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I. INTRODUCTION

Federal and state criminal defendants often seek to avoid responsibility for their crimes by putting the actions of government officials on trial.[1] Defense efforts in this regard range from pretrial motions to suppress illegally-derived evidence,[2] to trial arguments implicitly or explicitly seeking "jury nullification" of a criminal statute to send a message to government officials.[3] The entrapment defense, which applies to instances where the government induces a defendant who is otherwise

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1. *See generally* ALAN M. DERSHOWITZ, THE BEST DEFENSE (1982).

2. *See, e.g.*, Minnick v. Mississippi, 498 U.S. 146, 156 (1990) (excluding evidence obtained by officials in violation of the Fifth Amendment); Maine v. Moulton, 474 U.S. 159, 176 (1985) (excluding evidence obtained by officials in violation of the Sixth Amendment); Minnesota v. Dickerson, 113 S. Ct. 2130, 2139 (1993) (excluding evidence obtained by officials in violation of the Fourth Amendment).

3. Federal Judge Jack B. Weinstein defines jury nullification as "occur[ing] when a jury—based on its own sense of justice or fairness—refuses to follow the law and convict in a particular case even though the facts seem to allow no other conclusion but guilt." Jack B. Weinstein, *Considering Jury "Nullification": When May and Should the Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239, 239 (1993). A jury's power of "nullification" is deeply rooted, but courts should not instruct the jury that it has such power. *Id.* at 241-43, 250. *See, e.g.*, United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir.), *cert. denied*, 488 U.S. 832 (1988); United States v. Dellinger, 472 F.2d 340, 408 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973); United States v. Boardman, 419 F.2d 110, 116 (1st Cir. 1969), *cert. denied*, 397 U.S. 991 (1970); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COL. L. REV. 79, 139 n.226 (1988).

not predisposed to commit a crime,[4] is perhaps the most traditional means by which criminal defendants ask juries to condemn the government's conduct.

This Article examines the "entrapment by estoppel" defense,[5] or, as it is sometimes called, the " 'official statement' mistake of law" defense.[6] Entrapment by estoppel differs markedly from the traditional entrapment defense because a defendant need not show that a government official "induced" his conduct but only that the official offered an honest, albeit mistaken, opinion that the conduct was lawful.[7] Similarly, the defense differs from the "outrageous government misconduct" defense that some courts have recognized as a matter of substantive due process in cases where, even though the defendant was criminally predisposed, the government induced the crime or participated in it through means that "shock the conscience."[8]

Defendants in several recent cases have successfully invoked entrapment by estoppel. Consider the following three cases:[9]

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4. *See, e.g.*, Jacobson v. United States, 112 S. Ct. 1535, 1540 (1992); United States v. Russell, 411 U.S. 423, 432 (1973); Sherman v. United States, 356 U.S. 369, 372 (1958); Sorrells v. United States, 287 U.S. 435, 452 (1932). A defendant may claim he was entrapped and simultaneously deny that he committed the offense. *See* Mathews v. United States, 485 U.S. 58, 66 (1988).

5. The Supreme Court has never accepted the entrapment by estoppel label. *See* OPM v. Richmond, 496 U.S. 414, 426-427 (1990) (noting current debate about whether United States v. Pennsylvania Indus. Chem. Corp. ("PICCO"), 411 U.S. 655 (1973), created an estoppel against the government).

6. *See* Jeffrey F. Ghent, Annotation, *Criminal Law: "Official Statement" Mistake of Law Defense*, 89 A.L.R. 4th 1031 (1991) (collecting cases).

7. As one commentator explained, the facts in entrapment by estoppel cases "differ[ ] significantly from the typical entrapment situation." Note, *Applying Estoppel Principles in Criminal Cases*, 78 YALE L.J. 1046, 1046 (1969). The officials in entrapment by estoppel cases "were known by the defendants to be government agents and had no design to deceive and entrap the defendants, nor did they persuade the defendants to commit the criminal acts. Instead, they merely gave their honest opinion that what the defendants proposed to do was not unlawful." *Id.* at 1046-47.

8. *Cf.* Rochin v. California, 342 U.S. 165, 172 (1952) (holding that forcible pumping of suspect's stomach violate due process because it shocked the conscience). The Supreme Court in a plurality opinion has categorically rejected the existence of a due process defense of outrageous government misconduct. Hampton v. United States, 425 U.S. 484, 488-91 (1976) (Rehnquist, J., with Burger, C.J., and White, J.). Nonetheless, the concurring justices in *Hampton* refused to rule out the existence of this defense in all cases. *Id.* at 491-95 (Powell, J., joined by Blackmun, J.). Although such a defense is generally assumed to exist, some courts have questioned its viability. *See, e.g.*, United States v. Bontkowski, 865 F.2d 129, 131 (7th Cir. 1989); United States v. Miller, 891 F.2d 1265, 1271 (7th Cir. 1989) (Easterbrook, J., concurring). The defense, however, only rarely succeeds. Typically, the defendant must show that: "1) the government utilize[d] unwarranted physical or mental coercion to effectuate the crime; or 2) the police completely fabricate[d] the crime solely to secure the defendant's conviction." United States v. Emmert, 829 F.2d 805, 811 (9th Cir. 1987).

9. *See* discussion *infra* part IV.

1. In *Commonwealth v. Twitchell*,[10] two Christian Scientists parents were convicted of involuntary manslaughter ("wanton or reckless" conduct resulting in death) because they refused to allow surgery that could have corrected their two-year old son's life-threatening medical condition. The Massachusetts Supreme Judicial Court rejected the parents' contention that a state statute protecting parental rights to provide "spiritual" treatment is a defense to involuntary manslaughter charges. Nonetheless, the court held that the state Attorney General's official statements regarding the spiritual treatment statute, which were recounted in a Christian Science publication, might be read as precluding an involuntary manslaughter prosecution. The *Twitchell* court held that the parents should have been allowed to present an entrapment by estoppel defense to the jury by showing that they reasonably relied on the Attorney General's statements.

2. In *United States v. Levin*,[11] an ophthalmologist was indicted for Medicare fraud because he received "kickbacks" from lens manufacturers that he did not reflect on his cost reports, which he submitted to secure federal reimbursement for Medicare-covered cataract surgeries. Although such kickbacks are unambiguously proscribed by the relevant criminal statute, the Sixth Circuit upheld pretrial dismissal of the indictment because the federal agency overseeing the Medicare program had written informal letters seemingly allowing similar reimbursement practices in other cases. In his dissent, Judge Martin noted the lack of evidence that the doctor even knew of the other letters and explained, in any event, that the issue whether he reasonably relied on letters to different Medicare providers was a question of fact that could only be determined by a trial jury.

3. In *United States v. Hedges*,[12] an Air Force procurement officer responsible for billion-dollar defense contracts was convicted under a federal conflict-of-interest statute for discussing employment opportunities with a defense contractor that later hired him. The defendant offered evidence that he had consulted his military "Standards of Conduct Counselor" about his employment discussions and that the counselor advised him without ever suggesting that the employment discussions created a conflict of interest. The district court excluded this defense evidence, on the ground that the conflict-of-interest statute creates a strict liability offense in which the defendant's state of mind is irrelevant. The Eleventh Circuit reversed. While agreeing with the district court that the statute created a strict liability offense, the Eleventh Circuit held that the

10. 617 N.E.2d 609 (1993).
11. 973 F.2d 463 (6th Cir. 1992).
12. 912 F.2d 1397 (11th Cir. 1990).

defense evidence should have been admitted under an entrapment by estoppel theory.

