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"Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime."1

Justice Felix Frankfurter

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INTRODUCTION

Different types of crime require differing methods of detection. So-called "consensual" crimes,2 such as drug transactions, are considered the most difficult to detect, expose, and punish since they occur in private, and the participants in such crimes do not commonly complain to police.3 Given this reality, law enforcement agencies often

2. Drug offenses are the most common type of consensual crimes (also commonly referred to as "victimless" crimes). In addition to drug offenses, offenses such as bribery, gambling, prostitution and firearm sales are common consensual crimes. Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs, 60 YALE L.J. 1091, 1093 (1951). These crimes are labeled as consensual because of the absence of an unwilling, non-consenting participant or “victim” which exists in crimes such as theft, assault, robbery, and rape. Almost all reported entrapment cases arise in the area of consensual or “secret” crimes where no unwilling victims are involved. Note, Entrapment, 73 HARV. L. REV. 1333, 1338 (1960).
3. See Park, The Entrapment Controversy, 60 MINN. L. REV. 163, 164 (1976). Park notes that during the five-year period between 1970 and 1975 which he researched for his article, 65% of the federal cases in which the entrapment defense was raised involved drug offenses. Id. at 230 n.223. Studies generally show that drug use within the United States population increased during the late seventies and early to mid-eighties. For example, the number of people using cocaine on a monthly basis went from one million in 1976 to an estimated five to six million in 1984.
use undercover agents and informants in their efforts to expose these types of offenses. The most common method employed in detecting consensual crimes is solicitation of the offense by an informant or an undercover law enforcement official. The question in these cases is whether the individual who was "solicited" would have participated in the criminal offense if not for the active efforts of law enforcement officials. This question is at the heart of what is known as the entrapment defense.

The recent Eighth Circuit case of United States v. Hinton represents AND ORGANIZED CRIME 18 (March 1986). There has also been a heightened emphasis on the detection and punishment of drug offenses during the 1980s. For example, between fiscal years 1982 and 1986, federal funding for drug law enforcement increased by 70%. See id. at 440. Given the rise in drug use and the corresponding increase in efforts directed at detecting and punishing drug offenders, one would suspect that the percentage of entrapment cases involving drug offenses would also increase, perhaps even substantially.

4. Park, supra note 3, at 164. Utilization of "undercover agents is an accepted and necessary practice, particularly in combatting an ever-expanding narcotics traffic." United States v. Lard, 734 F.2d 1290, 1296 (8th Cir. 1984).

5. Donnelly defines an "informant" as "one who, having participated in an offense, turns against his partners and discloses information to the police[,] [q]uite often under a promise of immunity . . . ." Donnelly, supra note 2, at 1092. Another type of informant is referred to as a "stool pigeon" and is defined as a person who "acts as a decoy to draw others into a trap. He solicits the commission of the crime . . . ." Id.

6. Id. See also Kibby v. United States, 372 F.2d 598, 602 (8th Cir.), cert. denied, 387 U.S. 931 (1967) ("In order to effectively combat the market in contraband goods such as narcotics, . . . it is a common police practice for officers or undercover agents to pose as potential buyers of the illegal merchandise.").

7. The entrapment defense does not apply to situations where a private person solicits criminal conduct from the defendant or where a private person induces the defendant to commit a criminal offense. For the defense to apply, a law enforcement officer or an agent of the government, such as an informant, must induce or solicit the criminal activity. United States v. Leroux, 738 F.2d 943, 947 (8th Cir. 1984). See also infra note 122 (discussing this limitation on the entrapment defense).

Some circuits recognize a "derivative" form of the entrapment defense in limited situations where the government's inducement is indirectly communicated to the defendant by an unwitting middleman or where government agents have acted through private citizens rather than undercover agents or informants. See, e.g., United States v. Pilarinos, 864 F.2d 253, 255-56 (2d Cir. 1988). Other circuits steadfastly refuse to recognize a derivative theory of entrapment. See, e.g., United States v. Stewart, 770 F.2d 825 (9th Cir. 1985), cert. denied, 474 U.S. 1103 (1986). The Eighth Circuit has not expressly recognized a purely derivative claim of entrapment, but it has examined the effect of "indirect" solicitations in the context of the entrapment defense. See United States v. Dion, 762 F.2d 674, 686 (8th Cir. 1985) (holding that two of five defendants charged and convicted for illegally "taking or selling" eagles were entrapped by federal agents even though not directly solicited), aff'd in part and rev'd in part on other grounds, 476 U.S. 734 (1986). For a general discussion of the derivative or indirect theory of entrapment, see Note, Entrapment Through Unsuspecting Middlemen, 95 HARV. L. REV. 1122 (1982).

