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The Forgotten Constitutional Right to Present a Defense and Its Impact on the Acceptance of Responsibility-Entrapment Debate

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NOTE

The Forgotten Constitutional Right to Present a Defense and Its Impact on the Acceptance of Responsibility-Entrapment Debate

Katrice L. Bridges

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INTRODUCTION

Police arrest Bailey and charge him with possession of cocaine with intent to distribute it, a federal offense.[1] Instead of striking a plea bargain, he pleads not guilty and proceeds to trial. At trial, Bailey admits that he committed the offense but claims that he was entrapped — that is, he would not have committed the crime had an undercover FBI agent not convinced him to do so. The jury rejects the defense and finds Bailey guilty. At sentencing, the probation officer presents the judge with a presentence report[2] stating that Bailey appears to be genuinely remorseful for his actions, that he has acknowledged that the sale of drugs is wrong, and that he has assisted law enforcement

1. 21 U.S.C. § 841(a)(1) (2002).

2. Before a judge imposes a sentence or grants probation, a probation officer is required to conduct a presentence investigation and prepare a report, unless the court finds that there is sufficient information in the record for the meaningful exercise of sentencing authority. FED. R. CRIM. P. 32(c)(1). The report of the presentence investigation must contain extensive information about the defendant's background and the relevant sentencing classifications. FED. R. CRIM. P. 32(d).

officials in their investigation. The judge explains to Bailey that he believes that Bailey is sorry for his actions and that Bailey has owned up to his participation in the crime, but that he is unable to reduce Bailey's sentence because in his circuit a defendant who claims entrapment is not entitled to a lesser sentence on the grounds of acceptance of responsibility.[3] The judge goes on to explain that by claiming that he would not have committed the crime without the FBI agent's inducement, Bailey has disputed his intent to commit the crime. The judge further explains that intent is an essential factual element of guilt and such a dispute as to guilt precludes the acceptance-of-responsibility adjustment because it is an attempt to shift blame for the commission of the crime to law enforcement officials. When Bailey's attorney argues that Bailey has a constitutional right to present a defense that should not prejudice his sentence, the judge responds that Bailey does not have a constitutional right to leniency, and that the entrapment defense precludes acceptance of responsibility.

This fictional account highlights the tension between the entrapment defense and the Federal Sentencing Guidelines'[4] discount

3. The acceptance-of-responsibility adjustment allows a judge to decrease a defendant's base offense level if the defendant clearly demonstrates recognition and affirmative acceptance of personal responsibility for his criminal conduct. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (2002) [hereinafter USSG]. The guidelines do not clearly define "acceptance of responsibility." They state that a guilty plea "will constitute significant evidence of acceptance of responsibility." USSG § 3E1.1, cmt. n.3. The guidelines list several other factors that may be taken into consideration in determining acceptance of responsibility including, inter alia, truthfully admitting the conduct comprising the offense, voluntary termination or withdrawal from criminal conduct or associations, and voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense. USSG § 3E1.1, cmt. n.1 (a)-(h). The guidelines also state, however, that a defendant may qualify in certain limited circumstances for an acceptance-of-responsibility adjustment even though he did not plead guilty to the crime. USSG § 3E1.1, cmt. n.2.

4. Congress passed the Sentencing Reform Act of 1984, which created the U.S. Sentencing Commission, and granted it authority to create sentencing guidelines. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified in various sections of 18 U.S.C. and 28 U.S.C.). The Act contains detailed instructions as to how to create the guidelines. *See* 28 U.S.C. § 994 (2002). In particular, the Act directs the Commission to create categories of offense behavior and offender characteristics. 28 U.S.C. § 994(b)(1). The Federal Sentencing Guidelines are a grid system with forty-three offense levels on its vertical axis and six criminal history categories on its horizontal axis. USSG ch. 1, pt. A, 4(h). A court initially assigns a base offense level for the crime or crimes for which an offender is being sentenced. USSG § 1B1.1. Next, the court determines the criminal history category based on the number and type of prior convictions. *Id.* Once both the offense level and criminal history have been determined, the judge finds the point of intersection on the grid and assigns a sentence within the range of months listed. *Id.* The Federal Sentencing Guidelines provide for flexibility by granting adjustments and departures. *See* John N. Winstead, Note, Nunez-Rodriguez *and a Defendant's Acceptance of Responsibility: A Jailbreak from the Confinement of the Federal Sentencing Guidelines?*, 85 KY. L.J. 1021, 1024-25 (1996-97).

for acceptance of responsibility.[5] To successfully argue entrapment, there must be evidence that the defendant was not predisposed to commit the crime.[6] Predisposition is critical because entrapment is a judicially created defense,[7] founded upon the notion that the legislature could not have intended that the government would enforce its statutes by tempting innocent persons to violate them.[8]

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5. Prior to the enactment of the Federal Sentencing Guidelines, defendants who pled guilty were often given more lenient sentences. Robert N. Strassfeld, *Robert McNamara and the Art and Law of Confession: "A Simple Desultory Phillipic (or How I was Robert McNamara'd into Submission)"*, 47 DUKE L.J. 491, 507-511 (1997) (discussing the historical development of the practice of granting more lenient sentences to defendants who plead guilty). This was due in part to the belief that those who accept responsibility for their crimes, by pleading guilty, have begun the reformation process and are thus entitled to leniency. *Id.* at 510. The acceptance-of-responsibility adjustment codifies the tradition of offering leniency to defendants in exchange for entry of a guilty plea. *See, e.g.*, United States v. Guadagno, 970 F.2d 214, 226 (7th Cir. 1992); United States v. Henry, 883 F.2d 1010, 1012 (11th Cir. 1989). This tradition was deemed constitutional by the Supreme Court in *Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978). The sentence discount under the acceptance-of-responsibility adjustment, however, is not as big as the discount a defendant would have received prior to the enactment of the Federal Sentencing Guidelines. Prior to the enactment of the guidelines, the average sentence discount for a defendant who pled guilty was approximately thirty to forty percent below what a defendant who proceeded to trial and was convicted would receive. Under the Federal Sentencing Guidelines, the reduction is approximately twenty percent. *See* Strassfield, *supra*, at 512 n.109 (citing U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS at 48-50 (1987)). The adjustment takes a more expanded view of acceptance of responsibility than pre-guideline practice, however, by not precluding the adjustment to a defendant who proceeds to trial or guaranteeing the adjustment for a defendant who pleads guilty. USSG § 3E1.1, cmt. n.2 (explaining that a defendant who goes to trial may qualify for the adjustment in rare cases); USSG § 3E1.1, cmt. n.3 (explaining that a defendant who enters into a guilty plea is not entitled to the adjustment as a matter of right). By providing that a defendant who goes to trial may qualify for the adjustment, USSG § 3E1.1, cmt. n.2 safeguards the acceptance-of-responsibility adjustment from attack as an unconstitutional penalty for the exercise of the right to trial. *See infra* Part III.

6. *See infra* note 28 and accompanying text.

7. The entrapment defense was formally recognized by the Supreme Court in the case of *Sorrells v. United States*, 287 U.S. 435 (1932). In *Sorrells*, a government agent posed as a tourist and visited the home of the defendant. *Id.* at 439. The agent and the defendant served in the same military unit during World War I. *Id.* The agent repeatedly asked Sorrells if he could obtain some liquor. *Id.* at 439-40. Initially, Sorrells told the agent that he did not have any liquor. *Id.* at 439. After they began speaking about their common war experiences, the agent made another request. Sorrells then left his home and returned with a half gallon of whiskey, for which the agent paid him five dollars. *Id.* The agent testified that he requested the liquor in order to prosecute Sorrells for procuring and selling liquor. *Id.* at 440. Sorrells was convicted of violating the National Prohibition Act. On appeal to the Supreme Court, Sorrells defended his actions by claiming entrapment. *Id.* at 438-39. The Supreme Court unanimously agreed and reversed his conviction. Prior to *Sorrells*, though the Supreme Court had suggested that solicitation of crime by the government might be improper under some circumstances, it had never expressly ruled that an entrapment defense existed. *See, e.g.*, Casey v. United States, 276 U.S. 413, 418-19 (1928); Grimm v. United States, 156 U.S. 604, 604-11 (1895). Lower courts, however, had widely recognized the entrapment defense prior to *Sorrells*. *See, e.g.*, O'Brien v. United States, 51 F.2d 674, 677 (7th Cir. 1931); Cline v. United States, 20 F.2d 494, 496 (8th Cir. 1927); Cermak v. United States, 4 F.2d 99, 99 (6th Cir. 1925); Woo Wai v. United States, 223 F. 412, 415 (9th Cir. 1915).

8. United States v. Russell, 411 U.S. 423, 428 (1973). Entrapment is thus based on the rule of statutory construction that prohibits literal interpretation of a statute that produces

While government officials may use decoys to lure individuals intending or willing to commit a crime, in order for liability to attach the criminal design must originate with the accused and not with government officials. Courts examine evidence of the defendant's inclination to commit a particular crime in the time period before the defendant's initial exposure to government agents to determine if a defendant is predisposed to commit a particular offense.[9]

The acceptance-of-responsibility adjustment enables a judge to reduce a sentence if he finds that the defendant owned up to his participation in the crime and has shown remorse for his actions.[10] While acceptance of responsibility is not defined, the Sentencing Guidelines' Application Notes,[11] which are binding upon the courts,[12]

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absurd results. *Sorrells*, 287 U.S. 435. The notion that Congress could not have intended its criminal statutes to be applied to people tempted into violation has been sharply criticized. *See, e.g.*, Sherman v. United States, 356 U.S. 369, 379 (1958) (Frankfurter, J., concurring) (arguing that the congressional-intent justification is sheer fiction because the only intent Congress had in enacting criminal statutes was to set forth the elements of the crime).

9. *Russell*, 411 U.S. at 436 (explaining that predisposition must be established before government involvement with defendant). In *Russell*, the defendant actively participated in the manufacturing of illegal drugs before government agents initiated contact. *Id.* The Court found that the defendant had a predisposition to commit the offense irrespective of the law enforcement techniques employed. *Id.*; *see also Sherman*, 356 U.S. at 372 (finding that the government must prove defendant otherwise inclined to commit offense prior to contact with government). In *Sherman*, the Court examined the defendant's criminal history, whether the defendant was engaged in the narcotics trade, and the defendant's readiness and willingness to sell narcotics, independent of any governmental inducement. *Sherman*, 356 U.S. at 375.