Although defendants increasingly invoke entrapment by estoppel, courts have not adequately considered basic questions such as: From whence does entrapment by estoppel derive? What are the prerequisites to entrapment by estoppel? Does it apply equally to crimes requiring specific intent, general intent, and no intent at all? Does entrapment by estoppel raise a question for a judge or a jury?

II. ENTRAPMENT BY ESTOPPEL CASELAW

As the Supreme Court recently explained, "[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system."[13] This rule, however, is not invariable. Some criminal statutes limit liability to "willful" violations, which courts typically construe as "making specific intent to violate the law an element of" the offense.[14] Even where a mistake of law defense would not otherwise be cognizable, the Supreme Court has held that prosecution may be precluded under the Due Process Clause where government officials affirmatively, albeit mistakenly, assured defendants that their conduct was legal. The three leading Supreme Court cases, which lower courts have read as adopting an "entrapment by estoppel" defense, are *Raley v. Ohio*,[15] *Cox v. Louisiana*,[16] *United States v. Pennsylvania Industrial Chemical Corp. ("PICCO")*.[17]

A. *The Supreme Court Trilogy*

In all three of the Supreme Court's purported entrapment by estoppel cases, the defendants claimed that a government official's erroneous advice had misled them. In *Raley*, an Ohio commission chairman informed the defendants that they could decline to answer the commission's questions when, in fact, the applicable Ohio immunity statute actually eliminated their privilege against self-incrimination.[18] The Supreme Court reversed the contempt convictions. The Court, characterizing the commission as "the voice of the State,"[19] observed that it had given the defendants "positive advice",[20] and in so doing had

13. Cheek v. United States, 498 U.S. 192, 199 (1991).
14. *Id.* at 200; *see e.g.*, Ratzlaf v. U.S., 114 S. Ct. 655 (1994).
15. 360 U.S. 423 (1959).
16. 379 U.S. 559 (1965).
17. 411 U.S. 655 (1973).
18. 360 U.S. at 425.
19. *Id.* at 439.
20. *Id.* at 432.

actively misled the defendants.[21] The Court explained that while there was no suggestion that the commission had any intent to deceive the defendants, to sustain the judgments of conviction on such a basis after the commission had acted as it did "would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him."[22]

Similarly, the defendant in *Cox* was convicted of violating a state statute prohibiting demonstrations "near" a courthouse even though "the highest police officials of the city, in the presence of the Sheriff and Mayor, in effect told the demonstrators that they could meet where they did, 101 feet from the courthouse steps, but could not meet closer to the courthouse."[23] The Supreme Court, quoting *Raley*, reversed the defendant's conviction on the ground that the Due Process Clause does not permit such "an indefensible sort of entrapment by the State."[24] The Court noted that "[o]bviously telling demonstrators how far from the courthouse steps is 'near' the courthouse for purposes of a permissible peaceful demonstration is a far cry from allowing one to commit, for example, murder or robbery."[25]

Finally, the defendant in *PICCO* claimed that he relied upon agency regulations that (erroneously) allowed the discharge of industrial pollutants into rivers if the discharge would not impede navigation.[26] As the Supreme Court characterized it, the defendant claimed he was "affirmatively misled by the responsible administrative agency into believing that the law did not apply in this situation."[27] The Court concluded that "to the extent that the regulations deprived PICCO of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution."[28] The Court did not frame its decision in terms of "estoppel," but favorably quoted commentary using that term.[29] The Court concluded that "the issues whether there was in fact reliance and, if so, whether that reliance was reasonable under the circumstances

21. *Id.* at 438.

22. *Id.* at 425-26.

23. Cox v. Louisiana, 379 U.S. 559, 568-69, 571 (1965).

24. *Id.* at 571.

25. *Id.* at 569.

26. United States v. PICCO, 411 U.S. 655, 670-75 (1973).

27. *Id.* at 674.

28. *Id.* at 674.

29. *Id.* at 674 (citing Frank C. Newman, *Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines In Administrative Law*, 53 COLUM. L. REV. 374 (1953)); Note, *supra* note 7, at 1046.

. . . must be decided in the first instance by the trial court."[30]

B. *The Roots and Elements of the Supreme Court Trilogy*

The entrapment by estoppel defense is, at least in part, constitutionally based. In *Raley* and *Cox*, the Supreme Court specifically ruled that the Due Process Clause precludes convicting an individual for "exercising a privilege which the State had clearly told him was available to him."[31] Reliance on the Constitution was necessary given that the Supreme Court lacks supervisory authority over state prosecutions.[32] In *PICCO*, which involved a federal prosecution, the Court was not explicit about the source of its ruling, but the citation to *Raley* and *Cox*[33] suggests that the rule had some constitutional underpinnings.

Moreover, although *Raley* and *Cox* did not use the term, the Court in those cases employed what today could be labeled "substantive due process" analysis.[34] Defendants claiming entrapment by estoppel are not asking for additional "process"—they are most likely entitled to a trial by jury under the Sixth Amendment—but instead are challenging the substantive fairness of the prosecution itself. Thus, in *Raley* and *Cox*, the Supreme Court construed the Due Process Clause as preventing "an indefensible sort of entrapment by the State."[35] Similarly, in *PICCO*, while the Court referred to a denial of "fair warning" to the defendant,[36] it ultimately relied on "traditional notions of fairness inherent in our system of criminal justice."[37] An entrapment by estoppel claim, therefore, requires a court to analyze whether, under all the circumstances of the case, fundamental fairness precludes conviction.

The Supreme Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly."[38] At least with respect to entrapment by estoppel, this is correct. As the Court has explained, "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined."[39] Thus, Congress or state legislatures must define the elements of criminal

30. *Id.* at 675.

31. Raley v. Ohio, 360 U.S. 423, 425-26 (1959); Cox v. Louisiana, 379 U.S. 559, 571 (1965).

32. *See* Estelle v. McGuire, 112 S. Ct. 475, 482 (1991).

33. *See* United States v. PICCO, 411 U.S. 655, 674 (1973).

34. *See, e.g.*, Reno v. Flores, 113 S. Ct. 1439, 1446-47 (1993); *see also* Foucha v. Louisiana, 112 S. Ct. 1780, 1785 (1992); United States v. Salerno, 481 U.S. 739, 746 (1987).

35. *Raley*, 360 U.S. at 426; *see also Cox*, 379 U.S. at 571.

36. *PICCO*, 411 U.S. at 674.

37. *Id.* at 674-75.

