

## THE NEED FOR A DUAL APPROACH TO ENTRAPMENT

There are a number of crimes for which undercover police involvement is the only practical method for both detecting specific instances of the crime and gathering evidence to prosecute the offenders.<sup>1</sup> As a result, police<sup>2</sup> involvement has included the use of traps and informers<sup>3</sup> to afford would-be offenders the opportunities or facilities needed for the commission of the crimes.<sup>4</sup> The fact that the police afford such opportunities or facilities ordinarily is not a defense to the prosecution,<sup>5</sup> but when the criminal conduct becomes the product of the creative activity of the police, entrapment becomes an affirmative defense.<sup>6</sup>

Courts use various legal theories to explain the entrapment defense.<sup>7</sup>

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1. Certain types of criminal activity are consensual and covert. Hence they are virtually undetectable without the use of a government agent or an informer. Narcotics peddlers, brokers of counterfeit currency, transporters of prostitutes across state lines, and gamblers employing interstate facilities to transmit bets all do business clandestinely. Their victims are willing, sometimes eager, accomplices. Their crimes are likely to go unchecked unless the government can itself approach a suspect to offer him the opportunity to commit a crime and thus give evidence of his guilt.

*Pierce v. United States*, 414 F.2d 163, 165 (5th Cir.), *cert. denied*, 396 U.S. 960 (1969). See generally L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *DETECTION OF CRIME* 273 (1967); Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 *YALE L.J.* 1091 (1951); Rotenberg, *The Police Detection Practice of Encouragement*, 49 *V.A. L. REV.* 871 (1963).

2. Police will be used in this Note to refer to government agents (including such local, state or federal officials as police and FBI or Drug Enforcement Agency agents) or persons working for government agents (*e.g.*, informers).

3. See *Sorrells v. United States*, 287 U.S. 435, 453-54 (1932) (Roberts, J., concurring in the result). Government involvement is often bizarre. See, *e.g.*, *United States v. Smalls*, 363 F.2d 417 (2d Cir. 1966) (defendant had known informer for many years and informer's mother helped to rear him); *United States ex rel. Toler v. Pate*, 332 F.2d 425 (7th Cir.), *cert. denied*, 379 U.S. 858 (1964) (more than twenty solicitations for narcotics); *Guarro v. United States*, 237 F.2d 578 (D.C. Cir. 1956) (plainclothes policemen offering themselves as bait for homosexuals); *People v. Isaacson*, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978) (police beat up a suspect to force him to become an informant and then had him arrange a drug pickup at a point in New York that was physically similar to Pennsylvania so that the defendant would believe the transaction was in Pennsylvania).

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

5. *Id.*

6. In this Note, entrapment indicates cases in which the defendant has raised the entrapment defense. Entrapment serves as a complete defense against conviction. The accused, who has performed the act constituting the crime, nevertheless is set free on the theory that he is an otherwise innocent person who is being punished for an offense that was the creation of the government. 287 U.S. at 451.

7. See *United States v. Russell*, 411 U.S. 423, 433, 435 (1973) (legislative intent); *Sorrells v. United States*, 287 U.S. 435, 455 (1932) (Roberts, J., concurring) (protect purity of judicial proc-

Currently, there are two views of entrapments—a subjective view that has always attracted a majority of the Supreme Court and most state courts,<sup>8</sup> and an objective view that has always had minority support in the Court and a few state courts.<sup>9</sup> The subjective view focuses on the intent or predisposition of the defendant.<sup>10</sup> Predisposition exists when the defendant intends to commit the crime irrespective of police conduct.<sup>11</sup> If the police induced the defendant to commit the offense by

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ess); *Banks v. United States*, 249 F.2d 672, 674 (9th Cir. 1957) (constitutional due process); *United States v. Lemons*, 200 F.2d 396, 397 (7th Cir. 1952) (estoppel); *Woo Wai v. United States*, 223 F.412, 415 (9th Cir. 1915) (public policy).

8. See *Hampton v. United States*, 425 U.S. 484 (1976); *United States v. Russell*, 411 U.S. 423 (1973); *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932); *State v. Keating*, 551 S.W.2d 589 (Mo. 1977), *cert. denied*, 434 U.S. 1071 (1978); *People v. Isaacson*, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978); *State v. Knight*, 230 S.E.2d 732 (W. Va. 1976).

9. See *United States v. Russell*, 411 U.S. 423, 436 (1973) (Douglas, J., dissenting); *id.* at 441 (Stewart, Brennan, and Marshall, J.J., dissenting); *Sherman v. United States*, 356 U.S. 369, 384 (1958) (Frankfurter, J., concurring); *Sorrells v. United States*, 287 U.S. 435, 455 (1932) (Roberts, J., concurring); *Grossman v. State*, 457 P.2d 226 (Alaska 1969); *State v. McKinney*, 108 Ariz. 436, 501 P.2d 378 (1972); *State v. Mullen*, 216 N.W.2d 375 (Iowa 1974); *People v. Turner*, 390 Mich. 7, 210 N.W.2d 336 (1973); *State v. Talbot*, 71 N.J. 160, 364 A.2d 9 (1976); *Lynn v. State*, 505 P.2d 1337 (Okla. Crim. App. 1973); *State v. Taylor*, 599 P.2d 496 (Utah 1979); *Wood v. Commonwealth*, 213 Va. 363, 192 S.E.2d 762 (1972).

The test for the objective view of entrapment usually refers to police conduct that would induce a hypothetical person to commit the offense charged. This is also the view that the Model Penal Code has adopted:

(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
- (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.

MODEL PENAL CODE § 2.13(1) (Proposed Official Draft, 1962).

10. The Supreme Court has never comprehensively defined predisposition. One court 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,” rather than an intent to commit a specific crime involving a specific victim at a specific time and place. *State v. Houpt*, 210 Kan. 778, 782, 504 P.2d 570, 574 (1972). One commentator has stated that a more careful consideration of two additional questions is also required:

1. How much must the offense that the subject is predisposed to commit resemble the offense that he is offered the opportunity to commit; and
2. How likely must it be that, if not offered the opportunity, the subject would in fact commit the offense that he is disposed to commit.

Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203, 254-55 (1975).

11. The subjective view is an offshoot of the notion that “Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense,

implanting a disposition to commit the crime in the mind of an innocent person, however, the entrapment defense will succeed.<sup>12</sup> The objective view focuses on the police conduct itself. Entrapment exists when police conduct would induce a reasonable person to commit a crime. The issue is thus whether the police used an improper inducement;<sup>13</sup> if so, the defendant will be acquitted.

At trial the real difference between the subjective and objective approaches to entrapment is in the admissibility of certain types of evidence.<sup>14</sup> In a typical entrapment case the prosecution presents its case-in-chief, generally by detailing the illegal actions and the role the defendant played. In the defense case-in-chief, the defendant then raises the entrapment defense by showing the police used persuasion or inducement that caused the defendant to commit the illegal acts.<sup>15</sup> To raise the defense, the defendant has the initial burden of going forward with some evidence that the police induced him to commit the offense.<sup>16</sup> The prosecution must rebut the defendant's evidence of entrapment beyond a reasonable doubt. This rebuttal evidence takes the form of proving the defendant's predisposition to commit the crime beyond a reasonable doubt.<sup>17</sup>

The crucial difference between the two approaches is in the admissi-

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but was induced to commit them by the government." *United States v. Russell*, 411 U.S. 423, 435 (1973). The general view is that there is a missing element of the crime in entrapment cases. The defendant has committed the acts constituting the crime, but the criminal intent needed for the offense is missing because of the police inducements. *See People v. Calvano*, 30 N.Y.2d 199, 205, 282 N.E.2d 322, 325, 331 N.Y.S.2d 430, 435 (1972). *See also* note 121 *infra*.

12. 287 U.S. at 442.

13. Different formulae can determine the propriety of the police inducement. The Model Penal Code has adopted the view that an inducement is illegal if it creates "a substantial risk that . . . an offense will be committed by persons other than those who are ready to commit." MODEL PENAL CODE § 2.13(1) (Proposed Official Draft, 1962). One state court has stated that an inducement is improper if it "would be effective to persuade an average person" to commit the crime. *Grossman v. State*, 457 P.2d 226, 229 (Alaska 1969).

14. *See* notes 18-23 *infra* and accompanying text.

15. *See* notes 3-4 *supra* and accompanying text.

16. *See United States v. Wolffs*, 594 F.2d 77 (5th Cir. 1979); *United States v. Timberlake*, 559 F.2d 1375 (5th Cir. 1977); *United States v. Bailey*, 503 F.2d 969 (5th Cir. 1974). *Accord*, *United States v. Burkley*, 591 F.2d 903 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 966 (1979); *United States v. Glaeser*, 550 F.2d 483 (9th Cir. 1977); *State v. Ford*, \_\_\_ Minn. \_\_\_, 276 N.W.2d 178 (1979).

In the objective approach to entrapment the defendant carries the burden of establishing the defense by a preponderance of the evidence. *Coffey v. State*, 585 P.2d 514 (Alaska 1978); *Batson v. State*, 563 P.2d 973 (Alaska 1977).

