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Entrapment and the “Free Market” for Crime

Louis Michael Seidman*

Few people wanting to learn about the entrapment defense would start their research by reading Lochner v. New York,¹ and yet it is with Lochner that a real understanding of entrapment doctrine must begin. Speaking broadly, Lochner stands for a jurisprudential tradition that equates market allocations with freedom and treats redistributive departures from market baselines as coercive and problematic. Criticism of Lochner, again broadly conceived, takes two forms. The substantive critique claims that Lochner’s philosophical commitments are flawed. On the one hand, substantive critics have disputed the fairness, voluntariness, and inevitability of market distributions. On the other, they have disputed the premise that market distributions can really be separated from government choice. The procedural critique does not necessarily embrace the substantive criticisms, but recognizes that there is enough to them to justify placing issues about redistribution in the discretionary, political sphere rather than in the mandatory, constitutional sphere.

When the police entrap a suspect, they redistribute the cost of crime control from outcomes produced by the “ordinary” market for criminal acts. Instead of accepting privately established market rates for crime as a baseline, they influence the market, thereby shifting the cost of deterrence onto people who might not otherwise become entangled with the criminal law. When judges, in turn, resist these efforts, they

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¹ 198 U.S. 45 (1905).
are insisting that the market distributions are natural and sacrosanct. They are, in other words, rejecting the substantive critique of *Lochner*.

With regard to the procedural critique, it is significant that entrapment doctrine is, for the most part, a judicial creation. To be sure, at least some aspects of judicially fashioned entrapment rules are subject to legislative revision, and to this extent the rules are compatible with the procedural critique. Some forms of entrapment seem to be constitutionally impermissible, however, and, even with respect to the subconstitutional parts of the doctrine, strong inertial forces sharply limit the realistic possibilities of political correction. To this extent, entrapment doctrine also runs afoul of the procedural critique.

Entrapment doctrine, then, provides yet another example of how *Lochnerism* survives in the world of criminal law and procedure long after it has supposedly been discredited elsewhere. All of this was, I hope, implicit in an analysis of entrapment I published in 1981. In the more than quarter century since I wrote, my analysis has been subjected to some penetrating and subtle criticisms, which have helped me to think more clearly about the problem. I am especially in debt to Richard H. McAdams and to the team of Ronald J. Allen, Melissa Luttrell, and Anne Kreeger, (hereinafter ALK), whose insightful and generous treatment of my work has caused me to understand the ways in

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2 I discuss this point at greater length and with reference to other aspects of criminal law and procedure in Louis Michael Seidman, Points of Intersection: Discontinuities at the Border of Criminal Law and the Regulatory State, 7 J. Contemp. Legal Issues 97 (1996).


which it was flawed, incomplete, unclear, or simply muddled. Perhaps out of stubbornness, I still want to insist that the main lines of my argument were correct. The criticism has nonetheless convinced me that my argument might have been more persuasive had I made the connection between entrapment and Lochnerism explicit rather than merely implicit.

In the first part of this brief essay, I set out my original argument in abbreviated form. In the second part, I discuss some of the criticisms of my argument and bring to the foreground the connection between entrapment and the Lochner controversy. A brief conclusion ties the entrapment problem to broader themes in the criminal law.

I. Black Letter Entrapment and Its Difficulties

Superficially, the “black letter” of federal entrapment law seems easy enough to comprehend.\(^6\) Supposedly as a matter of statutory construction, the Supreme Court has read federal criminal statutes to prohibit punishment of a defendant, not previously disposed to commit a crime, who is induced to commit it by a government agent. Although the defendant has the burden of production on the issue, once he introduces some evidence of “inducement,” the government must then demonstrate beyond a reasonable doubt that the defendant was in fact predisposed – a burden that it can meet by introducing evidence of the defendant’s reputation, character, prior convictions, and prior bad acts. Except in the very rare case where the government can offer no evidence of predisposition, the defense then goes to the jury.

\(^6\) Much of what follows in this section is drawn directly from my 1981 article. \(See\) note 3, \textit{supra}. 
Although the states are split on the issue, the success of the federal defense does not depend on the reasonableness of the inducement that the government offers. Even if the government offers an “excessive” inducement, the defendant will not prevail if he is in fact predisposed. Conversely, a quite ordinary and proper inducement is enough to trigger the defense if it has the effect of leading a nondisposed defendant into crime.

