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The Challenge of Prosecuting Organized Crime in the United States: Procedural Issues

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THE CHALLENGE OF PROSECUTING ORGANIZED CRIME IN THE UNITED STATES: PROCEDURAL ISSUES

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I. INTRODUCTION

In the United States, the prosecution of organized crime raises serious procedural questions. Three matters, in particular, are worthy of consideration here. The first involves the application of constitutional principles regarding the search and seizure provision. The second is the newly refined and powerful prosecution tool of forfeiture of property. The third looks to the ability of the government to initiate long-term investigations and the later evaluation of the accused's defense of entrapment.

This Article will explore these matters, looking to the constitutional, policy, and practical implications of a broadening

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government attack on organized crime. I begin with an analysis of the search and seizure provision.

II. APPLICATION OF THE FOURTH AMENDMENT

The Fourth Amendment of the United States Constitution reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[1]

This Amendment applies to both federal and state actions.[2] However, the Fourth Amendment considers only the conduct of government agents such as police officers and private citizens acting on a request from the government. It does not apply to purely private acts:

> The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.[3]

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1. U.S. CONST. amend. IV.
2. *See* Mapp v. Ohio, 367 U.S. 643 (1961).
3. Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

As protection from unreasonable searches and seizures is a constitutional right, the government may face serious sanctions if its conduct violates the Fourth Amendment. Evidence obtained in violation of this Amendment is subject to the exclusionary rule in both federal[4] and state courts.[5] This rule provides that the government may not use evidence obtained illegally at trial. The principle, as established, is not found in the text of the Constitution. As noted in *Wolf v. Colorado*,[6] the doctrine of exclusion "was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication."[7] It was for this reason that the United States Supreme Court initially limited the application of the exclusionary rule. However, in *Mapp v. Ohio*, the court held that the rule applied to the states as well as the federal government.[8]

The Court established that this principle of exclusion is necessary to deter police from improper behavior: "The rule . . . operates as 'a judicially created remedy designed to safeguard

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4. *See* Weeks v. United States, 232 U.S. 383 (1914).

> If letters and private documents can [unreasonably] be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.

Id. at 393.

5. *See Mapp*, 367 U.S. at 655.

> We hold that all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court. Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government.

Id.

6. 338 U.S. 25 (1949).

7. *Id.* at 28.

8. *See Mapp*, 367 U.S. at 655-56.

Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'"[9] In keeping with this purpose of the exclusionary rule, unless the state constitution provides otherwise,[10] there are recognized exceptions to the doctrine. While it cannot be used in the state's case in chief, the government evidence may offer the limited purpose of impeaching the defendant's in-court testimony.[11] Also, the Supreme Court has held that the deterrent function of the rule is ineffective in situations in which the police acted in good faith in executing a warrant which later turns out to be defective.[12] In some situations, then, such resulting evidence is admissible. There are several situations, however, where the police are *not* granted the benefit of this good faith exception to exclusion.

> We do not suggest, however, that exclusion is always inappropriate in cases where an officer has obtained a warrant and abided by its terms. . . . [T]he officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.
>
> Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. The exception [for good faith reliance on a defective warrant] will also not apply in cases where the issuing magistrate wholly abandoned his judicial role . . .

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9. United States v. Leon, 468 U.S. 897, 906 (1984) (citing United States v. Calandra, 414 U.S. 338, 348 (1974)). *See generally* William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARVARD J.L. & PUB. POL'Y 443 (1997).

10. Some states do require exclusion as a matter of state constitutional law. *See, e.g.*, Vermont v. Oakes, 598 A.2d 119 (Vt. 1991).

11. *See* Walder v. United States, 347 U.S. 62 (1954).

12. *See Leon*, 468 U.S. at 905-09.

> [because] in such circumstances, no reasonably well-trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.[13]

The evidence gathered directly from the illegal search or seizure must be suppressed. However, the use of other evidence acquired either directly or indirectly from the illegally-obtained materials may also be restricted.[14] This principle is referred to as the "tainted

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13. *Id.* at 922-23 (citations omitted).

14. *See* Nardone v. United States, 308 U.S. 338, 340 (1939) ("To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.'"); *see also* Wong Sun v. United States, 371 U.S. 471 (1963).