17. *See United States v. Glaeser*, 550 F.2d 483 (9th Cir. 1977); *United States v. Hermsillo-Nanez*, 545 F.2d 1230 (9th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977); *People v. Walker*, 61 Ill.

bility of rebuttal testimony. Under the subjective approach the rebuttal evidence must prove the defendant's already-formed intent to commit the crime or similar crimes and his willingness to commit them.<sup>18</sup> Types of admissible evidence include evidence of past criminal conduct,<sup>19</sup> not necessarily limited to felonies,<sup>20</sup> convictions,<sup>21</sup> or criminal reputation.<sup>22</sup> Under the objective approach, however, such rebuttal evidence is immaterial and thus properly excludable from the trial<sup>23</sup> because the focus is on the police conduct.

Despite this difference in focus, both views share a basic concern for governmental intrusion into the lives of innocent people to induce criminal acts. Neither view recognizes a constitutional basis for the defense.<sup>24</sup> Some courts, however, have used the concept of due process as a basis for the entrapment defense,<sup>25</sup> and the Supreme Court has indicated that due process is available as a non-entrapment defense when

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App. 3d 4, 377 N.E.2d 604 (1978); *State v. Sherburne*, 366 A.2d 1127 (Me. 1976); *State v. Ford*, \_\_\_ Minn. \_\_\_, 276 N.W.2d 178 (1979).

The view that predisposition is a proper inquiry to rebut the police conduct in inducing the defendant to commit the criminal acts was outlined in *Sorrells v. United States*, 287 U.S. 435 (1932), in which the Court held that predisposition can properly rebut the defendant's claim of improper police conduct. *Sherman* reiterated this view. "On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence." 356 U.S. at 373 (quoting *Sorrells v. United States*, 287 U.S. 435, 451 (1932)).

18. *United States v. Becker*, 62 F.2d 1007, 1008 (2d Cir. 1933).

19. *Sullivan v. United States*, 219 F.2d 760 (D.C. Cir. 1955).

20. *Carlton v. United States*, 198 F.2d 795 (9th Cir. 1952).

21. *Sullivan v. United States*, 219 F.2d 760 (D.C. Cir. 1955); *United States v. Perkins*, 190 F.2d 49 (7th Cir. 1951).

22. *Rocha v. United States*, 401 F.2d 529 (5th Cir. 1968), *cert. denied*, 393 U.S. 1103 (1969); *Washington v. United States*, 275 F.2d 687 (5th Cir. 1960); *United States v. Valdes*, 229 F.2d 145 (2d Cir.), *cert. denied*, 350 U.S. 996 (1956).

23. Because the objective focus is on the police conduct, any evidence relating to the defendant's past criminal conduct or reputation would have no bearing on the material facts in issue. The rebuttal evidence admissible under the subjective approach would be at best superfluous and at worst misleading to the trier of fact who would be focusing solely on the police conduct.

24. Some courts and commentators argue that entrapment should have a constitutional basis. *See, e.g., Banks v. United States*, 249 F.2d 672 (9th Cir. 1957); *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970); Note, *The Defense of Entrapment: A Plea for Constitutional Standards*, 20 U. FLA. L. REV. 63 (1967).

25. *See United States v. Russell*, 459 F.2d 671 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973); *Banks v. United States*, 249 F.2d 672 (9th Cir. 1957); *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970). The Supreme Court specifically rejected a constitutional basis for entrapment in *United States v. Russell*, 411 U.S. 423, 433 (1973).

police conduct is sufficiently outrageous.<sup>26</sup> Part I of this Note will examine the role of due process in entrapment cases and its role after the Supreme Court decisions in *United States v. Russell*<sup>27</sup> and *Hampton v. United States*.<sup>28</sup> Part II will analyze how courts have applied the due process defense and the standards that have developed to guide courts in its application. Finally, part III will suggest the necessity for a dual focus to entrapment cases and propose some standards with which to evaluate police conduct.

### I. HISTORICAL DEVELOPMENT OF THE ENTRAPMENT DEFENSE

The Supreme Court first recognized the entrapment defense in *Sorrells v. United States*,<sup>29</sup> indicating that the defense derived from a congressional intent implicit in criminal statutes not to find an otherwise-innocent person guilty when the offense was the product of the creative activity of the government.<sup>30</sup> The defense was unavailable, however, if the defendant had a predisposition to commit the crime and was merely availing himself of the opportunity provided by the government agent.<sup>31</sup> Following *Sorrells*, lower federal courts, with only two excep-

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26. *Hampton v. United States*, 425 U.S. 484, 495 (1976) (Powell, J., concurring); *United States v. Russell*, 411 U.S. 423, 431 (1973).

27. 411 U.S. 423 (1973).

28. 425 U.S. 484 (1976).

29. 287 U.S. 435 (1932). The first reported state cases recognizing the entrapment defense were *Saunders v. People*, 38 Mich. 218 (1878) and *O'Brien v. State*, 6 Tex. App. 665 (1879). The first reported federal case recognizing an entrapment defense was *Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915).

30. We are unable to conclude that it was the intention of the Congress in enacting this statute that its process of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. We are not forced by the letter to do violence to the spirit and purpose of the statute.

287 U.S. at 448.

31. The predisposition and criminal design of the defendant are relevant. . . . [T]he defendant [who] seeks acquittal by reason of entrapment . . . 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 by reason of the nature of the defense.

*Id.* at 451-52. Justice Roberts, in a separate concurring opinion in which Justices Stone and Brandeis joined, opted for a completely different approach to entrapment while concurring in the result. For Justice Roberts an objective approach focusing on the propriety of the government conduct (*id.* at 458-59) was the proper focus of entrapment cases. The Court's function was to preserve the purity of government and the administration of justice. *Id.* at 457. The defendant's predisposition of the type of offense charged should have no bearing on the Court's disposition of the entrapment defense. *Id.* at 455.

tions,<sup>32</sup> adhered to the majority view that the defendant's predisposition is determinative for the entrapment defense.<sup>33</sup> In 1958 the Supreme Court in *Sherman v. United States* again faced an entrapment case, but the Court simply reiterated the majority position in *Sorrells* and specifically refused to reconsider the doctrinal underpinnings of the entrapment defense.<sup>34</sup>

Although paying lip service to the majority view that the focus in entrapment cases is on the predisposition of the defendant, a number of post-*Sherman* federal cases instead focused on police conduct.<sup>35</sup> Various legal theories underlay this shift in focus,<sup>36</sup> but potentially the most far-reaching was the use of due process standards as a constitutional

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32. See *Banks v. United States*, 249 F.2d 672 (9th Cir. 1957); *Wall v. United States*, 65 F.2d 993 (5th Cir. 1933).

33. See, e.g., *United States v. Ginsburg*, 96 F.2d 882 (7th Cir.), cert. denied, 305 U.S. 620 (1938); *Burke v. United States*, 84 F.2d 40 (5th Cir. 1936); *Bonnoyer v. United States*, 63 F.2d 93 (1st Cir. 1933); *United States v. Becker*, 62 F.2d 1007 (2d Cir. 1933).

34. *Sherman v. United States*, 356 U.S. 369 (1958). Appellant, while undergoing treatment for narcotics addiction, met a fellow narcotics patient who was also a government informer. The informer repeatedly asked the appellant to help him obtain drugs for his own use. After some initial reluctance, the appellant obtained drugs for the informer and eventually was convicted for illegally selling narcotics. The Supreme Court reversed the conviction finding that the appellant had been entrapped as a matter of law because he was not predisposed to commit the crime. In regard to the policies underlying the entrapment defense the Court said:

It has been suggested that in overturning this conviction we should reassess the doctrine of entrapment according to principles announced in the separate opinion of Mr. Justice Roberts in *Sorrells v. United States*. . . . To do so would be to decide the case on grounds rejected by the majority in *Sorrells* and . . . not raised here or below by the parties before us.

*Id.* at 376 (citation omitted).

35. See, e.g., *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971); *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971), cert. denied, 411 U.S. 949 (1973); *United States v. Arceneaux*, 437 F.2d 924 (9th Cir. 1971); *United States v. Morrison*, 348 F.2d 1003 (2d Cir. 1965); *Williamson v. United States*, 311 F.2d 441 (5th Cir. 1962); *Banks v. United States*, 249 F.2d 672 (9th Cir. 1957); *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970).

The courts felt that the government activity had exceeded permissible bounds in these cases, and the entrapment defense, with its subjective focus on the defendant, did not allow for adequate supervision of the police. In *Greene* the court stated that, "we do not believe 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." *Greene v. United States*, 454 F.2d 783, 787 (9th Cir. 1971).