The federal defense is thus subjective; its focus is on the defendant’s preinducement state of mind. A bare majority of the Supreme Court has maintained, however, that the defense should be supplemented by objective, constitutionally based restrictions. When truly outrageous government conduct is proved, the due process clause apparently prohibits conviction of even predisposed defendants.

As many commentators have noted, this black letter is very nearly incoherent. The core problem is that it makes no sense to separate the question of predisposition from the level of inducement. Potential criminals, like most other people, do not work for free, and their willingness to work depends on the potential return on their labor. Thus, when juries are instructed to determine whether the defendant was abstractly “predisposed” without reference to the level of inducement offered to him, they are asked a meaningless question.

In my 1981 article, I argued that one might nonetheless make some sense of the doctrine if “disposition” were understood in the sense of “temperament” or “character” rather than “tendency.” In everyday life, we sometimes categorize individuals in terms of the specific acts they perform, but we also sometimes categorize them in terms of the general demeanor that they present. We are especially prone to this
tendency when we intend to demean individuals, often in unfair or overbroad fashion.

“Trailer trash” does not necessarily categorize people according to their abode, and
“Starbuck’s Democrats” need not drink coffee. These terms refer to ways of life or
thought rather than to specific acts. So, too, when we say that a person has a “criminal
disposition,” we may mean that his general life-style and pattern of behavior is associated
with stereotypic preconceptions of what criminals are like rather than with any specific
act. Such a person is simply one of the usual suspects.

I make no claim that the Supreme Court intends for “predisposition” to be
understood in this way, but there can be little doubt that this is what the term means in
practice. The jury in an entrapment case does not have the luxury of deciding an issue as
concrete as what the defendant did, or even what he was thinking when he did it. The
jury must speculate on what the defendant would have done under a set of circumstances
that never occurred. The jury must make this decision by utilizing instructions that are
incoherent and impossible of principled application. Moreover, once the defendant raises
an entrapment defense, special rules of evidence apply. The prosecution is permitted to
undertake a broad-scale inquest into the defendant’s character and reputation. Normally,
of course, this evidence is inadmissible, precisely because it distracts the jury from
deciding what acts the defendant performed and causes it to focus instead on the
defendant’s character. Can it be doubted, then, that when this evidence is admitted on a
question as nebulous as entrapment under a test as confused as predisposition even the
most conscientious juror ends up making a judgment about the kind of person it perceives
the defendant to be?

II Lochner, Entrapment, and Distributing the Costs of Deterrence
Why should courts, in the absence of any legislative encouragement, mandate these judgments? Although the Supreme Court has occasionally suggested otherwise, the entrapment defense cannot be justified on retributive grounds. The retributive problem is not, as some commentators have argued, that an entrapped defendant has caused no harm. We regularly punish and hold blameworthy people who have not caused harm, as when, for example, a person intending to kill fires a gun into an empty bed. The problem, instead, is that we have no general retributive principle that excuses individuals when they are motivated by very tempting offers. We know that this is true because there is no defense when these offers come from private sources. To be sure, in extreme circumstances, we sometimes exculpate individuals when threats make obedience to law very difficult, but we make no similar allowance for offers, as when, for example, a public official is led astray by a very generous bribe that is too good to refuse.

The failure of retributive theory to justify an entrapment defense has led commentators to suggest two other arguments, one based on efficiency, the other on the risk of political abuse. I discuss these arguments in turn.

A. The Efficiency Rational

Building on earlier suggestions by Richard Posner⁷ and Steven Shavell,⁸ RLK argue that it is inefficient to punish individuals who receive above market offers to commit crimes.⁹ Richard McAdams elaborates on and qualifies RLK’s theory by distinguishing between “true offenders” who commit offenses in the real world, “false

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⁹ See RLK at 415-421.
offenders,” who commit offenses only in the artificial world created by government inducements, and “probabilistic offenders” whose willingness to offend depends upon fluctuating preferences and opportunities. He adds to this a persuasive account of why the police might be motivated to entrap false offenders even when doing so produces little law enforcement gain.

