Tailoring Entrapment to the Adolescent Mind

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Abstract

Much has been written about the entrapment defense, its internal inconsistencies, and its impracticalities. Those treatments, however, have overlooked potential effects of the defendant's age. This is the first scholarly analysis of the entrapment defense's application to adolescents. The increasing use of police sting operations in schools, coupled with the Supreme Court's recent attention to adolescent culpability, presents an important opportunity for reevaluating the entrapment defense in light of new findings about the adolescent mind. Through a synthesis of the Supreme Court's "juvenile jurisprudence" and the doctrine that makes up the entrapment defense, this Article argues for reforming the defense as it applies to children. In so doing, this Article first traces the development of the entrapment defense from its initial appearance in American courts to its current fragmented state. Then, this Article turns to the Supreme Court's recent landmark decisions concerning youth-specific constitutional protections. Finally, drawing from both the Court's key declarations about youth culpability and emerging behavioral and neuropsychological science, this Article evaluates the entrapment doctrine in light of the current landscape of juvenile law, proposing specific reforms to ensure that the defense, as asserted by youth, comports with constitutional and scientific norms.

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Introduction

Under certain circumstances, the law refuses to punish a person who committed his crime at the hands of law enforcement encouragement or artifice. That refusal is, in simple terms, the entrapment defense. It is intuitive and has a moral sensibility to it: the government may not put people into jail by tricking or persuading them to commit crimes. Of all the criminal defenses, entrapment occupies a unique space in the criminal law. It originates as early as biblical times, when Eve, having eaten the forbidden fruit, protested, "the serpent beguiled me, and I did eat."[1] Later, early American common law judges recognized the defense. Within time, courts and lawmakers also endorsed entrapment as a defense. Today, state constitutional provisions, state statutes, and the federal common law compose a patchwork of rules, standards, and elements that collectively embody the entrapment defense.

In modern society, it does not take a legal education to know that, at least to some extent, the government cannot trap people into committing a crime and then punish them for it. Woven through television and movie crime dramas, the entrapment defense fits within the public's basic understanding of criminality. For instance, in HBO's *The Wire*, Bodie—a likeable drug dealer—decries a traffic stop as "contrapment," and while he got the term wrong, McNulty—a cop—agrees: "kid's got a point."[2] In short, the prohibition against entrapment by government agents has become a cultural norm that we, as a society, believe in, even if we don't completely understand the intricacies of the legal defense.

Another norm, not typically associated with entrapment, has increasingly appeared in recent Supreme Court jurisprudence: juveniles should be treated differently. That proposition is not novel. Socially, children are held to different standards than adults. And the law, consistent with that cultural practice, often treats children differently. As a general principle, youth are not charged with the same crimes, or sentenced to the

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[1] *See Genesis* 3:13 (King James) ("And the Lord God said unto the woman, what is this that thou hast done? And the woman said, The serpent beguiled me, and I did eat."); *see also* Antony M. Dillof, *Unraveling Unlawful Entrapment*, 94 J. CRIM. L. & CRIMINOLOGY 827 (Sum. 2004); Amanda D. Johnson & Rolando del Carmen, *The Entrapment Defense: Current Issues, Problems, and Trends*, 45 CRIM. L. BULL. 294 (Spr. 2009) (drawing the origins of entrapment as a criminal defense to "biblical times," noting that Eve attempted to use the defense after eating the forbidden fruit by blaming the serpent); Christopher D. Moore, *The Elusive Foundation of the Entrapment Defense*, 89 NW. U. L. REV. 1151, 1153 (1995) (citing the book of Genesis as the first example of an entrapment defense—at least an attempted one).

[2] *The Wire: Mission Accomplished* (HBO television broadcast Dec. 19, 2004).

same punishments, as adults, and they are often subject to less stringent standards of civil liability. Despite this cultural and legal norm, the Supreme Court has only recently taken lessons from the cognitive and behavioral sciences and fashioned new normative standards on youth behavior, culpability, and rights.[3] This evolving understanding of adolescence appears most clearly in the Court's recent decisions recalibrating Eighth Amendment[4] and Fifth Amendment[5] protections for adolescents. In those cases, the Court confirmed key declarations about youth: that children are categorically less culpable than adults, that teenagers are biologically prone to make mistakes, and that the pitfalls of adolescence are transient and malleable.[6] The Court also acknowledged that youth perceive and succumb to pressure and coercion differently than adults.[7] Those lessons—lessons that were arguably known before behavioral sciences or the Supreme Court confirmed them—have yet to be fully assimilated into all areas of criminal law.

To date, these two legal norms—the norm against entrapment and the norm that we treat children differently—have not been considered together. And yet, adolescents are increasingly confronting undercover police activity that arguably comprises entrapment. Consider, for instance, a relatively recent story told on National Public Radio's *This American Life*:[8] Justin Laboy, a high school senior without any criminal record fell

[3] *See, e.g.*, Graham v. Florida, 130 S. Ct. 2011, 2027 (2010) (citing amici curiae briefs on behalf of the American Medical Association and American Psychological Association in declaring that there are "fundamental differences between juvenile and adult minds.").

[4] *See, e.g.*, Miller v. Alabama, 132 S. Ct. 2455 (2012) (holding that the Eighth Amendment's prohibition on cruel and unusual punishment does not allow for mandatory life imprisonment without parole sentences for criminal defendants who were under the age of 18 when they committed the crime in question); *Graham*, 130 S. Ct. 2011 (holding that a sentence of life without parole for a juvenile defendant who did not commit homicide violates the Eighth Amendment); Roper v. Simmons, 543 U.S. 551, 570 (2005) (holding that the Eighth Amendment also prohibits the execution of criminal defendants arrested under the age of eighteen).

[5] *See, e.g.*, J.D.B. v. N. Carolina, 131 S. Ct. 2394, 2406-07 (2011) (holding that, as long as the child's age is known or objectively apparent at the time of the law enforcement questioning, a child's age properly informs the *Miranda* custody analysis).

[6] *See Miller*, 132 S. Ct. 2455; *Graham*, 130 S. Ct. 2011; *Roper*, 543 U.S. at 570.

[7] *See id.*

[8] Justin Laboy narrated his story during a segment on National Public Radio. *See This American Life: What I Did for Love*, NAT'L PUBLIC RADIO (Feb. 10, 2012), http://www.thisamericanlife.org/radio-archives/episode/457/what-i-did-for-love?act=2#play. The second segment of the show, featuring Justin Laboy's story, is called "21 Chump Street"—a play on the title of a television series and 2012 film *21 Jump Street*, about young cops who go back to high school undercover. Though Justin was 18 at the time of the offense, many of his classmates and schoolmates (also targets of Naomi's undercover work) were 17, 16, and younger.

for Naomi Rodriguez, a new student at his school. After months of courtship, Naomi asked Justin if he could get her some marijuana. Justin did not use drugs, but Naomi continued to ask, and finally Justin agreed to help. When Justin finally found drugs, Naomi insisted—over his initial refusal—on exchanging money. Some time later, Justin was arrested for selling marijuana; as it turns out, Naomi was actually a 25-year-old police officer who had been posing as a high school student in a larger police sting targeting Justin's school.

Was Justin Laboy entrapped? He ultimately pled guilty to selling marijuana in a school, a felony in Florida, thus such a defense was never litigated.[9] But Jason's story mirrors those of other adolescents caught in undercover police operations in public schools.[10] Further, even if one of

[9] *See This American Life: What I Did for Love*, NAT'L PUBLIC RADIO (Feb. 10, 2012), http://www.thisamericanlife.org/radio-archives/episode/457/what-i-did-for-love?act=2#play.

[10] As early as the 1970s, law enforcement began placing young-looking cops in schools to try to root out and prevent adolescent delinquency. In 1985, the San Diego Chapter of the American Civil Liberties Union sued the San Diego Police Department, seeking to block police programs that placed undercover agents in San Diego schools. Press coverage of this suit noted that, over two years of conducting these kinds of undercover busts, the San Diego Police Department had arrested more than 200 students. In challenging the constitutionality of this emerging police tactic, the ACLU argued that undercover operations in schools violated students' constitutional rights to privacy, free association, and freedom from unreasonable searches. The next year, the ACLU again tried to end undercover police activity in schools. This time, they sued the Los Angeles school district, challenging the constitutionality of district policies that did not allow students who faced expulsion as a result of the undercover police activity to present an entrapment defense. *See* Jim Schacter, *Police Chief Calls ACLU Extremely Ignorant: Suit Aims to Block School Drug 'Stings'*, LA TIMES, Aug. 14, 1985, http://articles.latimes.com/1985-08-14/local/me-2756_1_high-school-students; Kim Murphy, *ACLU Sues Schools Over Drug-Related Student Expulsions*, LA TIMES, Nov. 14, 1986, http://articles.latimes.com/1986-11-14/local/me-29523_1_high-school-students. In recent years, police have staged undercover drug operations in public schools in California, Ohio, New York, Washington, and Texas. In Exeter, California, in March 2012, a rookie cop enrolled in Exeter Union High School in under the name "Johnny Ramirez." After the eight-month operation, during which he attended classes, took tests, did homework, and found his way into the popular crowd, police officers arrested 12 students from both Exeter Union High School and neighboring Kaweah Continuation School; seven of the 12 are under 18 and will be tried in juvenile court. *See* Tracie Cone, *Rookie Cop Goes Undercover to Bust Students*, NBCNEWS.COM (Mar. 28, 2012), http://www.msnbc.msn.com /id/46881674/ns/us_news-crime_and_courts/t/rookie-cop-goes-undercover-bust-students/#.UKAOakKmDww. Similarly, in June 2012 in Warren County, Ohio, police arrested six students or former students in an undercover drug bust in the Mason and King school districts, near Cincinnati. Police amassed evidence against the students when an undercover cop began making purchases at Mason High School. *See* Russell Goldman, *Ohio King Pin Arrested in Major Drug Bust*, ABCNEWS (Jul. 16,

these adolescents did assert the entrapment defense, would he or she prevail?

In many contexts, the law still treats minors and adults uniformly. This includes the entrapment defense, which mandates the same standards and tests for adolescent and adult criminal defendants. Indeed, while the doctrine actually encompasses a spectrum of different legal standards (largely varying based on state law), none of those doctrines account for a defendant's juvenile status. I argue that that is a mistake.

Given the law's changing view of youth, elements of the entrapment defense, as asserted by a juvenile, merit reevaluation. This is the first scholarly analysis of the entrapment defense's application to adolescents. The increasing use of police sting operations in schools, coupled with the Supreme Court's recent attention to adolescent culpability, presents an important opportunity for reevaluating the entrapment defense in light of new findings about the adolescent mind. Drawing from both the Court's key declarations about youth culpability and emerging behavioral and neuropsychological science, this Article evaluates the entrapment doctrine in light of the current landscape of juvenile law, proposing specific modifications to ensure that the defense,

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2012), http://abcnews.go.com/News/high-school-kingpin-arrested-million-dollar-drug-bust/story?id=16787358#.UH7fm0J9nww. In New York, a 19-year-old student charged with receiving stolen property after buying an iPhone from an undercover cop. *See* Chris Glorioso, *Brooklyn Teen: Undercover Cop Used Sob Story in iPhone Sting*, NBC NEW YORK (Dec. 29, 2011), http://www.nbcnewyork.com/news/local/iPhone-Sting-Arrest-Suspect-Entrapment-College-Student-Complaint-136346688.html. At Redmond High School, in Seattle, Washington, police have run undercover drug operations twice in the past decade. A 2003 drug bust in the school led to 5 student arrests; in 2010, police ran a similar operation in the same high school. That most recent bust culminated in 11 student arrests. All 11 students were under the age of 18. *See* Jennifer Sullivan, *High School Undercover: Look Young and Act Sullen*, THE SEATTLE TIMES, Jun. 6, 2007, http://seattletimes.com/html/localnews/2003736106_undercover06m.html; Linda Brill, *11 Redmond High Students Arrested in Drug Bust*, KING5.COM (Feb. 19, 2010, 10:45 AM), http://www.king5.com/news/Police-arresting-11-students-at-Redmond-High-School-84783892.html. And in January 2012, ten students were arrested for allegedly selling drugs to an undercover officer as part of an undercover drug bust in Angleton High School in Angleton, Texas. *See* Vicente Arenas, *Angleton ISD police: Undercover Drug Bust Worked So Well, We Might Do it Again*, KHOU.COM (Jan. 12, 2012, 6:21 PM), http://www.khou.com/news/Angleton-ISD-police-Undercover-drug-bust-worked-so-well-we-might-do-it-again-137216048.html. In the Cleveland Independent School District, a female police officer identified as Peggy spent nearly two years pretending to be a student. Her undercover scheme resulted in 13 arrests by September of 2012. *See* Larry Seward, *Undercover Officer Posed as High School Student to Nab Drug Dealers*, KHOU.COM (Sept. 20, 2012, 10:30 AM), http://www.khou.com/news/Undercover-officer-says-drugs-are-prevalent-in-schools-170456136.html.

as asserted by youth, comports with constitutional and scientific norms.

Specifically, I address the two theories of entrapment—the subjective and objective tests—that are being used across states and consider how they ought to be applied to youth. In considering the subjective test (used in a majority of jurisdictions), which asks whether the defendant was predisposed to commit her crime, I argue that children cannot be "predisposed" or criminally inclined, effectively making the inquiry moot. Without the predisposition element, subjective entrapment mirrors the objective analysis test (used in a minority of states). Under the objective test, the defendant's mindset and intent are no longer center-stage; instead, the objective test focuses on the coerciveness of law enforcement's conduct and evaluates that government inducement from the perspective of a normal, law-abiding adult. I argue that both the subjective test (with, as I suggest, the predisposition element removed) and the objective test should evaluate inducement from the standard of a normal, law-abiding *youth.*

Part I of this Article traces the historical origins and development of the entrapment doctrine. Part II surveys the changing landscape of juvenile law, including the Supreme Court's recent decisions regarding children's rights under the Eighth and Fifth Amendments and the social, behavioral, and cognitive science underlying those landmark rulings. Finally, Part III uses lessons from constitutional and scientific principles to outline the ways that a defendant's youth status modifies the entrapment analysis.

I. The History[ies] and Contours of the Entrapment Doctrine

Despite the entrapment doctrine's early origins,[11] the defense occupies a fairly tenuous position in American jurisprudence. Critics depict entrapment as an unstable legal doctrine, citing the spectrum of interpretations and applications across jurisdictions.[12] Others consider the defense to be "relatively misunderstood" and used infrequently,[13] despite

[11] *See supra* note 1; *see also* Moore, *supra* note 1, at 1153 (citing the book of Genesis as the first example of an entrapment defense—at least an attempted one).

[12] *See generally* Joseph A. Colquitt, *Rethinking Entrapment*, 41 AM. CRIM. L. REV. 1389 (2004).