36. See *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971) (overreaching government conduct); *Williamson v. United States*, 311 F.2d 441 (5th Cir. 1962) (contingent fee arrangement with informer too prone to abuse); *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970) (due process).

basis for entrapment.<sup>37</sup> *Banks v. United States*,<sup>38</sup> decided prior to *Sherman*, was the first case to explicitly rest entrapment on fifth amendment due process grounds. In *Banks* a government agent gave the defendant money to buy narcotics, and the court found that the government officials had instigated the illegal conduct.<sup>39</sup> The Ninth Circuit, without any discussion, stated that obtaining a conviction in this manner violated the due process provision of the fifth amendment.<sup>40</sup>

In *United States v. Chisum*<sup>41</sup> the government agents supplied the contraband with which to convict defendants. The court examined various rationales for the entrapment defense and found entrapment as a matter of law by comparing the police conduct with due process standards.<sup>42</sup> *Chisum* relied on *Cox v. Louisiana*<sup>43</sup> and *Raley v. Ohio*,<sup>44</sup> two Supreme Court cases in which the government agent had specifically authorized the accused to act and then had arrested him for those acts.<sup>45</sup> The Supreme Court found that the entrapment in *Cox* and

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37. A constitutional basis for entrapment would make the defense mandatory upon the states, although all states now recognize the defense in one of its forms. In addition, premising entrapment on due process grounds would yield a "more consistent and just delineation of the line between permissible police participation in crime and improper tactics which violate personal integrity." Note, *The Defense of Entrapment: A Plea for Constitutional Standards*, 20 U. FLA. L. REV. 63, 66 (1967).

38. 249 F.2d 672 (9th Cir. 1957).

39. *Id.* at 674.

40. *Id.* The defendant made a motion to dismiss because he had been entrapped by government agents and thus could not be prosecuted. The trial court denied the motion and he was convicted, but the court of appeals reversed and remanded because of their finding that the defendant's due process rights had been violated. On remand, the defendant made a motion to vacate his conviction, which was again denied, and this time the court of appeals affirmed the denial of the motion and thus apparently reversed itself as to the due process claim at 258 F.2d 318 (1958). The Supreme Court denied certiorari at 358 U.S. 886 (1958).

41. 312 F. Supp. 1307 (C.D. Cal. 1970).

42. Were the courts to sanction the law enforcement activities committed in this case, it would transform the laws designed to promote the general welfare into a technique aimed at manufacturing disobedience in order to punish, a concept thoroughly repugnant to constitutional principles. When the government supplies the contraband, the receipt of which is illegal, the government cannot be permitted to punish the one receiving it. To permit the government to do so would be to countenance violations of justice.

*Id.* at 1312. In this case *Chisum*, the defendant, approached Metzger, whom the police had previously charged with dealing in counterfeit money, and offered to buy his counterfeit bills. Metzger told the police about this, they gave him some of the money, and he sold it to *Chisum*. *Chisum* was then arrested for receiving counterfeit bills with intent to sell. *Id.* at 1308-09. The court noted that the intent to commit the crime had originated with *Chisum* and thus that he was predisposed, but dismissed the charge on both entrapment and due process grounds, which the court found were "indistinguishable." *Id.* at 1310-12.

43. 379 U.S. 559 (1965).

44. 360 U.S. 423 (1959).

45. *Cox v. Louisiana*, 379 U.S. 559, 571 (1965); *Raley v. Ohio*, 360 U.S. 423, 437-39 (1959).

*Raley* violated due process.<sup>46</sup>

The final case using due process as the basis for the entrapment defense was *United States v. Russell*.<sup>47</sup> The *Russell* court convicted defendant of manufacturing narcotics after the government agent had supplied a necessary ingredient for their manufacture.<sup>48</sup> Russell, the defendant, conceded a predisposition to commit the offense,<sup>49</sup> but argued that the degree of governmental participation in the manufacture of the narcotics should bar the prosecution.<sup>50</sup> The Ninth Circuit agreed, recognizing that such governmental conduct was intolerable because it violated fundamental concepts of due process "and evince[d] the reluctance of the judiciary to countenance 'overzealous law enforcement . . . .'"<sup>51</sup>

On appeal, the Supreme Court expressly rejected the idea that entrapment rests on a constitutional basis.<sup>52</sup> Justice Rehnquist, writing for the five member majority,<sup>53</sup> found that predisposition to commit the crime was fatal to Russell's entrapment defense.<sup>54</sup> Justice Rehnquist, however, did not completely shut the door on any due process aspect to

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46. *Cox* and *Raley* differ from the standard entrapment situation in which the government agents afford the accused the opportunity to perform acts that he knows are illegal. In neither *Cox* nor *Raley* did the defendants attempt to establish an entrapment defense and in this sense they are not really entrapment cases. Instead, they are cases in which the Supreme Court on its own initiative decided that the defendants had been entrapped because they had obeyed government officials whom they had reason to believe were authorized to tell them what to do and were then arrested for doing what they had been told to do. In *Cox* the police gave the defendants permission to picket where they did. To then convict the defendants for picketing would be an improper form of entrapment for which "[t]he Due Process Clause does not permit convictions." 379 U.S. 559, 571 (1965). In *Raley* the defendants were convicted for exercising a privilege against self-incrimination they had been led to believe was available to them. The Supreme Court held that this constituted "an indefensible sort of entrapment" that violated the due process clause. 360 U.S. 423, 425, 426 (1959).

47. 459 F.2d 671 (9th Cir. 1972), *rev'd*, 411 U.S. 423 (1973).

48. In *Russell* a government agent supplied the defendant with phenyl-2-propanone, a chemical necessary for the production of methamphetamine (speed) and difficult, but not impossible, to obtain legally. The agent took part in the manufacture of the drug and also purchased a small amount from the defendant. Subsequently, the defendant was charged and convicted for the manufacture, delivery, and sale of methamphetamine.

49. 411 U.S. at 427.

50. 459 F.2d at 673.

51. *Id.* at 674 (quoting *Sherman v. United States*, 356 U.S. 369, 381 (1958) (Frankfurter, J., concurring in result)).

52. 411 U.S. at 433.

53. Chief Justice Burger and Justices White, Blackmun, and Powell joined to form the majority.

54. 411 U.S. at 436.



entrapment cases.<sup>55</sup> He held open the possibility that in a proper case of sufficiently outrageous government conduct, such conduct could bar prosecution even when the defendant was predisposed to commit the crime.<sup>56</sup> Neither of the two dissents addressed the defendant's due process claim.<sup>57</sup> The dissenting Justices merely reiterated the nonconstitutional, objective view of entrapment.

Because *Russell* indicated that the Court would recognize some police conduct as exceeding the bounds of due process, defendants quickly seized upon this new defense—but with little success.<sup>58</sup> Just three years after *Russell*, however, the Court put this due process claim to the test in *Hampton v. United States*.<sup>59</sup> In *Hampton* a government agent supplied the heroin that other government agents subsequently

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55. Predisposition of the defendant remained the focus of the entrapment defense, *id.* at 433, with the new due process rationale available as a non-entrapment defense when there was sufficiently outrageous police conduct, *id.* at 431-32.

56. While 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, *cf. Rochin v. California* . . . the instant case is distinctly not of that breed.  
411 U.S. at 431-32 (citation omitted).

57. Justice Douglas wrote one dissent in which Justice Brennan joined. *Id.* at 436. Justice Stewart wrote the other dissent in which Justices Brennan and Marshall joined. *Id.* at 439.

58. Compare *United States v. Smith*, 538 F.2d 1359 (9th Cir. 1976) (limited government involvement in drug manufacturing does not violate due process); *United States v. Quintana*, 508 F.2d 867 (7th Cir. 1975) (government agents posing as mobsters and selling drugs does not violate due process) and *United States v. Spivey*, 508 F.2d 146 (10th Cir.), *cert. denied*, 421 U.S. 949 (1975) (government agent distributing marijuana to "set up" defendant does not violate due process) and *United States v. Lue*, 498 F.2d 531 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975) (government supply of drug couriers does not violate due process) and *United States v. Hopkinson*, 492 F.2d 1041 (1st Cir.), *cert. denied*, 417 U.S. 968 (1974) (government agent accompanying and paying travel expenses of unindicted co-conspirator in order to observe drug purchase does not violate due process) and *United States v. Greenbank*, 491 F.2d 184 (9th Cir.), *cert. denied*, 417 U.S. 950 (1974) (government agent acting as carrier of contraband for defendants does not violate due process) and *United States v. McGrath*, 468 F.2d 1027 (7th Cir. 1972), *vacated in light of Russell*, 412 U.S. 936 (1973), *conviction aff'd*, 494 F.2d 562 (7th Cir. 1974) (government involvement in ongoing counterfeit operation does not violate due process) with *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973) (In *Archer* the Government, believing there was corruption in the district attorney's office, authorized some agents to carry pistols and then arrested them for unauthorized possession of two loaded pistols (a felony in New York). The agents then let it be known that they were willing to pay to avoid a trial or conviction to see the reaction of members of the district attorney's office. The court found that the government agents had "displayed an arrogant disregard for the sanctity of the state judicial and police processes by permitting their fabrications to involve police, courts and members of the grand jury." 486 F.2d at 677. Although the court condemned this government activity in dicta, it decided the case on other grounds.).

59. 425 U.S. 484 (1976).

purchased from the defendant.<sup>60</sup> The defendant was convicted of distributing heroin and on appeal sought reversal of his conviction on due process grounds.<sup>61</sup>

Justice Rehnquist wrote a plurality opinion in which he apparently reversed his stand in *Russell* and rejected the due process claim for a predisposed defendant.<sup>62</sup> For Justice Rehnquist, the only remedy available to criminal defendants with respect to the acts of government agents is the defense of entrapment.<sup>63</sup> The only circumstances that would allow the defendant to avail himself of the due process defense would be those in which the government activity in question violates one of the defendant's rights.<sup>64</sup> In any other situation in which the police and the defendant act together in some illegal manner "the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law."<sup>65</sup>

A majority of the Court rejected this attempt to erase the due process language of *Russell*. Justice Powell in his concurring opinion concluded that *Russell* controlled the case.<sup>66</sup> He stated that the plurality opinion went too far in denying that due process considerations could ever bar the prosecution of a predisposed defendant.<sup>67</sup> Given sufficiently outrageous police conduct, Justice Powell would allow the defendant to assert a due process claim irrespective of his

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60. *Id.* at 485-87.

