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VALUING INSIDE KNOWLEDGE: POLICE INFILTRATION AS A PROBLEM FOR THE LAW OF EVIDENCE

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• For six months a federal prosecutor targets Henry Jones, suspected of selling cocaine. From Jones' tapped telephone, the government records conversations that appear drug-related, though the quantities, prices, and the type of product remain cryptic. Eventually, prosecutors send an informant to Jones, who agrees to obtain five kilograms of cocaine for the informant's associate, an undercover police officer. During the transaction, Jones calls the cocaine "tires" and uses other code terms to refer to the price. This terminology makes it possible to interpret the drug codes he used during the previously intercepted phone calls. The police arrest Jones when he hands the drugs over to the undercover agent. Jones is charged with possession of five kilograms of cocaine with intent to distribute. The government never charges him with any offenses stemming from the government's wiretap investigation. At trial, however, the court admits intercepted calls during which Jones offers "tires, really good quality" for sale to a variety of customers. The undercover agent testifies that during the drug deal Jones referred to each kilogram of cocaine as a "tire." The jury convicts. At sentencing, the court relies on the intercepted calls to conclude that Jones has trafficked in two to three kilograms of cocaine a week over a six-month period. The judge increases Jones' sentence accordingly. If the prosecution had offered the intercepted calls to convict Jones of his weekly sales, it would have had to establish his guilt by proof beyond a reasonable doubt. But since the tapes merely adjust Jones' sentence after conviction for the five-kilogram sale, the court reviews them under a "preponderance of the evidence" standard.

• An informant tells the police that prison guard Cynthia Smith is smuggling narcotics into jail for a variety of inmates, including

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Edna Baines. At the direction of the police, the informant provides Smith with fifty grams of crack cocaine, which she smuggles into prison and delivers to Baines. The police arrest both Smith and Baines. Smith, Baines, and other inmates tell the government that Smith has smuggled user quantities of marijuana into prison on previous occasions. Telephone records and testimony from other prison guards corroborate these accounts. Smith is convicted of distributing fifty grams of crack and sentenced accordingly.

I. INTRODUCTION: TWO USES OF POLICE INFILTRATION

Should anything trouble us about these fairly routine undercover operations? Commentators have pointed to a number of potentially disturbing features. Were the government's methods unduly intrusive?[1] Did the undercover agents use undue pressure or incentives to encourage the offense?[2] Such pressures or incentives could support a defense of entrapment.[3] Critics might condemn the sting operation against Smith as a form of "sentencing entrapment" in which the police selected the drug type and quantity in order to trigger a higher penalty.[4] The use of "other acts" evidence at trial is also controversial.[5] And many commentators protest the use of a preponderance standard to prove uncharged offenses at sentencing.[6]

1. Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 105 (1991) (noting intrusiveness of undercover operations along with their tendency to erode trust in the government, and concluding that while "one might argue that undercover activity should be banned. . . [a]t the least, judicial authorization should be obtained prior to any non-exigent undercover activity").

2. *See generally* ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT (Gerald M. Caplan ed., 1983); GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA (1988).

3. Sherman v. United States, 356 U.S. 369, 371 (1958) (entrapment occurs when person acting on behalf of government "convince[s] an otherwise unwilling person to commit a criminal act"); *see also* Sorrells v. United States, 287 U.S. 435, 442 (1932) (government may not "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order [to] prosecute").

4. *See generally* Daniel L. Abelson, Comment, *Sentencing Entrapment: An Overview and Analysis*, 86 MARQ. L. REV. 773 (2003); Jeff LaBine, Note, *Sentencing Entrapment Under the Federal Sentencing Guidelines: Activism or Interpretation?*, 44 WAYNE L. REV. 1519 (1998); Joan Malmud, Comment, *Defending a Sentence: The Judicial Establishment of Sentencing Entrapment and Sentencing Manipulation Defenses*, 145 U. PA. L. REV. 1359 (1997); *see also* UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 2D1.1, app. n.14 (permitting downward departures for some forms of undercover manipulation affecting volume of drug sales).

5. Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 526 n.131 (1983) (arguing, *inter alia*, that "[e]vidence of prior crimes or acts should not be automatically admissible under Rule 404 when

Without rejecting these criticisms, I want to call attention to a problem typically overlooked. In each scenario, the government used undercover methods to investigate suspicions about the target's criminal activities. But the government did not use the offense which it facilitated—what I will term a "contrived offense"—to convict the target of the suspected crimes. (I will call the wrongdoing that originally attracted police interest the "independent crime," since this conduct occurred prior to and independent of government intervention.) Instead of prosecuting the independent crime, the government convicted the target of the contrived offense. Prosecuting this contrived offense became a substitute for proving the independent crime that originally motivated police infiltration. In addition, once the government convicted the target of a contrived offense, it increased punishment by introducing at sentencing the uncharged crimes that initially provoked its investigation. In this fashion, the government successfully bypassed any need to persuade a jury of those independent crimes by proof beyond a reasonable doubt.

The problem here is not just that the government relegated the independent crimes to the sentencing phase, thereby circumventing the role of the jury along with the burden of proof beyond a reasonable doubt. The deeper problem is that the government substituted prosecution of the easier-to-prove contrived offense for the harder-to-prove independent crime in circumstances where the evidence obtained undercover could have been used to prosecute the independent crime. Proving the independent crime would have been better for two reasons. First, allowing the government to prove the contrived offense diverts investigative resources from clearing up independent crimes that occur without government influence. In pursuit of an easy conviction, police and prosecutors shift from exposing existing independent crime to demonstrating the readiness of targets to commit contrived offenses if given the opportunity.

Second, proving the contrived offense instead of the independent crime for which it substitutes gives infiltrators little reason to minimize their distorting influence on targets. And it gives juries little

offered [for some permissible purpose] . . . . Rule 404(b) cannot be used to . . . permi[t] clearly prejudicial evidence to be admitted on a flimsy pretext.").

6. *See, e.g.*, Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1202–03 (1993); Jacqueline E. Ross, *What Makes Sentencing Facts Controversial? Four Problems Obscured by One Solution*, 47 VILL. L. REV. 965 (2002); Lauren Greenwald, Note, *Relevant Conduct and the Impact of the Preponderance Standard of Proof Under the Federal Sentencing Guidelines: A Denial of Due Process*, 18 VT. L. REV. 529, 530 (1994).

opportunity to correct for that influence in weighing undercover evidence. Imagine an alternative (which I will develop later in this essay). Suppose the government were required to use the contrived offense only to illuminate the prior, independent crimes. To convict Jones or Smith of the independent crimes, the government would have to present direct evidence of those crimes. The contrived offense would only serve to corroborate that evidence. Using the undercover evidence in this way would expose and thus control for the infiltrator's distorting influence on the target. Would Smith have smuggled fifty grams of crack into prison had the investigator not suggested both the type of drug and the quantity? If the government could use the evidence of crack smuggling only to corroborate the marijuana offenses (*i.e.*, the independent crimes), it would need to offer evidence to prove that Smith smuggled marijuana into jail on previous occasions. The prosecution's case would thus automatically expose that Smith smuggled crack under government influence. The distorting effect of the infiltration would be revealed.

Section II will develop my suggestion that we view the prosecution of contrived offenses in lieu of hard-to-prove independent crimes as a "shortcut" to conviction. Section III will identify structural reasons that tempt police and prosecutors to use infiltration to generate these shortcuts. Sections IV and V will suggest a way to regulate shortcuts through an amendment to the rules of evidence that builds on "best evidence" principles. Section VI will explore the implications of my proposal for the roles of the prosecutors and the police, for plea bargaining, and for sentencing. Finally, in the Conclusion, I will look beyond the problem of shortcuts to identify other ways in which infiltrators' influence on the crimes they investigate may compromise the value of their findings as evidence.

II. THE PROBLEM STATED: UNDERCOVER INVESTIGATIONS AS INSIDE KNOWLEDGE OR AS A SHORTCUT TO CONVICTION

Infiltrating criminal organizations with undercover agents and informants allows the government to gain inside knowledge, either from the vantage of a participant in crime, or (in the case of many decoy stings) from the perspective of a victim.[7] Valorized as "proactive" weapons against crime, undercover police tactics promise jurors

7. *See generally* MARX, *supra* note 2.

a ringside seat to criminal activity, often in the early planning stages.[8] Undercover operations create a vantage point not ordinarily available to police and prosecutors who rely on reactive methods of investigation (like questioning witnesses and issuing subpoenas for documents). Covert infiltration is an especially powerful weapon against organized crime because it can reveal structures of hierarchy, divisions of responsibility, and many otherwise inaccessible details about the inner workings of secretive organizations.[9] It has also been widely deployed against a variety of legitimate enterprises, such as stock exchanges, in which illegitimate practices coexist secretly with lawful ones.[10] But the cost of obtaining inside knowledge is some degree of involvement with the criminal organization being investigated. To gain knowledge, the investigator must be an insider. To be an insider, the investigator must be a participant (either as victim or accomplice). By participating, the investigator affects the course of events. Indeed, the better an investigator positions herself to learn firsthand about the doings of a criminal gang, the more she risks altering what she seeks to observe.

These features of undercover policing are both its strength and its weakness. The target's participation in offenses contrived by covert agents can illuminate independent crimes by corroborating direct evidence such as informant testimony, financial records, and wiretapped telephone conversations. But the ability of undercover agents to set up easy-to-prove contrived offenses presents a temptation to overworked law enforcement personnel in a system providing defendants with extensive protections. Prosecuting contrived offenses in place of independent crimes reverses the legitimating logic of undercover investigations, for proof of contrived offenses can substitute for proof of the independent crimes that justified the sting operation in the first place. Thus while the government *might* deploy undercover agents to reveal organizational hierarchies and divisions of labor between members of organized crime, it is tempted to use covert tactics more cheaply and conveniently to convict a target for the offenses the government aids or encourages.

8. *Id.*

9. *Id.*

10. ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT, *supra* note 2, at vii; UNDERCOVER: POLICE SURVEILLANCE IN COMPARATIVE PERSPECTIVE 118 (Cyrille Fijnaut & Gary T. Marx eds., 1995).