Although some of the argument supporting it is complex, the basic insight driving the efficiency argument is clear enough: There is no need to incapacitate individuals who respond to offers unlikely ever to be made in the real world, and punishing these individuals adds nothing whatever to the deterrent threat that already exists against individuals who respond to more realistic offers.

It must be noted at the outset that none of these authors claims, and there is no reason to suppose, that the actual entrapment defense bars only these supposedly inefficient, above market offers. For reasons explained above, the actual defense operates primarily to exculpate individuals who do not fit our stereotype of the criminal class. Suppose, though, that an idealized entrapment defense of the sort that MLK and McAdams advocate were put in place. Could such a defense be justified on efficiency grounds?

McAdams demonstrates his deterrence point with a simple numerical example. Imagine that in the absence of entrapment, 100 individuals respond positively to the market rate for criminal activity and that 10 of these individuals are apprehended.

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10 See McAdams at 126,150.
11 Id., at 153
12 McAdams, at 129-30. I have modified the example slightly for expository purposes.
The chance of apprehension is therefore 10%. Now suppose that of the original 100 individuals three, who would not otherwise be apprehended, are entrapped at market rates. The chance of apprehension goes up to 13%, and, if potential offenders perceive this change, there is a deterrence gain. Suppose, however, that the three entrapped individuals are “false offenders” in the sense that they are responding only to an artificially inflated price. If they are entrapped by above market rates, McAdams claims, their apprehension has no additional effect on individuals who are responding to market rates. For this group, the odds of apprehension remain at 10%. McAdams concludes that because “individuals care only about the probability of their own detection, which they judge from the probability of detecting the class of individuals like themselves,” the claim that above market inducements advances general deterrence is “erroneous.”

It is, however, McAdams who has committed the error. There are numerous problems with his analysis. First as McAdams himself concedes, his argument crucially depends on the assumption that the target population will be able to distinguish between the “true” and “false” offenders caught up in an entrapment operation. Of course, if they were really able to make this distinction, no one would ever accept above market offers because the offeree would always know that the offer came from the government. A ban on above market offers is only necessary in the first place on the assumption that some individuals will not accurately make the distinction that McAdams claims they will make.

McAdams’ response to this point is lame. He says that while some people may mistake false offenders for true offenders, others will mistake true offenders for false

\[^{13}\text{Id., at 130.}\]
\[^{14}\text{Id.}\]
and that there is no reason to suppose that one kind of error will predominate over the other. It is highly unlikely, however, that these two kinds of mistakes will balance out.

Suppose that the market rate for contract killing is $10,000 and that 10 people out of the hundred willing to engage in the offense at this price are apprehended without entrapment. Suppose, further, that the government offers $100,000 for the offense, that 6 people accept the government’s offer at this price, and that three of these people are “true offenders” who would have accepted a $10,000 offer, while the other three are “false offenders” who are responding only because the government artificially inflated the price. This means that the government has increased the number of offenders from the original 100 to 103 (the 100 who would commit the offense anyway at the market price and the 3 who now commit the offense because of above market inducements).

Assume, finally, that 50% of the target audience for all this correctly identifies the true and false offenders, while 25% mistakenly think that the true offenders are false and the other 25% mistakenly think that the false offenders are true. For the 50 individuals who correctly identify each group, the perceived odds of apprehension are now 13 in 103 (12.6%). For the 25 individuals who think that the true offenders are false, their perceived odds of apprehension fall to the 10 out of 103 or 9.7%. But for the 25 who think that the false offenders are true, the perceived odds of apprehension rise to 16 out of 103 or 15.5%. In this example, then, the overall perceived risk of apprehension is 12.6%, (the weighted average of the three numbers), which is above the 10% base apprehension rate.

\[15\] Id.
Of course, at some point, if the individuals mistaking the true offenders for false greatly outnumber those mistaking the false for true, the numbers turn around. But as McAdams himself seems to concede, there is no reason to think that one kind of error predominates over the other. If the errors remain proportionate, there is a deterrence gain. Moreover, if we move away from highly stylized theoretical models to the real world, it seems quite unlikely that potential offenders will know whether entrapped defendants have accepted market or above market inducements. Acquittals based on an entrapment defense might advertise the government’s use of above market rates, but in the absence of a defense, there will be no such acquittals. In a real world without an entrapment defense, the most that potential offenders are likely to know is that there are government agents out there trying to entrap them. And recall that even if I am mistaken about this and even if it is widely known that the government is making above market offers, the only result will be that not many individuals will be entrapped in the first place.