61. *Id.* at 485, 489.

62. *Id.* at 485-91. Chief Justice Burger and Justice White joined in this opinion. Justice Rehnquist found that the defendant's admission of predisposition was dispositive on the entrapment issue, *id.* at 489, thus reaffirming the majority focus in entrapment cases in *Sorrells*, *Sherman*, and *Russell*. Justice Rehnquist's stand on the due process issue is not entirely clear. He states that *Hampton* is consistent with *Russell* because in both cases the government was acting in concert with the defendant. *Id.* at 489. However, the cases are inconsistent because in *Hampton* Justice Rehnquist states that the only remedy for a criminal defendant who acts in conjunction with the police is the defense of entrapment. The due process claim that *Russell* would allow under the appropriate circumstances is no longer available. *Id.* at 490. Justice Rehnquist then does a reversal of his thinking by indicating that a due process defense would be available if the police conduct violated some protected right of the defendant. *Id.* After this "peek-a-boo" stance on the availability of a due process defense, it is difficult to tell exactly where Justice Rehnquist stands on this issue.

63. *Id.* at 490.

64. *Id.*

65. *Id.*

66. *Id.* at 495. Justice Blackmun joined in this concurrence.

67. *Id.* at 491-95.

predisposition.<sup>68</sup> The three dissenting Justices<sup>69</sup> reaffirmed the objective approach to entrapment, focusing on whether the police conduct fell below the standards for legitimate police practices.<sup>70</sup> In addition the dissent, unlike in *Russell*, stated that they would apply due process standards in entrapment cases for sufficiently offensive law enforcement activities.<sup>71</sup>

Because of the Court's split in *Hampton*, entrapment law is in a state of confusion. Five Justices still adhere to the subjective approach to entrapment,<sup>72</sup> but five Justices also recognize a non-entrapment due process defense that, because of its focus on police conduct, is very similar to the objective approach to entrapment.<sup>73</sup> The Justices who recognize the due process defense are further split into two groups. One group<sup>74</sup> would recognize a limited due process defense triggered by "police overinvolvement in crime that would have to reach a demonstrable level of outrageousness before it could bar conviction."<sup>75</sup> The other group<sup>76</sup> would apparently find a due process violation under circumstances of significantly less police involvement in crime.<sup>77</sup>

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68. Justice Powell recognized that significant problems may arise in trying to develop standards for applying the due process claim. *Id.* at 491 (citing *Rochin v. California*, 342 U.S. 165, 173 (1952)). Justice Powell also indicated there would not be many cases in which a due process defense would be successful. *Id.* at 495 n.7. He indicated, however, that these difficulties do not justify the plurality's absolute rule:

Due process in essence means fundamental fairness, and the Court's cases are replete with examples of judgments as to when such fairness has been denied an accused in light of all the circumstances. . . . The fact that there is sometimes no sharply defined standard against which to make these judgments is not itself a sufficient reason to deny the federal judiciary's power to make them when warranted by the circumstances.

*Id.* at 494-95 n.6 (citations omitted).

69. *Id.* at 495-500. Justice Brennan wrote the dissenting opinion joined by Justices Stewart and Marshall. Justice Stevens took no part in the consideration of the case.

70. *Id.* at 496-97.

71. *Id.* at 497.

72. These five are Chief Justice Burger and Justices Rehnquist, White, Powell, and Blackmun.

73. These five are Justices Brennan, Marshall, Stewart, Powell, and Blackmun.

74. Justices Powell and Blackmun comprised the concurrence in *Hampton*. See note 68 *supra* and accompanying text.

75. 425 U.S. at 495 n.7.

76. Justices Brennan, Marshall, and Stewart comprised the dissent in *Hampton*. See text accompanying note 71 *supra*.

77. *Hampton* indicates the differences in the level of police conduct acceptable to each group. Justice Powell found that government supply of contraband to one later convicted of selling that heroin to other government agents was not sufficiently outrageous police conduct to invoke the fundamental fairness notions of due process. Justice Brennan, on the other hand, would find, at a minimum, that a conviction is barred when the crime charged is the sale of contraband which the government supplied to the defendant. 425 U.S. at 500.

## II. AN EVALUATION OF THE CURRENT STATE OF THE ENTRAPMENT DEFENSE

Since *Hampton*, a dual focus to entrapment cases has existed. One focus is on the predisposition of the defendant to commit the crime charged,<sup>78</sup> and the other focus is on the outrageousness of the police conduct measured by due process standards.<sup>79</sup> These two foci are theoretically independent of each other: The former is part of the entrapment doctrine while the latter is a non-entrapment defense that has been mentioned in some entrapment cases. Both approaches, however, deal with the same general circumstances—a defendant who alleges that the police entrapped him by inducing him to engage in illegal activity. The type of conduct in which the police can engage while dealing with potential criminals is a matter of concern to all the parties involved.<sup>80</sup> Therefore it would be reasonable to expect the Supreme Court to develop standards to determine the level of outrageous police conduct that will satisfy the due process defense and to delineate situations in which due process would be an available defense.<sup>81</sup>

Because the Supreme Court has failed to do this, however, lower federal courts and state courts are extremely reluctant to utilize the due process defense.<sup>82</sup> Courts generally dismiss defendants asserting the defense with only a cursory statement that the defense exists, but that the police conduct in the case falls short of the outrageousness necessary to make it available to the particular defendant.<sup>83</sup>

In *Russell*<sup>84</sup> and again in *Hampton*<sup>85</sup> the Justices allowing the due process defense cited *Rochin v. California*<sup>86</sup> as an example of the type of law enforcement conduct that was impermissible. *Rochin* is the infamous stomach pump case. After observing the defendant swallow morphine capsules, the police transported him to the hospital where his

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

79. See note 73 *supra* and accompanying text.

80. The vast majority of entrapment cases deal with drug-related crime—the manufacture, sale, distribution, or possession of narcotics.

81. Although the Court could reasonably develop the standards, the present split in the Court over the types of police conduct that would reach the level of “outrageousness” makes the development of standards both difficult and somewhat unlikely. See note 77 *supra* and accompanying text.

82. See note 103 *infra* and accompanying text.

83. *Id.*

84. 411 U.S. at 431-32.

85. 425 U.S. at 494-95 n.6.

86. 342 U.S. 165 (1952).

stomach was pumped against his will to retrieve the morphine.<sup>87</sup> The Supreme Court used the due process provision of the fourteenth amendment to disallow this police conduct. The language the Court used to describe due process illustrates the problem of developing standards for due process in entrapment cases. The Court saw the due process clause as guaranteeing rights that "are 'so rooted in the tradition and conscience of our people as to be ranked as fundamental.'"<sup>88</sup> The police must confine themselves to conduct exhibiting "a community sense of fair play and decency"<sup>89</sup> that does not "brutalize the temper of society."<sup>90</sup> Pumping the defendant's stomach, however, was "conduct that shock[ed] the conscience."<sup>91</sup>

The problem with these alleged standards is that they are really subjective judgments that are too general to serve as manageable standards against which to measure specific police conduct.<sup>92</sup> These vague notions gloss over the very real problem of the need for clarity in defining the limits of permissible police conduct. *Rochin* acknowledged that subjective judgments are inadequate bases for determining proper police conduct: "In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims."<sup>93</sup>

Defendants, courts, and police all probably would prefer more specific standards for "outrageous" law enforcement conduct. Such standards would aid defendants in preparing their cases and in arguing that the police conduct was excessive.<sup>94</sup> Courts would have definite criteria

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87. The police forced their way into the defendant's bedroom without a warrant and then brought him to the hospital against his will. If the case had been in federal court the warrantless search and seizure would have prevented using evidence obtained in this manner. *See Weeks v. United States*, 232 U.S. 383 (1914).

88. 342 U.S. at 169 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

89. *Id.* at 173.

90. *Id.* at 174.

91. *Id.*

92. "Subjective" means that a particular judge will use his own notions of what type of police conduct will fall within the conduct proscribed by the due process clause. This use of "subjective" is different from the Court's use of subjective in its split between a subjective and objective focus for entrapment cases. Subjective in the latter context refers to the predisposition of the defendant to commit the crime charged. The Court in *Russell* recognized the problem of judges determining permissible police conduct when it stressed the fact that the objective focus of entrapment would give courts a "chancellors' foot" veto over unacceptable police conduct. 411 U.S. at 434-35.

93. 342 U.S. at 172.

94. In federal cases after *Hampton*, defendants raising the due process defense have had only

against which to measure the alleged objectionable police conduct and would not have to merely restate the vague pronouncements the Supreme Court uses in describing due process. Police would know how far they could go in their relationship with potential criminals before they cross the line into outrageous conduct.