The undercover "buy-bust" operation best illustrates the use of infiltration to generate shortcuts (that is, to set up contrived offenses that can be prosecuted instead of independent crimes). In a buy-bust operation, an undercover agent asks the target to sell him drugs. The quantity is often high enough to trigger the application of a mandatory minimum prison term, even though that amount may be more than the target's usual transaction.[11] When the target sells the requested drugs, the agent arrests him. The government does not charge the target with the narcotics crimes he commits every day, a decision that would treat the contrived offense as a device for corroborating proof of the independent crimes. Instead, prosecutors charge the target with the (often larger) narcotics sale that the government requested. In this way, police infiltration changes the original object of inquiry from the independent crime to the more readily observable and provable contrived offense. In the eyes of police and prosecutors, the advantage of this tactic is that it makes it easier to prosecute a target who they know is committing similar crimes on his own. The cost, however, is a shift in the focus of investigation from those crimes the defendant commits without police assistance to the contrived offense that the police facilitated. At trial, the contrived offenses will not be offered to prove the defendant's independent crimes, though the defendant's participation in these crimes supposedly motivates and legitimates the undercover operation. Instead the independent crimes—what prosecutors often call "historical" to differentiate them from contrived offenses—need not be proved at all. If the government does try to prove them, the government typically offers evidence of independent crimes as "intricately related" to proof of the contrived offense; or as "other acts" evidence under Rule 404(b); or to rebut a defense of entrapment by establishing the target's criminal predisposition. Thus an irony: the independent crimes that inspired the undercover investigation in the first place are treated merely as evidence useful in convicting the defendant of the contrived offense or in enhancing the penalty.

One might think about this shortcut by analogy to the introduction of the mongoose into Martinique. Oral tradition, as offered by a tour guide of uncertain reliability, has it that the mongoose was first brought to Martinique to kill snakes. But instead of killing snakes, mongooses attacked the farmers' chickens. The reason was simple:

11. *See supra* note 4 (discussing sentencing entrapment, and its limited applicability).

chickens are easier to kill. Like the mongoose, which has the capacity to kill snakes with much effort, the government has the ability to conduct lengthy and complicated investigations to prove independent crimes. But why record hours of tedious hard-to-interpret wiretap recordings when a contrived "buy-bust" will deposit the target in jail more quickly and reliably? Police and prosecutors are rewarded for obtaining convictions, for getting the "stat," and they gain little for elegant and patient work. Like the mongoose, they prefer chickens to snakes.

Allowing the government to charge a contrived offense in its own right deflects focus from independent crimes—which may or may not be troubling. In some circumstances, concentrating on a contrived offense might be justified as a necessary substitute for investigating the independent crime. Since undercover agents cannot witness the independent crime, they must put themselves in a position to watch its closest facsimile. When investigators offer bribes to officials whom they suspect of being corrupt, for example, the government's intervention may be justifiable. Investigators are unlikely to catch officials taking bribes unless agents offer the cash themselves. Once the police arrest an official for corruption, they may well learn more about other instances in which the official accepted bribes. But if they do not, then the best they can do is prove the contrived offense. Prosecuting a contrived offense in place of an independent crime is not per se problematic. The danger arises when the government could prove an independent crime but chooses instead to charge the more clear-cut contrived offense. Only then can one speak of a shortcut.

The temptation to substitute proof of contrived offenses for independent crimes is not endemic to all covert investigations. For many kinds of undercover investigations it makes no sense to distinguish contrived offenses from independent crimes. Suppose a man is looking for a hired killer to murder his wife. A covert agent masquerades as a hit man and offers his services. The husband offers the agent a contract and is arrested. The independent crime under investigation is solicitation to murder. This is also the offense that the agent facilitates. In this context, there is no shortcut problem. The independent crime and the contrived offense are the same.

The shortcut problem most commonly arises in undercover investigations of transactional crimes like dealing in drugs, weapons, or stolen goods. When agents offer themselves as a partner to an illegal transaction, they gain access to criminal networks at their point of

greatest vulnerability, namely their dealings with outsiders. Agents can replicate otherwise hidden independent crimes by purchasing weapons, offering to launder drug money, or fencing stolen goods. The contrived offenses could be used to gather inside information about an organization's suppliers, structure, and scope. In a corruption investigation, paying a bribe to obtain desired official action can confirm difficult-to-verify information about similar offenses. It can also help interpret circumstantial evidence, such as inflows and outflows of cash. The arrest itself can lead witnesses to come forward with information. In all these ways, contrived offenses can help the government build a case on independent crimes. Alternatively, the contrived offenses can be used as an end in themselves: to convict targets of the contrived offenses instead of the independent crimes. The higher the penalties for the contrived offense, the greater is the temptation to prosecute it in its own right instead of the independent crimes.

The danger of using undercover policing to generate shortcuts has been recognized in other legal systems, if obliquely. Consider Germany. German regulation of undercover policing evinces a special concern for the shortcut problem. German sentencing law gears punishment to harms and risks of harms. In sentencing defendants for contrived offenses, German courts treat the involvement of undercover agents as reducing the risk of harm.[12] For every contrived offense, there is some discount at sentencing because the police presence prevented a potential harm from reaching fruition (for example, by seizing drugs before they reach the market).[13] This discount also reflects an uncertainty about what the contrived offense tells us about the crimes a target would commit when left to her own devices. The more contrived the undercover scenario, the less the risk that the defendant would have engaged in similar conduct without government influence, and hence the greater the discount.[14] How "contrived" the offense appears depends on what else the court knows about the offender. The less evidence the government offers of independent crimes, the less willing courts are to conclude that the defendant would have, say, sold the same kilogram of drugs to someone other than the undercover agent. The dealer might have sold less, or

12. BGHSt32, 345, BGHStV 1989, 528; BGHStV 1994.

13. *Id.*

14. Lars Kutzner, *Bemerkungen zur Vereinbarkeit der sog. Strafzumessungs-Loesung des BGH mit de Gundsaetzen des Strafzumessungsrechts*, Strafverteidiger (2002).

she might not have sold at all. In order to justify a sentence for the contrived offense that is commensurate with the sentence it would receive as an independent offense, investigators must seek out evidence of independent crimes. Thus the German approach highlights the relevance of the independent crime to the proper evaluation of the contrived offense.[15] To the extent the available penalties for contrived offenses correlate with the strength of the government's evidence about independent crimes, German investigators have an incentive to seek out evidence of such crimes to correct for the distorting influence of the infiltrator.

III. WHY OUR SYSTEM ENCOURAGES SHORTCUTS

Prosecuting a contrived offense is a shortcut when the government could use the same evidence to convict the defendant of an independent crime. But what features of our legal system encourage investigators to shift their focus of inquiry to contrived offenses and away from independent crimes? There are a number of ways in which our legal system frees investigators from the task of clearing up independent crimes, thereby permitting them to obtain convictions for contrived offenses instead. First, prosecutors and the police have discretion in selecting which crimes to investigate. Without a principle of compulsory prosecution, they need not pursue every reported offense. They can select the most readily provable crimes and the most accessible targets, even if the result is an incomplete picture of a target's criminal activities. Having discretion allows the police and prosecutors to shift their resources from reactive techniques designed to solve a particular crime to proactive techniques, including undercover policing, which emphasize prevention over detection and target diffuse "crime problems" rather than specific reported offenses. The police may initially target someone because they suspect him of particular independent crimes. But because prosecutors have discretion in the selection of charges, the government need not charge the target with the crimes it suspected, even if the results of the sting confirm the suspicions. Accordingly, prosecutors are free to charge contrived offenses instead.

15. I do not wish to import into American law the German solution of using sentencing reductions to remedy the shortcut problem. The German approach still focuses primarily on the offender's predisposition to commit contrived offenses, which is essentially a concern about entrapment. Where predisposition can be established, the German system still allows prosecutors to charge contrived offenses even when independent crimes are provable.

A second reason why police and prosecutors are free to shift their focus to contrived offenses is that our legal system allows them tremendous leeway in their selection of investigative methods. By contrast, German investigators have to obtain advance judicial authorization to use infiltration.[16] They must show that other, less intrusive investigative means have failed to yield usable evidence. American investigators need not do so. American criminal procedure recognizes no hierarchy of investigative resources, even though investigative techniques differ in their intrusiveness. American investigators need not begin their investigation with an inquiry into "historical," independent crimes. Nor need they employ less invasive investigative means before launching an undercover operation. American investigators often find that undercover transactions yield the quickest results. (Instead of having to wait for their suspects to act, undercover investigators can be proactive and take the initiative by offering criminal opportunities to willing targets.) This flexibility in choice of tactics offers American investigators incentives to use undercover tactics as a substitute for, rather than an auxiliary to, conventional investigative techniques. Once again, prosecutors can readily deflect their focus from "historical," independent crimes to offenses they help into being.

There is one pronounced exception to prosecutors' freedom to select among investigative techniques. The American legal system requires a particularly rigorous set of findings before authorizing electronic surveillance. This exception constitutes the third reason why our system is tempted to prove contrived offenses in place of independent crimes. It is not sufficient for prosecutors who seek judicial authorization to conduct electronic surveillance to show that there is probable cause to believe that certain specified crimes have been committed. They must also demonstrate that other investigative means, including the use of undercover agents and informants, will not yield sufficient evidence to convict.[17] Accordingly, investigators must actually consider infiltration before they will be permitted to resort to electronic surveillance. The basis for this preference is straightforward: electronic surveillance counts as a "search," and therefore implicates the target's Fourth Amendment rights. Infiltra-

16. StPO 110a; Koerner-Scherp, BtmG § 31 at 105, 106 (5th ed. 2001).

17. 18 U.S.C. § 2518(1)(c) (2000) (to satisfy necessity requirement, an application for a wiretap order must include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous").

tion does not. According to the Supreme Court, offenders assume the risk of betrayal by their associates, including the danger that such associates will turn out to be informants or undercover agents.[18] Infiltration therefore infringes no reasonable expectation of privacy. As a result, investigators need not establish probable cause or even reasonable suspicion as a predicate for infiltration. If undercover agents or informants tape-record conversations with targets, this does not count as electronic surveillance and therefore requires no judicial authorization.[19] Since the agent is allowed to infiltrate and testify about the resulting conversations, he is equally free to record them. The recording will count as the functional equivalent of his testimony. It is true that investigators may use infiltration and electronic surveillance in tandem.[20] Nonetheless, the hurdles that prosecutors face in obtaining approval for electronic surveillance, the cost in time and manpower, the legislated preference for infiltration, and the paucity of legal restraints give investigators every reason to prefer infiltration to electronic surveillance. Prosecutors therefore use covert agents as a substitute for, rather than an auxiliary to, phone tapping and bugs. The restrictions on electronic surveillance redirect investigators from listening to conversations about independent crimes to stimulating conversations and contriving offenses they may more easily record.

