.B.E., Book Review, 28 HARV. L. REV. 221 (1914) (reviewing BARON RAFFAELE GAROFALO, CRIMINOLOGY (1914)) ("[Garofalo's] moderate tone and practical nature make [his work] good preparation for the audacious theorizing of Lombroso . . . ."); Arthur D. Hill, Book Review, 31 HARV. L. REV. 316 (1917) (reviewing ENRICO FERRI, CRIMINAL SOCIOLOGY (1884)) (praising Ferri for "very sensibly . . . modify[ing] earlier and more extreme views" by exploring "the relation between environment and crime").

[42] Gibson & Rafter, *supra* note 25, at 1.

[43] Garland, *supra* note 23, at 122. Garland also discusses "individualisation," "correctionalism," and "statism" as additional shared commitments of the positivists, though these positions have less direct bearing on the development of the entrapment doctrine. Individualization, while by no means a necessary starting point for the general criminological endeavor, is generally implicit in the operation of criminal law (insofar as the law acts on individual criminal defendants). Correctionalism concerns itself more with the potential to reform individuals *after* conviction for a criminal offense. Finally, statism refers to the positivists' aim to incorporate nonlegal professionals (forensic scientists, psychiatrists, or other "penal experts") into the legal process. These issues largely fall outside the scope of this Article's discussion of the development of the entrapment doctrine, though the issue of individualization is discussed briefly in the Conclusion.

> [T]he only difference between the criminal and non-criminal is a contingent event: one has chosen, on occasion, to behave in a criminal fashion while the other has not. This difference of conduct reveals nothing beyond itself. The individual in each case is assumed to be similarly constituted—as a free, rational, human subject.[44]

This basic proposition led to the traditional bar against the introduction of prior bad acts and other character evidence and even the fundamental idea of the act requirement in criminal law.[45] But the positivists rejected such "metaphysical" conceptions as free will and its implicit contingencies; the criminal is qualitatively different, "a being apart" whose (essentially determined) behavior is therefore more amenable to positive analysis.[46] Whereas the classical school insisted that criminal sanctions be tailored to fit the crime,[47] the positivists answered that the purpose of punishment "should be not to punish the criminal fact but to strike the criminality of the agent as revealed by the fact."[48]

This shift in perspective produced the positivists' interest in (or perhaps obsession with) the classification of criminal types, which Enrico Ferri envisioned as the central aim of the modern penal process. Providing that prosecutors could establish a causal link between the defendant and the criminal act, the chief matter of dispute at trial should become, "To what anthropological category does the accused belong?"[49] Instead of "grotesque duels in which an acquittal is sought, no matter what the psychological or psychopathologic conditions" of the defendant, the trial would center on "an absolutely scientific discussion" aimed at classifying the defendant as one of five criminal types.[50] Courts would then tailor their penal judgments not to the crime itself or the "moral culpability" of the accused, but to a scientific appraisal of the criminal's character.[51]

While the most extreme criminal types (e.g., the "born criminals") might be beyond rehabilitation—necessitating permanent incapacitation,

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[44] *Id.*

[45] *See* Carlson, *supra* note 17, at 1039.

[46] BARON RAFFAELE GAROFALO, CRIMINOLOGY 68 (1914); *accord* FERRI, *supra* note 28, at 422 ("[I]t is the capital conclusion of criminal anthropology and sociology that the delinquent . . . in place of being a man like his fellows, as classical science and legislation picture him, presents on the other hand in his organic and psychic characteristics many anthropological varieties with different potentialities in anti-social activity.").

[47] CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 69, 86 (Aaron Thomas ed., 2008) (1764) ("[I]mprisonment and servitude should fit the nature of the crime itself . . . . [It should be] proportionate to the crimes, and established by the law.").

[48] GAROFALO, *supra* note 46, at 408.

[49] FERRI, *supra* note 28, at 462–63.

[50] *Id.* at 463.

[51] *Id.* at 464.

banishment, or execution—lesser criminal types were merely predisposed to engage in crime.[52] As Ferri explained in *Criminal Sociology*:

> When [the positivist school] speak[s] of the criminal type . . . we mean . . . a physio-psychic *predisposition* to crime, which in certain individuals may not end in criminal acts . . . if restrained by favorable circumstances of the medium, but which, when these circumstances are unfavorable, is none the less the sole positive explanation of the anti-human and anti-social activity . . . .[53]

An individual who lacks a "predisposition to crime," however, even under unfavorable social or environmental circumstances, could "never become[] a 'rascal.'"[54]

B. PATHOLOGY

Differentiation was the critical starting point of the positivist project, but absent a "hierarchy of character-types," such differentiation lacked critical bite.[55] By asserting the pathology of the criminal classes, the positivists brought about an important shift in the development of criminological knowledge. This move was sometimes implicit in the process of differentiation itself: as Ferri analogized, an individual's diagnosis as belonging to a particular delinquent type was no different than "the individual treatment [given] every sick or insane person."[56] But the positivists' argument that "crime is *always* the effect of an anomaly or of a pathological condition"[57] signaled a more fundamental shift. "[P]athology fixes a definite norm of social and individual 'health' and places the

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[52] The views of the major figures of the Italian school differed significantly with regard to the precise categorization of criminal types. Lombroso initially posited the existence of a single, undifferentiated group of criminals (who were juxtaposed to "healthy" men), but he significantly revised this position in subsequent editions of his work. *See* Gibson & Rafter, *supra* note 25, at 9–13. Ferri identified five classes of criminals: born criminals, habitual criminals, occasional criminals, passionate criminals, and the insane. FERRI, *supra* note 28, at 125–67. Garofalo, meanwhile, criticized Ferri's taxonomy as "without a scientific basis and lack[ing] homogeneity and exactness." GAROFALO, *supra* note 46, at 132. Entrapment law, of course, has never concerned itself with such nuance; the basic point here is the initial process of differentiation.

[53] FERRI, *supra* note 28, at 98 (emphasis added).

[54] *Id.* at 99.

[55] Garland, *supra* note 23, at 124.

[56] FERRI, *supra* note 28, at 457; *id.* at 285 ("Crime is Pathological . . . For crime, in its atavistic and anti-human forms (forms contrary to the imminent and fundamental conditions of human existence), and in its evolutionary or politically anti-social manifestations (manifestations contrary to the transitory order of a given society), is not the fiat of free will and human perversity, but is rather an effect and symptom of individual pathology in its atavistic, and social pathology in its evolutionary forms.").

[57] *Id.* at xl.

criminal character below that norm . . . . Criminal behaviour ceases to be a violation of conventional norms and becomes instead a deviation from 'the normal.'"[58]

Introducing this "pathology principle" provided modern criminology with "both its raison d'être and its practicable object,"[59] but positivists' efforts to identify these deviations from "the normal" generated some of their most dubious claims. Ferri found symptoms and manifestations of this pathology in peculiar places: "tattooing, gait, sly expression of face, language, and scars" all signaled "characteristics [of the] anthropological criminal type."[60] Lombroso's later works increasingly focused on groups "that were beginning to elicit anxiety in late nineteenth-century Europe and America: women; southern Italians, Africans, and other 'inferior races'; youth; and the lower classes . . . ."[61] As later critics were quick to highlight, the positivists' emphasis on the pathology of criminality often revealed nothing more than the unexamined biases of the discipline's champions.[62]

C. INTERVENTIONISM

Finally, by discovering and categorizing criminal types and asserting that criminal acts were the products of identifiable pathologies, the positivist project (implicitly) legitimated and (explicitly) argued for "a new and extended basis for disciplinary intervention and regulation."[63] The positivists argued that the very purpose of the criminal justice system needed to be reconsidered: "It should cease to be a belated and violent resistance to effects and should diagnose and eliminate the natural causes. This function must be advanced as a preventive defense of society against natural and statutory crime."[64] This entailed incapacitation—perhaps by execution—of the most dangerous criminal types, but also proactive interventionism targeting "the remote origin of crime in order to suppress the first germs."[65] Positive criminology thus opened the possibility of

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[58] Garland, *supra* note 23, at 124.

[59] *Id.*

[60] FERRI, *supra* note 28, at 92; *accord* LOMBROSO, *supra* note 37, at 58 ("One of the most singular characteristics of primitive men and those who still live in a state of nature is the frequency with which they undergo tattooing. . . . Because of its common occurrence among criminals, tattooing has assumed a new and special anatomico-legal significance that calls for close and careful study.").

[61] Gibson & Rafter, *supra* note 25, at 15.

[62] *Id.* at 28–34 (discussing the positivists' early critics and Lombroso's enduring influence).

[63] Garland, *supra* note 23, at 131.

[64] FERRI, *supra* note 28, at 285.