McAdams also fails to account for the fact that some true offenders will nonetheless think, rightly or wrongly, that they will be able to take advantage of an entrapment defense by convincing the jury that they are false offenders. Given how amorphous the defense is, and given the fact that, once an inducement is shown, the government will have to prove the absence of entrapment beyond a reasonable doubt, this possibility is far from fanciful. Suppose, then, that individuals think that if they respond to government inducements, they will have a 25% chance of prevailing with an entrapment defense, even if they are true offenders. This means one quarter of our original three percentage point gain in deterrence from the entrapment strategy has been
eaten away by the mere existence of the defense even if the government never entraps a false offender.

Relatedly, the entrapment defense is costly because it raises the cost of the government making its case. Oddly, McAdam’s himself seems to recognize this point. He analogizes entrapment to what he calls “proxy”crimes. He uses the example of a statute that makes it a criminal offense to have an opened alcohol container in an automobile.  One might say that just as punishing individuals who respond to above market offers adds no deterrence for individuals responding to market offers, so too punishing individuals who do not drink from open containers adds nothing to the deterrence already directed against individuals who do drink. It is obvious, though, that the government is better able to deter those who do drink if it does not have to prove that they do. The same point applies to individuals who accept market offers to commit criminal acts.

Finally, McAdam’s argument assumes that if there is an entrapment defense, the government will accurately calculate the market price and, having done so, will refrain from making above market offers. If either of these assumptions is wrong, then the defense again produces a loss of deterrence. If the government is, itself, not deterred by the rules prohibiting above market incentives, some individuals who would have responded to those incentives and been convicted will instead respond to above market incentives and be acquitted. How often would the police make this kind of mistake? There is no way to know, but the difficulty of accurately calculating the market rate for

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16 See id., at 158.
crime as well as the factors that sometimes cause police to be more interested in arrests than convictions provide reason for concern.

An analogy to the fourth amendment exclusionary rule is useful here. If the police always obeyed the fourth amendment, the exclusionary rule would impose no costs because no evidence would ever be excluded. But we know that the exclusionary rule does impose costs caused by the fact that the police do not always obey the fourth amendment. When they disobey it, because they make a mistake, or because they think they will not be caught, or because they are uninterested in securing evidence, the disobedience sometimes leads to the acquittal of guilty defendants. There is no reason to think that entrapment rules operate any differently.

None of this demonstrates that McAdams and ALK are necessarily wrong about the putative efficiency losses imposed by some kinds of entrapment. It is entirely possible that the effects I identify are swamped by the incentives police have to entrap individuals even when the entrapment serves no law enforcement purpose.

Suppose, then that, for the sake of argument, we concede the McAdams/ALK point and assume that some kinds of entrapment are inefficient. Does this concession establish the case for an entrapment defense? Only if one thinks that distributional concerns can never justify a loss in efficiency. It is here that the arguments of the *Lochner* court and its critics take hold. Just as government regulation of the labor market redistributes goods from those who benefit from market pricing to those who do not, so too, entrapment redistributes the cost of deterrence from those who bear that cost when the market prices criminal conduct to a new class that bears it when government conduct helps to set the price.
The key insight is that if, as have already argued, above market prices deter to at least to some extent, then entrapment of some individuals will allow us to achieve the same level of crime without the punishment of other individuals. Of course, any effort to redistribute from the results produced by market pricing creates some costs. In the post-

Lochner world, it is widely assumed that, the political branches are nonetheless permitted to impose those costs for the sake of social justice.