[13] *See* Dru Stevenson, *Entrapment by Numbers*, 16 U. FLA. J.L. & PUB. POL'Y 1, 2 (2005). Stevenson identifies emerging trends in the entrapment defense: (1) "[t]he proportion of cases where entrapment arises as a defense appears to be decreasing in almost every state, as well as in the federal courts, (2) a disproportionate number of entrapment cases arise during post-sentencing appeals, and (3) while defendants are less frequently using the "classic elements" of the defense, defendants are relying on "newer variations of the

the fact that police have historically relied on undercover stings and show no sign of deviating from that practice.[14]

This Part traces the origins and development of entrapment law, revealing not one history but several versions of the defense developing in parallel. Such fragmentation suggests that judges and lawmakers have long disagreed about the elements and standards for the entrapment defense. Yet the spirit behind the defense has survived this fragmentation, buoyed by its core notions of fairness and justice.. Further, the idea of protecting innocent citizens and innocent minds from government overreaching lies at the heart of entrapment law, regardless of the form. This ubiquitous goal of protecting violators who are not inherently culpable but merely creatures of government intervention reappears throughout the doctrine's history.

A. Early Origins of Entrapment

Few other countries besides the United States recognize the entrapment doctrine.[15] In England, courts have historically rejected

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defense, including 'sentencing entrapment' (manipulation of sentencing factors by savvy undercover agents) or 'entrapment by estoppel' (where defendant relied on the official assurances about the legality of the activity charged as an offense)." *Id*.; *see also* Johnson & del Carmen, *supra* note 1.

[14] *See, e.g.*, United States v. Owens, 228 F. Supp. 300, 303 (D.D.C. 1964) ("It is recognized, of course, that the use of informers and undercover agents to secure evidence in narcotics cases is necessary to the efficient enforcement of the narcotics laws and has been sanctioned by the courts."); Bernard W. Bell, *Secrets and Lies: News Media and Law Enforcement Use of Deception as an Investigative Tool*, 60 U. PITT. L. REV. 745, 747 (1999) ("Undercover techniques provide an efficient and effective means to reveal secrets society needs to know—either to sanction wrongdoers and frustrate their plans, or to warn potential victims."); Eric Blumenson & Eva Nilsen, *Policing for Profit*: *The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 100 n. 269 (1998) ("Complete control over the 'crime' makes 'sting operations' an efficient law enforcement technique."); Bruce Hay, *Sting Operations, Undercover Agents, and Entrapment*, 70 MO. L. REV. 387 (2005) (outlining law enforcement rationales behind stings, including informational and behavioral (deterrent) functions); Stevenson, *supra* note 13, at 9.

[15] *See, e.g.*, Fred Warren Bennet, From Sorrells to Jacobson: Reflections on Six Decades of Entrapment Law, and Related Offenses, in Federal Court, 27 WAKE FOREST L. REV. 829, 842; Wendy Harris, Entrapment, 18 CRIM L.F. 197 (1994) (discussing how common-law nations of England, Australian, and New Zealand do not recognize Entrapment. Canada did not recognize the defense until 1988); John D. Lombardo, Comment, Causation and Objective? Entrapment Toward a Culpability-Centered Approach, 43 UCLA L. REV. 209, 216 (1995) (noting that entrapment is a "uniquely American phenomenon"); Stevenson, supra note 13, at 7 ("Entrapment is a creature of American law, recognized nowhere else in the world.").

entrapment as a defense, refusing it as recently as 1980.[16] Bypassing discussions of fairness, the House of Lords instead rejects the entrapment doctrine for technical and conceptual reasons. [17] As long as the defendant possessed the requisite mental intent (*mens rea*) and committed a physical act (*actus reus*), then she is guilty under the English criminal framework.[18]

Up until the early twentieth century, American courts largely rejected the idea of entrapment as an affirmative defense.[19] Around the turn of the nineteenth century; however, changes in police tactics, including the emergence of intricate police traps, led certain state courts to begin reigning in overzealous policing through the entrapment doctrine.[20] Courts in Missouri,[21] Illinois,[22] Michigan,[23] Pennsylvania,[24] and Texas,[25]

[16] *See* Regina v. Sang, 1980 A.C. 402, 432 (recognizing that "[m]any crimes are committed by one person at the instigation of others," and so inducement by a government agent "cannot affect the guilt of the principal offender").

[17] *Sang*, 1980 A.C. at 432 (holding that, despite government inducement, the defendant is guilty if "both the physical element (*actus reus*) and the mental element (*mens rea*) of the offense with which he is charged are present in his case").

[18] *Id.*

[19] *See* Lombardo, *supra* note 15, at 218. For examples of state courts that rejected the entrapment defense see *Board of Commissioners v. Brackus*, 29 How. Pr. 33, 42 (N.Y. Sup. Ct. 1869) (relying on biblical references to refuse the defendant's claim of entrapment: "[e]ven if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the plea as ancient as the world, and first interposed in Paradise: 'The serpent beguiled me and I did eat.'"); *State v. Gibbs*, 123 N.W. 810 (Minn. 1909); *French v. State*, 115 So. 705, 707 (Miss. 1928).

[20] While the exact cause of this sea change is difficult to pin down, some scholars have suggested that this changed with law enforcement's increased devotion to preventing and rooting out crimes of vice, or victimless crimes. *See* Andrew H. Costinett, *"In A Puff of Smoke": Drug Crime and the Perils of Subjective Entrapment*, 48 AM. CRIM. L. REV. 1757, 1761 (2011) (explaining how the increased "prevalence" of "intricate [police] schemes" in the twentieth century created a "perceived need for restraints upon overzealous officers" and "led to the judicial acceptance of the entrapment defense." *See also* Michael A. DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F.L. REV. 234 (1967).

[21] *See* United States v. Whittier, 28 F. Cas. 591 (E.D. Mo. 1878) (No. 16,688). *See, generally* William E. Mikkell, *The Doctrine of Entrapment in Federal Courts*, 90 U. PA. L. REV. 245 (1942) (citing *Whittier* as the earliest case containing any form or discussion of an entrapment defense).

[22] *See* Love v. People, 43 N.E. 710, 713 (Ill. 1896) (reversing defendant's conviction on an entrapment defense and recognizing that "[t]o stimulate unlawful intentions, for the purpose and with the motive of bringing them to maturity, that they may be punished, is a dangerous practice.").

[23] *See* Saunders v. People, 38 Mich. 218, 222 (1878) (reversing conviction on evidentiary issue, but noting the dangers of entrapment in dicta: "Human nature is frail enough at best, and requires no encouragement in wrong-doing. If we cannot assist another and prevent him from violating the laws of the land, we at least should abstain from any

took notice of the dangers of police traps, which, in their view, implanted a criminal motive in the mind of the defendant.[26] Accordingly, these early articulations of the entrapment doctrine focused on the source of the defendant's criminal mindset, asking whether she intended to commit the crime prior to law enforcement's suggestion or inducement.[27] These cases provide early examples of the state common law shift from the English system to a uniquely American vision of entrapment. This shift happened slowly, with some states' courts clinging to the traditional notion that "[t]he courts do not look to see who held out the bait, but who took it" into the first decades of the 1900s.[28] Nevertheless, by the middle of the twentieth century, the entrapment defense had taken root in American jurisprudence through state common law.

Federal courts soon followed suit, with the first federal appeals court recognizing an entrapment defense in the 1915 case of *Woo Wai v. United States*.[29] In *Woo Wai*, a U.S. immigration agent suspected that the

active efforts in the way of leading him into temptation."). *See also* People v. McCord, 42 N.W. 1106, 1108 (Mich. 1889) (criticizing law enforcement overreaching in dicta, but reversing conviction on other grounds).

[24] *See* Commonwealth v. Bickings, 12 Pa. D. 206 (1903); *see also* Com. v. Wasson, 42 Pa. Super. 38, 57 (1910) (holding that entrapment did not apply to the defendant, but doing so "[w]ithout declaring that under no circumstances ought the courts to direct an acquittal of a crime clearly proved upon the ground that the accused was entrapped into it by immoral and illegal detective methods").

[25] *See* O'Brien v. State, 6 Tex. Ct. App. 665, 668 (1879).

[26] *See generally* Moore, *supra* note 1, at 1153 (citing early examples of state court decisions, in Texas and Michigan, which recognized entrapment).

[27] *See* O'Brien, 6 Tex. Ct. App. at 668 (noting that the crime is "not within the spirit of" the statutory offense when the police officer "originates the criminal intent [and then] apparently joins the defendant in the criminal act first suggested by the officer). *See also Bickings*, 12 Pa. D. at 207 (holding that "the defendant who is trapped must himself have previously intended the offense into which he is trapped" and stating that "[n]o state can safely adopt a policy by which crime is to be artificially propagated").

[28] People v. Mills, 70 N.E. 786 (N.Y. 1904). Certain state courts continued to reject entrapment defenses through the first few decades of the 20th Century. *Mills* dealt an especially eloquent blow to the common law movement towards an entrapment defense. However, even in *Mills*, the dissent expressed concern with his court's inflexible position: "The state has taken advantage of a man with an evil and corrupt disposition—a man who was willing to commit a crime—and through its officers has tempted and procured him to put six indictments in his pocket, and then complains that is peace has been disturbed and its dignity violated. The question arises here whether this farce constitutes a criminal defense." (O'Brien, J. dissenting). For other state cases in the 1900s rejecting entrapment see State v. Rippey, 122 S.E. 397 (S.C. 1924); Bauer v. Commonwealth, 115 S.E. 514 (Va. 1923); Davis v. State, 158 S.W. 288 (Tex. Crim. App. 1913); State v. Smith, 67 S.E. 508 (N.C. 1910).

[29] 223 F. 412 (9th Cir. 1915) (reversing a conviction when the trial court refused to allow a jury instruction on the entrapment defense, instead instructing the jury that even if they

defendant, a Chinese merchant in San Francisco named Woo Wai, possessed information about unlawful trafficking of Chinese women.[30] The agents thus planned to lure Woo Wai into committing an immigration violation and then use the threat of a criminal charge to obtain information from him about other human trafficking.[31] The immigration agent and his fellow law enforcement personnel "coaxed, persuaded, and urged" the defendant to help traffic Chinese aliens into the United States—all for the corollary purpose of obtaining intelligence about other criminal immigration activity.[32]

In a landmark decision, the Ninth Circuit overturned Woo Wai's conviction despite recognizing that "[s]ome courts have gone far in sustaining convictions of crimes induced by detectives and by state officers."[33] The court did not go so far as to condemn all police traps, but noted that, in cases where the court had declined to find entrapment, "it was the defendant who made the first suggestion looking toward the commission of the criminal act."[34] The court distinguished those legal police traps from the trap that ensnared Woo Wai; "In the case at bar, the suggestion of the criminal act came from the officers of the government. The whole scheme originated with them."[35] With no federal precedent, the court referenced state court decisions from Texas, Pennsylvania, Illinois and Michigan[36] to support its decision that "it is against public policy to sustain a conviction" like Woo Wai's, where the government placed criminal intent in the mind of an otherwise innocent defendant.[37]

Despite *Woo Wai* and other federal cases recognizing entrapment that followed,[38] the Supreme Court did not comment on the defense for

found facts suggesting entrapment "those facts would constitute no legal or valid defense in law"). Although *Woo Wai* represents the first circuit court decision recognizing entrapment, at least one other district court had previously articulated the defense. *See, e.g.*, U.S. v. Healy, 202 F. 349 (D. Mont. 1913) (vacating conviction based on entrapment and noting that "a conviction under such circumstances is unjust and contrary to public policy").

[30] *Woo Wai*, 223 F. at 413.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 415. *See generally* Bennet, *supra* note 15, at 832 (noting how entrapment gained "judicial recognition in the federal courts" with *Woo Wai*).

[34] *Woo Wai*, 223 F. at 415.

[35] *Id.*

[36] *See supra* notes 17-21 and accompanying text.

[37] *Id.*

[38] *See, e.g.*, U.S. v. Reisenweber, 288 F. 520, 525 (2d Cir. 1923) (affirming defendant's conviction and holding that the "defense of entrapment is without merit" if "the purpose of the entrapment is not to induce an innocent man to commit a crime, but to secure

several years. Justice Brandeis led the Court in first articulating concern about police overreaching in his dissent to *Casey v. United States*[39] in 1928. In *Casey*, the Court accepted certiorari on a sufficiency of evidence question—but Justice Brandeis strayed from that inquiry.[40]

> I have no occasion to consider that question, . . . [f]or, in my opinion, the prosecution must fail because officers of the government instigated the commission of the alleged crime. . . . The obstacle to the prosecution lies in the fact that the alleged crime was instigated by officers of the government; that the act for which the government seeks to punish the defendant is the fruit of their criminal conspiracy to induce its commission. The government may set decoys to entrap criminals. But *it may not provoke or create a crime and then punish the criminal, its creature*.[41]

Brandeis thus distinguished mere "criminals" from criminals who are "creature[s]" of law enforcement schemes.[42] In focusing on law enforcement behavior and the results of that behavior, Brandeis' dissent removed accountability from the individual defendant. This important foundation for the Court's entrapment jurisprudence, however, failed to delve into the crucial question: how can courts distinguish a mere criminal from one created by government provocation?

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evidence upon which a guilty man can be brought to justice"); Luterman v. U.S., 281 F. 374, 377 (3d Cir. 1922) (affirming defendant's conviction and finding no entrapment because the defendant was simply "lur[ed] . . . to disclose a crime which he ha[d] already committed" but noting, more generally, that "it is against public policy to sustain a conviction for an offense where officers of the law incited and induced its commission"); Butts v. U.S., 273 F. 35, 38 (8th Cir, 1921) (reversing conviction and noting that "when the accused . . . never conceived any intention of committing the offense prosecuted . . . the fact that the officers of the government incited and by persuasion and representation lured him to commit the offense charged, in order to entrap, arrest, and prosecute him therefor, is and out to be fatal to the prosecution, and to entitle the accused to a verdict of not guilty"); Voves v. U.S., 249 F. 191, 192 (7th Cir. 1918) ("We are strongly of the view that sound public policy estops the government from asserting that an at which involves no criminal intent was voluntarily done when it originated in and was caused by the government agents' deception."); Sam Yick v. U.S., 240 F. 60 (9th Cir. 1917) (reversing based on lower court's refusal to allow an entrapment jury instruction); *see also* Annotation, *Entrapment to Commit Crime with View to Punishment Therefor*, 86 A.L.R. 263 (1933).

[39] *See* Casey v. United States, 276 U.S. 413, 423 (1928).

[40] *Id*. at 422. (Brandeis, J. dissenting).

[41] *Id.* at 422-23 (Brandeis, J. dissenting) (emphasis added).

[42] *Id.*

B. The Supreme Court's Entrapment Jurisprudence

Following Brandeis' *Casey* dissent, five years passed before the Court fully outlined the contours of the entrapment doctrine. In 1932, in *Sorrells v. United States*,[43] the Court acknowledged that "the weight of authority in the lower federal courts is decidedly in favor of the view that in such case as the one before us, the defense of entrapment is available."[44] Faced with the "gross abuse of authority" recounted in the facts of *Sorrells*, the Court reversed the defendant's conviction and remanded with a new mandate: "entrapment is available" to the defendant.[45]

In *Sorrells*, all nine Justices concluded that the entrapment defense was available—but not without some disagreement as to the appropriate test.[46] Indeed, *Sorrells* marked a crucial bifurcation in entrapment jurisprudence.[47] The following section charts the developments of two schools of thought on entrapment: the subjective theory (based on the *Sorrells* majority opinion) and the objective theory (based on the *Sorrells* concurrence).