[65] *Id.* at 283.

singling out "the infected members of society *before* their disease has become an actual offense."[66] As Garofalo proclaimed (in presciently Nixonian terms): "The time has come to proclaim warfare on crime in the name of civilization as the watchword of penal science."[67]

* * *

"[F]rom all quarters of Europe arose those calumnies and misrepresentations," Lombroso would later write about the entrenchment of classical thought, but "[o]ne nation . . . —America,—gave a warm and sympathetic reception to the ideas of the [positivists]."[68] Many in the United States certainly viewed Lombroso's biological determinism with a certain skepticism,[69] but the approach he championed ("namely, that of [scientifically] studying the psychology of criminals and their pathological abnormities") was lauded as revolutionary.[70] Whether due to growing socioeconomic anxieties, the newfound prominence of science in American social thought, the steady professionalization of policing and penology, or the unsettled state of the legal profession (or a combination of all four, as Nicole Hahn Rafter has argued), America proved fertile ground for positivist ideas.[71]

Particularly important in spreading positivist thought was the American Institute of Criminal Law and Criminology, founded in 1909 by John H. Wigmore and other legal luminaries who hoped "to foster cooperation between lawyers and scientists to improve criminal laws and

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[66] Garland, *supra* note 23, at 131–32 (quoting HENRY M. BOIES, THE SCIENCE OF PENOLOGY 451 (1901)).

[67] GAROFALO, *supra* note 46, at xxix.

[68] Cesare Lombroso, *Introduction* to GINA LOMBROSO FERRERO, CRIMINAL MAN: ACCORDING TO THE CLASSIFICATION OF CESARE LOMBROSO (1911).

[69] *See* H.B.E., *supra* note 41. However, it is worth recalling that "[i]n the United States . . . [many] people most concerned with crime control were receptive to the idea of the criminal as a biologically distinct and inferior being," and the positivist ideas often dovetailed with those of the budding eugenics movement. Rafter, *supra* note 24, at 166. Consider, for example, that just five years before the landmark entrapment case *Sorrells v. United States*—discussed at length in Part II—the Court also upheld the practice of compulsory sterilization of mentally retarded individuals. *See* Buck v. Bell, 274 U.S. 200, 207 (1927) ("It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . . Three generations of imbeciles are enough.").

[70] Helen Zimmern, *Criminal Anthropology in Italy*, 10 GREEN BAG 342, 342 (1897).

[71] Rafter, *supra* note 24, at 159–66.

the administration of justice."[72] By that point, at least nine English-language books popularizing the positivists' theories had already appeared,[73] but the Institute's founders nevertheless "lament[ed] the lack of acquaintance in America with the modern works on criminal science."[74] As one of its first projects, the Institute began publishing its "Modern Series," translating works to "inculcate the study of modern criminal science, as a pressing duty for the legal profession and for the thoughtful community at large."[75] Key works by Lombroso (1911), Garofalo (1914), and Ferri (1917) were among the first selected,[76] and each work received favorable reviews in America's leading law reviews.[77] The Institute thus "opened a door through which Lombrosian works passed into the United States while closing that door to studies in alternative theoretical traditions."[78]

Discussion of the positivist school's work continued in American legal circles throughout the 1920s and 1930s. In the early 1920s, for example, Ferri headed a government commission that drafted a radical new penal

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[72] Devroye, *supra* note 23, at 7.

[73] Rafter, *supra* note 24, at 167–68.

[74] Robert J. Gault et al., *The Progress of Penal Law in the United States of America, 1874–1924*, 15 J. AM. INST. CRIM. L. & CRIMINOLOGY 173, 174 (1924) ("In the United States the inspiration of Italy's criminalists was strongly influential in the founding of the 'Journal of the Institute' . . . . Since 1909, the expansion of thought in this field in the United States has been enormous.").

[75] Comm. on Translations, *Bulletins of the American Institute of Criminal Law and Criminology, Bulletin No. 3, April 1910*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 451–52 (1911).

[76] Devroye, *supra* note 23, at 18, n.75 (listing titles in the Institute's "Modern Series" publications); Gault et al., *supra* note 74, at 174.

[77] For scholarly reviews of key positivist texts, see W.B., Book Review, 25 HARV. L. REV. 199 (1911) (reviewing CESARE LOMBROSO, CRIME: ITS CAUSES AND REMEDIES (1911)) (recommending Lombroso's emphasis on "the search for causes of crime, with a view to prevention and repression" to "those who make daily practice of the modern theory on the bench and at the bar"); H.B.E., Book Review, 23 YALE L.J. 554 (1914) (reviewing BARON RAFFAELE GAROFALO, CRIMINOLOGY (1914)) ("To deal with crime the criminal must be understood. Though the treatise is not a legal one, yet it is recommended to the student of the law . . . ."); H.B.E., *supra* note 41 (praising Garofalo's categorization of criminal types—the "insane," the "legal or conventional offender," and the "natural criminal"—and recommending the book "for lawyers and law students"); William Healy, Book Review, 28 YALE. L.J. 103 (1918) (reviewing ENRICO FERRI, CRIMINAL SOCIOLOGY (1917)) ("We owe a considerable debt of gratitude to the learned translators . . . for their well-performed task in translating for us this work, so well known abroad . . . . [A]n English abridged translation, for years on the shelves of our libraries, has most inadequately represented the scholarship which marks the author's work."); Hill, *supra* note 41 ("Still this book is a useful one. Particularly good are the classifications of criminals (in which Signor Ferri clearly restates his former argument) . . . .").

[78] NICOLE RAFTER, CREATING BORN CRIMINALS 115 (1998).

code for Italy, one that focused exclusively on "the principle of the dangerousness of the offender."[79] Though the fascists' October 1921 "March on Rome" thwarted implementation of the reformers' plans, a lengthy analysis in the *Harvard Law Review* lauded the basic thrust of Ferri's effort as "a great stride in advance, when one compares it with the basis of our criminal law."[80] Proposals from criminal law reform in the 1930s regularly discussed the positivists' work,[81] and some commentators continued to vigorously champion positivist ideas. Albert J. Harno, for example, who served for thirty-five years as Dean of the University of Illinois College of Law, based much of his *Rationale of a Criminal Code* on positivist theory as late as 1937:

> The whole system of the penal law as it now stands stresses the offense. But if protection is the aim [as Ferri correctly argued], the principal inquiry should be as to the dangerousness of the offender. It is he whom society has to fear. To find how much it has to fear him it must diagnose him to determine his motivations, his anti-social tendencies, his personality, and his responsiveness to peno-correctional treatment.[82]

By this point, criminology as a discipline had long since progressed to new frontiers,[83] but the positivist school plainly left its mark on how the legal profession conceived of criminality and the role of the criminal law in countering criminality in the early decades of the twentieth century.

Some of the positivists' arguments now seem antiquated or bizarre; other contributions have become part of our common sense understanding of how criminals and the criminal law operate. But at the time, each of these contributions was at the cutting edge of American legal thought.

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[79] *See* Thorsten Sellin, Book Review, 42 HARV. L. REV. 1086 (1929) (reviewing HENRY G. J. MAAS GEESTERANUS, LA RÉFORME PÉNALE EN ITALIE (1929)).

[80] Sheldon Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453, 468 (1928). The article's author, who went on to become America's leading criminologist in subsequent decades, recommended tempering the positivist program, however. In addition to the criminal's personality, Glueck recommended that sentences should also reflect the moral gravity of the particular offense, the offender's "personal assets," and also his "responsiveness to peno-correctional treatment." *Id.* This "broad, anti-retributivist, treatmentist approach remained dominant through the 1930s." Gerald Leonard, *Towards A Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691, 808 (2003).

[81] *See, e.g.*, Alfred L. Gausewitz, *Considerations Basic to a New Penal Code, Part I*, 11 WIS. L. REV. 346, 352–53 (1935) (providing detailed overview of "Positive school" and its critique of "earlier Classical school").

[82] Albert J. Harno, *Rationale of a Criminal Code*, 85 U. PA. L. REV. 549, 554 (1937).

[83] *See* Clive R. Hollin, *Criminological Psychology*, *in* THE OXFORD HANDBOOK OF CRIMINOLOGY 43, 48–50 (Mike Maguire et al. eds., 4th ed. 2007) (discussing birth of the Chicago School of Criminology and differential association theory).

II. DEVELOPMENT OF THE ENTRAPMENT DOCTRINE

While the ideas of Lombroso, Ferri, and Garofalo were circulating through the American legal profession, American courts increasingly struggled "to police the boundaries between government and the individual in the newly drawn precincts of the modern state."[84] American criminal law was expanding into new domains,[85] and by the late nineteenth century, law enforcement was developing sophisticated and proactive ways of combating crime. "Sting operations" hatched by both government agents and private detective companies proved effective at uncovering would-be lawbreakers, but the resulting criminal prosecutions posed novel theoretical problems for American courts.[86] The entrapment doctrine developed over several decades as one of the courts' responses.

A. FROM *BACKUS* (1864) TO *SORRELLS* (1932)[87]

At common law, courts uniformly rejected the argument that a claim of entrapment could excuse a defendant for criminal wrongdoing. As one oft-cited New York court explained in *Board of Commissioners v. Backus*, the entrapment defense was "first interposed in Paradise: 'The serpent beguiled me and I did eat.' That defence was overruled by the great Lawgiver . . . [and] has never since availed to shield crime or give indemnity to the culprit . . . ."[88] If a defendant committed a criminal act with the requisite mental state, the nature of the inducement was legally irrelevant.