38. Dowling v. United States, 493 U.S. 342, 352 (1990); *accord* Estelle v. McGuire, 112 S. Ct. 475, 482 (1991).

39. Heckler v. Community Health Servs., 467 U.S. 51, 60 (1984).

offenses, prosecutors must execute the laws by deciding when to charge individuals with such offenses, and grand and petit juries must serve as the ultimate guardians against injustice. Courts should hesitate before setting aside a conviction rendered in conformance with all the procedural requisites of law and consistent with all the specific protections of the Bill of Rights. Such setting aside cannot be justified simply because it offends a judge's personal views of "traditional notions of fairness."[40]

Of course, courts should utilize the entrapment by estoppel doctrine in cases where fundamental fairness dictates that it be applied. But because the doctrine is such strong medicine, the doctrine should be reserved for those cases where it is truly needed. An analysis of the Supreme Court's trilogy of cases reveals at least four prerequisites to a successful entrapment by estoppel claim.

The first prerequisite is the involvement of a government agent with authority over the area in question. This is necessary as a matter of constitutional law because the Due Process Clause, like other guarantees of the Bill of Rights, is limited to "state action."[41] Thus, for example, the Court in *Raley* was careful to characterize the Ohio commission as "the voice of the State."[42] The Court in *Cox* similarly emphasized that the advice had been given by "the highest police officials of the city, in the presence of the Sheriff and Mayor."[43] Likewise, the Court in *PICCO* deemed there to be "no question that PICCO had a right to look to the Corps of Engineers' regulations for guidance" given that "[t]he Corps is the responsible administrative agency under the [statute]."[44]

Second, the responsible government official must have made some affirmative misrepresentation of law. In *Raley*, for example, the commission gave "positive advice" that resulted in the "active misleading" of the defendants.[45] In *Cox*, the police officers gave the defendant an "official grant of permission" to demonstrate where he did.[46] In *PICCO*, the responsible agency "affirmatively misled" the defendant through its regulations.[47] Likewise, the more recent Supreme Court case of *OPM v. Richmond*, though outside the criminal law context, explained that "[o]ur own opinions have continued to mention the possibility, in the course of rejecting estoppel arguments, that some type of 'affirmative

40. *PICCO*, 411 U.S. at 674.

41. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991, 1001 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 839 (1982).

42. Raley v. Ohio, 360 U.S. 423, 439 (1959).

43. Cox v. Louisiana, 379 U.S. 559, 571 (1965).

44. *PICCO*, 411 U.S. at 674.

45. *Raley*, 360 U.S. at 432, 438.

46. *Cox*, 379 U.S. at 572.

47. *PICCO*, 411 U.S. at 674.

misconduct' might give rise to estoppel against the Government."[48] Requiring some affirmative agency action is necessary to prevent undercutting the well-established rule that "ignorance of the law or a mistake of law is no defense to criminal prosecution."[49] Accordingly, the Supreme Court in *PICCO* noted that the defendant did not "contend . . . that it was ignorant of the law or that the statute is impermissibly vague."[50]

Third, the defendant must have reasonably relied on the government official's misstatement of law. The Court in *PICCO*, for example, remanded the case for the trial court to determine "whether there was in fact reliance and, if so, whether that reliance was reasonable under the circumstances."[51]

The final, and most amorphous, prerequisite is that conviction must be "unfair" under the circumstances. Thus, the Court in *Raley* and *Cox* stressed the "indefensibility" of convicting the defendants.[52] The *PICCO* Court suggested that convicting the defendant would contravene "traditional notions of fairness inherent in our system of criminal justice."[53] While it could be argued that unfairness will always exist if the first three prerequisites are established, the Supreme Court apparently has not adopted this view. In *Cox*, the Court noted that "[o]bviously telling demonstrators how far from the courthouse steps is 'near' the courthouse for purposes of a permissible peaceful demonstration is a far cry from allowing one to commit, for example, murder, or robbery."[54] This Article suggests that the Court may balance the unfairness to the defendant against the cost to society of estopping law enforcement, especially with respect to serious crimes.

C. *The Response of the Lower Courts*

Federal courts of appeals have generally recognized the key prerequisites to a successful entrapment by estoppel claim.[55] Courts, for example, require a government official to issue the pronouncement.[56]

48. OPM v. Richmond, 496 U.S. 414, 421 (1990).

49. Cheek v. United States, 498 U.S. 192, 199 (1991).

50. *PICCO*, 411 U.S. at 673-74.

51. *Id.* at 675.

52. Raley v. Ohio, 360 U.S. 423, 426 (1959); Cox v. Louisiana, 379 U.S. 559, 571 (1965).

53. *PICCO*, 411 U.S. at 674.

54. *Cox*, 379 U.S. at 569.

55. *See, e.g.*, United States v. Levin, 973 F.2d 463, 468 (6th Cir. 1992) (prerequisites are "that (1) a government [official] must have announced that the charged criminal act was legal; (2) the defendant relied on the government announcement; (3) the defendant's reliance was reasonable; and, (4) given the defendant's reliance, the prosecution would be unfair") (citing United States v. Smith, 940 F.2d 710 (1st Cir. 1991)).

56. *See, e.g.*, United States v. Clark, 986 F.2d 65, 69 (4th Cir. 1993); United States v.

Obviously, statements of a private party cannot estop the government;[57] nor, in a federal prosecution, can statements of state or local officials estop the federal government.[58] There is, however, disagreement as to whether statements of federally-licensed gun dealers may estop the federal government. In *United States v. Tallmadge*,[59] the Ninth Circuit held that a gun dealer's statements may provide the basis for entrapment by estoppel. In light of the Supreme Court's requirements for estoppel, this decision seems wrong. Courts have never considered a person doing business pursuant to a government license as a government official.[60] In such a system, states would be liable for the negligence of every citizen holding a drivers license. The government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]."[61] There was no evidence in *Tallmadge* to suggest that the federal government had encouraged the gun dealer to advise the defendant that he could own a gun legally.

Second, federal courts have required some evidence that the government official made an affirmative misrepresentation as to the legality of the action.[62] The Eighth Circuit has held that "the absence of an explicit assurance of legality" is fatal to a successful entrapment by

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Brebner, 951 F.2d 1017, 1027 (9th Cir. 1991); United States v. Austin, 915 F.2d 363, 366 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1626 (1991).

57. United States v. Clark, 986 F.2d 65, 69 (4th Cir. 1993) (private museum official's statements could not bar prosecution for improperly selling tiger skins) (citing United States v. Austin, 915 F.2d 363, 366 (8th Cir. 1990)). In United States v. Tallmadge, 829 F.2d 767, 773-75 (9th Cir. 1987), the court estopped the federal government from prosecuting the defendant for possessing firearms that a federally-licensed gun dealer said he could possess. The court also noted that the defendant's private attorney and state officials had given him similar advice. In another case, the Ninth Circuit explained "[r]ather than authorizing a defendant's reliance on non-federal officials, we analyzed this evidence in regard to the second requirement of the entrapment by estoppel test, namely the reasonableness of the defendant's reliance on the licensed firearms dealer." United States v. Brebner, 951 F.2d at 1027.