There is a fourth way that the legal system encourages investigators to prove contrived offenses in place of independent crimes. The substantive criminal law often targets core criminal conduct, which may be difficult to detect, by turning peripheral manifestations of crimes into separate offenses. The existence of offenses like money laundering and obstruction of justice make it possible to punish wrongdoers for acts of concealment when it is too difficult to prosecute them for the crimes they cover up. Thus money laundering and obstruction can substitute for proof of past crimes, relieving the government of the need to prove that the defendant himself committed these crimes. Possession offenses play a similar role. Charging the possession of burglary tools obviates the need to catch an offender in the attempt. Charging the possession of stolen property makes it unnecessary to establish that the defendant had a hand in the theft.

18. Illinois v. Perkins, 496 U.S. 292, 300 (1990); Hoffa v. United States, 385 U.S. 293, 302 (1966); Lewis v. United States, 385 U.S. 206, 211–12 (1966).

19. United States v. White, 401 U.S. 745 (1971) (upholding constitutional validity of warrantless interception recorded with the knowledge and consent of a cooperating interlocutor).

20. They may do so, for example, when undercover buys will not by themselves reveal the full hierarchical structure of the targeted organization.

Charging the possession of cocaine makes it unnecessary to prove a transaction, let alone the network that supports it. And charging possession of drug paraphernalia makes it unnecessary to prove even the possession of narcotics. If money laundering and obstruction substitute for proof of past crimes, possession offenses can substitute for proof of crimes that a target has not yet committed or even attempted, relieving the government of any need to prove that the target was going to commit them. Since legislatures allow prosecutors to charge second-order crimes (like possession, money laundering, and obstruction of justice) that arise out of a first-order crime (say, burglary), and since these second-order crimes are typically easier to detect, our system encourages investigative techniques such as undercover stings that yield evidence of those second-order crimes.[21]

Allowing the government to prove second-order crimes in place of more elusive first-order crimes not only invites greater reliance on covert policing. It also establishes a precedent for the use of evidentiary shortcuts. If the government may prosecute accessible peripheral crimes in lieu of hard-to-detect core offenses, it makes sense also to allow the government to prosecute easy-to-prove contrived offenses in place of hard-to-prove independent crimes. The structure of the criminal law compounds the temptation to prosecute contrived offenses instead of independent crimes because the availability of possession charges makes contrived offenses even simpler to prove than they otherwise would be. It is already easier to convict Smith of smuggling crack into prison than of smuggling marijuana, since the crack offense was contrived and therefore monitored by the government. Charging Smith with simply possessing crack cocaine may be too tempting to forego.

If the availability of second-order offenses like possession legitimates and encourages shortcuts, it also compounds one shortcut with another. As Markus Dubber has argued, statutes that criminalize possession invite the police to alter their focus from clearing up crimes to incapacitating dangerous persons.[22] Charging Smith with a *contrived* possession offense not only shifts investigative focus from a core offense (smuggling) to a peripheral manifestation (possession); it also shifts attention from an independent crime to a contrived offense. This takes investigators even further away from core offenses that

21. Other investigative techniques include traffic stops and airport searches.

22. Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 840 (2001).

defendants commit independently of the government. The threat implicit in possession offenses is already once removed from the harmfulness of drug trafficking. The threat implicit in *contrived* possession is even more remote from that harm than the threat implicit in ordinary possession offenses, which are not stimulated or shaped by the government. The ease of obtaining a conviction for contrived offenses reinforces the tendency to target criminals rather than crimes and predispositions rather than conduct.

IV. WHY ARE SHORTCUTS A PROBLEM FOR THE LAW OF EVIDENCE?

The ease of proving contrived offenses instead of independent crimes reduces prosecutors' incentives to use infiltration for the purpose its advocates valorize: to gain inside knowledge of criminal organizations in order to prove independent crimes. None of our existing controls on infiltration address the shortcut problem or even recognize it as a concern. Currently, the primary constraints on covert policing are internal law enforcement regulations;[23] codes of professional responsibility that limit prosecutors' contacts with represented parties;[24] the Sixth Amendment (which places some limits on undercover questioning of incarcerated defendants);[25] and the prohibition on entrapment.[26] The law also limits the extent to which undercover agents may participate in crimes.[27] These boundaries are established through internal law enforcement regulation and through limitations

23. *See, e.g.*, THE ATTORNEY GENERAL'S GUIDELINES ON FEDERAL BUREAU OF INVESTIGATION UNDERCOVER OPERATIONS (2002), *at* www.usdoj.gov/olp/fbiundercover.pdf.

24. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 4.2 (1992) (prohibiting attorney contact with represented persons).

25. Maine v. Moulton, 474 U.S. 159, 180 (1985) (undercover agent may not circumvent the Sixth Amendment right to counsel by speaking to subject who has been charged with the crime under investigation).

26. *See supra* note 3.

27. An agent may

> violate the literal terms of certain penal statutes. . . . The issue is one of kind and degree. . . . [A]t some point feigned participation in a crime bears such resemblance to the crime itself that society cannot tolerate the conduct. No one doubts that they could not work in an undercover role in the investigation of a juvenile rape gang and actually participant in a rape. . . . The question is how far may police and prosecutors go in engaging in conduct that would otherwise be illegal?

2 G. ROBERT BLAKEY, TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME: MANUALS OF LAW AND PROCEDURE 41 n.217 (1980). Judge Friendly noted "there is certainly a limit to allowing governmental involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums." United States v. Archer, 486 F.2d 670, 676–77 (2d Cir. 1973).

on the public authority defense (which ordinarily protects agents from prosecution for the crimes they commit in their undercover capacity).[28] Together, these limitations address the selection of targets and venues, the required threshold of suspicion, the inducements undercover agents may offer, the pressures they may exert, and how far agents (and informants) may participate in criminal acts. What remains largely unregulated, however, is the temptation to use infiltration to set up a shortcut to conviction.

In order to address this concern, it is useful to point out how the shortcut creates problems from the perspective of the rules of evidence—specifically, by undermining best evidence principles.[29] Many, but not all, contrived offenses can be thought of as copies of independent crimes.[30] A contrived offense involves undercover agents offering a target the opportunity to replicate independent crimes under controlled circumstances, so that the government may witness the offense. When the government substitutes proof of a contrived offense for proof of an independent crime, it offers evidence of the copy in place of the original. Prosecuting the copy violates best evidence principles where the government could have proved the original, that is, where the state could have used the contrived offense to corrobo-

28. 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 142(a) (1984). *See, e.g.*, IOWA CODE ANN. § 704.11 (2003):

> A peace officer or person acting as an agent of or directed by any police agency who participate in the commission of a crime by another person solely for the purpose of gathering evidence leading to the prosecution of such other person shall not be guilty of that crime or of the crime of solicitation.

See also N.Y. PENAL LAW § 35.05(1) (McKinney 1998); UTAH CODE ANN. § 76-2-401 (1995). The U.S. Supreme Court has held that "[c]riminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law," Brogan v. United States, 522 U.S. 398, 406 (1998), and has explicitly recognized undercover participation in unlawful activity as "a recognized and permissible means of investigation," United States v. Russell, 411 U.S. 423, 432 (1973); Lewis v. United States, 385 U.S. 206, 208–09 (1966). *See also* Baucom v. Martin, 677 F.2d 1346 (11th Cir. 1982) (invoking Supremacy Clause immunity for FBI agent charged with bribing a state prosecutor in an undercover operation).

29. Enshrined in Federal Rule of Evidence 1002 and better denominated as the "Original Documents Rule," the Best Evidence Rule itself applies to documents, recordings, photographs, movies, and videotape. FED. R. EVID. 1002. Though the rule establishes a preference for presentation of the original artifact, Federal Rule of Evidence 1003 creates a presumption that "duplicates" of the original shall be admissible, unless "a genuine question is raised as to the authenticity of the original" or "in the circumstances, it would be unfair to admit the duplicate in lieu of the original." FED. R. EVID. 1003. Federal Rule of Evidence 1004 lists the circumstances in which the production of the original will be excused and "other evidence of the contents" will be admissible. FED. R. EVID. 1004.

30. There may also be investigations in which the contrived offense does not resemble the suspected crime. To imprison a cagey burglar, agents may offer him a drug transaction in order to set up an easy-to-prove contrived offense. I do not treat this sort of scenario in this Article. Rather, I am focusing on contrived offenses that mimic independent crimes.

rate evidence of the independent crime. In particular, allowing prosecutors to charge the defendant with the contrived offense permits them to prove the proxy even in those circumstances when the government's evidence would have enabled it to prove the original.[31]

As an illustration, consider Henry Jones, whose story began this Article. Jones was a drug dealer who sold five kilograms of cocaine to a government informant in a contrived offense. Instead of convicting Jones for the contrived offense, that drug transaction could be used as a way of corroborating the information about the independent narcotics crimes that the government had collected through a wiretap. Jones' use of code words during the transaction could help the government decrypt the previously intercepted telephone calls. Because of the government's influence on the transaction, using evidence of it to prove prior independent crimes is preferable to using the same evidence to prosecute Jones for the contrived offense. Convicting Jones of the contrived offense punishes him for what he is willing to do under government prodding. But the state has the better option of

31. Challenging the claim that evidentiary rules serve primarily to control the jury, Dale Nance has argued that many evidentiary rules can be understood as forcing litigants to present better evidence—that is, more complete, well-founded, and reliable evidence. Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 227 (1988). *But see* Edward J. Imwinkelried, *Should the Courts Incorporate a Best Evidence Rule Into the Standard Determining the Admissibility of Scientific Testimony?: Enough is Enough Even When It Is Not the Best*, 50 CASE W. RES. L. REV. 19, 24 (1999) (questioning the role of best evidence principles in the Rules of Evidence and arguing against the introduction of a "best evidence" rule as a criterion for screening expert testimony). In response, see David L. Faigman et al., *How Good is Good Enough?: Expert Evidence Under* Daubert *and* Kumho, 50 CASE W. L. REV. 645, 654 (2000) (disavowing any desire to introduce a "best evidence" rule into screening of expert testimony but endorsing a "better evidence" principle according to which courts "may exclude proffered evidence when other evidence of greater probative value is or should be available").