Beginning in the late nineteenth century, however, a few state courts began appropriating the private law doctrine of consent to fashion an early prototype of the modern entrapment defense.[89] In cases where force or lack

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[84] Roiphe, *supra* note 18, at 259.

[85] *See* Livingston Hall, *The Substantive Law of Crimes 1887–1936*, 50 HARV. L. REV. 616, 618 (1937) (discussing "[t]he increasing area of conduct regulated by the criminal law" over the fifty-year period).

[86] Roiphe, *supra* note 18, at 270–73.

[87] Sorrells v. United States, 287 U.S. 435 (1932); Bd. of Comm'rs v. Backus, 29 How. Pr. 33 (N.Y. Sup. Ct. 1864).

[88] *Backus*, 29 How. Pr. at 42; *accord* President v. O'Mailey, 18 Ill. 407, 413 (1857) ("If men, who voluntarily or otherwise become acquainted with the secret brothels, gambling and drinking hells with which our cities and villages are sometimes overrun, and our neighbors and our children are corrupted and ruined are to lose their character for veracity, and are to be denounced as informers and spies for seeking out and bringing these evil practices to light, then are our hopes of protection slight indeed.").

[89] Roiphe, *supra* note 18, at 271. An early English decision, *Egginton's Case*, appears to have laid the groundwork for these cases. King v. Egginton, (1801) 126 Eng. Rep. 1410 (K.B.). There, a proprietor learned in advance of a plot to rob his factory and contacted

of consent was an element of the crime—most frequently burglary or larceny—surreptitious inducements might constitute "consent" that would negate a substantive element of the charged offense.

Speiden v. State, a representatively colorful case from Texas's highest criminal court in 1877, illustrates this approach.[90] There, the Pinkerton Detective Agency intercepted ("by some means") a series of letters indicating that a plan was afoot to rob banks in Dallas, Texas.[91] Dallas's bank owners organized themselves, retained Pinkerton's services to "work up the case" against the author of the suggestive letters, and "[f]inally, it was agreed on all hands that the banking house of Adams & Leonard should be broken into on [a] Sunday night."[92] On the appointed evening, with a deputy sheriff and deputy marshal lying in wait inside the bank, the Pinkerton detectives forced open a back door and entered with the defendant.[93] The unlucky bank robber was promptly convicted of burglary, but on appeal, the Court of Appeals of Texas explained that the detectives were the lawful agents of the bank owners, and had legal occupancy and control of the premises at the time of entry. The defendant thus entered with the consent—indeed, at the invitation—of the bank owners. "This," the Court explained in reversing the conviction, "cannot be burglary in contemplation of law, however much the defendant was guilty in purpose and intent."[94]

These proto-entrapment opinions sometimes explicitly disclaimed the suggestion that the criminal character of the accused or the imperatives of social defense legitimated such aggressive law enforcement tactics.[95] In a leading case from 1878, for instance, the Supreme Court of Michigan

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authorities to catch the burglars in the act. *Id.* at 1412. While the court convicted the defendants, it noted that the owner's encouragement to commit the act might constitute assent to the burglars' entry, thereby negating the critical element of trespass. *Id.* *Egginton's Case* was cited by American courts in several pre-Civil War cases (*see, e.g.*, State v. Covington, 18 S.C.L. (2 Bail.) 569, 572 (1832)), but it was not until somewhat later that state courts consistently applied this consent-based rationale. *See* Roiphe, *supra* note 18, at 271–77.

[90] 3 Tex. Ct. App. 156 (1877).

[91] *Id.* at 160.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 163; *accord* Connor v. People, 33 P. 159, 160 (Colo. 1893) ("To constitute the crime of larceny . . . there must be a trespass,—that is, a taking of property without the consent of the owner,—coupled with an intent to steal the property so taken. It is therefore evident that the crime is not committed when, with the consent of the owner, his property is taken, however guilty may be the taker's purpose and intent."); Love v. People, 43 N.E. 710, 713 (Ill. 1896) (overturning burglary conviction on grounds of owner's consent).

[95] Paul Marcus, *The Development of Entrapment Law*, 33 WAYNE L. REV. 5, 10 (1986).

overturned a felony conviction for burglary where a policeman facilitated an attorney's illicit entry to a courthouse, holding:

> The mere fact that the person contemplating the commission of a crime is supposed to be an old offender can be no excuse, much less a justification for the course adopted and pursued in this case . . . . [T]he law does not contemplate or allow the conviction and punishment of parties on account of their general bad or criminal conduct, irrespective of their guilt or innocence of the particular offense charged and for which they are being tried.[96]

The Supreme Court of Michigan weighed in again in 1889, this time concerning a trap laid by private parties: "That [the defendant] is not a good member of society is hardly questioned. But it is not edifying when persons who would be horrified at being classed among criminals forget their legal duties."[97] These cases—which focus on the technical elements of the charged offense and the act itself (i.e., not the defendant's character)—are firmly grounded in the tradition of classical jurisprudence.

In the ensuing decades, however, the doctrinal structure of the entrapment defense began to change. Entrapment "outgrew its increasingly ill-suited roots in private law concepts," shifting instead to an analysis of "whether [the] criminal intent originated with the defendant."[98] While focus on the victim's supposed consent might provide a useful way of approaching trespass or burglary prosecutions, other criminal prosecutions (e.g., mail fraud, obscenity, public morality offenses, and, in particular, alcohol and narcotics violations) were less amenable to this theoretical justification. Increased government regulation of sex, morals, and other everyday conduct also created practical difficulties for law enforcement: many of these new crimes were difficult to detect without aggressive

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[96] Saunders v. People, 38 Mich. 218, 222 (1878) (Marston, J., concurring). Professor Marcus highlights *Saunders* as a "leading case" from the period. Marcus, *supra* note 95, at 9–11; *see also Connor*, 33 P. at 161 ("We feel warranted in quoting thus fully from [*Saunders*] . . . because of the universally recognized learning and ability of the eminent jurists who announced them.").

[97] People v. McCord, 42 N.W. 1106, 1109 (Mich. 1889); *see also* United States v. Whittier, 28 F. Cas. 591, 594 (C.C.E.D. Mo. 1878) (Case No. 16, 688) (Treat, J., concurring) ("No court should, even to aid in detecting a supposed offender, lend its countenance to a violation of positive law, or to contrivances for inducing a person to commit a crime."); People v. Pinkerton, 44 N.W. 180, 181 (Mich. 1889) ("Whether this woman is reprobate or not, justice is not respected when it disregards its own safeguards against oppressive prosecution."). *But see* Varner v. State, 72 Ga. 745, 746 (1884) ("One who is trying to steal the property of another is in the condition of a beast of prey, and it is as lawful to trap such a person as it is the beast of prey."). Professor Roiphe notes that opinions praising such zealous pursuit of potential lawbreakers were the "few exceptions" during the period. Roiphe, *supra* note 18, at 274.

[98] Roiphe, *supra* note 18, at 276, 278.

policing or infiltration of criminal networks.[99] Courts began allowing criminal defendants to argue that they had been legally "entrapped" where the "origin of the criminal intent" could be attributed to the government, even for crimes where "consent" failed to negate an element of the substantive offense.[100] By the 1920s, the formal, consent-based rationale articulated in proto-entrapment cases had yielded almost entirely to a new emphasis on the origins of the criminal intent.[101]

State and (later) federal courts developed different formulations of how, as a practical matter, this forensic inquiry into the origins of the criminal intent should proceed. Some courts seemed to stress the reasonableness, or lack thereof, of the investigatory efforts. For example, in *Woo Wai v. United States*, the first entrapment case in the federal courts, the Ninth Circuit recounted at length the exhaustive efforts of immigration officials to lure the defendant into an immigrant trafficking operation on the Mexican border.[102] For six months, the defendant resisted the scheme "which had been so assiduously and persistently urged upon him."[103] "Public policy," the court ultimately held, precluded it from sustaining "a conviction obtained in the manner which is disclosed by the evidence in this case."[104] Other courts, however, focused more on the subjective characteristics of the defendant than the nature of the government trap. These opinions emphasized that even the most intrusive law enforcement conduct might have been appropriate, provided the individual defendant

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[99] *See* Sorrells v. United States, 287 U.S. 435, 453 (1932) (Roberts, J., concurring) ("The increasing frequency of the assertion that the defendant was entrapped is doubtless due to the creation by statute of many new crimes, (e.g., sale and transportation of liquor and narcotics) and the correlative establishment of special enforcement bodies for the detection and punishment of offenders. The efforts of members of these forces to obtain arrests and convictions have too often been marked by reprehensible methods."); G.E.D., Comment, *Criminal Law—Defenses—Entrapment*, 2 S. CAL. L. REV. 283, 284 (1929) ("Since [1915] the defense has been urged in hundreds of cases which have reached the appellate courts of the states and federal government. This is without a doubt the result of increasing police legislation, such as the narcotic and liquor laws, where unlawful acts are more easily hidden, and detection thus rendered more difficult.").

[100] Roiphe, *supra* note 18, at 278.

[101] *Id.*

[102] 223 F. 412, 413–14 (9th Cir. 1915).

[103] *Id.* at 414.