> In order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person, this Court held nearly half a century ago that evidence seized during an unlawful search could not constitute proof against the victim of the search. The exclusionary prohibition extends as well to the indirect as the direct products of such invasions. Mr. Justice Holmes, speaking for the Court in [the *Silverthorne*] case, in holding that the Government might not make use of information obtained during an unlawful search to subpoena from the victims the very documents illegally viewed, expressed succinctly the policy of the broad exclusionary rule:
>
> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

Id. at 484-85 (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385,

fruit of the poisonous tree" doctrine. So, in a situation where the illegal search of a home leads the police to find a gun in the home and a knife hidden in a car, both items would be excluded. The evidence of the knife would be admissible, the "taint" would be attenuated, if the government can demonstrate that the police would have discovered the knife regardless of the illegal action,[15] the police obtained this evidence from an independent source not connected to the illegal search or seizure,[16] or there is too weak or too distant a connection between the illegal police search or seizure and the challenged evidence.[17] Moreover, a defendant's intervening act of his own free will can also break the chain between the evidence and the illegal search or seizure allowing the admission of the evidence.[18]

The key to applying the Fourth Amendment doctrine is the definition of the appropriate terms, for if the police have not, in the constitutional sense, "searched or seized" the individual, a defendant cannot successfully assert a Fourth Amendment claim. Early case law narrowly applied the exclusionary rule, refusing to label a government action as a search or seizure unless the government physically trespassed on the defendant's property, or specifically searched the defendant's house, person, papers, or effects, as enumerated in the text of the Fourth Amendment.

Thirty years ago, the Supreme Court took a drastically different approach to defining search and seizure. In *Katz v. United States*,[19] the government used electronic surveillance without a warrant to monitor a call made by the defendant from a public phone booth.[20] In its decision, the Court turned from the traditional property analysis to a new privacy consideration, determining that the

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392 (1920)).

15. This is referred to as "inevitable discovery." *See* Nix v. Williams, 467 U.S. 431, 441-42 (1984).

16. *See* United States v. Crews, 445 U.S. 463, 475-77 (1980).

17. *See* New York v. Harris, 495 U.S. 14, 17 (1990).

18. *See Wong Sun*, 371 U.S. at 484-86.

19. 389 U.S. 347 (1967).

20. *See id.* at 348.

Fourth Amendment protects people rather than places.[21] However, this privacy approach required some action by the defendant: in order to invoke the privacy rights associated with the Fourth Amendment, the defendant must take steps to shield her privacy. What one freely offers to the public, even in one's own home, will not be protected by the Fourth Amendment, for no privacy concern would have been expressed by the accused.[22]

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[23]

The Supreme Court has defined some of the privacy situations which are particularly significant in combating organized crime. Defendants do not have a recognizable interest generally as to the government's use of an officer's normal senses and commonly-used or generally-available enhancements, such as flashlights. For instance, the Court has categorized helicopters as commonly-available technology, despite its mechanical sophistication, thus stating that defendants normally have no privacy interest from overhead observation.[24] Drug-sniffing dogs have also been approved under the Fourth Amendment because of the limited intrusion and because a defendant has no privacy expectations in contraband being transported in a public place.[25]

Electronic surveillance is of special importance in this area. The Supreme Court decisions construing the Fourth Amendment have evolved markedly since the 1928 case of *Olmstead v. United States*.[26]

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21. *See id.* at 351.
22. *See id.*
23. *Id.*
24. *See* Florida v. Riley, 488 U.S. 445 (1989).
25. *See* United States v. Place, 462 U.S. 646, 707 (1983).
26. 277 U.S. 438 (1928).