1. The Sorrells Subjective Test for Entrapment

In *Sorrells*, the Court found that a prohibition agent "lured [the] defendant, otherwise innocent" to commit the prohibition-era crime of possessing and selling whisky.[48] The agent did so by "repeated and persistent solicitation in which [the agent] succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in the arms in the World War."[49] Such evidence established

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[43] Sorrells v. United States, 287 U.S. 435 (1932).
[44] *Id.* at 443.
[45] *Id.* at 452.
[46] The threshold issue in *Sorrells* was whether or not the Court had the authority to permit an entrapment defense at all, since neither legislative nor constitutional directive had created it. Both the majority and the concurrence agreed that the Court did possess the requisite power; the majority grounded its authority in Congressional intent, deciding that "[w]e are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them." *Id.* at 448. *See generally* Ronald J. Allen et al., *Clarifying Entrapment*, 89 J. CRIM. L. & CRIMINOLOGY 407, 408 (1999).
[47] *See, generally* Moore, *supra* note 1, at 1155 (noting that the "entrapment defense has evolved along two purportedly distinct lines"). *See also* Bennet, *supra* note 15, at 833 (charting the "'subjective' versus 'objective' debate" that began with *Sorrells*).
[48] *Sorrells*, 287 U.S. at 212.
[49] *Sorrells*, 287 U.S. at 441.

inducement, but the majority noted that even where a government agent instigated the criminal act, the "controlling question" is one of predisposition: was the defendant "otherwise innocent"?[50]

Objecting to the entrapment defense, the prosecution stressed that such a predisposition inquiry would "lead to the introduction of issues of a collateral character related to the activities of the officials of the government and to the conduct and purpose of the defendant previous to the alleged offense."[51] Writing for the majority, Justice Hughes responded with this tempered warning to defendants invoking entrapment:

> The predisposition and criminal design of the defendant are relevant. But the issues raised and the evidence adduced must be pertinent to the controlling question of whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials. . . . If the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue.[52]

Therefore, a defendant who claims entrapment waives certain traditional evidentiary protections. Justice Hughes did offer limits to this breach of evidentiary safeguards, stressing that the issues must be "pertinent" to the predisposition question. Nonetheless, the Court in *Sorrells* delved into the defendant's reputation and his criminal record, weighing witness testimony of his "general reputation of a rum runner" against the fact that "there was no evidence that the defendant had ever possessed or sold any intoxicating liquor prior to the transaction in question."[53] On balance, the Court concluded that the defendant was not predisposed to possess and sell alcohol.[54]

Post *Sorrells*, the Court did not revisit entrapment until the 1958 case of *Sherman v. United States*.[55] In *Sherman*, the Court further defined entrapment's two key inquiries: inducement and predisposition.[56]

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[50] *Id.* at 451. *See generally* Jonathan C. Carlson, The Act Requirement and the Foundations of the Entrapment Defense, 73 VA. L. REV. 1011, 1014-15 (1987).
[51] *Sorrells*, 287 U.S. at 451.
[52] *Id.* (emphasis added).
[53] *Id.* at 441.
[54] *Id.*
[55] Sherman v. United States, 356 U.S. 369 (1958).
[56] Indeed, on *Sherman*'s first appeal, Judge Learned Hand, writing for the Second

Although the "function" of law enforcement manifestly excludes "the manufacturing of crime," the Court stressed that "manufacturing" means truly creating or implanting criminal intent—not merely facilitating a criminal act. And, in order to determine whether the criminal mindset was truly manufactured, courts may examine the defendant's "conduct and predisposition":

> [T]he fact that government agents "merely afford opportunities or facilities for the commission of the offense does not" constitute entrapment. Entrapment occurs only when the criminal conduct was "the product of the creative activity" of law-enforcement officials. To determine whether entrapment has been established, a *line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal*. The principles by which the courts are to make this determination were outlined in Sorrells. On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim on innocence.[57]

Here, Justice Warren draws a very different distinction than the one drawn by Justice Brandeis in *Casey*. Writing for the *Sherman* majority, Warren divided defendants into two categories: the "unwary innocent" versus the "unwary criminal."[58] Focusing entirely on the defendant, this analysis necessarily overlooks any critical evaluation of the government conduct.

Using this defendant-focused approach, the Court applied the "unwary innocent" versus "unwary criminal" distinction to the facts of *Sherman*.[59] The defendant, a recovering drug addict, sold narcotics to a government informer who befriended him at a doctor's office where both

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Circuit, stated the elements of a subjective test for entrapment: "[I]n [entrapment] cases two questions of fact arise: (1) did the agent induce the accused to commit the offence charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offence. On the first question the accused has the burden; on the second the prosecution has it." United States v. Sherman, 200 F.2d 880, 882-83 (2d Cir. 1952).

[57] *Sherman*, 356 U.S. at 372-73 (emphasis added) (quoting *Sorrells*) (internal citations omitted).

[58] *Id.*

[59] *Sherman*, 356 U.S. at 372-73

the defendant and the informant were seeking drug treatment.[60] The informant met the defendant at the doctor's office where "[f]rom mere greetings, conversation progressed to a discussion of mutual experiences and problems, including their attempts to overcome addiction to narcotics."[61] After forging this friendship, the informant asked the defendant to help him find drugs.[62] The informant explained that "he was not responding to treatment" and suggested that he was "suffering."[63] Finally, the defendant acquiesced, selling drugs to the informant on three separate occasions.[64]

At trial, the defendant invoked an entrapment defense.[65] Though the defendant had a criminal record, including two previous narcotics convictions, the Court found no evidence of predisposition holding that, "a nine-year-old sales conviction and a five-year-old possession conviction are insufficient to prove petitioner had a readiness to sell narcotics at the time [the informant] approached him, particularly when we must assume from the record he was trying to overcome the narcotics habit at the time."[66] *Sherman* thus established that prior crimes are not the sole measurement of predisposition.[67]

Through the latter part of the twentieth century, the Court adhered to this subjective entrapment analysis.[68] In *United States v. Russell*,[69] the Court affirmed the conviction of a man who had supplied methamphetamine to an undercover agent. In *Russell*, an undercover

[60] *Id.* at 371
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* at 371-72.
[66] *Id.* at 375.
[67] *Id.*
[68] The Court briefly discussed entrapment in *Lopez v. United States*, 373 U.S. 427 (1963), but that opinion did not advance the court's entrapment jurisprudence. *Lopez* involved the attempted bribery of an Internal Revenue Agent. At trial, the Lopez's attorney alluded to entrapment during his closing but did not explicitly request acquittal on that defense; nevertheless, the trial judge instructed the jury on entrapment. On appeal, the defendant challenged the trial court's jury charge on entrapment. The Court disagreed, calling the petitioner's claim of entrapment "belated," "insubstantial," and not "warrant[ing] reversal on this score." Further, the defendant could not demonstrate the requisite inducement. The Court thus left certain issues within entrapment undefined and untouched, admitting that "[t]he defense of entrapment, its meaning, purpose, and application, are problems that have sharply divided this Court on past occasions," but declining to address those "problems" because "under any approach" the petitioner's entrapment challenge would fail.
[69] United States v. Russell, 411 U.S. 423 (1973).

officer offered to supply (and eventually did supply) to the defendant an "essential ingredient which was difficult to obtain, though legally available."[70] Despite the weight of *Sorrells* and *Sherman*, the defendant conceded predisposition and urged the Court to adopt an alternative theory of entrapment.[71] He argued that entrapment applies "regardless of predisposition, whenever the government supplies contraband to defendants."[72] Further, because the "government investigator was so enmeshed in [the defendant's] criminal activity," prosecution would be "repugnant to the American criminal justice system."[73] Though the Court agreed that government conduct could, hypothetically, be "so outrageous" as to violate due process, it declined to see Russell's facts in that light. [74] In reaching such a conclusion, the Court reasoned that the chemical supplied by the undercover agent "is by itself a harmless substance" and "legal."[75] The Court thus held fast to *Sorrells* and its progeny:

> Nor does it seem particularly desirable for the law to grant complete immunity from prosecution to one who himself planned to commit a crime, and then committed it, simply because the government undercover agents subjected him to inducements which might have seduced a hypothetical individual who was not so predisposed. We are content to leave the matter where it was left by the Court in Sherman.[76]

Here, Justice Rehnquist's majority opinion suggests another measurement of predisposition: planning. Regardless of the type of inducement or "seduction," if the defendant "planned to commit a crime" then he shows the requisite predisposition.[77] Yet, it is unclear whether the opposite is true; Rehnquist does not address whether even a defendant who had not *planned* to commit a crime in advance could be deemed

[70] *Id*. at 423.
[71] *Id*. at 433 ("Respondent conceded in the Court of Appeals, as well he might, 'that he may have harbored a predisposition to commit the charged offenses.' Yet he argues that the jury's refusal to find entrapment under the charge submitted to it by the trial court should be overturned and the views of Justices Roberts and Frankfurter, in Sorrells and Sherman, respectively, which make the essential element of the defense turn on the type and degree of governmental conduct, be adopted as the law. We decline to overrule those cases.").
[72] *Id.* at 428.
[73] *Id.*
[74] *Id.* at 432.
[75] *Id.* at 431-32.
[76] *Id.* at 434.
[77] *Russell*, 411 U.S. at 434.

"predisposed."[78] Moreover, this analysis does not indicate what constitutes "planning," including the requisite time, notice, and preparation.

In the decades following *Russell*, the Court revisited the entrapment doctrine twice. In both cases the Court focused on predisposition or criminal intent, reconfirming the subjective theory. Like in *Russell*, the defendant in *Hampton v. United States*[79] admitted his own predisposition but argued, nonetheless, that the government's conduct violated due process.[80] As it had in *Russell*, the Court again reconfirmed its commitment to the subjective entrapment analysis, holding that "petitioner's conceded predisposition rendered [the entrapment] defense unavailable to him."[81] Then, in the 1988 case of *Matthews v. United States*, the Court held that a defendant may deny one or more elements of a crime and still assert entrapment—as long as "there is sufficient evidence from which a reasonable jury could find entrapment."[82]

The Court's most recent entrapment decision, *Jacobson v. United States*,[83] remains the controlling explanation of inducement and predisposition.[84] The defendant in *Jacobson* purchased child pornography; but, he did so only after two and a half years of receiving mailings from fictitious government-created organizations, which offered the defendant sexually explicit pictures of boys.[85] These fake publications urged the reader to take part in a fight for "sexual freedom" and freedom of speech.[86] The Court found that the mailing scheme "not only excited petitioner's interest in sexually explicit materials banned by law but also exerted substantial pressure on petitioner to obtain and read such materials as part of a fight against censorship and the infringement of individual rights."[87] These facts clearly established the first prong of entrapment, inducement.

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[78] *Id.*
[79] Hampton v. United States, 425 U.S. 484 (1976).
[80] *Id.*
[81] *Id.* at 490. However, *Hampton* still captured the same split that reappears throughout the Court's entrapment cases. Writing for the dissent, Justice Brennan supported an entrapment analysis that asks, fundamentally, whether "the methods employed on behalf of the Government to bring about conviction cannot be countenanced." See *infra* Part II.B.2 for further explanation of this consistent minority view of entrapment, the "objective theory."
[82] 485 U.S. 58, 62 (1988).
[83] 503 U.S. 540, 550 (1992).
[84] *See, e.g.*, Moore, *supra* note 1, at 1165.
[85] *Id.* at 540-41.
[86] *Id.* at 544.
[87] *Id.* at 552.

After finding inducement, the Court turned to the question of predisposition. Importantly, *Jacobson* adds a crucial temporal requirement to that inquiry: "the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act *prior* to first being approached by Government agents."[88] Ultimately, the Government could not point to criminal intent or mindset that existed entirely before and independently of the law enforcement's two and a half year mailing campaign.[89] Thus, the defendant was not predisposed.

Jacobson was the Court's final word on entrapment and its last explanation of inducement and predisposition—notions that are already difficult to grasp. The predisposition question creates particularly salient challenges. Some have argued that the predisposition question clashes with other criminal law principles. One commentator has noted that criminal law generally avoids placing weight on a defendant's criminal disposition.[90] Inchoate crimes like attempt and conspiracy, which require a finding of criminal intent, demonstrate the disinclination to predict liability based on a propensity for crime, alone.[91]

Opponents of the subjective analysis also stress that predisposition is an inherently circular inquiry. Some have labeled the legal idea a "fictional entity,"[92] "logically inconsistent,"[93] and "awkward."[94] Among its issues, the predisposition inquiry requires courts to sort through the blurred distinction between "proclivity for certain conduct and a willingness to engage in that conduct."[95] Further, the predisposition inquiry belies traditional culpability theory by insisting "when two individuals submit to identical temptation, the non-disposed actor is innocent, and the predisposed actor is guilty."[96] This distinction, in effect, holds actors of "demonstrably weaker resolve" to a higher standard of

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[88] *Id.* at 548-49 (emphasis added) (internal citation omitted).
[89] *See generally* Bennet, *supra* note 15, at 840-41.
[90] *See* Dillof, *supra* note 1, at 833.
[91] *See id.*
[92] *See generally* Allen, *supra* note 46, at 413. Allen notes that un-disposed people, the "few people who would not commit any criminal acts no matter what the provocation or enticement," do not exist because "everyone. . .has a price." In short, predisposition "cannot usefully distinguish anyone from anyone else."
[93] David J. Elbaz, *The Troubling Entrapment Defense: How About an Economic Approach*? 36 AM. CRIM. L. REV. 117, 129 (1999); *see also* Moore, *supra* note 1, at 1162-63 ("A logical flaw in the subjective approach appears in the inquiry into the defendant's predisposition.").
[94] *Id.*
[95] Moore, *supra* note 1, at 1163.
[96] Elbaz, *supra* note 93, at 130.

moral responsibility.[97]

Nevertheless, the inducement and predisposition analyses play out in varying ways, depending on the source and the context. On inducement, the Model Penal Code suggests that government "overreaching" occurs when law enforcement agents use "methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it."[98] But this explanation, which inherently relies on the idea of predisposition, offers little guidance. Lower courts thus attempt the highly factual distinction between proper and improper law enforcement efforts on a case-by-case basis. Courts have found improper inducement where, for example, government officials: used intimidation or threats,[99] relied on "forceful" or "dogged" solicitation,[100] played on a defendant's vulnerabilities (including, for example, common narcotics addictions[101] or common war experiences[102]), appealed to a defendant's family financial emergency,[103] or suggested that the undercover agent was "suicidal" or desperately needed money.[104]

On the difficult question of predisposition, different courts use different standards.[105] These standards include: an "existing course of criminal conduct similar to the crime for which the defendant is charged," an "already formed design" to commit the crime, or "willingness" and "ready response" to the inducement.[106] Often, the question of predisposition goes to a jury where jury instructions ask jurors to consider, for example, the defendant's "character and reputation" and his

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[97] *Id.*

[98] Model Penal Code § 2.13(b) (1962).

[99] *See, e.g.*, United States v. Becerra, 992 F.2d 960, 963 (9th Cir.1993); United States v. Groll, 992 F.2d 755, 759 (7th Cir.1993).

[100] *See* United States v. Rodriguez, 858 F.2d 809, 815 (1st Cir. 1988).