[104] *Id.* at 415; *accord* Vaccaro v. Collier, 38 F.2d 862, 870 (D. Md. 1930) ("A suspected person may be tested by being offered opportunity to transgress the law in such manner as is not unusual, but may not be put under any form of extraordinary temptation or inducement."); Shouquette v. State, 219 P. 727, 733 (Okla. 1923) ("Persons with criminal inclinations . . . should not be encouraged in the commission of crime by private detectives or by officers of the law. The evils resulting from such practice outweigh the good that may be accomplished.").

was someone who might have otherwise undertaken the proscribed course of conduct.[105]

This doctrinal tension was definitively resolved in 1932, when the Supreme Court first recognized the entrapment defense in *Sorrells v. United States*.[106] In the opinion authored by Chief Justice Hughes, the Court announced that the defense was available where government officials "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."[107] The Court explained that there was a distinction, however, between traps set for "persons otherwise innocent" and those set for the "predispos[ed]."[108] Only individuals in the former category could avail themselves of the entrapment defense, and courts were entitled to undertake a "searching inquiry" on this "controlling question" of the category to which the defendant belonged.[109] The Court has reaffirmed this approach in every entrapment case in the eighty years since.[110]

A separate opinion in *Sorrells*, authored by Justice Roberts and joined by Justices Brandeis and Stone, also endorsed the defense of entrapment, but offered sharp criticism of the majority opinion's focus on the individual characteristics of the defendant. Justice Roberts argued that focusing on predisposition "results in the trial of a false issue wholly outside the true rule which should be applied by the courts."[111] Whatever the character flaws of the defendant, excessive instigation and inducement by a government officer was an affront to "the principles of justice" and contrary

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[105] *See, e.g.*, United States v. Pappagoda, 288 F. 214, 220 (D. Conn. 1923) ("There are bounds beyond which no officer, in his zeal to make an arrest or secure a conviction, should go; but when the criminal intent originates in the mind of the accused, [the officer's conduct] constitutes no defense."); State v. Lambert, 269 P. 848, 849 (Wash. 1928) ("[P]ractically all of the authorities sustaining the rule are replete with expressions to the effect that it does not rest upon any limitation of the right of an officer to obtain evidence of a crime in any manner possible, even to a participation in the criminal act, but it is only applicable in those cases where, by some scheme, device, subterfuge, or lure, the accused is induced to adopt and pursue a course of conduct, which he would not have otherwise entered upon . . . .").

[106] 287 U.S. 435 (1932). The Court had signaled that it might be willing to accept the argument "that the Government induced the crime" in a case four years earlier, but declined to do so given the facts presented. *See* Casey v. United States, 276 U.S. 413, 418–19 (1928).

[107] *Casey*, 276 U.S. at 442.

[108] *Id.* at 448, 451.

[109] *Id.* at 451.

[110] *See* Jacobson v. United States, 503 U.S. 540, 548 (1992); Mathews v. United States, 485 U.S. 58, 62–63 (1988); Hampton v. United States, 425 U.S. 484, 488–90 (1976) (plurality opinion); United States v. Russell, 411 U.S. 423, 429–30 (1973); Sherman v. United States, 356 U.S. 369, 372–73 (1958).

[111] *Sorrells*, 287 U.S. at 458 (Roberts, J., concurring).

to "public policy."[112] The courts had a duty not to "consummate [such] an abhorrent transaction": "It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law."[113] This principle, firmly rooted in the courts' traditional prerogative to preserve "the purity of [their] own temple[s]," should have been sufficient justification for the entrapment defense.[114]

B. ENTRAPMENT RECONSIDERED

Though much of the vast legal commentary on the entrapment defense criticizes the doctrine's emphasis on subjective predisposition, relatively little scholarship focuses on *why* the courts opted for this particular approach. Two authors who have declined to view the emergence of the subjective test as a mere historical accident are noteworthy exceptions.

Rebecca Roiphe's thorough historical overview of the entrapment doctrine's formation argues that, by adopting the subjective approach, the courts sought to preserve some space "for free will and autonomy" in the law.[115] The entrapment doctrine arose during a period of rapidly expanding state power, and the emphasis on individual predisposition allowed the courts "to articulate and develop [their] own version of what it means to act freely in the modern world."[116] However "clumsy and imprecise [a] tool" the concept of subjective predisposition might be, it at least "provide[d] doctrinal room to shape an evolving notion of the proper interaction between the state and the individual."[117]

This argument is not entirely convincing. First, it fails to explain why entrapment (as opposed to, say, the law of contracts or torts) became the anomalous doctrinal site where courts honored the imperiled concept of free will by preserving subjective tests. Second, it too readily dismisses the possibility that the alternative approach—the objective test of law enforcement reasonableness—might equally, if not better, allow courts to "draw, erase, and redraw the line between government and citizen."[118] If

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[112] *Id.* at 457.

[113] *Id.* at 457, 459. Justice Brandeis, who joined Justice Roberts's opinion in *Sorrells*, advanced a similar argument four years earlier in a dissenting opinion in *Casey v. United States*: "This prosecution should be stopped, not because some right of [the defendant]'s has been denied, but in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts." 276 U.S. 413, 425 (1928) (Brandeis, J., dissenting).

[114] *Sorrells*, 287 U.S. at 457 (Roberts, J., concurring).

[115] Roiphe, *supra* note 18, at 292–97.

[116] *Id.*

[117] *Id.* at 293.

[118] *Id.*

courts were indeed principally driven by anxiety over the modern state's growing capacity to "manipulate its citizens and undermine free will through sheer force of persuasion,"[119] it hardly follows that the subjective test would be the courts' inevitable choice. While it might result in a less individualized focus, a more regulatory approach aimed solely at the issue of government misconduct or overreaching (i.e., the *Sorrells* minority's objective test) might better serve the ends of promoting overall individual autonomy.

Jonathan C. Carlson has advanced an alternative theory asserting that the *Sorrells* Court's preference for the subjective approach was the straightforward product of judicial modesty. As Carlson argues:

> [I]n order to produce a defense that meshed with their view that judicial power was confined to interpreting statutes, the *Sorrells* majority neglected to build a careful, substantive analysis of entrapment. It somehow had to rationalize the creation of an entrapment defense, in a situation where the defendant had clearly violated the letter of the law, without conceding an inherent judicial power to stop a prosecution. To accomplish this, the Justices simply replaced the law's narrow mens rea inquiry—under which all encouraged defendants would be guilty—with a broad standard of culpability.[120]

This, Carlson argues, represents the "single source" from which the entrapment doctrine's weaknesses stem.[121]

While it is true that the *Sorrells* majority was wary of grounding the entrapment doctrine in the federal courts' "supervisory power" or the guarantees of substantive due process, Carlson's explanation also has its shortcomings. At the outset, Chief Justice Hughes and the others who joined the majority opinion simply did not have a particularly confined view of judicial power. Though three of the four "conservatives" on the New Deal Court joined the Chief Justice's opinion,[122] their judicial philosophies recognized a robust role for the judiciary in checking perceived overreaching by the coordinate branches, as evidenced by the Justices' invalidation of key pieces of President Roosevelt's New Deal reforms.[123] But even if this were not the case, there is a strong argument

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[119] *Id.* at 294.

[120] Carlson, *supra* note 17, at 1041.

[121] *Id.*

[122] Justices Cardozo, Van Devanter, Sutherland, and Butler joined the *Sorrells* majority. Justice McReynolds—the fourth of the New Deal era "Four Horsemen"—alone opposed the entrapment defense altogether.

[123] It is also worth noting that one day before *Sorrells v. United States* was argued, the Court announced its opinion in *Powell v. Alabama*, 287 U.S. 45 (1932), a landmark civil rights case vacating the convictions of seven young black men accused of raping two white women in Scottsboro, Alabama. Justice Sutherland wrote the Court's opinion, which the

that the Court's chosen subjective test evinced a markedly *more* expansive view of judicial power than the alternative path. As Justice Roberts's concurrence highlighted, construing an otherwise silent statute to include an unwritten proviso for entrapment of the nonpredisposed "seems . . . strained and unwarranted . . . and amounts, in fact, to judicial amendment."[124] Scholarly commentary at the time echoed this concern: "[T]he Court ought not attribute to Congress an intent to accomplish a result contrary to what seems to be the sound policy unless specific and unequivocal language leaves no room for a different interpretation. There [was] no such language [in *Sorrells*]."[125] Establishing an objective test would have been far more consistent with a traditional understanding of the judiciary's proper role.

This Article proposes an alternative explanation: that the *Sorrells* Court, like many of the lower courts before it, adopted a version of the entrapment doctrine built upon a particular view of criminality and punishment that the positivist school championed. In the intellectual context in which the entrapment doctrine arose, the subjective test was simply a natural choice. This is not to suggest that the judges and lawyers who developed the entrapment doctrine intended to further a positivist project. Indeed, as noted above, many of the positivists' positions—the denial of free will, the irrelevance of the offender's moral culpability for specific criminal acts—represented direct challenges to basic tenets of traditional criminal jurisprudence. But these early entrapment opinions appear to accept, almost as common sense, assumptions about criminality drawn directly from positivist theory. Examining these opinions in the context of previously discussed tenets of the positivist project—the overarching commitments to differentiation, pathology, and interventionism—helps to further illustrate these parallels.