My concerns about using contrived offenses as shortcuts to conviction echo "better evidence" concerns. I argue against allowing prosecutors to seek convictions for contrived offenses when the government can avail itself of better ways of establishing that a target is involved in criminal activities. To be sure, any attempt to address the shortcut I have identified would require courts to impose new limits on prosecutors' freedom to choose the evidence they wish to present. And though courts have generally been reluctant to interfere with litigants' narrative control over the presentation of their case, the Supreme Court has shown some willingness to enforce limits on that strategic prerogative, holding, for example, that one consideration in deciding whether to admit probative but prejudicial evidence is the availability of nonproblematic evidence of equal probative value. Old Chief v. United States, 519 U.S. 172, 174 (1997) (finding reversible error where court admitted evidence disclosing the nature of a defendant's prior felony conviction, though the conviction was relevant to the indictment charging him with being a felon in possession of a firearm, because defendant had offered to stipulate that he had been previously convicted of an unspecified felony). Michael Risinger has argued that courts should more readily exclude probative evidence when other (less prejudicial) evidence is available, for example, by excluding what he calls "heartstrings and gore" evidence whenever defendants offer to admit the facts which the evidence is offered to prove. D. Michael Risinger, *John Henry Wigmore, Johnny Lynn Old Chief, and "Legitimate Moral Force"—Keeping the Courtroom Safe for Heartstrings and Gore*, 49 HASTINGS L.J. 403, 406–08 (1998).

pursuing him for what he does independently. The best measure of how dangerous Jones is to society is what Jones does without government influence.

Prosecuting the contrived offense should be considered second-best to proving the independent crime: first, because it *is* a proxy; and second, because the infiltration provides only limited information about what the target does independently of the investigator. When the prosecution proves the contrived offense in its own right, the government shows what the target was willing to do when the state offered him a criminal opportunity. When the government instead uses the contrived offense to corroborate other evidence of independent crimes, it proves not only what the target was willing to do but what he actually did independently of the government. This reveals more about the world as it exists unaffected by the influence of the investigator. At the same time, using the contrived offense to prove the independent crime corrects for the infiltrator's influence, which invariably distorts the accuracy of the contrived offense in representing the original, independent crime. In proving the independent crime, the government will inevitably juxtapose the contrived scenario against evidence of the target's independent criminal doings. This will tend to expose those features of the contrived offense that result from the infiltrator's influence.

I do not mean to suggest that the government may not engage in sting operations, or that it may never prosecute the contrived offense in its own right. Rather, I wish to argue that prosecuting the contrived offense is second best to using the contrived offense as evidence of the independent crime.[32] Using the contrived offense to corroborate

32. In Richard Uviller's terminology, infiltration yields "trace evidence" of contrived offenses but may yield only "predictive evidence" of independent crimes. H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 847–48 (1982). Trace evidence includes any evidence created by the crime itself—for example, eyewitness testimony, bullet holes, hair samples, and the like. By contrast, proof of other bad acts under Rule 404(b), proof of motive and opportunity, and negative character evidence are forms of "predictive evidence" that a given defendant would be likely to commit a given crime. (Predictive evidence might be better called "probabilistic evidence," since it not only increases the probability that someone may commit a crime in the future, but also makes it more likely that he committed such a crime in the past.) Evidence about a target's dealings with undercover agents is trace evidence of the crimes he commits with their aid, but is only predictive (probabilistic) evidence of his past participation in independent crimes. To be sure, infiltration may also yield trace evidence of independent crimes, if the target makes some reference to past offenses when speaking to informants or undercover agents. But if the government can prove contrived offenses in place of independent crimes, it has less reason to seek out such trace evidence. Trace evidence, however, is more direct proof of a crime. For a recent critique reviving the distinction and cautioning against over-reliance on predictive evidence, see

other evidence of the independent crime has the advantage of proving the original in lieu of the copy while exposing the distortions introduced by the government. Consider again Cynthia Smith, who smuggled fifty grams of crack into prison at the suggestion of a government informant. Suppose this contrived offense were used to corroborate other evidence that she had previously smuggled small quantities of marijuana into prison (the independent crime). Then, the jury could use the evidence of the contrived offense to conclude that Smith has previous experience in smuggling narcotics into prison, that she knew how to do so, and that she had previously provided drugs to Edna Baines. At the same time, admitting the contrived offense only as evidence of independent crimes would prevent the government from greatly increasing Smith's sentence by inducing her to deal in crack instead of marijuana (her usual product). If investigators come to use infiltration to corroborate independent crimes, police and prosecutors would have every reason to minimize the distortions they introduce into the target's decision-making environment. For the less a proffered criminal opportunity resembles those that the target confronts ordinarily, the less the contrived offense illuminates the independent crimes that it is offered to prove.

One may ask why we need the rules of evidence to correct for the distorting influence of undercover agents. The entrapment doctrine seems designed to deal with this concern. Yet the entrapment defense regulates this problem only incompletely. Only a limited subset of distortions counts as entrapment. The defense remedies only extreme situations, which occur when informants and undercover agents exert excessive pressure or offer inordinate inducements—investigations in which the government's tactics "implant the criminal design" in otherwise law-abiding persons.[33] The entrapment defense does not correct for less distorting influences on the target—that is, for the intervention inherent in using undercover tactics. Unless the undercover agent used tactics that overbore the target's will, or that would have overborne the will of a hypothetical law-abiding person, the entrapment defense does not distinguish contrived offenses from independent crimes.[34]

Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1234–39 (2001).

33. See the cases cited *supra* note 3.

34. *Id.*

To use the rules of evidence to regulate infiltration would remedy a blind spot of the entrapment doctrine. The entrapment doctrine asks only whether the evidence supports a conviction for the contrived offense. It does not inquire whether the independent crime is best proved by proxy, that is, by prosecuting the target for a contrived offense. Once courts recognize that the contrived offense *is* a proxy, and an imperfect one at that, best evidence principles dictate a preference for the original (independent crime) over its replica. The rules of evidence thus offer a way to constrain the too common temptation to prove the contrived offense in place of the independent crime.

V. A REFORM PROPOSAL

How can the rules of evidence counteract the temptation to use undercover operatives to generate shortcuts? Here is a proposal. Based on best evidence principles, legislatures should enact a new rule of evidence limiting the purposes for which the government may offer evidence of contrived offenses. The objective of the new rule would be to limit the circumstances in which the government can prove contrived offenses in their own right, as a substitute for independent crimes. Whenever the government plans to prosecute a target for contrived offenses facilitated by government intervention, prosecutors would first have to proffer evidence of any independent crimes that the contrived offenses help to corroborate. The court should then determine whether proof of the contrived offense sufficiently corroborates evidence of an independent crime to support a conviction for that independent crime. In making this determination, the court should interpret the proffered evidence in the light most favorable to the government. If the court concludes that the evidence of the independent crime is too weak to permit a rational jury to convict the defendant of that crime, it would allow the government to prove the contrived offense in its own right. If, on the other hand, the evidence of the contrived offense sufficiently corroborates evidence of the independent crime to support a conviction, the court should conditionally admit evidence of the contrived offense for the limited purpose of proving the independent crime. (In effect, this would require the government to charge the independent crime if it wishes to use the evidence it obtained in the undercover investigation of the contrived offense.) In this way, the court would force the prosecution

to put its evidence of the contrived offense to its best use: proving the independent crime.

Suppose that a jury refused to convict a defendant of an independent crime after hearing evidence of that crime plus evidence of a contrived offense introduced to corroborate the independent crime. Under these circumstances, the jury would be entitled to convict the defendant of the contrived offense instead. The court would enforce this policy through limiting instructions to the jury, directing them to consider proof of the independent crimes first and to use evidence obtained undercover to convict of the contrived offense only if they acquit the defendant of all independent crimes that the contrived offense tends to corroborate.[35] In this way, the jury would retain the power to convict defendants of contrived offenses when such evidence falls short of proving the independent crimes.

Under my proposal, how would courts decide whether to admit evidence of independent crimes as "other acts" evidence under Rule 404(b)? At present, the government often seeks admission of inde-

35. Under my proposal, then, certain conditions must be met before evidence that was obtained undercover may used to convict defendants of contrived offenses. The jury must first acquit the defendant of independent crimes. But this proposal is not intended to resuscitate the doctrine of conditional relevance, which has been widely criticized. *See* Ronald J. Allen, *The Myth of Conditional Relevancy*, 25 LOY. L.A. L. REV. 871, 871–72 (1992); Vaughn C. Ball, *The Myth of Conditional Relevancy*, 14 GA. L. REV. 435, 437–38 (1980). The reason for limiting the purposes for which the government may admit evidence of contrived offenses is not that the evidence is only conditionally relevant to the contrived offense. Evidence of contrived offenses is directly relevant to the allegation that the defendant committed these offenses. The admissibility of this evidence, unlike the admissibility of conditionally relevant evidence, does not depend on the ability of the government to prove some predicate proposition. Rather, admissibility depends on the government's *inability* to prove an allegation, that is, its inability to convict the defendant of an independent crime. My proposal is closer in spirit to Dale Nance's argument that some applications of the conditional relevance doctrine (which he would prefer to describe as "a doctrine of 'conditional probative value'") can be defended as excluding relevant evidence because "it is inexcusably incomplete standing alone"; that is, because the litigant inexcusably failed "to collect, preserve, and present such evidence." Dale A. Nance, *Conditional Relevance Reinterpreted*, 70 B.U. L. REV. 447, 473, 474, 480 (1990). Richard Friedman offers a similar reconstruction of the doctrine as a way of requiring litigants "to support . . . proffered evidence with appropriate predicate evidence." Richard D. Friedman, *Conditional Probative Value: Neoclassicism Without Myth*, 93 MICH. L. REV. 439, 471 (1994). That is, I propose that courts condition admission of evidence to prove contrived offenses in ways that will require prosecutors, whenever possible, to present the best and most direct evidence of a target's independent doings before resorting to the shortcut that permits them to convict the target of a contrived proxy for that crime. For another proposal that would require litigants to present more direct and complete evidence of a factual allegation, see David Kaye, *The Paradox of the Gatecrasher and Other Stories*, 1979 ARIZ. ST. L.J. 101, 104 (arguing that trial courts should direct a verdict against a plaintiff who relies exclusively on evidence establishing background probabilities). This proposal would place on plaintiffs the burden to acquire additional evidence that would improve the accuracy of fact-finding. For a discussion of this proposal, see Richard Lempert, *The New Evidence Scholarship: Analyzing the Process of Proof*, *in* PROBABILITY AND INFERENCE IN THE LAW OF EVIDENCE 61, 71 (Peter Tillers & Eric D. Green eds., 1988).

pendent crimes as "other acts" establishing modus operandi, absence of mistake or accident, or some other aspect of the contrived offense. In particular, if a defendant raises the entrapment defense, the government may offer proof of the independent crimes to establish the defendant's predisposition to commit the contrived offense.[36] Under my proposal, if the government seeks to admit evidence of independent crimes under Rule 404(b), the court will have to make two linked decisions. First, it will have to decide whether to allow the government to prove the contrived offense in its own right. If the court concludes that the evidence of independent crimes is too weak to support a conviction for those crimes by proof beyond a reasonable doubt, the court will permit prosecutors to pursue a conviction for contrived offenses instead. In that case, the court will face a second decision. Should it admit evidence of independent crimes as "other acts" helping to prove the contrived offense? Should the court allow prosecutors to use that evidence to establish, for example, that a defendant claiming entrapment was predisposed to commit the contrived offense? Since Rule 404(b) applies only a preponderance standard to the "other acts" evidence, a court may well permit the government to use the independent crimes as 404(b) evidence, even if it harbors enough doubt about the independent crimes to permit the government to go forward with its prosecution for contrived offenses.

