

ENTRAPMENT AND DUE PROCESS: MOVING TOWARD A DUAL SYSTEM OF DEFENSES

KENNETH M. LORD*

I. INTRODUCTION.....	463
II. THE SUBJECTIVE APPROACH TO ENTRAPMENT	468
A. Introduction: The Birth of the Entrapment Doctrine	468
B. Subjective Entrapment: The Prevailing Theory.....	470
C. The Nature of the Predisposition Inquiry	474
D. Types of Predisposition Evidence	477
1. Similar Past Acts: Noncriminal Acts, Criminal Convictions, and Criminal Allegations.....	479
2. Response to the Inducement and Opportunity to Withdraw	482
3. Subsequent Acts and Statements	486
4. Defendant's Reputation and Hearsay	488
5. Defendant's Ability to Commit the Crime	489
E. A Critique of the Subjective Approach	491
III. THE OBJECTIVE APPROACH TO ENTRAPMENT: THE COMPETING THEORY.....	493
A. Introduction: The Birth of the Objective Approach	493
B. The Nature of the Objective Inquiry and Its Adoption by Various States .	494
C. A Critique of the Objective Approach	497
IV. HYBRID APPROACHES TO ENTRAPMENT: ATTEMPTS TO RECONCILE THE SUBJECTIVE/OBJECTIVE DICHOTOMY	499
A. The Composite Hybrid Approach	499
B. The Discrete Hybrid Approach.....	502
V. THE OUTRAGEOUS GOVERNMENT CONDUCT DEFENSE: AN EXPANSION OF SUBSTANTIVE DUE PROCESS PROTECTIONS.....	504
A. Introduction: The Birth and Nature of the Outrageous Government Conduct Defense	504
B. Constitutional and Precedential Foundations of the Defense	507
1. Substantive Due Process and Official Misconduct	507
2. Supreme Court Precedent Addressing the Defense.....	509
C. Lower Court Adoption of the Outrageous Government Conduct Defense: Competing Perspectives	511
1. The Prevailing Perspective: The Defense Is a Valid Exercise of Substantive Due Process	511
2. The Minority View: The Defense Is Unconstitutional	515
VI. CONCLUSION: MOVING TOWARD A DUAL SYSTEM OF DEFENSES.....	517

I. INTRODUCTION

In Pennsylvania, undercover police officers sell a new Sears vide o-cassette recorder to a shopkeeper at a suspiciously low price. The shopkeeper then repeatedly calls the security manager of the local Sears store in an attempt to ascertain if the VCR had been stolen. The

* J.D., Cornell Law School, 1996; Ph.D., University of Florida, 1993; M.S., University of Florida, 1987; B.A., University of Miami, 1983. Many thanks to Will Bain, Nikki Rozsman, Lance Salisbury, Scott Seabolt, and Christy Talley for their good-natured inspiration and remarkable insight. The author also wishes to thank Professor Robert Kent and Professor Stephen Garvey for their invaluable suggestions and oft-needed encouragement.

security manager, who provided the VCR to the police officers, assures the shopkeeper that it was not stolen but does not tell him of the covert police operation. The shopkeeper then advises a uniformed police officer that he suspects the VCR was stolen, but the officer merely instructs him to stop harassing Sears employees. Thus reassured, the shopkeeper makes several other purchases from the undercover police officers. He is later indicted for conspiracy to receive stolen property.¹

In Florida, an unemployed man is invited to rent a room in the home of a police informant. When he falls behind in his rent payments, the informant tells the man that he has friends in the Mafia and that these friends would not put up with a moocher. The informant then kicks the man out, leaving him fearful, jobless, and homeless. Police detectives, posing as the informant's Mafia friends, then approach the man and offer him a job and a place to live, but only on the condition that he find them a supplier of cocaine. After some hesitation, the man agrees and is subsequently arrested for conspiring to engage in drug trafficking.²

On a summer night in Springfield, Missouri, two informants on the police payroll, acting at the direction of the Springfield Police Department, break into a building and steal a safe. An undercover police officer helps them load the safe into a van while a fourth man, who does not know that it is a police operation, sits in a car one-half block away and acts as a lookout. Six weeks later, only the lookout is arrested. He is charged with burglary and conspiracy.³

Although police-induced criminal activity is relatively rare, the issues of whether and how the judiciary should deal with it have engendered a great deal of controversy for most of this century.⁴ In 1932, the U.S. Supreme Court responded to the controversy by recognizing the defense of entrapment.⁵ Since then, this defense has been adopted in one form or another in almost every jurisdiction in the United States.⁶ Its effect is to exculpate those who might not have committed a crime but for the government's involvement and coercive efforts.⁷

Even though this judicially created defense has become a fundamental component of American jurisprudence over the past sixty-five

1. See *Commonwealth v. Phillips*, 654 A.2d 591, 592-94 (Pa. Super. Ct. 1995).

2. See *Robichaud v. State*, 658 So. 2d 166, 167-69 (Fla. 2d DCA 1995).

3. See *State v. Hohensee*, 650 S.W.2d 268, 268-69 (Mo. Ct. App. 1982).

4. See generally Fred Warren Bennett, *From Sorrells to Jacobson: Reflections of Six Decades of Entrapment Law, and Related Defenses*, in *Federal Court*, 27 WAKE FOREST L. REV. 829, 831-32 (1992) (historically tracing entrapment and related defenses, and suggesting the addition of a notice requirement to the Federal rules).

5. See *Sorrells v. United States*, 287 U.S. 435, 452 (1932).

6. See Christopher D. Moore, *The Elusive Foundation of the Entrapment Defense*, 89 NW. U. L. REV. 1151, 1152 (1995).

7. See *Sorrells*, 287 U.S. at 441-42.

years, its doctrinal underpinnings remain in dispute.⁸ As a consequence, several different forms of the entrapment defense are employed around the country, and fundamental issues surrounding it remain unresolved.⁹ For example, why should society exculpate those committing crimes at the behest of the government, but not those beguiled into criminal activity by someone else? Is it appropriate for the judiciary to scrutinize the law enforcement activities of the executive branch? Is the purpose of the defense to deter police misconduct or is it to protect innocent defendants?

Based on different answers to these unresolved questions, the judiciary has developed two basic forms of the entrapment defense. Although both forms share a common goal—to determine whether the government's involvement is the principal cause of the crime—the foci of the two inquiries differ.¹⁰ The objective form of the entrapment defense emphasizes the nature of the government's actions, while the subjective form focuses on the defendant's state of mind.¹¹

A minority of the Supreme Court Justices, along with a minority of the states and the American Law Institute, have concluded that an entrapment defense should be founded in the public policy rationales of deterring police misconduct and preserving the integrity of the judicial process.¹² Based on this conclusion, they argue for the adoption of the objective approach, in which the conduct of the government actor, rather than the defendant's predisposition or culpability, is the principal focus of the inquiry into whether the government inducement caused the crime.¹³ If the government engaged in conduct that was illegal or inappropriate, then a court applying the objective standard may find that the defendant was entrapped regardless of other considerations.¹⁴

The charges against the Pennsylvania shopkeeper, for example, were dismissed after the trial court applied the objective approach.¹⁵

8. See generally Jonathan C. Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 VA. L. REV. 1011 (1987) (detailing the legal foundations of entrapment and arguing that the entrapment defense is a reactive situation to government encouragement of crime).

9. See *id.* at 1014-21.

10. See *id.* at 1014.

11. See *id.* at 1014-17.

12. See, e.g., *Sorrells*, 287 U.S. at 454 (Roberts, J., concurring); MODEL PENAL CODE § 2.13 cmt. 1 (1985).

13. See PAUL MARCUS, *THE ENTRAPMENT DEFENSE* 81, 105-07 (2d ed. 1995). Under the objective approach, the entrapment defense would be a nonexculpatory defense; that is, a defense that arises only when an important public policy is realized by foregoing the otherwise guilty defendant's punishment. See 2 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* 460 (1984).

14. See Bennett, *supra* note 4, at 835-36.

15. See *Commonwealth v. Phillips*, 654 A.2d 591, 593 (Pa. Super. Ct. 1995).

The dismissal was affirmed by the Pennsylvania Superior Court after it concluded that the actions of the police were inappropriate because they were clearly designed to induce the shopkeeper into believing that his purchases were not unlawful.¹⁶

In contrast, a majority of the Supreme Court Justices have always favored the subjective approach to entrapment. According to this view, entrapment is a defense founded in legislative intent and the concept of fundamental fairness to defendants.¹⁷ In *Sorrells v. United States*,¹⁸ the case in which the Court first recognized entrapment as a defense, the majority reasoned that it was contrary to established principles of law to "punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not . . . lured him to . . . commit it."¹⁹ Pursuant to this reasoning, the federal courts and most of the states have adopted the subjective standard, in which the court examines the extent to which the defendant was subjectively predisposed to commit the criminal act prior to the government's involvement.²⁰

In the case of the Florida man charged with conspiracy to engage in drug trafficking, the Florida district court applied the subjective approach.²¹ Rather than examining the actions of the police and the informant, the court reversed the man's conviction solely because it concluded that he was not disposed to engage in drug trafficking prior to his contact with the undercover police officers.²²

In recent years, to expand the protections afforded under the beleaguered and arguably underinclusive entrapment doctrine, some jurisdictions have also recognized the due process-based exculpatory defense of outrageous government conduct.²³ The outrageous government conduct defense is founded on the principle that when the government's conduct and involvement in a criminal venture is so scandalous that a defendant is arguably deprived of due process of

16. See *id.* at 594-95.

17. See *Sorrells*, 287 U.S. at 451-52.

18. 287 U.S. 435 (1932).

19. *Id.* at 444 (quoting *Butts v. United States*, 273 F. 35 (8th Cir. 1921)).

20. See *Moore*, *supra* note 6, at 1160. Under this subjective approach, entrapment, like duress, is an excuse defense because the defendant's actions are not considered to have been fully his own. See *ROBINSON*, *supra* note 13, at 513. In addition to the subjective and objective standards, a few states have adopted hybrid approaches to entrapment that are comprised of both objective and subjective elements. See *MARCUS*, *supra* note 13, at 44-47.

21. See *Robichaud v. State*, 658 So. 2d 166, 167 (Fla. 2d DCA 1995).

22. See *id.*

23. See generally Donald A. Dripps, *At the Borders of the Fourth Amendment: Why a Real Due Process Test Should Replace Outrageous Government Conduct Defense*, 1993 U. ILL. L. REV. 261, 265 (1993) (criticizing the outrageous government conduct defense as historically unstable and at odds with selective incorporation).

law, fundamental fairness prohibits prosecution of the resulting crime.²⁴ Because the defense is founded in the Constitution, it is doctrinally distinct from the various forms of entrapment. Nevertheless, in practical application, there is some redundancy between the outrageous government conduct defense and the objective approach.²⁵

For example, in the case of the lookout in Springfield who was charged with burglary, the only statutory defense available to him under Missouri law was the subjective approach to entrapment.²⁶ Even though the court concluded that the defendant was predisposed to commit the burglary, it nevertheless examined the actions of the police officers and reversed his conviction on due process grounds because "[if] the government agents had not been there, doing their illegal acts, defendant's conduct would not be illegal."²⁷

The federal courts of appeals have split over their recognition of the outrageous government conduct defense, with some concluding that it represents an erroneous attempt to expand the protections of the Fifth and Fourteenth Amendment Due Process Clauses.²⁸ However, most of the circuits and many states have effectively developed a dual approach to government-induced crimes in which they allow defendants to invoke both the predisposition-based subjective entrapment defense and either the objective entrapment defense or, more commonly, the outrageous government conduct defense.²⁹

The principal purpose of this Article is to present a detailed description of the evolution and scope of each of these defenses, including a critical analysis of their strengths and weaknesses. Based upon this analysis, this Article concludes that the best means for balancing the rights of an induced defendant against the government's need to detect ongoing criminal activity is a dual system of defenses in which the underinclusive subjective approach to entrapment is augmented by one or both of the objective defenses. Part II is a description and critique of the subjective entrapment defense, includ-

24. See, e.g., *United States v. Twigg*, 588 F.2d 373, 381 (3d Cir. 1978).

25. Although the outrageous government conduct defense and the entrapment defense both turn on the government's involvement in a crime and its efforts to coerce an unwitting person into participating, they are distinguishable as the former is grounded in the Constitution and the latter is a creation of the judiciary. Because due process jurisprudence demands a much higher degree of governmental coercion or misconduct, the outrageous government conduct defense does not apply in all of the circumstances in which a defendant might successfully invoke the entrapment defense. See Bennett, *supra* note 4, at 855-59.

26. See *State v. Hohensee*, 650 S.W.2d 268, 270 n.2 (Mo. Ct. App. 1982).

27. *Id.* at 274. Although the court reversed the defendant's conviction for burglary, it upheld his conviction for conspiracy since he had taken part in planning the crime. See *id.* at 275-76.

28. See, e.g., *United States v. Miller*, 891 F.2d 1265, 1272 (7th Cir. 1989) (Easterbrook, J., concurring).

29. See *infra* Parts III, IV, V.

ing a detailed summary of the evidentiary standards surrounding a court's inquiry into a defendant's predisposition to commit the crime. Part III is an analogous treatment of the objective entrapment defense. Part IV presents a description and analysis of two hybrid forms of the entrapment defense, the discrete and composite hybrid approaches. Courts using these approaches, which have been adopted in only a few states, incorporate both subjective and objective prongs into their entrapment analyses. Part V is an examination and critique of the outrageous government conduct defense, including its development, constitutional foundations, and practical applications. Incorporated into this discussion is an analysis of the circumstances in which courts are likely to conclude that the government's conduct has been "outrageous."

II. THE SUBJECTIVE APPROACH TO ENTRAPMENT

A. Introduction: The Birth of the Entrapment Doctrine

Until the turn of the twentieth century, the judiciary staunchly and almost universally rejected the notion that an inducement-based exculpatory defense conferred any benefit on society. In 1864, for example, the New York Supreme Court stated that the entrapment defense "has never availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say christian [sic] ethics, it never will."³⁰ Even as late as 1904, New York's Judge Vann vigorously rejected the entrapment defense in a grand larceny case, stating that "[t]he courts do not look to see who held out the bait, but to see who took it" and arguing that courts "should not hesitate to punish the crime actually committed by the defendant."³¹

Notwithstanding Judge Vann's admonishment, at about that time courts began to recognize the need for a legal defense against increasingly common police attempts to induce otherwise law-abiding people into committing criminal acts.³² The most notable recognition came in 1915, when the Ninth Circuit decided the case of *Woo Wai v. United States*.³³ In *Woo Wai*, undercover government immigration officials spent several months attempting to persuade the reluctant defendant, *Woo Wai*, to transport Chinese citizens into the United

30. *Board of Comm'rs v. Backus*, 29 How. Pr. 33, 42 (1864).

31. *People v. Mills*, 70 N.E. 786, 791 (N.Y. 1904).

32. See John D. Lombardo, *Causation and "Objective" Entrapment: Toward a Culpability-Centered Approach*, 43 UCLA L. REV. 209, 219-20 (1995). See, e.g., *People v. McCord*, 42 N.W. 1106 (Mich. 1889) (setting aside a burglary conviction on the ground that a private detective, who worked for the victim, had induced the defendant into committing the burglary).

33. 223 F. 412 (9th Cir. 1915).

States across the Mexican border.³⁴ When Woo Wai finally acceded, officials arrested him for violating certain immigration laws.³⁵ In reversing the lower court's conviction, the Ninth Circuit found it determinative that "the suggestion of the criminal act came from the officers of the government," rather than from the defendant.³⁶ The court based its decision in the public policy that government officials should be dissuaded from encouraging individuals to commit crimes they would not otherwise have committed.³⁷

Seventeen years later, in *Sorrells v. United States*,³⁸ the U.S. Supreme Court recognized the validity of the entrapment defense.³⁹ In *Sorrells*, an undercover prohibition agent, accompanied by several of the defendant's friends, visited the defendant's home.⁴⁰ During the visit, the agent repeatedly asked to purchase some liquor, but the defendant responded that he "did not fool with whiskey."⁴¹ By coincidence, *Sorrells* and the agent had served in the same military unit during World War I, and the conversation eventually turned to their common war experiences.⁴² The agent then made yet another request for liquor.⁴³ This time, *Sorrells* left the house and returned with a half-gallon of whiskey; he was later convicted of violating the National Prohibition Act.⁴⁴

On appeal, the Supreme Court held that the trial court erred by failing to instruct the jury on the entrapment defense and reversed *Sorrells*'s conviction.⁴⁵ Although the Court's decision to embrace the entrapment doctrine was unanimous, the justices were divided over its proper foundation and application. The majority and concurring opinions exemplify the two competing approaches to the entrapment doctrine.⁴⁶

Both approaches require the defendant to prove that the government actively induced her to commit the crime charged.⁴⁷ However,

34. See *id.* at 413.

35. See *id.*

36. *Id.* at 415.

37. See *id.*

38. 287 U.S. 435 (1932).

39. See *id.* at 438-39.

40. See *id.* at 439.

41. *Id.* at 440.