58. *See, e.g.*, United States v. Etheridge, 932 F.2d 318, 321 (4th Cir.) (claim may not be based on advice given by state trial judge), *cert. denied*, 112 S. Ct. 323 (1991); United States v. Hurst, 951 F.2d 1490, 1499 (6th Cir.) (entrapment by estoppel claim may not be based on statements of state law enforcement officials), *cert. denied*, 112 S. Ct. 1952 (1992); United States v. Bruscantini, 761 F.2d 640, 641-42 (11th Cir.), *cert. denied*, 474 U.S. 904 (1985); United States v. Allen, 699 F.2d 453, 458 n.1 (9th Cir. 1982) (state parole officer).

59. 829 F.2d 767, 773-75 (9th Cir. 1987). *See* United States v. Clegg, 846 F.2d 1221, 1224 (9th Cir. 1988) (panel deemed itself bound by *Tallmadge* "[w]hatever our disagreements may be with the court's ruling" in that case); *see also* United States v. Billue, 994 F.2d 1562, 1568-69 (11th Cir.) (holding that federal firearms license does not make gun dealer a federal official), *cert. denied*, 114 S. Ct. 939 (1993); United States v. Austin, 915 F.2d 363, 366-67 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1626 (1991).

60. *See, e.g.*, Moose Lodge, Inc. v. Irvis, 407 U.S. 163 (1972).

61. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

62. United States v. Brebner, 951 F.2d 1017, 1025-26 (9th Cir. 1991).

estoppel claim.[63] The mere failure to advise the defendant that his conduct was wrongful cannot suffice. If courts "were to accept [defense] contention[s] that mere nonfeasance in law enforcement was tantamount to official approval of illegal acts and entrapment, there would be scarcely a speeding ticket not subject to due process challenge."[64]

Third, federal courts have required that the defendant reasonably relied on the statements by the responsible government official. As one court stated, "the defendant must show that he relied on the official's statement and that his reliance was reasonable in that a person sincerely desirous of obeying the law would have accepted the information as true and would not have been put on notice to make further inquiries."[65] In at least one case, however, this requirement was not applied as strictly as it should have been. In *United States v. Levin*,[66] the court acknowledged the reliance requirement,[67] but found that the "defendants initiated no inquiry of their own concerning the legality of" their conduct.[68] Similarly, the dissenting opinion noted that "there apparently is no evidence that [defendants] saw these [agency] letters before the grand jury indicted [them]."[69] Nonetheless, the majority upheld an entrapment by estoppel claim based on a vague notion of constructive reliance.[70]

Finally, courts have recognized that the entrapment by estoppel defense will be sustained only where prosecution would otherwise be "unfair."[71] One court explained, "[e]ven if [it] were to find the technical elements of estoppel present, [a] court can refuse to apply the doctrine when policy considerations so demand."[72] This additional element of unfairness, however, has not been considered in detail. Generally, where courts have found that the other elements of the defense have

63. United States v. LaChapelle, 969 F.2d 632, 637 (8th Cir. 1992); *see also*, United States v. Clark, 986 F.2d 65, 69-70 (4th Cir. 1993) (defense rejected where statements of federal official were, at best, equivocal).

64. United States v. Hurst, 951 F.2d 1490, 1499 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1952 (1992).

65. United States v. Weitzenhoff, 1 F.3d 1523, 1534 (9th Cir. 1993). A defendant will not be entitled to rely on the defense where he is in collusion with corrupt government officials. *See* Note, *supra* note 7, at 1058 ("The purpose of criminal estoppel is the protection of those whom the government has confused as to the state of the law; and collusion, bribes, and favoritism by officials are outside its scope—no matter how much the defendant may have relied on such misconduct.").

66. 973 F.2d 463 (6th Cir. 1992).

67. *Id.* at 468.

68. *Id.* at 465.

69. *Id.* at 472 (Martin, J., dissenting).

70. *See id.* at 465 (deeming it "apparent" that federal government approval of similar conduct "was circulated throughout the targeted professional medical community by manufacturers' representatives and sales personnel").

71. *See id.* at 468 (citing United States v. Smith, 940 F.2d 710 (1st Cir. 1991)).

72. United States v. Hall, 974 F.2d 1201, 1205 (9th Cir. 1992).

been proven, they have assumed it would be unfair to convict the defendant.

III. UNRESOLVED ISSUES

Although the preceding section illustrates some disagreement among courts regarding application of the entrapment by estoppel doctrine to particular cases—for example, as to whether a gun dealer is a federal agent capable of binding the government or whether a defendant reasonably relied on a misstatement—courts have failed to address two broader issues. First, for what types of crimes is the defense available? Courts have recognized that, because "entrapment by estoppel rests upon principles of fairness [and] not [a] defendant's mental state," it may be raised even as to crimes requiring specific intent.[73] But, is the converse also true? Can the defendant raise an entrapment by estoppel defense to a crime that requires that he have acted with specific intent, or is the defense superfluous in that context? Second, in cases where the defense is properly raised, is it a question for a judge or a jury to decide?

A. *Does the Defense Apply to Specific Intent Crimes?*

Courts have neglected to consider whether the Constitution requires that an entrapment by estoppel defense be cognizable in all criminal cases. When a court considers and upholds the defense even though the statutory elements of an offense are established, it is necessarily holding the statute unconstitutional as applied. In essence, the court invalidates application of the statute to a defendant as contrary to "traditional notions of fairness inherent in our system of criminal justice."[74] Before considering and upholding an entrapment by estoppel claim, courts should decide whether an available statutory defense exists that would obviate the unfairness. Considering the possible statutory defenses first, accords with the Supreme Court's practice "not [to] pass on the constitutionality of an Act of Congress if a construction of the Act is fairly possible, or some other nonconstitutional ground fairly available, by which the constitutional question can be avoided."[75]

Some criminal statutes, particularly those limiting liability to "willful" violations, "mak[e] specific intent to violate the law an element of"

73. *Smith*, 940 F.2d at 714 (citing United States v. Hedges, 912 F.2d 1397, 1405 (11th Cir. 1990)).

74. United States v. PICCO, 411 U.S. 655, 674 (1973); *see also* United States v. Hall, 974 F.2d 1201, 1205 (9th Cir. 1992); United States v. Levin, 973 F.2d 463, 468 (6th Cir. 1992); *Smith*, 940 F.2d at 710.

75. United States v. Locke, 471 U.S. 84, 92 (1985).

the offense.[76] For example, the federal conspiracy statute makes it a crime to conspire to commit a federal offense or "to defraud the United States, or any agency thereof."[77] This language has been construed as "reach[ing] 'any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government.' "[78] The entrapment by estoppel defense, therefore, should have no application to a defendant who acted with the specific intent to defraud the United States. Stated otherwise, defendants who rely in good faith on assurances of government officials that their conduct was legal will not have acted with the statutorily-proscribed "purpose of impairing, obstructing or defeating the lawful function of any department of Government."[79] By allowing good faith reliance to negate an element of the offense, the entrapment by estoppel defense is not necessary, as the statute itself protects against fundamentally unfair convictions.