There, in the first wiretap case to reach the Supreme Court, the majority concluded that police wiretaps did not constitute a search and seizure.[27] This decision emphasized that there was no physical trespass onto the defendant's property and that conversations are intangible and cannot be seized. Congress reacted to the issue of wiretapping in the Federal Communications Act of 1934. Section 605 of that Act read: "[N]o person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person."[28] In line with Congress' intent in enacting the Federal Communications Act, the decision in *Katz* expressly rejected *Olmstead* and its progeny, holding that any form of electronic surveillance, be it wiretapping or electronic surveillance, that violates a reasonable expectation of privacy constitutes a search and/or seizure and is subject to the limitations of the Fourth Amendment.[29]

> [A]lthough a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. . . .
> We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment.[30]

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27. *See id.* at 441.
28. 47 U.S.C. § 605 (1939).
29. *See* Katz v. United States, 389 U.S. 347, 353 (1967).
30. *Id.*

The Supreme Court has defined the constitutional requirements in cases of electronic surveillance. *Berger v. New York*[31] established the minimum standards for a valid warrant authorizing electronic surveillance: (1) the warrant must describe with particularity the conversations to be overheard; (2) a showing of probable cause to believe that a specific crime has been or is being committed must be made; (3) the wiretapping must be for a limited period of time; (4) the suspects whose conversations are to be overheard must be named; (5) a return must be made to the court, showing what conversations were intercepted; (6) and the wiretapping must terminate when the desired information has been obtained.[32] In addition, a neutral, disinterested magistrate must determine whether a warrant should be issued for electronic surveillance.[33]

Congress has since enacted more stringent requirements for the use of electronic surveillance without the consent of a party. Title III of the Omnibus Crime Control and Safe Streets Act of 1968[34] authorizes the United States Attorney General, or certain other officials, to allow an investigating agency to submit an application to a judge for an order permitting interception of wire or oral communications. The application may only be authorized where such interception may provide evidence of certain enumerated federal crimes, including murder, robbery, extortion, bribery and drug dealing. Upon receiving an application, the judge may grant an interception order only if there is compliance with 18 U.S.C. § 2518 in that:

> a. there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in § 2516 of this chapter;

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31. 388 U.S. 41 (1967).

32. *See id.* at 55-60.

33. *See* United States v. United States District Court, 407 U.S. 297, 317 (1972).

34. 18 U.S.C. §§ 2510-2520 (1994). *See generally* United States v. Denman, 100 F.3d 399 (5th Cir. 1996); United States v. Spy Factory, Inc., 951 F. Supp. 450 (S.D.N.Y. 1997).

b. there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;
c. normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or be too dangerous;
d. . . . there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electric communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.[35]

An order granted under this title must give:

a. the identity of the person, if known, whose communications are to be intercepted;
b. the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;
c. a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;
d. the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and
e. the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.[36]

One important law enforcement tactic in fighting organized crime in which the Fourth Amendment generally does *not* apply is

35. 18 U.S.C. § 2518(3).
36. *Id.* § 2518(4).

with information freely given to undercover government agents. Indeed, the Court has narrowly limited the constitutional reach here, even in situations in which the agent electronically records the defendant's conversation. The key is that the accused voluntarily spoke to the agent. The Court in *United State v. White*[37] held that one may not have a justifiable expectation that his trusted associates neither are nor will become police agents, and that a different result is not needed when the agent has recorded or transmitted the conversations between the parties.[38] Essentially, the defendant assumes the risk that the person with whom he is conversing is an informant for the government.

> Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his. In terms of what his course will be, what he will or will not do or say, we are unpersuaded that he would distinguish between probable informers on the one hand and probable informers with transmitters on the other. . . .
>
> Nor should we be too ready to erect constitutional barriers to relevant and probative evidence which is also accurate and reliable. An electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent. It may also be that with the recording in existence it is less likely that the informant will change his mind, less chance that threat or injury will suppress unfavorable evidence and less chance that cross-examination will confound the testimony.[39]

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37. 401 U.S. 745 (1971).
38. *See id.* at 752.
39. *Id.* at 752-53.

Some have asserted that "[a] coherent interpretation of the Fourth Amendment would treat government informants the same way the Court treats governmental wiretapping."[40] While these critics would mandate the usual "constitutional requirements of probable cause, [and a warrant],"[41] the courts have not been convinced.[42] Indeed, the principal constitutional restriction involving undercover agents is not the Fourth Amendment, rather it is the Sixth Amendment. The Supreme Court has carefully applied the right to counsel to situations in which the undercover agent questions the formally charged defendant.[43] The exclusion of the defendant's comments would apply even if the defendant is not in police custody.[44]

III. FORFEITURE[45]

One effective tool against organized crime has been the forfeiture procedure. Property used in the commission of a crime may be subject to state or federal seizure, without compensation, even when the property was obtained lawfully.