[101] *See Sherman*, 356 U.S. at 373.

[102] *See Sorrells*, 287 U.S. at 440-41

[103] *See* United States v. Kessee, 992 F.2d 1001, 1003 (9th Cir. 1993)

[104] *See* United States v. Sullivan, 919 F.2d 1403, 1419 & n.21 (10th Cir. 1990).

[105] *See generally* Bennet, *supra* note 15, at 844 (explaining that "the Supreme Court has not articulated an explicit list of factors to examine in determining the issue of a defendant's predisposition" so "numerous factors" are used).

[106] United States v. Brand, 467 F.3d 179 (2d Cir. 2006). The Ninth Circuit has articulated similar factors to determine predisposition. *See* United States v. Bonanno, 852 F.2d 434, 438 (9th Cir. 1988) ("This court has developed five factors to consider when determining whether a defendant was entrapped: (1) the defendant's character or reputation; (2) whether the government made the initial suggestion of criminal activity; (3) whether the defendant engaged in the activity for profit; (4) whether the defendant showed any reluctance; and (5) the nature of the government's inducement.").

"reluctance" (or lack thereof) to commit the crime.[107] Other courts have focused on the defendant's response to government inducement, noting that when a defendant "responds immediately and enthusiastically to commit a crime, without any period of government prodding, his criminal disposition is readily apparent."[108] Some courts have blended the inducement and predisposition questions, asking, "[w]as the defendant 'predisposed' to respond affirmatively to a *proper*, not to an *improper*, lure?"[109] Finally, courts also disagree on the proper temporal scope of predisposition evidence. While some circuits strictly apply *Jacobson*, looking only at the defendant's behavior prior to government intervention,[110] other courts have considered "events occurring after the two parties came into contact."[111]

Additionally, after *Jacobson*, circuits disagree about whether predisposition is synonymous with willingness.[112] In interpreting *Jacobson*, the Seventh Circuit, for example, has held that, for defendants who are not "traditional targets of stings," mere willingness to commit the crime is not enough.[113] The Seventh Circuit thus emphasized the

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[107] *See* United States v. Mitchell, 67 F.3d 1248, 1251 (6th Cir. 1995).

[108] United States v. Myers, 575 F.3d 801, 807-08 (8th Cir. 2009). *Accord* United States v. LaChapelle, 969 F.2d 632 (8th Cir. 1992) (holding that the defendant was independently predisposed to purchase child pornography because of his immediate acceptance of the government's offer); *see also* Brand, 467 F.3d at 192–93 (recognizing that a defendant's "ready response" to government inducement establishes predisposition); *cf.* United States v. Poehlman, 217 F.3d 692, 703 (9th Cir. 2000) (concluding that the defendant's eventual response did not establish predisposition because the government's sustained inducement may have made him willing to break the law).

[109] United States v. Gendron, 18 F.3d 955, 962 (1st Cir. 1994) (explaining that the predisposition inquiry requires the court to "abstract from—to assume away—the present circumstances *insofar as they reveal government overreaching*. That is to say, we should ask how the defendant likely would have reacted to an *ordinary* opportunity to commit the crime. By using the word 'ordinary' we mean an opportunity that lacked those special features of the government's conduct that made it an 'inducement' or an 'overreaching.'") (emphasis in original). *See also* Dillof, *supra* note 1, at 834 ("Although theoretically distinct, inquiries into the existence of inducement and predisposition in practice often overlap.").

[110] *See Poehlman*, 217 F.3d at 703.

[111] *See* United States v. Nguyen, 413 F.3d 1170 (10th Cir. 2005).

[112] *Compare* United States v. Ulloa, 882 F.2d 41, 44 (2d Cir. 1989) (holding that a defendant's "physical readiness" to commit a crime shows that he was not entrapped, and noting that there is little distinction between "readiness" and "willingness") *with* United States v. Hollingsworth, 27 F.3d 1196, 1198 (7th Cir. 1994) (noting that "the courts of appeals had been drifting towards" the idea that entrapment must fail where a defendant is willing or "psychologically prepared" to commit the crime, but holding that such a notion "cannot in our view be squared with *Jacobson*.").

[113] *Hollingsworth*, 27 F.3d at 1200.

"positional" nature of predisposition: "[a] public official is in a position to take bribes; a drug addict to deal drugs; a gun dealer to engage in illegal gun sales."[114] For those who are not positioned to break the law, on the other hand, the government must show more than mere physical willingness to prove predisposition. In that sense, the Seventh Circuit explained, a defendant was "predisposed" only if, absent government intervention, he had both physical willingness to commit the crime ("dispositional force") and he was in a position to commit the crime (the "positional" element).

> Predisposition is not a purely mental state, the state of being willing to swallow the government's bait. It has positional as well as dispositional force. . . . The defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so; only then does a sting or other arranged crime take a dangerous person out of circulation. . . . It is different when the defendant is not in a position without the government's help to become involved in illegal activity.[115]

The Seventh Circuit thus suggested that predisposition is a dynamic standard that changes depending on the position and status of the defendant. Under this analysis, non-traditional subjects of police schemes (citizens who are not public officials, drug dealers, or gun merchants) have to demonstrate "tendency" and "inclination" to show predisposition. But this nuanced interpretation does not govern in all circuits.

The range of predisposition standards demonstrates some of the challenges inherent to the subjective view. Accordingly, an outspoken minority of justices and states have identified these and other shortcomings in renouncing, time and time again, any entrapment theory that focuses on the defendant's subjective mindset. Indeed, the competing theory of entrapment, the objective theory, offers a test that seeks to avoid logical inconsistencies and focus on the integrity of law enforcement activity.[116] Majority votes in favor of the subjective theory of entrapment in *Jacobson* and the line of cases leading up to it did not silence Justices

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[114] *Id*.

[115] *Id. See generally* Moore, *supra* note 1, at 1165 (noting *Hollingsworth* and *Gendron* demonstrate the "amorphous nature of the subjective approach").

[116] *See generally* Moore, *supra* note 1, at 1166 (outlining the foundation of the objective approach).

Brandeis, Roberts, Frankfurter and others, who held fast to their view that the entrapment doctrine should focus on "government integrity instead of the mindset of the defendant.[117]

2. Roberts' Objective Test for Entrapment

In his *Casey* dissent, Brandeis laid the first foundation for a theory of entrapment that did not hinge on the defendant's mindset. Unlike the majority, Brandeis reframed entrapment as protecting not the defendant but the government from its own unbridled power, arguing that "[t]he prosecution should be stopped, not because some right of Casey's has been denied, but in order to protect the government. To protect it from illegal conduct of its officers. To preserve the purity of its courts."[118] This strict admonition to the government did not go unnoticed; five years later, Justice Owen Roberts, joined by Brandeis and Stone, breathed life back into Brandeis' original entrapment formulation from *Casey* in his concurring opinion in *Sorrells*.[119] Justice Roberts refocused the analysis away from the mindset of the defendant and onto the conduct of law-enforcement, declaring that, "society is at war with the criminal classes" and that the "efforts of these forces to obtain arrests and convictions have too often been marked by reprehensible methods."[120]

Roberts further contended that entrapment should be a question of law and not of fact.[121] This formulation of entrapment, Roberts wrote, accomplishes two goals. First, it upholds the true purpose of such a defense, which is to protect the integrity of the criminal law from overzealous law enforcement efforts. Second, it keeps that objective within the purview of the courts instead of in the hands of the jury.[122]

Though front-and-center to the majority's subjective interpretation, the predisposition or criminal intent of the defendant is conspicuously

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[117] *Casey*, 276 U.S. at 425 (Brandeis, J. dissenting).

[118] *Id.*

[119] *See* Bennett, *supra* note 15, at 835 ("The objective approach to entrapment, also known as the 'hypothetical approach', was first advanced by the three concurring Justices in *Sorrells*.").

[120] *Id.* at 453 (Roberts, J., concurring).

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

[122] *Id.* ("The doctrine rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter whom or at what stage of the proceedings the facts are brought to its attention . . . .the power and duty to act remain with the court and not with the jury.").

absent from Roberts' view of entrapment, noting "[w]hatever may be the demerits of the defendant or his previous infractions of the law these will not justify the instigation and creation of a new crime."[123] Roberts thus denounced any view of entrapment that "pivots conviction in such cases, not on the commission of the crime charged, but on the prior reputation or some former act or acts of the defendant not mentioned in the indictment."[124]

Justice Frankfurter echoed the same concerns in his *Sherman* concurrence, where he held that, "[a]lthough agreeing with the Court that the undisputed facts show entrapment as a matter of law, I reach this result by a route different from the Court's."[125] Indeed, Frankfurter, joined by three other justices, carried the torch ignited by Roberts and Brandeis before him. Frankfurter not only spoke to the "unrevealing" nature of the subjective test's predisposition inquiry, but he highlighted the "evident" dangers of using "reputation, criminal activities, and prior disposition" to prove a defendant's "general intention or predisposition."[126] Besides dangers of unnecessary prejudice against the defendant, the introduction of such evidence, Frankfurter wrote, subverts the purpose of the entrapment doctrine:

Furthermore, a test that looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment. No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society.[127]

The concurrence further outlined some guiding principles in determining when government traps become illegal entrapment—a decision that "must be picked out from case to case as new situations arise involving different crimes and new methods of detection."[128] Factors that are highly relevant to the legality of police conduct include the setting of inducement, the nature of the crime involved (including its level of secrecy and how difficult it is to detect), and "the manner in which the

[123] *Sorrells*, 287 U.S. at 459.
[124] *Id*.
[125] *Sherman*, 356 U.S. at 378 (Frankfurter, J. concurring). *See generally* Bennet, *supra* note 15, at 839.
[126] *Sherman*, 356 U.S. at 382.
[127] *Id.* at 382-83.
[128] *Id*. at 384.

particular criminal business is usually carried on."[129]

The minority objective view of entrapment reappeared in *Russell*. In his dissent, Justice Stewart reaffirmed the minority's commitment to an entrapment doctrine focused solely on "prohibit[ing] unlawful governmental activity in instigating crime."[130] Stewart further attacked the subjective theory's predisposition question, calling the inquiry "misleading, at best" and noting that every defendant claiming entrapment is "'predisposed' in the sense that he proved to be quite capable of committing the crime."[131] Given the fallacy of predisposition, Stewart contended, the entire subjective formulation of entrapment misses the point.

Though it remains the minority analysis, the objective theory highlights many of the shortcomings of the subjective approach and, in particular, of the inquiry into a defendant's predisposition. Currently this formulation of the defense asks "whether the government's conduct created a substantial risk that such an offense would be committed by 'persons other than those who are ready to commit it,' or, alternatively, by 'normally law-abiding' persons."[132]

C. Entrapment Under State Law

At the state level, the Supreme Court's own internal debates about entrapment have opened the door for a patchwork of state common law and statutory rules. All jurisdictions in the United States recognize entrapment in some form,[133] and most states have chosen to follow the subjective test.[134] However, nine states (Alaska, California, Hawaii, Iowa, Michigan, Oregon, Pennsylvania, Utah, and Vermont) have adopted a purely "objective" version of the defense.[135] Five states, Delaware,[136] New

[129] *Id.* at 384-85.
[130] *Russell*, 411 U.S. 423 (Stewart, J. dissenting).
[131] *Id.* at 442.
[132] Dillof, *supra* note 1, at 835 (quoting MODEL PENAL CODE § 2.13(1)(b)(1962) and Staff of National Commission on Reform of Federal Criminal Laws, 95th Cong., Final Report on Proposed New Federal Criminal Code § 702 (1971)).
[133] *See*, *e.g.*, Johnson & del Carmen, *supra* note 1 at 294; Moore, *supra* note 1, at 1152.
[134] *Id.*
[135] Five of the nine states that follow the objective form of the defense have codified it in statute: Grossman v. State, 457 P.2d 226 (Alaska 1969) (later codified in ALASKA STAT. § 11.81.450 (1989)); HAW. REV. STAT. § 702-237 (1994); OR. REV. STAT. § 161.275 (2006); 18 PA. CONS. STAT. ANN. § 313 (1983); UTAH CODE ANN. § 76-2-303 (1995); For the remaining four states, the objective theory of the defense appears in common law: California (People v. Barraza, 591 P.2d 947 (Cal. 1979)), Iowa (State v. Mullen, 216 N.W.2d 375 (Iowa 1974)), Michigan (People v. Turner, 210 N.W.2d 336 (Mich. 1973)),

Hampshire,[137] New Jersey,[138] New Mexico,[139] and Texas,[140] use a hybrid of the subjective and objective theories. Both the Model Penal Code and the Brown Commission's Proposed New Federal Criminal Code adhere to an objective view of the defense.[141] Further adding to the inconsistent application of entrapment across jurisdictions, about half of the states in the U.S. have codified the defense in statute; the rest have left entrapment to common law.[142] Some states, like Florida and New Jersey, draw on both statutory and constitutional bases for entrapment law.[143] Finally, states differ in their views of who holds the burden of proof once entrapment is asserted. On this question, states follow one of three ways. Some states require the defendant to carry the burden on all parts of the entrapment defense. Other states require that, once the defendant asserts the defense, the prosecution must disprove it. Finally, a small minority of states use a "shared method" that places the burden on both the prosecution and the defense.[144]

Clearly, the defense varies according to the jurisdiction (and according to the facts of a particular case). It would be impossible to

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Vermont (State v. Wilkins, 473 A.2d 295 (Vt. 1983)). *See generally* Johnson & del Carmen, *supra* note 1, Colquitt, *supra* note 12, at 1399.

[136] *See* DEL. CODE ANN. tit. 11, § 432 (2006); Harrison v. State, 442 A.2d 1377, 1385 (Del. 1982) ("[T]he test for entrapment under the statute requires us to focus on the predisposition of the defendant and on the conduct of the government agents.").

[137] *See* N.H. REV. STAT. ANN. § 626:5 (2006); State v Little, 435 A.2d 517 (1981).

[138] *See* N.J. REV. STAT. § 2C2-12 (2006); State v. Abdelnoor, 641 A.2d 1102, 1106 (N.J. 1994) ("The statutory entrapment defense is a combination of two separate entrapment defenses: subjective and objective entrapment.").

[139] *See* State v. Vallejos, 945 P.2d 957, 967 (N.M. 1997) ("[T]he defendant may assert either or both objective and subjective entrapment in defense of the charge").

[140] *See* TEX. PENAL CODE ANN. § 8.06 (West 1994); Barnes v. State, 70 S.W.3d 294, 305 (Tex. 2002) ("The test for entrapment under Texas Penal Code section 8.06 is a two-pronged subjective test comprised of subjective and objective elements.").

[141] MODEL PENAL CODE § 2.13 (2006). The Model Penal Code's description of the elements of an entrapment defense focuses on the conduct of the public law enforcement official, or an agent of such official, who "perpetrates an entrapment" if he "induces or encourages" an individual to break the law by either "(a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (b) employing methods of persuasion or inducement that create a substantial risk that such offense will be committed by persons other than those who are ready to commit it." *See, e.g.*, Dillof, *supra* note 1, at 835; Lombardo, *supra* note 15, at 232.

[142] Lombardo, *supra* note 15, at 231-32.