Why might redistribution of the cost of crime prevention promote social justice? The critique of Lochner again provides an explanation. For nineteenth century liberal theorists, freedom of contract was just that – free choices made by, for example, workers and holders of capital to exchange service for pay at rates set by large numbers of autonomous transactions. So, too, a Lochnerian conception of freedom might treat criminals as deserving their punishment because of their free choice to accept market rates in exchange for criminal activity.

In the context of the economic regulation, critics of Lochner have responded by arguing that supposedly autonomous bargains in the labor market are in fact dictated by prior entitlements. Workers accept low wages not because they want to but because the pattern of prior entitlements force them to. Precisely the same point can be made about the criminal market. Imagine that there is a good called crime resistance capital that is unequally allocated at or shortly after birth. This capital might consist of early training in impulse control, plausible noncriminal paths toward wealth and happiness, inculcation in mainstream values, and so forth. It is easy to see that, through no fault of his own, a person with little crime resistance capital is differently situated than a person with a great deal of this capital with respect to ability to obey the law. Whereas the low
capital person might respond to a market inducement of $10,000, it might require $100,000 to tempt the high capital person. Without entrapment, or with only market level entrapment, we force the low capital person to bear the entire cost of deterring criminal conduct. This distribution is no more natural and inevitable than the distribution that forced the *Lochner* bakers to work ten hours per day. A government interested in social justice might sensibly intervene in both markets to produce more just distributions even if the intervention also imposed some cost.

B. The Political Rationale

McAdams supplements his economic rationale with a political theory. He has both a macro and a micro concern. On the macro level, he persuasively argues that police will have incentives to use an entrapment strategy even when doing so does not advance crime control.\(^\text{17}\) On the micro level, he worries that the police may select the particular individuals to entrap for illegitimate reasons.\(^\text{18}\)

McAdams is right to worry about these possibilities, but his remedy for them turns out to be upside down. To see the problem, we need, once again, to connect the entrapment controversy to *Lochner* and its history. From the outset, *Lochner*'s defenders have relied on a theory of politics as well as a theory of freedom. As noted above, part of their defense was rooted in the claim that market ordering was the product of consensual decisions by market participants. But another part of the defense was based on the belief that government could not be trusted to allocate resources in a fair and efficient fashion. Like McAdams, they had both macro and micro concerns. On a broad

\(^{17}\) Id., at 153.

\(^{18}\) Id., at 149-156.
scale, familiar defects in political markets were likely to lead to regulation that benefited powerful minorities rather than served the public good. On the individual level, government bureaucrats might use their power to punish unpopular minorities or political enemies.

Lochner’s opponents had both a response to this argument and a strategy for reducing the extent of the problem. The response amounted to confession and avoidance. It was true, they acknowledged, that whenever the government regulated markets, the power to regulate might be abused. The problem was that there was no escape from government regulation.

Opponents of Lochner pointed out that supposedly private markets were themselves inevitably formed by background government decisions allocating entitlements. Markets could be “regulated” as much by adhering to these earlier decisions as by departing from them. A government decision “not to regulate,” thereby leaving politically powerless individuals to the mercy of the markets formed by earlier government decisions, was, itself, a form of regulation. Moreover, this regulation, like its more overt cousin, might result in oppression. Defects in the political process and prejudice against unpopular groups might just as easily produce laissez faire as interventionist policies.

The strategy for reducing the extent of the problem was famously foreshadowed in United States v. Carolene Products, decided in the immediate aftermath of Lochner’s demise. Several generations later, John Hart Ely, elaborated on it.

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19 See United States v. Carolene Products, 304 US 144, 1532 n. 4 (1938).
with great sophistication.20 The basic idea was to prevent government oppression by yoking the interests of the powerful to the interests of the powerless through the equal protection clause. Here is how, years later, Justice Scalia made the argument in the context of regulating end of life decisionmaking:

Are there, then, no reasonable and humane limits that ought not to be exceeded in requiring an individual to preserve his own life? There obviously are, but they are not set forth in the Due Process Clause. What assures us that those limits will not be exceeded is the same constitutional guarantee that is the source of most of our protection—what protects us, for example, from being assessed a tax of 100% of our income above the subsistence level, from being forbidden to drive cars, or from being required to send our children to school for 10 hours a day, none of which horribles are categorically prohibited by the Constitution. Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.21

Of course, requiring government regulation to apply to a broader group of people makes the regulation less efficient. Broader application means that more people bear the regulation’s cost. Nonetheless, this price might be worth paying if the broader regulation stimulates the ordinary political processes that guard against oppression.