Even in cases where the government is not the intended victim, the need for the constitutional defense with respect to other specific intent crimes may not exist. For example, two of the most commonly charged federal criminal statutes prohibit any "scheme or artifice to defraud" that is executed through the United States mails or interstate wire facilities.[80] A defendant's good faith reliance on governmental assurances that his conduct was legal would negate any intent to defraud, and preclude conviction under the mail or wire fraud statutes, even where a private party is the victim. In this regard, the leading jury instruction manual offers the following instruction with respect to specific intent crimes:

> The "good faith" of Defendant — is a complete defense to the charge of — contained in [Count — of] the indictment because good faith on the part of the defendant is, simply, inconsistent with [*describe required mental state, e.g.*, "the intent to defraud", "the intent to obtain money or property by means of false or fraudulent pretenses, representations, or promises"] alleged in that charge.[81]

When courts give the above instruction, the entrapment by estoppel defense is superfluous because a defendant who reasonably relied on government assurances cannot have the requisite mental state for conviction. The instruction notes that, in determining whether the defendant acted with the requisite intent, "the jury must consider all of the evi-

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76. Cheek v. United States, 498 U.S. 192, 200 (1991); *see also, e.g.*, Ratzlaf v. U.S., 114 S. Ct. 655 (1994).

77. 18 U.S.C. § 371 (1993).

78. Tanner v. United States, 483 U.S. 107, 128 (1987) (citations omitted).

79. *Id.*

80. 18 U.S.C. §§ 1341, 1343 (1993).

81. 1 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 19.06, at 797 (1992).

dence received in the case bearing on the defendant's state of mind."[82]

Moreover, where specific intent is an element of the offense, whether the defendant reasonably relied on government assurances can only be determined at trial. The Federal Rules of Criminal Procedure preclude "speaking motions" in which defendants challenge the sufficiency of evidence underlying an indictment.[83] One reason for this difference between a criminal case and a civil case in which summary judgment would be permitted is that, in a criminal case, a grand jury typically has found probable cause for the facts underlying the charged offense. As the Supreme Court has consistently reaffirmed, most recently in *United States v. Williams*, federal courts have no power to dismiss indictments based on insufficiency of evidence relied on by the grand jury.[84]

Federal Rule of Criminal Procedure 12(b) expressly limits pretrial motions to dismiss to those matters that are "capable of determination without trial of the general issue."[85] Accordingly, in *United States v. Knox*,[86] the Supreme Court held that Rule 12(b) prohibited a defendant charged with making false statements on a wagering tax form from asserting a pretrial claim that requiring gamblers to file such forms improperly coerced them into choosing between incriminating themselves or lying. The Court stated that, "the question whether Knox's predicament contains the seeds of a 'duress' defense, or perhaps whether his false statement was not made 'willfully' as required by § 1001, is one that must be determined initially at his trial."[87] In addition, the Supreme Court's decision in *Serfass v. United States*[88] provides similar precedent.[89] Federal courts of appeals have also held that a Rule 12(b) pretrial motion may not be the basis for controverting the factual allega-

82. *Id.*

83. *See* 1 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 194, at 714 (1982).

84. 112 S. Ct. 1735, 1745-46 (1992).

85. FED. R. CRIM. P. 12.

86. 396 U.S. 77 (1969).

87. *Id.* at 83; *see also id.* at 83 n.7 (Rule 12(b) "indicates that evidentiary questions of this type should not be determined on such a motion.").

88. 420 U.S. 377 (1975).

89. In *Serfass*, the district court dismissed the defendant's indictment. He was charged with willful failure to report for induction into the armed services. The dismissal was based on the court's conclusion, upon consideration of a pretrial affidavit and defendant's selective service file, that the Draft Board had not adequately explained why the defendant was not entitled to conscientious objector status. The Supreme Court rejected the defendant's claim that a government appeal of this dismissal order was barred by the Double Jeopardy Clause. The Court held that jeopardy never attached because the defendant had not been "put to trial before the trier of facts." *Id.* at 389. The Court explained that, in considering a pretrial motion to dismiss an indictment, "the District Court was without power to make any determination regarding [defendant's] guilt or innocence." *Id.*

tions of an indictment.[90]

Where an indictment charges that the defendant acted "willfully" or with another specific intent inconsistent with reasonable reliance on government assurances, the defendant should not be allowed to controvert the charge until trial. If the jury convicts the defendant, the entrapment by estoppel defense cannot apply because the jury's verdict would be inconsistent with the prerequisites to that constitutional defense.

B. *Should a Court or Jury Decide the Issue?*

As previously discussed, entrapment by estoppel is a constitutional defense. It is reserved for cases in which, though the prosecution proves all elements of the statutory offense, conviction remains fundamentally unfair, and therefore in violation of the Due Process Clause. Thus, it differs from a traditional entrapment defense, which 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."[91] As a constitutional defense, entrapment by estoppel is more analogous to the "outrageous government" conduct defense.[92] Federal courts of appeals uniformly hold that the merits of an outrageous government conduct defense should be decided by the court as a question of law rather than by a jury as a question of fact.[93]

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90. *See, e.g.*, United States v. Russell, 919 F.2d 795, 797 (1st Cir. 1990) (applying the "general rule" that "when a pretrial motion raises a question of fact that is intertwined with the issues on the merits, resolution of the question of fact thus raised must be deferred until trial"); United States v. Ayarza-Garcia, 819 F.2d 1043, 1048 (11th Cir.) (noting that "a pretrial motion to dismiss the indictment cannot be based on a sufficiency of evidence argument because such an argument raises factual questions embraced in the general issue"), *cert. denied*, 484 U.S. 969 (1987); United States v. King, 581 F.2d 800, 802 (10th Cir. 1978) (reinstating indictment where "dismissal was in effect a determination of guilt made at a point in the proceedings when the district judge was without jurisdiction to render it"); United States v. Mann, 517 F.2d 259, 267 (5th Cir. 1975) (reversing pretrial dismissal based on "evidence outside of the indictment" because "such evidence is irrelevant to a determination of whether the indictment itself is legally sufficient"), *cert. denied*, 423 U.S. 1087 (1976); Universal Milk Bottle Serv. v. United States, 188 F.2d 959, 961-62 (6th Cir. 1951) (holding that defendants charged with illegal price-fixing could not challenge the indictment with official bulletins and affidavits showing that they could not have fixed milk prices because the federal Agriculture Secretary had already established them).

91. United States v. Russell, 411 U.S. 423, 435 (1973); *see also* Mathews v. United States, 485 U.S. 58, 66 (1988).

92. *See* United States v. Smith, 940 F.2d 710, 714-16 (1st Cir. 1991) (recognizing parallels between entrapment by the estoppel and outrageous government conduct defenses).

93. *See, e.g.*, United States v. Henderson-Durand, 985 F.2d 970, 973 & n.4 (8th Cir.), *cert. denied*, 114 S. Ct. 164 (1993); United States v. Hudson, 982 F.2d 160, 163 (5th Cir.), *cert. denied*, 114 S. Ct. 100 (1993); United States v. Payne, 962 F.2d 1228, 1232 (6th Cir.), *cert. denied*, 113 S. Ct. 306 (1992); United States v. Sotelo-Murillo, 887 F.2d 176, 182 (9th Cir. 1989); United States v. Swiatek, 819 F.2d 721, 726 (7th Cir.), *cert. denied*, 484 U.S. 903 (1987); United States v. Nunez-Rios, 622 F.2d 1093, 1098 (2d Cir. 1980).