10. In Bailey's case, for example, if Bailey was in possession of less than twenty-five grams of cocaine, his base offense level would be twelve. *See* Drug Quantity Table, USSG § 2D1.1(c)(14). This calculation assumes that no victim-related role in the offense, or obstruction adjustments apply. *See* USSG §§ 3A, 3B, & 3C (2002). Assuming that Bailey had one prior felony conviction in the past fifteen years, his criminal history category would be II. *See* USSG § 4A1.1(a); Sentencing Table, USSG § 5A. This calculation assumes that the instant offense was not committed while the defendant was on probation or parole, *see* USSG § 4A1.2, or less than two years after release from imprisonment, see USSG § 4A1.1(e). Thus, Bailey would receive a sentence of twelve to eighteen months. *See* Sentencing Table, USSG § 5A. If Bailey received a two-point adjustment for acceptance of responsibility, however, his base offense level would be ten and his sentence would be eight to fourteen months instead of twelve to eighteen months. *See id.* The acceptance-of-responsibility adjustment has an even greater impact on defendants who have committed more serious crimes and have more extensive criminal histories. For example, someone who commits a level thirty-seven offense and has a criminal history category of V, would receive a sentence of 324-405 months. If that person were given an acceptance-of-responsibility adjustment of two points, he would receive a sentence of 262-327 months — a difference of five years and two months at the low end and six years and six months at the high end of the sentence.

11. The Sentencing Commission issues commentary that guides the sentencing judge in imposing a sentence. USSG § 1B1.7. One form of commentary is the Application Notes.

12. The Application Notes in the Sentencing Guidelines Manual, which are under the Commentary heading, must be given controlling weight unless they violate the Constitution or a federal statute or are plainly erroneous or inconsistent with the guideline. USSG § 1B1.7; Stinson v. United States, 508 U.S. 36, 45 (1993) (analogizing the commentary to an agency's interpretation of its own legislative rule).

explain that the acceptance-of-responsibility adjustment is not intended to apply to a defendant who goes to trial to contest his factual guilt and then later expresses remorse after his conviction.[13] Factual guilt has been interpreted by most courts to include both the mens rea and actus reus of an offense.[14] The Application Notes, however, instruct that the acceptance-of-responsibility adjustment is allowed for a defendant who proceeds to trial to contest an issue unrelated to his factual guilt, such as a challenge as to whether a statute applies to the defendant's conduct.[15] The courts that have addressed the issue appear to agree that the challenge-to-the-applicability-of-the-statute exception applies when a defendant goes to trial to contest the legal conclusion drawn from the facts that he admits.[16]

The conflict between the acceptance-of-responsibility adjustment and the entrapment defense occurs because courts view the acceptance-of-responsibility adjustment as a reward for total acknowledgment of fault and entrapment as an attempt to shift fault onto law enforcement officials.[17] The circuit courts disagree on whether a defendant who unsuccessfully argues entrapment at trial is eligible for a reduced sentence based upon acceptance of

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13. USSG § 3E1.1, cmt. n.2.

14. *See, e.g.*, United States v. Starks, 157 F.3d 833, 840 (11th Cir. 1998) (finding that intent is a factual element of guilt and cannot be contested without putting the acceptance-of-responsibility adjustment in jeopardy); United States v. Crass, 50 F.3d 81, 83-84 (1st Cir. 1995) (same); United States v. Lindholm, 24 F.3d 1078, 1087 (9th Cir. 1994) (same).

15. USSG § 3E1.1, cmt. n.2.

16. *See, e.g.*, United States v. Purchess, 107 F.3d 1261, 1267 (7th Cir. 1997) (concluding that a "district court should not deny the reduction for acceptance of responsibility because the defendant challenges a legal conclusion drawn from facts the defendant admits"); United States v. Smith, 106 F.3d 350 (11th Cir. 1996) (finding that where a defendant admits all the necessary facts of his scheme to the government, "he should not be precluded from having counsel argue the *legal* effect of those facts to the sentencing court by risking the benefits derived by his candid admissions"); United States v. Fells, 78 F.3d 168, 172 (5th Cir. 1996) (holding that a district court erred in denying reduction for a defendant who challenged venue because the defendant had "freely admitted all the facts but challenged their legal interpretation"); United States v. Broussard, 987 F.2d 215, 224 (5th Cir. 1993) (holding that a district court erred in denying an acceptance-of-responsibility adjustment when a defendant admitted ownership of guns found in the defendant's home and went to trial only to argue that the statute did not apply to uncontested facts), *overruled on other grounds by* J.E.B. v. Alabama, 511 U.S. 127 (1994).

17. *See, e.g.*, United States v. Kirkland, 104 F.3d 1403, 1405 (D.C. Cir. 1997) ("The defendant, by asking for the downward departure, is in effect claiming that he accepts responsibility even though he was not responsible for his acts."); United States v. Hansen, 964 F.2d 1017, 1021 (10th Cir. 1992) ("It is difficult for this Court to envision how the defendant argues that he affirmatively accepted responsibility for his criminal action when throughout the proceedings he maintained that his criminal action was not his fault, but rather, it was the result of government inducement."); United States v. Demes, 941 F.2d 220, 222 (3d Cir. 1991) ("The defendant, rather than accepting 'personal responsibility for his criminal conduct' urges that the party responsible for the offense was actually the government." (internal citations omitted)).

responsibility.[18] Some circuits have found that the predisposition inquiry in entrapment is tantamount to an inquiry about intent.[19] Thus, according to these circuits, entrapment is a dispute about factual guilt and does not give rise to one of those rare situations where a defendant goes to trial and remains eligible for the acceptance-of-responsibility adjustment. The Tenth Circuit, however, has found that entrapment is not a challenge to factual guilt because the entrapment defense does nothing more than challenge whether the statute applies to the defendant's conduct.[20]

While the debate in the circuit courts has focused on whether the entrapment defense disputes factual guilt, there is a constitutional issue that has remained unexamined. It has long been held that courts may not use the exercise of constitutional rights against a defendant at the sentencing stage.[21] Defendants have a constitutional right to present a defense[22] that stands on equal constitutional footing with other rights protected by the Sixth Amendment.[23] Thus, the question

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18. In *United States v. Garcia*, 182 F.3d 1165 (10th Cir. 1999), the Tenth Circuit joined the First, Third, Sixth, Ninth, and Eleventh Circuits in concluding that entrapment and the acceptance-of-responsibility adjustment are not necessarily incompatible. The court decided that by proceeding to trial to assert an entrapment defense, a defendant attempts to preserve an issue that does not relate to factual guilt. *Id.* In *Kirkland*, the D.C. Circuit found that a claim of entrapment seems particularly inconsistent with a demonstrated acceptance of responsibility, but fell short of holding that it was impossible that the two could be consistent. *Kirkland*, 104 F.3d at 1405-06. The Fifth and Eighth Circuits, however, have held that the entrapment defense and the acceptance-of-responsibility reduction are incompatible. United States v. Chevre, 146 F.3d 622, 625 (8th Cir. 1998); United States v. Brace, 145 F.3d 246, 265 (5th Cir. 1998). In *Brace*, 145 F.3d at 265, the Fifth Circuit reasoned that although the defendant admitted committing criminal acts, his assertion of entrapment was a denial of factual guilt because it was a denial of subjective predisposition and the required element of mens rea.

19. *See, e.g.*, *Brace*, 145 F.3d at 265.

20. *Garcia*, 182 F.3d 1165.

21. *See, e.g.*, United States v. Watts, 910 F.2d 587, 592 (9th Cir. 1990) (explaining that a sentencing court cannot balance constitutionally protected conduct, such as requesting counsel or invoking the privilege not to make statements to the police, against evidence of remorse or acceptance of responsibility); Colten v. Kentucky, 407 U.S. 104, 124 (1972) (Marshall, J., dissenting) (arguing that where the original conviction was set aside due to constitutional error, the imposition of a more severe punishment would serve to penalize the defendant for exercising his constitutional rights and would be "patently unconstitutional" (quoting North Carolina v. Pearce, 395 U.S. 711 (1969))); United States v. Jackson, 390 U.S. 570, 583-85 (1968) (invalidating the death penalty provision of Federal Kidnapping Act because only those defendants who abandon the constitutional right to contest their guilt before a jury are assured they will not be executed). The Court went on to explain that "[t]his construction of Section 3E1.1 will avoid an unconstitutional application of the Sentencing Guidelines." *Id.*

22. *See infra* note 83 and accompanying text.

23. *See* Taylor v. Illinois, 484 U.S. 400, 409 (1988). The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

becomes what, if any, impact the constitutional right to present a defense has on the acceptance-of-responsibility/entrapment discussion.

This Note argues that Section 3E1.1 of the Federal Sentencing Guidelines must be interpreted to allow defendants who claim entrapment at trial to remain eligible for the acceptance-of-responsibility adjustment. To interpret Section 3E1.1 in any other way would run afoul of defendants' constitutional right to present a defense. Part I argues that the entrapment defense does not put factual guilt at issue; instead the entrapment defense challenges whether the statute should apply to the defendant's conduct. Part II contends that the legislative intent in creating the sentencing guidelines in general and the acceptance-of-responsibility adjustment in particular are furthered by requiring sentencing judges to make individualized assessments about the extent to which defendants have accepted responsibility. Part III argues that the use of the entrapment defense as an automatic bar to the receipt of the acceptance-of-responsibility adjustment is a penalty for the exercise of the defendant's constitutional right to present the entrapment defense. This Note concludes that because the assertion of entrapment and acceptance of responsibility are not inherently inconsistent, the use of a per se rule barring the adjustment is a violation of the defendant's constitutional right to present a defense.