Alternatively, a court reviewing a motion to admit evidence of independent crimes under Rule 404(b) might find the evidence sufficiently compelling to conclude that the government has no need to prove the contrived offense in its own right. In that case, the contrived offense may itself become "other acts" evidence under Rule 404(b), depending on the degree to which evidence of the contrived offense corroborates proof of the independent crimes. In other words, courts will have the option of reversing the direction of inference: instead of admitting independent crimes to help prove contrived offenses, they might admit contrived offenses to prove the independent crimes.[37]

36. United States v. Coleman, 284 F.3d 892, 894 (8th Cir. 2002); United States v. Van Horn, 277 F.3d 48, 57 (1st Cir. 2002).

37. Notice that it may be harder to admit evidence of contrived offenses to prove independent crimes than vice versa. Predisposition will not be at issue when the government is offering its evidence of contrived offenses to prove independent crimes, for there is no entrapment defense to such charges. Rule 404(b) will bar the government from using evidence of contrived offenses to prove an offender's propensity; instead, Rule 404(b) will admit such evidence only when it tends to establish some feature of the contrived offense, such as motive, opportunity, absence of mistake or accident, or modus operandi, subject to an assessment of

Reversing the direction of inference would force the government to charge the independent offenses along with the contrived offense. That the contrived crime is *easier* to prove should not permit the government to dispense with proof of independent crimes, if the court concludes that the evidence reasonably obtainable by the government supports a conviction for the independent crimes. Limiting instructions would direct the fact-finder to the preferred use of contrived offenses—namely as corroborating evidence of independent crimes.

Consider how this proposal applies to the two operations described at the beginning of this Article. Evidence from Henry Jones' five-kilogram "buy-bust" (the contrived offense) could have assisted the government in building a case against him for the narcotics crimes he committed without government assistance. In the same way, evidence that Cynthia Smith smuggled crack into prison (the contrived offense) could have been used to corroborate witness testimony, telephone records, and Smith's own confession concerning her previous narcotics smuggling (the independent crimes). Unlike the contrived offenses, the independent crimes were never contaminated by government influence. The reform proposal would privilege proof of these independent crimes.

Perhaps the most troubling implication of this reform proposal is that it sometimes forces courts to reject evidence of a charged (contrived) offense, directing the jury instead to consider the evidence as proof of a different (independent) crime, which the prosecutor would have elected not to charge. If evidence tends to prove a charged offense, its potential relevance to an uncharged crime would not normally prevent the jury from considering it as proof of the charged offense. Why prevent evidence of the contrived offense from establishing that crime? Why force the prosecutor to use the evidence for another, much less direct purpose—proof of the independent crime? Why require the prosecutor to bring charges that she chose to forego?

The justification for redirecting the use of evidence in this way comes from viewing the prosecution of contrived offenses as a sometimes unnecessary substitute for proof of independent crimes. Contrived offenses and independent crimes should be viewed as alternatives. Since contrived offenses are often copies of independent crimes, where the government can prove the original, it should. Prov-

prejudice. FED. R. EVID. 404. To bear on these issues in any meaningful way, the contrived offenses must be fairly similar to the independent crimes. United States v. Blankenship, 775 F.2d 735, 739 (6th Cir. 1985).

ing an independent crime makes it unnecessary to prosecute the proxy (*i.e.*, the contrived offense). Accordingly, whenever possible the government should prove the contrived offense as a means of convicting upon the independent crime, not as an end in itself.

My proposal seems to have a counterintuitive consequence. Suppose that Cynthia Smith's friend Betty Roberts was also a prison guard. Roberts, like Smith, smuggled fifty grams of crack into prison. Both Roberts and Smith obtained the crack from a government informant. But assume that the government has insufficient evidence to convict Roberts of smuggling drugs into prison on any prior occasions. Smith seems to deserve more punishment than Roberts, since she has probably committed previous crimes. Yet under my proposal, Smith faces conviction for small-scale marijuana crimes, while Betty faces conviction for the much more serious crack offense. One might defend this result by treating Smith's prior offenses as exculpatory evidence with respect to the more serious crime. Smith's record of smuggling only small amounts of marijuana into prison suggests that Smith would likely not have sold fifty grams of crack had the government not intervened. This extenuating argument is not available to Roberts, absent evidence that she too dealt in smaller quantities of lesser narcotics. In Roberts' case, the contrived offense must substitute for the independent crime; what Roberts was willing to do for an informant is the best evidence of what she did on her own.

But it does seem that my proposal would give the government a reason to avoid investigating Smith's prior, independent crimes. Any evidence the police gather of prior lesser offenses might undermine the government's ability to prosecute Smith for the more serious contrived offense. In order to redirect investigative focus to independent crimes, it will be necessary to supplement my proposal. Whenever the government shapes a criminal plan, for example, by suggesting the type or amount of drugs, the government should have to prove that the target was predisposed to traffic in such narcotics.[38] When the

38. At present, a defendant who claims that she was predisposed to commit a less serious crime must raise this defense at sentencing, and must bear the burden of proving it by a preponderance of the evidence. United States v. Naranjo, 52 F.3d 245, 250 (9th Cir. 1995). Courts are divided in their willingness to recognize a defense of "sentencing entrapment" in their construction of the doctrine. Some courts that recognize the defense and employ it to reduce a defendant's sentence will do so only if the government violated Due Process by engaging in "outrageous official conduct." United States v. Si, 343 F.3d 1116, 1128 (9th Cir. 2003). Some courts do not require a constitutional violation. United States v. Searcy, 233 F.3d 1096, 1100 (8th Cir. 2000) (government conduct does not have to be outrageous to support claim of sentencing entrapment). Yet others require a showing that unrelenting government pressure overbore the

government participates in the crimes it investigates, it necessarily influences the course of events to some extent, regardless of whether its intervention rose to the level of entrapment. Inevitably, therefore, infiltration raises a question about whether the defendant would have committed a comparable offense on his own. To ensure that undercover tactics do not create the crimes that they purport to expose, courts should require the prosecution to establish that the contrived offense reliably reflects what the defendant would have done without government influence. To make this showing, the government must correct for its intervention. And to correct for its intervention, the government must offer evidence of predisposition.

Requiring the government to prove that a defendant was predisposed to commit the contrived offense would have two salutary consequences. First, it would give the police a reason to investigate independent crimes since these might provide evidence of predisposition to commit contrived offenses. Presenting evidence of the independent crime thus enhances the government's chances of convicting the defendant of the contrived offense, should the jury fail to convict on the independent crimes. (A jury might acquit the defendant of

defendant's will. United States v. Gutierrez-Herrera, 293 F.3d 373, 377 (7th Cir. 2002). Others apply the defense only to unspecified "egregious cases." United States v. Bara, 13 F.3d 1418, 1420 (10th Cir. 1994). And others have rejected the defense entirely. United States v. Miller, 71 F.3d 813, 817 (11th Cir. 1996); United States v. Walls, 70 F.3d 1323, 1329–30 (D.C. Cir. 1995). The U.S. Sentencing Guidelines have recognized a limited form of the entrapment defense in drug cases, providing that,

> "if . . . [a] defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of the controlled substance that the defendant establishes he or she did not intend to provide or was not reasonably capable of providing.

UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 2D1.1 app. n.12. Further, the Sentencing Guidelines provide that a downward departure may be warranted where price manipulation by the government in a reverse sting operation allows a defendant to purchase a significantly greater quantity than his resources would allow at market rates. *Id.* at app. n.14. Defendants who were capable of supplying a greater quantity of drugs but would not ordinarily have done so will not benefit from this provision, since they will not be able to show that they were not "reasonably capable" of supplying the negotiated amount. Nor will defendants be able to establish sentencing entrapment by establishing that "but for the request and assistance of the government and its informant," they would not have been capable of supplying the agreed-upon drug. United States v. Hinds, 329 F.3d 184, 188 (D.C. Cir. 2003). And again, the defendant bears the burden of proof on these claims; mere deviance from the scope of his usual operations will not suffice to reduce his sentence for contrived offenses, absent evidence of fairly egregious government manipulation. Even then, at least one court has rejected a defense of "sentencing manipulation"—the claim that the government has improperly manipulated the defendant for the sole purpose of increasing his sentence—distinguishing this from "sentencing entrapment," which it defined as the claim that the government has improperly enticed him to commit an offense different from the one he was predisposed to commit. United States v. Garcia, 79 F.3d 74, 75–76 (7th Cir. 1996).

independent crimes and convict him of contrived offenses if there is sufficient evidence to prove that the defendant had previously committed similar crimes but not sufficient evidence to identify the prior occurrence.)

Second, requiring the government to prove predisposition (*e.g.*, as to drug type and quantity) may lead covert agents to influence criminal opportunities in ways that better approximate the normal activities of the target.[39] If the prosecution lacked evidence of independent crimes, the government would have to make sure that it was the target, not the undercover agent, who suggested the basic parameters of the contrived criminal transaction. The less the government influenced the transaction—the less it suggested—the less evidence it would need to show predisposition.

Limiting the evidentiary uses of contrived offenses also accords with the role that evidentiary rules play in shaping investigative methods. The rules of evidence do not just validate evidence. They influence investigative methods by determining what sort of information counts as "evidence" at trial. Suppression remedies for illegally obtained evidence are designed to influence investigative methods by giving investigators reasons to respect constitutional limitations on searches, seizures, and police interrogations. Likewise, hearsay rules, authentication requirements, and the best evidence rule itself all affect investigators' decisions on which documents to obtain and which witnesses to interview. Limiting the evidentiary uses of undercover tactics at trial can counteract the temptation to investigate contrived offenses in lieu of independent crimes. Evidentiary limitations on proving contrived offenses can give the government a powerful incentive to investigate and charge the independent crimes that motivate the use of undercover tactics in the first place.