One reason why the entrapment by estoppel defense is more appropriate for a court is that "[e]ven if [it] were to find the technical elements of estoppel present, [a] court can refuse to apply the doctrine when policy considerations so demand."[94] This policy consideration is important because "entrapment by estoppel rests on a due process theory which focuses on the conduct of the government officials rather than on a defendant's state of mind."[95] Criminal juries should not be asked to weigh "policy considerations" involving the government's conduct.

Despite these factors strongly supporting judicial resolution of an entrapment by estoppel claim, there are cases which suggest that such a claim raises a jury question.[96] One recent law review article accepted the view that a "defendant using [the entrapment by estoppel] defense requests a jury instruction that reasonable reliance upon the legal advice of a public official charged with interpreting the law is a defense."[97] In addition, an earlier note concluded that "[t]he criminal estoppel defense is heavily fact-oriented" and, therefore, "must be tried to the jury in some form."[98] However, a jury question arises only where the defendant's specific intent is an element of the offense. Indeed, in such cases there is no need for a constitutional entrapment by estoppel defense (predicated on the need to avoid fundamental unfairness) because a defendant who is affirmatively misled will lack of the requisite criminal intent.

Making entrapment by estoppel an issue for the court rather than the jury benefits the prosecution in some respects but the defense in others. The prosecution is generally helped by the fact that a sympathetic jury is not invited to nullify the perceived harshness of non-spe-

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94. United States v. Hall, 974 F.2d 1201, 1205 (9th Cir. 1992).

95. United States v. Brebner, 951 F.2d 1017, 1025 (9th Cir. 1991).

96. United States v. Evans, 928 F.2d 858, 860 (9th Cir. 1991); *see also* United States v. LaChapelle, 969 F.2d 632, 637-38 (8th Cir. 1992); United States v. Ramos, 961 F.2d 1003, 1006 (1st Cir.), *cert. denied*, 113 S. Ct. 364 (1992); United States v. Hedges, 912 F.2d 1397, 1405-06 (11th Cir. 1990).

97. Fred W. Bennett, *From Sorrells to Jacobson: Reflections on Six Decades of Entrapment Law, and Related Defenses, In Federal Court*, 27 WAKE FOREST L. REV. 829, 862 (1992) (citing United States v. Hedges, 912 F.2d 1397, 1404 (11th Cir. 1990)).

98. Note, *supra* note 7, at 1056 n.34. The student note applies a fact versus law dichotomy and advocates a hybrid approach in which some elements of the entrapment by estoppel defense are decided by the jury and others by the court. *Id.* at 1056-57 nn.34-37. That the defense is "heavily fact-oriented," however, does not justify requiring a partial jury determination. Many fact-dependent issues (*e.g.*, suppression issues, the outrageous government misconduct defense) are decided solely by the court prior to trial. Moreover, the Federal Rules of Criminal Procedure allow pretrial resolution of defenses "capable of determination without trial of the general issue." FED. R. CRIM. P. 12(b). The dividing line, therefore, is not whether a defense raises factual issues, but rather whether it is inextricable from the elements of the offense, which can only be decided by the jury. Because the entrapment by estoppel defense, properly construed, is wholly separate from the statutory elements of an offense, it is a question of law for the court.

cific intent statutes. On the other hand, the defense is benefitted because the court has greater power to act as a fact-finder regarding the issue of reliance without viewing the evidence in the light most favorable to the prosecution.[99] If the trial court finds for the defendant on the issue, however, the prosecution may appeal.[100] In contrast, the government cannot appeal an adverse jury verdict.[101]

IV. RECONSIDERING ENTRAPMENT BY ESTOPPEL CASELAW

The general principles related to an entrapment by estoppel defense, and attendant questions, are illustrated in the three recent cases highlighted in the introduction.[102] In the first case, *Commonwealth v. Twitchell*, the court correctly permitted a reliance defense at trial, but erred in terming it entrapment by estoppel.[103] In *United States v. Levin*, the second case, the court erred both in allowing the introduction of a reliance defense prior to trial and in identifying such a defense as entrapment by estoppel.[104] Finally, in the third case, *United States v. Hedges*, the court correctly recognized an entrapment by estoppel claim, but

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99. Where the defendant claims that the prosecution failed to prove an element of the offense, the narrow judicial inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979).

100. *See* 18 U.S.C. § 3731 (1990) ("In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."). Where an entrapment by estoppel claim is resolved prior to trial, as it should be under Fed. R. Crim. P. 12(b), the Double Jeopardy Clause does not restrict the government's appeal because jeopardy never attached. *See* Serfass v. United States, 420 U.S. 377, 394 (1975) (Double Jeopardy Clause does not bar government appeals of pretrial dismissals). Where the court grants an entrapment by estoppel claim after jeopardy has attached—*i.e.*, after the jury has been empaneled and sworn—the double jeopardy issue becomes more complicated. *See* Crist v. Bretz, 437 U.S. 28, 29 (1978). In such cases, the general rule is that the Double Jeopardy Clause bars government appeals of any judgment regarding the merits of "some or all of the factual elements of the offense charged." United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977); *accord* Smalis v. Pennsylvania, 476 U.S. 140, 143 (1986). The thesis of this Article, however, is that entrapment by estoppel is a constitutional defense unrelated to the elements of the offense. If this thesis is correct, even a mid-trial judgment upholding the defense arguably would be appealable under Section 3731 (and not barred by the Double Jeopardy Clause), because it would not represent a finding that the government failed to prove any elements of the offense. *Cf.* United States v. Torkington, 874 F.2d 1441, 1444-45 (11th Cir. 1989) (government entitled to appeal mid-trial judgment purportedly entered under Fed. R. Crim. P. 29, because the judgment of "acquittal" was "based on prosecutorial misconduct rather than on insufficiency of the evidence").

101. *See generally* Burks v. United States, 437 U.S. 1 (1978).

102. *See supra* pp. 629-30.

103. Commonwealth v. Twitchell, 617 N.E.2d 609, 618-19 (Mass. 1993).

104. United States v. Levin, 973 F.2d 463, 468-70 (6th Cir. 1992).

erred in deeming it a trial defense.[105] The analytical errors in these cases are not simply a matter of semantics. These errors adversely affect the procedural and substantive rights of both the prosecution and the defense.

A. *The Involuntary Manslaughter Case*

In *Commonwealth v. Twitchell*, the Massachusetts Supreme Judicial Court, citing entrapment by estoppel caselaw, held that Christian Science parents convicted of involuntary manslaughter should have been allowed to show at trial that they relied on statements by the state Attorney General.[106] Arguably, these statements would have precluded prosecution for failure to provide medical services because of religious beliefs. The court may have reached the correct result, but it erred in failing to examine whether the evidence was admissible under state law.

The Massachusetts common law offense of involuntary manslaughter encompasses "wanton or reckless" conduct resulting in death.[107] Although the nuances of Massachusetts law are beyond the scope of this Article, it seems that the parents would be entitled to offer evidence of those factors that influenced their thinking to demonstrate that their conduct was not "wanton or reckless." If the parents had consulted a doctor and been advised that the medical risks of the operation outweighed its possible benefits, then the evidence would be admissible to demonstrate their decision to decline the operation was not wanton or reckless. Indeed, the *Twitchell* court cited evidence that the parents had consulted a Christian Science practitioner, nurse, and church official during the course of their child's illness.[108] If the parents had relied on the state Attorney General's opinion regarding the legality of purely spiritual treatment,[109] there is no apparent reason why such evidence would not bear on whether their actions were wanton or reckless.