I. THE ENTRAPMENT DEFENSE DOES NOT DISPUTE FACTUAL GUILT

Sentencing courts that prohibit defendants who unsuccessfully claim entrapment at trial from receiving the acceptance-of-responsibility adjustment do so by mischaracterizing the nature of the entrapment defense. In any criminal case, the government must prove that the defendant committed a criminal act, the "actus reus," and that the defendant had a culpable state of mind, or "mens rea," in order to obtain a conviction.[24] Both the actus reus and mens rea are components of factual guilt. Some courts have found the entrapment

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compulsory process for obtaining witnesses in his favor, and the have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

24. *See* Ariel L. Bendor, *Prior Restraint, Incommensurability, and the Constitutionalism of Means*, 68 FORDHAM L. REV. 289, 339 (1999) (explaining that in order to hold a defendant criminally liable, it must be shown that he "was aware of his conduct and the circumstances in which it was performed" (citing Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 958-59 (1998))). "The Constitution limits the state's power to create strict liability offenses; that is, offenses that do not include a mental element." Bendor, *supra*, at 339-40 (citing Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 830 (1999)).

defense to be a challenge to factual guilt by confusing mens rea with predisposition.[25]

Entrapment, however, is an *affirmative* defense that does not negate an element of the crime.[26] The crux of the entrapment defense is causation, or whether the defendant would have committed the crime had the government not induced him.[27] Once the defendant has shown that the government induced the commission of the crime, the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime before being approached by law enforcement officials.[28] In practice, the focus is almost exclusively on predisposition.[29] Predisposition to commit a crime concerns the defendant's propensity to perpetrate a crime as separate from the government's inducement.[30] A court considering an

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25. *See, e.g.*, United States v. Brace, 145 F.3d 247, 265 (5th Cir. 1998) (en banc) ("[A]n entrapment defense is a challenge to criminal intent and thus to culpability."); United States v. Kirkland, 104 F.3d 1403, 1405 (D.C. Cir. 1997) (finding that it is "rather obvious that the entrapment defense is a way of challenging one 'factual element[ ] of guilt' — intent" (alteration in original)).

26. "[T]he absence of entrapment is not an essential element of a charged offense; instead, entrapment is an affirmative defense." *Brace*, 145 F.3d at 257; *see also* United States v. Bala, 236 F.3d 87, 94 (2d Cir. 2000) (entrapment is an affirmative defense); United States v. Squillacote, 221 F.3d 542, 564 (4th Cir. 2000) (same); United States v. Wise, 221 F.3d 140, 154 (5th Cir. 2000) (same); United States v. Dumas, 207 F.3d 11, 17 (1st Cir. 2000) (same); United States v. Blassingame, 197 F.3d 271, 279 (7th Cir. 1999) (same); Vega v. Suthers, 195 F.3d 573, 583 (10th Cir. 1999) (same); United States v. Berg, 178 F.3d 976, 980 (8th Cir. 1999) (same); United States v. Roper, 135 F.3d 430, 435 (6th Cir. 1998) (same); United States v. Quinn, 123 F.3d 1415, 1423 (11th Cir. 1997) (same).

27. United States v. Garcia, 182 F.3d 1165, 1173 (10th Cir. 1999). To determine predisposition, a court may look at the following factors:

> (1) the character or reputation of the defendant; (2) whether the suggestion of criminal activity was originally made by the government; (3) whether the defendant was engaged in criminal activity for a profit; (4) whether the defendant evidenced a reluctance to commit the offense, overcome by government persuasion; and (5) the nature of the inducement or persuasion offered by the government.

United States v. Haddad, 976 F.2d 1088, 1095 (7th Cir. 1992); *see also* Ian J. McLoughlin, Note, *The Meaning of Predisposition in Practice*, 79 B.U. L. Rev. 1067, 1071-72 (1999) (explaining that in entrapment cases the Supreme Court has historically focused on the "defendant's state of mind or lack of predisposition to commit the alleged crime").

28. United States v. Nelson, 922 F.2d 311, 317 (6th Cir. 1990); Mathews v. United States, 485 U.S. 58, 63 (1988). To be entitled to an entrapment instruction, however, a defendant must "come forward with evidence that government agents implanted criminal design in his mind and induced him to commit the offense." *Nelson*, 922 F.2d at 317 (quoting United States v. Felix, 867 F.2d 1068, 1074 (8th Cir. 1989)). "[E]vidence that Government agents merely afforded an opportunity or facilities for the commission of the crime would be insufficient to warrant such an instruction." *Mathews*, 485 U.S. at 66.

29. *See* Troy A. Wolf, Note, *Criminal Law — Persistence Pays: Enforcement Efforts to Solicit Illegal Activity*, 17 WM. MITCHELL L. REV. 913, 918 (1991).

30. *See* Sorrells v. United States, 287 U.S. 432, 442 (1932) (finding that government officials may not implant in individual's mind disposition to commit offense). Predisposition focuses on the defendant's state of mind prior to contact with government agents. United States v. Osborne, 935 F.2d 32, 38 (4th Cir. 1991) (predisposition is defendant's decision to commit crime and not a product of government persuasion); United States v. Kaminski, 703

entrapment defense asks, "how the defendant likely would have reacted to an ordinary [that is, noninduced] opportunity to commit the crime."[31]

Predisposition, however, is not the same as intent to commit a crime. A defendant who claims entrapment does not argue that he did not intend to commit the crime for which he is standing trial.[32] Rather, the defendant argues that in spite of his intent to commit the offense and actual commission of the crime, the government should not be entitled to obtain a conviction due to its role in encouraging the crime. Predisposition and intent look at the defendant's state of mind at different points of time. Predisposition looks back in time to the defendant's inclination to commit the offense prior to its commission to determine if the defendant was motivated by his own desires or induced by a government official.[33] Intent, on the other hand, is the defendant's mental resolution or determination to commit the criminal act at the time it takes place.[34] While the government bears the burden of proving an individual's predisposition if he claims

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F.2d 1004, 1008 (7th Cir. 1983) (predisposition must exist prior to contact with the government). Predisposition may be inferred from a prior history of engaging in the same type of criminal behavior combined with an eager response to the government's offer. United States v. Ortiz, 804 F.2d 1161, 1165 (10th Cir. 1986) (inducement implicates whether defendant was eager or reluctant to engage in criminal offense). The defendant's criminal state of mind must exist before government agents suggest that the defendant commit a crime. *Kaminski*, 703 F.2d at 1008 (discussing existence of defendant's predisposition prior to government inducement). The amount of inducement the government offers to the defendant has no correlation to the defendant's predisposition; rather, predisposition is an independent determination of the defendant's ready acquiescence to commit an offense. *Id.* (discussing the relevance of amount of inducement to predisposition inquiry). Predisposition is usually a question of fact for the jury. *See* Paul Marcus, *Proving Entrapment Under the Predisposition Test*, 14 AM. J. CRIM. L. 53, 70 (1987) (individual's state of mind at time of government inducement is a matter given to trier of fact).

31. United States v. Gendron, 18 F.3d 955, 962 (1st Cir. 1994).

32. "When a defendant pleads entrapment, he is asserting that, although he had criminal intent, it was 'the Government's deception [that implanted] the criminal design in the mind of the defendant.'" *Mathews*, 485 U.S. at 62 (quoting United States v. Russell, 411 U.S. 423, 436 (1973)); *see also* United States v. Hill, 655 F.2d 512, 514 (3d Cir. 1981) (explaining that the entrapment defense "requires admission of guilt of the crime charged and all of its elements, including the required mental state"); United States v. Mitchell, 514 F.2d 758, 760-61 (6th Cir. 1975) (defense of entrapment "admits all [of the] elements of the offense" (quoting United States v. Lamonge, 458 F.2d 197, 201 (6th Cir. 1972))).

33. *See, e.g.*, United States v. Evans, 216 F.3d 80, 88 (D.C. Cir. 2000) (predisposition goes to state of mind — why the defendant did what he did). The inducement requirement is met if the government's conduct "created a substantial risk that the offense would be committed by a person other than one ready to commit it." United States v. Andrews, 765 F.2d 1491, 1499 (11th Cir. 1985) (quoting United States v. Dickens, 524 F.2d 441, 444 (5th Cir. 1975)); *see also* United States v. Kelly, 748 F.2d 691, 697 (D.C. Cir. 1984) ("Inducement focuses on whether the government's conduct could have caused an undisposed person to commit a crime."); United States v. Van Slyke, 976 F.2d 1159, 1162 (8th Cir. 1992) (same).

34. *See* BLACK'S LAW DICTIONARY 810 (6th ed. 1990).

entrapment,[35] the fact that the government must prove predisposition does not transform it into an element of the crime. As currently formulated, the entrapment defense presupposes that an individual is factually guilty of the crime for which he is charged.[36] Therefore, it is a fallacy to equate intent and predisposition.

As the entrapment defense does not put intent to commit the crime at issue, it is not a challenge to factual guilt. An individual who claims entrapment denies legal, rather than factual, responsibility for the crime.[37] Application Note 2 of the acceptance-of-responsibility adjustment explains that in "rare situations" a defendant who is convicted at trial may clearly demonstrate acceptance of responsibility if he proceeds to trial to make a "challenge to the applicability of a statute to his conduct."[38] This language mirrors the way the Supreme Court has written about entrapment, i.e., "the question is whether the defense, if the facts bear it out, takes the case out of the purview of the statute" because Congress did not "intend[] that the letter of its enactment should be used to support such a gross perversion of its purpose."[39] A defendant who raises an entrapment defense admits that he has committed a crime but argues that he should not be held accountable for it.[40] The defendant, therefore, goes to trial to contest the legal conclusion drawn from the facts that he admits.[41] Thus, a defendant who raises entrapment argues that the statute under which he is being charged should not apply to his conduct.[42] As such, the entrapment defense falls squarely into the exception in Application Note 2 that allows defendants to remain eligible for the Section 3E1.1 adjustment. Accordingly, the mere fact that a defendant raised an entrapment defense at trial is not enough, standing alone, to deny him an adjustment for acceptance of responsibility.

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35. United States v. Brace, 145 F.3d 247, 257 (5th Cir. 1998) ("[T]he absence of entrapment is not an essential element of a charged offense; instead, entrapment is an affirmative defense.").

36. *See* United States v. Garcia, 182 F.3d 1165, 1173 (10th Cir. 1999) (explaining that the entrapment defense "concedes that the defendant's conduct satisfies the essential factual elements of guilt"); *see also* Maureen F.J. Whelan, Note, *Lead Us Not Into (Unwarranted) Temptation: A Proposal to Replace the Entrapment Defense With a Reasonable-Suspicion Requirement*, 133 U. PA. L. REV. 1193, 1205-06 (1985).

37. *See* Strassfeld, *supra* note 5, at 518 (explaining the courts' treatment of defenses that deny legal responsibility in the context of the acceptance-of-responsibility adjustment).