1. *Differentiation*

Sorrells enshrined a modern entrapment doctrine predicated upon a fundamental differentiation between the "predisposed" (a term used by Ferri himself) and the "otherwise innocent."[126] As the Court later

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Chief Justice and Justices Cardozo and Van Devanter also joined, holding that the defendants' denial of trial counsel violated their right to due process under the Fourteenth Amendment. As the dissent sharply noted, this holding hardly reflected a confined view of the federal courts' role. *See Powell*, 287 U.S. at 76 (Butler, J., dissenting) ("[The majority's opinion] is an extension of federal authority into a field hitherto occupied exclusively by the several States.").

[124] *Powell*, 287 U.S. at 455–56 (Roberts, J., concurring).

[125] Arthur H. Kent, Note, *The Nature of the Defense of Entrapment*, 1 U. CHI. L. REV. 115, 116–17 (1933).

[126] Sorrells v. United States, 287 U.S. 435, 451 (1932); FERRI, *supra* note 28, at 98.

characterized the inquiry, *Sorrells* drew a line "between the trap for the unwary innocent and the trap for the unwary criminal."[127] This move, of course, reconfigured the basic aim of the criminal trial, replacing the traditional focus on the defendant's moral responsibility for the alleged *crime* with a new analysis of the character of the alleged *criminal*.[128] Thus, the Court announced, if a defendant claims entrapment, he is in no position to "complain of an appropriate and searching inquiry into his own [prior] conduct and predisposition as bearing upon that issue."[129] And if this prompts the introduction of otherwise inadmissible evidence, the defendant "brought it upon himself by reason of the nature of the defense."[130] As a leading scholarly defense of the subjective approach explains:

> The argument that testimony about prior criminal conduct is "prejudicial" because the jury may punish the defendant for being a bad man instead of for committing the specific act charged is based upon a misleading analogy of entrapment cases to cases in which the defendant has denied committing the criminal act . . . [In entrapment cases, t]he issue is precisely whether he was a "bad man" who was predisposed to commit the type of crime charged.[131]

Whereas the proto-entrapment cases disclaimed the relevance of the character of the accused[132]—a sentiment that, no doubt, would have been anathema to the positivists—the modern entrapment doctrine placed the issue front and center.

Sorrells arguably announced a new standard by focusing on subjective predisposition (as opposed to just the "origins of the criminal intent"), but lower court opinions during the preceding decades regularly distinguished between stings targeting "criminals" and those that had ensnared "innocents."[133] As courts in the 1910s and 1920s frequently framed the

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[127] Sherman v. United States, 356 U.S. 369, 372 (1958).

[128] As argued above, classical jurisprudence has always distinguished between those who are guilty and those who are not guilty of a criminal offense, but here we deal with differentiation of an altogether different sort: the critical factor is no longer a single volitional decision (the choice to undertake a proscribed act), but the very constitution of the accused.

[129] *Sorrells*, 287 U.S. at 451.

[130] *Id.* at 452.

[131] Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 257 (1976).

[132] *See infra* Part II.A.

[133] The question of whether the defendant was predisposed to criminality may have already been implicit in these lower court opinions, even when they were framed as inquiries into the origins of the criminal intent. As Justice Roberts's concurrence explained: "It has been generally held, where the defendant has proved an entrapment, it is permissible for the government to show in rebuttal that the officer guilty of incitement of the crime had reasonable cause to believe the defendant was a person disposed to commit the offense. This procedure is approved by the opinion of the court." 287 U.S. at 458 (Roberts, J.,

rule, "decoys may be used to entrap criminals . . . [b]ut decoys are not permissible to ensnare the innocent and law-abiding."[134] Law enforcement was entitled to entrap members of the criminal class, but never "to ensnare the law-abiding,"[135] to lure "an innocent person,"[136] or to tempt those on "the path of being a law abiding citizen."[137] And between the two categories, the Ninth Circuit explained in its landmark case *Woo Wai*, there was a "clear distinction."[138] This confident assertion was, of course, the very thesis of positivism.

2. *Pathology*

In practice, however, the line between the predisposed and the nonpredisposed was anything but clear. Many early entrapment opinions reflect the same biases and prejudices that marred the positivists'

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concurring). The extent to which the *Sorrells* Court—by highlighting the element of predisposition—broke new ground, as opposed to maintaining a part of the doctrine already in practice during its origins-of-the-criminal-intent phase during the preceding decades, is thus somewhat unclear.

[134] Newman v. United States, 299 F. 128, 131 (4th Cir. 1924); *accord* Casey v. United States, 276 U.S. 413, 423 (1928) (Brandeis, J., dissenting) ("The government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature. . . . [T]he court [is not obliged to] suffer a detective-made criminal to be punished."); United States v. Wray, 8 F.2d 429, 430 (N.D. Ga. 1925) ("It is not, therefore, properly speaking, the entrapment of a criminal that the law frowns down [on], but the seduction of its officers to commit crime."); People v. Schell, 240 Ill. App. 254, 259 (1926) ("The law is that decoys are permissible to entrap criminals, not to create them."); State v. Hester, 146 S.E. 116, 120 (S.C. 1929) (Cothran, J., concurring) ("decoys or artifices may be employed to *entrap criminals*, but not to *create them*") (emphases in original); State v. Jarvis, 143 S.E. 235, 236 (W. Va. 1928) ("It is not the decoy of a criminal which public policy condemns . . . .").

[135] Reim v. State, 280 P. 627, 628 (Okla. 1929).

[136] Ritter v. United States, 293 F. 187, 189 (9th Cir. 1923).

[137] State v. Heeron, 226 N.W. 30, 31 (Iowa 1929); *see also* O'Brien v. United States, 51 F.2d 674, 679–80 (7th Cir. 1931) ("[I]t shocks the court's sense of justice to permit a prosecution to proceed where the evidence shows the offender was innocent of wrongdoing and free of evil intent prior to his acquaintance with the government or state representative, who, in the professed cause of law enforcement, proceeds, first to corrupt the accused's mind by possibilities of profit and gain through violation of the statutes and then, surrounded by accomplices as witnesses, awaits the downfall and ignominy of the victim."); Capuano v. United States, 9 F.2d 41, 42 (1st Cir. 1925) ("It is well settled that decoys may be used to entrap criminals. . . . But decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime."); State v. Boylan, 197 N.W. 281, 281 (Minn. 1924) ("The thought at the basis of [the entrapment doctrine] is that officers of the law shall not incite crime to punish its perpetrator, shall not lead a man into crime, making him a criminal, merely to convict and punish him.").

[138] Woo Wai v. United States, 223 F. 412, 416 (9th Cir. 1915) (citing Commonwealth v. Wasson, 42 Pa. Super. Ct. 38 (1909)).

understanding of criminality as pathology. Where defendants successfully invoked the defense, the courts often set forth in significant detail reasons for empathizing with the entrapped party. In *Peterson v. United States*, for example, the Ninth Circuit overturned the conviction of an innkeeper, despite "ample evidence [that she] willfully violated the law" by selling three beers to uniformed soldiers.[139] The court quoted extensively from Mrs. Peterson's trial testimony:

> My own son is in the army; he volunteered, and the other is ready to go. I have been dealing with soldiers for the past 19 years . . . wash[ing] for soldiers in the Post Laundry. . . . I see them drilling in front of my door, and they come in by the dozens and get ice cream; my boy is in the army; when he started to drill, he was all stiff and sore; I know what it is . . . .[140]

Such stirring testimony helped convince the Ninth Circuit—writing less than three months after the armistice in Europe—that Mrs. Peterson was, in fact, the sort of law-abiding citizen who had to have been "inveigled" into criminality.[141] In *Butts v. United States*, which the Supreme Court later referred to as the "leading case" on entrapment,[142] the Eighth Circuit held that the defendant was improperly entrapped into selling $190 worth of morphine to a government agent.[143] At the outset, the court took pains to emphasize that the defendant was hardly a run-of-the-mill drug dealer: "[D]uring 14 years prior to April 6, 1920, [the defendant] had suffered 18 operations for tuberculosis of the bones, and he had been and was addicted to the use of morphine when he was in pain."[144] The origins of the criminal intent could not be located in the minds of these unfortunate targeted parties.[145]

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[139] Peterson v. United States, 255 F. 433, 433–34 (9th Cir. 1919).

[140] *Id.* at 435.

[141] *Id.*

[142] Sorrells v. United States, 287 U.S. 435, 444 (1932).

[143] 273 F. 35 (8th Cir. 1921).

[144] *Id.* at 36; *see also* State v. McKeehan, 276 P. 616, 617 (Idaho 1929) (explaining that the fact that the defendant was a "good Samaritan" is irrelevant for the question of factual innocence or guilt, but such evidence might properly inform an entrapment analysis); Reim v. State, 280 P. 627, 628 (Okla. 1929) ("The defendant testified that the witnesses came to his house and wanted to get some whisky, and told him that the wife of one of the witnesses was sick and needed it very badly . . . Other witnesses were called by the defendant, who testified to defendant's previous good character.").