8. 908 F.2d 355 (8th Cir. 1990).
a typical entrapment case. In *Hinton*, the defendant took part in a 
drug sale after an agent of the government made repeated efforts to 
solicit her involvement in the illegal transaction. As such, *Hinton* 
provides an opportunity to examine the Eighth Circuit's application 
of the entrapment defense.

I. THE DEFENSE OF ENTRAPMENT

The defense of entrapment evolved slowly. Historically, American 
courts treated the defense with a great deal of skepticism; the de-

defense did not gain judicial recognition until the early twentieth cen-
tury. It was not until 1932, when the Supreme Court issued its 

opinion in *Sorrells v. United States* that federal courts accepted 
the defense of entrapment. In *Sorrells*, a government agent, posing as a 
tourist, visited the home of the defendant with several of the defend-
ant's friends. Both Sorrells and the agent were veterans of World 
War I, and they reminisced about their war experiences. During 
this visit, the agent repeatedly asked Sorrells if he could obtain some 
liquor. On the first two occasions, Sorrells told the agent that he 
did not have any liquor. After the third request, Sorrells left his 
home and returned a short time later with a half-gallon of whiskey. 
The agent paid Sorrells five dollars for the whiskey. Sorrells was 
charged, tried and convicted of violating the National Prohibition

9. The most often quoted piece of nineteenth century case law on the subject of 
entrainment expressed the general legal sentiment toward the entrapment defense:

Even if inducements to commit crime could be assumed to exist in this case, 
the allegation of the defendant would be but the repetition of the pleas as 
ancient as the world, and first interposed in Paradise: "The serpent beguiled 
me and I did eat." That defence was overruled by the great Lawgiver, and 
whatever estimate we may form, or whatever judgment pass upon the char-
acter or conduct of the tempter, this plea has never since 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 ethics, it never will.

10. In 1915, the Ninth Circuit Court of Appeals issued what is believed to be the 
first appellate court decision in which the defense of entrapment was recognized. 
*Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915). For a thorough review of the 
historical development of the defense of entrapment in the United States, see Mar-


12. Id. at 439.

13. Id.

14. According to the testimony of the government agent, he asked Sorrells to 
find him some liquor on three occasions. Another witness present stated that the 
agent may have made up to five requests before the defendant retrieved a bottle of 
whiskey for the agent. Id. at 439-40.

15. Id. at 439.
At trial and on appeal to the Supreme Court, Sorrells defended his conduct by claiming he had been entrapped. In recognizing the defense for the first time, the Court unanimously agreed that Sorrells had been entrapped. The Sorrells decision, however, sparked a heated debate over the foundation, formulation and application of the entrapment defense. To this day, legal scholars and the nation's courts, including the justices of the United States Supreme Court, remain divided over the proper justification for recognizing the entrapment defense and the proper standard for establishing entrapment.

A. The Majority View—The "Subjective" Test of Entrapment

A majority of the Sorrells Court adopted what is known as the "subjective" test of entrapment. This decision sets forth the justification for recognizing the entrapment defense and the standard for establishing entrapment. This standard of entrapment is applied throughout the federal court system.

16. Id.
17. Id. at 438-39.
18. Compare Sorrells v. United States, 287 U.S. 435, 435-52 (1932) (Hughes, C.J., delivering the opinion of the court) with Sorrells, 287 U.S. at 453-59 (Roberts, J., concurring). While the entire Court agreed that the defendant in Sorrells had been entrapped, there was sharp disagreement over the theoretical basis of the entrapment defense, the standard for determining whether the defendant had been entrapped, and whether the question of entrapment was one for the judge or the jury.