42. See *id.*

43. See *id.*

44. See *id.* at 439.

45. See *id.* at 438-39.

46. Compare *id.* at 435-52 (1932) (Hughes, C.J.) with *id.* at 453-59 (Roberts, J., concurring).

47. See Carlson, *supra* note 8, at 1014. The issue of inducement focuses on whether the government conduct created a risk that an undisposed person might be persuaded to commit the crime. It also requires some causal connection between the government's conduct and the defendant's commission of the offense. While this is a relatively easy stan-

once she meets this burden of proof, the nature of the inquiry into the two approaches diverges. This divergence stems from differences in opinion over how to distinguish the government's detection of ongoing criminal activity from a seduction of otherwise innocent persons. The Sorrells majority focused on the predisposition of the accused to commit the crime,⁴⁸ while Justice Roberts, who wrote the concurring opinion, argued that the emphasis of the inquiry should instead be on the conduct of the government agent in inducing the criminal conduct.⁴⁹ These competing approaches, which remain in dispute even today, are the subject of the following sections.

B. Subjective Entrapment: The Prevailing Theory

The gravamen of the subjective approach to entrapment is not the amount of government participation, but rather the defendant's willingness to commit the crime.⁵⁰ The Sorrells majority, which embraced this approach, concluded that a defendant with no criminal predisposition falls outside the scope of the applicable criminal statute when she would not have committed a crime but for the government's enticement.⁵¹ Oddly, the majority founded its analysis in legislative intent, reasoning that Congress could not have intended to punish "person[s] otherwise innocent" for falling prey to a government-created trap.⁵²

Twenty-six years later, a majority of the Supreme Court reaffirmed its subjective view of the entrapment doctrine in *Sherman v. United States*.⁵³ The case arose after a government informant met the defendant, Sherman, in a doctor's office, where both were receiving treatments for narcotics addiction.⁵⁴ The informant feigned great suffering from narcotics withdrawal and, over the course of several months, repeatedly asked the defendant if he knew of a source for the drugs.⁵⁵ Sherman tried to avoid the issue, but eventually acquiesced and was later arrested for selling drugs to the informant.⁵⁶ Although the issue of entrapment went to the jury, Sherman was nevertheless convicted.⁵⁷

dard for the defendant to meet, she must show that the government offered more than the mere opportunity to commit a crime. See ROBINSON, *supra* note 13, at 519-20.

48. See Sorrells, 287 U.S. at 435-52.

49. See *id.* at 453-59 (Roberts, J., concurring).

50. See Moore, *supra* note 6, at 1160.

51. See Sorrells, 287 U.S. at 451-52.

52. *Id.* at 451.

53. 356 U.S. 369 (1958).

54. See *id.* at 371.

55. See *id.*

56. See *id.*

57. See *id.* at 372.

The Supreme Court unanimously reversed the conviction, holding that entrapment was established as a matter of law, but the justices disagreed concerning the appropriateness of the subjective standard.⁵⁸ Chief Justice Warren, who wrote the majority opinion, found that the circumstances surrounding the informant's repeated efforts to persuade the defendant to obtain narcotics constituted inducement.⁵⁹ Invoking the subjective approach, he rejected the government's assertion that the defendant's criminal record—a nine-year-old drug sales conviction and a five-year-old possession conviction—demonstrated a predisposition to commit the crime, particularly in light of the fact that the defendant was trying to overcome his addiction at the time of the inducement.⁶⁰ Justice Frankfurter, joined by three other justices, concurred in the result of the case but dissented with respect to the majority's use of the subjective approach.⁶¹ He argued that the Sorrells congressional intent justification for a subjective approach was sheer fiction and that an objective approach was necessary for the proper judicial supervision over governmental abuses of power.⁶²

Indeed, the Supreme Court has always been strongly divided over the proper jurisprudence with respect to the entrapment doctrine. The case of *Hampton v. United States*⁶³ perhaps best exemplifies this division.⁶⁴ In *Hampton*, the defendant, having observed needle marks on the arm of a Drug Enforcement Agency (DEA) informant, stated that he knew where to obtain some heroin.⁶⁵ The informant subsequently contacted the DEA and arranged for an agent to purchase heroin from the defendant.⁶⁶ Coincidentally, a second DEA agent, who was posing as a narcotics dealer, was supplying the defendant.⁶⁷ After two separate sales were completed, the defendant was arrested.⁶⁸ Upon being convicted, he appealed the jury instruction on the ground that the government's role in both supplying and purchasing the heroin constituted entrapment.⁶⁹

58. See *id.* at 373.

59. See *id.*

60. See *id.* at 374.

61. See *id.* at 378-85 (Frankfurter, J., concurring). The three justices joining Justice Frankfurter were Justices Douglas, Harlan, and Brennan.

62. See *id.* at 379-81.

63. 425 U.S. 484 (1976).

64. A second issue raised in *Hampton* was the applicability under the circumstances of the defendant's constitutional right to due process. See *id.* at 489; *infra* notes 386-93 and accompanying text.

65. See *Hampton*, 425 U.S. at 486.

66. See *id.*

67. See *id.*

68. See *id.*

69. See *id.* at 487-88.

In a plurality opinion authored by Justice Rehnquist, three justices looked only at the defendant's predisposition, rather than the government's conduct, and found that there had been no entrapment.⁷⁰ Justice Rehnquist expressly reaffirmed the subjective analysis, stating that the Court, in *Sorrells* and its progeny, had "ruled out the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case . . . where the predisposition of the defendant to commit the crime was established."⁷¹ In a concurring opinion, Justices Powell and Blackmun accepted the use of the subjective approach in this instance, but expressed strong reservations about the plurality's view that police over-involvement could never, under any circumstances, give rise to an exculpatory defense.⁷² In his dissent, Justice Brennan, joined by Justices Stewart and Marshall, argued for the adoption of the objective analysis of entrapment and a reversal of the defendant's conviction on the ground that the DEA's methods were unacceptable.⁷³

The Supreme Court's most recent examination of the entrapment doctrine was set forth in the 1992 case of *Jacobson v. United States*.⁷⁴ The United States Postal Inspection Service targeted the defendant, Keith Jacobson, as a potential purchaser of child pornography after his name was found on a mailing list from a California pornographic bookstore.⁷⁵ Over a period of twenty-six months, undercover postal inspectors sent Jacobson two sexual attitude surveys, seven letters asking him about his sexual preferences, and two sex catalogues, all from fictitious persons and organizations.⁷⁶ Eventually, the defendant ordered a publication called "Boys Who Love Boys" and, following delivery of the magazine, he was arrested for violating the Child Protection Act of 1984.⁷⁷ At trial, Jacobson testified that he was unsure of the magazine's contents when he ordered it and that the government had merely succeeded in piquing his curiosity.⁷⁸ He raised the defense of entrapment, but was nevertheless found guilty.⁷⁹

70. See *id.* at 488-89.

71. *Id.* at 492.

72. See *id.* at 493 (Powell, J., concurring).

73. See *id.* at 496-97 (Brennan, J., dissenting). In the alternative, Justice Brennan argued that, even under the subjective approach, a defendant should not be considered "predisposed" when the government actually supplied the contraband. See *id.* at 497-98.

74. 503 U.S. 540 (1992).

75. See *id.* at 542-43. The defendant was a 56-year-old farmer in Nebraska. His name was on the mailing list because he had previously ordered two "Bare Boys" magazines from the bookstore. Those magazines, which contained photographs of nude preteen and teenage boys, were not illegal at the time that Jacobson placed his order because the young men depicted were not engaged in sexual activity. See *id.*

76. See *id.* at 543-46.

77. 18 U.S.C. § 2252(a)(2)(A) (1997); see *Jacobson*, 503 U.S. at 547.

78. See *Jacobson*, 503 U.S. at 547.

79. See *id.* at 547-48. After trial, Jacobson's case was appealed to the Eighth Circuit Court of Appeals twice. On the first appeal, an Eighth Circuit panel overturned the con-

In a five-to-four decision, the Supreme Court overturned Jacobson's conviction.⁸⁰ Justice White, writing for the majority, concluded that there was inadequate evidence to demonstrate that the defendant was predisposed to violate the law by receiving child pornography through the mail.⁸¹ The Court required the prosecution to prove, beyond a reasonable doubt, that the defendant's predisposition to commit the crime was "independent of the Government's acts."⁸² Although the prosecution attempted to meet this burden by showing that Jacobson had previously ordered magazines from the California bookstore, that action was not illegal at the time he placed the order.⁸³ The majority considered this legal purchase to be "scant if any proof of [Jacobson's] predisposition to commit an illegal act"⁸⁴ and concluded that the government had failed to meet its burden of proof with respect to predisposition.⁸⁵

Justice O'Connor, who wrote the dissenting opinion, argued that the issue of entrapment was properly left for the jury and that a reasonable juror could find that Jacobson was predisposed to commit the crime.⁸⁶ Furthermore, she maintained that the majority had improperly redefined "predisposition" to exclude any indication of the defendant's intent that comes to light after the government's initial contact with him, even if the government has not yet made any attempt to induce the commission of a crime.⁸⁷ Surprisingly, there was no discussion of the objective approach to entrapment in Jacobson.

The Jacobson decision did not change the Court's use of the subjective standard in entrapment cases.⁸⁸ However, the Court estab-

viction, holding that the government must have reasonable suspicion of illegal activity before targeting an individual, and that Jacobson had been entrapped as a matter of law. See *United States v. Jacobson*, 893 F.2d 999, vacated, 899 F.2d 1549 (8th Cir. 1990). On appeal by the government, the Eighth Circuit, sitting en banc, reversed the panel's finding that the government's actions constituted entrapment. See *United States v. Jacobson*, 916 F.2d 467 (8th Cir. 1990) (en banc), rev'd, 503 U.S. 540 (1992). See generally Damon D. Camp, *Out of the Quagmire After Jacobson v. United States: Towards a More Balanced Entrapment Standard*, 83 J. CRIM. L. & CRIMINOLOGY 1055, 1078-85 (1993) (suggesting that Jacobson only added to the unworkable nature and unjust results engendered in the entrapment defense); Amy Perkins, *Jacobson v. United States—Entrapment Redefined?*, 28 NEW ENG. L. REV. 847, 863-66 (1994) (examining entrapment generally and focusing on the ambiguous effect of Jacobson on future cases).

80. See *Jacobson*, 503 U.S. at 547.

81. See *id.* at 554.

82. *Id.*

83. See *id.* at 550-51. Jacobson placed his order in February of 1984, but the Child Protection Act of 1984 (18 U.S.C. §§ 2251-2259 (1994)), which outlawed such mailings, was not enacted until three months later. See *id.*

84. *Id.* at 550.

85. See *id.* at 554.

86. See *id.* at 554 (O'Connor, J., dissenting). Chief Justice Rehnquist, Justice Kennedy, and Justice Scalia joined Justice O'Connor.

87. See *id.* at 556-57.

88. See Bennett, *supra* note 4, at 842.

lished that the issue of a defendant's predisposition is to be considered at the moment of the government's first contact, rather than at the moment the government induces the defendant to commit the crime.⁸⁹ Thus, the Supreme Court has consistently, if not unanimously, advocated the use of the subjective approach to entrapment.

In addition to the federal courts, about thirty-seven states have followed the Supreme Court's lead by incorporating a subjective inquiry into the entrapment defense, while only thirteen states have adopted some form of objective entrapment.⁹⁰

C. The Nature of the Predisposition Inquiry

The first step in any entrapment inquiry is to determine whether government inducement preceded and encouraged the act of which the defendant is accused.⁹¹ A judicial finding of inducement, which is usually a fairly easy burden for the defendant to meet, suggests that there may be no justifiable reason, either retributive or preventative, for society to punish the defendant.⁹² Since most jurisdictions apply the subjective standard, the second, and pivotal, step in a majority of entrapment cases is to determine whether the defendant was predisposed to commit the offense charged.⁹³

A predisposition inquiry focuses on when the defendant made the decision to commit the criminal act, which hopefully will provide a reliable indication of whether she made that decision of her own free will.⁹⁴ This, in turn, is presumed to be evidence of whether the defendant poses a danger to society.⁹⁵ If the defendant made the decision prior to the government's inducement, then she is considered to

89. See *id.*

90. See Scott C. Paton, "The Government Made Me Do It": A Proposed Approach to Entrapment Under *Jacobson v. United States*, 79 CORNELL L. REV. 995, 1002 n.45 (1994). While those states following the subjective approach have largely adopted it by judicial decision, most states following the objective view have done so by statute. See MARCUS, *supra* note 13, at 43.

91. See *supra* note 47 and accompanying text.

92. See Carlson, *supra* note 8, at 1055-56. This is because a government-encouraged act is not necessarily a convincing or reliable indicator that the defendant poses a threat to society. See *id.*

93. See MARCUS, *supra* note 13, at 126.

94. See *id.*

95. See Carlson, *supra* note 8, at 1071. The reasoning and presumptions here are arguably weak. Simply because it did not occur to a defendant to commit a crime until a government agent suggested it does not necessarily mean that she will be less dangerous to society than someone who decided to commit the same offense at the suggestion of a person not working for the government. Nevertheless, the former is exculpated while the latter is held responsible for the offense. Thus, "the predisposition test alone cannot make the distinction that subjectivists wish to make between defendants who are ready and willing to commit crimes and those who are not." *Id.* at 1040. Despite the test's logical weaknesses, its validity stems largely from the fact that it reflects a judicial attempt to heed the notions of fundamental fairness and the presumption of innocence. See Sorrells v. United States, 287 U.S. 435, 451-52 (1932).

have had the requisite mens rea and is culpable for her criminal conduct.⁹⁶ Conversely, if she made the decision to participate after the government induced her to act, then the inducement is presumed to have been the causal source of her decision and she is not held culpable.⁹⁷ The most compelling justification for this distinction is that the principal purpose of a legal penalty is to protect society from those who would harm it, not from those whose wrongful conduct consists solely of a failure to exercise self-restraint in the face of government-generated temptation and encouragement.⁹⁸

The Supreme Court conducted its first predisposition inquiry in *Sherman v. United States*,⁹⁹ in which the defendant had been convicted of selling narcotics.¹⁰⁰ Considering Sherman's hesitancy and the fact that he was seeking treatment for his narcotics addiction at the time of the government's inducement, the Court concluded that his two previous narcotics convictions—one nine years previous and the other five years previous—were not sufficient evidence of his predisposition to sustain his conviction.¹⁰¹ Although the Court utilized a "totality of the circumstances" methodology, which remains the standard approach for courts applying the subjective standard, the Court never specifically defined predisposition.

In response, lower courts have attempted to provide some guidance to lawyers and trial judges by devising a number of generalized definitions for predisposition. The Supreme Court of Kansas, for example, has stated that predisposition "connotes only a general intent or purpose to commit the crime when an opportunity or facility is afforded for the commission thereof."¹⁰² Similarly, the Second Circuit has posited that "[i]t is sufficient if the defendant is of a frame of mind such that once his attention is called to the criminal opportunity, his decision to commit the crime is the product of his own preference and not the product of government persuasion."¹⁰³ The Sixth Circuit has commented that a defendant must only show "a predisposition to commit an offense."¹⁰⁴ Each of these descriptions suggests that it is unnecessary for a predisposed defendant to have had an intent to commit a specific crime at a specific time and place—a general intent to commit a crime is sufficient.

96. See Carlson, *supra* note 8, at 1071.

97. See *id.* at 1071-73.

98. See *id.* at 1063-64. However, this justification has its limits. The entrapment defense is not available when the defendant is accused of a violent crime. See MODEL PENAL CODE § 2.13(3) (1985).

99. 356 U.S. 369 (1958).

100. See *id.* at 375; *supra* notes 53-62 and accompanying text.

101. See *Sherman*, 356 U.S. at 375-76.

102. *State v. Houpt*, 504 P.2d 570, 574 (Kan. 1972) (emphasis added).

103. *United States v. Williams*, 705 F.2d 603, 618 (2d Cir. 1983).

104. *United States v. Leja*, 563 F.2d 244, 245 (6th Cir. 1977).

However, definitions offered by other courts suggest that a predisposed defendant must have had a specific intent to commit the crime charged. The Tenth Circuit has defined predisposition as a "defendant's inclination to engage in the illegal activity for which he has been charged, i.e. that he is ready and willing to commit the crime."¹⁰⁵ Similarly, the Seventh Circuit has stated that predisposition "refers to whether the defendant had a readiness or willingness to commit the offenses charged."¹⁰⁶ In its most recent predisposition inquiry, the Supreme Court in *Jacobson* commented that "the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents."¹⁰⁷ However, there was no discussion of the general/specific intent dichotomy accompanying this remark, so it is unclear whether the Court contemplated that it was making such a distinction.¹⁰⁸

Thus, while it is firmly established that a predisposition inquiry should focus on "the defendant's state of mind and inclinations before his initial exposure to the government agents,"¹⁰⁹ it has never been explicitly determined that specific intent is necessary to support a finding of predisposition. In practical application, however, most courts require a fairly strong indication that the accused was willing to engage in that particular crime. For example, with regard to evidence of prior criminal acts, courts generally require that there be a "substantial similarity" between the nature of the prior act and the nature of the crime charged before they will admit that evidence as bearing on whether the defendant was predisposed.¹¹⁰ Although

105. *United States v. Ortiz*, 804 F.2d 1161, 1165 (10th Cir. 1986).

106. *United States v. Perez-Leon*, 757 F.2d 866, 871 (7th Cir. 1985).

107. *Jacobson v. United States*, 503 U.S. 540, 549 (1992) (emphasis added); *supra* notes 74-90 and accompanying text (discussing *Jacobson*).

108. In *Jacobson*, the Court found that the defendant was not predisposed to engage in any criminal activity. As a consequence, the Court was not compelled to engage in any further analysis and never addressed the issue of his specific intent. See *Jacobson*, 503 U.S. at 550.