Here is an objection to my proposal. Undercover policing is not the only investigative technique that influences criminal conduct. Witness interviews, grand jury subpoenas, and other conventional methods of inquiry may also trigger criminal activity, including lies to investigators, efforts to destroy evidence, and threats to witnesses. As with contrived offenses, these crimes are a product of the government's investigation. But for the government's efforts to investigate

39. Undercover agents will have little reason to request inordinate drug amounts if they must use evidence of independent crimes to prove predisposition. If the target's normal narcotics business involved lesser quantities than those the police purchase undercover, the independent crimes will negate the target's predisposition to sell the larger amount.

an underlying, independent offense, the targets would not have threatened witnesses, destroyed evidence, and engaged in other efforts to obstruct. As with contrived offenses, the government may choose to charge targets with obstruction of justice when the penalties for doing so exceed the sanctions for the crimes the government was investigating, or when the crimes they investigated are too costly and difficult to pursue. Should courts therefore bar prosecutors from charging defendants with obstruction? Should they allow the evidence of obstruction to be admitted only for the purpose of proving the defendant's participation in the underlying offense? Should the government's right to pursue obstruction charges depend on their inability to prove the underlying, independent crime?

The answer to these questions, I contend, is "no." Destroying documents or threatening witnesses does not replicate the crimes that the government is investigating. In proving up the obstruction, the government does not implicitly represent the offense as a copy or proxy for what the defendant does when the government is not present to observe. The obstruction offense is different in nature. It therefore deserves its own punishment. Nor can the government be said to engineer the offense as it does when it purchases drugs undercover. The primary function of conventional investigative techniques is to gather evidence of a suspected crime, not to stimulate new offenses. The government does not investigate a crime in order to generate obstruction offenses. Investigating a crime through conventional methods does not inherently tempt the government to prove up a different (contrived) offense as a shortcut to conviction. By contrast, whenever an undercover operation offers the target the opportunity to repeat a suspected crime in full view of the undercover agent, stimulating a new offense is essential to the success of the investigation. Covert agents inevitably confront a temptation to shift the focus of inquiry from the independent crime to the proxy contrived by the government. Fighting the temptation to generate shortcuts is therefore essential to constraining undercover operations. In a conventional investigation, there is little ability to "generate" obstruction charges.

VI. IMPLICATIONS OF MY REFORM PROPOSAL FOR INSTITUTIONAL ACTORS, PLEA BARGAINING, AND PUNISHMENT

Limiting what prosecutors can prove will constrain what crimes they charge and how they investigate cases. Does this proposal in-

volve the judiciary too deeply in the executive sphere? No—given that rules of evidence already affect the ways in which prosecutors gather information and the sorts of information they pursue. The rules of evidence have the effect of limiting what parties can prove and how—for example, when the rules limit a witness's testimony to statements based on personal knowledge, or when the rules prefer tapes to transcripts, or direct testimony to hearsay.[40] Even if the government's evidence tends to prove some relevant allegation, a court can demand better evidence, where that is obtainable. A court can require, for example, an original document when the government tenders some other proof of its contents; or it can bar the government from introducing a declarant's former testimony when she is available to testify at trial.[41] By determining what counts as evidence and by regulating permissible inferences, the rules of evidence inevitably influence investigators' tactics and the charges they choose to pursue. What matters in assessing new evidentiary limits is whether the resulting burdens on litigants serve some valid purpose. Limiting the uses of infiltration serves such a purpose. It promotes efforts to discover what a target does independently of the government's influence. What a target does on her own is a better indicator of what punishment she deserves than what she may be prompted to do by investigators.

But even if my proposal serves a valid purpose, it must be workable in the real world. Is it? How well can it be administered within the adversarial context of litigation? The rest of this Section will explore how my proposal would affect the division of labor between prosecutors, judges, and defense counsel, and how it would alter the dynamics of plea-bargaining and the sentencing process.

40. Dale Nance has suggested interpreting the missing evidence rule in ways that heighten investigative burdens on prosecutors. Under his proposal, courts would often have to consider whether the prosecutor might have pursued better evidence before ruling on the inferences that the jury will be permitted to draw from those bits of evidence that the government chooses to present. Dale A. Nance, *Missing Evidence*, 13 CARDOZO L. REV. 831, 847–49 (1991); *see also*, Dale A. Nance, *Evidential Completeness and the Burden of Proof*, 49 HASTINGS L.J. 621, 621 (1998) (arguing that "the burden of proof should reflect the need to avoid rendering a judgment on the basis of an evidentiary package that is unreasonably incomplete, completeness being measured relative to the total package of evidence that is (or should have been) reasonably available to the tribunal").

41. FED. R. EVID. 804(b)(1); *see* White v. Illinois, 502 U.S. 346, 354 (1992). Invoking defendants' Sixth Amendment confrontation rights, John Douglass argues that even when hearsay evidence is admitted, the government should be required to produce available declarants for cross-examination. John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 196 (1999).

To begin with, my proposal would change interactions between prosecutors, investigators, judges, and the defense. A preference for using contrived offenses to prove independent crimes would encourage prosecutors and agents to shape contrived offenses in ways that illuminate independent crimes. At present, since prosecutors can punish targets for contrived offenses, they are tempted to use infiltration in place of more conventional investigative tactics. Once prosecutors had to prove independent crimes, they would supplement infiltration with other investigative techniques. If infiltration served mainly to corroborate other evidence, and if prosecutors had to explore independent crimes to prove predisposition, investigators would seek out direct evidence of such crimes from witnesses, financial records, and wiretaps. This shift would encourage closer cooperation between prosecutors and the police in the early formative stages of criminal investigations. Such contacts are already commonplace in investigations that require judicial approval of search warrants or wiretaps.[42] But many types of undercover operations currently occur without any or with only minimal prosecutorial oversight.[43]

My proposal would also require courts to scrutinize prosecutorial charging decisions in new and unfamiliar ways. Judges would need to enforce new limits on prosecutorial discretion by evaluating evidence of crimes the government has chosen not to charge and, in effect, second-guess that decision. In addition, prosecutors and agents would have to open their investigative files in ways that might compromise confidential sources. For how could judges otherwise assess the strength of the government's evidence? These new burdens, while troubling, are not fatal to my proposal. Where there are valid concerns about protecting the identity of informants, courts can examine investigative records *in camera,* as they already do, such as in evaluating defense allegations of improprieties in grand jury proceedings.[44]

The monitoring function that I propose to assign to the judiciary is not without precedent in other contexts. Judges routinely weigh the

42. For an account of the interdependence between prosecutors and agents as members of a mutually monitoring "working group," see Daniel Richman, *Prosecutors and their Agents, Agents and their Prosecutors*, 103 COLUM. L. REV. 749, 749 (2003). Requiring prosecutors to consider contrived offenses as evidence of independent crimes would increase the interdependence of prosecutors and agents and might well enhance their incentives to monitor each other's performance and keep each other in check.

43. See *id.* at 758–59 for the argument that police officers and federal agents turn to prosecutors mainly when they engage in investigative conduct requiring judicial authorization, including the issuance of subpoenas, wiretap orders, search warrants, and the like.

44. *See, e.g.*, United States v. Foster, 128 F.3d 949, 951 (6th Cir. 1997).

strength of the prosecution's evidence in deciding whether to allow the government to offer coconspirator statements under the coconspirator exception to the hearsay rule,[45] or whether to admit "other act" evidence under Rule 404(b).[46] In deciding whether to accept coconspirator testimony, judges must weigh evidence that a conspiracy existed, even where that conspiracy is not charged.[47] In assessing the strength of the government's "other acts" evidence, courts necessarily evaluate crimes that the government has never charged.[48] Currently judges only weigh the strength of the government's evidence when the government wants to admit evidence of uncharged crimes. Under my proposal, judges would have to evaluate evidence of uncharged, independent crimes, even when the government does not seek to prove them at trial.

Judges' review of prosecutors' investigative and charging decisions will be complicated by the incentives that motivate prosecutors and the constraints that confront defense counsel. A judge may find it difficult to second-guess a prosecutor's claim that the evidence of independent crimes is too weak to support a conviction, particularly since the government controls the evidence and the way in which it is presented. Prosecutors could underplay the strength of such evidence if they wish to convict on a contrived offense instead—perhaps because the contrived offense is easier to prove, or carries heavier penalties. If the defendant wishes to avoid higher penalties for a contrived offense, defense counsel might argue that the evidence of independent crimes is sufficiently strong to support a conviction. But such claims may be difficult to support, given that prosecutors' control of the evidence puts them in a better position to characterize their proffer to the judge.

By what standard should the judge evaluate the government's proffer of evidence establishing the defendant's commission of an independent crime? I advocate that the judge use "the light most favorable to the government." That is the standard that courts ordinarily use in evaluating a prosecutor's proffer of evidence when she moves, say, for admission of coconspirator statements.[49] But how, in

45. FED. R. EVID. 801(d)(2)(E); *see* Bourjaily v. United States, 483 U.S. 171, 177 (1987).

46. Such determinations are usually made in advance of trial, through rulings on motions *in limine*.

47. United States v. Postal, 589 F.2d 862, 886 n.41 (5th Cir. 1979).

48. Rule 404(b) explicitly requires judges to weigh the evidence of the prior bad act. FED. R. EVID. 404.

49. *See supra* note 45.

practice, should the court apply that standard when the party who controls the evidence—the government—has no reason to advocate its admission? What does it mean to evaluate evidence "in the light most favorable" to the government when the prosecutor has no reason to present the evidence of independent crimes in a favorable light? Since prosecutors may underplay the evidence, any admissibility standard that defers to their characterization of the record would make judicial oversight ineffective as a device for requiring the government, whenever possible, to prove independent crimes instead of contrived offenses. Interpreting evidence of independent crimes in a favorable light must therefore mean assessing it in the light most favorable to *admission,* not in the light most favorable to the government's position—which may be hostile to admission.