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40. Tracey Machlin, *Informants and the Fourth Amendment: A Reconsideration*, 74 WASH. U. L.Q. 573, 628 (1996); *see also* Commonwealth v. Schaeffer, 688 A.2d 1143 (Pa. 1993) (interpreting a state constitution).

41. Machlin, *supra* note 40, at 575.

42. *See id.* at 634. "A home or private conversation should not lose its constitutional protection against promiscuous police intrusion merely because an individual has allowed a third party's presence. When it comes to Fourth Amendment rights, the difference between the police and everyone else matters." *Id.* at 634-35.

43. *See* Massiah v. United States, 377 U.S. 201, 204-05 (1964).

44. *See id.* at 205.

45. The Author notes in the summer of 1998, the United States Supreme Court decided *United States v. Bajakajian*. 118 S. Ct. 2028 (1998). In this case the Court, for the first time, struck down a forfeiture as being "grossly disproportional" to the crime. In a 5-4 decision, Justice Thomas for the majority emphasized that the "amount of the forfeiture [did not] bear some relationship to the gravity of the offense that it is designed to punish." *Id.* at 2036. As such, the penalty in the case was deemed to violate the Excessive Fines Clause of the Eighth Amendment. *See id.* at 2038.

Two separate kinds of forfeiture exist in the United States. Criminal forfeiture is a seizure that results from a criminal conviction under a statute that requires the relinquishing of specific property, such as vehicles used in drug transactions. Civil forfeiture is not dependent on the defendant's conviction of a crime. Though civil forfeiture proceedings may sometimes follow a criminal trial, the civil forfeiture action is a separate and independent process brought by the government.[46] The standard of proof in civil forfeiture proceedings is much less than that required by a criminal trial; usually the government need only prove the defendant's guilt by a preponderance of the evidence.[47]

One of the primary difficulties in applying forfeiture statutes concerns jointly held property. The government must protect innocent persons. Forfeiture of jointly owned property may injure an innocent person who was not responsible for, and not knowledgeable of, the defendant's wrongdoing. Eliminating the remedy of forfeiture in such a setting may, however, discourage law enforcement initiatives and may also encourage criminals to place property with other individuals.

The Supreme Court explored this tension between the protection of innocent persons and the imposition of forfeiture proceedings in *Bennis v. Michigan*.[48] In *Bennis*, the husband used the family automobile, of which his wife was a joint owner, to engage in unlawful sexual activities with a prostitute. State law required the forfeiture of property used in such criminal activities; the state took ownership of the car despite the wife's interest in it. She protested, asserting that her substantial interest in the property had been taken even though she did nothing wrong and had no knowledge of wrongdoing.[49] The Supreme Court rejected this "innocent owner defense" and upheld the state forfeiture law:

> [Petitioner] claims she was entitled to contest the abatement

46. *See generally* 21 U.S.C. § 881 (1994).
47. *See id.*
48. 516 U.S. 442 (1996).
49. *See id.* at 446.

> by showing she did not know her husband would use it to violate Michigan's indecency law. But a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use. . . .
> She did not know that her car would be used in an illegal activity that would subject it to forfeiture. But . . . the Due Process Clause of the Fourteenth Amendment does not protect her interest against forfeiture by the government.[50]

Another major issue concerning forfeiture statutes is the question of whether such actions violate the Double Jeopardy Clause of the United States Constitution if they are utilized after a criminal conviction.[51] The Double Jeopardy Clause of the Fifth Amendment reads: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."[52] In *United States v. Ursery*,[53] the defendant was convicted of various criminal charges. The government then filed a civil action for forfeiture against the same defendant for the same criminal acts.[54] The Supreme Court allowed the forfeiture proceeding because "these *in rem* civil forfeitures are neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause."[55] The Court strongly supported the property forfeiture remedy stating:

> Since the earliest years of this Nation, Congress has authorized the Government to seek parallel *in rem* civil forfeiture actions and criminal prosecutions based upon the

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50. *Id.* at 446, 449.