109. *United States v. Jannotti*, 501 F. Supp. 1182, 1191 (E.D. Pa. 1980), *rev'd on other grounds*, 673 F.2d 578 (3d Cir. 1982).

110. See, e.g., *United States v. Higham*, 98 F.3d 285, 292 (7th Cir. 1996) (stating that prior acts of violence were relevant to the issue of whether the defendant was predisposed to engage in a murder-for-hire scheme); *United States v. Davis*, 15 F.3d 526, 530-31 (6th Cir. 1994) (holding that evidence of past cocaine sales were sufficiently similar to the charge of possession of cocaine with intent to distribute to show the defendant's predisposition); *United States v. Blankenship*, 775 F.2d 735, 742-43 (6th Cir. 1985) (holding that the defendant's tape-recorded confession to dealing in stolen lawn equipment was not admissible because that activity was not similar enough to the crime of unlawfully dealing in firearms to show predisposition); *United States v. Segovia*, 576 F.2d 251, 252-53 (9th Cir. 1978) (concluding that evidence of the defendant's willingness to arrange the sale of marijuana was substantially similar to the charge of possession with intent to distribute cocaine for the purposes of a predisposition inquiry); *State v. Burciaga*, 705 P.2d 1384, 1387 (Ariz. Ct. App. 1985) (upholding the suppression of evidence showing a past convi-

this widely applied "substantial similarity" test is not well-delineated, its purpose is to discriminate between past acts that demonstrate a general criminal intent and past acts that demonstrate a form of specific intent.¹¹¹

D. Types of Predisposition Evidence

Ever since the U.S. Supreme Court recognized the entrapment defense and adopted the subjective standard in *Sorrells*, evidentiary issues relating to predisposition have been the principal focus of federal court entrapment inquiries.¹¹² Yet, because of the nebulous nature of any examination of a person's state of mind, there are no infallible means for distinguishing the non-predisposed innocent from the predisposed criminal.¹¹³ As a consequence, courts use a "totality of the circumstances" approach in predisposition inquiries.¹¹⁴ This approach gives courts the ability to consider all relevant factors, yet it also allows a great deal of judicial discretion and raises the possibility that courts might incorporate irrelevant, incorrect, or misleading information into their analyses.

Several courts have compiled lists of factors appropriate for distinguishing predisposed defendants from non-predisposed defen-

tion for theft on the ground that it was not sufficiently similar to the crime of trafficking in stolen property to demonstrate the defendant's predisposition); *State v. Ross*, 540 P.2d 754, 756-57 (Ariz. Ct. App. 1975) (holding that evidence of a past intent to purchase heroin was insufficiently similar to the charge of selling heroin to show predisposition); *Dockery v. State*, 644 N.E.2d 573, 579-81 (Ind. 1994) (reversing a conviction on the ground that evidence of the defendant's arrest for the possession of marijuana and illegal firearms, which took place two years previously, and for selling cocaine to a confidential informant, which took place one year previously, were insufficiently similar to the crime of dealing in cocaine to demonstrate predisposition); *Powers v. State*, 380 N.E.2d 598, 600-01 (Ind. Ct. App. 1978) (finding that evidence of a past conviction for possession of a controlled substance was substantially similar to the crime of selling narcotics, and thus admissible as evidence of predisposition); *State v. Gibbons*, 519 A.2d 350, 357 (N.J. 1987) (holding that prior convictions for burglary and larceny were insufficiently similar to the crime of narcotics distribution to show that the defendant was predisposed); *State v. Stanley*, 215 S.E.2d 589, 594-98 (N.C. 1975) (holding that evidence of the defendant's past possession of marijuana did not indicate a predisposition to distribute LSD).

111. At best, past act evidence merely demonstrates the defendant's specific intent with respect to that type of crime at some time in the past, but not a specific willingness at the instant that the defendant engaged in the activity for which he is charged. Generally, evidence of specific intent at the instant of the offense is always admissible to show predisposition, while evidence of crime-specific intent must meet the "substantial similarity" standard. Evidence of general intent is inadmissible to show predisposition unless it demonstrates a criminal intent at the precise time of the offense charged. See *MARCUS*, *supra* note 13, at 135-37.

112. See *Sorrells v. United States*, 287 U.S. 435 (1932); *supra* notes 38-49 and accompanying text (summarizing *Sorrells*).

113. See *United States v. Navarro*, 737 F.2d 625, 635 (7th Cir. 1984).

114. See *MARCUS*, *supra* note 13, at 135-37.

dants.¹¹⁵ The most detailed of these was produced by the Eighth Circuit in *United States v. Dion*.¹¹⁶ The court listed ten such factors:

- (1) whether the defendant readily responded to the inducement offered;
- (2) the circumstances surrounding the illegal conduct;
- (3) "the state of mind of a defendant before government agents make any suggestion that he shall commit a crime;"
- (4) whether the defendant was engaged in an existing course of conduct similar to the crime for which he is charged;
- (5) whether the defendant had already formed the "design" to commit the crime for which he is charged;
- (6) the defendant's reputation;
- (7) the conduct of the defendant during the negotiations with the undercover agent;
- (8) whether the defendant has refused to commit similar acts on other occasions;
- (9) the nature of the crime charged; and
- (10) "[t]he degree of coercion present in the instigation law officers have contributed to the transaction" relative to the "defendant's criminal background."¹¹⁷

Although such lists provide guidance to courts and help prevent lawyers from overlooking potentially valuable predisposition evidence, they are necessarily generalized and potentially overbroad. Indeed, courts have admitted many types of evidence bearing on predisposition. The most commonly admitted forms of predisposition evidence may be loosely categorized into similar past acts and crimes, response to the inducement, subsequent acts, reputation, and ability to commit the crime.¹¹⁸

115. See *id.* at 136-37. Perhaps the most widely cited list was compiled by the Seventh Circuit in *United States v. Kaminski*, 703 F.2d 1004 (7th Cir. 1983). The Court listed five factors for determining whether a defendant was predisposed to commit a crime:

[T]he character or reputation of the defendant, including any prior criminal record; whether the suggestion of the criminal activity was initially made by the Government; whether the defendant was engaged in the criminal activity for profit; whether the defendant evidenced reluctance to commit the offense, overcome only by repeated Government inducement or persuasion; and the nature of the inducement or persuasion supplied by the Government.

Id. at 1008. The Seventh Circuit's inclusion of "the nature of the inducement or persuasion supplied by the government" is intriguing because it suggests that the Court is incorporating an objective entrapment inquiry into its subjective standard. See *United States v. Perez-Leon*, 757 F.2d 866, 871 (7th Cir. 1985).

116. 762 F.2d 674 (8th Cir. 1985), modified, 476 U.S. 734 (1986).

117. *Id.* at 687-88 (alteration in original) (citations omitted).

118. See generally Bennett, *supra* note 4, at 850-54.

1. Similar Past Acts: Noncriminal Acts, Criminal Convictions, and Criminal Allegations

In predisposition inquiries, it is important to draw a clear distinction between prior similar acts and prior similar crimes.¹¹⁹ The use of acts to show that the defendant was predisposed “involves far more dangerous possibilities”¹²⁰ and, as a consequence, the use of similar noncriminal acts as dispositive evidence of predisposition was recently foreclosed by the Supreme Court in *Jacobson*.¹²¹ In *Jacobson*, the court concluded that “[e]vidence of predisposition to do what [is] lawful is not, by itself, sufficient to show predisposition to do what is . . . illegal, for there is a common understanding that most people obey the law even when they disapprove of it.”¹²²

In contrast, the defendant’s history of prior convictions remains a common form of evidence used by the prosecution to prove predisposition.¹²³ Such evidence is often inadmissible because its probative value is substantially outweighed by the potential for unfair prejudice to the defendant.¹²⁴ However, if the evidence is used only to rebut a defense of entrapment and to demonstrate predisposition, then it is admissible under Rule 404(b) of the Federal Rules of Evidence.¹²⁵ The rationale for the admission of this evidence in a predisposition inquiry is that recidivism rates suggest that one who has committed a particular type of criminal act is likely to do so again.¹²⁶

Nevertheless, there are limitations on the types of prior criminal acts that can be used as evidence of predisposition. To be admissible, the prior crime generally must either be “similar in kind and reasonably close in time to the crime charged”¹²⁷ or, alternatively, it

119. See MARCUS, *supra* note 13, at 148.

120. *Id.*

121. See *Jacobson v. United States*, 503 U.S. 540, 551 (1992); *supra* notes 74-90 (discussing *Jacobson*).

122. *Jacobson*, 503 U.S. at 551.

123. See MARCUS, *supra* note 13, at 149.

124. See, e.g., FED. R. EVID. 404(b) advisory committee’s note.

125. See *id.* Section 404(b) provides that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .

126. See MARCUS, *supra* note 13, at 149.

127. *United States v. Crump*, 934 F.2d 947, 954 (8th Cir. 1991) (concluding that testimony concerning the defendant’s past willingness to provide drugs to the witness whenever they engaged in sexual activity was sufficiently similar to the charge of narcotics distribution to show predisposition). See *supra* note 110 and accompanying text for additional cases and discussion relating to the “substantial similarity” test. The “closeness in time” test is decided on a case-by-case basis in which the court applies a reasonableness standard. In a majority of federal courts, evidence of convictions for similar offenses committed within the previous nine years are considered reasonably close in time. See W.H.

must be so "inextricably intertwined" from a factual perspective that excluding the evidence would leave a "chronological and conceptual void" in the story heard by the court.¹²⁸ In addition, like all evidence, its probative value must substantially outweigh its prejudicial effect.¹²⁹

The "similar in kind" and "inextricably intertwined" tests are exemplified by the Seventh Circuit's decision in *United States v. Swiatek*.¹³⁰ Over the course of several months, an undercover federal agent and an informant convinced Swiatek that they were amateur thieves, in part by selling him stolen jewelry and also by soliciting advice from him about what to do with a car that they had supposedly stolen.¹³¹ After a series of meetings, Swiatek eventually sold firearms and bombs to the federal agent.¹³² He was subsequently arrested and charged with a variety of federal offenses.¹³³ At trial, Swiatek raised the defense of entrapment, claiming that the agent had repeatedly asked for help in procuring such weapons.¹³⁴

In response, the prosecution presented several forms of evidence to demonstrate that Swiatek was predisposed to deal in firearms and explosive devices.¹³⁵ Among other things, the court admitted evidence of Swiatek's claims to have some degree of expertise with explosive devices, to have owned a garage full of guns before he went to prison, and to have committed several armed robberies.¹³⁶ In addition, the court admitted the agent's testimony relating Swiatek's willingness to deal in stolen jewelry and his apparent willingness to deal in stolen cars.¹³⁷ Swiatek was found guilty and appealed, partly on the ground that the evidence against him was improperly admitted and unduly prejudicial.¹³⁸ For the purposes of the evidence relating to the jewelry and car, the Seventh Circuit found that it had indeed been improperly admitted.¹³⁹ Regarding a predisposition inquiry, the court found that a willingness to deal in stolen property was insufficiently similar to the crime of dealing in firearms, and that the past events

Johnson, III, Note, *Proving a Criminal Disposition: Separating the Unwary Innocent from the Unwary Criminal*, 43 DUKE L.J. 384, 395-96 (1993).

128. *United States v. Hattaway*, 740 F.2d 1419, 1425 (7th Cir. 1984).

129. See FED. R. EVID. 403.

130. 819 F.2d 721 (7th Cir. 1987).

131. See *id.* at 727.

132. See *id.* at 724.

133. See *id.*

134. See *id.*

135. See *id.* at 727-29. There was other evidence admitted to which the defendant objected on appeal, including evidence of a felony conviction 17 years previously. See *id.* at 729.

136. See *id.*

137. See *id.* at 727.

138. See *id.* at 726.

139. See *id.* at 727.

were not sufficiently factually intertwined with the crime to permit presentation of that evidence.¹⁴⁰ In contrast, the court found that the evidence relating to Swiatek's remarks concerning firearms, explosives, and robberies were sufficiently probative of his predisposition, and therefore admissible, because they were substantially similar to the nature of the crime charged and were made at nearly the same time that the crime occurred.¹⁴¹

In addition to demonstrating the application of the "similar in kind" and "inextricably intertwined" tests, the facts of Swiatek serve to introduce another evidentiary issue with respect to the use of past crimes in predisposition inquiries. This is the difference between the prosecution's burden of proof for unproven past crimes, such as Swiatek's alleged dealing in stolen jewelry, and its burden of proof for crimes in which the defendant has been previously tried and convicted. While evidence of a previous conviction must only be "similar in kind" and reasonably close in time to the offense charged,¹⁴² evidence of an unproven past crime must also be accompanied by the introduction of ample evidence for the jury to determine that the defendant actually committed the crime.¹⁴³

This is a relatively low burden of persuasion for the prosecution to meet.¹⁴⁴ In *Huddleston v. United States*,¹⁴⁵ for example, the Supreme Court upheld the admission of evidence suggesting that the defendant had previously sold stolen televisions for the purpose of demonstrating that he had knowingly engaged in the crime of selling stolen videotapes.¹⁴⁶ The primary evidence supporting the prosecution's allegation that the televisions were stolen was "the[ir] low price . . . , the large quantity offered for sale, and [the defendant's] inability to produce a bill of sale."¹⁴⁷ Similarly, in *United States v.*

140. See *id.* at 727-28.

141. See *id.* at 729. Interestingly, the court was unconcerned with whether or not the defendant's claims of past crimes were based in fact. The Court noted that the evidentiary value of the claims was in their capacity to demonstrate that he was "eager to impress [the agent] with his knowledge and expertise" and therefore predisposed to commit the crime. *Id.*

142. See *United States v. Crump*, 934 F.2d 947, 954 (8th Cir. 1991).

143. See *Huddleston v. United States*, 485 U.S. 681, 685 (1988).

144. Prior to the Supreme Court's decision in *Huddleston*, the circuits were split concerning the appropriate level of proof. While the First, Fourth, Fifth, and Eleventh Circuits had all adopted the standard now adopted by the Court, the Second and Sixth Circuits required the prosecution to show by a preponderance of the evidence that the defendant committed the past crime. The Seventh, Eighth, Ninth, and District of Columbia Circuits, on the other hand, required the prosecution to meet the "clear and convincing" standard before evidence of a defendant's past crime would be admissible. See *id.* at 685 n.2.

145. 485 U.S. 681 (1988).

146. See *id.* at 689.

147. *Id.* at 691.

York,¹⁴⁸ the Seventh Circuit applied this standard and found that the testimony of a witness that merely related the defendant's confession to a similar past crime was admissible, even though the credibility of the witness was debatable.¹⁴⁹

In effect, then, the prosecution is free to present past crime evidence to the jury as long as it is supported by a mere modicum of proof. This, of course, raises the concern that factually unfounded accusations of past crimes will be erroneously used to weaken defendants' cases. In addition, there is a strong possibility that the admission of past crime evidence, even if it is well-substantiated, will improperly prejudice the jury.

The prevailing wisdom is that evidence pertaining to an individual's history of criminal behavior is relevant to an inquiry into his propensity for engaging in a similar behavior at a later time.¹⁵⁰ Despite its relevance, however, the use of such evidence may improperly prejudice a jury in two different ways.¹⁵¹ First, members of the jury may infer that the defendant is more likely to have committed the crime charged if she has previously engaged in criminal activity.¹⁵² Second, a juror might conclude that the defendant deserves to be punished for the past crime, regardless of her involvement in the crime charged.¹⁵³ Thus, there is a particularly strong tension between relevance and prejudicial effect with respect to the use of past-crimes evidence in predisposition inquiries. Nevertheless, courts are inclined to conclude that the probative value of past-crimes evidence is not substantially outweighed by its potential prejudicial effect, and that it is admissible regardless of its strength or weakness.¹⁵⁴

2. Response to the Inducement and Opportunity to Withdraw

The defendant's willingness to engage in the crime, or even the defendant's failure to demonstrate reluctance at the time of the government's inducement, may be used by the prosecution as circumstantial evidence to demonstrate predisposition.¹⁵⁵ Indeed, the defendant's response to the inducement, whether she demonstrates

148. 933 F.2d 1343 (7th Cir. 1991).

149. See *id.* at 1352.

150. See Johnson, *supra* note 127, at 412.

151. See Huddleston, 485 U.S. at 686.

152. See *id.*; see also D. Craig Lewis, Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases, 64 WASH. L. REV. 289, 323 (1989).