One way of making it easier for judges to evaluate the government's evidence of independent crimes is to give prosecutors a reason to champion proof of independent crimes. My proposal does so by refusing to allow prosecutors to prove a contrived offense unless they first show that the target was predisposed to commit the offense. How does one prove predisposition? One way is by showing a prior history of similar criminal transactions—in other words, by demonstrating the independent crimes that motivated the undercover operation in the first place. At present, the government only needs to prove predisposition when a target raises the entrapment defense and carries an initial burden of production by offering some evidence of overbearing tactics.[50] Thus, predisposition currently matters only in those cases where defendants have some grounds to claim that they were entrapped. Under my proposal, the government would have to establish predisposition whenever it seeks to prosecute a contrived offense in place of an independent crime. This requirement would correct for the inevitable influence of the infiltrator on the crimes she investigates. The government would have to establish predisposition, not just generally, but with respect to every aggravating feature of the

50. United States v. Gutierrez, 343 F.3d 415, 419 (5th Cir. 2003) (requiring defendant to present evidence not only of unusual government inducement, but also of her own lack of predisposition); United States v. Spriggs, 102 F.3d 1245, 1260–61 (D.C. Cir. 1996) (same); United States v. King, 73 F.3d 1564, 1568 (11th Cir. 1996) (defendant bears initial burden of production on entrapment defense); United States v. Busby, 780 F.2d 804, 806 (9th Cir. 1986) (same); United States v. Branca, 677 F.2d 59, 61 (11th Cir. 1982) (same). Some state courts require defendants to bear the burden of proof as well. State v. Hammeren, 655 N.W.2d 707, 709 (N.D. 2003); State v. Casey, 71 P.3d 351, 355 (Ariz. 2003); Taylor v. State, 777 A.2d 759, 765–77 (Del. 2001); State v. Branham, 569 S.E.2d 24, 29 (N.C. Ct. App. 2002); State v. Miyashiro, 979 P.2d 85, 91–92 (Haw. Ct. App. 1999); State v. Chatman, 599 So. 2d 335, 347 (La. Ct. App. 1992).

offense (such as drug type and quantity).[51] Requiring the state to prove predisposition should counteract the temptation for prosecutors to downplay evidence of independent crimes whenever they would prefer to prosecute contrived offenses instead. In order to show that a defendant was predisposed to commit contrived offenses, prosecutors will have to investigate independent crimes and to argue the strength of that evidence in their submission to the court.

If the court concludes that the evidence of an independent crime is strong enough to support a conviction, the jury will have the opportunity to convict the defendant of the contrived offense only if it first decides to acquit the defendant of the independent crime. Suppose a jury refuses to convict a defendant of an independent crime. It may nonetheless conclude that the government's evidence is strong enough to establish predisposition with respect to the contrived offense. That is, the jury will have the opportunity to consider the evidence of independent crimes as "other acts" evidence only after it has decided that the evidence is not strong enough to support a conviction for those crimes in their own right. When would a jury find there to be sufficient evidence of predisposition to convict the defendant of the contrived offense, but insufficient evidence to convict him of the independent crimes? The jury may conclude that there is enough evidence to find that the defendant had committed similar offenses in the past, even if it cannot determine with certainty which prior offenses the defendant committed. Requiring the government to prove predisposition—and with respect to every aggravating feature of the offense—will not only have the salutary effect of requiring the government to expose and correct for the distortions inherent in the use of infiltration. It will also give prosecutors a reason to investigate independent crimes. It will give them an incentive to argue for admis-

51. My proposal thus makes it more difficult to establish predisposition. Under the current standard for evaluating claims of entrapment, prosecutors can prevail by establishing a general predisposition to commit crimes like those charged, even if the government offers an opportunity that significantly escalates the target's ordinary criminal activities, for example, by convincing a marijuana dealer to sell cocaine instead. The government need not prove that the defendant was predisposed to deal in the particular type of drug charged. United States v. Brown, 43 F.3d 618, 625 n.6 (11th Cir. 1995); United States v. Gambino, 788 F.2d 938, 944 (3d Cir. 1986); United States v. Navar, 611 F.2d 1156, 1158 (5th Cir. 1980) (noting proof of defendant's "predisposition to sell drugs" generally). Indeed, the defendant can be convicted without proof that he knew what type of drug he was handling, so long as the government establishes that he knew he was dealing with a controlled substance. United States v. Lewis, 676 F.2d 508, 512 (11th Cir. 1982); United States v. Restrepo-Granda, 575 F.2d 524, 527 (5th Cir. 1978); United States v. Jewell, 532 F.2d 697, 698 (9th Cir. 1976); United States v. Zapata, 497 F.2d 95, 97–98 (5th Cir. 1974).

sion of evidence proving such crimes. And it will encourage them to design contrived offenses in ways that closely approximate the settings in which targets conduct their independent crimes. For the more the contrived offense resembles the independent crimes, the more likely that evidence of the contrived offense will be admissible under Rule 404(b) to prove modus operandi, absence of mistake or accident, and the like.

My proposal must take into account not only the interests of prosecutors. It must also counteract defendants' incentives to invite prosecution for lesser independent crimes as a way of avoiding harsher penalties for more serious contrived offenses. What happens if the defendant "confesses" to the independent crime? If the court views that admission in the light most favorable to the prosecution, would that automatically establish that the evidence of the crime is strong enough to convict? If so, a defendant who wishes to avoid punishment for a contrived offense can always "confess" to a less serious independent crime, forcing the government to charge the independent crime if it wishes to present evidence of the contrived offense. Once the government charges the independent crime, the defendant can plead guilty to that charge, thereby insulating herself from prosecution for the contrived offense. In evaluating evidence of independent crimes, the judge may find herself in the odd position of assessing a defense claim that the evidence of independent crime is sufficiently strong to support a conviction, while the government will have every reason to underplay the weight of the evidence. At trial, of course, the defense and the prosecution will have to make the opposite arguments (unless the defendant pleads guilty to the independent crime).

Courts would also have to exclude self-serving "confessions" in assessing the evidence of independent crimes. Given the incentive for defendants to "admit" to less serious independent crimes, courts should not allow defendants to use a plea to a lesser charge as an expedient for avoiding conviction on a more serious contrived offense. After all, courts would not allow a defendant to plead guilty to manslaughter against the wishes of a prosecutor who was pursuing a murder charge.[52] Courts should only allow defendants to plead to independent crimes if the government's proffer convinced the court that, even without the confession, there was sufficient evidence to

52. The defendant would retain the option of testifying at trial that she lacked predisposition to commit the more serious contrived offense.

support a conviction for the independent crime. To be sure, a guilty plea to the independent crime would prevent the government from prosecuting the defendant for the contrived offense. But if it were reliably established that the defendant committed the independent crime, there would be no more need to convict him of the contrived offense that serves as a substitute.

How would my proposal affect guilty pleas to contrived offenses? After all, most criminal cases do not go to trial. How easily could prosecutors avoid the impact of evidentiary constraints by negotiating pleas to contrived offenses? That would depend on judicial willingness to require complete information from prosecutors about their investigation of a target before accepting a guilty plea to a contrived offense. The court's aim would be to reject pleas to contrived offenses whenever the government's evidence would have strongly corroborated evidence of independent crimes. And where proof of the independent crimes is possible, defendants would have little reason to plead to more serious contrived offenses, which carry higher penalties.

The effectiveness of this reform proposal would also depend on what happens at sentencing. Suppose the jury convicts Cynthia Smith of the marijuana offenses and acquits her of the (contrived) crack offense. Under present sentencing systems, the sentencing judge would include the fifty grams of crack in calculating the drug quantity that dictates her sentence. Though Smith would not be subject to a statutory minimum term, the contrived offense would still increase her sentence substantially.[53] The current sentencing system rewards distortions introduced by the government. Accordingly, my evidentiary reform must also entail a sentencing reform: unless the judge or jury convicts a defendant of a contrived offense, that crime may not increase punishment at sentencing. Nor should the judge increase punishment for the contrived offense if she concludes by a preponderance of the evidence that the defendant committed the independent crimes. The contrived and independent crimes provide alternative measures of the same harm.

53. In the federal system, her sentence under the U.S. Sentencing Guidelines would closely track the mandatory minimum that she would have faced had she been convicted of the crack offense.

VII. BEYOND SHORTCUTS: OTHER EVIDENTIARY TEMPTATIONS OF UNDERCOVER POLICING

My proposal does not pertain to every kind of infiltration. It addresses those forms of infiltration in which the police contrive offenses that substitute for hard-to-prove independent crimes. But not all contrived offenses are proxies for some other crime. Undercover police who infiltrate a drug-trafficking organization may learn of plans to murder a rival and offer themselves as accomplices to unmask the scheme. Agents may pose as arsonists to investigate targets who want to burn down their businesses for insurance proceeds. Informants investigating a series of small-scale terrorist attacks may learn that their targets are planning a much larger operation. These scenarios resemble contrived offenses in the sense that the infiltrator inevitably influences the course of events by his participation. But in all of these instances, the crimes in which the government intervenes merit inquiry in their own right. This use of infiltration is more than a shortcut that creates a contrived offense in place of a hard-to-prove independent crime. The government should be able to prosecute these offenses without having to establish its inability to prove some other crime.

But these sorts of undercover operations also tempt investigators with shortcuts, though shortcuts of a somewhat different kind than I have so far discussed. Charging contrived crimes rather than independent crimes is essentially a shortcut employed by prosecutors. Now I would like to consider shortcuts specific to undercover agents. Instead of simply positioning themselves to observe their targets in action, agents and informants may choose to help matters along—to facilitate proof—by taking an active part in planning and carrying out the crimes they investigate. This may make it easier for them to obtain information and to prevent harm to their targets' intended victims. Yet when pressed too far, overly intrusive undercover work blurs as much as it reveals. When an agent assumes too active a role in shaping a target's criminal plans, the government may learn less than it hoped about the firmness of a target's plans and her ability to carry them out. Consider, for example, the undercover agent in her role as deep-cover mole. To create easily provable evidence, the mole may supply her targets with essential tools and know-how and even carry out key parts of offenses herself. Undercover agents have car-

ried out burglaries,[54] set up drug labs,[55] and printed counterfeit currency,[56] all in the name of "exposing" the crimes they facilitate. Or consider the agent pretending to be a hired killer or arsonist. She may assist too much in planning, arranging alibis, disabling alarms, opening safes, supplying essential tools, helping with the financing, and so forth. The more actively the agent shapes an inchoate criminal plan, the less she puts her target to the test—and the less she learns about what the target would have and could have done on his own.

The rules of evidence should play a role in regulating these kinds of undercover agent shortcuts as well as the prosecutor shortcuts that I earlier described. In particular, the rules can encourage the government to put infiltration to its best use as a device for gathering inside knowledge of its targets' plans. Evidentiary rules should give investigators incentives to minimize their intervention and thereby maximize knowledge about what their targets intended, how they intended to do it, and how capable they were of accomplishing their objectives.

At present, neither criminal law nor criminal procedure adequately addresses this problem. If the mole or hired gun assumes too active a role in an undercover investigation, targets may raise the entrapment defense or seek dismissal of the indictment, challenging the government's "over-involvement" as a violation of Due Process.[57] But the entrapment defense and its Due Process variant focus only on extreme cases. Most instances where the government participates in crimes do not count as sufficiently extreme, because most targets are

54. United States v. Brown, 635 F.2d 1207, 1209 (6th Cir. 1980) (informant participated in forty burglaries); State v. Pooler, 255 N.W.2d 328, 329 (Iowa 1977) (undercover agents participated in burglary).