51. *Austin v. United States*, 509 U.S. 602, 629 (1993) raised the constitutional concern in its conclusion that a civil judgment may serve, in part, to "punish" the owner of forfeited property.

52. U.S. CONST. amend. IV.

53. 518 U.S. 267 (1996).

54. *See id.*

55. *Id.* at 292.

> same underlying events. And, in a long line of cases, this Court has considered the application of the Double Jeopardy Clause to civil forfeitures, consistently concluding that the Clause does not apply to such actions because they do not impose punishment. . . .
> "[U]nless the forfeiture sanction was intended as punishment, so that the proceeding is essentially criminal in character, the Double Jeopardy Clause is not applicable. The question, then, is whether a § 924(d) forfeiture proceeding is intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial."
> Our inquiry proceeded in two stages. In the first stage, we looked to Congress' intent, and concluded that "Congress designed forfeiture under § 924(d) as a remedial civil sanction. . . . In the second stage of our analysis, we looked to "'whether the statutory scheme was so punitive either in purpose or effect as to negate' Congress' intention to establish a civil remedial mechanism."
> Our cases reviewing civil forfeitures under the Double Jeopardy Clause adhere to a remarkably consistent theme. Though the two-part analytical construct employed . . . was more refined, perhaps, than that we had used over 50 years earlier . . . , the conclusion was the same in each case: *in rem* civil forfeiture is a remedial civil sanction, distinct from potentially punitive *in personam* civil penalties such as fines, and does not constitute a punishment under the Double Jeopardy Clause.[56]

IV. UNDERCOVER OPERATIONS AND THE ENTRAPMENT DEFENSE

Law enforcement officials often find it essential, in investigating

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56. *Id.* at 274, 277-78 (citations omitted). Of course, other narrower procedural issues are also present. *See, e.g.*, United States v. Tencer, 107 F.3d 1120 (5th Cir. 1997) (concerning assets legitimately and illegitimately obtained); Bye v. United States, 105 F.3d 856 (2d Cir. 1997) (concerning notice requirements).

organized crime, to engage in long term undercover investigations or "sting operations." In such situations, however, an entrapment defense is often raised.[57] All United States jurisdictions now provide for the defense of entrapment. The basic purpose behind recognizing entrapment is to prevent the government from manufacturing crime.[58] American judges have struggled in attempting to define the distinction between improper government inducement and appropriate investigative tools. For example, it is not entrapment for a police officer simply to offer to purchase narcotics at the going price from someone believed to be a drug dealer. However, it may be entrapment for a police officer to persuade a suspect to sell narcotics by pretending to be the suspect's friend and applying immense pressure in playing on the sympathies of the suspect.[59] The United States Supreme Court has set forth the basic principles governing the defense of entrapment:

> [T]here can be no dispute that the Government may use undercover agents to enforce the law. "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises."
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> In their zeal to enforce the law, however, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute. Where the Government has induced an individual to break the law and the defense of entrapment is at issue . . . the prosecution must prove beyond reasonable doubt that the defendant was

57. *See generally* Paul Marcus, *Presenting, Back from the [Almost] Dead, the Entrapment Defense*, 47 U. FLA. L. REV. 205 (1996).

58. *See* Lopez v. United States, 373 U.S. 427, 434 (1963). *See generally* United States v. Cecil, 96 F.3d 1344, 1347-49 (10th Cir. 1996).

59. *See* Sherman v. United States, 356 U.S. 369 (1958).

> disposed to commit the criminal act prior to first being approached by Government agents.[60]

In *Sorrells v. United States*,[61] the Supreme Court held that a defendant cannot assert the entrapment defense if all the defendant shows is that the government provided the opportunity to commit a crime.[62] It also found, though, that the government's action may not "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."[63] This difference was based on the Court's view concerning the purpose of legislators in enacting criminal statutes. The Court reasoned that the statute was being abused by the government.[64] These statutes were not made part of the law so that the government could induce an otherwise innocent person to commit a crime just so that person could be punished. By looking to the "innocent" state of mind of the accused, the Justices established a subjective approach to the defense.[65]

The dissenting Justices in *Sorrells* reached a very different result as to entrapment. They enunciated the reasoning behind the objective test for entrapment. The minority discussed the public policy justifications for entrapment and concluded that the question of entrapment properly belongs to the judge, rather than the jury, and that the principal question would be to ask if the government acted responsibly in its investigations:

> The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the

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60. Jacobson v. United States, 503 U.S. 540, 548-49 (1992) (quoting Sorrells v. United States, 287 U.S. 435, 441 (1932)) (citations omitted).