Underlying this need for standards are broad and sometimes conflicting policies concerning the proper scope of police involvement in crime, the rights of defendants, and the societal desire for a safe environment in which to live.<sup>95</sup> Although there has always been a societal aversion to undercover police investigations,<sup>96</sup> the increase in drug use and the concomitant rise in drug-related crimes have made police undercover drug investigations necessary to safeguard society.<sup>97</sup> In *Hampton* the Supreme Court noted the difficulty of detecting contraband offenses without undercover investigations and the many problems the police face in dealing with narcotic trafficking.<sup>98</sup>

Society, however, also recognizes interests in both personal privacy and interpersonal relations upon which undercover investigations can infringe. The extent to which society is willing to allow limited infringement of these interests for the sake of an environment freer of crime cannot be determined with mathematical precision.<sup>99</sup> It is possible, however, to identify the types of crimes in the investigation of which police should be allowed greater leeway.<sup>100</sup>

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*Rochin* as an example of sufficiently outrageous police conduct. Because most cases are more ambiguous than *Rochin* in the type of police conduct that is involved, standards are necessary to help delineate when police conduct is outrageous in given circumstances.

95. An extensive discussion of these policy goals is beyond the scope of this Note. For a detailed exposition of the various types of police conduct involved in entrapment cases and their effect on both society at large and individual defendants, see *Dix, supra* note 10.

96. See, e.g., *Donnelly, supra* note 1, at 1091; Note, *Judicial Control of Secret Agents*, 76 *YALE L.J.* 994 (1967).

97. Narcotic sales generally occur between consenting parties. Because this is a victimless crime, there is no one to come forward to make a complaint or give evidence. Consequently, police often have no other option besides undercover investigations or the use of informers to get evidence of narcotic trafficking. See note 1 *supra* and accompanying text.

98. 425 U.S. at 494-95 n.6.

99. For a discussion of the idea of balancing the rights of the defendant against society's need for criminal procedures which will adequately protect the public, see D. FELLMAN, *THE DEFENDANT'S RIGHTS TODAY* (1976); Packer, *Two Models of the Criminal Process*, 113 *U. PA. L. REV.* 1 (1964).

100. See *Betts v. Brady*, 316 U.S. 455, 467 (1942), *rev'd on other grounds*, *Gideon v. Wainwright*, 372 U.S. 335 (1963), where the Supreme Court recognized that different situations would allow for varying degrees of court protection. The Court stated that an asserted denial of the protections of due process must "be tested by an appraisal of the totality of facts in a given case.

One criterion in identifying these crimes is the degree of danger the criminals pose to society. Both the type of offense and the likelihood that the criminal design could be put into effect bear on the degree of danger. Thus, the more serious the crime and the more likely the perpetrators will accomplish their goal, the more leeway the police should have.<sup>101</sup> Another criterion is the necessity for police involvement in crimes. As the Court noted in *Hampton*, the nature of contraband offenses necessitates undercover police investigations to effectively deal with them.<sup>102</sup>

The New York Court of Appeals has attempted to define standards for police conduct using the due process aspect of entrapment cases.<sup>103</sup>

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That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and the light of other considerations, fall short of such denial." *Id.* at 462.

101. The criteria mentioned here are, of course, general. Classifying crimes as more or less dangerous to society or determining how likely it is that a criminal design can be effected are judgments that the courts (during litigation) or the police (when deciding what action they will take against potential criminals) must make according to the facts in a given situation.

One example of how crimes might be classified according to their danger to society would be the various narcotics violations. A person whose crime is possession of marijuana generally would seem to pose little threat to others. The manufacture of speed, however, is a more serious crime because of the potential that speed has for reaching many users and involving many more people than the single person possessing marijuana. Because of the greater severity of the crime of manufacturing speed, the police should have more leeway in the types of permissible conduct in their investigation than if they were investigating a single marijuana possession.

102. 425 U.S. at 495 n.7 (Powell, J., concurring).

103. Since *Hampton* was decided the courts have allowed the due process defense to free a defendant in an entrapment case in only three of numerous reported federal cases. Compare *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978); *United States v. Jannotti*, 501 F. Supp. 1182 (E.D. Pa. 1980) and *United States v. Hastings*, 447 F. Supp. 534 (E.D. Ark. 1977) with *United States v. McQuin*, 612 F.2d 1193 (9th Cir.), *cert. denied*, 445 U.S. 995 (1980); *United States v. Till*, 609 F.2d 228 (5th Cir.), *cert. denied*, 445 U.S. 995 (1980); *United States v. Hammond*, 598 F.2d 1008 (5th Cir. 1979); *United States v. Hodge*, 594 F.2d 1163 (7th Cir. 1979); *United States v. Corcione*, 592 F.2d 111 (2d Cir.), *cert. denied*, 440 U.S. 985 (1979); *United States v. Szycher*, 585 F.2d 443 (10th Cir. 1978); *Cross v. State*, 581 F.2d 102 (5th Cir. 1978); *United States v. Prairie*, 572 F.2d 1316 (9th Cir. 1978); *United States v. Thomas*, 567 F.2d 638 (5th Cir.), *cert. denied*, 439 U.S. 822 (1978); *United States v. Johnson*, 565 F.2d 179 (1st Cir. 1977); *United States v. Leja*, 563 F.2d 244 (6th Cir. 1977), *cert. denied*, 434 U.S. 1074 (1978); *United States v. Garcia*, 562 F.2d 411 (7th Cir. 1977); *United States v. Walker*, 559 F.2d 365 (5th Cir. 1977); *United States v. Graves*, 556 F.2d 1319 (5th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); *United States v. Steinberg*, 551 F.2d 510 (2d Cir. 1977); *United States v. Reynoso-Ulloa*, 548 F.2d 1329 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978); *United States v. Puma*, 548 F.2d 508 (5th Cir. 1977); *United States v. McClure*, 546 F.2d 670 (5th Cir. 1977); *United States v. Ryan*, 548 F.2d 782 (9th Cir.), *cert. denied*, 429 U.S. 939 (1976); *United States v. Sanford*, 547 F.2d 1085 (9th Cir.), *rev'd on other grounds*, 429 U.S. 14 (1976); *United States v. Quinn*, 543 F.2d 640 (8th Cir. 1976); *Ainsworth v. Reed*, 542 F.2d 243 (5th Cir. 1976), *cert. denied*, 430 U.S. 917 (1977); *United States v. Gonzales*, 539 F.2d 1238 (9th Cir.

In *People v. Isaacson*<sup>104</sup> the New York state police used an informant (Breniman) to purchase drugs from the defendant, a Pennsylvania resident. The police, after physically abusing and tricking the informant

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1976); *United States v. Robinson*, 539 F.2d 1181 (8th Cir. 1976), *cert. denied*, 429 U.S. 1101 (1977); *United States v. Gonzalez-Benitez*, 537 F.2d 1051 (9th Cir.), *cert. denied*, 429 U.S. 923 (1976) and *United States v. Reifsteck*, 535 F.2d 1030 (8th Cir. 1976).

In *United States v. Hastings*, 447 F. Supp. 534 (E.D. Ark. 1977), the United States sought dismissal of federal indictments for interstate transportation and receipt of stolen goods on the ground that the local law enforcement tactics in apprehending the defendants were inimical to fundamental fairness principles of due process. The police used an informer to arrange a sale with the defendants in which the defendants would purchase "stolen" merchandise from the informer under police surveillance. *Id.* at 538-39. The merchandise had been supplied by government officials and so was not really stolen. The police would then move in and arrest the defendants. The Department of Justice, with the court's concurrence, saw the defendants as victims of selective law enforcement. *Id.* at 540. The police officer heading this operation previously had lost a civil suit in which the defendants had been opposing parties. *Id.* at 538. The court characterized these events as a vendetta against the defendants. The necessary federal element of an interstate nexus (the merchandise had been "stolen" in Texas and Mississippi and transported to Arkansas) was a police device, as was the procurement of the contraband necessary for the charges. *Id.* at 540. The court found the police conduct egregious and dismissed the indictments. *Id.*

In *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), the government used an informer, who had been convicted of illegally manufacturing methamphetamine (speed), to contact an acquaintance (Neville) to discuss setting up a laboratory to manufacture speed. *Id.* at 375. The parties eventually agreed to set up the laboratory. Neville was responsible for raising capital and arranging to distribute the speed and the informant was responsible for procuring the equipment, raw materials, and lab site. *Id.* The other defendant, Twigg, transported equipment to the lab and ran errands. *Id.* at 376. The government provided the informant with most of what he needed, *id.* at 375-76, and the informant paid for it with money supplied by Neville. *Id.* at 376. Once the laboratory was set up the informant was completely in charge of the manufacture of the speed. *Id.* at 380-81. The lab operated for a week before the police arrested Neville, while he was driving from the farm with a suitcase containing speed, and the other defendant, Twigg. *Id.* at 376.

In neither case did the court specify what made the police conduct so outrageous that it violated fundamental fairness. The court's concern in *Hastings* was the motive behind the police operation. In *Twigg* the court's primary concern was that the government itself through its informant had concocted the criminal scheme and then lured the defendant into it. *Id.* at 380-81. In addition, the informer was completely in charge of the illegal operation and was the only party with the laboratory skills necessary to manufacture the methamphetamine. *Id.* Under these circumstances there would seem to be at least a reasonable doubt of the defendants' predisposition to commit the crime. Because the jury found the defendants were predisposed, however, entrapment was unavailable as a defense and the only defense the defendants could argue was due process.