The *Twitchell* court's failure to consider the admission of reliance evidence under state law was not simply a case of unnecessarily deciding a constitutional issue. By resting its decision on entrapment by estoppel, the court placed "the burden on the defendants to prove by a preponderance of the evidence the facts that support the affirmative defense."[110] Although the court was correct to consider entrapment by

105. United States v. Hedges, 912 F.2d 1397, 1404-06 (11th Cir. 1990).

106. 617 N.E.2d 609 (1993).

107. *Id.* at 613-14 (discussing Massachusetts caselaw).

108. *Id.* at 612. Obviously, the source of the advice will affect its weight. Reliance on a physician will be more reasonable than reliance on a fortune teller.

109. Giving special treatment to religious practices potentially implicates the Establishment Clause of the First Amendment. The *Twitchell* court, however, did not consider these First Amendment issues. *Twitchell*, 617 N.E.2d at 614.

110. *Id.* at 620 n.17.

estoppel as an affirmative defense in which defendants have the burden of proof,[111] the court neglected to consider whether reasonable reliance embodied by that defense was already encompassed in the elements of the offense. If evidence of the defendants' reliance was relevant to whether they had acted wantonly or recklessly, as the prosecution was required to prove beyond a reasonable doubt, then the court should have required the prosecution to negate the defendants' reasonable reliance.[112]

If the evidence of the defendants' reliance were irrelevant as a matter of state law, then the *Twitchell* court would have been justified in resorting to the constitutional defense of entrapment by estoppel.[113] One issue the court failed to explicitly address is whether the entrapment by estoppel defense should be available for a serious crime such as involuntary manslaughter. In *Cox*, the Supreme Court suggested that the defense may not apply to certain crimes, stating "[o]bviously telling demonstrators how far from the courthouse steps is 'near' the courthouse for purposes of a permissible peaceful demonstration is a far cry from allowing one to commit, for example, murder, or robbery."[114] The *Twitchell* court, therefore, should not have recognized an entrapment by estoppel defense without considering whether the theory applies to crimes such as manslaughter.

As one commentator suggests, "[e]stoppel can never be a valid defense to a charge of an heinous crime" or to "almost any crime involving substantial personal injury."[115] This generalization, however, cuts too broadly. Massachusetts does not criminalize all conduct which causes death, but only "reckless or wanton" conduct.[116] Reasonable reliance on governmental advice is the antithesis of wanton or reckless conduct. Thus, it is fundamentally unfair to convict defendants under such a theory without allowing evidence that they conformed to the advice of a

111. Note, *supra* note 7, at 1056.

112. *See generally In re* Winship, 397 U.S. 358, 364 (1970) (Due Process Clause requires prosecution to prove every element of the offense beyond a reasonable doubt).

113. If reliance evidence were admissible under state law, and if the jury nonetheless convicted the parents, the constitutional entrapment by estoppel defense would not apply because conviction would not violate "traditional notions of fairness inherent in our system of criminal justice." United States v. PICCO, 411 U.S. 655, 674 (1973).

114. 379 U.S. 559, 569 (1965).

115. Note, *supra* note 7, at 1060-61. The note defines "heinous" crimes as those that "involve such markedly cruel physical treatment of other persons as to involve shocking disregard for the dignity of life and person." *Id.* at 1060 n.53. The note apparently would not deem manslaughter as a heinous crime but would include it as another type of crime—one "involving substantial personal injury"—for which an entrapment by estoppel defense should generally be unavailable. *See id.* at 1060 n.54, 1061.

116. Commonwealth v. Twitchell, 617 N.E.2d 609, 613-14 (1993) (discussing Massachusetts caselaw).

responsible state official. Notwithstanding any state rule of evidence to the contrary, the Constitution requires that the court allow defendants to offer evidence in their own defense that would negate an essential element of the crime charged.[117]

B. *The Medicare Fraud Case*

In *United States v. Levin*,[118] the United States Court of Appeals for the Sixth Circuit upheld the pretrial dismissal of an indictment that charged a doctor and others with Medicare fraud. The court held that pretrial dismissal was appropriate because a federal Medicare agency had issued informal letters approving marketing practices purportedly similar to the "kickback" scheme in which the doctor had participated.[119] The court's holding was premature. The Medicare fraud statute requires the government to prove that a defendant "knowingly and willfully" solicited or received a kickback or other illegal remuneration in return for purchasing Medicare-reimbursed items.[120] The statute thus demands proof that the defendant acted with the specific intent to defraud the government by accepting illegal kickbacks.[121] Evidence that the defendant acted in good faith in reasonable reliance on government assurances that his conduct was lawful would be inconsistent with the mental state required for conviction of Medicare fraud. The *Levin* court erred in employing an entrapment by estoppel theory and in allowing the defendant's reliance claim to be resolved prior to trial. The indictment in *Levin* charged that the doctor had acted with the requisite criminal intent,[122] and the Supreme Court has consistently held that federal courts have no pretrial power to dismiss indictments based on the insufficiency of evidence relied on by the grand jury.[123] Contrary to the majority's

117. It is, of course, "not the province of a federal [reviewing] court to reexamine state court determinations on state law questions." Estelle v. McGuire, 112 S. Ct. 475, 480 (1991). The Due Process Clause, however, as well as the Sixth Amendment, do prevent states from "arbitrarily exclud[ing] material portions of [defense] testimony." Rock v. Arkansas, 483 U.S. 44, 55 (1987) (citing Chambers v. Mississippi, 410 U.S. 284, 302 (1973)). Defendants could claim that restricting evidence of reasonable reliance is so arbitrary, in a case where they must be proven to have acted wantonly or recklessly, as to violate their constitutional rights to offer evidence in their own defense.

118. 973 F.2d 463 (6th Cir. 1992).

119. *Id.* at 470.

120. 42 U.S.C. § 1320a-7b(b)(1)(B) (1993).

121. *Cf.* Cheek v. United States, 498 U.S. 192, 200 (1991) (discussing general meaning of term "willfully" as used in criminal tax statutes). One court has referred to the Medicare fraud statute as containing an "unusually high scienter requirement." United States v. Bay State Ambulance and Hosp. Rental Serv., Inc., 874 F.2d 20, 33 (1st Cir. 1989).

122. *Levin*, 973 F.2d at 469.

123. *See, e.g.*, United States v. Williams, 112 S. Ct. 1735, 1745-46 (1992).

suggestion in *Levin*,[124] no case holds that courts may dismiss indictments before trial based on extrinsic evidence inconsistent with the grand jury's allegations. The case most heavily relied upon by the *Levin* majority held that a defendant charged with illegal wiretapping could raise the legal argument that the wiretap statute did not cover the tapping of a spouse's phone—by supplementing (not controverting) the indictment with the additional undisputed fact that the phone in question belonged to his wife.[125] Similarly, the other cases cited by the *Levin* majority involved affirmative defenses that could be resolved through undisputed facts without controverting essential elements of the indictment.[126]

It is not surprising, given the precipitous nature of the *Levin* court's action, that the majority and dissent disagreed about whether the factual elements of the entrapment by estoppel defense had been established.[127]

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124. *Levin*, 973 F.2d at 469-70.