[143] *See* Colquitt, *supra* note 12, at 1390 (identifying ways to increase the "stability" of the entrapment doctrine and noting how this combination of both "fixing the entrapment defense in statutory form and/or grounding it with some constitutional support seem to enhance its legitimacy and increases acceptance of the doctrine.").

[144] *See* Johnson & del Carmen, *supra* note 1.

explore the way entrapment as used by an adolescent defendant would change in every situation and in every state. Still, an overview of some of the various configurations of the defense across different state jurisdictions will help inform this article's analysis in Part III.

1. State Entrapment: Subjective Theory

Early state court decisions like *O'Brien*, *Love*, *Wasson*, and *Saunders* laid the foundation for an analysis of entrapment that seeks to protect innocently minded citizens.[145] Like the federal majority view, these "subjective" states—through their courts or legislatures—focus on predisposition.[146] And, like the federal courts, state courts use a variety of measures to detect this elusive marking of prior criminal intent. Often, a defendant's prior criminal history serves as an important measure of predisposition.[147] Additionally, like the federal circuits, state courts also aim to determine whether the defendant was "ready and willing" to commit the criminal act.[148] For example, when a defendant initiated the criminal act (such as a drug deal)—and not the other way around—the defendant has demonstrated predisposition.[149] In drug cases where the defendant claims entrapment, courts have held that knowledge of the drug

[145] *See O'Brien*, 6 Tex. Ct. App. at 668. *See also* Lombardo, *supra* note 15, at 219-21.

[146] At least one commentator has recast this question of "predisposition" as a causation issue, noting that, in claiming a lack of predisposition, the defendant is actually just proving that he would not have committed the crime but for the police inducement. *See* Lombardo, *supra* note 15, at 235 n.102 (stating that a defendant has been entrapped under the law when he has "commit[ed] crimes which he otherwise would not have attempted"); *see also Sorrells*, 287 U.S. at 444-45. *But see* Louis M. Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111, 117-18 (noting that in order to prove predisposition, the prosecution need only demonstrate that, even absent government inducement, the defendant would have committed crimes *such as* the instant offense.).

[147] *See, e.g.*, Perez v. State, 856 So. 2d 1074, 1077 (Fla. Dist. Ct. App. 2003) (holding that, in a narcotics case where the defendant raises an entrapment defense, the state may properly "inquire into prior convictions tending to show that Perez was predisposed to illegally sell drugs."); Davis v. State, 804 So. 2d 400, 404 (Fla. Dist. Ct. App. 2001) ("There are several ways for the state to prove predisposition. One way is to present evidence of a prior criminal history."); Sampson v. State, 645 So. 2d 1005, 1007 (Fla. Dist. Ct. App. 1994) ("When a defendant claims entrapment, evidence of prior crimes is admissible because it is relevant to rebut the defense by showing his predisposition to commit crimes of the type charged.").

[148] Davis v. State, 937 So. 2d 300, 303-04 (Fla. Dist. Ct. App. 2006) (finding that the defendant, who claimed entrapment, was "[r]eady and willing to sell the crack cocaine at that opportune moment").

[149] *See id*. In *Davis*, the court noted that because the defendant first approached the informant, who "expressed some reluctance" at purchasing the drugs the defendant was offering.

trade and familiarity with the usual details of drug transactions are relevant to the predisposition determination.[150]

Clearly, different jurisdictions employ different measurements, but all analyses are highly fact-specific. Consider, for example, the Florida case of *Fruetel v. State*,[151] where a female defendant who bought cocaine from an undercover agent claimed entrapment. In *Fruetel*, the court (following the subjective theory of entrapment) had to decide which evidence suggested predisposition and which did not.[152] To that end, the fact that the defendant "cut into one of the cocaine bags and tested the substance in such a way as to indicate her familiarity with the drug" was not sufficient to demonstrate predisposition prior to and independent of government acts.[153] However, other facts about the transaction, including the defendant's use of terms "in the parlance of the drug trade," the fact that the defendant carried "additional sums of money" typical of drug dealers, and the fact that the defendant had in her possession a book "which glamorized the experiences of a drug dealer" all did tend to suggest her predisposition or criminal intention.[154]

In short, state versions of subjective entrapment aim to carry out the original goals of the defense: to protect innocent citizens who would not have committed a crime but for law enforcement implanting criminal intent. To accomplish this goal, though, courts (or a jury) have great discretion to determine whether the defendant was "predisposed" to commit the crime. Once predisposition is at issue, normal evidentiary rules no longer apply and the fact-finder is free to consider a wide range of evidence including criminal history and details about the criminal incident.

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[150] *See, e.g.*, Nadeau v. State, 683 So. 2d 504, 507 (Fla. Dist. Ct. App. 1995) (holding that the government failed to meet its burden of showing predisposition because, in part, law enforcement "conceded that [the defendant] had little knowledge of the drug trade.").

[151] Fruetal v. State, 638 So. 2d 966 (Fla. Dist. Ct. App. 1994).

[152] *Id*. at 969; *see also* Nadeau v. State, 683 So. 2d 504, 507 (Fla. Dist. Ct. App. 1995) (holding that the government failed to meet its burden of showing predisposition because, in part, the defendant was ignorant about the drug trade).

[153] *Fruetal*, 638 So. 2d. at 969; *see also* Nadeau v. State, 683 So. 2d 504, 507 (Fla. Dist. Ct. App. 1995) (holding that the government failed to meet its burden of showing predisposition because, in part, the defendant was ignorant about the drug trade).

[154] *Fruetal*, 638 So. 2d. at 969-70. Other courts have looked to whether the defendant possessed enough money to consummate a drug deal in determining predisposition to commit a drug crime; *see, e.g.*, *Nadeau*, 683 So. 2d at 507 (holding that the fact that the defendant "had no money to consummate the deal" suggested a lack of predisposition).

2. State Entrapment: Objective Theory

Nine states subscribe to a purely objective test.[155] Through statute or common law, those jurisdictions focus on the nature of the government conduct or inducement. They do not address the mindset or predisposition of the defendant. States that have adopted this formulation of the doctrine note that it best addresses the purpose of the entrapment defense: to deter egregious and lawless government conduct.[156]

In states that ascribe to this interpretation, courts have held police conduct improper where the government agent offered an excessive amount of money, forged a close personal relationship with the defendant, preyed on a defendant's known weaknesses and vulnerabilities, or used a sexual relationship to pressure the defendant.[157] California often serves as a prominent example of a jurisdiction that has implemented a common law objective version of the defense.[158] Under this theory of the defense, California courts weigh certain factors in determining the legality of the law enforcement scheme; these considerations mirror the ones used by federal courts to delineate between proper and improper inducement. For example, California courts have considered the type of motivation

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[155] *See* Johnson & del Carmen, *supra* note 1.

[156] *Id.*

[157] *See generally* Dillof, *supra* note 1, at 836, citing a string of state court cases: Grossman v. State, 457 P.2d 226, 230 (Alaska 1969) ("[E]xtreme pleas of desperate illness, appeals based primarily on sympathy, pity, or closer personal friendship, and offers of inordinate sums of money" all constitute improper government intervention); Dial v. Florida, 799 So. 2d 407, 409-410 (Fla. Dist. Ct. App. 2001) (declining to apply statutory subjective entrapment because government conduct in that case, including "targeting an innocent person under [the agent's] supervision and exploiting her weaknesses" offended due process and constituted entrapment as a matter of law); People v. Wisneski, 292 N.W. 2d 196, 199 (Mich. Ct. App. 1980) ("Police encouragement of an agent's use of sex to induce one who is unwilling and unready to commit a crime constitutes entrapment").

[158] In the principal case discussing entrapment, *People v. Barraza*, 23 Cal. 3d 675, 689-90 (1979), the California Supreme Court held that, for purpose of analyzing whether there was entrapment, all defendants should be assumed to be "normally law-abiding person[s]." "[T]he proper test of entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? For the purposes of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect, for example, a decoy program is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime."

implanted in the accused.[159] Motivating a suspect by "friendship or sympathy" is improper, while tapping into a more typical criminal purpose, such as "desire for personal gain" may be legal.[160] California courts may also consider whether "affirmative police conduct" made the crime "unusually attractive to a normally law-abiding person."[161] This could include "a guarantee that the act is not illegal or the offense will go undetected, an offer of exorbitant consideration, or any similar enticement."[162] States like California who adhere to the objective interpretation of entrapment echo the concerns and justifications of Brandeis, Roberts, Frankfurter, Stewart, and others, who defended a government-centered approach.[163]

Despite this fracturing of the entrapment doctrine, none of the multiple permutations of the defense account for the defendant's age. That blindness to the defendant's age is outdated, considering the Court's shifting views on adolescence. Recent legal developments that recognize certain characteristics of youth demonstrate how such a defense like entrapment, which serves to protect innocent citizens and to restrain law enforcement from manufacturing crime, can no longer ignore a defendant's youth status. Part II thus turns to significant constitutional, common law, and statutory principles that adjust to fit the unique vulnerabilities of juvenile defendants.

II. Considering Age: Constitutional, Statutory, and Common Law Principles that Adjust in the Youth Context

Adolescents have long occupied a unique space in the law. Society recognizes that adolescent offenders lack the experience, judgment, and maturity of adult defendants. This recognition of inherent mental and physiological differences between adults and youth appears in examples like age requirements for driving, voting, drinking, signing contracts, and other privileges.[164] Tort law also lays out special considerations for youth;

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[159] *Barraza*, 23 Cal. 3d at 689-90.
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.* at 687 ("No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society. . . . Permissible police activity does not vary according to the particular defendant concerned . . . ." (quoting Sherman v. United States, 356 U.S. 369, 382-83 (1958))).
[164] *See generally* Elizabeth S. Scott & Laurence Steinberg, Rethinking Juvenile Justice 62-67 (2008).

the standard of care for children is "a reasonable person of like age, intelligence, and experience under like circumstances."[165] Indeed the very existence of a juvenile justice system separate and apart from the adult justice system evinces this recognition.

In the past decade, the Court has handed down several key decisions concerning minors' unique constitutional considerations. These holdings and analyses have solidified the law's changing treatment of youth offenders, as demonstrated by Eighth Amendment cases (*Roper v. Simmons*,[166] *Graham v. Florida*,[167] *Miller v. Alabama*[168]) and Fifth Amendment cases (*J.D.B. v. North Carolina*[169]).[170] Through these decisions, the Court has emphasized that there are "fundamental differences between juvenile and adult minds"[171]—a determination that is somehow both obvious and revelatory at the same time. Relying on social science research in *Roper*,[172] augmented by cognitive brain science in *Graham*,[173] the Court declared that "transient rashness, proclivity for risk, and inability to assess consequences . . . lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed."[174]

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[165] RESTATEMENT (SECOND) OF TORTS § 283A cmt. A (1965). See generally Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts A Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can A More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501, 506-07 (2012).

[166] Roper v. Simmons, 543 U.S. 551 (2005).

[167] Graham v. Florida, 130 S. Ct. 2011 (2010).

[168] Miller v. Alabama, 132 S. Ct. 2455 (2012).

[169] J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011).

[170] *See generally* Levick & Tierney, *supra* note 165, at 503 ("[T]he Court's recognition of a reasonable *juvenile* standard for the purposes of the Miranda custody analysis [in *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011)] augurs a broad shift in the analysis of a juvenile's guilt, criminal responsibility, and conduct across a wide spectrum of American criminal law.").

[171] *See Graham*, 130 S. Ct. at 2026 (citing Brief for the American Medical Ass'n et. al. as Amicus Curiae in Support of Neither Party, Graham v. Florida 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621), 2009 WL 2247127, at 16-24; Brief for the American Psychological Ass'n et. al. as Amicus Curiae Supporting Petitioners, Graham v. Florida 130 S. Ct. 2011 (2010) (Nos. 08-7142, 087621), 2009 WL 2236778, at 22-27).

[172] Roper v. Simmons, 543 U.S. 551, 570 (2005) ("Only a relatively small proportion of adolescents' who engage in illegal activity develop entrenched patterns of problem behavior.").

[173] *Graham*, 130 S. Ct. at 2026 (recognizing that "parts of the brain involved in behavior continue to mature through late adolescence").

[174] Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012) (remarking on the findings from *Roper* and *Graham* that paved the way for the *Miller* decision).

These judicially sanctioned observations about youth show the need to reconsider other areas of law that treat adults and adolescents equally. As two youth law commentators have noted, "[t]he Supreme Court's broad recognition that youth are different precludes uniform treatment of juvenile and adult defendants on issues where youths' understanding, judgment, or mental state reflects their developmental status and distinguishes them from adults in legally and constitutionally relevant ways."[175]

A. Youth and the Eighth Amendment

After *Roper*, *Graham* and *Miller*, any Eighth Amendment cruel and unusual punishment analysis where the criminal defendant is an adolescent must take into account the offender's age. *Miller*, the court's most recent of these landmark decisions about youth law, recognized the "foundational principle" laid out in *Graham* and *Roper* that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."[176]

In *Roper*, the defendant committed a heinous and premeditated murder when he was seventeen years old.[177] At eighteen, he was convicted and sentenced to execution.[178] On appeal, the Missouri Supreme Court set aside the death sentence, holding that the Eighth Amendment (applying to states through the Fourteenth Amendment) prohibits the execution of a juvenile who was under 18 when the crime was committed.[179]

The Court relied heavily on developmental psychology[180] when it

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[175] *See* Levick & Tierney, *supra* note 165, at 527. Levick and Tierney assert that the "reasonable juvenile standard" adopted in *J.D.B.* "has the potential to alter long-standing views about juvenile's criminal responsibility and guilt." *Id.* at 517. These include duress defenses, justified use of force defense, provocation defense, and negligent homicide. Conspicuously absent from this list is the entrapment defense, which, I argue *supra* in Part I, is likely to become more and more relevant to juvenile criminal defenses as undercover police tactics in schools increase.

[176] *Miller*, 132 S. Ct. at 2466 ("[m]ost fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole.").

[177] *Roper*, 543 U.S. at 559.