To take an example from the realm of criminal justice, consider the Supreme Court’s treatment of automobile stops on less than reasonable suspicion. The Court has prohibited the police from stopping some people but not others, but permitted the police to stop all people at police roadblocks.22 From an efficiency standpoint, this “misery loves company” rule seems perverse. In this context, the purpose of the fourth amendment is to protect individual freedom of movement from government interference.

Yet the Court’s doctrine requires more restrictions on movement when the police might be able to achieve their goals with less. The Court has nonetheless thought the trade worth making in part because widening exposure to the restrictions links the interests of the politically vulnerable to the politically powerful, thereby harnessing ordinary political processes to guard against oppression.

How does this analysis apply in the entrapment context? Whatever entrapment doctrine we adopt, the government will inevitably be regulating the market for crime. Even if it conducts no undercover operations at all, its decisions concerning, say, monetary and fiscal interest policy, trade, education, and family autonomy affect the distribution of crime resistance capital. Just as even a laissez-faire government necessarily forms economic markets, so too even a government with no police force at all will form criminal markets.

McAdams’ concern is not just with these large-scale macro effects, though. He also worries about government singling out of individuals on the micro level. But it is hard to see, how his proposal solves this problem. Even if the government is barred from making above market offers, it can still target individuals. If it dangles market offers before a particular person with low crime resistance capital, it can virtually guarantee that she will offend.

The only difference an entrapment defense makes is that it reduces the size of the pool of people subject to individualized political abuse. If we take the *Carolene Products* strategy seriously, however, this may be a bad rather than a good thing. People with little crime resistance capital who are vulnerable to market offers tend to be the same people who have little political capital. They are just the people most at risk of
political abuse. Just as we might want the police to stop more motorists at checkpoints even if it leads to some inefficiency, so too, we might want more people subject to the risk of entrapment.

This line of argument leads to something like the reverse of McAdams’ policy proposals. As counterintuitive as it seems, perhaps entrapment should be allowed only if the government offers above market inducements and only if the inducements are offered widely enough to attract individuals with high crime resistance capital. Requiring above market inducements insures that the pool of people potentially subject to government abuse is broad enough to trigger a political response. Spreading the cost of deterrence is not only just from a blameworthiness perspective; it also helps the built-in Carolene Products safeguards against tyranny to operate.

III. Conclusion

I have no illusions that my above market incentive proposal will be adopted anytime soon. The very fact that the proposal will strike almost everyone as ludicrous reinforces another point of my 1981 essay: Our society’s judgments about the population appropriately put at risk of criminal sanction cannot be justified by a coherent theory of blame. It rests, instead, on deeply ingrained presuppositions about the class of people that should be treated as criminal and the class that should be treated as law abiding. For just this reason, it is simply inconceivable that the government might be required to adopt a policy putting “ordinary” rather than “predisposed” citizens at risk of criminal sanction.

Standing alone, the entrapment defense is an insignificant contributor to the network of legal rules that reflect this presupposition, It is worthy of study only because it is a particularly egregious and conspicuous contributor. But the entrapment defense does
not stand alone. It is indeed part of a network -- a network that is all the more powerful because it operates outside our conscious perception. Taken as a whole, this network helps produce a downward spiral begun by the deep resentment felt by the criminal class. Embittered by what they perceive as unfair treatment, they turn away from mainstream norms and commit still more crime. The law abiding class responds to these depredations with increased fury and imposes still more concentrated and draconian punishment on the criminal class, which, in turn, becomes even more alienated.\textsuperscript{23}

When I described this phenomenon a quarter century ago, I did not imagine that the spiral would lead to the incarceration of more than two million of our fellow citizens. The number is growing. It is anybody’s guess what it will be twenty five years from now.

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\textsuperscript{23} I provide a more complete description of this dynamic in Louis Michael Seidman, Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control, 94 Yale L. J. 315 (1984).
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