153. See Lewis, *supra* note 152, at 325.

154. See Johnson, *supra* note 127, at 398-99.

155. See *id.* at 402-03.

strong reluctance, mild reluctance, indifference, or eagerness, is often the most persuasive evidence of her state of mind.¹⁵⁶

As in the case of *United States v. Hunt*,¹⁵⁷ this type of evidence is often dispositive when a defendant has admitted the crime but raised a defense of entrapment. J. Wilton Hunt was a state district judge in North Carolina from 1974 until his indictment in 1982 for accepting bribes.¹⁵⁸ Pursuant to an informant's claim that Hunt could be "delivered," an undercover FBI agent, posing as the operator of an illegal gambling operation, arranged to make monthly payments of \$1500 to the judge for "protection."¹⁵⁹ When the agent initially made the offer, Hunt's response was merely, "That sounds good."¹⁶⁰ Although he later expressed a few misgivings about the arrangement, the judge continued to accept payments and said that he would consider them to be campaign contributions.¹⁶¹ In return for the "contributions," he set low bonds for certain people so they could flee, took care of traffic tickets, and used his influence to assist a drug smuggling operation.¹⁶² Following the judge's arrest, he unsuccessfully raised the entrapment defense at trial and was convicted¹⁶³ under North Carolina's Racketeer Influenced and Corrupt Organizations (RICO) statute.¹⁶⁴

On appeal, Hunt argued, among other things, that the evidence of his predisposition to engage in the offenses charged was insufficient as a matter of law.¹⁶⁵ The Fourth Circuit rejected this argument based on the observation that "no significant pressure or cajoling was required to secure the judge's assent," and that he failed to withdraw from the arrangement even though he had ample opportunity.¹⁶⁶ Since Hunt failed to make an adequate showing of reluctance, the Fourth Circuit properly concluded that the jury was free to decide that he was predisposed.¹⁶⁷

156. See MARCUS, *supra* note 13, at 141-44. Compare *Sherman v. United States*, 356 U.S. 369, 373-74 (1958) (finding that the defendant's "refusal, then his evasiveness, and then his hesitancy" to repeated requests for drugs by the government informer were a strong indication that he was not predisposed) with *United States v. Kaminski*, 703 F.2d 1004, 1008-09 (7th Cir. 1983) (finding predisposition only because the defendant, a professional arsonist, enthusiastically agreed to burn down a building even before learning how much the government informant would pay for his services).

157. 749 F.2d 1078 (4th Cir. 1984).

158. See *id.* at 1080.

159. *Id.* at 1080-81.

160. *Id.* at 1081.

161. See *id.*

162. See *id.*

163. See *id.* at 1079-80.

164. N.C. GEN. STAT. § 75D-4 (1997).

165. See *Hunt*, 749 F.2d at 1084.

166. *Id.* at 1086.

167. See *id.*

More problematic for courts engaging in predisposition inquiries are cases in which the defendant initially evinces reluctance, then engages in actions that demonstrate a willingness to commit the crime.¹⁶⁸ The critical distinction in such cases is whether the defendant's initial reluctance merely belied a true willingness to participate in the crime, or whether the government coerced an unwilling defendant into acting in an incriminating fashion. Two prominent cases demonstrating this distinction are *United States v. Knight*¹⁶⁹ and *United States v. Perez-Leon*.¹⁷⁰ In *Knight*, the defendant agreed to sell a shotgun to a government agent, but the agent insisted that he first cut the barrel to an illegal length.¹⁷¹ *Knight* initially refused the agent's demand, even though it was undisputed that he needed the money, but acceded after the agent contacted him a second time.¹⁷² After being arrested for possession of a sawed-off shotgun, *Knight* argued that he had been entrapped.¹⁷³ The trial court agreed, concluding that "[t]he Defendant's reluctance to sell such a weapon was overcome by repeated Government inducements and the Defendant's precarious financial condition."¹⁷⁴

In *Perez-Leon*, the jury came to a different conclusion based on its determination that the defendant, despite his initial display of reluctance, was a willing participant in the crime.¹⁷⁵ In that case, the defendant declined a government informant's request to participate in a drug sale, stating that "[he had] been burned before."¹⁷⁶ However, he then asked for the informant's phone number and soon became an "eager" participant in the ensuing drug transactions.¹⁷⁷ Based partly on this eagerness and partly on the defendant's apparent expertise in drug-related matters, both the jury and the Seventh Circuit rejected his claim that he was a non-predisposed victim of government inducement.¹⁷⁸

In addition to emphasizing the defendant's active responses to the government's inducement, the prosecution may also attempt to prove predisposition by arguing that the defendant was given an opportunity to withdraw, but failed to do so.¹⁷⁹ Generally, courts are hesitant to conclude that such a failure is a singularly dispositive indication

168. See Johnson, *supra* note 127, at 405-06.

169. 604 F. Supp. 984 (S.D. Ohio 1985).

170. 757 F.2d 866 (7th Cir. 1985).

171. See *Knight*, 604 F. Supp. at 986.

172. See *id.*

173. See *id.* at 985.

174. *Id.* at 987.

175. See *Perez-Leon*, 757 F.2d at 872.

176. *Id.* at 869.

177. *Id.*

178. See *id.*

179. See Bennett, *supra* note 4, at 852.

that the defendant was predisposed.¹⁸⁰ Nevertheless, as in *Harrison v. State*,¹⁸¹ a few courts conducting predisposition analyses have given significant weight to the defendant's failure to withdraw.¹⁸²

Winifred Harrison was a guard at the Smyrna Correctional Institution in Delaware.¹⁸³ An inmate at the prison, Barlow, who was working as an informant for the state police, became aware that Harrison was violating prison rules by bringing food into the facility.¹⁸⁴ Based only on this information, Barlow approached Harrison and offered her a hundred dollars to smuggle marijuana to him.¹⁸⁵ She eventually acceded and met Barlow's outside contact, an undercover police lieutenant named Williams, to purchase the marijuana.¹⁸⁶ At each of their meetings, Williams offered Harrison the opportunity to withdraw, but she refused.¹⁸⁷ Harrison was arrested after making two deliveries of marijuana to Barlow.¹⁸⁸

At trial, Harrison unsuccessfully argued that she had not been predisposed to commit the crime and that she had been entrapped.¹⁸⁹ On appeal, the Delaware Supreme Court conceded that the only evidence of Harrison's predisposition was her failure to withdraw, yet it concluded that this evidence was sufficient for the jury to reject her entrapment defense.¹⁹⁰ Consequently, the court affirmed her conviction.¹⁹¹

The defendant's immediate response to the government's inducement is one of the most widely used forms of evidence in predisposition inquiries. Its value is that, unlike other types of predisposition evidence, it is probative of the defendant's state of mind at the time of the inducement, rather than at some other time and under

180. There have been numerous cases in which the defendant had days or even months to think about the inducement and ultimately failed to withdraw, yet the court still found that he or she was not predisposed. See, e.g., *Jacobson v. United States*, 503 U.S. 540, 554 (1992); *Sherman v. United States*, 356 U.S. 369, 374 (1958); *United States v. Dion*, 762 F.2d 674, 690 (8th Cir.), modified, 476 U.S. 734 (1985); *United States v. Knight*, 604 F. Supp. 984, 987 (S.D. Ohio 1985).

181. 442 A.2d 1377 (Del. 1982).

182. See, e.g., *id.* at 1386; *United States v. Miller*, 71 F.3d 813, 817 (11th Cir. 1996); *United States v. Rodriguez*, 799 F.2d 649, 655 (11th Cir. 1986); *United States v. Kaminski*, 703 F.2d 1004, 1009 (7th Cir. 1983); *State v. Schillaci*, 526 N.E.2d 871, 876 (Ill. App. Ct. 1988).

183. See *Harrison*, 442 A.2d at 1379.

184. See *id.*

185. See *id.*

186. See *id.* at 1380. There was conflicting testimony concerning the amount of reluctance shown by Harrison at the time of the inducement. While the informant claimed that Harrison merely deliberated for an hour or two, she testified that she rebuffed his repeated requests for a month before finally agreeing to participate. See *id.* at 1379-80.

187. See *id.* at 1380.

188. See *id.*

189. See *id.* at 1381.

190. See *id.* at 1386.

191. See *id.* at 1388.

different circumstances. In contrast, the value of failure-to-withdraw evidence is that it may indicate the defendant's willingness to engage in the criminal activity even though there has been a passage of time during which she has had an opportunity to carefully weigh the circumstances and the consequences of her actions. However, courts must consider the circumstances surrounding such forms of evidence carefully, for both an initially positive response and a subsequent failure to withdraw may merely suggest a reluctant, or even a fear-induced, submissiveness to an overwhelming inducement rather than an ardent willingness to engage in a crime.

3. Subsequent Acts and Statements

While proof of a defendant's predisposition often pivots on the character of her acts preceding or during the crime, the prosecution may also present evidence that she later engaged in similar activity.¹⁹² Like evidence of prior criminal acts, an admissible subsequent act must either be similar in nature and reasonably close in time to the crime charged, or be "inextricably intertwined" with it.¹⁹³ Of course, its probative value must also substantially outweigh its prejudicial effect.¹⁹⁴ The reasoning behind the admission of subsequent act evidence is that "the defendant's continuation of the prohibited conduct after the removal of the government inducement indicates that it was not the government's inducement that motivated the defendant to commit the charged offense, but some other, continuing factor."¹⁹⁵

As this reasoning suggests, the prosecution often presents subsequent act evidence to show that a defendant has actively engaged in similar illegal conduct even after the government's inducement ceases. In *United States v. Burkley*,¹⁹⁶ for instance, the government introduced evidence that the defendant sold heroin to an undercover

192. See, e.g., *United States v. Posner*, 865 F.2d 654, 658 (5th Cir. 1989) ("[E]vidence of the defendant's subsequent, extrinsic offense [is] admissible because it fairly rebut[s] [a] claim of entrapment by proving disposition to commit a criminal act."); *United States v. Moschiano*, 695 F.2d 236, 243-44 (7th Cir. 1982) (rejecting the defendant's argument that there should be a per se rule against the admission of "subsequent act" evidence); *United States v. Mack*, 643 F.2d 1119, 1122-25 (5th Cir. 1981) (holding that evidence of subsequent crimes was admissible to establish predisposition); *United States v. Burkley*, 591 F.2d 903, 921 (D.C. Cir. 1978) (noting that the defendant's ability to access large quantities of heroin in November was probative of his predisposition to sell heroin the previous September); *United States v. Brown*, 567 F.2d 119, 120 (D.C. Cir. 1977) ("The [issue] is not whether the events sought to be introduced occurred before, during, or after commission of the alleged offense. The question is whether the events are relevant to and probative of defendant's willingness to commit the crime.").

193. See *Johnson*, *supra* note 127, at 401.

194. See *FED. R. EVID.* 403.

195. *Johnson*, *supra* note 127, at 401.

196. 591 F.2d 903 (D.C. Cir. 1978).

police officer on November 8, partly for the purpose of demonstrating that the defendant had been predisposed when he sold the same officer heroin on September 9.¹⁹⁷ By doing so, the prosecution successfully rebutted the defendant's claim of entrapment, even though the police officer initiated the contact with the defendant.¹⁹⁸

For the purpose of demonstrating a defendant's predisposition, most courts also admit evidence that she was merely "willing" to engage in similar conduct after the government discontinued its inducement. As in *Burkley*, the defendant in *United States v. Jenkins*¹⁹⁹ attempted to raise the entrapment defense after being charged with selling heroin to undercover agents.²⁰⁰ Although there was no evidence that Jenkins had ever engaged in any other criminal activity, the Fifth Circuit found that he was predisposed merely because he made the statement, "[I]f you need more, I'll be here," after the sale was completed.²⁰¹

Thus, subsequent actions and statements may both be properly admitted to demonstrate a defendant's predisposition.²⁰² Yet, by admitting this type of evidence, courts sometimes ignore the possibility that the government's inducement and coercion at the time of the crime charged may have engendered the defendant's subsequent "predisposition." For example, the admission of statement evidence ignores the ease with which such statements can be elicited by police officers hoping to defeat the defendant's ability to invoke the entrapment defense. This is particularly true when complaisant remarks such as "[I]f you need more, I'll be here" are considered to be dispositive evidence that the defendant was predisposed.²⁰³ Jenkins made that statement immediately after the transaction was completed, when he could have been flush with the prospect of making a significant amount of money.²⁰⁴ For the purposes of a predisposition inquiry, an offhand remark made in the heat of such a moment has little relevance to the issue of whether Jenkins was willing and ready to engage in drug trafficking prior to the government's inducement. Despite the Fifth Circuit's holding to the contrary, courts should preclude similar remarks as a matter of law on the grounds of

197. See *id.* at 921-22. *Burkley* was tried for both crimes in a consolidated trial. See *id.* at 907.

198. See *id.* at 907. Although the prosecution also presented other evidence to demonstrate that the defendant was predisposed, none of it appears to have been dispositive. This included proof of the ease with which *Burkley* obtained high-quality heroin and reputation testimony by an apparently unreliable witness. See *id.* at 910.

199. 480 F.2d 1198 (5th Cir. 1973).

200. See *id.* at 1199.

201. *Id.* at 1200.

202. See *MARCUS*, *supra* note 13, at 158.

203. *Jenkins*, 480 F.2d at 1200.

204. See *id.*

irrelevance or insufficiency, rather than allowing them to foreclose an otherwise well-grounded defense of entrapment.

4. Defendant's Reputation and Hearsay

While the issue of predisposition is most commonly resolved through an assessment of the defendant's actions before, during, and after the time of the inducement, evidence of the defendant's reputation in the community may also bear on the issue.²⁰⁵ In the past, it was often the prosecution that sought to use reputation evidence to show that the defendant was predisposed.²⁰⁶ However, as courts are becoming more wary about the prejudicial effects of such testimony,²⁰⁷ it is increasingly the defendants who are introducing reputation evidence in the hope of bolstering claims of non-predisposition.

This was the situation in *United States v. Fedroff*,²⁰⁸ when the defendant proffered reputation evidence to show that, prior to the government's involvement, he had not been predisposed to commit the crimes of mail fraud, extortion, and accepting kickbacks.²⁰⁹ Joseph Fedroff was the acting superintendent of public works in North Arlington, New Jersey, when FBI agents investigating official corruption targeted that town.²¹⁰ An undercover agent, posing as a steel salesman, approached Fedroff and solicited contracts from him.²¹¹ After the town placed its first order, the agent met Fedroff at a local bar and handed him \$100, saying "Here's a hundred bucks many thanks Joe . . . We appreciate your business you guys are super O.K."²¹² Later, after Fedroff accepted additional payments and gratuities from the agent, he was arrested.²¹³

At trial, Fedroff asserted that he had been entrapped and he had two character witnesses testify on his behalf to show his "good reputation and lack of prior involvement in this kind of illegal activity."²¹⁴ Fedroff argued that this testimony, considered in light of the fact that he never actually requested money from the agent, was evidence of his non-predisposition.²¹⁵ However, the court refused to give

205. See, e.g., *United States v. Akinsanya*, 53 F.3d 852, 856 (7th Cir. 1995); *United States v. Fedroff*, 874 F.2d 178, 183 (3d Cir. 1989); *United States v. Reynoso-Ulloa*, 548 F.2d 1329, 1336 (9th Cir. 1977).

206. See MARCUS, *supra* note 13, at 153.

207. See *id.* at 154.

208. 874 F.2d 178 (3d Cir. 1989).

209. See *id.* at 183.

210. See *id.* at 179-80.

211. See *id.*

212. *Id.* at 180.

213. See *id.*

214. *Id.* at 183.

215. See *id.*

an entrapment instruction to the jury and Fedroff was found guilty.²¹⁶ On appeal, the Third Circuit agreed that the defendant's evidence of non-predisposition, although not substantial, was enough to warrant the instruction, so it ordered a new trial.²¹⁷

Testimony concerning a person's reputation in the community is an express exception under the Federal Rules of Evidence to the prohibition against the use of hearsay at trial.²¹⁸ Nevertheless, the admissibility of reputation evidence to demonstrate predisposition is subject to various limitations, including the omnipresent Rule 403 stipulation that any evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.²¹⁹ All federal circuits that have addressed the issue have concluded that the prosecution may not present hearsay evidence of reputation because of the danger of unfair prejudice.²²⁰ As a consequence, the only reputation-related statements that are admissible in federal courts to show predisposition are those that are not hearsay, such as statements made by the defendant herself²²¹ or by her co-conspirator.²²² Of course, this has no effect on the defendant's ability to present reputation evidence tending to demonstrate non-predisposition.

5. Defendant's Ability to Commit the Crime

Courts have used a defendant's ability to commit the crime to infer predisposition. Courts have also used a defendant's apparent inability to commit the crime to infer non-predisposition. Although these two inquiries are facially similar, it is important to distinguish between them. An ability to commit a crime is often a strong indication of predisposition, while an inability to commit the crime is not a reliable gauge of non-predisposition.

When the defendant committed the crime with particular ease, a jury may use this fact alone to infer that she was predisposed. This commonly takes place in trials for drug trafficking when the defen-

216. See *id.* at 182.

217. See *id.* at 184-85. Following the defendant's conviction, but before his sentencing, the U.S. Supreme Court decided *Mathews v. United States*, 485 U.S. 58 (1988), holding that a defendant may deny one or more elements of a crime and still be entitled to raise the defense of entrapment. See *id.* at 61-64. In light of the *Mathews* decision, the Third Circuit concluded that Fedroff was also entitled to a new trial so that he could present additional reputation evidence that he was previously foreclosed from using. See Fedroff, 874 F.2d at 186.

218. See FED. R. EVID. 803(21).

219. See Johnson, *supra* note 127, at 407-08.

220. See *id.* at 403. The Fifth Circuit allowed reputation evidence in predisposition inquiries until 1981, when it explicitly reversed its position in the landmark case of *United States v. Webster*, 649 F.2d 346 (5th Cir. 1981) (en banc).

221. See FED. R. EVID. 801(d)(2)(A).

222. See *id.* at 801(d)(2)(E).

dant was able to deliver large amounts of contraband to undercover police officers in a relatively short period of time.²²³ It also commonly occurs when a defendant argues that she was entrapped even though she demonstrated a high degree of expertise in the type of criminal activity with which she is charged.²²⁴ Since ease and expertise tend to demonstrate preparation and past experience, there is a strong rational basis for concluding that the defendant's criminal abilities are a reflection of her predisposition at the time of the government's inducement.