[145] Wadie E. Said also picks up on this theme, arguing that "unlike the defendants in *Sorrells* and *Jacobson* [*v. United States*, 503 U.S. 540 (1992)], both of whom had served in the United States armed forces, [many of today's] terrorism defendants are of foreign origin; both their presence here and their religion are suspect. There is little that they could do to disprove their already suspect status the way a native-born veteran, farmer, or former soldier could, even before any negative statements had been admitted against them." Said, *supra*

The oft-overlooked facts of *Sorrells* itself, in which the Court upheld the availability of an entrapment defense in a late Prohibition-era alcohol prosecution, are similarly illustrative in this regard. As a purely technical matter, it seems plain that C.V. Sorrells was predisposed to violating portions of the National Prohibition Act. As the government highlighted in its brief, the defendant sold federal Prohibition agents half-gallon jars of whiskey on three separate occasions, and agents discovered barrels of wine and "fruit jars full of whisky in a thicket about 100 yards below the house" in rural western North Carolina.[146] But the Court largely disregarded such evidence in favor of other testimony.[147] Significantly, the Court noted that the defendant's initial reluctance to sell whiskey to his new (undercover) acquaintance abated only upon learning that they had both served in the "Old Hickory Division" (30th Division A.E.F.) in World War I.[148] Also apparently relevant to the issue of predisposition was the defendant's gainful employment at a nearby wood fiber plant, as established by timecards introduced to show that he had been "on his job continuously without missing a pay day since March, 1924."[149] C.V. Sorrells was not the criminal type, in the Court's estimation, but a manipulated veteran, "an industrious, law-abiding citizen [overcome by] the sentiment aroused by reminiscences of their experiences as companions in arms in the World War."[150]

But if "crime" was the exclusive province of a distinct and pathological criminal subset of the population, as the positivists insisted, then the capacity of such virtuous, law-abiding citizens to engage in nominally illegal conduct posed a theoretical challenge. A fascinatingly

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note 8, at 734.

[146] Brief for the United States at 4–5, Sorrells v. United States, 287 U.S. 435 (1932) (No. 177), 1932 WL 33674, at *4–5.

[147] The Supreme Court's opinion, in fact, makes no mention of the alcohol caches near the defendant's home, or of the subsequent sales of whiskey (beyond the initial encounter, for which the defendant was charged). While the Fourth Circuit took note of this evidence in denying the availability of an entrapment defense, the Supreme Court held that "[t]here was no evidence that the defendant had ever possessed or sold any intoxicating liquor prior to the transaction in question." *Compare* Sorrells v. United States, 57 F.2d 973, 980 (4th Cir. 1932), *with* Sorrells v. United States, 287 U.S. 435, 441 (1932).

[148] *Sorrells*, 287 U.S. at 439.

[149] *Id.* at 440.

[150] *Id.* at 441. Developments on the political front also may have helped the Court conclude that C.V. Sorrells was not a genuine criminal to whom the defense of entrapment was unavailable. On the very day *Sorrells* was argued before the Supreme Court, Franklin D. Roosevelt won a landslide victory for his first term as President. During his campaign, Roosevelt promised a repeal of Prohibition, and the Twenty-First Amendment was introduced in Congress less than four months later. The entire voluminous legal commentary on *Sorrells* has failed to note this intriguing historical coincidence.

ambivalent passage from the *Harvard Law Review*'s generally favorable review of Garofalo's *Criminology* speaks directly to this dilemma:

> It is impossible [Garofalo argues] for Mr. Hyde to be also Dr. Jekyl . . . . We may not acquiesce in all his contentions, we may even wonder how many of us, if subjected to powerful temptation, would escape the brand of Mr. Hyde. Yet we cannot but feel that his division into natural and legal criminals has a sound basis.[151]

Modern law enforcement's demonstrated capacity to lead even the virtuous down the path of lawbreaking complicated the positivists' clean bifurcation between the criminal and the noncriminal types.

The *Sorrells* Court's strained "statutory interpretation" rationale for the entrapment defense—which so vexed the concurring Justices and has puzzled legal scholars ever since[152]—neatly resolves this problem. Cases involving entrapment, the majority explained, *do not* present a situation in which "the accused though guilty may go free."[153] Rather, when law enforcement lures the nonpredisposed into misconduct, such government misconduct takes "the case out of the purview of the [relevant] statute" altogether, since Congress would never have "intended that the letter of its enactment should be used to support such a gross perversion of its purpose."[154] The nonpredisposed—though engaging in precisely the conduct proscribed by statute, and doing so with a culpable mental state—are nevertheless not guilty of criminal wrongdoing in the first instance.[155] The opposing explanation favored by the concurring Justices would have recognized that the entrapped plainly have committed some crime, but

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[151] H.B.E., *supra* note 41, at 221.

[152] *See, e.g.*, *Sorrells*, 287 U.S. at 455–56 (Roberts, J., concurring) ("A new method of rationalizing the defense is now asserted. This is to construe the act creating the offense by reading in a condition or proviso that if the offender shall have been entrapped into crime the law shall not apply to him. So, it is said, the true intent of the legislature will be effectuated. This seems a strained and unwarranted construction of the statute; and amounts, in fact, to judicial amendment. It is not merely broad construction, but addition of an element not contained in the legislation."); Kenneth M. Lord, *Entrapment and Due Process: Moving Toward a Dual System of Defenses*, 25 FLA. ST. U. L. REV. 463, 490 (1998) ("[T]he subjective analysis is not philosophically well-founded. A widely discussed concern is that its legal foundation—congressional intent—is extraordinarily tenuous considering that the defendant has, in fact, engaged in legislatively proscribed conduct."); Paul Marcus, *Toward an Expanded View of the Due Process Claim in Entrapment Cases*, 6 GA. ST. U. L. REV. 73 (1989) (noting consistent scholarly criticism of "statutory construction" rationale); Kent, *supra* note 125, at 116–17 ("[T]he Court ought not to attribute to Congress an intent to accomplish a result contrary to what seems to be the sound policy unless specific and unequivocal language leaves no room for a different interpretation. There is no such language here.").

[153] *Sorrells*, 287 U.S. at 452.

[154] *Id.*

[155] *Id.*

nevertheless are entitled to go free to preserve the court's "purity." The majority's statutory interpretation theory, for all of its shortcomings, thus provided a solution for those invested in policing the positivists' clean line separating the noncriminal and criminal types: the former category simply never broke the law.[156]

3. *Interventionism*

Finally, the development of the modern entrapment defense rationalized and legitimized a historically unprecedented degree of interventionism—subject to basic protections for the "otherwise innocent"—as a routine part of twentieth-century law enforcement. Whereas the proto-entrapment cases of the late nineteenth century often included strong denunciations of covert police activity, the early twentieth-century opinions regularly affirmed that "the first duties of the officers of the law [were] to prevent . . . crime."[157] Law enforcement officers were sometimes overzealous, courts acknowledged, but detectives also had "to

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[156] It could be argued that this explanation conflates two independent variables: (1) the various tests for entrapment (i.e., subjective vs. objective), and (2) the legal rationale for recognizing the doctrine (i.e., statutory interpretation vs. supervisory power). Indeed, one could imagine an entrapment defense focusing on the objective reasonableness of law enforcement's conduct that is still somehow rationalized on statutory interpretation grounds, or an entrapment defense focusing on the subjective predisposition of the accused that is nevertheless rationalized as part of the federal courts' supervisory power. But tellingly, only those Justices who have favored retaining the subjective test for entrapment—the approach this Article has argued largely tracks positivist ideas on criminality—have embraced the statutory interpretation justification. In contrast, those Justices who have argued for an objective test uniformly have argued that we dispense with the fiction that entrapped parties have not actually engaged in criminal conduct. *See* Hampton v. United States, 425 U.S. 484 (1976) (Brennan, J., dissenting) (rejecting both subjective test and statutory interpretation rationale); United States v. Russell, 411 U.S. 423 (1973) (Stewart, J., dissenting) (same); Sherman v. United States, 356 U.S. 369, 379 (1958) (Frankfurter, J., concurring) (same).

Previous scholarly accounts have failed to explain adequately why proponents of the subjective test have consistently embraced the statutory construction rationale, while proponents of the objective test have favored a justification based on the federal court's supervisory power or the guarantees of due process. The argument here is that an entrapment doctrine that posits a fundamental divide between the criminally predisposed and nonpredisposed must reconcile how members of the latter category could engage in apparently illegal activity; the statutory interpretation rationale handily accomplishes this feat.