38. USSG § 3E1.1, cmt. n.2.

39. Sorrells v. United States, 287 U.S. 435, 452 (1932).

40. Entrapment presupposes the commission of a crime. United States v. Russell, 411 U.S. 423, 435 (1973).

41. *See supra* note 16 and accompanying text.

42. *See* United States v. Garcia, 182 F.3d 1165, 1173 (10th Cir. 1999) (finding that entrapment is a "challenge to the applicability of a statute to the defendant's conduct" (internal quotation marks omitted)).

II. CONGRESSIONAL OBJECTIVES OF THE SENTENCING GUIDELINES

Sentencing courts have three choices as to how to treat defendants who claimed entrapment at trial. The first is to create a per se rule that prohibits courts from granting an acceptance-of-responsibility adjustment; the second is to automatically grant the acceptance-of-responsibility adjustment; and the third is to require the courts to make case-by-case determinations of defendants' contriteness. The question then becomes which of these three options furthers the goals of the Federal Sentencing Guidelines. This Part argues that requiring judges to make case-by-case determinations of acceptance of responsibility for defendants who claimed entrapment at trial is consistent with the statutory objectives of the Federal Sentencing Guidelines. Section II.A argues that the purposes of the Federal Sentencing Guidelines are not furthered by the creation of a per se rule; instead, they are furthered by requiring courts to make individual assessments about the extent to which defendants have accepted responsibility. Section II.B argues that there is nothing inherent in the nature of the entrapment defense that is inconsistent with the goals of the acceptance-of-responsibility adjustment. This Part concludes that defendants who claim entrapment at trial should be given the opportunity to prove to the sentencing judge that they have accepted responsibility for their crimes. To construe Section 3E1.1 otherwise would vitiate a vital, albeit narrow, realm of discretion carved out for sentencing judges under the Federal Sentencing Guidelines.

Federal statutes, such as the Federal Sentencing Guidelines, are interpreted by examining the language of the statute itself.[43] Where the language is not dispositive, courts look to the congressional intent "revealed in the history and purposes of the statutory scheme."[44] The court's duty "is to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested."[45] As the statutory language is silent as to whether a defendant who claims entrapment is eligible for the adjustment, the terms of the statute are to be interpreted in light of both Congress's purpose in enacting the Federal Sentencing Guidelines and the acceptance-of-responsibility adjustment, and the historical background of the guidelines and the adjustment, which is detailed in this Part.

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43. Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992).

44. Adams Fruit Co. v. Barrett, 494 U.S. 638, 642 (1990).

45. C.I.R. v. Engle, 464 U.S. 206, 217 (1984).

A. *The Twin Goals of Uniformity and Proportionality*

Prior to the promulgation of the Federal Sentencing Guidelines, sentencing was generally guided by the rehabilitative ideal, which sought to transform the criminal into a person who, upon return to society, will conform her behavior to societal norms.[46] As a result, a trial judge in the federal judicial system had wide discretion in determining what sentence to impose.[47] In making his determination, the trial judge was permitted to conduct an inquiry broad in scope, largely unlimited as to either the kind of information he might consider, or the source from which it might come.[48] This led to gross disparities in the sentences assigned by judges for similar crimes and similar offenders, particularly along race and class lines.[49]

In creating the new sentencing laws, Congress sought to limit this boundless discretion.[50] Thus, the Sentencing Commission focused on honesty,[51] uniformity, and proportionality in sentencing to achieve the goal of increasing the criminal justice system's ability to reduce crime through fair and effective means.[52] The goal of uniformity is to narrow

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46. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., 1 SUBSTANTIVE CRIMINAL LAW § 1.5, 38-40 (1986), *reprinted in* YALE KAMISAR ET AL., ADVANCED CRIMINAL PROCEDURE 1531, 1532 (1999) (explaining that the trend in sentencing prior to the enactment of the sentencing guidelines was to influence future conduct); *see also* Williams v. New York, 337 U.S. 241, 248 (1949) (explaining that the dominant objective of criminal law is no longer retribution, but instead reformation and rehabilitation).

47. United States v. Tucker, 404 U.S. 443, 446-47 (1972) (collecting cases). *See generally* Daniel J. Fried, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1687-89 (1992) (discussing the different methodologies pre-guideline courts used to sentence offenders).

48. *Tucker*, 404 U.S. at 446-47.

49. KAMISAR ET AL., *supra* note 46, at 1538 (explaining that these gross disparities along race and class lines led to efforts to reform discretionary sentencing and the disparities it produced).

50. 28 U.S.C. § 991(b)(1)(B) (2000) (stating that one of the goals of the new sentencing policies is to avoid "unwarranted sentencing disparities"); *see also* 28 U.S.C. § 994(d) (explaining that "[t]he Commission shall assure that the guidelines and policy statements are entirely neutral as to race, sex, national origin, creed, and socioeconomic status of offenders").

51. In an attempt to achieve honesty in sentencing, Congress abolished parole. USSG ch. 1, pt. A, 3. Parole, one of the vestiges of the rehabilitative system of punishment, perpetuated indeterminate sentencing by allowing the parole commission, not the sentencing court, to determine how much of a court-imposed sentence the offender would actually serve. *See, e.g.*, United States v. Addonizio, 442 U.S. 178, 188-90 (1979) (explaining that a judge cannot predict when an offender will be released, and the Parole Commission is in the best position to determine release date). "An *indeterminate sentence* is a maximum and minimum term and set by the judge, which leaves to the parole board the task of determining the precise date at which the defendant will actually finish his sentence." KAMISAR ET AL., *supra* note 46, at 1536 n.2. Indeterminate sentences "encourage[ ] efforts to reform and permit[ ] the actual sentence to track the rehabilitative progress of an offender." *Id.*

52. USSG ch. 1, pt. A, 3.

the gap in sentences imposed by judges for similar criminal conduct by similar offenders.[53] The goal of proportionality requires different sentences for criminal conduct of differing severity.[54] While uniformity and proportionality can conflict with one another,[55] the Federal Sentencing Guidelines attempt to address both goals by setting forth a grid system that considers the offense and the individual characteristics of the offender.[56]

The goal of proportionality is not subverted by allowing a defendant who claims entrapment to receive the adjustment. In fact, the goal of proportionality is undermined by creating a per se rule against the granting of the adjustment or automatically granting the adjustment. While there is no constitutional right to an individualized sentencing determination in noncapital cases,[57] the Federal Sentencing Guidelines require a judge to examine individual characteristics.[58] The sentencing grid instructs the judge to look at the characteristics of the particular defendant before him and of the particular crime committed.[59] When the judge combines all of the factors he gets an individualized determination. If warranted by the situation of the defendant, the judge still has discretion to depart from the guidelines or adjust the base offense level to create a fair and just sentence.[60] This discretion is necessary to achieve proportionality. Proportionality is destroyed, however, when circuit courts create a per se rule that bars the adjustment because it takes away sentencing courts' ability to examine defendants' contriteness, an important circumstance in fashioning a sentence. Further, the simple assertion of the entrapment defense coupled with acknowledgment of underlying criminal activity should not automatically entitle a defendant to an acceptance-of-

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53. *Id.*; *see also* 28 U.S.C. § 991(b)(1)(B) (1993) (explaining that the purpose of the Sentencing Commission is to create sentencing guidelines that "avoid[ ] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct").

54. USSG ch. 1, pt. A, 3.

55. For example, "simple uniformity — sentencing every offender to five years — destroys proportionality" because it does not take into account the seriousness of each defendant's criminal conduct. *Id.*

56. *See supra* note 4 and accompanying text.

57. *See* Harmelin v. Michigan, 501 U.S. 957, 965-66 (1991).

58. 28 U.S.C. § 991(b)(1)(B) (explaining that one of the Sentencing Commission's goals is to set flexible sentencing policies in order to permit individualized sentences when warranted).

59. *See supra* note 4 and accompanying text.

60. The guidelines were intended to reduce disparity in the sentencing of different defendants for similar offenses. United States v. Mejia-Orosco, 867 F.2d 216, 218 (5th Cir. 1989). They do not, however, entirely abrogate the district court's discretion. The guideline range "allows the district court some latitude to fine tune the sentence to the individual defendant and the circumstances of the defendant's offense." *Id.* at 219.

responsibility adjustment. Such a rule would violate the rule of proportionality in the same way that a blanket rule barring the adjustment would because it would reward the defendant without regard to his remorse. Thus, to preserve proportionality, sentencing courts must make case-by-case determinations about the extent to which defendants have accepted responsibility.

On the surface, it may seem that uniformity in sentencing is furthered by the creation of a per se rule. If there is a per se rule, the judge does not use the acceptance-of-responsibility adjustment to reduce the sentence of any defendant who claimed entrapment at trial. Thus, the result for defendants who claim entrapment is completely uniform — no reduction for acceptance of responsibility. If courts granted the adjustment to any defendant who claimed entrapment, the result would be similarly uniform. In reality, however, uniformity is concerned with eliminating sentencing disparities for offenders who commit similar crimes. Therefore, if circuit courts create a rule providing that all defendants who assert the entrapment defense are to be treated alike, they are not furthering the goal of uniformity because the defense that is asserted is not necessarily related to the crime committed. It is the crime that is to be punished, not the defense.

It is Congress's job, through the Sentencing Commission, to create categories of offenses and offenders and determine a suitable range of punishment. It is the sentencing courts' duty to apply these guidelines, not to create additional rules that are not based upon empirical analysis. Categorical rules, such as one that renders a class of defendants ineligible for a sentencing adjustment, reflect broad generalizations holding true in so many cases that inquiry into whether they apply in the case at hand would be needless and wasteful.[61] It is improper for a court to make such a determination.[62] This is especially true where, as here, courts have failed to adequately justify the generalization that a defendant who claims entrapment is never remorseful or cooperative enough to evidence acceptance of responsibility. Instead, the courts simply say that entrapment is the "antithesis" of acceptance of responsibility.[63] Such a cursory

61. *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3, 8-22 (1997).

62. The purpose of the Federal Sentencing Guidelines is to curb some of the courts' discretion in sentencing. USSG, ch. 1 pt. A, 3. Under 18 U.S.C. § 3553(b), "[t]he court shall impose a sentence . . . within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . . ." Further, under 18 U.S.C. § 3553(c), the court must give a statement of reasons for imposing a particular sentence.