However, the converse is not necessarily true. A defendant's inability to commit a crime may merely demonstrate ineptitude, rather than non-predisposition. Nevertheless, the defense has, on occasion, successfully argued that the inability of the defendant to commit the crime demonstrates non-predisposition. In *United States v. Hollingsworth*,²²⁵ for example, the Seventh Circuit found that the defendants were not predisposed to engage in international money laundering because they did not have the necessary "underworld contacts, financial acumen or assets, access to foreign banks or bankers, or other assets."²²⁶ For this reason, the court concluded that the defendants were "objectively harmless" and reversed their convictions.²²⁷

The flaw in the reasoning of the *Hollingsworth* majority lies in its emphasis on actual ability.²²⁸ Actual ability is irrelevant because an inability to complete the crime does not preclude the possibility that the defendant was an eager, albeit overconfident, participant. The proper focus of a non-predisposition inquiry is not whether the defendant was "objectively harmless," but whether the defendant subjectively perceived herself to have the ability to commit the crime at the time of the government's inducement. Therefore, if a defendant wishes to show non-predisposition using ability evidence, she must demonstrate that at the time of the inducement she did not believe that she would be able to commit the crime.

223. See, e.g., *United States v. Gunter*, 741 F.2d 151, 154 (7th Cir. 1984); *Gossmeyer v. State*, 482 N.E.2d 239, 241 (Ind. 1985); *State v. Stahl*, 482 N.W.2d 829, 838 (Neb. 1992).

224. See, e.g., *United States v. Aikens*, 64 F.3d 372, 375 (8th Cir. 1995) (finding that the defendant was predisposed because he demonstrated skill and sophistication when selling crack cocaine to an undercover officer); *United States v. Lakich*, 23 F.3d 1203, 1209-10 (7th Cir. 1994); *United States v. Hernandez*, 31 F.3d 354, 360 (6th Cir. 1994) (finding that by giving sophisticated advice to an undercover officer about cocaine trafficking, one defendant demonstrated that he was not an innocent dupe); *United States v. Barth*, 990 F.2d 422, 424-25 (8th Cir. 1993); *Collins v. State*, 520 N.E.2d 1258, 1260-61 (Ind. 1988).

225. 27 F.3d 1196 (7th Cir. 1994) (en banc).

226. *Id.* at 1202.

227. *Id.*

228. See *id.* at 1205-11 (Coffey, J., dissenting).

E. A Critique of the Subjective Approach

In theory, the subjective approach properly distinguishes a willing participant in a criminal venture from an unwary innocent. Its primary advantage is that those who would not have committed a crime on their own are not punished for committing it at the behest of the government,²²⁹ which has extraordinary resources at its command and an unmatched power to coerce unsuspecting individuals.

Despite this advantage, the subjective analysis is not philosophically well-founded. A widely discussed concern is that its legal foundation--congressional intent--is extraordinarily tenuous considering that the defendant has, in fact, engaged in legislatively proscribed conduct.²³⁰ Furthermore, the subjective approach neither offers guidance to the police concerning their conduct in difficult situations nor dissuades improper police inducement of crime.²³¹ Finally, and perhaps most importantly, the distinction between predisposed defendants and non-predisposed defendants is not predicated on a well-reasoned concept of moral blameworthiness.²³² Although two people might succumb to identical temptations, the subjective approach prescribes that the predisposed defendant is "guilty," while the non-predisposed defendant is "innocent."²³³ Yet, there is no reasonable basis for holding persons with criminal records or imperfect reputations to a higher standard of ethical responsibility than those who have avoided, or perhaps merely escaped, being similarly stigmatized.²³⁴

The subjective approach is also plagued by difficulties in practical application. One of the more vexing problems with the approach is that, in order to demonstrate predisposition, the prosecution may introduce a broad array of otherwise inadmissible evidence dealing with the defendant's prior unsavory or illegal activities.²³⁵ This evi-

229. See Paton, *supra* note 90, at 1029.

230. See *Sherman v. United States*, 356 U.S. 369, 379 (1958) (Frankfurter, J., concurring). Recall that in *Sorrells*, the Court adopted subjective entrapment based on its conclusion that Congress could not have intended for statutes to be enforced by tempting innocent persons into committing crimes. See *Sorrells v. United States*, 287 U.S. 435, 448 (1932). Justice Roberts strongly objected to this "strained and unwarranted construction of the statute" that "is not merely broad construction, but [provides the] addition of an element not contained in the legislation." *Id.* at 456.

231. See *Sherman*, 356 U.S. at 385.

232. See Carlson, *supra* note 8, at 1038.

233. See *id.*

234. See *id.* at 1038-39.

235. See *United States v. Russell*, 411 U.S. 423, 443 (1973) (Stewart, J., dissenting). In *Sorrells*, the majority casually dismissed this concern, stating that: "if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself." *Sorrells*, 287 U.S. at 451.

dence is often unreliable and highly prejudicial.²³⁶ Exacerbating this problem is the fact that subjective inquiries are notoriously inaccurate and difficult despite the wide variety of evidence used to inquire into the defendant's state of mind. Indeed, judges and juries have repeatedly demonstrated a tendency, when faced with a melange of predisposition evidence, to ignore the "totality of the circumstances" methodology by simply concluding that a single factor is a dispositive indicator of the defendant's predisposition.

For example, in *United States v. Akinsanya*,²³⁷ the jury found that the defendant was predisposed to sell heroin solely on the basis that he was able to obtain 100 grams of it relatively quickly, despite strong character evidence indicating that he was not predisposed and the notable fact that the government agent's initial attempts to purchase drugs from him failed.²³⁸ Similarly, in *United States v. Bogart*,²³⁹ the defendant repeatedly expressed an unwillingness to become involved in the narcotics sale for which he was later charged, but nonetheless he was absolutely barred from invoking the entrapment defense at trial solely because his criminal background suggested that he may have been predisposed.²⁴⁰ In *Dion*, the trial court found that one of the defendants, Lyle Dion, was predisposed to sell eagle parts in violation of federal law based merely on the fact that he had responded to the inducement.²⁴¹ However, the Eighth Circuit properly overruled his conviction because it was undisputed that Dion, an impoverished Native American, had never previously killed an eagle and had only responded after undercover agents spent nearly two years offering substantial amounts of money for the parts.²⁴²

In each of these cases, the defendant was almost certainly disinclined to commit the crime charged at the time of the government's initial contact and inducement. Nevertheless, in each of these cases a single factor (the defendant's ability to commit the crime, his criminal background, and his response to the inducement) was considered by either the judge or the jury to be a dispositive indicator of his predisposition.²⁴³ By ignoring the "totality of the circumstances"

236. See *Russell*, 411 U.S. at 443.

237. 53 F.3d 852 (7th Cir. 1995).

238. See *id.* at 858.

239. 783 F.2d 1428 (9th Cir. 1986).

240. See *id.* at 1430-32; *infra* notes 405-18 and accompanying text (summarizing *Bogart*).

241. See *United States v. Dion*, 762 F.2d 674, 685 (1985).

242. See *id.* at 686.

243. See also *United States v. Lard*, 734 F.2d 1290, 1298 (8th Cir. 1984) (overturning the defendant's conviction for transporting a pipe bomb because he had repeatedly rejected the government's inducements and had no criminal record for related offenses); *United States v. McLernon*, 746 F.2d 1098, 1113-14 (6th Cir. 1984) (noting that the defen-

methodology when determining the defendant's predisposition, these courts effectively undermined the Supreme Court's stated goal of exculpating the defendant when the crime occurred only because of the government's inducement.²⁴⁴

III. THE OBJECTIVE APPROACH TO ENTRAPMENT: THE COMPETING THEORY

A. Introduction: The Birth of the Objective Approach

The gravamen of the objective view of entrapment is whether the police conduct "falls below standards, to which common feelings respond, for the proper use of governmental power."²⁴⁵ According to this test, which is also known as the "reasonable law-abiding person approach,"²⁴⁶ if the government's method of inducement was likely to induce an ordinarily law-abiding citizen to break the law, then the charges should be dismissed even if the accused was ready and willing to commit the offense.²⁴⁷ Unlike the subjective inquiry, which is an issue of fact for the jury, the objective determination is an issue of law decided by the judge.²⁴⁸

The foundation for the objective approach to entrapment is traceable to Justice Brandeis' dissent in the 1928 case of *Casey v. United States*.²⁴⁹ Casey, a lawyer, was convicted of illegally purchasing and delivering morphine to prison inmates.²⁵⁰ After jailers noticed that drug addicts in the prison repeatedly appeared to be under the influence of narcotics following Casey's visits, federal narcotics officers persuaded two informants to approach Casey and ask him to procure morphine for them.²⁵¹ They gave Casey money in advance and he later delivered a morphine-soaked towel to one of them.²⁵² Although a majority of the Court upheld Casey's subsequent conviction, Justice Brandeis voted to reverse it on the ground that "the act for which the Government seeks to punish the defendant is the fruit of [the government agent's] criminal conspiracy to induce its commission."²⁵³ He based his position on the need to protect the integrity of the government and its courts.²⁵⁴

dant, who had no criminal record, repeatedly refused to participate in a drug transaction until the government agent continually increased the pressure over a long period of time).

244. See *Sorrells v. United States*, 287 U.S. 435, 444 (1932).

245. *Sherman v. United States*, 356 U.S. 369, 382 (1958) (Frankfurter, J., concurring).

246. ROBINSON, *supra* note 13, at 520-21.

247. See *Sherman*, 356 U.S. at 383-84.

248. See *Sorrells*, 287 U.S. at 457.

249. 276 U.S. 413 (1928).

250. See *id.* at 416.

251. See *id.* at 422.

252. See *id.* at 423.

253. *Id.* (Brandeis, J., dissenting).

254. See *id.* at 425.

Justice Brandeis' reasoning foreshadowed a sequence of minority opinions by various justices, each of whom argued for the use of the objective analysis in entrapment cases. The first of these, of course, was Justice Roberts' concurrence in *Sorrells*, in which he opined that "the true foundation of [the entrapment] doctrine [is] the public policy which protects the purity of government and its processes."²⁵⁵ He felt that it "is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law" regardless of the defendant's state of mind when committing the crime.²⁵⁶

B. The Nature of the Objective Inquiry and Its Adoption by Various States

Building on Justice Brandeis' and Justice Roberts' reasoning, Justice Frankfurter in *Sherman* proffered the first explicit statement of an objective entrapment standard:

[I]n holding out inducements [the government] should act in such a manner as is likely to induce to the commission of crime only [those persons already willing to engage in criminal conduct] and not others who would normally avoid crime and through self-struggle resist ordinary temptations. . . . The power of government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law.²⁵⁷

Even though the objective approach to entrapment would allow culpable defendants to go free, Justice Frankfurter argued that it was "less evil that some criminals should escape than that the Government should play an ignoble part."²⁵⁸

In 1973, Justice Frankfurter's formulation of the objective approach was embraced and reiterated by Justice Stewart in his dissenting opinion in *United States v. Russell*.²⁵⁹ That case involved a defendant, Russell, who was convicted of illegally manufacturing methamphetamine.²⁶⁰ Although conceding that he was predisposed to commit the crime, Russell argued that he was entrapped when a government agent supplied an essential chemical for the process,

255. *Sorrells v. United States*, 287 U.S. 435, 455 (1932) (Roberts, J., concurring); see also *supra* notes 38-49 and accompanying text (summarizing *Sorrells*).

256. *Sorrells*, 287 U.S. at 457.

257. *Sherman v. United States*, 356 U.S. 369, 384 (1958) (Frankfurter, J., concurring); see also *supra* notes 53-62 (summarizing *Sherman*).

258. *Id.* at 380 (quoting *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting)).

259. 411 U.S. 423 (1973).

260. See *id.* at 426.

thereby contributing to a criminal enterprise and violating Russell's constitutional right to due process.²⁶¹ The majority affirmed Russell's conviction and rejected his due process argument,²⁶² finding instead that his admission of predisposition was "fatal to his claim of entrapment."²⁶³ In a forceful dissent, Justice Stewart reiterated Justice Roberts' desire to maintain the purity of the government and offered an objective entrapment standard similar to that proposed by Justice Frankfurter:

[W]hen the agents' involvement in criminal activities goes beyond the mere offering of such an opportunity and when their conduct is of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit it, then—regardless of the character or propensities of the particular person induced—I think entrapment has occurred.²⁶⁴

Applying this standard, Justice Stewart suggested that Russell was entrapped as a matter of law.²⁶⁵

Although the objective approach to entrapment has never commanded a majority in the U.S. Supreme Court, both the American Law Institute and a minority of states have adopted it over the past thirty-five years. The first to do so was the American Law Institute, which incorporated the objective standard into the Model Penal Code (MPC) in 1962.²⁶⁶ The MPC approach closely traces the Roberts-Frankfurter-Stewart-Brennan formulation of an objective standard by focusing the inquiry exclusively on the actions of the government.²⁶⁷ It requires the defendant to prove, by a preponderance of the

261. See *id.* at 426-28; *infra* notes 375-85 and accompanying text (discussing the defendant's due process defense).

262. See *Russell*, 411 U.S. at 430.

263. *Id.* at 436. The majority also expressed a strong disapproval of the objective standard, stating that the entrapment defense "was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve." *Id.* at 435.

264. *Id.* at 445 (Stewart, J., dissenting). Justice Stewart was joined by Justices Brennan and Marshall, the same three justices who argued for the adoption of the objective standard of entrapment three years later. See *Hampton v. United States*, 425 U.S. 484, 496 (1976) (Brennan, J., dissenting).

265. See *Russell*, 411 U.S. at 449-50. Justice Douglas, joined by Justice Brennan, also wrote a separate dissenting opinion in *Russell*. Quoting Justices Brandeis, Roberts, and Frankfurter extensively, he similarly argued for the adoption of the objective approach to entrapment. See *id.* at 436 (Douglas, J., dissenting).

266. See MARCUS, *supra* note 13, at 39.

267. Section 2.13 provides that:

(1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:

(a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or

evidence, that her illegal conduct was merely a response to the government's entrapment.²⁶⁸

Since the adoption of the objective approach by the American Law Institute, thirteen states have followed suit either through judicial pronouncement or legislative enactment.²⁶⁹ The first state to do so was Alaska, which adopted the objective standard in 1969 when its Supreme Court decided the case of *Grossman v. State*.²⁷⁰ Before presenting a historical review of the debate over the objective and subjective approaches, the court stated that "the underlying basis of entrapment is found in public policy."²⁷¹ It rejected the reasoning of the Sorrells majority, arguing that "[t]o speak of entrapment as an implied statutory condition, and then to focus inquiry on the origin of intent, the implantation of criminal design, and the predisposition of the defendant does not make much sense."²⁷² Instead, the court explicitly adopted the objective approach, concluding that "[a]n external standard, if it can be achieved, is certainly preferable to a doctrine founded in theoretical riddles."²⁷³

(b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

(2) Except as provided in Subsection (3) of this Section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the Court in the absence of the jury.

(3) The defense afforded by this Section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.

MODEL PENAL CODE § 2.13 (1985).

268. See *id.* § 2.13(2).

269. The states that currently follow the objective approach include Alaska, Arkansas, Colorado, Hawaii, Iowa, Kansas, Michigan, New York, Pennsylvania, Texas, Utah, and Vermont. See Paton, *supra* note 90, at 1002 n.45. The thirteenth state, North Dakota, initially adopted the objective standard. However, in 1993 its legislature added a subjective element to the entrapment statute, thereby creating a hybrid approach. See N.D. CENT. CODE § 12.1-05-11 (1993). For a further discussion of the hybrid approach, see *infra* Part IV.

270. 457 P.2d 226 (Alaska 1969). In *Grossman*, a government agent, assigned to report on drug-related activities in the Anchorage area, befriended the defendant. Over the following months, the agent requested and purchased marijuana and amphetamines from the defendant on various occasions. Eventually, the agent asked the defendant to procure some "hard stuff" for a friend of his in Fairbanks who needed a new contact. Five days later, the defendant complied and was later convicted of supplying the agent with 10 "fixes" of morphine. The Alaska Supreme Court, after adopting the objective standard, remanded the case back to the trial level for a judicial determination of whether *Grossman* had been entrapped as a matter of law. See *id.* at 230-31.

271. *Id.* at 227.

272. *Id.* at 229.

273. *Id.* The Alaska Supreme Court formulated the objective test as follows:

[U]nlawful entrapment occurs when a public law enforcement official, or a person working in cooperation with him, in order to obtain evidence of the commission of an offense, induces another person to commit such an offense by

Most states that have adopted the objective approach to entrapment have done so by legislative enactment. In the early 1970s, for example, Hawaii, Pennsylvania, North Dakota, Utah, Texas, and Arkansas all promulgated statutes requiring the application of the objective standard.²⁷⁴ Typically, these statutes are modeled after the MPC's formulation²⁷⁵ or on Justice Frankfurter's opinion in *Sherman*.²⁷⁶ In recent years, movement towards the adoption of an objective approach has waned, perhaps because the subjective view has continued to be a strongly entrenched tenet of the U.S. Supreme Court.²⁷⁷

C. A Critique of the Objective Approach

The principal advantage of the objective inquiry "may simply be that it avoids the problems of the subjective" approach.²⁷⁸ The focus of the inquiry is wholly upon the facts of the case and the legitimacy of the government's actions, rather than on the state of mind or prior conduct of an individual.²⁷⁹ Not only is the factual inquiry thereby simplified, but the judge may also properly exclude prejudicial evidence pertaining to the defendant's reputation, criminal activities, and prior convictions.²⁸⁰ Furthermore, the objective approach leads to greater equity of treatment between similarly situated defendants than does the subjective approach. As Justice Frankfurter stated in *Sherman*, "[S]urely if two suspects have been solicited at the same time in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition."²⁸¹ By shifting the focus of the inquiry away from the defendant and onto the government's actions, the objective inquiry circumvents this unfairness.