It is very possible that the court's finding of a due process violation represents its belief that the defendants really were not predisposed. Twigg could not raise the entrapment defense because a defendant who is induced by a non-government official (here Twigg became involved through the other defendant) to commit a crime cannot argue entrapment. *Id.* at 381. The entrapment defense is reserved solely for those defendants who have been induced by government agents. See *United States v. Garcia*, 546 F.2d 613, 615 (5th Cir.), *cert. denied*, 430 U.S. 958 (1977); *United States v. Conversano*, 412 F.2d 1143, 1148 (3d Cir.), *cert. denied*, 396 U.S. 905 (1969).

104. 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978).



into believing he faced a long prison term,<sup>105</sup> forced him to assist them in drug investigations. Breniman contacted a number of people he knew, including the defendant.<sup>106</sup> Eventually he got the defendant to agree to sell him some cocaine. The sale was arranged to take place at a point near the New York-Pennsylvania border, which the defendant believed was in Pennsylvania, but was in fact in New York.<sup>107</sup> The defendant devised an elaborate method for delivering the cocaine,<sup>108</sup> but was arrested in spite of his precautions and convicted for the sale of a controlled substance.<sup>109</sup> The court found the defendant predisposed to commit the crime, but stated that the police conduct was so egregious under due process standards as to require dismissal of the case.<sup>110</sup>

The court went beyond merely stating that the police conduct violated due process and listed the factors to consider in scrutinizing police conduct.<sup>111</sup> The factors the court considered were: (1) Whether the police manufactured the crime or only took part in ongoing criminal activity; (2) whether the police themselves engaged in criminal conduct; (3) whether the police overcame the defendant's reluctance to commit the crime with appeals to past friendships, temptation of financial gain or repeated solicitations; and (4) whether the police had a legitimate motive for conducting the investigation.<sup>112</sup> None of these was dispositive for the court. All four are relevant, however, in the context of such

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105. 44 N.Y.2d at 514-15, 378 N.E.2d at 79, 406 N.Y.S.2d at 715. The police kicked the informant and threatened to shoot him. They also led him to believe that the drug charges would result in a stiff prison term. In fact, the police had already analyzed the capsules in the informant's possession and found them to be only caffeine.

106. 44 N.Y.2d at 516, 378 N.E.2d at 80, 406 N.Y.S.2d at 716.

107. 44 N.Y.2d at 517, 378 N.E.2d at 80-81, 406 N.Y.S.2d at 716-17. The New York police wanted the sale to take place in New York where they had jurisdiction to make an arrest. The defendant feared the stiff New York drug penalties and wanted the sale to occur in Pennsylvania. During the course of negotiations the place for the sale was moved progressively north until the final place was a spot near the New York-Pennsylvania border.

108. 44 N.Y.2d at 518, 378 N.E.2d at 81, 406 N.Y.S.2d at 717. The scheme involved having a third party drive along in a separate car with the cocaine and the defendant carrying a plastic bag containing a nonnarcotic substance in case of a "rip-off."

109. *Id.*

110. 44 N.Y.2d at 518-19, 378 N.E.2d at 81, 406 N.Y.S.2d at 717.

111. The court stated:

While due process is a flexible doctrine, certain types of police action manifest a disregard for cherished principles of law and order. Upon an inquiry to determine whether due process principles have been transgressed in a particular factual frame there is no precise line of demarcation. . . . All components of the complained of conduct must be scrutinized but certain aspects of the action are likely to be indicative.

*Id.* at 521, 378 N.E.2d at 83, 406 N.Y.S.2d at 719 (citations omitted).

112. *Id.*

law enforcement objectives as the prevention of crime and the apprehension of criminals.<sup>113</sup> The court found that all four factors had been met<sup>114</sup> and that, taken as a whole, they revealed "a brazen and continuing pattern in disregard of fundamental rights."<sup>115</sup>

It is true that the Supreme Court has left no doubt that the primary focus in entrapment cases is on the defendant's predisposition.<sup>116</sup> *Isaacson* shows, however, that it is possible to focus on the police conduct as long as there are standards to determine when to focus on and how to measure the police conduct. Insofar as *Isaacson* has tried to incorporate these two strands into an entrapment case, it has shown that a dual approach can achieve a proper result in a logical and sound manner.

### III. THE VIABILITY OF A DUAL APPROACH TO ENTRAPMENT CASES

The defendant's predisposition should control the availability of the traditional subjective entrapment defense.<sup>117</sup> If the defendant was not predisposed, entrapment will be his defense. It is only when the defendant was predisposed that the due process defense is needed. The due process defense, like the objective approach to entrapment, focuses on police conduct. Adoption of the objective approach makes development of the due process defense unnecessary. It effectively deals with the same problem the due process defense meets and avoids the vagueness inherent in due process cases.<sup>118</sup> Dealing with the problem of overreaching police conduct outside the entrapment defense is justifiable only if some need for retaining the subjective approach to entrapment exists.

Courts have developed a variety of rationales to justify their particular view of entrapment,<sup>119</sup> but the undeniable fact<sup>120</sup> remains that the

113. *Id.*

114. The court said (1) was met because there was police manufacture and creation of crime; the abuse of the informant violated (2); the persistent attempts to overcome the defendant's reluctance to sell the cocaine violated (3); and the police concern for getting the defendant into New York showed an overriding police desire for a conviction in violation of (4). *Id.* at 522-23, 378 N.E.2d at 83-84, 406 N.Y.S.2d at 720.

115. *Id.* at 523, 378 N.E.2d at 84, 406 N.Y.S.2d at 720.

116. *See Hampton v. United States*, 425 U.S. 484, 488 (1976); *id.* at 492 n.2 (Powell, J., concurring).

117. *See* 425 U.S. at 489-90; 411 U.S. at 436.

118. *See* notes 68, 100 *supra* and accompanying text.

119. At the federal level Congress has never enacted a statutory formulation of the entrapment defense, although bills to do that have been proposed. *See* S. 1, 93d Cong., 1st Sess. § 1-382

allegedly entrapped defendant knowingly and voluntarily committed a criminal act.<sup>121</sup> He has thus to an extent shown himself to be a danger to society. The entrapment defense does not disprove the commission of the crime, it merely implements the commonly held belief that innocent people should not be induced or persuaded to commit criminal acts. The traditional subjective defense should be available only to the "unwary innocent" who, but for the police inducement, would not have committed the criminal act.<sup>122</sup> Because a court acquits a defendant in a successful entrapment defense, it seems more reasonable to focus the defense on the defendant rather than on the police conduct.<sup>123</sup> The

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(1973). The Supreme Court has recognized that Congress is free to enact legislation concerning entrapment because the defense is not a constitutional one. "Since the defense is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable." *United States v. Russell*, 411 U.S. 423, 433 (1973). In the absence of any statutory formulation, federal courts are bound by Supreme Court precedents on the entrapment defense.

The majority of states have also left the development of the entrapment defense to the courts. Most state courts have followed the lead of the Supreme Court and adopted the subjective approach. *See* text accompanying note 8 *supra*. A minority of states have adopted the objective approach. *See* note 9 *supra* and accompanying text. In a few instances, however, states have enacted legislation recognizing an express statutory entrapment defense. *See, e.g.,* COLO. REV. STAT. ANN. § 18-1-709 (1973) (subjective approach); N.D. CENT. CODE ANN. § 12.1-05-11 (1973) (objective approach); UTAH CODE ANN. § 76-2-303(1) (1973) (subjective approach); WASH. REV. CODE ANN. § 9A.16.070 (1975) (subjective approach). *See* note 7 *supra* and accompanying text.

120. Most courts require the defendant to admit the commission of the offense before pleading entrapment. *See United States v. Caron*, 588 F.2d 851, 852 (1st Cir. 1978); *Tzimopoulos v. United States*, 554 F.2d 1216, 1217 n.1 (1st Cir.), *cert. denied*, 434 U.S. 851 (1977); *United States v. Russo*, 540 F.2d 1152, 1154 (1st Cir.), *cert. denied*, 429 U.S. 1000 (1976). *Contra, United States v. Demma*, 523 F.2d 981, 982 (9th Cir. 1975).

121. *See* note 10 *supra*. The defendant's defense in entrapment cases is that there is an element missing from the offense. The defendant often concedes and in many courts is required to concede that he in fact did commit the criminal act charged. *See* note 120 *supra* and accompanying text. He then argues that he lacked the requisite criminal intent to commit the crime. That intent, ordinarily inferable from the admitted act, is absent because the defendant claims the police induced him to commit the criminal act and that he would not have committed it without the inducement.

122. *See* note 6 *supra*. The view that the entrapped defendant is an "innocent person" is part of the subjective approach to entrapment and has been expressed in Supreme Court majority opinions since *Sorrells*. The entrapment defense prohibits the police from inducing criminal acts by persons "otherwise innocent in order to lure them to [their] commission and to punish them." *Sorrells v. United States*, 287 U.S. 435, 448 (1932). In *Sherman v. United States*, 356 U.S. 369, 372 (1958), the Court stated that "[t]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."