19. As Justice Stewart noted, the approach adopted by the Sorrells majority has been labeled the "subjective approach to the defense of entrapment." Russell v. United States, 411 U.S. 423, 440 (1973) (Stewart, J., dissenting). The label refers to the defendant's subjective intent, the focus of the majority test for entrapment. By contrast, the "objective" standard of entrapment focuses on the conduct of the police in their attempts to engage the defendant in criminal activity.

The subjective/objective distinction is misleading because focusing on police conduct, as the "objective" standard does, leaves as much room for subjective value judgments as the "subjective" examination of the defendant's state of mind. See Park, supra note 3, at 165-66. Having noted this, the author will continue to refer to the respective standards as "objective" and "subjective" because of their widespread use and acceptance.

20. Following the lead of the Supreme Court, all federal circuit courts of appeals have adopted the subjective formulation of the entrapment defense. See, e.g., United States v. Pratt, 913 F.2d 982 (1st Cir. 1990), cert. denied, 111 S. Ct. 681 (1991); United States v. Alston, 895 F.2d 1362 (11th Cir. 1990); United States v. Fusko, 869 F.2d 1048 (7th Cir. 1989); United States v. Fadel, 844 F.2d 1425 (10th Cir. 1988); United States v. Dougherty, 810 F.2d 763 (8th Cir. 1987); United States v. Gambino, 788 F.2d 988 (3d Cir.), cert. denied, 479 U.S. 825 (1986); United States v. Elordy, 612 F.2d 986, cert. denied, 447 U.S. 910 (1980); United States v. Jackson, 539 F.2d 1087 (6th Cir. 1976); United States v. Ewbank, 483 F.2d 1149 (9th Cir. 1973).

As noted, the circuit courts of appeals follow the pronouncements of the Supreme Court and apply the subjective test. Some circuits, however, require that
The *Sorrells* majority based the entrapment defense on the implied intent of Congress to not apply criminal statutes to those who have committed crimes at the instigation of government officials. In *Sorrells*, the government argued that since the criminal act was knowingly committed by the defendant, the government’s inducement to commit the act was irrelevant. The Court, however, chose not to literally interpret or apply the criminal statute in question. The Court determined that Congress did not intend to have a criminal statute apply where government officials lured an “innocent” individual into committing a crime in order to prosecute the offender later. After making this determination, the Court set out the standard for evaluating a claim of entrapment.

The majority in *Sorrells* stated that the government has entraped an individual when “the criminal design originates with the officials of Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission.” This language is capsulized by the Court in a two-prong test for determining when a person has been entrapped: (1) “government inducement of the crime,” and (2) “a lack of predisposition on the part of the defendant to engage in the criminal conduct.” In

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21. *Sorrells v. United States*, 287 U.S. 435, 448 (1932); see also *Sherman v. United States*, 356 U.S. 369, 372 (1958) (“Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations.”).


23. The Court stated “[l]iteral interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has been frequently condemned.” *Id.* at 446.

24. An “innocent” individual is one who does not already harbor a predisposition to commit the crime charged. See *infra* text accompanying notes 36-42.

25. *Sorrells*, 287 U.S. at 448. According to the majority’s opinion in *Sorrells*, an entrapped individual has engaged in conduct which “lies outside the purview of the [criminal statute].” *Id.* at 449. In essence, this means that the defendant is simply not guilty of the offense, rather than guilty of the offense but excused because of government’s instigation of the otherwise criminal conduct. *Id.* at 452.

26. *Id.* at 442.

practice, the first prong is superfluous;\textsuperscript{28} the second prong is the essence of the defense.

Under the first prong of the test, it is perfectly appropriate for the government to undertake clandestine operations to detect and expose consensual crimes.\textsuperscript{29} If law enforcement officers do nothing to induce the defendant to commit a crime, the defendant cannot claim entrapment.\textsuperscript{30} Similarly, if the government merely provides the defendant with the opportunity to commit a crime, the defendant has not been entrapped.\textsuperscript{31} Thus, no entrapment occurs in consensual crimes such as drug sales where a government agent merely requests that the defendant sell the agent illegal narcotics, and the defendant readily does so.\textsuperscript{32} If, however, law enforcement officials or their agents actively induce the defendant to act illegally, then the entrapment claim will only succeed where the defendant was not “predisposed” to commit the crime charged.\textsuperscript{33} The Supreme Court has acknowledged an emphasis on the second prong, stating that “the principal element in the defense of entrapment [is] the defendant’s predisposition to commit the crime.”\textsuperscript{34}