[157] *See, e.g.*, Butts v. United States, 273 F. 35, 38 (8th Cir. 1921); Rothman v. United States, 270 F. 31, 34–35 (2d Cir. 1920) (approving jury instruction that sting operation was "not only legal, but commendable" so long as "officers of the government believe[d] these defendants were violating the law"); State v. Richie, 180 S.W. 2, 3 (Mo. Ct. App. 1915) ("That the purchaser is an officer is immaterial in law and commendable in morals, where done to detect and suppress crime."); State v. McCornish, 201 P. 637, 639 (Utah 1921) ("It is their duty to prevent crime, not to instigate and encourage its commission.").

match their wits against the wits of the man who is deliberately, persistently, or frequently violating the law."[158] Indeed, the lower courts' chief rationale for recognizing an entrapment defense was that, as a matter of "public policy," police officers should not be sidetracked from their (legitimate) efforts to proactively identify actual would-be criminals by setting traps for unwary innocents.[159]

Given this view, legal commentators' standard account of the origins of the entrapment defense—that it emerged as a bulwark against invasive and questionable police practices—tells only part of the story. Though the United States was the first (and for many years, the only) country to recognize the entrapment defense, American law enforcement also engaged in far more extensive and invasive forms of undercover policing throughout the twentieth century than most other democratic countries.[160] The entrapment doctrine also placed the courts' imprimatur on covert or deceitful police practices, at least in many instances, just as such tactics were beginning to occupy a central role in American law enforcement.[161]

The *Sorrells* opinion contains striking language endorsing such preventative law enforcement measures in furtherance of the cause of social defense. "It is well settled," the Court explained, "that . . . [a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises." Indeed, in the context of modern law enforcement, such deceptions were "frequently *essential* to the enforcement of the law."[162] Even Justice Roberts's concurrence spoke directly about the imperative of countering society's criminal elements and the grave danger that the criminal type

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[158] Ritter v. United States, 293 F. 187, 189 (9th Cir. 1923).

[159] *Id.* at 189 ("[T]he government is not engaged in the business of manufacturing criminals . . . [I]t has enough to do to prevent the commission of crime."); *see* O'Brien v. United States, 51 F.2d 674, 677 (7th Cir. 1931) ("Because, in this land of ours, Gentlemen, public policy forbids that . . . those whose duty it is to detect criminals, should create them."); Shouquette v. State, 219 P. 727, 733 (Okla. 1923) ("So frequently it has been demonstrated, and the facts in this case again demonstrate, that the practice of employing one thief to catch another, by participating with him in the commission of the offense, is of doubtful propriety. It is a bad investment, financially.").

[160] *See* Cyrille Fijnaut & Gary T. Marx, *Introduction: The Normalization of Undercover Policing in the West: Historical and Contemporary Perspectives*, *in* UNDERCOVER: POLICE SURVEILLANCE IN COMPARATIVE PERSPECTIVE 15–16 (Cyrille Fijnaut & Gary T. Marx eds., 1995).

[161] *See generally* KENNETH M. MURCHISON, FEDERAL CRIMINAL LAW DOCTRINES: THE FORGOTTEN INFLUENCE OF NATIONAL PROHIBITION 23–46 (1994) (arguing that increased role of undercover police in enforcing Prohibition animated growth of entrapment doctrine); Roiphe, *supra* note 18, at 260–70 (discussing history of American law enforcement in late-nineteenth- and early-twentieth-century America).

[162] Sorrells v. United States, 287 U.S. 435, 441–42 (1932).

posed to organized society. As Justice Roberts conceded, "Society is at war with the criminal classes, and courts have uniformly held that in waging this warfare the forces of prevention and detection may use traps, decoys, and deception to obtain evidence of the commission of crime."[163] The passage's blunt acknowledgement of society's preventative "war" against criminality—one of the first (and only) times the phrase "criminal class" has appeared in the *U.S. Reports*[164]—betrays the unmistakable influence of positivist thought.[165]

III. CONCLUSION

In October 2010, four Muslim men were convicted in federal court in the Southern District of New York on a host of terrorism-related charges,

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[163] *Id.* at 452–53 (Roberts, J., concurring).

[164] The phrase "criminal classes" appears in one earlier Supreme Court case, from 1887, but there the Court was referring to criminal defendants as a whole, not a subset of the general population to be targeted by law enforcement. *See* Hayes v. Missouri, 120 U.S. 68, 71 (1887). The phrase has been cited repeatedly, usually with hints of sarcasm, in most of the Court's subsequent entrapment cases. *See* Hampton v. United States, 425 U.S. 484, 494 (1976) (Powell, J., concurring) ("Government participation ordinarily will be fully justified in society's 'war against the criminal classes[,]' [but] I . . . am unwilling to . . . conclud[e] that, no matter what the circumstances, neither due process principles nor our supervisory power could support a bar to conviction in any case where the Government is able to prove predisposition."); United States v. Russell, 411 U.S. 423, 444 n.2 (1973) (Stewart, J., dissenting) (criticizing "sinister sophism that the end, when dealing with known criminals or the 'criminal classes,' justifies the employment of illegal means"); Sherman v. United States, 356 U.S. 369, 383 (1958) (Frankfurter, J., concurring) (criticizing the subjective test as "run[ning] afoul of fundamental principles of equality under law, and [ ] espous[ing] the notion that when dealing with the criminal classes anything goes").

[165] *Accord* FERRI, *supra* note 28, at xxxix ("[Positivists view] penal justice as an instrument of social defense against criminals."); *id.* at 285 ("The function by which society is preserved from crime should undergo a complete change of orientation. It should cease to be a belated and violent resistance to effects and should diagnose and eliminate the natural causes. This function must be advanced as a preventive defense of society against natural and statutory crime."); GAROFALO, *supra* note 46, at xxix ("The time has come to proclaim warfare on crime in the name of civilization as the watchword of penal science."); *id.* at 329 ("[The current shape of criminal law] lend[s] countenance to the enemies of society and embolden[s] them in their merciless warfare."); LOMBROSO, *supra* note 37, at 335 ("Advances in criminal anthropology have now made possible the preventive isolation of criminals—the most important measure of social defense."); *id.* at 236 ("[T]he conclusions of the new positivist school leap out straight away; the principles of penal law can never be the same, nor can the procedures of the courts or the aims of the penitentiary system. . . . [T]he new system will function according to logic rather than emotion. It will be harsh but not cruel, because the guilty individual will no longer be disdained. He will be arrested and interned, but without anger. The right of social defense will replace revenge . . . .") (internal quotations omitted).

including conspiring and attempting to use weapons of mass destruction.[166] Following the lead of Shaheed Hussain, a Federal Bureau of Investigation (FBI) informant paid $100,000 to pose as a Pakistani militant, the "Newburgh Four" planted what they believed were explosives outside two Bronx synagogues and plotted to use surface-to-air missiles against military transport planes at a base sixty miles north of New York City.[167] The U.S. Attorney, emphasizing the demonstrated willingness of the conspirators to follow through with the deadly attacks, lauded the verdict: "We are safer today because of these convictions."[168]

Yet to many, the conviction of the Newburgh Four was a grave injustice.[169] James Cromitie, Hussain's main recruit, initially seemed wary of participating in the FBI's scheme.[170] For ten months, Cromitie dodged Hussain, pretending to leave town for long periods, screening Hussain's phone calls, and avoiding the mosque where the pair first met.[171] Only after losing his job at Wal-Mart did Cromitie succumb to the promised bait: nearly $250,000 in cash, a BMW, and a two-week vacation in Puerto Rico.[172] At Hussain's urging, Cromitie then recruited three lookouts for the operation, including a schizophrenic Haitian immigrant and another acquaintance with whom Cromitie occasionally "smoke[d] lots of weed and played video games."[173] The group proved to be hapless terrorists, patently unable to plan or carry out the informant's suggested attacks without considerable assistance.[174] As Judge Colleen McMahon announced at the

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[166] Kareem Fahim, *4 Convicted of Attempting to Blow Up 2 Synagogues*, N.Y. TIMES, Oct. 19, 2010, at A21.

[167] *Id.*

[168] Press Release, Fed. Bureau of Investigation, Four Men Found Guilty of Plotting to Bomb New York Synagogue and Jewish Community Center and to Shoot Military Planes with Stinger Missiles (Oct. 18, 2010), *available at* http://www.fbi.gov/newyork/press-releases/2010/nyfo101810.htm.

[169] *See, e.g.*, Richard Bernstein, *A Defense That Could Be Obsolete*, N.Y. TIMES (Dec. 1, 2010), http://www.nytimes.com/2010/12/02/us/02iht-letter.html?_r=0 (noting scholarly and popular criticism of Newburgh Four prosecution); Paul Harris, *Newburgh Four: Poor, Black, and Jailed Under FBI 'Entrapment' Tactics*, THE GUARDIAN (Dec. 12, 2011), http://www.guardian.co.uk/world/2011/dec/12/newburgh-four-fbi-entrapment-terror.

[170] Harris, *supra* note 169; Graham Rayman, *Were the Newburgh 4 Really Out to Blow Up Synagogues? A Defendant Finally Speaks Out*, VILLAGE VOICE (Mar. 2, 2011), http://www.villagevoice.com/2011-03-02/news/were-the-newburgh-4-really-out-to-blow-up-synagogues/.

[171] Rayman, *supra* note 170.