[178] *Id.*

[179] *Id.*

[180] The Court adopted much of the developmental research provided by the American Psychological Association and others in their Brief as Amici Curiae Supporting Respondent. See *infra* for more in-depth discussion of the impact of behavioral and cognitive scientific studies on the law's treatment of juveniles.

outlined "three general differences between juveniles" and adults.[181] First, adolescents are reckless and immature, characteristics that result in "impetuous and ill-considered actions and decisions."[182] On this point, the Court recognized "a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young."[183] Second, the Court underscored the group-think mentality of youth: "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[184] Finally, the Court recognized that, unlike an adult, adolescent identity and character are malleable: "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[185] Taken together, these key differences between youth and adults require that youth offenders are categorically less culpable than adult violators:

> [Adolescents'] own vulnerability and comparative lack of control over their immediate surroundings means juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment . . . . From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.[186]

This theme of diminished culpability of youth reappears in several decisions following *Roper*. In *Graham*, the Court further extended special Eighth Amendment protections for youth, holding that sentences of life in prison without parole for non-homicide crimes is unconstitutional as applied to child offenders.[187]

In *Graham*, the defendant pled guilty to armed burglary with assault or battery and attempted armed-robbery when he was sixteen, and received two concurrent three-year terms of probation.[188] While on probation for those charges, Graham was arrested again and charged with

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[181] *Roper*, 543 U.S. at 553. In *Roper*, the Court drew the line between juvenile and adult at eighteen; therefore, in the context of the *Roper* decision, "juvenile" means an adolescent under the age of 18.
[182] *Id*. at 569.
[183] *Id.*
[184] *Id.*
[185] *Id.* at 570.
[186] *Id.*
[187] Graham v. Florida, 130 S.Ct. 2011, 2018 (2010).
[188] *Id.*

home invasion robbery, possessing a firearm, and other probation violations.[189] The trial court sentenced Graham to the maximum sentence authorized by law on each charge, which resulted in a sentence of life imprisonment for the armed burglary and fifteen years for the attempted armed robbery.[190] In Florida, where there is no parole system, Graham's life sentence meant (barring executive clemency) life imprisonment without the possibility of parole.[191] Though Graham was seventeen at the time of his last arrest, he was nineteen when he was sentenced.[192]

Holding that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide," the Court in *Graham* affirmed and expanded on the unique constitutional protections it laid out for youth in *Roper*.[193] Recognizing that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," the Court restated its observations about youths' diminished culpability, malleable character, and expanded possibilities for rehabilitation.[194] The Court further noted that traditional penological justifications for life imprisonment without the possibility of parole (retribution, deterrence) do not apply to adolescents *Roper* noted:

> the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence. [Because juveniles'] lack of maturity and underdeveloped sense of responsibility . . . . often result in impetuous and ill-considered actions and decisions, they are less likely to take a possible punishment into consideration when making decisions.[195]

Miller represents the Court's most recent extension of unique Eighth Amendment considerations for youth. In that case, the two youth petitioners were both fourteen at the time of their respective offenses. Both faced sentences of life without parole.[196] One petitioner, Jackson, faced such a sentence after a jury convicted him of murder and aggravated

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[189] *Graham*, 130 S.Ct. at 2018.
[190] *Id.* at 2020.
[191] *Id.*; *see also* FLA. STAT. § 921.002(1)(e) (2003) (abolishing parole system in Florida).
[192] *Graham*, 130 S. Ct. at 2020 (citing Graham v. Florida, 982 So. 2d 43, 52 (2008)).
[193] *Graham*, 130 S.Ct. at 2034.
[194] *Id.* at 2026. For further discussion of brain psychology see *infra* Part II.D.
[195] *Graham*, 130 S.Ct. at 2028-29. (citations omitted) (quoting Roper v. Simmons, 543 U.S. 511, 571 (2005); Johnson v. Texas, 509 U.S. 350, 367 (1993)).
[196] Miller v. Alabama, 132 S. Ct. 2455, 2457 (2012).

robbery.[197] The second petitioner, Miller, faced the same sentence after a jury found him guilty of murder in the course of arson.[198] Both juveniles challenged their mandatory life sentences with no possibility of parole as cruel and unusual punishment under the Eighth Amendment.[199]

Once again, the Court took notice of the "mitigating qualities of youth" and declared "youth is more than a chronological fact."[200] Extending the Eighth Amendment's prohibition on mandatory life without parole sentences for *all* youth offenders (not just non-homicide offenders, as established in *Graham*), the Court recounted all of the special acknowledgements—the "hallmark features"—of youth:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstance of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.[201]

The Court thus recognized certain characteristics of youth, including immaturity and risk-taking, as grounded in science and, after *Roper*, *Graham*, and *Miller*, codified in law. Further, the Court affirmed its trust in developmental psychology and neuroscience research that provided the biological evidence of these "hallmark features" of youth.[202] Aside from the internal characteristics of teenagers, the Court also highlighted the effects of external pressures, from which, as the Court noted, a youth offender "cannot usually extricate himself."[203]

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[197] *Miller*, 132 S. Ct. at 2457.
[198] *Id.*
[199] *Id.*
[200] *Id.* at 2467 (quoting Johnson v. Texas 509 U.S. 350, 370 (1993) and Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).
[201] *Id.* at 2468.
[202] *See id.* at 2465 n. 5 ("The evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger."); *infra* Part II.D for more discussion of the implications of cognitive and scientific research on these findings about youth and the criminal law.
[203] *Id.* at 2468.

B. Youth and the Fifth Amendment

The Fifth Amendment right against self-incrimination also looks different in the context of youth defendants. In *J.D.B.*, the Court redefined the "custodial interrogation" analysis as applied to youth, strengthening the "set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination," mandated by *Miranda*.[204] The determination of whether an individual was "in custody" for *Miranda* purposes involves two inquiries.[205] First, courts look to the circumstances surrounding the interrogation.[206] Next, courts ask, given those circumstances, would a reasonable person have felt that he or she was free to leave the interrogation?[207] Before *J.D.B.*, this analysis governed all police decisions whether to read a detainee his or her *Miranda* warnings—regardless of the age of the accused.

But *J.D.B.*, like *Miller* and *Graham* before it, marked a substantial shift in the Court's view of the adolescent mindset and the ways that different pressures, inducements, and coercive forces affect teenagers.[208] "[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go."[209] This recognition, the Court continued, is consistent with "commonsense conclusions about [adolescent] behavior and perceptions," which are reflected in both common law[210] and statutory principles.[211]

Even though it revisited the second prong of the *Miranda* custody analysis, the Court insisted that *J.D.B.* left the test's objective nature untarnished. The traditional (pre-*J.D.B.*) *Miranda* custody analysis benefits law enforcement, who do not have to "anticipat[e] the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind."[212] The test is thus designed to allow police officers to make "in-the-moment judgment

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[204] J.D.B. v. North Carolina, 131 S. Ct. 2394, 2401 (2011).
[205] *Id.*
[206] *Id.*
[207] *Id.* at 2402 (citing Thompson v. Keohane, 516 U.S. 99, 112 (1995)).
[208] *Id.* at 2403.
[209] *Id.*
[210] The Court cites its own long history of observing the particular vulnerabilities of youth: "Time and again, this Court has drawn these commonsense conclusions for itself." *Id.* at 2403.
[211] For a discussion of other legal and statutory principles that reflect the assumption that adolescents reason differently and require heightened protections, see *infra*, Part II.C.
[212] *J.D.B.*, 131 S. Ct. at 2402.

as to when to administer *Miranda* warnings."[213] Characteristics that are unique to the psyche of the suspect would, of course, destroy the objectivity of the *Miranda* analysis. But age is inherently different. Put bluntly, age is a characteristic that carries inevitable and predictable consequences, including susceptibility to outside influences and pressures.[214] Accordingly, the Court reasoned that *J.D.B.*'s ruling would not hinder practical, on-the-job considerations for law enforcement.[215]

Further, the Court describes how not considering the accused's age would render, in certain cases, the *Miranda* custody analysis "nonsensical."

> [W]ere the court precluded from taking J.D.B's youth into account, it would be forced to evaluate the circumstances present here through the eyes of a reasonable person of average years. In other words, how would a reasonable adult understand his situation, after being removed from a seventh-grade social studies class by a uniformed school resource officer; being encouraged by his assistant principal to 'do the right thing'; and being warned by a police investigator of the prospect of juvenile detention and separation from his guardian and primary caretaker? To describe such an inquiry is to demonstrate its absurdity.[216]

Such circumstances (being removed from class, encouragement from the assistant principle, the looming prospect of separation from a primary caretaker) represent various coercive forces or forms of inducement. In *J.D.B.*, the Court thus highlighted the "absurdity" of using a reasonable *adult* perspective to measure the power and effect of certain coercive forces on a teenager.

After *J.D.B.*, both courts and government agents must consider the objective characteristics of youth, including heightened susceptibility to outside influences and poor decision-making. Courts can no longer apply the same measurements of inducement and coercion to adults and children, at least when determining whether a suspect was in custody for

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[213] *J.D.B.*, 131 S. Ct. at 2402.

[214] *Id.* at 2404-05 (citing United States v. Eddings, 455 U.S. 115 (1982) and Roper v. Simmons, 543 U.S. 551, 569, (2005)) ("Precisely because childhood yields objective conclusions like those we have drawn ourselves—among others, that children are 'most susceptible to influence,' and 'outside pressures"—considering age in the custody analysis in no way involves a determination of how youth 'subjectively affect[s] the mindset of any particular child.")

[215] *Id.*

[216] *Id.* at 2405.

purposes of *Miranda* warnings. And, given the prophylactic nature of the *Miranda* analysis, law enforcement must also take into account the suspect's age when making on-the-job decisions about when to administer *Miranda* warnings. According to the Court, these new procedural safeguards in both the interrogation room and the courthouse will not take much effort—just common sense: "in short, officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age. They simply need common sense to know that a 7-year-old is not a 13-year-old and neither is an adult."[217]

C. Statutory and Common Law Principles

In *J.D.B.*, the Court cited long-standing "legal disqualifications placed on children as a class" en route to its holding about the *Miranda* custodial announcement.[218] Indeed, many of these extra statutory and common law protections concerning youth stem from the law's long-held idea that minors are more susceptible to inducements and coercion.

Among the long-held common law principles that restrict minors, as a class, the Court cited contract law,[219] property law,[220] and marriage law.[221] Further, state statutory regimes often include a litany of special protections for minors. Several states have enacted local juvenile curfew ordinances; while these are created at the municipal or local level, state entities have also publicly committed themselves to this agenda of protecting of minors through such curfews.[222] In Florida, for example, the state has backed these ordinances, citing such goals as "protect[ing] minors from harm and victimization . . . promot[ing] the safety and well-

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[217] *Id.* at 2407.

[218] *Id.* at 2397.

[219] *See, e.g.*, 1 E. Allan Farnsworth, FARNSWORTH ON CONTRACTS § 4.4, 379 (1990) (citing the "prevailing view that a minor's contract is 'voidable' at the instance of the minor" 8 W. Holdsworth, HISTORY OF ENGLISH LAW 51); 1 WILLIAM BLACKSTONE, COMMENTARIES *465 (explaining that "an infant can neither . . . do any legal act, nor make a deed, nor indeed any manner of contract, that will bind him").

[220] *See, e.g.*, 1 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 8.1, p. 663 (rev.2d. ed. 2005) (noting that minors are "considered incapable of property management"(footnote omitted)); 1 WILLIAM BLACKSTONE, COMMENTARIES *465 (citing the general proposition that "an infant can neither aliene his lands . . .").

[221] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 569 (2005) ("In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from . . . marrying without parental consent.").

[222] *See, e.g.*, FLA. STAT. ANN. § 877.20 (providing "counties and municipalities with the option of adopting a local juvenile curfew ordinance" and declaring state legislative intent for localities to do so).

being of minors in this state . . . reduc[ing] the crime and violence committed by minors in this state."[223] Curfew rules thus save teenagers from their own poor choices, keeping them at home after curfew hours to prevent them from breaking the law. Therefore, states like Florida seek to protect youth not only from outside predators, but also from themselves.

States have also enacted laws designed to protect minors from harmful materials or items—all with the underlying suggestion that adolescents lack the maturity and strength of will to be exposed to certain temptations, inducements, or dangers. In certain states, for example, it is a crime for retailers to knowingly display "any book, magazine, or other printed material, the cover of which depicts material which is harmful to minors" in a way that places the harmful material in "convenient reach of" minors who "may frequent" that retail establishment.[224] Similarly, many states criminalize adults who knowingly "exhibit for monetary consideration to a minor or knowingly sell or rent" a video (or admission ticket to a film) that depicts "in whole or in part" nudity, sexual conduct, and other images that are "harmful to minors."[225] Minors must be protected not only from harmful images and video footage, but also from harmful items. At a basic level, this includes common prohibitions on minors owning firearms.[226] It also includes regulation of minors in possession of BB guns or other electric weapons or devices.[227]

These common law and statutory principles collectively demonstrate society's view that youth are more susceptible to both external and internal pressures. These regulations and laws show that society has long understood and acknowledged that adolescents, as a class, are less capable of making reasoned and mature decisions. They prove that society views all youth as easily tempted, induced, and coerced.

D. Behavioral and Cognitive Principles

The hallmarks of adolescence, now woven into the Court's juvenile jurisprudence, derive not only from personal experiences and commonsense observations about youth. They are also grounded in science. In all three landmark cases concerning youth and the Eighth

[223] FLA. STAT. ANN. § 877.20 (2013).
[224] *See* FLA. STAT. ANN. § 847.0125(2)(a) (2010).
[225] *See* FLA. STAT. ANN. § 847.013(3)(a) (2008).
[226] *See, e.g.*, FLA. STAT. ANN. § 790.22 (3) (2010).
[227] *See, e.g.*, FLA. STAT. ANN. § 790.22 (1)-(2) (2010) (requiring adult supervision for minors using "BB guns, air or gas-operated guns, or electric weapons or devices" and criminalizing any adult "responsible for the welfare of any child" who allows that child to use or possess one of the described weapons without supervision).

Amendment (*Roper*, *Graham*, and *Miller*), the Court took notice of social, behavioral, and neuropsychological research about the adolescent brain.[228] Amicus briefs filed by the American Psychological Association and the Missouri Psychological Association (in *Roper*), American Psychological Association, National Association of Social Workers, and Mental Health America (in *Graham*), and, most recently, the American Medical Association and the American Academy of Child and Adolescent Psychiatry (in *Miller*) chart the newest developments in the study of teenage brains.[229] These studies define adolescence as "the bridge between childhood and adulthood" that begins around age ten or eleven and continues until age eighteen or nineteen.[230] "Adolescence is a unique stage of human development, bearing distinctive psychosocial and psychological traits that shape judgment and behavior. These developmental differences adversely affect the reliability of determinations about the character and long-term behavior of adolescents, including sixteen- and seventeen- year olds."[231]

The Court's observations about youth are based on social behavioral studies[232] as well as neuropsychological/cognitive science.[233] Collectively, these studies reveal that, during adolescence, the brain is still developing and maturing.[234] Furthermore, the sections of a teenage brain change and mature at different paces, resulting in uneven functioning (with certain parts of the brain functioning at an adult level while other

[228] *Miller*, 132 S. Ct. 2455, *Graham*, 130 S. Ct. 2011, *Roper*, 543 U.S. at 570.

[229] Brief for the American Psychological Ass'n, and the Missouri Psychological Ass'n as Amici Curiae Supporting Respondent, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1636447, at 4.

[230] *Id.*

[231] *Id.*

[232] In *Roper* the court based much of its reasoning on social behavioral science about children. *Roper*, 543 U.S. 551.

[233] In *Miller*, the court expanded its recognition of the biological and scientific studies concerning adolescents. In that opinion, the court incorporated cognitive research about the adolescent brain. *Miller*, 132 S. Ct. 2455.

[234] *See Less Guilty by Reason of Adolescence*, Issue Brief 3 (MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, Philadelphia, PA), at 2, *available at* http://www.adjj.org/downloads/6093issue_brief_3.pdf (explaining that, "although the intellectual abilities" of a teenager "stop maturing around age 16, psychological capability continues to develop well into early adulthood"); *see generally* David Dobbs, *Beautiful Brains*, NATIONAL GEOGRAPHIC, Oct. 2011, at 36-59, *available at* http://ngm.nationalgeographic.com/2011/10/teenage-brains/dobbs-text/1 (charting general developments and findings of research on the adolescent brain).

parts lagging behind, developmentally).[235] These scientific conclusions do not absolve teenagers of culpability, or make children less accountable for their actions or decisions. However, they do provide important biological and physiological context for teenagers' choices. And, since the Court has recognized the veracity of these studies, courts must now consider this "context"—the vulnerabilities of the adolescent brain—when making legal decisions concerning children, at least in the Eighth Amendment and Fifth Amendment contexts.