61. 287 U.S. 435 (1932)

62. *See id.* at 442.

63. *Id.*

64. *See id.* at 443-44.

65. *See id.*

enforcement of this overruling principle of public policy.[66]

Although all states have an entrapment defense, they vary considerably its definition and application. Because the entrapment defense is not constitutionally based, states may use any test desired, and apply the defense as they decide. In most states, entrapment will be seen as a factual matter, to be resolved generally by the jury. In other states, especially those applying the objective test, it is seen as a question of law for the trial judge. Moreover, in some states if the defendant denies participation in the crime, the defense of entrapment is waived. In other states, and in the federal system, the defendant may raise the defense of entrapment, even while denying participation in the offense. In *Mathews v. United States*,[67] the Supreme Court allowed the defense of entrapment to be considered even if the defendant denied meeting the elements of the charged crime.[68]

The difference in entrapment laws between the states and the federal system is largely due to the varying purposes behind entrapment. States that see entrapment as a curb on law enforcement use an objective standard where only the actions of the law enforcement are important. Other jurisdictions are primarily concerned with the mental state of the individual. These states look to see if the defendant is an innocent person coerced or persuaded into committing the crime. In these jurisdictions, the test for entrapment is subjective. The Supreme Court has repeatedly reaffirmed the subjective test in federal entrapment cases.[69]

With the subjective test as used by the federal courts, the trier of fact must determine the state of mind of the defendant at a particular time.[70] The issue of timing can become critical, for many

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66. *Id.* at 459 (Roberts, J., dissenting).

67. 485 U.S. 58 (1987).

68. *See id.* at 63.

69. *See id.* at 66-67 (Brennan, J., concurring), where the final dissenter on the topic, Justice Brennan, conceded the lack of controversy over the application of the subjective test for entrapment.

70. *See* United States v. Yater, 756 F.2d 1058, 1062 (5th Cir. 1985).

investigations can last for weeks, months, or even years. The question then becomes whether the jury or judge is to look to the state of mind of the defendant at the moment of solicitation, during the period of solicitation, or before the solicitation began.

The United States Supreme Court answered this question in *Jacobson v. United States*.[71] The Court found that the government must show that the defendant was truly predisposed to commit the crime and that a mere "inclination" to engage in activity is not enough.[72] The defendant there was targeted by the government for twenty-six months through repeated mailings asking about his interest in child pornography, mailings that claimed to be from organizations that were in favor of allowing people to view child pornography.[73] At the end of this extended period the agents asked the defendant to order child pornography and he responded immediately.[74] A search of the defendant's home found magazines that featured child pornography, but the defendant had purchased these magazines before they became illegal to receive them through the mail.[75] The Court held that the prosecution only showed a predisposition to view child pornography, not a predisposition to commit an illegal act.[76] In deciding the appropriate time period for consideration, the Court looked not simply at the moment when the defendant was actually solicited by the government agents. Instead, it indicated that courts should focus on the entire period of government involvement.[77] With that twenty-six month period in mind, the Court found entrapment as a matter of law and dismissed the criminal changes against the defendant.[78]

The *Jacobson* opinion has been highly influential throughout the United States. Several courts have construed it broadly in terms of

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71. 503 U.S. 540 (1992).
72. *See id.* at 549.
73. *See id.* at 543-47.
74. *See id.* at 547.
75. *See id.*
76. *See id.* at 551.
77. *See id.* at 553.
78. *See id.* at 554.

requiring a careful scrutiny of both the defendant's state of mind and the intensity of the government's involvement in the criminal enterprise. One federal court stated the matter plainly:

> The defendant must be so 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.[79]

Even after *Jacobson*, it is clear that judges must look at the extent of the government involvement in inducing the defendant to commit the crime. Later lower federal cases and many state courts still use a subjective test for entrapment. In essence, the question has now become: Would this sort of crime have occurred without the persuasion of the government agent? If the answer is no, the courts can find that the governmental involvement was too great, the predisposition of the defendant too weak, and the entrapment defense can be proved, perhaps even as a matter of law.