In addition, the objective approach enables judges to critique and correct the past actions of the police, thereby helping to deter future police misconduct.²⁸² As a consequence, the consistent application of an objective standard would eventually allow the judiciary to pre-

persuasion or inducement which would be effective to persuade an average person, other than one who is ready and willing, to commit such an offense.

Id.

274. See MARCUS, *supra* note 13, at 43.

275. See *supra* note 267.

276. See MARCUS, *supra* note 13, at 43; *supra* notes 53-62 and accompanying text (discussing *Sherman*).

277. See MARCUS, *supra* note 13, at 43.

278. Id. at 103.

279. See Paton, *supra* note 90, at 1030.

280. See *Sherman v. United States*, 356 U.S. 369, 382 (1958) (Frankfurter, J., concurring).

281. Id. at 383.

282. See Paton, *supra* note 90, at 1031.

cisely define the outer limits of acceptable police behavior. It was this characteristic that compelled Justice Roberts in 1932 to argue for the adoption of an objective approach to entrapment.²⁸³ “[U]nlike the fiction of contravening legislative intent by finding an entrapped defendant guilty” under the subjective approach, the objective approach places restraints on society’s and Justice Roberts’ predominant concern of governmental overreaching.²⁸⁴

A difficulty with the objective approach is that it places a great deal of emphasis on the behavior of a hypothetical, reasonable law-abiding person.²⁸⁵ For example, the Alaska Supreme Court in *Grossman* focused its inquiry on “persuasion or inducement which would be effective to persuade an ‘average person,’ other than one who is ready and willing, to commit such an offense.”²⁸⁶ As a consequence of this emphasis, the objective standard may be too abstract and difficult to apply.²⁸⁷ In fact, ten years after its *Grossman* decision, the Alaska Supreme Court was forced to admit that:

we have come to realize that there are certain difficulties in applying the [average person] standard. An “average person” probably cannot be induced to commit a serious crime except under circumstances so extreme as to amount to duress. Yet it is clear that entrapment may occur where the degree of inducement falls short of actual duress.²⁸⁸

To reduce this problem, the Alaska Supreme Court shifted the emphasis of its objective inquiry by indicating that the entrapment defense is appropriate when there has been “unreasonable or unconscionable efforts on the part of the police to induce one to commit a crime.”²⁸⁹

Perhaps the most compelling criticism of the objective inquiry is that it is overinclusive.²⁹⁰ That is, by focusing the inquiry exclusively on the conduct of the government, it relieves defendants of liability regardless of their degree of culpability or predilection for committing the offense.²⁹¹ Thus, an indurate criminal might be “acquitted at

283. See *Sorrells v. United States*, 287 U.S. 435, 453-59 (1932) (Roberts, J., concurring); supra notes 255-56 and accompanying text (summarizing Justice Robert’s argument).

284. MARCUS, supra note 13, at 104 (quoting *Sherman*, 356 U.S. at 379 (Frankfurter, J., concurring)).

285. See Paton, supra note 90, at 1031.

286. *Grossman v. State*, 457 P.2d 226, 229 (Alaska 1969).

287. See MARCUS, supra note 13, at 104.

288. *Pascu v. State*, 577 P.2d 1064, 1066-67 (Alaska 1978).

289. *Id.* at 1067.

290. See Moore, supra note 6, at 1169.

291. See *id.*

a substantial cost to the deterrent credibility of" the criminal justice system and in contravention of society's concept of fair justice.²⁹²

IV. HYBRID APPROACHES TO ENTRAPMENT: ATTEMPTS TO RECONCILE THE SUBJECTIVE/OBJECTIVE DICHOTOMY

A few states have developed alternative entrapment doctrines that include both objective and subjective elements.²⁹³ The New Jersey, Florida, Indiana, and North Dakota legislatures have all promulgated hybrid entrapment statutes, while New Hampshire and New Mexico have adopted hybrid approaches by way of judicial pronouncement.²⁹⁴ The ultimate intent underlying the adoption of these hybrid approaches is to reap the benefits of both the subjective and objective inquiries, while minimizing the problems associated with each.

A. The Composite Hybrid Approach

In New Jersey, Indiana, and New Hampshire, the entrapment standard is a mixture of the subjective and objective approaches into a single two-pronged inquiry.²⁹⁵ This standard, which will be termed the "composite hybrid approach," is exemplified by the Indiana entrapment statute:

(a) It is a defense that:

(1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and;

(2) the person was not predisposed to commit the offense.

(b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.²⁹⁶

Typically, to successfully raise a defense of entrapment under the composite approach, the defendant must first demonstrate either that the government's inducement created a substantial risk that the average person would commit the crime, or that its conduct was so egregious as to "impugn the integrity of the court that permits a

292. *Id.*

293. See MARCUS, *supra* note 13, at 44-47.

294. See Paton, *supra* note 90, at 1005; Doug Nesheim, Comment, Criminal Law—Entrapment: Illegal Police Conduct Gets Stung by the Entrapment Defense in *State v. Kummer*, 69 N.D. L. REV. 969, 993-96 (1993).

295. See N.J. STAT. ANN. § 2C:2-12 (West 1998); IND. CODE ANN. § 35-41-3-9 (Michie 1997); N.H. REV. STAT. ANN. § 626:5 (1996).

296. IND. CODE ANN. § 35-41-3-9 (Michie 1997) (emphasis added).

conviction.”²⁹⁷ Second, the defendant must prove no predisposition to commit the crime.²⁹⁸

While the various creators of the composite hybrid approach presumably aspired to maximize the fairness and benefits associated with the entrapment defense, they merely succeeded in negating the benefits of the individual subjective and objective approaches. The primary societal benefit of the subjective standard is that those who would not commit a crime on their own are not punished for committing it at the behest of the government.²⁹⁹ However, this benefit is significantly diminished under the composite approach when an additional burden is placed on the defendant to prove that the police used improper or egregious methods to coerce her behavior. One of the principal advantages of the objective standard is that it avoids some of the difficulties of the subjective standard—there is no need to introduce prejudicial evidence of the defendant’s reputation or past behavior, and there is greater equity of treatment between predisposed and non-predisposed defendants.³⁰⁰ These advantages, too, are lost under the composite hybrid approach because the defendant is still required to answer the subjective inquiry concerning her predisposition.

In addition, by placing a two-pronged burden on the defendant, a composite entrapment defense is likely to be underinclusive. “Predisposed” defendants might still fall victim to egregious police tactics, while non-predisposed defendants will face the significant burden of meeting an abstract and unclear “average person” standard. Furthermore, because it is underinclusive, there will be little deterrent effect on government overreaching. While courts will still have opportunities to critique the inducement tactics used by the police, many defendants will nevertheless be convicted for failing to meet the subjective prong. In such instances, the judicial criticism will be relegated to the status of dicta, which police officers will have little incentive to heed.

Indiana, while maintaining a composite hybrid approach to entrapment, has attempted to avoid the problem of underinclusiveness by shifting the burden of persuasion to the prosecution.³⁰¹ The prosecution must rebut a defense of entrapment by showing both that the level of police inducement did not affect the free will of the defendant

297. *State v. Fogarty*, 607 A.2d 624, 627 (N.J. Sup. Ct. 1992).

298. In New Jersey, this burden of proof is placed on the defendant, who must prove each prong by a preponderance of the evidence. See, e.g., *State v. Florez*, 636 A.2d 1040, 1047 (N.J. Sup. Ct. 1994).

299. See *supra* text accompanying note 229.

300. See *supra* text accompanying notes 278-84.

301. See, e.g., *Smith v. State*, 565 N.E.2d 1059, 1063 (Ind. 1991).

and that the defendant was predisposed to commit the crime.³⁰² This burden of persuasion is not always as insurmountable as it might be, since the Indiana Supreme Court has declared that the prosecution may meet it by "show[ing] circumstances which establish the criminal predisposition of the accused including his possession of large quantities of contraband, his ability to access contraband in a short time, his knowledge of prices and sources and his manner of conducting the sale of contraband itself."³⁰³

Despite this apparent easing of the burden of persuasion, Indiana's approach has the potential to be seriously overinclusive. Every defendant that can show the slightest inducement on the part of the government will raise the entrapment defense and then sit back to see if the prosecution can meet its burden. If the state fails then her entrapment defense succeeds. Furthermore, if the prosecution presents a substantial amount of evidence to demonstrate predisposition, and this evidence is not unlawful conduct sufficiently similar to the crime charged, then the case against the defendant may be reversed because the jury was unduly prejudiced.³⁰⁴

The 1994 case of *Dockery v. State*³⁰⁵ illustrates the potential difficulties of Indiana's approach. The case arose when an undercover officer told Jackson that he wanted to purchase cocaine.³⁰⁶ Jackson then took the officer to the street in front of the home of the defendant, Dockery.³⁰⁷ After speaking only with Jackson, Dockery weighed out a specific amount of cocaine, carried it out to the officer's car, and sold it to him for \$250.³⁰⁸ Dockery was subsequently arrested. In response to Dockery's defense of entrapment, the prosecution presented evidence of his predisposition, including his arrest three years previously for the possession of marijuana and an illegal firearm.³⁰⁹ In addition, the prosecution presented the testimony of a police officer who stated that Dockery had sold cocaine to a confidential informant two years previously.³¹⁰ Although Dockery was found guilty the Indiana Supreme Court reversed the conviction, concluding that the prosecution's evidence was not sufficiently similar to the crime charged to prove that Dockery was predisposed to

302. See *Baird v. State*, 446 N.E.2d 342, 344 (Ind. 1983).

303. *Gossmeier v. State*, 482 N.E.2d 239, 241 (Ind. 1985).

304. See *Powers v. State*, 380 N.E.2d 598, 600 (Ind. Ct. App. 1978).

305. 644 N.E.2d 573 (Ind. 1994).

306. See *id.* at 575.

307. See *id.* at 575-76.

308. See *id.*

309. See *id.* at 576. That case was not prosecuted, in part because one of the arresting officers was later killed in an unrelated incident. See *id.*

310. See *id.* The officer testified that the case was not prosecuted because the confidential informant was later "kidnapped by some other dopers." *Id.*

deal in cocaine.³¹¹ Furthermore, the court held that the prosecution's evidence of predisposition had a "prejudicial impact on the mind of the average juror," which also warranted a reversal.³¹²

According to the facts presented in *Dockery*, the defendant was clearly willing and able to make the transaction on short notice, as Jackson apparently knew when he took the officer to *Dockery's* house.³¹³ Yet, contrary to its own precedent, the court made no attempt to address the defendant's "possession of large quantities of contraband, his ability to access contraband in a short time, his knowledge of prices and sources and his manner of conducting the sale of contraband itself."³¹⁴ As a consequence, not only was the prosecution unable to meet its burden of proof in what appears to be a relatively straightforward case, but it also, in the opinion of the Indiana Supreme Court, improperly prejudiced the jury in its attempt to do so.³¹⁵

The *Dockery* case demonstrates how placing the burden of persuasion on the state in a composite hybrid approach leads to a variety of problems. Too many predisposed and eager defendants will be acquitted pursuant to unjustified claims of entrapment because the prosecution will often be unable to meet the dual burden of proving both predisposition and that the level of police coercion did not affect the defendant's free will. One of the attendant problems is that the prosecution will be forced to present highly prejudicial evidence to the jury, even though it might not meet the ill-defined "sufficiently similar" standard, which is applied by the Indiana courts to scrutinize evidence of predisposition.³¹⁶ This, in effect, gives the defendant two bites at the apple. Either her claim of entrapment succeeds or, if not, her conviction may be reversed because prejudicial evidence was presented to the jury.

B. The Discrete Hybrid Approach

In the hybrid approach used in Florida, North Dakota, and New Mexico, a defendant is not required to satisfy both the subjective and objective prongs of the inquiry.³¹⁷ Rather, each prong is considered to be an independent justification for establishing a successful entrapment defense.³¹⁸ According to New Mexico case law, for example, a

311. See *id.* at 580.

312. *Id.* (quoting *Mitchell v. State*, 287 N.E.2d 860, 863 (Ind. 1972)).

313. See *id.*

314. *Gossmeyer v. State*, 482 N.E.2d 239, 241 (Ind. 1985).

315. See *Dockery*, 644 N.E.2d at 580.

316. See, e.g., *Powers v. State*, 380 N.E.2d 598, 600 (Ind. Ct. App. 1978).

317. See FLA. STAT. § 777.201 (1997); N.D. CENT. CODE § 12.1-05-11 (1997); *Baca v. State*, 742 P.2d 1043, 1046 (N.M. 1987).

318. See *Paton*, *supra* note 90, at 1005 n.66.

defendant may prevail "either by showing lack of predisposition to commit the crime for which he is charged, or, that the police exceeded the standards of proper investigation."³¹⁹ Similarly, according to Florida and North Dakota jurisprudence, the burden of persuasion falls on the defendant, who must satisfy either the subjective or the objective prong by a preponderance of the evidence.³²⁰ This form of the entrapment defense is termed the "discrete hybrid approach."

The discrete hybrid inquiry is a relatively recent and little-used innovation, yet its benefit to defendants is clear. As compared to the composite hybrid approach used in New Jersey and New Hampshire, it gives a defendant greater latitude to assert an entrapment defense while reducing the burden of persuasion. It provides the non-predisposed defendant with a defense against the government's overwhelming power to coerce, and also gives the non-predisposed defendant a defense against egregious police conduct.

A recent Florida case, *Robichaud v. State*,³²¹ illustrates the advantages of the discrete hybrid inquiry. The defendant, Robichaud, took part in three sales of cocaine, but only after a confidential informant and undercover agents "threatened [him] with bodily harm, took away his residence and then, when [he] was jobless and virtually homeless, offered him a job and a residence on the condition that he obtain cocaine for them."³²² Although Robichaud was initially found guilty, the district court reversed his conviction after finding that he was not predisposed to engage in drug dealing.³²³ Thus, Robichaud successfully raised an entrapment defense by meeting the subjective prong of Florida's discrete hybrid inquiry.

Suppose, however, that Robichaud's assertion of non-predisposition had failed, perhaps because the prosecution presented reputation

319. *Baca*, 742 P.2d at 1046 (emphasis added).

320. See FLA. STAT. § 777.201(2) (1997); N.D. CENT. CODE § 12.1-05-11 (1997); see also *Herrera v. State*, 594 So. 2d 275, 278-79 (Fla. 1992) (Kogan, J., concurring); *State v. Murchison*, 541 N.W.2d 435, 440 (N.D. 1995). The legal source (whether statutory or constitutional) of Florida's hybrid approach is not entirely clear. In *Munoz v. State*, 629 So. 2d 90, 98-99 (Fla. 1993), the Florida Supreme Court indicated that while the subjective prong of the entrapment inquiry is required by state statute, the objective prong of the inquiry is founded more in the Due Process Clause of the Florida Constitution.

The North Dakota statute was revised in 1993 and its courts have had little opportunity to interpret or apply it. However, the North Dakota Legislature modeled its entrapment statute after Florida's approach, so it is likely that the courts will apply it similarly. See *Nesheim*, *supra* note 294, at 995.

321. 658 So. 2d 166 (Fla. 2d DCA 1995).

322. *Id.* at 169.

323. See *id.* The police department had focused its efforts on the defendant after receiving an anonymous tip that someone in the trailer park in which the defendant lived was selling narcotics. Although Robichaud admitted to having used cocaine several years previously, he had no prior felonies, the police had no reason to suspect him of engaging in criminal activity, and there was nothing to indicate that he had ever had any inclination to sell drugs. See *id.*

evidence suggesting that he had sold drugs in the past. In the federal courts and in most state courts, where either the subjective or the composite hybrid approach is favored, his attempt to rely on the defense of entrapment would be unsuccessful. Under Florida's hybrid inquiry, however, he would have had a second, and arguably well-deserved, opportunity to assert the defense on the ground that the police used egregious tactics when inducing him to commit the crime.

The discrete hybrid approach preserves most of the advantages of both the objective and subjective standards. As in jurisdictions applying the subjective standard, defendants who would not commit a crime on their own initiative are not punished for committing it because of undue coercion by the government.³²⁴ As in jurisdictions applying the objective standard, predisposed and non-predisposed defendants are treated equitably under the law, and there is greater opportunity for the courts to deter police misconduct.³²⁵

Nevertheless, the discrete hybrid inquiry presents a few difficulties. Like the subjective approach, it may allow the prosecution to introduce evidence that is highly prejudicial to the defendant.³²⁶ In addition, if the defendant relies on the objective prong, she must still fulfill the requirements of the abstract and ill-defined "average person" standard.³²⁷ Also, from the prosecution's perspective, the discrete hybrid approach may be overinclusive because it gives defendants, in effect, two separate exculpatory defenses founded on the entrapment doctrine. However, the most compelling objection to this approach is that, like the objective standard, it exonerates defendants who were eager to commit the offense simply because the government's methods of inducement were improper.³²⁸

V. THE OUTRAGEOUS GOVERNMENT CONDUCT DEFENSE: AN EXPANSION OF SUBSTANTIVE DUE PROCESS PROTECTIONS

A. Introduction: The Birth and Nature of the Outrageous Government Conduct Defense

In 1962, Jack Courtney, a special investigator with the United States Treasury Department, was told by an informant that two men, Mike Thomas and John Becker, were attempting to make a "syndicate" connection so that they could sell bootleg whiskey that

324. See *supra* text accompanying note 229.

325. See *supra* text accompanying notes 278-84.

326. See *supra* text accompanying notes 235-36. However, if appropriate under the circumstances, the defendant presumably would have the option under the discrete hybrid approach of limiting his entrapment defense to the objective prong and demanding that any such prejudicial evidence be excluded.