First, social and behavioral research suggests several hallmarks of adolescent behavior. From a behavioral standpoint, children are more inclined to take risks, because "adolescents, as a group, often value impulsivity, fun-seeking, and peer approval more than adults do."[236] Behavioral studies indicate that adolescents are "less likely to consider alternative courses of action, understand the perspective of others, or restrain impulses."[237] And, for teenagers, the presence of peers plays an important role in their already impaired decision-making abilities.[238]

These behavioral observations are rooted in the teenage brain's maturation process. In particular, the brain's frontal lobes and the prefrontal cortex, areas associated with decision-making, evaluating future consequences, and moral judgment, are some of the last regions of the brain to mature.[239] Such cognitive regions develop "through adolescence and into adulthood."[240] Research now demonstrates that, before these developmental processes kick in, children are less in control of their

[235] *See Less Guilty by Reason of Adolescence*, supra note 234 at 2, explaining that, "although the intellectual abilities" of a teenager "stop maturing around age 16, psychological capability continues to develop well into early adulthood").

[236] Brief for the American Psychological Ass'n, and the Missouri Psychological Ass'n as Amici Curiae Supporting Respondent, *supra* note 229, at 7.

[237] *Id.*

[238] *See* Brief for the American Medical Ass'n and the American Academy of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party, Miller v. Alabama, 132 S. Ct. 2394 (2011) (Nos. 10-9646, 10-9647), 2012 WL 121237, at 15.

[239] Brief for the American Medical Ass'n and the American Academy of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party, Miller v. Alabama, 132 S. Ct. 2394 (2011) (Nos. 10-9646, 10-9647), 2012 WL 121237, at 18-22. The frontal lobes (and, specifically, the prefrontal cortex) continue to "mature" late into adolescence in several ways. First, gray matter in these areas continues to mature, allowing greater neural processing. Second, the "integrity of white matter neural connections" improves, allowing for better "connectivity" that allows for improved impulse control. And, finally, the thinning of gray matter in the brain (a process known as "synaptic pruning") allows for the elimination of unused and cumbersome neuronal connections, making room for more complex information processing. *See id.* at 20-22.

[240] *Id.*

actions than adults:

> Specifically, adolescents are less able, on average, than adults to self-regulate, or "cognitively" control, their behavior. Cognitive control refers to the ability to voluntarily exert goal-directed behavior while controlling compelling but goal-inappropriate responses. Scientists have identified various interrelated immaturities in adolescents' self-regulatory abilities that contribute to [this] limitation. To name just a few, adolescents (1) tend to be more strongly motivated by the possibility of reward than adults; (2) have greater difficulty controlling their impulses; and (3) have greater difficulty recognizing and regulating emotional responses.[241]

As described above, cognitive research about the teenage brain suggests several key observations. First, adolescents experience heightened "reward sensitivity."[242] Indeed, developmental neuroimaging studies reveal that the part of the brain that regulates sensitivity to rewards (the "motivational system" or the limbic and paralimbic regions) develops more quickly and, in some cases, completely prior to the part of the brain that regulates risky behavior (the "cognitive control system" or the prefrontal cortex and its surrounding areas).[243] The window of time when the motivational system is fully mature but the cognitive control system is undeveloped coincides with adolescence. And, during that time, adolescents "experience increasing motivation for risky and reward-seeking behavior without a corresponding increase in the ability to self-regulate behavior."[244] At least one adolescent clinical psychologist has likened this imbalance between reward-seeking and risk-assessment, which is unique to teenagers, to a car with a powerful engine—but no

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[241] Brief for the American Medical Ass'n and the American Academy of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party, *supra* note 238, at 6-7.

[242] *Id.* at 7. See also Elizabeth Cauffman & Lawrence Steinberg, (Im)maturity of Judgment in Adolescences: Why Adolescents May Be Less Culpable Than Adults, 18 BEHAV. SCI. & L. 741 (2000); William Gardner, A Life-Span Rational-Choice Theory of Risk Taking, in Adolescent and Adult Risk Taking, in the Eighth Texas Tech Symposium on Interfaces in Psychology 66, 67 (N. Bell & R.Bell eds., 1993), available at http://www.mltei.org/cqn/Adolescent%20Development/Resources/Risk%20Behaviors/Bell%20&%20Bell,%20Adolescent%20Risk%20Taking.pdf.

[243] *Id.* at 29-30. *See also* Deborah Yurgelun-Todd, *Emotional and Cognitive Changes During Adolescence*, 17 CURRENT OPINION IN NEUROBIOLOGY 251, 253 (2007).

[244] Brief for the American Medical Ass'n and the American Academy of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party, *supra* note 238, at 29-30.

brake system.[245]

Cognitive research about the adolescent brain also serves to better explain the phenomenon of peer pressure. Society has long recognized that the presence of peers greatly influences teenagers' decision making. [246] Teenagers show a greater willingness than adults to take risks when their friends are around, "as evidenced in studies of reckless driving, substance abuse, and crime."[247] Though lawmakers, psychologists, teachers, parents, and others have all long acknowledged peer pressure's existence, only recently has science stepped in to provide a biological explanation for it. Studies show that the imbalance between reward-seeking and risk-assessment cognitive functions is, in part, to blame for adolescents' increased susceptibility to peer influences.[248] Indeed, research suggests that the "maturational imbalance between competing brain systems" greatly contributes to adolescents' especially heightened propensity to take risks in the presence of peers.[249] The presence of peers stimulates the reward sensitive regions of the teenage brain—with no corresponding spike in activity of the cognitive control centers.[250] In other words, to return to the car analogy, adolescents are hardwired to rev their engines when their peers are around, even though their car still has no brake mechanism. "[G]iven the elevated reward value of peer interactions in adolescence, the presence of peers may sensitize the incentive processing

[245] Telephone Interview with Antoinette Kavanaugh, Ph.D., Forensic Clinical Psychologist (Mar. 13, 2013); *see also* Jason Chein et al., *Peers Increase Adolescent Risk Taking By Enhancing Activity in the Brain's Reward Circuitry*, 14:2 DEVELOPMENTAL SCIENCE F1 (2011) (This study notes how two systems within the adolescent brain, the incentive processing system, and the impulse check system, "undergo considerable modification during adolescence, but on different time tables." The "incentive processing system evinces dramatic remodeling during adolescence" resulting in "heightened sensitivity to rewards" while the "brain regions involved in cognitive control undergo comparatively gradual and protracted maturation." *Id.* at F2).

[246] Brief for the American Psychological Ass'n, and the Missouri Psychological Ass'n as Amici Curiae Supporting Respondent, *supra* note 229, at 8. *See also Less Guilty by Reason of Adolescence*, *supra* note 234, at 3 (comparing peer pressure to a "coercion" that shapes teenagers' behavior much in the same way that other forces, like a perceived physical threat, duress, or provocation, are often viewed as "mitigating factors" to a crime).

[247] Chein, *supra* note 245, at F1 (citations omitted).

[248] *See id.* at F2.

[249] *See id.* at F2.

[250] *Id*. *See also* Tara Parker-Pope, *Teenagers, Friends and Bad Decisions*, N.Y. TIMES, Feb. 3, 2011, http://well.blogs.nytimes.com/2011/02/03/teenagers-friends-and-bad-decisions (citing studies Temple University that concluded that "teenage peer pressure has a distinct effect on brain signals involving risk and reward, helping to explain why young people are more likely to misbehave and take risks when their friends are watching").

system to respond to cues signaling the potential rewards of risky behavior."[251]

These recent observations about teenage brain development serve to refute certain misconceptions about adolescent delinquency and adolescent behavior, more generally. They prove that teenagers take risks, not because they discount the risk involved, but because they place unreasonable emphasis on the rewards.[252] While this does not absolve youth delinquents of culpability, it does provide further context for their indiscretions. Poor decision-making results not from an inability to weigh risks, but from an overactive inclination towards rewards.

Additionally, research about the teenage brain also corrects misconceptions that peer pressure is the result of active badgering, pressuring, or teasing from peers. Indeed, studies now show that teenagers need no "explicit encouragement" from peers to feel the effects of peer pressure.[253] Merely knowing that a peer is watching creates the *effects* of what is traditionally thought of as peer pressure.[254] In other words, "the observed 'peer effect' [is] not due to overt peer pressure."[255] In one study, peers watched from a separate room and could not interact with the participants during the decision-making task.[256] Even through a glass wall, the peer influence triggered involuntary cognitive responses in the teenage participants.[257] Results of that study demonstrated that the presence of peers resulted in "significantly greater activation" of the participants' reward processing regions.[258]

These observations, based on behavioral and neuropsychological studies, thus provide important context to understanding adolescent decision-making, thought processes, and motivations. Teenagers are biologically and cognitively bound to certain behavioral patterns, including impaired decision-making in the presence of peers, risky behavior, and sensitivity to rewards. While this does not relieve youth offenders of all culpability, they do teach important lessons that, I argue,

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[251] Chein, *supra* note 245, at F2.

[252] *See Less Guilty by Reason of Adolescence*, *supra* note 234, at 3 ("Juveniles' tendency to pay more attention to the potential benefits of a risky decision than to its likely costs may contribute to their impulsivity in crime situations."). *See also* Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 16:3 ANN. REV. CLINICAL PSYCHOL. 47, 58 (2009).

[253] *See* Chein, *supra* note 245, at F7.

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] *Id.*

should shape the way we view the use of police traps targeting juveniles. Further, they suggest that, in the juvenile context, the traditional elements of entrapment must be reformed.

III. Entrapment and Adolescent Culpability

Recall Justin Laboy, the teenager who graduated from high school with a felony record after selling marijuana to his classmate and crush—a young woman who turned out to be an undercover police officer.[259] Justin pled guilty, and thus his possible entrapment claim was never borne out. But his story, combined with other stories of teenagers caught by the police artifice within their own schools, provides a helpful tool to identify the shortcomings of entrapment as asserted by an adolescent defendant.

A. Reevaluating the Subjective Test for Entrapment

In Florida, where an officer arrested Justin and others, courts apply a subjective analysis that would require Justin to demonstrate two elements. First, Justin would have to show that Naomi "induce[d] or encourage[d] and, as a direct result, cause[d]" him to commit the crime "by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it."[260] Second, Justin would have to prove "by a preponderance of evidence that his . . . criminal conduct occurred as a result of an entrapment," or, in other words, an absence of predisposition.[261] Justin thus would face the initial burden of establishing lack of predisposition, but the burden would ultimately shift to the government, which, to rebut the defendant's showing, would look to prove Justin's predisposition beyond a reasonable doubt.[262]

Hypothetically, if Justin had asserted an entrapment defense at trial, the controlling inquiry would have been his predisposition. The government might try to prove predisposition by delving into Justin's character and reputation. The prosecution might also try to demonstrate readiness and willingness to sell drugs; though he has no prior criminal history, Justin did know how and where to locate marijuana. But any investigation into Justin's predisposition presumes that criminal intent and willingness to commit a crime function the same way in both the youth and adult contexts. This presumption belies the Court's observations about

[259] *See* This American Life: What I Did for Love, supra note 8.
[260] FLA. STAT. ANN. § 777.201 (West 2006).
[261] *Id.*
[262] *See supra* Part I.B.1.

youth as well as the behavioral and cognitive science behind those decisions.

This Article is not the first to note the dangers and pitfalls of the predisposition question.[263] In the adult context, the predisposition analysis may be prejudicial and "awkward,"[264] but as applied to adolescent defendants its flaws amplify. A juvenile's youth status negates the predisposition question for three main reasons. First, criminal intent in youth is more transient and malleable, suggesting that children do not possess criminal inclination the way an adult does. Second, adolescents are cognitively driven to seek rewards, yet the whole question of predisposition ignores this fact. Finally the historical purpose and genesis of predisposition as part of measuring entrapment proves that the predisposition analysis does not comport with accepted ideas about youth culpability.

First, youth negates the predisposition prong of subjective entrapment because youth culpability is transient, and, therefore, any inquiry into an adolescent's criminal character is, *ab initio*, flawed. *Sorrells*, *Sherman*, *Jacobson* and others explain that predisposition is more than just a capacity, in the moment, to commit the crime and more than a history of committing similar violations.[265] *Jacobson*, in particular, clarified that the predisposition must exist prior to and completely independent of law enforcement's intervention.[266] Other courts have noted that, in most cases, a defendant must show "tendency" or "inclination" to be deemed predisposed.[267] All of this indicates that predisposition reflects on the defendant's mindset and his character. And as such, predisposition becomes meaningless in the context of youth offenders.

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[263] *See, e.g.*, Sherman v. U.S., 356 U.S. 369, 382 (1958) (Frankfurter, J. concurring) (warning that the predisposition question is "unrevealing" and carries "evident" dangers of using "reputation, criminal activities, and prior disposition" to prove a defendant's "general intention or predisposition"); U.S. v. Russell, 411 U.S. 423, 442 (1973) (Stewart, J. dissenting) (noting that, once a defendant has committed the crime at all, Stewart explained, she proves that she was "predisposed" in the sense that she was "quite capable of committing the crime); Allen, *supra* note 46, at 413 (offering a searing and explicit criticism of the predisposition inquiry, arguing "'predisposition' is meaningless and commits a existential fallacy"). *See also* Elbaz, *supra* note 93, at 129-33; Moore, *supra* note 1, at 1162-63.

[264] Elbaz, *supra* note 93, at 129.

[265] *See, e.g.*, *Sherman*, 356 U.S. at 375-76. Recall that the defendant had a criminal record that included narcotics charges, which was the charge he was contesting via entrapment.

[266] *Jacobson*, 503 U.S. at 550.

[267] United States v. Hollingsworth, 27 F.3d 1196, 1200 (7th Cir. 1994).

Yet a teenager's character is notably and uniquely "transitory."[268] Any teenage inclination towards crime is necessarily transitory and impermanent, too. In considering the application of cruel and unusual punishment to juveniles, the Court in *Roper* noted that even a youth who has committed a "heinous crime" could not be deemed of "irretrievably depraved character."[269] Similarly, the Court noted how it is almost impossible to differentiate between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[270] Even expert psychologists cannot discern this fundamental and crucial difference.[271] True, these statements stress the possibility of rehabilitation for juvenile offenders *following* a violent act, not the existence or non-existence of criminal disposition *prior* to the crime. Nevertheless, the underlying sentiment—that youth character and criminality is impermanent and dynamic—is equally helpful in exposing the flaws of determining predisposition in youth.