55. United States v. Hudacek, 24 F.3d 143, 145 (11th Cir. 1994).

56. United States v. Irving, 827 F.2d 390, 391–92 (8th Cir. 1987) (conviction upheld where undercover agents assisted defendants by obtaining paper, printing press, printing paraphernalia, and vacant office, and thereafter printed $200,000 in counterfeit currency).

57. In dicta, the Supreme Court has suggested that the Due Process Clause may bar a criminal prosecution when the undercover agents' conduct is sufficiently outrageous to "shock . . . the universal sense of justice" and offend principles of fundamental fairness. United States v. Russell, 411 U.S. 423, 432 (1973). Outrageous conduct may be established by proof of "an intolerable degree of governmental participation in the criminal enterprise." *Id.* at 424–25; 431–32 (internal quotation omitted). While the Supreme Court limits this defense to defendants who can demonstrate that they lacked predisposition, some state courts and federal district courts have applied this constitutional test as a purely objective one, opining that government over-involvement in the targeted offense may be sufficiently "outrageous" to deprive a defendant of Due Process and warrant dismissal of the charges against him, even if he is "predisposed." United States v. Bagnariol, 665 F.2d 877, 883 (9th Cir. 1981); United States v. Fekri, 650 F.2d 1044, 1045–46 (9th Cir. 1981); United States v. Wylie, 625 F.2d 1371, 1377 (9th Cir. 1980); United States v. Borum, 584 F.2d 424, 427–28 (D.C. Cir. 1978); United States v. Prairie, 572 F.2d 1316, 1318–19 (9th Cir. 1978); United States v. Leja, 563 F.2d 244, 246 (6th Cir. 1977).

only too happy to accept the infiltrator's assistance. The agent's active role in the criminal plan does nothing to relieve the targets of guilt, unless the targets lacked predisposition to commit the offense. Focusing as they do on the targets' willingness to commit crimes, entrapment and Due Process defenses do not concern themselves with the information that agents forego when they carry out a difficult task themselves instead of waiting for their targets to attempt them, and, perhaps, fail. The government foregoes opportunities to probe targets' competence, resources, and resolve because the agents' assistance to their targets make a crime more likely to occur and easier to prove when it does. Agents may not learn how the target would have tackled obstacles without government assistance.

A new rule of evidence should be enacted to provide agents with reasons to reduce their activism and thereby increase what they learn about their targets. Such a rule would direct the fact-finder to subtract the undercover agent's contribution from the crimes juries may ascribe to defendants. Specifically, judges should direct the juries not to count the contributions of an undercover agent or infiltrator toward the *actus reus* of the crime. If the infiltrator's conduct cannot be attributed to the target, the target herself must perform all actions essential to the crime in order to incur criminal liability.

How, then, would this proposal work? Suppose, for example, a target wanted to print counterfeit money and procured the necessary negatives. He then asked the undercover agent to provide him with a printing press. Now assume the undercover agent obtained the paper, supplied the press, and printed the $200,000 that the target had requested. Under my proposal, the target could not be prosecuted for manufacturing and possessing $200,000 in counterfeit currency. The government's conduct could not be attributed to him. The jury could convict him only of the attempt. By the same token, the quantity that the government printed should have no influence on the target's sentence, particularly absent any evidence that he could have printed the money himself. To convict the defendant of anything more than an inchoate offense, the government would have to leave all essential contributions to him.

Likewise, suppose an agent is investigating a ring of suspected burglars. She and her targets drive to a house. While the targets wait in the car, she enters the residence and steals a stereo. Subtracting her contribution would make it possible to convict the targets only of those crimes that they have already committed at the time the agent

left the car to enter the house. Under my proposal, the agent's conduct should be admitted to prove that the targets conspired with each other to commit a burglary, but not to convict them of the burglary itself. Had the agent confined herself to acting as a lookout, her targets would have had to commit the *actus reus* of the crime themselves. Subtracting the agent's modest contribution as a lookout would not have relieved the targets of liability for the resulting burglary.

A few judges have already adopted this way of thinking. A Montana appeals court acquitted a defendant who was charged as an accomplice for standing watch while undercover agents and informants committed a burglary. The court reasoned, "If [the infiltrators' conduct] is subtracted from the . . . break-in, what remains of that midnight enterprise is a lone figure, sitting in a parking lot ½ block away. . . . [H]is conduct, standing alone, represented no more of a threat to society than that of a stargazer . . . contemplating Polaris."[58] The court used the government's "over-involvement" in the offense to acquit the defendant on Due Process grounds, holding that the undercover agents' role violated fundamental principles of fairness. Yet this court's approach would not protect the defendant in many circumstances. First, a Due Process rationale would not have shielded the defendant if the government had been able to show that the burglary was, in the court's words, "part of ongoing criminal activities engaged in by [the] defendant prior to his involvement with [the government's agents]."[59] Such evidence would have established the defendant's predisposition to participate in the burglary. If the defendant had a pattern of criminal activity, the court implied, the government's contribution to the offense would not be sufficiently unfair to violate the Due Process Clause. Second, there is at present great uncertainty about how much government involvement is required to trigger Due Process protection. The Alaska Supreme Court, for example, distinguished the Montana decision and rejected a Due Process challenge by a hunting guide convicted for shooting foxes out of season. Even though the undercover agent rather than the defendant shot the foxes, the court reasoned, the hunting guide could be convicted because he had piloted the agent over the game preserve and provided other assistance. Following a Ninth Circuit decision,[60]

58. State v. Hohensee, 650 S.W.2d 268, 274 (Mo. Ct. App. 1982).
59. *Id.*
60. United States v. Williams, 791 F.2d 1383, 1386 (9th Cir. 1986).

the Alaska Supreme Court ruled that a defendant could not prevail on a Due Process challenge unless he established that the government had "engineered and directed the criminal enterprise from start to finish."[61]

My proposal addresses these shortcomings of Due Process as a way of constraining undercover policing. My proposal establishes a criterion for determining how much government involvement is too much. Any government contribution that relieves the target of the need to perform some necessary part of the *actus reus* will remove criminal liability. The jury may consider only the target's own actions in deciding whether the government has proved the *actus reus* of an offense. Such an evidentiary rule gives the police an incentive to leave all essential contributions to the target.

My proposal not only establishes a workable criterion of liability for completed crimes, but does so for attempted offenses as well. This is important because undercover agents participate not only in completed crimes but in a variety of inchoate offenses. For example, the "hired gun" agent does not actually kill the intended victim—he only invites the target to take out a contract (which is an attempted crime). My proposal can be implemented for these types of sting operations. In assessing whether the target's activities go beyond preparatory conduct to attain the status of an attempt, the court should consider only the target's (not the agent's) contributions. If the undercover agent makes an essential contribution to the attempt—say, by disabling alarms—courts should exclude evidence of subsequent conduct by which the target capitalized on the agent's contributions (say, by entering a building after the alarms go dead). The agent should ensure that the target herself takes a sufficiently active part in the preparations to implicate her in the attempt. This proposal goes further than the entrapment defense because it exonerates even a predisposed target whenever the undercover agent relieves her of the need to carry out essential contributions to the attempt.

My proposal would correct for, but not discourage, the many appropriate and desirable interventions by infiltrators. An undercover agent may need to exert influence to prevent harm to others, or to

61. Vaden v. State, 768 P.2d 1102, 1108 (Alaska 1989). A dissenting opinion argued that the assistance, in and of itself, was insufficient to incriminate the hunting guide. Citing the decision in *Hohensee*, the dissent reasoned, "[w]hen [the agent's] conduct is subtracted from the equation, the conduct of the defendants, however evil the intent which accompanied it, does not amount to a crime." *Id.* at 1109.

divert operations to places where they can best be monitored and their ill effects contained. An agent might convince terrorists to plant explosives in an empty building instead of a full one, or suggest taking an extortion victim's car instead of killing him. These interventions are desirable, but they raise questions: How should the prosecution use the evidence, given the government's role in shaping it? How should the court correct for the influence of the government? Under my proposal, courts should subtract the infiltrator's contribution from the assignment of criminal responsibility. Evidence of the government's influence should neither aggravate nor mitigate the offense. Suppose an agent secretly disables a bomb. Evidence that the target planted the defused explosive would prove a criminal attempt that was independent of the investigator, not a product of contrivance. If a loan shark threatens a debtor's life and an undercover agent convinces the shark to take the victim's car instead, the court should admit the evidence only to prove the extortionate threat, which was independent of the agent's influence. In these examples, the agent's contrivance does not compromise the independent character of at least some chargeable offenses. Admitting the evidence to prove those independent crimes corrects for the infiltrator's influence.

CONCLUSION

Police infiltration is a powerful tool for obtaining inside information about secretive criminal networks. But because infiltration allows the government to influence the events it investigates, undercover policing offers investigators a powerful temptation to set aside the laborious process of obtaining inside information in a quest for an easy conviction. Proving contrived offenses in place of independent crimes is one such shortcut. Prosecutors often charge targets with offenses that the undercover agent facilitated, even when evidence of those offenses could have been used to illuminate other crimes that occurred independently of the government. The investigator's influence on targets also tempts agents with a different kind of shortcut. By excessively involving themselves in the crimes they investigate, agents may facilitate the later proof of offenses at the cost of obscuring their target's capabilities, and hence the danger she poses to society.

I have proposed an amendment to the rules of evidence that counteracts these temptations. The rules should limit the purposes for which juries may consider contrived offenses so as to require the gov-

ernment, wherever possible, to use infiltration as a means of proving independent crimes. In addition, the rules should prevent the government from using the infiltrator's actions to supply the *actus reus* of a crime. These reforms would improve undercover operations and charging decisions alike. They would provide prosecutors with reasons to charge those offenses that best reflect what targets do without government intervention. And they would provide the police with incentives to conduct infiltration in ways that reveal, but do not enhance, the target's own capacities.

But why is it so important to tie the offenses that the government facilitates to some underlying, independent reality? What is at stake in regulating undercover policing is whether to treat infiltration primarily as a tool for obtaining convictions or as a technique for investigating crime. These purposes are in tension with each other. Giving precedence to the goal of facilitating convictions diverts attention from the harder challenges of crime control. Unmoored from the task of clearing up crimes that occur independently of investigators, infiltrators have every reason to focus their efforts on "soft" targets such as street-dealers, occasional thieves without a stable fence, and all manner of opportunity seekers lacking resources and experience. Soft targets are those least insulated from contact with strangers, least connected to powerful networks, and most in need of assistance. In the quest for arrest "stats" and easy convictions, the effort to control crime may yield to the appearance of doing so.