327. See *supra* text accompanying notes 285-89.

328. See *supra* text accompanying notes 290-92.

they had manufactured.³²⁹ Courtney assumed the role of a gangster, gained the trust of the two men, and eventually bought eight gallons of whiskey from them.³³⁰ Later, following a raid on Thomas' property near Sacramento, California, where their still was located, Becker and Thomas were arrested and sentenced to six months in jail.³³¹

A month after they were released, Becker and Thomas, still unaware of Courtney's true identity, contacted him and asked to resume their illicit dealings.³³² Courtney agreed.³³³ However, as they had trouble setting up a new still, over the course of the next two-and-a-half years, Courtney repeatedly contacted the men and offered to provide them with equipment, a still site in Nevada, an operator, and plastic containers.³³⁴ Although Becker and Thomas did not accept any of these offers, they did purchase 2000 pounds of sugar from Courtney at wholesale prices for use in their operation.³³⁵ In 1966, after the defendants had made three new deliveries of bootleg whiskey to Courtney, he again had them arrested.³³⁶

Becker and Thomas were convicted again, but, on appeal to the Ninth Circuit, argued that they had been entrapped as a matter of law.³³⁷ The court of appeals properly found that it was foreclosed from accepting their entrapment defense since the two were unequivocally predisposed to manufacture bootleg whiskey.³³⁸ Nevertheless, stating that "[w]e do not believe [that] the Government may involve itself so directly and continuously over such a long period of time in the creation and maintenance of criminal operations, and yet prosecute its collaborators," the court reversed their convictions.³³⁹

Although the Ninth Circuit never mentioned a statutory or constitutional basis for its holding, the Greene decision is generally regarded as the first application of the outrageous government conduct defense.³⁴⁰ Strictly speaking, a claim of outrageous government conduct is not a defense because it results in a dismissal of the criminal charges regardless of their merits.³⁴¹ Nevertheless, it is commonly re-

329. See *Greene v. United States*, 454 F.2d 783, 784 (9th Cir. 1971). Since Earl Greene, the named defendant, was murdered while this case was under appeal, the facts as given by the Ninth Circuit focused exclusively on the activities of Becker and Thomas. Greene's role in the matter was not discussed. See *id.*

330. See *id.*

331. See *id.*

332. See *id.* at 785.

333. See *id.*

334. See *id.* at 785-86.

335. See *id.* at 786.

336. See *id.* at 785.

337. See *id.* at 786.

338. See *id.*

339. *Id.* at 787.

340. See, e.g., *United States v. Bogart*, 783 F.2d 1428, 1436-37 (9th Cir. 1986) (discussing *Greene*).

341. See *id.* at 1432 n.2.

ferred to as a defense, so this widely accepted nomenclature will be used here.

Like the entrapment defenses, a successful claim of outrageous government conduct exculpates the defendant, even though she may well have committed all of the elements of the crime.³⁴² Furthermore, like the objective view of entrapment, the court focuses its inquiry wholly on the government's role in the defendant's behavior and the propriety of the government's actions, rather than on the defendant's state of mind.³⁴³ However, unlike the judicially created entrapment defenses, the constitutionally grounded outrageous government conduct defense has neither been explicitly adopted by the U.S. Supreme Court nor universally accepted by lower courts.³⁴⁴ In those jurisdictions where it is accepted, the defense has been grounded either in the Due Process Clauses of the Fifth and Fourteenth Amendments or in analogous state constitutional provisions.³⁴⁵

Although there are facial similarities between the outrageous government conduct defense and the objective approach to entrapment, there are also important differences. Most significantly, the outrageous government conduct defense is narrower in its application than the objective entrapment defense. In comparison to the threshold requirements of a successful objective entrapment defense, due process jurisprudence demands a significantly higher degree of governmental misconduct before the outrageous government conduct defense can be successfully invoked.³⁴⁶ Specifically, the standard for "outrageousness" is a degree of governmental misconduct that is "shocking to the universal sense of justice,"³⁴⁷ while a successful objective entrapment claim merely requires that the government's method of inducement was likely to induce an ordinary, reasonable, law-abiding citizen to break the law.³⁴⁸ The consequence of this difference is that, unlike claims of objective entrapment, claims of outrageous government conduct are rarely successful.³⁴⁹

342. See Gail Greaney, Note, Crossing the Constitutional Line: Due Process and the Law Enforcement Justification, 76 NOTRE DAME L. REV. 745, 746 (1992).

343. See, e.g., Bogart, 783 F.2d at 1433 (concluding that an objective legal standard, without regard to the defendant's predisposition, is the proper standard for evaluating the government's conduct in outrageous government conduct defense cases).

344. See Greaney, *supra* note 342, at 749-50.

345. See MARCUS, *supra* note 13, at 265. Since it is constitutionally based, a significant practical difference between the outrageous government conduct defense and the entrapment defense is that the former is an issue of law for the judge, while the latter is an issue of fact for the jury. See *id.* at 273-82.

346. See *United States v. Mosley*, 965 F.2d 906, 910 (10th Cir. 1992).

347. *United States v. Russell*, 411 U.S. 423, 431-32 (1973) (quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960)).

348. See *Sherman v. United States*, 356 U.S. 369, 383-84 (1958) (Frankfurter, J., concurring).

349. See *Mosley*, 965 F.2d at 911.

B. Constitutional and Precedential Foundations of the Defense

1. Substantive Due Process and Official Misconduct

The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”³⁵⁰ On its face, the Due Process Clause only guarantees procedural protection; however, the U.S. Supreme Court has also invoked it to protect certain substantive rights.³⁵¹ The protection of substantive rights stems from the Court’s long-held tenet that due process is “implicit in the concept of ordered liberty.”³⁵² The Court has invoked substantive due process in cases of egregious deprivations of property and liberty, regardless of whether the deprivation is caused by legislative enactments, administrative actions, or official misconduct.³⁵³

In criminal cases, a defendant’s right to due process is violated when the government has ignored principles of fundamental fairness.³⁵⁴ Unfortunately, there is no well-established dividing line between fundamentally fair and unfair government behavior.³⁵⁵ Courts make fundamental fairness determinations on a case-by-case basis, which means that the substantive due process doctrine with respect to official misconduct is unclear and difficult to apply.³⁵⁶

The authority of the judiciary to supervise the administration of the criminal justice system was addressed by the U.S. Supreme Court in *McNabb v. United States*.³⁵⁷ In that case, the Court relied on the “fundamental principles of liberty and justice’ which are secured by the Fourteenth Amendment” to reverse the murder convictions of three defendants because their post-arrest confessions had been improperly coerced.³⁵⁸

The Supreme Court invoked substantive due process to limit police misconduct again in the case of *Rochin v. California*.³⁵⁹ In *Rochin*, police officers entered the defendant’s home based on a suspi-

350. U.S. CONST. amend. XIV, § 1.

351. See Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process?*, 16 U. DAYTON L. REV. 313, 313 (1991).

352. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

353. See Levinson, *supra* note 351, at 360.

354. See *Kinsella v. United States ex. rel. Singleton*, 361 U.S. 234, 246 (1960).

355. See Molly Kathleen Nichols, *Comment, Entrapment and Due Process: How Far is Too Far?*, 58 TUL. L. REV. 1207, 1214-15 (1984).

356. See *id.*

357. 318 U.S. 332 (1943).

358. *Id.* at 340 (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)). Following their arrests for the murder of a federal agent, the three defendants, none of whom had more than a fourth-grade education, were intensively interrogated for several days. During this period, they were locked in a bare room for 14 hours, given little to eat, and continuously interrogated without the benefit of counsel for hours at a time. See *id.* at 334-39.

359. 342 U.S. 165 (1952).

cion that he was selling narcotics.³⁶⁰ They saw two capsules on a table in the bedroom, but Rochin swallowed them.³⁶¹ After unsuccessfully attempting to retrieve the capsules from his throat, the police took the defendant to the hospital and had his stomach pumped.³⁶² The retrieved capsules were used as evidence at his trial and he was convicted of the possession of an illegal narcotic.³⁶³ The district court of appeal affirmed the conviction and the California Supreme Court denied Rochin's petition for a hearing.³⁶⁴

Justice Frankfurter, for a unanimous Court, began his analysis by observing that the "Due Process Clause inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings . . . to ascertain whether they offend those canons of decency and fairness which express the notions of justice."³⁶⁵ Regarding the actions of the police officers, Justice Frankfurter concluded that illegally breaking into Rochin's house, forcibly attempting to extract the pills from his throat, and using an invasive procedure to pump his stomach shocked the conscience.³⁶⁶ The Court held that such egregious behavior constituted a deprivation of Rochin's liberty without due process and reversed his conviction.³⁶⁷

Although McNabb and Rochin exemplify the Supreme Court's past willingness to broaden the applicability of substantive due process in cases of governmental misconduct, the Court appears to have reversed that trend in recent years.³⁶⁸ For example, in *DeShaney v. Winnebago County Department of Social Services*,³⁶⁹ the Court rejected a due process claim against a county social services department for failing to protect a child from his habitually abusive father, even though the department apparently knew of the danger to the child.³⁷⁰ The Court concluded that a "[s]tate's failure to protect

360. See *id.* at 166.

361. See *id.*

362. See *id.*

363. See *id.*

364. See *id.* at 166-67.

365. *Id.* at 169 (quoting *Malinski v. New York*, 324 U.S. 401, 416-17 (1945)).

366. See *id.* at 172. In frequently quoted language, the Court stated that substantive due process in criminal cases is violated by government misconduct that "shocks the conscience" or constitutes a "brutal" use of force that offends "even hardened sensibilities." *Id.* at 172-73.

367. See *id.* at 174. The Rochin case does not resolve the issue of the outrageous government conduct defense because the case focused on the post-arrest conduct of the officers and it involved a physically intrusive seizure. In contrast, claims of outrageous government conduct, like claims of entrapment, are usually raised in relation to the pre-arrest behavior of the government actor in inducing the defendant's criminal behavior.

368. See Levinson, *supra* note 351, at 360.

369. 489 U.S. 189 (1989).

370. See *id.* at 191-94. After repeatedly abusing the child over a two-year period, the father eventually beat him so severely that the child suffered brain damage. He was expected to spend the rest of his life in an institution. See *id.* at 193.

an individual against private violence simply does not constitute a violation of the Due Process Clause.”³⁷¹ Furthermore, in *Whitley v. Albers*³⁷² and *Graham v. Connor*,³⁷³ the Court held that, when appropriate, claims of excessive force by government officials must be analyzed under the Eighth and Fourth Amendments, respectively, rather than under the more general due process jurisprudence.³⁷⁴

Thus, there is a solid constitutional and precedential foundation upon which the Supreme Court could adopt a substantive-due-process-based affirmative defense for the purpose of policing pre-arrest official conduct. Nevertheless, it is unclear whether the present Court would uphold such a defense. Over the past twenty-five years, however, there have been a few decisions suggesting that at least some members of the Court believe that the outrageous government conduct defense is both constitutional and prudentially sound.

2. Supreme Court Precedent Addressing the Defense

In 1969, an undercover federal agent met with Richard Russell and two others suspected of unlawfully manufacturing methamphetamine.³⁷⁵ The agent, who was posing as a member of a criminal organization, offered to supply the three with a chemical, phenyl-2-propanone (propanone), in exchange for one-half of the drug produced.³⁷⁶ The chemical, which is an essential ingredient in the manufacture of methamphetamine, is legal but difficult to obtain.³⁷⁷ The defendants agreed to the arrangement, then gave the agent a sample of the drug that they had manufactured previously.³⁷⁸ Two days later, the agent gave the defendants propanone and watched them manufacture more of the drug in their laboratory.³⁷⁹ After the defendants were arrested, an entrapment instruction was given at trial, but they were convicted nonetheless.³⁸⁰

On appeal, the Ninth Circuit reversed the conviction because the undercover agent had supplied the necessary chemical, which the court argued was an “intolerable degree of governmental participation in the criminal enterprise.”³⁸¹ The Supreme Court, however, re-

371. *Id.* at 197.

372. 475 U.S. 312 (1986).

373. 490 U.S. 386 (1989).

374. See *id.* at 397-99; *Whitley*, 475 U.S. at 327-28; see also *Levinson*, *supra* note 351, at 345.

375. See *United States v. Russell*, 411 U.S. 423, 425 (1973).

376. See *id.*

377. See *id.*

378. See *id.*

379. See *id.* at 426.

380. See *id.* at 424.

381. *United States v. Russell*, 459 F.2d 671, 673 (9th Cir. 1972).

jected the Ninth Circuit's reasoning and reinstated the conviction.³⁸² Justice (now Chief Justice) Rehnquist, for the majority, reasoned that the entrapment defense was "not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve."³⁸³ Interestingly, however, Justice Rehnquist also stated that "[w]hile we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, the instant case is distinctly not of that breed."³⁸⁴ This "some day" dicta, as the passage has come to be known, has been so widely cited in connection with the outrageous government conduct defense that it has effectively become a battle cry for the defense's proponents.³⁸⁵

Justice Rehnquist's seemingly contradictory statements in *Russell* created confusion among the lower courts. For example, while most courts of appeals continued to recognize only the subjective entrapment defense, the Second Circuit interpreted the "some day" dicta as creating a supplemental due process defense that empowered courts to regulate the conduct of police and other officials.³⁸⁶ Perhaps as a consequence, the Supreme Court granted certiorari on another official conduct-related case, *Hampton v. United States*,³⁸⁷ less than three years later.

Hampton was convicted of selling heroin to undercover DEA agents, even though a government informant allegedly supplied the heroin to him.³⁸⁸ The defendant admitted that he was predisposed to commit the crime but, relying on the *Russell* "some day" dicta, he argued that the government's actions in both supplying him with the heroin and purchasing it were so outrageous that it violated his right to due process.³⁸⁹ The Court affirmed *Hampton's* conviction and, in the process, merely increased confusion in the lower courts.³⁹⁰

Justice Rehnquist wrote a three-justice plurality opinion in *Hampton*. In striking contrast to his dicta in *Russell*, Justice Rehnquist attempted to foreclose the use of the outrageous government conduct defense by opining that due process protections "come into play only when the Government activity in question violates some [constitutionally] protected right of the Defendant."³⁹¹ However,

382. See *Russell*, 411 U.S. at 425.

383. *Id.* at 435.

384. *Id.* at 431-32 (citation omitted).

385. See *MARCUS*, *supra* note 13, at 415-16.

386. See *United States v. Archer*, 486 F.2d 670, 685-86 (2d Cir. 1973).

387. 425 U.S. 484 (1976); see also *supra* notes 63-73 (discussing *Hampton*).

388. See *Hampton*, 425 U.S. at 485-87.

389. See *id.* at 489-90.

390. See *id.* at 491.

391. *Id.* at 490 (emphasis added).

both of the concurring justices³⁹² and the three dissenting justices³⁹³ opined that the outrageous government conduct defense is a valid exercise of the Fifth and Fourteenth Amendments' Due Process Clauses. As a result, Justice Rehnquist's attempt to repudiate his Russell "some day" dicta effectively failed, leaving the lower courts free to form their own opinions of the defense.

C. Lower Court Adoption of the Outrageous Government Conduct Defense: Competing Perspectives

1. The Prevailing Perspective: The Defense Is a Valid Exercise of Substantive Due Process

Five different federal courts of appeals have expressly accepted the constitutional validity of the outrageous government conduct defense, although only the Third and Ninth Circuits have actually invoked it to dismiss an indictment.³⁹⁴ These five courts of appeals, which also include the First,³⁹⁵ Seventh,³⁹⁶ and Tenth Circuits,³⁹⁷ have grounded the defense in substantive due process, although the judiciary's "supervisory powers" are a possible alternative foundation.³⁹⁸

The two seminal outrageous government conduct cases are *United States v. Twigg*³⁹⁹ and *United States v. Bogart*.⁴⁰⁰ In *Twigg*, a government agent named Kubica suggested to the two defendants that they all start an illegal methamphetamine manufacturing opera-

392. See *id.* at 491 (Powell, J., concurring). Justice Powell was joined by Justice Blackmun in arguing that, while the outrageous government conduct defense remains valid, it simply did not apply in Hampton's case. See *id.* at 491-95.

393. See *id.* at 495. The three dissenters—Justices Brennan, Stewart, and Marshall—agreed with the concurrence that the outrageous government conduct defense is constitutionally valid, but argued that Hampton's conviction should be reversed. See *id.* at 496-500.

394. See *United States v. Bogart*, 783 F.2d 1428, 1440 (9th Cir. 1986); *United States v. Twigg*, 588 F.2d 373, 382 (3d Cir. 1978); *Greene v. United States*, 454 F.2d 783, 786-87 (9th Cir. 1971); *United States v. Batres-Santolino*, 521 F. Supp. 744, 752-53 (N.D. Cal. 1981).