63. *See, e.g.*, United States v. Rector, 111 F.3d 503, 508 (7th Cir. 1997); United States v. Demes, 941 F.2d 220, 222 (3d Cir. 1991). *See also supra* Part I.

examination is unacceptable in light of Congress's statutory directive for individualized sentencing.[64]

B. *Entrapment Is Consistent with the Purposes of Section 3E1.1*

The purpose of the acceptance-of-responsibility adjustment is to reward defendants for showing remorse for their criminal conduct and for cooperating with law enforcement.[65] This is consistent with the pre-guideline history of leniency for acceptance of responsibility. Prior to the enactment of the Federal Sentencing Guidelines, the Supreme Court recognized the importance of a defendant's cooperation with law enforcement officials in determining an appropriate sentence.[66] According to the Supreme Court,

> Few facts available to a sentencing judge are more relevant to the likelihood that a defendant will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, and the degree to which he does or does not deem himself at war with his society.[67]

In addition, the acceptance-of-responsibility adjustment was supposed to provide the kind of incentive to plead guilty that had traditionally been offered by prosecutors and judges before the guidelines went into effect.[68] The entrapment defense is consistent with the purposes of the acceptance-of-responsibility adjustment as they existed prior to and after the enactment of the Federal Sentencing Guidelines. Application Note 1(a) to section 3E1.1 states that one of the factors in determining whether a defendant has clearly demonstrated acceptance

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64. The guidelines resolve the conflict between proportionality and uniformity in favor of individualized sentencing. "The increase in uniformity was not, however, to be achieved through sacrificing proportionality. The guidelines must authorize appropriately different sentences for criminal conduct of significantly different severity." Danielle D. Giroux, Note, *My Dictionary or Yours? The Supreme Court's Interpretation of "Carrying" Under 18 U.S.C. § 924(C)(1) in* Muscarello v. United States, 8 GEO. MASON L. REV. 355, 379 n.233 (Winter 1999) (quoting U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS, June 18, 1987, p. G-21).

65. *See* Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1509 (explaining that the Application Notes to the guidelines "reflect two distinct, and sometimes competing, visions of what it means to 'accept responsibility' for an offense: either to feel remorse for the offense or to provide cooperation to police, prosecutors, and court officials"). Discussion of the statutory goals in enacting section 3E1.1 is lacking in the case law and is often inferred based on the structure of section 3E1.1.

66. Roberts v. United States, 445 U.S. 552, 558 (1980) (finding that it was proper for a sentencing judge to consider a defendant's lack of cooperation with law enforcement officials in sentencing because of the "deeply rooted social obligation" to assist authorities).

67. *Id.* at 558 (quoting United States v. Grayson, 438 U.S. 41, 51 (1978)) (internal quotations omitted).

68. *See supra* note 5 and accompanying text.

of responsibility is whether the defendant has "truthfully admit[ed] the conduct comprising the offense(s) of conviction . . . ."[69] The remaining factors in Application Note 1 focus on cooperating with law enforcement, terminating criminal conduct, and restitution or other rehabilitative efforts.[70] This shows that the concern of the acceptance-of-responsibility adjustment is with an admission of criminal conduct, remorse, and cooperation. A defendant must admit the "conduct comprising the offense" in order to claim the defense of entrapment.[71] The dispute in entrapment is whether the defendant would have committed the crime in the absence of government inducement, not whether the defendant performed the criminal act.[72]

Further, there is no reason to believe that a defendant who claimed entrapment at trial is incapable of showing remorse or cooperating with law enforcement. When an appellate court creates a per se rule, a district court must deny the acceptance-of-responsibility adjustment even if the defendant has shown remorse and cooperated with law enforcement. If the concern of the adjustment is to reward defendants for admitting their criminal conduct, showing remorse, and cooperating with law enforcement, then the creation of a per se rule undermines a court's ability to apply the acceptance-of-responsibility adjustment properly. Requiring courts to grant the adjustment whenever a defendant claims entrapment would do just as much to undermine the purpose of the acceptance-of-responsibility adjustment as would a per se rule prohibiting courts from granting the adjustment. There is nothing in the entrapment defense that makes it either inherently compatible or incompatible with the acceptance-of-responsibility adjustment. As such, district courts must retain the discretion to make the acceptance-of-responsibility determination in each case.

Furthermore, nothing in Section 3E1.1 evidences a legislative intent to categorically prevent a defendant who admits his criminal conduct, cooperates with law enforcement, and shows remorse for his crime from receiving an adjustment for acceptance of responsibility solely on the basis of an entrapment defense. In fact, there are no

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69. USSG § 3E1.1, cmt. n.1(a). There is no indication of whether the "conduct comprising the offense" simply refers to the actus reus of a crime or if it includes the mens rea as well. As it was established in Part I that entrapment does not put mens rea at issue, it is irrelevant whether "conduct comprising the offense" refers to mens rea.

70. USSG § 3E1.1, cmt. n.1(b)-(h).

71. United States v. Russell, 411 U.S. 423, 435 (1973) ("[Entrapment] is rooted . . . in the notion that Congress could not have intended criminal punishment for a defendant *who has committed all the elements of a proscribed offense*, but was induced to commit them by the Government." (emphasis added)); *see also* RONALD J. ALLEN ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE 999 (3d ed. 1995) ("Typically defendants claiming entrapment do not challenge the prosecutor's proof of the elements of the offense.").

72. *See supra* note 40 and accompanying text.

absolute rules in Section 3E1.1.[73] Most remarkably, Application Note 4 indicates that conduct resulting in an obstruction-of-justice enhancement "ordinarily indicates" that the defendant is not entitled to an adjustment, but there might be "extraordinary cases" where the obstruction-of-justice and acceptance-of-responsibility adjustment would both apply.[74] Section 3C1.1, *Obstructing or Impeding the Administration of Justice*, requires a district court to impose a two-level sentencing enhancement if the defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction" if the obstructive conduct related to the offense of conviction or a "closely related offense."[75] One type of conduct that merits the adjustment is perjury.[76] Other types of conduct include threatening a co-defendant, witness, or juror, producing false documents, destroying or concealing evidence, or escaping or attempting to escape from custody.[77] A defendant who engaged in any of the above-mentioned conduct remains eligible for the acceptance-of-responsibility adjustment. Certainly that type of conduct is more severe than the conduct of a defendant who takes the stand merely to assert that he performed a criminal act, but that it was out of character for him.

Whether the police entrapped a defendant in a given situation is a debatable question. The defendant attempts to convince the jury that he would not have committed the criminal act if the police had not convinced him to do so. The government attempts to persuade the jury that the defendant would have performed the criminal act even if the police had not been involved. A defendant, particularly a first offender, could genuinely believe that his will was overborne by the

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73. Application Note 1, for example, instructs the trial court to examine certain factors, but cautions that the inquiry is not "limited to" those factors. USSG § 3E1.1, cmt. n.1. Application Note 2 explains that conviction by trial "does not automatically preclude" a defendant from consideration for an adjustment. USSG § 3E1.1, cmt. n.2. Application Note 3 states that entry of a guilty plea does not entitle a defendant to an adjustment "as a matter of right." USSG § 3E1.1, cmt. n.3. Application Note 6 explains that the timeliness of an applicant's acceptance of responsibility is a consideration that is "context specific." USSG § 3E1.1, cmt. n.6.

74. USSG § 3E1.1, cmt. n.4.

75. USSG § 3C1.1.

76. USSG § 3C1.1, cmt. n.4(b); United States v. Dunnigan, 507 U.S. 87, 98 (1993) (holding that "[u]pon a proper determination that the accused has committed perjury at trial," the accused's trial testimony can supply the basis for application of the section 3C1.1 enhancement). To decide when an accused's testimony constitutes perjury, *Dunnigan* adopted the federal criminal definition of perjury set out in 18 U.S.C. § 1621. *Dunnigan*, 507 U.S. at 94. Under that definition, "[a] witness testifying under oath or affirmation [commits perjury] if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *Id.* (citing 18 U.S.C. § 1621(1)).

77. USSG § 3C1.1, cmt. n.4(a)-(e).

persuasive tactics of the police. The fact that a jury finds that a defendant was predisposed and, thus, that he likely would have committed the offense without government inducement, does not mean that the defendant was lying. A defendant's testimony that he would not have engaged in criminal conduct absent the police inducement would not even support a finding of perjury. Perjury requires that the defendant willfully intend to give false testimony concerning a material matter.[78] Even if the defendant's testimony amounted to perjury, however, he would not be foreclosed from receiving the adjustment.[79] If a defendant can obstruct justice and remain eligible for an acceptance-of-responsibility adjustment, then there is simply no rational reason to prohibit courts from granting the adjustment to defendants who claimed entrapment at trial.

The bottom line is that acceptance of responsibility is a discretionary decision, placed in the hands of a district court, that the Sentencing Commission did not think was amenable to mechanical rules of application. Requiring courts to make case-by-case determinations of defendants' remorse preserves the integrity of the adjustment. A per se rule, however, removes the discretionary acceptance-of-responsibility determination from the district court and places it in the hands of the appellate court. Such a removal directly contravenes the statutory purpose.

III. THE IMPACT OF THE CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

The goals of the acceptance-of-responsibility adjustment are furthered by requiring judges to make case-by-case determinations of contriteness for defendants who claimed entrapment at trial. As such, the creation of a bright line rule that prohibits district courts from considering the adjustment for defendants who claim entrapment is a violation of the constitutional right to present a defense. Because a per se bar on defendants who assert entrapment singles them out and categorically prevents them from eligibility for leniency, the per se rule unconstitutionally punishes defendants.

The constitutional right to present a defense derives from the Compulsory Process and Confrontation Clauses of the Sixth Amendment.[80] The Compulsory Process Clause guarantees a defendant the right to subpoena witnesses and have them testify on

78. *Dunnigan*, 507 U.S. at 94.

79. USSG § 3E1.1, cmt. n.4.

80. *See* Washington v. Texas, 388 U.S. 14, 22 (1967).

her behalf.[81] In addition, the Confrontation Clause gives defendants the right to subject prosecution witnesses to cross-examination.[82] Together, these protections provide what the Supreme Court has termed the constitutional right to present a defense.[83] Beginning in 1967, with *Washington v. Texas*,[84] the Supreme Court held that "the right to present a defense . . . is a fundamental element of due process of law."[85] Not long after, in the seminal decision *Chambers v. Mississippi* in 1973, the Court concluded that the fundamental constitutional right to present a defense includes the right to present exculpatory evidence.[86] Then in 1988, in *Taylor v. Illinois*, the Court

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81. *See* U.S. CONST. amend. VI; Washington v. Texas, 388 U.S. at 19 ("Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."); Taylor v. Illinois, 484 U.S. 400, 407-09 (1988).