123. There are, of course, areas of criminal law where the courts do focus on the police conduct. Courts apply the exclusionary rule to evidence gathered in illegal searches and seizures in violation of the fourth amendment, *see Mapp v. Ohio*, 367 U.S. 643, 657-60 (1961); *Weeks v. United States*, 232 U.S. 383, 398 (1914), as well as to coerced confessions in violation of the fifth

defendant voluntarily endangered society.<sup>124</sup>

Most commentators on the entrapment defense prefer an objective approach.<sup>125</sup> One reason for this preference is a belief that an objective approach is necessary to preserve the purity of the administration of justice.<sup>126</sup> This approach may be aesthetically appealing, but if, as it appears, the Justices using this rationale are concerned with public respect for the criminal justice system, an objective approach is improper. Public outrage is a highly unlikely response to the conviction of defendants predisposed to commit a crime unless outrageous police conduct is involved.<sup>127</sup> It is more likely that the public would lose respect for a judicial system that allows predisposed defendants to go free merely because the police exceeded the limits of what would induce a hypothetical person to commit the crime.<sup>128</sup>

A second and more defensible rationale for the objective approach is supervision of law enforcement practices.<sup>129</sup> This view requires the ar-

amendment, see *Miranda v. Arizona*, 384 U.S. 436, 471-74 (1966). The entrapment defense is very different from these exclusionary rules, however, because a successful entrapment defense results in the acquittal of a defendant who committed the acts constituting the crime for which he was charged, while the exclusionary rule results only in the exclusion of the tainted evidence at the trial.

124. The police conduct, if it is sufficiently outrageous, could also pose a threat to society. When the police themselves engage in criminal acts Justice Rehnquist has indicated the police will be liable to prosecution. "If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law." 425 U.S. at 490. If the police conduct did not warrant prosecuting the police, but was still outrageous, the due process defense would be available to the defendant. See note 79 *supra* and notes 136-37 *infra* and accompanying text. Because a successful due process defense results in the acquittal of the defendant, the availability of such a defense would help curb excessive police conduct.

125. See, e.g., L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *DETECTION OF CRIME* 265-72 (1967); Donnelly, *supra* note 1, at 1091; Murchison, *The Entrapment Defense in Federal Courts: Modern Developments*, 47 *MISS. L.J.* 573 (1976); Comment, *Entrapment: Predisposition of Defendant Crucial Factor in Entrapment Defense*, 59 *CORNELL L. REV.* 546 (1974); Comment *The Viability of the Entrapment Defense in the Constitutional Context*, 59 *IOWA L. REV.* 655 (1974); Comment, *Entrapment: A Critical Discussion*, 37 *MO. L. REV.* 633 (1972). *But cf.* Defeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 *U. SAN FRAN. L. REV.* 243 (1967) (supporting the subjective approach); Park, *The Entrapment Controversy*, 60 *MINN. L. REV.* 163 (1976) (supporting a modified version of the subjective approach); Note, *Entrapment*, 73 *HARV. L. REV.* 1332 (1960) (supporting a modified version of the subjective approach).

126. See *Sherman v. United States*, 356 U.S. 369, 384 (1958) (Frankfurter, J., concurring in the result).

127. See Park, *supra* note 125, at 224.

128. See note 9 *supra* and accompanying text. See also Park, *supra* note 125, at 224-25.

129. See *Sherman v. United States*, 356 U.S. 369, 385 (1958) (Frankfurter, J., concurring in the result); *Batson v. State*, 568 P.2d 973, 975 (Alaska 1977); *People v. Moran*, 1 *Cal. 3d* 755, 766, 463

tication of explicit standards as practical guidelines for police investigating crimes. The present formulations of the objective view of entrapment provide little guidance for the police.<sup>130</sup> They merely tell the police not to offer inducements that would lead a law-abiding, hypothetical person to commit a crime.

Establishing clear and detailed procedures for the variable situations police encounter in investigating and detecting crime is much more difficult than establishing such rules in confession cases.<sup>131</sup> In confession cases constitutional rights are involved, and it is easier to establish rigid rules because all defendants may be treated in a similar fashion.<sup>132</sup> In entrapment cases in which crimes are usually consensual<sup>133</sup> and difficult to detect, the situations in which the police find themselves and the techniques they must employ vary greatly. This variety militates against establishing hard and fast rules.<sup>134</sup>

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P.2d 763, 769, 83 Cal. Rptr. 411, 417 (1970) (Traynor, C.J., dissenting). Judge Traynor stated in *Moran*:

A jury verdict of guilty or not guilty tells the police nothing about the jury's evaluation of the police conduct. . . . Moreover, even when the verdict settles the issue of entrapment in the particular case, it "cannot give significant guidance for official conduct for the future. Only the court, through the gradual evolution of explicit standards in accumulated precedents, can do this with the degree of certainty that wise administration of criminal justice demands."

1 Cal. 3d at 766, 463 P.2d at 769, 83 Cal. Rptr. at 417 (quoting 356 U.S. at 385 (Frankfurter, J., concurring in the result)). *Accord*, MODEL PENAL CODE § 2.13(2) (Proposed Official Draft, 1962).

130. *See* notes 9, 128 *supra* and accompanying text. The objective approach cases show little attempt to develop the explicit rules that the police need. *People v. Turner*, 390 Mich. 7, 210 N.W.2d 336 (1973) involved a situation in which a government informer became friendly with the defendant over a three year period. The informer invented a story of a drug-addicted girlfriend to play on the defendant's sympathy as a friend. The court, without setting out any rules, stated that under these facts there had been entrapment as a matter of law. *Grossman v. State*, 457 P.2d 226 (Alaska 1969) and *State v. Mullen*, 216 N.W.2d 375 (Iowa 1974) tried to be more explicit. "Depending on an evaluation of the facts in each case, prohibited governmental activity *might* include extreme pleas of desperate illness, appeals based primarily on sympathy, pity or close personal friendship, and offers of inordinate sums of money." 216 N.W.2d at 383 (emphasis added). *Grossman* contained a similar passage. 457 P.2d at 230.

131. *Miranda v. Arizona*, 384 U.S. 436 (1966).

132. *Park*, *supra* note 125, at 227.

133. *See* note 1 *supra*.

134. *See* note 100 *supra*. This is especially true in narcotics cases that involve different crimes for possessing, dealing, and manufacturing the drugs. A court might find that when the police persistently suggested a drug sale and then arrested the party for possession, there was overreaching police conduct despite the predisposition of the accused. Persistent solicitations and supply of necessary ingredients, however, might not be overreaching conduct when the police were investigating a drug-manufacture operation. The difference in the two situations is in the danger the parties pose to society. Presumably, the greater that danger, the more active the police conduct that would be allowed.

Notwithstanding the difficulty of the task, some guidelines to curb excessive police conduct are necessary. A dual approach to entrapment cases<sup>135</sup> that places the primary focus on the defendant, but allows a focus on the police conduct under a due process rationale, is an effective method of meeting that need.<sup>136</sup> Because the due process aspect addresses the outrageousness of the police conduct in general,<sup>137</sup> as opposed to developing rules to guide specific aspects of police undercover work, it should be easier to develop standards to evaluate that conduct. The due process standards would apply to all situations involving entrapment cases. Thus they would not encounter the problem of the objective approach in trying to fit specific rules to particular situations.<sup>138</sup> They will instead be generalized standards applicable to the variable situations in which the police find themselves.

One of the factors comprising the due process standards is the police knowledge of the dangerousness of the persons with whom they are dealing. If the police know that a particular person is violent, the risk that others might be injured during the course of the criminal acts al-

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135. See text accompanying notes 78-79 *supra*.

136. Another doctrine some courts use to control police conduct is "reasonable suspicion." In *Childs v. United States*, 267 F.2d 619 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 948 (1959), the D.C. Circuit affirmed a conviction for the controlled sale of narcotics despite a lack of probable cause to believe the defendant was predisposed. In dicta the court stated that "reasonable suspicion" was sufficient. *Id.* at 620. The military courts allow a claim of entrapment to be defeated by a showing that the arresting officer had a reasonable suspicion that the party was engaged in the commission of a crime or was about to do so. *United States v. McGlenn*, 8 C.M.A. 286, 24 C.M.R. 96 (1957). *Accord*, *United States v. Suter*, 21 C.M.A. 510, 45 C.M.R. 284 (1972). In *Walker v. State*, 255 Ind. 65, 262 N.E.2d 641 (1970), the Indiana Supreme Court held that by pleading entrapment the defendant imposed on the prosecution the requirement of proving that it had probable cause of suspecting the defendant was engaged in illegal conduct. *Id.* at 71, 262 N.E.2d at 645. Since *Walker*, the Indiana Supreme Court has recognized that under the subjective approach it is immaterial whether the police have any reason to suspect the defendant and, accordingly, overruled *Walker* in *Hardin v. State*, 265 Ind. 635, 358 N.E.2d 134 (1976). The doctrine of "reasonable suspicion" also seems to be losing ground in the federal courts. See, e.g., *United States v. Swets*, 563 F.2d 989 (10th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978), in which the court held that the government did not need to show it had reasonable grounds to believe that the defendant was engaged in unlawful activities.