\textsuperscript{28} Justice Frankfurter, in his concurring opinion in \textit{Sherman v. United States}, called the first prong of the subjective test “unrevealing,” adding that in all cases where police solicit criminal activity from a defendant, “the intention that the particular crime be committed originates with the police . . . .” \textit{Sherman v. United States}, 356 U.S. 369, 382 (1958) (Frankfurter, J., concurring). Under the subjective test of entrapment, merely soliciting the crime or simply providing the accused with the opportunity to commit the crime charged does not, however, constitute entrapment. \textit{See infra} notes 32-33 and accompanying text.

\textsuperscript{29} “Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer.” \textit{Sherman}, 356 U.S. at 372. \textit{See also Sorrells}, 287 U.S. at 453-54 (Roberts, J., concurring) (Police may use “traps, decoys, and deception to obtain evidence of the commission of crime.”).

\textsuperscript{30} For example, where the defendant unwittingly initiates a criminal act with an undercover agent but still claims entrapment, the defendant’s claim will fail. Since it was the accused who solicited the official’s participation in the crime, the accused cannot satisfy the first prong of the subjective entrapment defense. In such cases, “criminal design” clearly originates with the defendant since the government official did nothing to induce the defendant’s illegal conduct. \textit{See, e.g., Willis v. United States}, 530 F.2d 308, 312 (8th Cir. 1976) (no entrapment when defendant initiated illegal drug sale by approaching government agents and showing them a large sum of money and assuring them he had outlets for drugs).

\textsuperscript{31} \textit{Sherman}, 356 U.S. at 372. \textit{See also Sorrells}, 287 U.S. at 441. “It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises.” \textit{Id}.

\textsuperscript{32} \textit{Kibby v. United States}, 372 F.2d 598, 602 (8th Cir. 1967). \textit{See also Sorrells}, 287 U.S. at 445 (“‘It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime.’”) (quoting \textit{Newman v. United States}, 299 F. 128, 131 (4th Cir. 1924)).


\textsuperscript{34} \textit{See id}. The subjective test examines the origin of the “criminal design” or
According to the second prong of the test, the defense of entrapment exists only for the "unwary innocent" who commits a crime at the urging of law enforcement officials; the defense is not available to the "unwary criminal" who commits a crime. The characterization of the defendant as an "unwary innocent" or an "unwary criminal" depends upon an examination of the defendant's conduct and predisposition to commit the criminal act. An "innocent" person is one who is not "predisposed" to commit the crime involved. To determine whether the defendant is "predisposed," the defendant's subjective intent is examined. If the evidence establishes that the defendant was ready and willing to commit the offense at any favorable opportunity, the defendant is deemed "predisposed" and has not been entrapped. On the other hand, if the defendant was not predisposed but was lured into committing the crime by agents of the government, the defendant has been entrapped. If there is a finding of predisposition, the entrapment defense is unavailable, even if the government has used unduly persuasive methods in order to encourage the defendant to act criminally. Only when the con-

"intent." See Sorrells, 287 U.S. at 442. This examination focuses on the origin of the intent to commit the type of offense charged, rather than the specific crime charged. It is only logical that the true focus be the intent to commit the type of offense charged, since the criminal design or intent to commit the specific criminal act for which the defendant is charged always originates with the government in cases where the defendant responds to an officer's solicitation to engage in criminal activity. Park, supra note 3, at 176-77, 244-45. 35. Sherman, 356 U.S. at 372. 36. Id. at 373. 37. See Sorrells, 287 U.S. at 451. 38. As stated in Sorrells: "If the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition . . . ." Id. 39. United States v. Lard, 734 F.2d 1290, 1293 (8th Cir. 1984). 40. "When the criminal design originates with the officials of Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission," the defendant has been entrapped. Sorrells, 287 U.S. at 442. 41. Hampton v. United States, 425 U.S. 484, 488-89 (1976). 42. United States v. Russell, 411 U.S. 423, 440 (1973) (Stewart, J., dissenting) (If the defendant had the predisposition to commit the crime, the defendant has not been entrapped "regardless of the nature and extent of the Government's participation" in soliciting the defendant in criminal activity.) (citing Sorrells, 287 U.S. at 451). Illustrative of this point is the case of United States v. Principe, 482 F.2d 60 (1st Cir. 1973). In Principe, a government informant made repeated and highly emotional appeals to persuade a friend, who at the time was enrolled in a methadone program, to set up a drug deal. Id. at 61. The court stated that, while this type of activity "reflect[s] no great credit on the government . . . [i] the ultimate focus of concern is not on the law enforcement techniques employed by the government, however questionable these may be, but rather on the defendant's own 'predisposition' to commit the crime." Id. at 62. See also United States v. Navar, 611 F.2d 1156 (5th Cir. 1980) (Defense of entrapment is destroyed by defendant's predisposition regardless of the
duct of government agents is so outrageous as to constitute a violation of due process principles will the conviction of a predisposed defendant be barred.43