82. *See* U.S. CONST. amend. VI; Delaware v. Van Arsdall, 475 U.S. 673, 678-79 (1986).

83. *See* Washington v. Texas, 388 U.S. at 19. The Court has explained that the rights that make up the right to present a defense are truth-furthering. *See* Taylor v. Illinois, 484 U.S. 400, 408-09 (1988) (quoting United States v. Nixon, 418 U.S. 683, 709 (1974)); Rock v. Arkansas, 483 U.S. 44, 48, 53 (1987); *Id.* at 63 (Rehnquist, C.J., dissenting); Crane v. Kentucky, 476 U.S. 683, 690-91 (1986); Chambers v. Mississippi, 410 U.S. 284, 295 (1973) ("The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.'" (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970))).

84. 388 U.S. 14 (1967).

85. Washington v. Texas, 388 U.S. at 19. In *Washington*, the Court held that a state rule of evidence that excluded "whole categories" of testimony on the basis of a presumption of unreliability was unconstitutional. *Id.* at 22.

86. Chambers v. Mississippi, 410 U.S. 284, 302 (1973). *Chambers* followed *Washington v. Texas* and *Webb v. Texas*, 409 U.S. 95 (1972). *Webb* was the first case to rest a defendant's right to present evidence solely on the Due Process Clause, rather than referring to the specifically enumerated rights of the Fifth or Sixth Amendments. *See* Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 713, 778 (1976). In *Webb*, the defendant's only witness was a prisoner with an extensive criminal record. *Webb*, 409 U.S. at 95. The witness refused to testify altogether after the trial judge emphatically warned him not to perjure himself. *Id.* at 95-96. The Supreme Court determined that the judge's statement coerced the witness into refusing to testify and thus denied the defendant the right to present evidence in his defense. *Id.* at 98. Much like the exclusion of accomplice testimony in *Washington, Webb* involved the absolute exclusion of a defense witness' testimony, and therefore could have been decided on Sixth Amendment grounds. *See* Clinton, *supra*, at 781. *Chambers* is significant because it dealt with only a partial exclusion of witness testimony, and because the Court disposed of the case by referring only to the Due Process Clause. *See id.* at 791. *Chambers*, therefore, clearly stands for a defendant's fundamental right to present defense evidence. *See id.* at 791-92. *But see* Peter Westen, *Compulsory Process II*, 74 MICH. L. REV. 191, 207 (1975) (concluding that *Washington v. Texas* stands for a defendant's "constitutional right to present any evidence that may be deemed to establish the existence of facts in his favor" (emphasis omitted)). Since *Chambers*, the Court has consistently found a fundamental right to present a defense that includes a right to present defense evidence. In *Green v. Georgia*, 442 U.S. 95 (1979), the Court considered a case where the trial court excluded critical defense evidence on hearsay grounds. Once again, the Court reasoned that the exclusion violated the Due Process Clause because the evidence was highly relevant to a critical issue in the case. *See id.* at 97. In *Crane v. Kentucky*, the Court held that the exclusion of evidence, pertaining to whether a defendant's confession was voluntary, deprived the defendant of a fair

stated that "the very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."[87]

Once a defendant has gone to trial and been allowed to present her defense, it may seem that the constitutional right to present a defense has been satisfied and the government has no further obligation. In the context of the acceptance-of-responsibility adjustment, however, there is a further obligation not to use the exercise of that right against the defendant in a way that amounts to an unconstitutional pressure.[88] As the Eleventh Circuit explained in *United States v. Rodriguez*, the sentencing court is well within its rights to examine "the defendant's conduct prior to, during, and after the trial to determine if the defendant has shown any remorse through his actions or statements."[89] The chances of a court granting an adjustment may well be reduced if the defendant has exercised all of his rights during the entire process.[90] If a defendant has shown some sign of remorse but has also exercised constitutional or statutory rights, however, "the sentencing judge may not balance the exercise of those rights against the defendant's expression of remorse to determine whether the 'acceptance' is adequate."[91]

Courts can not create an outright penalty for the exercise of a constitutional right, such as a criminal fine or increased punishment.[92] Courts also may not condition the receipt of a government benefit on

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opportunity to present a defense. 476 U.S. 683 (1986). In *Rock v. Arkansas*, the Court determined that the automatic exclusion of post-hypnotically refreshed testimony violated the defendant's right to present a defense. 483 U.S. 44, 52 (1987).

87. Taylor v. Illinois, 484 U.S. 400, 409 (1988) (rejecting state's argument that the constitutional right to present a defense can never be violated by the exclusion of evidence as a sanction for the violation of a discovery rule).

88. *See* United States v. Vance, 62 F.3d 1152, 1159 (9th Cir. 1995) (explaining that it is a well established proposition that taking advantage of a constitutional right cannot be weighed against a defendant in determining eligibility for the acceptance-of-responsibility adjustment); United States v. Sitton, 968 F.2d 947, 962 (9th Cir. 1992). *But see* United States v. Wright, 133 F.3d 1412 (11th Cir. 1998) (holding that court may deny a 3E1.1 reduction for conduct inconsistent with acceptance of responsibility, even if the court relies exclusively on conduct that includes assertion of a constitutional right).

89. United States v. Rodriguez, 959 F.2d 193, 197 (11th Cir. 1992) (finding that the sentencing court improperly balanced evidence of contrition against defendants' exercise of their Fifth Amendment right against compelled self-incrimination and their Sixth Amendment right to appeal).

90. *Id.*

91. *Id.* (emphasis omitted).

92. *See* McCabe v. Sharrett, 12 F.3d 1558, 1562 (11th Cir. 1994) ("Obviously the government burdens a constitutional right when it imposes a direct penalty such as a criminal fine on its exercise."); United States v. Perez-Franco, 873 F.2d 455, 463 (1st Cir. 1989) (finding that incarceration for a longer period of time is "one of a wide variety of penalties which can serve to trigger a constitutional violation").

the relinquishment of a constitutional right.[93] Imposing such a condition is viewed as burdening the right because it deters exercising the right to the same extent as a direct penalty. The amount of pressure — short of an outright penalty — that can be exerted on a constitutional right before the pressure becomes unconstitutional is less certain.[94]

The current presumption against courts granting an acceptance-of-responsibility adjustment when a defendant proceeds to trial,[95] for example, does not exert an unconstitutional amount of pressure. Many defendants have attacked the presumption on constitutional grounds because the sentencing court may not hold the constitutionally protected conduct of defendants against them when determining a sentence.[96] Specifically, defendants argue that they are being penalized by not receiving the acceptance-of-responsibility reduction merely because they exercised their constitutional right to trial,[97] their right

93. *See* Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) (finding, in the First Amendment context, "that 'constitutional violations may arise from the deterrent, or chilling, effect of governmental [efforts] that fall short of a direct prohibition'" (alterations in original)); Perry v. Sindermann, 408 U.S. 593, 597 (1972) ("Even though the government may deny [a] . . . benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . .").

94. The Supreme Court has not consistently applied the unconstitutional conditions doctrine. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 796 (1997). In *FCC v. League of Women Voters*, 486 U.S. 364 (1984), for example, the Supreme Court held unconstitutional a federal statute that prohibited any noncommercial educational-broadcasting station that received a grant from the Corporation for Public Broadcasting from engaging in editorializing. The Court explained that the government could not condition funds on a requirement that the stations relinquish their right to editorialize. *Id.* In *Regan v. Taxation with Representation.*, 461 U.S. 540 (1983), however, the Court upheld a provision of the federal tax law that conditioned tax-exempt status on a requirement that an organization not participate in lobbying or partisan political activities. The Court explained that Congress had not infringed any First Amendment right — it had simply chosen not to pay for TWR's lobbying. *Id.* at 546. The Court also refrained from applying the unconstitutional conditions doctrine in *Rust v. Sullivan*, 500 U.S. 173 (1991). *Rust* was a challenge to a federal regulation that barred recipients of federal funds for family-planning services from providing abortion counseling. *Id.* at 179. The Court explained that the "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Id.* at 193 (citations omitted).

95. USSG § 3E1.1.

96. *See, e.g.*, United States v. Rodriguez, 959 F.2d 193, 197 (11th Cir. 1992); United States v. Watt, 910 F.2d 587, 592 (9th Cir. 1990); United States v. Gonzalez, 897 F.2d 1018 (9th Cir. 1990). The Federal Sentencing Guidelines also explain that in determining the sentence to impose, "the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." USSG § 1B1.4.

97. The right to trial is implicated because defendants who enter into plea agreements are more likely to receive the adjustment than those who go to trial and maintain their innocence. For example, between October 1, 2000 and September 30, 2001, 96.9% of drug offenders entered into plea agreements and 3.1% went to trial. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 73 (6th ed. 2001). During that same period, 91.3% of drug offenders received an acceptance-of-responsibility adjustment while

against compelled self-incrimination,[98] or their right to appeal.[99] Most courts, however, resolve the issue of constitutionality by stating that the possibility of leniency in the statute does not make denial of the lenient treatment impermissible punishment, provided that the sentencing judge has actually determined that the defendant has not accepted responsibility.[100] The force of this reasoning lessens, though, when an appellate court creates a per se rule prohibiting district judges from making the acceptance-of-responsibility determination.

It is the district court that decides whether to grant an acceptance-of-responsibility adjustment.[101] The district court is in a unique position to evaluate a defendant's acceptance of responsibility and, as a result, the determination of the sentencing judge is termed a question of fact and subject to the clearly erroneous standard on review.[102] The refusal of some district courts to apply the factors set forth in the Application Notes to defendants who claimed an entrapment defense at trial is the first step in the erosion of defendants' constitutional right to present a defense. When appellate courts affirm the district courts' misapplication of the sentencing guidelines, they transform a one-time violation into a per se rule prohibiting district courts from granting the adjustment. Once that happens, the failure to protect defendants' constitutional right to present the entrapment defense is complete.