125. United States v. Jones, 542 F.2d 661 (6th Cir. 1976). The *Jones* court stressed that the defendant "did not contradict the essential allegations in the indictment" and emphasized that he would not have been allowed to do so. *Id.* at 665 & n.7. It illustrated the limits of a Rule 12(b) motion as follows:

> Professor Moore cites *United States v. J.R. Watkins Co.*, 16 F.R.D. 229 (D. Minn. 1954) as a case which illustrates "[t]he distinction between a defense which may be decided before trial on the basis of affidavits and exhibits, and one which requires a trial of the general issue." 8 Moore ¶ 12.04 at 12-27. In *Watkins* the Court was presented with two separate defenses in a Rule 12 motion to dismiss, one based on the statute of limitations and the other disputing the Government's interpretation of facts alleged in the indictment. The Court disposed of the statute of limitations defense before trial on the basis of affidavits and exhibits but deferred ruling on the other defense because it contradicted the allegations of the indictment and went "to the very foundation of [the] prosecution." 16 F.R.D. at 234.

Jones, 542 F.2d at 665 n.7.

126. *See* United States v. Covington, 395 U.S. 57, 59-60 (1969) (Fifth Amendment privilege against self-incrimination); Kentucky v. Long, 837 F.2d 727, 749-50 (6th Cir. 1988) (constitutional immunity of FBI agent from state prosecution for federally-authorized acts).

127. The majority stated:

> From the undisputed operative facts it is apparent that (1) [the federal government] and its duly designated representatives declared the sales promotion program, which was the predicate for the indictment, to be legal; (2) the [defendants] relied upon [the government's] announcement; (3) the defendants' reliance was reasonable; and (4) prosecution for violation of the controversial counts of the indictment would be unfair.

Levin, 873 F.2d at 468. The dissent, however, characterized the factual elements of estoppel as follows:

> the following facts were and are still in dispute with respect to the entrapment by estoppel defense: (1) whether an agent of the United States told Levin, as opposed to any other individuals, that the conduct at issue was allowed under the statute; (2) whether Levin actually relied on the government's letters; and (3) whether Levin's reliance was reasonable especially in light of the fact that there was abundant government material that stated that the particular type of conduct that Levin engaged in was, in fact, illegal. These disputed facts go to the heart of the entrapment by estoppel defense and, thus, involve the ultimate determination of guilt or innocence.

The key factual issue in *Levin* was whether the doctor reasonably relied on government assurances that his kickback arrangement was legal. The *Levin* court should have allowed this issue to be resolved at a trial where the prosecution had the burden of proving beyond a reasonable doubt that the doctor had knowingly and willfully acted to defraud the Medicare program. Because a defendant acting in reasonable reliance on official assurances cannot properly be found to have the specific intent to defraud the government, there is no need for a constitutional entrapment by estoppel defense to guard against fundamental unfairness.

C. *The Conflict of Interest Case*

In *United States v. Hedges*,[128] the United States Court of Appeals for the Eleventh Circuit reversed the conviction of an Air Force procurement officer who had improperly negotiated future employment opportunities with a defense contractor. Applying the entrapment by estoppel doctrine, the court held that the officer should have been allowed to introduce evidence that his military ethics counselor had advised him without suggesting that the employment negotiations created a conflict of interest. Unlike in *Twitchell* and *Levin*, however, such evidence was clearly irrelevant to the charged statutory offense. In construing a predecessor conflict of interest statute, the Supreme Court held that "the knowledge of [the federal employee's] superiors and their approval of his activities do not suffice to exempt [the employee] from the coverage of the statute."[129]

For a defendant's good faith reliance on federal officials' informal advice to preclude a conflict of interest conviction, there must be a constitutional bar. The *Hedges* court was therefore correct in analyzing the issue as one of entrapment by estoppel. Because a defendant's good or bad faith is not an element of the offense or a statutory defense, however, the court erred in suggesting that the issue was a jury question.[130]

An amendment to the conflict of interest statute following the critical events in *Hedges* clarifies the respective responsibilities of the judge and jury in the entrapment by estoppel context. Recognizing the strict liability nature of the offense, Congress prescribed misdemeanor penal-

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Id. at 473 (emphasis omitted).

128. 912 F.2d 1397 (11th Cir. 1990).

129. United States v. Mississippi Valley Generat. Co., 364 U.S. 520, 561 (1961); *cf.* Crandon v. United States, 494 U.S. 152, 165 (1990) ("Neither good faith, nor full disclosure, nor exemplary performance of public office will excuse the making or receipt of a prohibited payment.") (interpreting 18 U.S.C. § 209). The conflict of interest statute provides a formal procedure for obtaining written waivers. 18 U.S.C. § 208(b) (1993). Defendant Hedges never claimed to have obtained such a formal waiver.

130. *Hedges*, 912 F.2d at 1405-06.

ties except in those cases where the defendant acted "willfully."[131] Henceforth, when a defendant, who is charged with "willfully" engaging in a conflict of interest, proffers evidence that he conformed to official advice, courts should allow this evidence regarding the essential element of willfulness. If the jury finds that the defendant acted willfully, the constitutional entrapment by estoppel defense becomes superfluous and the only judicial issue is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found . . . beyond a reasonable doubt" that the defendant acted willfully.[132] The court should undertake plenary review of whether the conviction is fundamentally unfair and thus violative of due process only when the jury acquits the defendant of a felony conflict-of-interest offense, and convicts the defendant of a lesser-included misdemeanor offense based on non-willful conflict.

V. CONCLUSION

Entrapment by estoppel is a constitutional defense that should be reserved for those rare cases in which convicting a defendant guilty of all elements of a criminal offense would be fundamentally unfair. Where a criminal statute already requires specific proof of culpable intent, the constitutional defense is superfluous because a defendant who acted in good faith reliance on government advice that his conduct was legal cannot have intended to commit the offense. In such cases, the factual issue whether the defendant reasonably relied on government advice is a jury question. In addition, the prosecution has the burden of proving beyond a reasonable doubt that the defendant intended to commit the offense. Courts that have applied the entrapment by estoppel in such cases disadvantage the defendant by misplacing the burden of proof on the defendant.

Entrapment by estoppel should only be a defense when the statute does not require specific proof of culpable intent. The court must consider whether conviction of a defendant who reasonably relied on government advice would be fundamentally unfair and thus violative of due process. Because this issue is separate from the elements of the offense, and because upholding the defense essentially means that the statute is unconstitutional as applied, the issue is a question of law for the court rather than the jury.

131. *See* 18 U.S.C. § 216 (1993) (setting maximum one-year term of imprisonment unless defendant acted willfully, in which case five-year maximum term applies).

132. *See* Jackson v. Virginia, 443 U.S. 307, 319 (1979).