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

138. See note 134 *supra* and accompanying text. Although the standards would apply in all situations, they would be flexible enough to allow the police more or less leeway depending on the particular facts and circumstances of the situation. Once the defendant raises the due process defense, the trial judge, not the jury, makes the determination if fundamental fairness has been violated. See *United States v. Johnson*, 565 F.2d 179, 181 (1st Cir. 1977), *cert. denied*, 434 U.S. 1075 (1978); *United States v. Quinn*, 543 F.2d 640, 648 (8th Cir. 1976); *United States v. Gonzalez*, 539 F.2d 1238, 1240 n.1 (9th Cir. 1976).

lowed, outweighs the benefit of gathering the evidence needed to gain a conviction. For example, the risk that innocent bystanders might be hurt is too great to allow the police to set up an undercover drug purchase in a public place with a person known to carry and use weapons. The greater the danger of injury to others, the less the police should be allowed to arrange controlled crimes.

A second factor is the point in the criminal act in which the police get involved. If the police involve themselves in an ongoing crime, it is clear that the suspects already intended to commit the crime and had devised a plan upon which they had already embarked. The police merely go along with what had been started, perhaps helping out when necessary,<sup>139</sup> and thus gather the evidence needed to convict. If the police become involved at the outset, however, there is a greater danger the crime can move beyond the planning stage and actually be committed. People sometimes intend to commit crimes, but are unable to devise adequate plans or obtain necessary equipment. When the police become involved at the outset, there is always the danger they will provide the means for the crime that the suspects might not have been able to provide by themselves. Thus, there is a greater chance a crime will be committed that would not have otherwise occurred if the police had become involved at the outset rather than at a later stage.

The final factor is the type of police involvement in the undercover operation. *Hampton* indicated that the police can engage in some unlawful activities (*e.g.*, supply of contraband) that will not be a defense to the prosecution.<sup>140</sup> It is not clear, however, how far the police may go.<sup>141</sup> If, for example, the police committed a murder, this would cer-

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139. See 411 U.S. at 431.

140. *Hampton v. United States*, 425 U.S. 484 (1976).

141. The recent Abscam cases are good examples of the concern courts have for undercover police investigations. In the Abscam investigation the police posed as Arab sheiks attempting to gain influence in the United States by offering sums of money to government officials including congressmen. The police videotaped many of the money transactions. The videotapes have shown a marked lack of reluctance on the part of the government officials to accept the money. The care with which the police set up the transactions and the pains they took to ensure they did not entrap the officials, coupled with the videotapes has, thus far, resulted in five convictions and only one acquittal.

The acquittal was on the ground that the prosecution had not proven predisposition beyond a reasonable doubt. *United States v. Jannotti*, 501 F. Supp. 1182, 1200 (E.D. Pa. 1980). As an alternative ground for acquittal, however, the court stated that the police had violated the due process rights of the defendants. For the court, when the police initiate bribes, provide generous financial inducements, and use other incentives amounting to an appeal to civic duty, they violate

tainly be outrageous police conduct sufficient to violate fundamental fairness notions of due process. The line separating the acceptable criminal act of supplying contraband from the unacceptable murder must be drawn at the point of what is reasonably necessary under the circumstances for the police to gain the confidence of the suspects without either increasing the risk of harm to innocent bystanders or so involving themselves in criminal activity as to become as culpable as the parties they are investigating.

If the police cannot gain the confidence of their suspects, their investigation will have little chance of gathering the evidence needed for a successful prosecution. To gain the suspect's confidence, the police often will have to show a readiness to become involved in the very criminal activity they seek ultimately to stop. The extent to which the police may engage in criminal activity, however, must be limited by the need underlying undercover investigations. Such investigations are needed to gather evidence to prosecute certain crimes and ultimately to control such crimes.<sup>142</sup> If the police engage in criminal conduct that shows a disregard for the safety of bystanders or makes them as blameworthy as the suspects they are investigating, they pose at least as great a danger to society as those suspects. It is at this point that criminal police activity must be stopped. These factors should be considered under a "totality of the circumstances" approach to see if in a particular situation due process has been violated.

Adoption of such standards by the Supreme Court<sup>143</sup> will help to provide consistency to the limits of permissible police conduct. Because the standards will develop within the framework of the due process clause, they will apply to both federal courts and to the states through the operation of the fourteenth amendment. The police will retain a great deal of leeway in the undercover investigations that are an integral part of detecting and prosecuting consensual crimes,<sup>144</sup> and the public will be safeguarded from an excessive, overzealous police force.

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due process. *Id.* at 1204. The court, however, did not develop any explicit standards for a due process violation.

142. See note 1 *supra* and accompanying text.

143. See note 81 *supra*.

144. See note 1 *supra* and accompanying text.



## IV. CONCLUSION

The Supreme Court in *Hampton* left the entrapment doctrine in a confused, untenable state.<sup>145</sup> Five Justices retain the subjective focus to entrapment,<sup>146</sup> and five Justices would allow a non-entrapment due process defense that would focus on the outrageousness of the police conduct.<sup>147</sup> The Justices allowing the due process defense are further split into two groups who would each allow different levels of police conduct to fall within the category of "outrageous."<sup>148</sup>

Explicitly adopting a dual approach to entrapment cases would help alleviate the confusion. Retaining the subjective approach to entrapment would keep the focus on the defendant.<sup>149</sup> Allowing a due process defense that focuses on the police conduct would help eliminate

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145. See notes 72-73 *supra* and accompanying text. One court has remarked that "[t]he debate over whether to use a subjective or an objective test of entrapment has failed to produce workable guidelines and has led to sixty years of confusion." *State v. Paiz*, 91 N.M. 5, 6, 569 P.2d 415, 416 (Ct. App. 1977).

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

147. See note 73 *supra* and accompanying text.

148. See notes 74-77 *supra* and accompanying text.

149. Because the subjective view allows evidence of criminal reputation and past criminal conduct, there is a danger of prejudice. See notes 19-22 *supra* and accompanying text. Most proponents of the objective view have been quick to point out this danger. See *Sherman v. United States*, 356 U.S. 369 (1958):

The danger of prejudice in such a situation, particularly if the issue of entrapment must be submitted to the jury and disposed of by a general verdict of guilty or innocent, is evident. The defendant must either forego the claim of entrapment or run the substantial risk that, in spite of instructions, the jury will allow a criminal record or bad reputation to weigh in its determination of guilt of the specific offense of which he stands charged.

*Id.* at 382. (Frankfurter, J., concurring).

In *United States v. Russell*, 411 U.S. 423 (1973), Justice Stewart said:

[A] test that makes the entrapment defense depend on whether the defendant had the requisite predisposition permits the introduction into evidence of all kinds of hearsay, suspicion, and rumor—all of which would be inadmissible in any other context—in order to prove the defendant's predisposition. . . . This sort of evidence is not only unreliable, as the hearsay rule recognizes; but it is also highly prejudicial, especially if the matter is submitted to the jury, for, despite instructions to the contrary, the jury may well consider such evidence as probative not simply of the defendant's predisposition, but of his guilt of the offense with which he stands charged.

*Id.* at 443. (Stewart, J., dissenting). See also Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245 (1942); Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORDHAM L. REV. 399 (1959); Comment, *The Viability of the Entrapment Defense in the Constitutional Context*, 59 IOWA L. REV. 655 (1974); Note, *The Defense of Entrapment: A Plea for Constitutional Standards*, 20 U. FLA. L. REV. 63 (1967).

The danger in admitting this prejudicial testimony into evidence is that the trier of fact will convict the defendant for past offenses instead of the offense for which he is on trial. The answer to this possibility of prejudice, however, does not lie in excluding the evidence. It lies in properly

overreaching police conduct, once standards are determined.<sup>150</sup> The Supreme Court, by explicitly adopting a dual approach and delineating the necessary standards, would go a long way toward developing the clear and cogent view of entrapment that has been lacking since the defense was first recognized.

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limiting the scope of the evidence and instructing the jury of the limited purpose of the evidence—the evidence can be used only to show predisposition.

Because there are conflicting interests here—the probative value of evidence of predisposition to show criminal intent against the probative danger of unfairly prejudicing the defendant—a reasonable solution would balance the competing interests. The trial judge could have the discretion to balance the interests in light of the actual need for the evidence of other crimes or reputation, the similarity of the other crimes to the charged crime, the availability of other, less prejudiced, evidence, the availability of limiting instructions to the jury, and the possibility the jury will have been so prejudiced as to disregard those instructions. In this way the danger to the defendant would be diminished and the prosecution would be allowed to prove the allegedly missing element of the crime.

A trial judge's balancing to determine admissibility of other crimes or reputation evidence is certainly not a novel notion. The Federal Rules of Evidence allow for such balancing. Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FED. R. EVID. 403.

The Advisory Committee's Note to Rule 403 states that "[s]ituations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission." Thus the relevance of other-crimes evidence or reputation is always to be balanced against its prejudicial effect in the process of determining admissibility. Rule 404(b) deals specifically with evidence of other crimes:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted 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.

Because the other-crime evidence would be used to show predisposition it would come within the exception to the inadmissibility of evidence of other crimes.

150. See notes 135-44 *supra* and accompanying text.