395. See *United States v. Santana*, 6 F.3d 1, 8 n.11 (1st Cir. 1993).

396. See *United States v. Miller*, 891 F.2d 1265, 1267-68 (7th Cir. 1989).

397. See *United States v. Mosley*, 965 F.2d 906, 909 (10th Cir. 1992). In addition, dicta from the Second, Fifth, Eighth, Eleventh, and D.C. Circuit Courts of Appeals suggests that each has accepted the viability of the defense, although none have ever invoked it. See *United States v. Jacobson*, 916 F.2d 467, 469 (8th Cir. 1990) (*en banc*), *rev'd* on other grounds, 503 U.S. 540 (1992); *United States v. Arteaga*, 807 F.2d 424, 426 (5th Cir. 1986); *United States v. Kelly*, 707 F.2d 1460, 1468-69 (D.C. Cir. 1983); *United States v. Capo*, 693 F.2d 1330, 1336 (11th Cir.), modified on other grounds *sub nom. United States v. Lisenby*, 716 F.2d 1355 (11th Cir. 1983); *United States v. Myers*, 692 F.2d 823, 837 (2d Cir. 1982).

398. See Bennett, *supra* note 4, at 861; Nichols, *supra* note 355, at 1216-17.

399. 588 F.2d 373 (3d Cir. 1978).

400. 783 F.2d 1428 (9th Cir. 1986).

tion.⁴⁰¹ Once the defendants agreed, Kubica located a site, supplied equipment and chemicals, and directed the manufacturing process.⁴⁰² After the drugs were produced, federal agents then arrested the defendants, and they were subsequently convicted in the district court.⁴⁰³ On appeal, the Third Circuit summarized the Supreme Court's decisions in *Russell and Hampton*, then reversed the defendant's convictions on the ground that "[f]undamental fairness does not permit us to countenance such actions by law enforcement officials and prosecution for a crime so fomented by them will be barred."⁴⁰⁴

In *Bogart*, the defendant was the subject of a joint investigation by California and Utah authorities regarding his alleged involvement in a fraudulent real estate scheme.⁴⁰⁵ In addition, he was involved in a legitimate business relationship with a partner, Ralph LaQuay, for the purpose of selling posters in California.⁴⁰⁶ Over the course of five months, authorities in Utah arrested Bogart on four occasions on charges of questionable merit.⁴⁰⁷ Because he was unable to post bail, Bogart spent the entire time in jail.⁴⁰⁸ Soon after Bogart's first arrest, a San Francisco police officer named Kathleen Thaxton convinced LaQuay to become an informant.⁴⁰⁹ LaQuay, following Thaxton's instructions, then falsely told Bogart that he could not afford to pay their poster supplier because he had invested his money in a quantity of cocaine.⁴¹⁰ During the series of phone calls that followed, Bogart repeatedly expressed his need for the poster money to post bail, yet also indicated an unwillingness to become involved in a narcotics sale.⁴¹¹ He eventually acquiesced and agreed to trade the cocaine for 3500 posters.⁴¹² Both Bogart and the poster supplier were later arrested for conspiring to deal in narcotics.⁴¹³

401. See *Twigg*, 588 F.2d at 375-76.

402. See *id.*

403. See *id.* at 376. The jury found that one of the defendants, Neville, was predisposed to commit the crime, apparently because he had expressed no reluctance or hesitation at the time of the inducement. The Third Circuit found that this was a sufficient basis for a jury finding of predisposition, which prevented Neville from successfully invoking the entrapment defense. Similarly, the entrapment defense was not available to the second defendant, *Twigg*, because he was induced to enter into the criminal enterprise by Neville, rather than by a government agent. See *id.*

404. *Id.* at 381.

405. See *Bogart*, 783 F.2d at 1429.

406. See *id.* at 1429-30.

407. See *id.* at 1430.

408. See *id.* Bail varied from \$50,000 to \$400,000 at different times depending on the nature of the charges. See *id.*

409. See *id.*

410. See *id.*

411. See *id.*

412. See *id.*

413. See *id.*

At trial, Bogart was prevented from successfully raising a defense of entrapment because of his criminal background, which suggested that he was predisposed.⁴¹⁴ Instead, Bogart moved for dismissal on the ground that the government's conduct was so outrageous that it violated his right to due process.⁴¹⁵ The court denied the motion and, even though the judge conceded that he did not approve of the government's conduct, Bogart was convicted.⁴¹⁶ While considering Bogart's appeal, the Ninth Circuit carefully outlined the applicability of the outrageous government conduct defense, conceding that "[t]he point of division at the margins between police conduct that is just acceptable and that which goes a fraction too far probably cannot be usefully defined in the abstract."⁴¹⁷ Nevertheless, the court reaffirmed the viability of the defense and remanded the case for additional factual inquiry into possible violations of Bogart's due process rights.⁴¹⁸

As suggested by the Ninth Circuit in Bogart, the scope and applicability of the outrageous government conduct defense is unclear in ambiguous situations.⁴¹⁹ Because there is little precedent upon which they may base their decisions, courts accepting the constitutional validity of the defense necessarily make determinations of outrageousness on a case-by-case basis.

The Florida Supreme Court, for example, has recently applied an unusually broad interpretation of outrageousness and a liberal application of the defense.⁴²⁰ The court may invoke the defense to reverse defendants' convictions when law enforcement violates criminal law during the course of making a case against the defendant.⁴²¹ The court overturned a defendant's conviction for purchasing crack cocaine because the Broward County Sheriff's Office manufactured the crack in its own laboratory rather than using previously confiscated crack.⁴²² Although the source of the drug had no bearing on the defendant's criminal activities, the court concluded that due process

414. See *id.* at 1431. In fact, the judge even remarked that, if not for Bogart's background, he suspected that "the jury would walk him out in a minute on the entrapment defense." *Id.*

415. See *id.*

416. See *id.*

417. *Id.* at 1438.

418. See *id.*

419. See *id.* It is probable that, by the very nature of the defense, its scope and applicability are destined to remain ill-defined. As Justice Frankfurter noted: "In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. Words being symbols do not speak without a gloss." *Rochin v. California*, 342 U.S. 165, 169 (1952).

420. See *State v. Williams*, 623 So. 2d 462, 463 (Fla. 1993).

421. See *id.*

422. See *id.*

provides a "defense to overturn criminal convictions as a check against outrageous police conduct."⁴²³

The Florida approach notwithstanding, it is clear from the rapidly growing amount of dicta concerning the defense that there are two situations in which courts are likely to find that a criminal defendant's due process rights have been violated by pre-arrest governmental conduct.⁴²⁴ The first situation is when the government essentially generates a crime for the purpose of obtaining a conviction, rather than merely infiltrating an existing criminal enterprise.⁴²⁵ Such a circumstance is exemplified by *Twigg*, in which the court found a due process violation because the government agent created the drug manufacturing scheme, supplied necessary materials, and directed the manufacturing process solely for the purpose of arresting the other participants.⁴²⁶ Although under this doctrine the government may not engineer and direct the criminal enterprise from start to finish,⁴²⁷ it is not a due process violation for the government to induce a defendant to repeat, continue, or expand previous criminal behavior.⁴²⁸

The second situation in which courts are likely to find a due process violation is when the government uses excessive coercion to induce a person into committing a crime.⁴²⁹ This is perhaps best exemplified by *Bogart*, in which the defendant asserted that he was coerced into participating in a drug transaction in order to gain his freedom from a wrongful and pretextual incarceration.⁴³⁰ The Ninth Circuit held that those facts, if proven, would constitute outrageous government conduct in violation of the Due Process Clause.⁴³¹ Most courts have indicated that the government's coercion must be particularly egregious, as it apparently was in *Bogart*, before they will find that the defendant's due process rights have been violated.⁴³² However, a few courts have been more liberal in their approach. In *United States v. Batres-Santolino*,⁴³³ for example, the court indicated that a mere financial inducement by the government, if large enough, could be sufficiently egregious to violate due process.⁴³⁴

423. *Id.* at 465. Notably, the Florida Supreme Court based its decision in the Due Process Clause of the Florida Constitution, rather than in the U.S. Constitution. See *id.*

424. See *United States v. Mosley*, 965 F.2d 906, 911-12 (10th Cir. 1992); *United States v. Bogart*, 783 F.2d 1425, 1438 (9th Cir. 1986).

425. See *Mosley*, 965 F.2d at 911.

426. See *supra* notes 401-404 and accompanying text (summarizing *Twigg*).

427. See *United States v. Ramirez*, 710 F.2d 535, 539 (9th Cir. 1983).

428. See, e.g., *United States v. Cantwell*, 806 F.2d 1463, 1468-69 (10th Cir. 1986).

429. See *Mosley*, 965 F.2d at 912.

430. See *supra* notes 405-18 and accompanying text (summarizing *Bogart*).

431. See *United States v. Bogart*, 783 F.2d 1425, 1438 (9th Cir. 1986).

432. See *id.*

433. 521 F. Supp. 744 (N.D. Cal. 1981).

434. See *id.* at 749.

In summary, most courts appear to have concluded that the outrageous government conduct defense is a valid and necessary exercise of substantive due process protection. Although the scope of the defense remains poorly delineated, general guidelines are emerging and, as a consequence, defendants are raising it with increasing frequency.

2. The Minority View: The Defense Is Unconstitutional

In contrast to the majority of the courts of appeals and a number of states, the judges of the Sixth and Seventh Circuit Courts of Appeals have explicitly rejected both the constitutionality and the merits of the outrageous government conduct defense.⁴³⁵ These judges have presented a variety of arguments to support their position.

One of the more compelling of these arguments is that substantive due process protections should apply only when the government has violated a defendant's specifically enumerated constitutional right.⁴³⁶ In essence, the contention is that a reversal of a conviction should rest only on a violation of a personal right guaranteed by the Constitution, rather than on a right that has been invented for the occasion.⁴³⁷ Supreme Court case law supports this argument. Most significantly, in *United States v. Payner*,⁴³⁸ justices concluded that evidence that cannot be excluded under Fourth Amendment jurisprudence cannot, in the alternative, be excluded on grounds of due process.⁴³⁹ The majority opinion quoted, with approval, Chief Justice Rehnquist's previous assertion in *Hampton* that the limitations of the Due Process Clause come into play only when governmental activity violates some constitutionally protected right of the defendant.⁴⁴⁰

435. See, e.g., *United States v. Tucker*, 28 F.3d 1420, 1426 (6th Cir. 1994); *United States v. Miller*, 891 F.2d 1265, 1271-73 (7th Cir. 1989) (Easterbrook, J., concurring).

436. See *Miller*, 891 F.2d at 1271.

437. See *id.*

438. 447 U.S. 727 (1980).

439. See *id.* at 731. In *Payner*, government investigators hired a woman to befriend a bank's courier. When the courier left his briefcase at the woman's apartment, the investigators searched it. Subsequently, they used incriminating documents found in the briefcase to prosecute some of the bank's customers. The defendants were prevented from challenging the search on Fourth Amendment grounds because they had no privacy interest in the briefcase, but they argued that the use of the evidence should be suppressed nevertheless under the Due Process Clause and the judiciary's supervisory powers. See *id.* at 730-31.

440. See *id.* at 737 n.9 (quoting *Hampton v. United States*, 425 U.S. 484, 490 (1976)). Of course, Chief Justice Rehnquist's position contradicts the Court's earlier decisions in *Rochin* and *McNabb*, in which it concluded that the Due Process Clause of the Fourteenth Amendment imposes independent limitations on governmental conduct. See *supra* notes 357-67 and accompanying text. However, the precedential value of *Rochin* is debatable, since it is possible that the Court decided it on due process grounds only because the

A related due-process-based argument against the outrageous government conduct defense was presented by Judge Suhrheinrich in *United States v. Tucker*.⁴⁴¹ In effect, Judge Suhrheinrich reviewed the Supreme Court's treatment of the entrapment defense and concluded that governmental inducement could never be a due process violation.⁴⁴² Based on the fact that the Supreme Court chose to ground the subjective entrapment approach in legislative intent rather than in the Constitution, he concluded that "[i]f due process is not offended by convicting those who are not predisposed, a priori it is not offended by convicting those who are predisposed."⁴⁴³

A third argument against the adoption of the outrageous government conduct defense is that it violates the separation of powers doctrine.⁴⁴⁴ According to this argument, the judiciary should not be able to apply a "chancellor's foot veto" over executive conduct of which it disapproves because the management of executive conduct is appropriately left to the legislature.⁴⁴⁵ Furthermore, because Congress has already "implicitly curbed the Executive Branch by intending, as an implied part of each criminal statute, that no conviction may be had against one who was induced by the government to commit a crime unless the government proves . . . that [she] was predisposed," the issue with regard to the federal courts is arguably settled.⁴⁴⁶ Specifically, federal courts are arguably precluded from applying substantive due process principles to exculpate an induced defendant because the legislative intent is clear—the gravamen of a proper judicial inquiry is the defendant's subjective predisposition and nothing more.⁴⁴⁷

The final argument against the adoption of the outrageous government conduct defense is that it creates problems of consistency in the courts.⁴⁴⁸ According to this argument, there can be no uniform application of the defense because it is not possible to formulate a precise definition of outrageousness.⁴⁴⁹ As a consequence, judges

Fourth Amendment exclusionary rule had not yet been incorporated and applied to the states. See *Dripps*, *supra* note 23, at 267.

441. 28 F.3d 1420 (6th Cir. 1994).

442. See *id.* at 1427.

443. *Id.*

444. See *id.* at 1428.

445. See *United States v. Miller*, 891 F.2d 1265, 1271 (Easterbrook, J., concurring).

446. *Tucker*, 28 F.3d at 1428 (citing *Jacobson v. United States*, 503 U.S. 540 (1992)). The weakness of this argument, of course, is that legislative intent is not clear. Congress has never spoken on the issues of inducement, entrapment, outrageous conduct, predisposition, or any other aspect of these defenses, which is why Justice Frankfurter referred to this argument as "sheer fiction." *Sherman v. United States*, 356 U.S. 369, 379-81 (1958) (Frankfurter, J., concurring).

447. See *Tucker*, 28 F.3d at 1428.

448. See *Miller*, 891 F.2d at 1272 (Easterbrook, J., concurring).

449. See *id.* at 1272-73.

would simply “vote their lower intestines,” which is an inappropriate means of applying the Due Process Clause.⁴⁵⁰

VI. CONCLUSION: MOVING TOWARD A DUAL SYSTEM OF DEFENSES

To protect society and obtain evidence against unwary criminals, government agents must engage in undercover activities and inducement. However, starting with the *Sorrells* opinion, the Supreme Court has consistently recognized that this need to use “[a]rtifice and stratagem” must be offset by a means for protecting unwary innocents from being lured into criminal behavior by the government’s actions.⁴⁵¹

A majority of the Court has always held the view that the subjective approach to entrapment, by itself, provides an adequate counterbalance to the government’s overwhelming power and ability to entice.⁴⁵² By rejecting the objective approach to entrapment, it has also implicitly adopted the position that there is little need for the judicial branch to directly police the enforcement activities of the executive branch.⁴⁵³

Despite the Supreme Court’s view, most jurisdictions in the United States are operating under a dual system of defenses in which the subjective approach to entrapment is augmented by the outrageous government conduct defense.⁴⁵⁴ This dual system gives the judicial branch the means by which it can both protect unwary innocents⁴⁵⁵ and prevent the executive branch’s efforts at undercover investigation and inducement from becoming truly reprehensible.⁴⁵⁶

Although the doctrinal foundation of the outrageous government conduct defense differs from that of the entrapment defenses, a primary purpose of each is to prevent government officials from playing a causal role in criminal or other reprehensible behavior. The subjective approach to entrapment accomplishes this through an examination of the initial willingness of an induced defendant. The objective approach to entrapment and the outrageous government conduct defense each accomplish this by allowing courts to scrutinize the government’s actions directly.

In practical application, the subjective approach is the least reliable of the three defenses because a factual inquiry into a defendant’s thought processes is unavoidably inaccurate. The consequence is that the subjective approach is underinclusive—defendants may

450. *Id.* at 1272.

451. *Sorrells v. United States*, 287 U.S. 435, 441 (1932).

452. See, e.g., *Jacobson v. United States*, 503 U.S. 540, 548-49 (1992).

453. See MARCUS, *supra* note 13, at 12-38.

454. See *id.*

455. See *Sorrells*, 287 U.S. at 442.

456. See MARCUS, *supra* note 13, at 383.

be convicted even when the government's actions almost certainly caused the crime. In contrast, a factual and objective inquiry into the government's actions is far less complex and more accurate. However, even the most simplistic objective inquiry is subject to misapplication because it is often difficult for courts to accurately distinguish between government actions that are outrageous, government actions that would induce criminal behavior, and government actions that merely constitute artifice and strategem.

The most effective means for minimizing the government's involvement in crime and achieving fair verdicts, then, is for courts to retain the flexibility to conduct a dual subjective/objective inquiry. Under such a dual inquiry, the judge or jury first engages in an objective examination into whether the government's actions were either outrageous or would cause an otherwise innocent person to engage in the crime charged, depending on the applicable law of the jurisdiction. If this inquiry fails, the jury can then proceed with a subjective inquiry to determine whether the defendant was an unwary innocent induced into committing a crime by the government. In addition to compensating for the underinclusiveness of the subjective approach, using an objective approach as a backstop allows courts to provide explicit guidance to police agencies concerning the appropriateness of their actions in undercover operations.