In states which follow the objective test it is the actions of the government which are essential. The conduct of the accused is not normally a relevant issue. Instead, the question is whether the actions of the government were sufficient to induce an average, law-abiding person to commit a crime. Under this inquiry, it should not matter whether this particular defendant was disposed to commit the crime. Examples of improper inducement under the objective standard are physical threats, sexual favors, appeals to sympathy and friendship, and the possibility of exorbitant gain.[80] One of the leading entrapment cases under the objective view is the California Supreme Court's decision in *People v. Barraza*.[81] The

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79. United States v. Hollingsworth, 27 F.3d 1196, 1200 (7th Cir. 1994) (en banc); *see* Marcus, *supra* note 57. *But see* United States v. Thickstun, 110 F.3d 1394 (9th Cir. 1997).

80. *See* People v. Barraza, 591 P.2d 947, 955 (Cal. 1979).

81. *Id.*

court presumed that a normally law-abiding person would "resist the temptation to commit a crime presented by the single opportunity to act unlawfully."[82] It found that "if the actions of the law enforcement agent would generate in a normally law-abiding person a motive for the crime other than ordinary criminal intent, entrapment will be established."[83] Also, if affirmative police conduct would make commission of the crime especially attractive to a normally law-abiding person, that will also constitute entrapment.[84]

While the two approaches—subjective and objective—may appear mutually exclusive, some states have combined the tests either by judicial determination, or by a blend of state constitutional principles and statutory enactments.[85] In these states, the court determines if the defendant is predisposed to commit the crime. If the defendant is not predisposed, then entrapment occurred. If the defendant possessed that state of mind, the court will consider the government's conduct to decide if a law abiding person might have been induced under the circumstances by the extreme governmental action.[86]

The preference for one test or another, as previously stated, depends on the goals for the entrapment defense. When the state wants to make sure only the guilty-minded are punished, it will apply the subjective test. If the state wishes to use the defense to limit questionable police conduct, it will apply the objective test. The advantage to the subjective test is that it only seeks to punish those who are culpable. The disadvantage is that entrapment must be decided on a case-by-case basis. This type of determination is time-consuming and has little precedential value, as each case will have a different defendant and a unique fact pattern. The advantage

82. *Id.* at 955.

83. *Id.*

84. *See id.*

85. *See* N.J. STAT. ANN. § 2C:2-12 (West 1995); N.H. REV. STAT. ANN. § 626:5 (1996).

86. *See* N.J. STAT. ANN. § 2C:2-12(a)(1)-(2) (West 1995); N.H. REV. STAT. ANN. § 626:5 (1996).

of the objective test is that cases have more precedential impact because the review is of the police conduct. The disadvantage is that a guilty person may not be subject to criminal liability.

While numerous procedural and evidentiary issues concerning the entrapment defense can be found,[87] the major debate over the defense has been which test to apply and how much government inducement will be allowed before it is found to constitute improper activity.

V. CONCLUSION

Legislators and judges in the United States have given law enforcement officers considerable weapons in the fight against organized crime. In this article, I have discussed three of the most important: the allowance of broadened application of the search and seizure provisions of the federal Constitution, the use of forfeiture procedures, and the ability to engage in long term undercover investigations and "sting" operations.

While each of the three certainly provides strong support to law enforcement, each creates serious questions of law and policy. The Fourth Amendment concerns are deeply felt and will continue to be raised in cases involving arguable invasions of privacy. Forfeiture which impacts on the assets of innocent individuals will give rise to proposals to limit sharply the reach of property seizure rules. Finally, the entrapment defense can be expected to be asserted, and applied, ever more vigorously as we see continued long term, intensive investigations of criminal activities.

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87. For instance, these issues concern the nature of the evidence allowed to show predisposition, actions of private individuals working on behalf of the government, and so on. *See* Marcus, *supra* note 57.