8.7% of drug offenders received no adjustment. *Id.* at 43. The total percentage of all defendants who received the adjustment was 91.2%. *Id.* at 42.

98. The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. This amendment has long been interpreted to mean that a defendant may refuse to "answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." Lefkowitz v. Turley, 414 U.S. 70, 77 (1973). The right against compelled self-incrimination is at stake because in order to show remorse one must often admit her crime at the sentencing stage. *See* United States v. Larkin, 171 F.3d 556, 559 n.4 (7th Cir. 1999) (explaining that although section 3E1.1 rewards a defendant who demonstrates contrition through an honest and full account of his offense conduct, it does not impose any new penalty on a defendant who chooses to keep silent, and thus does not offend the Fifth Amendment). The privilege against self-incrimination applies at sentencing just as it does during any other stage of the prosecution. Estelle v. Smith, 451 U.S. 454, 462-63 (1981).

99. The right to appeal is in jeopardy because defendants maintain their innocence in order to preserve their right to appeal.

100. *See, e.g.*, United States v. Watt, 910 F.2d 587, 590 (9th Cir. 1990); United States v. Monsour, 893 F.2d 126, 129 (6th Cir. 1990) (holding that section 3E1.1 does not penalize a defendant for exercising his right to trial); United States v. Paz Uribe, 891 F.2d 396, 400 (1st Cir. 1989) (rejecting a Fifth Amendment challenge to section 3E1.1); United States v. Henry, 883 F.2d 1010, 1011 (11th Cir. 1989) ("We are unprepared to equate the possibility of leniency with impermissible punishment.").

101. *See* United States v. Chevre, 146 F.3d 622, 625 (8th Cir. 1998).

102. *See, e.g.*, United States v. Mitchell, 113 F.3d 1528, 1533 (10th Cir. 1997).

This problem is exemplified in cases such as *United States v. Chevre*,[103] *United States v. Demes*,[104] and *United States v. Kirkland*.[105] In each of these cases a defendant claimed entrapment at trial, the district court refused to grant an acceptance-of-responsibility adjustment, and the defendant appealed.[106] Blinded by the defense of entrapment, the courts gave little or no consideration to the factors set forth in the Application Notes.[107] Specifically, the Eighth Circuit stated that "Chevre's election to argue an entrapment defense . . . clearly shows that he did not accept responsibility for the crime of

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103. *Chevre*, 146 F.3d at 623. Russell Chevre was arrested as part of an undercover operation. *Id.* Before trial, Chevre met with an agent with the Minnesota Bureau of Criminal Apprehension (BCA). *Id.* During that meeting, Chevre admitted to the agent that he was carrying approximately eight ounces of methamphetamine and $5,800 in cash at the time of his arrest. *Id.* Additionally, Chevre told the agent the name of his supplier and that he had purchased methamphetamine from that supplier on eight to ten occasions before his arrest. *Id.* Chevre claimed entrapment at trial and was convicted. *Id.*

104. 941 F.2d 220 (3d Cir. 1991). Joseph E. Demes was arrested by an undercover detective. He was charged with possession of cocaine with intent to distribute and distribution of cocaine. *Id.* at 221. Demes had reached a plea agreement with the government in which he agreed to plead guilty and cooperate with the government in its investigation in exchange for the government's recommendation of an acceptance-of-responsibility adjustment. *Id.* Although Demes assisted the authorities, he chose not to take the plea agreement. *Id.*

105. 104 F.3d 1403 (D.C. Cir. 1997). Keith Kirkland was arrested following his sale of crack cocaine to DEA Agent Ronald Woods. *Id.* at 1403. An informant who knew Kirkland arranged the sale, and Kirkland admitted selling the drugs. *Id.* Kirkland disputed the state's evidence of predisposition to commit the crime by testifying that he had no prior experience as a drug dealer, was unfamiliar with how drugs are sold, and that he followed the informant's instructions in completing the sale. *Id.* at 1403-04. The jury convicted Kirkland. The presentence report did not recommend an adjustment for acceptance of responsibility because Kirkland stated that he was entrapped. *Id.* at 1404.

106. *Chevre*, 146 F.3d at 625; *Kirkland*, 104 F.3d at 1404; *Demes*, 941 F.2d at 222. At sentencing in the *Kirkland* case, the following exchange took place:

> DEFENSE COUNSEL: . . . I think even though Mr. Kirkland went to trial in this matter — and in fact he testified — I think that he accepted responsibility, and I don't think that his testimony was any different to that effect. He admitted to giving the undercover officer the drugs.
>
> THE COURT: He said he was entrapped . . . I don't regard that as . . . acceptance of responsibility.
>
> DEFENSE COUNSEL: Your Honor, I don't think that because a person legitimately claims a legitimate defense, that in claiming that, that he somehow is not accepting responsibility for what he did. My understanding of what he said was he explained why he did it. He didn't say he didn't do it. He said, I did it. That's accepting responsibility. That's a knowing act of what he did. He only explained to the court why he did it. I don't think that going forward with a legitimate defense is an indication indicating that he does not accept responsibility.
>
> THE COURT: That is the most absurd argument I have ever heard.

Kirkland, 104 F.3d at 1404.

107. *See Chevre*, 146 F.3d at 625 (rejecting the defendants request to ignore his assertion of entrapment and look instead to his admission to the BCA agent that he engaged in the conduct underlying his conviction).

conviction."[108] In *Demes*, the Third Circuit described a claim of entrapment at trial as "the antithesis of the acceptance of responsibility."[109] In *Kirkland*, the D.C. Circuit stated that it could not hypothesize a situation in which a defendant who claimed entrapment could demonstrate acceptance of responsibility and be entitled to a downward adjustment.[110]

A defendant who raises entrapment, like any other defendant, must accept the foreseeable and constitutionally permissible legal consequences that flow from strategic decisions. One acceptable consequence is that the entrapment defense will be rejected by the jury and the sentencing judge will view that as a credibility determination. Likewise, asserting the entrapment defense may mean that the judge will not believe the defendant when she attempts to show that she is remorseful, and the defendant will be denied the Section 3E1.1 adjustment.[111] The threat of ignoring the leniency factors in the Application Notes creates a very real pressure against a defendant's constitutional right to present the entrapment defense. The defendant, believing that an unsuccessful entrapment defense might prejudice her sentence, may decide to accept a plea bargain rather than assert her constitutional right to present the entrapment defense.

A prosecutor, when engaged in the negotiation phase of plea bargaining,[112] may confront the defendant with the risk of more severe

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108. *Id.* In reality, however, Chevre admitted not only the conduct comprising the offense of conviction, but at least eight other offenses as well. In addition, he voluntarily assisted law enforcement officials by revealing the name of his supplier, and he was not offered a deal in exchange for that information. *Id.* Assistance to law enforcement officials is a factor that is supposed to be taken into account when a defendant who goes to trial requests the adjustment. *See* USSG § 3E1.1, cmt. n.1(e). Admission of criminal conduct is also supposed to be taken into consideration. *See* USSG § 3E1.1, cmt. n.1(a). In Chevre's case, it is beyond dispute that Chevre both assisted law enforcement and admitted his criminal conduct.

109. *Demes*, 941 F.2d at 222. The court upheld the district court's determination that the downward adjustment was unwarranted, explaining that it is "difficult to reconcile Deme's claim of entrapment with his contention that he accepted responsibility." *Id.* The court left the door open by saying that "it is conceivable to hypothesize a case in which a plea of entrapment would not be inconsistent with the acceptance of responsibility;" it immediately closed that door, however, by pointing out that the claim of entrapment was "made by a person who in no circumstances could have had a justification for possession of the cocaine." *Id.* There was no discussion of whether the defendant assisted law enforcement, admitted his criminal conduct, or even whether the defendant appeared to be remorseful.

110. *See Kirkland*, 104 F.3d at 1405. Ultimately, the court rested its decision on the fact that a defendant who claims entrapment contests his intent to commit the crime that is a factual element of guilt. *Id.*; *see also supra* Part I. There was absolutely no discussion of whether Kirkland's pretrial behavior merited an acceptance-of-responsibility departure.

111. While this may be a natural consequence, section 3E1.1 clearly instructs courts to examine pretrial statements and conduct to determine if a defendant who proceeded to trial is deserving of the acceptance-of-responsibility adjustment. USSG § 3E1.1.

112. The Supreme Court has recognized the importance of counsel at plea negotiations, *see* Brady v. United States, 397 U.S. 742, 758 (1970), the need for a public record indicating

punishment even though that risk has a "discouraging effect on the defendant's assertion of his trial rights."[113] Imposing these "difficult choices" on a defendant is a permissible part of a system which allows the negotiation of pleas.[114] There is, however, a line that divides the constitutional from the unconstitutional consequences. That line is defined by the distinction between plea bargaining, which presents a defendant with a benefit/detriment choice prior to trial, and presenting a defense at trial, which presents a defendant with the wholly negative antecedent of being foreclosed from an acceptance-of-responsibility adjustment. Put another way, "difficult choices" become unconstitutional when the "choice" is restricted to selecting among harms. In the plea-bargain context, the defendant is required to choose between forgoing trial with the certainty that he will receive a lesser sentence either because the charges will be less severe or because he will receive an acceptance-of-responsibility adjustment, and going to trial with the possibility of more severe charges but also with the possibility of being acquitted of all charges. In this context, however, the defendant has already chosen to go to trial and the per se rule places a restriction on what the defendant can present once there. The defendant must either forgo the right to present the entrapment defense or forgo the right to be considered for the acceptance-of-responsibility adjustment. When the risk of more severe punishment in the plea-bargain "choice," becomes the certainty of more severe punishment under the per se bar, the line has been crossed.

The Supreme Court has cautioned that "not every burden on the exercise of a constitutional right, and not every encouragement to waive such a right, is invalid."[115] For example, Section 3E1.1 provides an incentive to plead guilty[116] that does not violate the defendant's Sixth Amendment right to trial[117] because it does not constitute a "per se policy of punishing those who elect to stand trial" and "the leniency decision is an individualized one, not based merely on the defendant's decision to go to trial."[118] A per se rule against eligibility for the

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that a plea was voluntarily and knowingly made, *see* Boykin v. Alabama, 395 U.S. 238, 242 (1969), and the requirement that a prosecutor's plea bargaining promise must be kept, *see* Santobello v. New York, 404 U.S. 257, 262 (1971).

113. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1977).

114. *Id.*

115. Corbitt v. New Jersey, 439 U.S. 212, 218 (1978).

116. *See* USSG § 3E1.1, cmt. n.3 (explaining that the entry of guilty plea along with the admission of the conduct comprising the offense and any additional relevant conduct will constitute "significant evidence" of acceptance of responsibility).

117. United States v. Saunders, 973 F.2d 1354, 1362 (7th Cir. 1992) ("It is well established under the so-called unconstitutional conditions doctrine that a defendant may not be subjected to more severe punishment for exercising his or her constitutional right to stand trial." (citing Minnesota v. Murphy, 465 U.S. 420, 434 (1980))).

118. *Id.* at 1362-63 (collecting cases).

adjustment for defendants who proceed to trial would mean that the leniency decision is no longer an individualized decision. While denying a reduction in sentence for leniency in an individual case is not a penalty implicating the exercise of the constitutional right to trial, a per se rule against eligibility for leniency is. The exercise of the constitutional right to present a defense, just like the exercise of any other constitutional right, may diminish the defendant's chances of being granted the acceptance-of-responsibility adjustment because it is likely that there is less evidence of acceptance of responsibility to weigh in the defendant's favor.[119] As the right to present a defense stands on equal constitutional footing with other rights protected by the Sixth Amendment,[120] however, a court cannot ignore the evidence of contrition simply because the defendant exercised his constitutional right to present the entrapment defense.[121]

Courts do have a legitimate interest which can be asserted into the constitutional calculus. Historically, the Supreme Court's treatment of the constitutional right to present a defense has dealt with evidentiary or procedural rules or rulings affecting the presentation of defense evidence.[122] In general, evidentiary rules are concerned with reliability and procedural rules tend to focus on judicial economy, regularization, and procedural reciprocity.[123] The Court typically examines the fairness of a rule or ruling to the accused.[124] Therefore, there are instances in which the constitutional right to present a defense may be outweighed by other interests.[125]

Nonetheless, in *Rock v. Arkansas* the Supreme Court concluded that restrictions on the right to present criminal-defense evidence can be constitutional only if they "accommodate other legitimate interests in the criminal trial process" and are not "arbitrary or disproportionate to the purposes they are designed to serve."[126] One of the

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119. *See* United States v. LaPierre, 998 F.2d 1460, 1468 (9th Cir. 1993).

120. *See* Taylor v. Illinois, 484 U.S. 400, 409 (1988) (citing Washington v. Texas, 388 U.S. 14, 18 (1967)).

121. *See LaPierre*, 998 F.2d at 1468 (explaining, in a case involving the Fifth Amendment privilege against self-incrimination, that the court may not "discount evidence of contrition because of a refusal to discuss the facts of the case with the probation officer").

122. *See* Clinton, *supra* note 86, at 796 (extrapolating a constitutional test from the many cases dealing with the constitutional right to present a defense).

123. *See id.* at 796-97.

124. *Id.*

125. *See Taylor v. Illinois*, 484 U.S. 400 (1988), in which the Supreme Court upheld the exclusion of a defense witness's testimony as a sanction for defense counsel's discovery-rule violation. The Court stated that rules providing for pretrial discovery serve the interests protected by the Compulsory Process Clause in providing a "full and truthful disclosure of critical facts." *Id.* at 412.

126. *See* Rock v. Arkansas, 483 U.S. 44, 52 (1987).

central purposes involved is in satisfying the defendant's and society-at-large's interest in "accurate adjudication."[127] Putting forth all evidence bearing on the circumstances surrounding the commission of the crime furthers that interest. The procedural interest of the courts must be balanced with the societal interest in accurate adjudication. In *Crane v. Kentucky*,[128] for example, the Supreme Court held that, "exclusion of . . . exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'"[129] *Crane*, therefore, serves as a cautionary note to circuits that fail to adequately justify application of a per se rule.

The circuits that have created per se rules have justified their actions by focusing on the theoretical inconsistency between entrapment and acceptance of responsibility.[130] As previously explained, however, the receipt of an acceptance-of-responsibility adjustment can be consistent with the entrapment defense. Evidence of entrapment, much like evidence of the circumstances surrounding a confession, would be essential to a defendant's argument for acquittal. It is true that in the context of the acceptance-of-responsibility adjustment evidence is not actually being excluded. Interpreting the Section 3E1.1 adjustment to exclude defendants who present evidence of entrapment, though, could assert enough pressure to completely discourage use of the entrapment defense.

The uncertainty that comes along with the choice to raise entrapment and possibly not receive the Section 3E1.1 adjustment or to plead guilty and be virtually guaranteed the adjustment is constitutionally permissible discouragement. What is impermissible is for the courts to leverage the per se bar against all defendants who would claim entrapment. The pressures asserted by a per se rule are far-reaching. A defendant's lawyer will advise her that raising the defense would preclude the adjustment if she is found guilty; this knowledge then puts the defendant in a position to roll the

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127. Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1391 (1991) (arguing that the Court's treatment of the constitutional right to present a defense, a truth furthering right, does not evidence a true commitment to accurate adjudication).

128. 476 U.S. 683 (1986). In *Crane*, the Court found that the constitutional right to present a defense was violated when the defendant was prevented from introducing evidence of the circumstances surrounding his confession. *Crane*, 476 U.S. at 690-91. The Court explained that "an essential component of procedural fairness is an opportunity to be heard" and that right "would be an empty one" if the states, without valid justification, "were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Id.* at 690.

129. *Crane*, 476 U.S. at 690-91 (quoting United States v. Cronic, 466 U.S. 648, 656 (1984)).

130. *See supra* notes 107-110 and accompanying text.

constitutional dice. That pressure infringes on defendants' constitutional right to present a defense because it assumes that all defendants who claim entrapment are not credible and are undeserving of the Section 3E1.1 adjustment regardless of their pre-trial conduct and other individual circumstances. Taking away the possibility of leniency from an entire class of defendants simply because they claimed entrapment at trial is offensive to the defendants' constitutional right to present a defense. If it is the *possibility* of leniency that saved Section 3E1.1 from constitutional attack,[131] then removing that *possibility* places Section 3E1.1 on precarious constitutional ground.[132]

Justice Stevens, dissenting in *Corbitt v. New Jersey*, stated that "[w]here the legislature, prosecutor, judge, or all three deliberately employ their charging and sentencing powers to induce a defendant to tender a plea of guilty and where they do so with the objective of penalizing a person's reliance on his legal rights such action is patently unconstitutional."[133] Such is the case here. The Supreme Court has very clearly stated that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."[134] In these circumstances, a defendant may enter into a plea bargain rather than proceed to trial with a legitimate

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131. *See supra* note 100 and accompanying text.

132. In interpreting an earlier version of the Sentencing Guidelines, the circuit courts split over whether a defendant could be denied an acceptance-of-responsibility adjustment because he refused to make self-incriminating statements related to conduct included in counts to which he had not pled guilty. *Compare* United States v. Piper, 918 F.2d 839 (9th Cir. 1990) (finding that requiring a defendant to accept responsibility other than for the count to which he pled guilty in order to receive a reduction would violate the defendant's Fifth Amendment right not to incriminate himself); United States v. Oliveras, 905 F.2d 623 (2d Cir. 1990) (same); United States v. Perex-Franco, 873 F.2d 455 (1st Cir. 1989) (same), *with* United States v. Ross, 920 F.2d 1530 (10th Cir. 1990) (finding that to deny a defendant a reduction because he will not acknowledge the full extent of his criminal behavior places no unconstitutional burden on the defendant's right against self incrimination); United States v. Gordon, 895 F.2d 932 (4th Cir. 1989) (same); United States v. Henry, 883 F.2d 1010 (11th Cir. 1989) (same). To resolve the controversy, the Sentencing Commission amended the Application Notes to read:

> Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection.

USSG § 3E1.1, cmt. n. 1(a) (2002). Thus, the Sentencing Commission sided with the courts that found it unconstitutional to make a defendant admit conduct to which he did not plead guilty to remain eligible for the acceptance-of-responsibility adjustment. In so doing, the Sentencing Commission reaffirmed once again its aversion to rules that completely take away the possibility of leniency.

133. Corbitt v. New Jersey, 439 U.S. 212, 232 n.7 (1978) (Stevens, J. dissenting) (internal citations and quotations omitted).

134. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (citing North Carolina v. Pearce, 395 U.S. 711, 738 (1969)).

entrapment defense because she knows that if the entrapment defense is unsuccessful she will be penalized, in the form of the court's refusal to consider an acceptance-of-responsibility adjustment, for the exercise of her right to present the entrapment defense. This result will be obtained regardless of the remorse shown by the defendant. Thus, to prevent this unconstitutional penalty, the Section 3E1.1 adjustment must be interpreted to allow defendants who proceed to trial to claim entrapment to remain eligible for the adjustment. Such a construction protects the delicate constitutional balance created by Section 3E1.1.

CONCLUSION

This Note shows that the defense of entrapment is consistent with the Federal Sentencing Guideline's acceptance-of-responsibility adjustment. In drafting the Federal Sentencing Guidelines, the Sentencing Commission attempted to lessen the sentencing disparity that resulted from pre-guideline sentencing. The Commission reserved some sentencing flexibility by creating adjustments to the guidelines, such as the acceptance-of-responsibility adjustment. The entrapment defense fits into the exception in Section 3E1.1 Application Note 2, which allows defendants who proceed to trial to receive the adjustment, because entrapment is not a challenge to factual guilt, but rather a challenge as to whether the statute applies to the defendant's conduct.

This interpretation of the statute safeguards the constitutional right of defendants to present an entrapment defense at trial. It also allows the punishment a defendant receives to be based on her individual circumstances, thus furthering the basic sentencing purpose of just deserts. When courts create per se rules preventing defendants who claim entrapment to receive the acceptance-of-responsibility adjustment, they not only violate defendants' constitutional right to present a defense, but also take away a sentencing court's ability to create a fair and just sentence. The Sentencing Commission set forth factors to determine whether a defendant has accepted responsibility for his crime. Therefore, these factors should guide the sentencing court's determination, and not a defendant's entrapment defense. As the entrapment defense can be consistent with the acceptance-of-responsibility adjustment, the denial of an acceptance-of-responsibility adjustment solely on the basis of an entrapment defense is a violation of the constitutional right to present a defense.