Second, measuring the predisposition of an adolescent defendant is nonsensical because predisposition ignores the significant role that reward-seeking plays in teenagers' decisions. Research shows that teenagers are cognitively and biologically inclined to seek rewards—while not comprehending the magnitude of risk involved. So, if presented with the right reward, any teenager would be ready and willing to commit a crime.[272] This would likely be true even if that decision to violate the law held grave consequences (or risk), as most crimes do. The maturational imbalance between reward-seeking and cognitive control systems prevents adolescents from properly understanding risks involved in certain decisions, even as their brains direct them towards rewards. Given these cognitive vulnerabilities, all children are "predisposed" and, therefore, the predisposition query is mooted in this context, as well.

Lastly, the historical underpinnings of the entrapment doctrine further discredit the predisposition inquiry as applied to adolescent defendants. As outlined in Part I, entrapment arose as a defense for the

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[268] Roper v. Simmons, 543 U.S. 551, 570 (2005).

[269] *Id.* ("The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.").

[270] *Id.* at 573.

[271] *Id*.

[272] See Allen, *supra*, note 46, at 413 for a similar argument about predisposition. Allen notes that anyone could be "predisposed"—at the right "price." But Allen's argument does not take into account the particular cognitive and biological vulnerabilities of adolescents, discussed *supra*, Part III.

"otherwise innocent" citizen who committed a crime but lacked the requisite criminal intent.[273] Though the law does not go so far as to declare all youth "otherwise innocent," it has named them categorically less culpable.[274] *Roper*, *Miller*, and *Graham* signal a shift, by which adolescents have come to resemble the innocent minded and easily seduced criminal that, since its inception, the entrapment defense has sought to protect.

If the question of predisposition is moot under any form of subjective entrapment, then, for a juvenile asserting entrapment in a subjective jurisdiction, the analysis collapses into a question of inducement. For example, without the predisposition query, Justin's entrapment defense boils down to the following: did the scheme or artifice that Naomi used created "a substantial risk that such crime will be committed by a person other than one who is ready to commit it"?[275] This question should look familiar.[276] It looks only to government conduct, asking whether the government agent employed proper or improper motivations to appeal to the defendant. It is the objective theory.

Part III.B proceeds by examining the objective theory in the youth context. To do so, it draws on another story of a teenager like Justin who was arguably entrapped by undercover police work at his school. Using that true example of a youth offender located in an objective jurisdiction, Part III.B highlights the current deficiencies of the objective standard. Any proposed changes to the objective theory, argued below, also apply to the reduced subjective test ("subjectivity *lite*"), because the status of a youth defendant effectively collapses the subjective theory into an analysis of inducement (i.e. the objective theory).

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[273] *See, e.g.*, Sorrells v. U.S., 287 U.S. 435, 442 (1932) (holding that an entrapment defense is needed in situations where "the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense. . ."); *see supra* Part II for a complete outline of the historical development and policy goals of the subjective entrapment theory.

[274] *Roper*, 543 U.S. at 552.

[275] FLA. STAT. ANN. § 777.201 (West 2006).

[276] Some entrapment critics have argued that, in reality, the line between the objective and subjective versions of the defense is blurred. *See, e.g.*, Allen, supra, note 46, at 409 (asserting that "[t]he controversy over the two versions of the test—the subjective and objective—is quite beside the point, because the two tests will virtually never lead to different results"); Moore, *supra* note 1, at 1173 (referring to the "false dichotomy" between the two forms of entrapment and arguing that "the supposedly clear distinction between these two approaches is chimerical. . .the two models are logically entwined and share points of reference").

B. Adjusting the Objective Test for Entrapment

In his first year at Chaparral High School in Temecula, California, Student A[277] struggled to make friends. He suffers from several behavioral and mental disorders: autism, bipolar disorder, Tourette's syndrome, impulse-control disorder, and anxiety.[278] Even with these disorders, Student A finally made a new friend at school, Daniel Briggs.[279] Daniel showed great interest in Student A.[280] Some of the other students at Chaparral suspected that something wasn't quite right about Daniel, but Student A was open to this new friend.[281] Soon, Daniel began asking Student A for marijuana and prescription clonazepam, a drug that Student A used legally to treat his own disorders.[282] Student A sensed that Daniel was desperate for the drugs.[283] Clonazepam helped Student A feel better, so perhaps it could do the same for Daniel.[284] Student A could not get the clonazepam from his parents, but he found a homeless man who agreed to sell him marijuana.[285] And so, on two separate occasions, Student A sold Daniel small amounts of the drug, $20 worth.[286]

One afternoon in December, police raided Chaparral and two other

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[277] Unlike Justin Laboy, this student has legal juvenile status; therefore, his name has been withheld from the media.

[278] Sarah Burge, *Undercover deputy targeted mentally disabled teen, parents say*, THE PRESS ENTERPRISE.COM (Feb. 2, 2013), http://www.pe.com/local-news/riverside-county/temecula/temecula-headlines-index/20130202-temecula-undercover-deputy-targeted-mentally-disabled-teen-parents-say.ece. Student A's parents, Doug and Catherine Snodgrass, told reporters that "their son's autism makes social interaction difficult for him and he has had few friends in his life." *See generally Autism*, AM. PSYCHOL. ASS'N, http://www.apa.org/topics/autism/index.aspx (last visited Oct. 9, 2012) (defining autism as a "severe developmental disability" that "involves impairments in social interaction. . . .").

[279] *Id*.

[280] *Id.*

[281] *See id.* (Doug and Catherine Snodgrass told reporters that "many of their son's classmates, they have since learned, realized right away that something wasn't quite right about Daniel Briggs. Some students had a different name for him, they called him 'Deputy Dan.'").

[282] *Id.* Student A's attorney "argued in her opening statement that the teen's actions were greatly influenced by his disability. She said the teen felt so much pressure from the deputy in his art class one day that he burned himself with a lighter as a way of coping with his anxiety."

[283] *Id.* ("The deputy told their son he was 'desperate' [A's parents said], and asked not only for marijuana but his prescription clonazepam." After his arrest, A told reporters that Daniel "begged [him] 60 times for marijuana.'").

[284] *Id.*

[285] *Id.*

[286] *Id*.

neighboring Temecula schools, arresting a total of twenty-two students.[287] "Daniel Briggs" was actually Daniel Zipperstein of the local County Sheriff's Department.[288] For months, Daniel Zipperstien had been attending high school as part of an undercover drug operation.[289] During the operation's "takedown," police arrested Student A for selling marijuana to Daniel Briggs.[290]

Student A's story helps expose the shortcomings of an objective entrapment test as applied to youth. Since Student A's offense occurred in Temecula, California, he would, indeed, face the objective entrapment analysis.[291] A California court would apply the following test: was Daniel Brigg's conduct "likely to induce a normally law-abiding person to commit the offense?"[292] The court might ask, did Daniel badger, cajole, or otherwise importune his target in a way that would coerce a normal, law-abiding person to break the law?[293]

But, in reality, Student A is not a normal, law-abiding person.[294] He makes decisions, weighs risk and reward, and generally views the world entirely differently than an average, reasonable adult. In this way, the objective test—though pledging to focus on government conduct—still defies Student A's juvenile status by evaluating Daniel Brigg's conduct from the wrong perspective.

In explaining that the *Miranda* custody analysis must take into account a suspect's age, the Court explored the "nonsensical" nature of using a one-size-fits-all adult perspective to evaluate coercive forces as

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[287] *22 Students Arrested in Drug Bust at Temecula High Schools*, LATIMES.COM (Dec. 12, 2012), http://latimesblogs.latimes.com/lanow/2012/12/temecula-high-school-drug-bust.html.

[288] Burge, *supra* note 278.

[289] *Id.*

[290] *Id.*

[291] In the principal case discussing entrapment, *People v. Barraza*, 23 Cal. 3d 675, 689-90 (1979), the California Supreme Court held that, for purpose of analyzing whether there was entrapment, all defendants should be assumed to be "normally law-abiding person[s]." The court thus announced that "the proper test of entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense?"

[292] *Id.*

[293] *Id.* at 690.

[294] Though, as outlined *supra* Part II, the objective form differs slightly across jurisdictions, most objective states examine the police scheme from the perspective of "persons other than those who are ready to commit it," or, alternatively, of "a normally law-abiding" person. *See* MODEL PENAL CODE § 2.13(1)(b)(1962); Staff of National Commission on Reform of Federal Criminal Laws, 95th Cong., Final Report on Proposed New Federal Criminal Code § 702 (1971); *see generally* Dillof, *supra* note 1, at 835.

perceived by a youth.[295] The "absurdity" of evaluating circumstances of J.D.B.'s custody (including removal from his middle school classroom, pressure from the assistant principal, and separation from his guardian) from the perspective of a reasonable adult,[296] is also true of an objective entrapment test that ignores the defendant's juvenile status. In evaluating the pressure that Daniel Briggs exerted on Student A, for example, the current entrapment question asks: would a normal, law-abiding adult be coerced into breaking the law when his only friend at school requests drugs from him, acts like he is desperate for help, and when that normal, law-abiding adult gets drugs legally, from his parents, to treat his own disorders? This exercise indicates that, like the *Miranda* custody analysis, the objective entrapment test should account for the defendant's age.

In the very first articulation of the objective theory of entrapment, Justice Brandeis explained that "[t]he government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature."[297] The law now recognizes that children are, from social behavioral and cognitive standpoints, uniquely susceptible to the very provocation and manipulation that Brandeis foresaw. Constitutional, statutory, common law, and scientific principles all point to the conclusion that adolescents are more easily induced and coerced than their adult counterparts. When undercover police target minors, courts should assess that government inducement from the perspective of an adolescent: a normal, law-abiding *youth*.

This revision best captures current juvenile jurisprudence. In particular, it abides by the law's observations about youth and coercion, outlined most explicitly in *J.D.B.*, and also suggested by various statutory and common law protections for minors. Further, using a normal, law-abiding youth standard complies with the cognitive and social behavioral research underlying the hallmarks of youth, including heightened reward-sensitivity, extreme susceptibility to peer influences, rash decision-making, and others. Finally, using a normal, law-abiding youth standard best preserves the objective theory's historical goals and origins.

First, a normal, law-abiding youth standard is consistent with principles of constitutional and statutory law that recognize minors' susceptibility to coercion and inducement. In *J.D.B.*, the Court held that a reasonable child perceives circumstances of police interrogation differently than a reasonable adult; specifically, youths feel "pressure[] to

[295] J.D.B. v. North Carolina, 131 S. Ct. 2394, 2405 (2011).
[296] *Id.*
[297] Casey v. United States, 276 U.S. 413, 423 (1928) (Brandeis, J. dissenting).

submit" where adults do not.[298] This notion reappears in various statues and common law rules that prevent minors from entering into binding contracts, owning property, viewing pornography, operating harmful devices like BB guns, or lingering in certain public places past curfew.[299] These laws and legal principles acknowledge that youth require extra protection from both internal and external pressures. Entrapment should follow suit.

Further, *J.D.B.* suggests that this proposed revision would be fairly easy to implement. Analogizing from *J.D.B.*, police officers should be able to take into account a target's age when making on-the-job decisions. This is especially true when the officers' entire operation and mission occurs in the school setting. In *J.D.B.*, the Court asserted that characteristics of youth that comprise a new "normal, law-abiding *youth*" standard are commonsense.[300] Government agents require no additional training to be able to recognize them.[301] The Court in *J.D.B.* trusted that police officers interrogating adolescent suspects are capable of evaluating, on the spot, what circumstances amount to custody for a child.[302] Similarly, law enforcement agents should be able to evaluate, in real time, what circumstances amount to improper inducement and trickery for a high school student.

In addition to the Court's own declarations, social behavioral and cognitive research demands that the objective entrapment standard adopt a normal, law-abiding youth perspective. After all, inducement is, simply put, a reward. Thus, how the target of a sting views rewards—and, particularly, how he or she weighs rewards against risks—is central to the police sting.

When it comes to weighing risks and rewards, adolescents are not biological equals to adults. Their cognitive control region has not caught up to their brain's quickly developing reward-processing system.[303] Teenagers are hardwired to seek rewards (inducement), yet their capacity to understand risk is significantly diminished. For example, while Student A could clearly recognize that helping Daniel Briggs would help their friendship—and perhaps even secure him more friends—he may have been unable to understand the grave risks of getting drugs for his classmate. Currently, the objective test does not account for this

[298] *J.D.B.*, 131 S. Ct. at 2403.
[299] See *supra* Part II.C.
[300] *J.D.B.*, 131 S. Ct. at 2405.
[301] *Id.*
[302] *Id.*
[303] See *supra* Part II.D.

maturational imbalance that all teenagers experience.

Using a uniform, adult standard to evaluate police inducement further ignores how peer pressure heightens teenagers' reward-sensitivity. For police traps that target youth in schools, this is an especially glaring oversight, for peer pressure permeates the hallways and classrooms of any middle or high school. Furthermore, research now indicates that, even without "explicit encouragement" from peers, mere knowledge that a peer is watching can stimulate the teenage brain's reward processing region.[304]

Lastly, adjusting the standard of a normal, law-abiding person to that of a normal, law-abiding youth best honors the purpose of reigning in overzealous law enforcement and protecting the purity of government officials. Given adolescent behavioral development and cognitive functioning, teenagers are "easy targets" of police traps, schemes and decoys. For this reason, where government intervention targets adolescents (as it does in the emerging practice of undercover stings in schools), the goals identified by proponents of the objective theory become especially important. For many of the reasons outlined above (including youth susceptibility to coercion, inducement, and peer pressure), the standards for the overzealousness and impurity that Brandeis and others sought to avoid heighten when law enforcement target juveniles.

Conclusion

This Article offers an important but previously ignored perspective on the way the entrapment defense should apply in cases involving youth. Recent Supreme Court teachings and scientific developments suggest that a defendant's juvenile status changes the entrapment analysis in certain crucial aspects. Under the subjective theory, the defendant's adolescence negates the key question of predisposition. Measuring the predisposition of a child belies common law and scientific principles, including adolescents' malleable character and reward-seeking behavior. Further, the whole point of the predisposition analysis—to protect the innocent-minded—is thwarted when applied to youth, who the law now regards as categorically less culpable than adult defendants.

Since youth status negates predisposition, the subjective inquiry reduces to a question of inducement only. In that sense, when an inquiry involves a juvenile, the analysis collapses into an objective test for entrapment. But both this reduced subjective inquiry and the traditional

[304] *See* Chein, *supra* note 245, at F7.

objective test require further revision. Currently, entrapment law evaluates the propriety of police conduct from the perspective of a normal, law-abiding adult. This Article argues that the proper standard for evaluating police conduct in the youth context should be a normal, lab-abiding *youth* perspective. The law now recognizes that children are coerced and pressured differently than adults. Entrapment law (under either the subjective or objective theories) should assess law enforcement conduct with a youth perspective in mind.

More broadly, this Article demonstrates how the law must adjust old criminal defenses and doctrines in light of advances in the natural and social sciences, including child psychology, neurobiology, cognitive science, and sociology. Entrapment is not the only traditional criminal law defense that relies on subjective norms to measure culpability and liability. Indeed, criminal law frequently relies on cognitive and psychological measures: propensity, pattern, motive, malice aforethought, and scienter, just to name a few. As science continues to advance, offering clearer explanations and contexts for youth behavior, how will traditional criminal law defenses, which rely on such subjective elements, react and adapt? In this way, entrapment can serve as an important illustrative device, anticipating how the criminal law may change to fit science and society's progressing understanding of both the human mind.