[172] *Id.*

[173] *Id.*

[174] Cromitie, for instance, immediately sold a camera that Hussain had provided the group to use to reconnoiter potential targets. *Id.* Laguerre Payen, one of the lookouts,

first three defendants' sentencing hearing:

> Only the government could have made a terrorist out of Mr. Cromitie, a man whose buffoonery was positively Shakespearean in its scope . . . . I believe beyond a shadow of a doubt that there would have been no crime here except the government instigated it, planned it and brought it to fruition.[175]

Nevertheless, each of the Newburgh Four received twenty-five year sentences in federal prison.[176]

Like criminal defendants in dozens of other terrorism-related cases in the past decade, the Newburgh Four (unsuccessfully) asserted a defense of entrapment. Throughout their interaction with Shaheed Hussain, the defendants repeatedly made anti-Semitic and anti-government statements, and in his first meeting with Hussain, Cromitie had stated that he wanted to "do something" to America.[177] This was sufficient for the jury to find that the defendants were already predisposed to engage in terrorism. The fact that the defendants apparently lacked any means to find, acquire, or operate a Stinger missile and the extraordinary lengths to which the FBI went in luring its targets were irrelevant to the inquiry. Disregarding such aspects of the case, of course, was consistent with the approach to entrapment the federal courts have used for the past eighty years.

Positivist ideas seem to haunt not only the entrapment doctrine, but also the assumptions of law enforcement and some legal academics in responding to the threat of terrorism. Until recently, for example, FBI training materials instructed agents "that Arabs had 'Jekyll and Hyde' personalities," and that they were thus more prone to "outburst[s] and loss of control" than ordinary, even-keeled Westerners.[178] Or as Dru Stevenson

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explained to the group that he would be unable to travel to Florida because he did not have a passport, believing it to be a foreign country. *Id.* Another lookout, David Williams IV, apparently "decided to walk away" in the midst of planting the bombs because "[h]e wanted to visit his son in Coney Island . . . and he got a little lost looking for the [subway] station." *Id.*

[175] Harris, *supra* note 169. Judge McMahon made similar statements at the sentencing of the fourth defendant:

> The essence of what occurred here was that a government, understandably zealous to protect its citizens, created acts of terrorism out of the fantasies and the bravado and the bigotry of one man in particular and four men generally, and then made these fantasies come true.

Bruce Golding, *Judge 'Not Proud of My Government' for Anti-Terror Sting Operation*, N.Y. POST (Sept. 7, 2011 4:26 PM), http://www.nypost.com/p/news/local/last_of_in_synagogue_bomb_plot_gets_6C9fQbX4HUleKiBcaY57oJ; Harris, *supra* note 169.

[176] Benjamin Weiser, *3 Men Draw 25-Year Terms in Synagogue Bomb Plot*, N.Y. TIMES, June 30, 2011, at A22; Golding, *supra* note 175; Harris, *supra* note 169.

[177] Fahim, *supra* note 166.

[178] Michael S. Schmidt & Charlie Savage, *Language Deemed Offensive Is Removed from F.B.I. Training Materials*, N.Y. TIMES, Mar. 29, 2012, at A20; *see also* Spencer Ackerman,

argued in proposing that the entrapment defense should be even *harder* to invoke for terrorism defendants:

> [O]nly people with a certain psychological makeup, or certain entrenched attitudes, could be potential recruits for a terror cell . . . . With this particular crime, we should assume that a normal person would be immune to inducements, that we can infer predisposition merely by the fact that the person agreed to engage in such a horrible act, and that other evidence of predisposition is unnecessary. They must be predisposed to be predisposed, as it were.[179]

Given how unsuccessful the entrapment defense has proven in terrorism cases, it may be that juries have already undertaken such reforms on their own.

Ironically, though, despite the influence of positivist criminology on the formation of the entrapment doctrine, there is good reason to think that the positivists themselves would object to how the doctrine has developed in American courts. For all their idiosyncrasies and excesses, the positivists understood themselves as progressive reformers: central to the positivist project was the promise that individualized determinations of criminals' dangerousness—purportedly supported by hard, scientific data—could efficiently and even humanely make society safer. Penal judgments that failed to serve the ends of social defense simply could not be justified.[180] Yet it is precisely this reasoned appraisal of the actual threat posed by the accused, critical to the goal of social defense, that today's focus on subjective predisposition has obscured.

The positivists' approach to punishment for an attempted offense helps illustrate this point. From a classical perspective, one could argue that the author of an attempted but failed homicide was as morally blameworthy as the author of an actually consummated homicide; in the alternative, because the intended harm never came to pass, one could also defensibly maintain that the defendant was less at fault.[181] The positivists concluded that there *was* a good reason to treat attempted and completed crimes differently, but they argued that the classical school was "lost in [a] most dangerous tangle."[182] For Ferri, the fact of attempt was relevant only insofar as "the failure of consummation, depending as it does upon the less energetic or less perverse action of the evildoer, can form an indication of a less degree

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FBI Purges Hundreds of Terrorism Documents in Islamophobia Probe, WIRED (Feb. 15, 2012, 6:30 AM), http://www.wired.com/dangerroom/2012/02/hundreds-fbi-documentsmuslims/.

[179] Stevenson, *supra* note 7, at 188.

[180] FERRI, *supra* note 28, at 326.

[181] *See id.* at 430–31 (discussing debates within "classical school" regarding legal responsibility for attempted crimes).

[182] *Id.* at 430.

of temibility [i.e., dangerous character of the delinquent] or offensive power."[183] In other words, the details of the thwarted criminal act could shed light on the type of criminal delinquent appearing before the court (which, in turn, ought to dictate the appropriate penal sanction).

While the federal courts' entrapment analysis traditionally shuns such nuance—defendants are either predisposed or they are not—an alternative version of the entrapment doctrine advanced by Judge Richard Posner and adopted by the Seventh Circuit takes account of individual dangerousness. In *United States v. Hollingsworth*,[184] Judge Posner interpreted a 1992 Supreme Court entrapment case, *Jacobson v. United States*, as having "clarified" the meaning of "predisposition" to mean something more than mere mental willingness.[185] Predisposition, the Seventh Circuit held, "has positional as well as dispositional force."[186] Under this test, the government must demonstrate not only that the defendant was subjectively preinclined to swallow the government's bait, but also that the accused was:

> [S]o situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so; only then does a sting or other arranged crime take a dangerous person out of circulation.[187]

Needless to say, the Seventh Circuit's approach could yield significantly different results in many of the FBI's post-9/11 terrorism prosecutions. For example, it is difficult to imagine that any of the Newburgh Four were "positionally predisposed" to shoot down military planes with a Stinger missile.

The Seventh Circuit's new approach has not been adopted elsewhere,[188] and five dissenting judges protested that the opinion "departed radically . . . from the governing precedent of the Supreme Court of the United States."[189] Several scholars have echoed this sentiment, criticizing Judge Posner's inventive opinion as simply unsupported by precedent.[190]

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[183] *Id.* at 431.

[184] 27 F.3d 1196 (7th Cir. 1994).

[185] *Id.* at 1198 (arguing that *Jacobson* signaled significant change to traditional predisposition analysis).

[186] *Id.*

[187] *Id.*

[188] Said, *supra* note 8, at 698.

[189] *Hollingsworth*, 27 F.3d at 1213 (Ripple, J., dissenting).

[190] *See, e.g.*, James F. Ponsoldt & Stephen Marsh, *Entrapment When the Spoken Word Is the Crime*, 68 FORDHAM L. REV. 1199, 1220 (2000) ("Judge Posner's contention that *Jacobson* cannot be explained without resorting to this expanded definition of predisposition is flawed . . . . [N]othing in the *Jacobson* opinion suggests that the Court believed the defendant to be someone 'willing' to purchase child pornography without the urging of the

Others have praised the opinion as "bring[ing] . . . greater rationality to the entrapment doctrine," though conceding that "[i]t seems difficult to read [Supreme Court precedent] as permitting the rule Posner adopted."[191] But both sides of the debate have overlooked an important point: for all of its interpretative liberties, Judge Posner's opinion was actually exceedingly faithful to the doctrine's positivist roots. By emphasizing the actual threat (or lack thereof) posed by the ensnared defendant—and insisting that courts tailor the entrapment defense to "take . . . dangerous person[s] out of circulation"—the Seventh Circuit's "innovation" simply drew upon the same theoretical perspectives that originally shaped the entrapment doctrine a century prior.

To the extent that a meaningful line *does* exist between the "unwary innocent" and the "unwary criminal," the addition of this positional element to the federal courts' entrapment test gives the doctrine a degree of consistency and coherence it otherwise lacks. So long as the entrapment defense remains based, at least in part, on subjective inquiries into defendants' criminal predisposition, this fuller embrace of positivist theory is a welcome development.

Government.").

[191] Richard H. McAdams, *Reforming Entrapment Doctrine in* United States v. Hollingsworth, 74 U. CHI. L. REV. 1795, 1803 (2007). *But see* Paul Marcus, *The Entrapment Defense: An Interview with Paul Marcus*, 30 OHIO N.U. L. REV. 211, 220–21 (2004) ("Judge Posner wrote the opinion there. And I published an article soon afterward praising him because I thought he got the doctrine exactly right. We were both harshly criticized by some who said that is not what the Supreme Court said and that is not what it meant [in *Jacobson v. United States*]. But I think it is what the Court meant.").