nature and extent of the government's inducement.); United States v. Spivey, 508 F.2d 146 (10th Cir. 1975), cert. denied, 421 U.S. 949 (1975) (Fact that government informant let defendant move in with him, let him live rent-free, provided him with food and money, and hosted "pot parties" for the defendant and the neighbors did not matter since the defendant's predisposition had been established.).

Even when governmental agents go so far as to engage in illegal conduct with a defendant, the defendant is not entrapped under the subjective standard of entrapment if the defendant is predisposed. As the Court stated in Hampton v. United States, "[i]f 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." Hampton v. United States, 425 U.S. 484, 490 (1976).

43. In Russell, the Supreme Court left open the possibility that a conviction of a predisposed defendant could be barred under due process principles if police conduct was especially outrageous. Russell, 411 U.S. 423, 431-32. In that case, an undercover agent supplied the defendant with the chemical phenyl-2-propanone, an ingredient necessary for manufacturing the illegal drug methamphetamine. The chemical is scarce and difficult to obtain. Id. at 426, 431. Without it, the drug cannot be manufactured. Id. at 431. The Ninth Circuit had held that providing this essential ingredient constituted "an intolerable degree of government participation in the criminal enterprise" and established entrapment as a matter of law. United States v. Russell, 459 F.2d 671, 673 (9th Cir. 1972), rev'd, 411 U.S. 423 (1973). In reversing the Ninth Circuit Court of Appeals, the Supreme Court noted that the defendant conceded that the jury's finding of predisposition was supported by the evidence. The Court determined that this concession completely precluded the defendant from establishing entrapment. Russell, 411 U.S. at 436. In so ruling the Court impliedly overturned two lower court decisions, United States v. Bueno, 447 F.2d 903 (5th Cir. 1971), and United States v. Chisum, 312 F. Supp. 1307 (C.D. Cal. 1970), which held that a defendant is entrapped as a matter of law when the government provides the defendant with contraband, regardless of the defendant's predisposition. See also Hampton, 425 U.S. at 489-90 (The Court expressly stated that due process is not violated when the government provides an accused with illegal drugs as part of an undercover operation.). In dictum in Russell, however, Justice Rehnquist, speaking for the Court, 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.'" Russell, 411 U.S. at 431-32 (citation omitted).

Justice Rehnquist, apparently unhappy with his choice of language in Russell, attempted to close the door on due process claims in entrapment cases when he announced the opinion of the Court three years later in Hampton. Justice Rehnquist, joined by Justice White and Chief Justice Burger, stated that the remedy of a defendant for any improper conduct on the part of government agents in soliciting criminal activity lies solely in the defense of entrapment. The conviction of a predisposed defendant cannot be barred by a due process violation on the part of the government. In cases where the officers engage in illegal conduct or violate the principles of due process, "the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under applicable provisions of state or federal law." Hampton, 425 U.S. at 490.

Five justices disagreed with this statement and with Justice Rehnquist's charac-
Under the subjective test, the defendant has the burden of producing evidence showing that government agents induced the defendant to commit the crime. Once the defendant produces such evidence, the burden shifts to the prosecution to establish beyond a reasonable doubt that the defendant was predisposed to commit the crime.

Characterization of the Russell decision. Justices Powell, Blackmun, Brennan, Stewart and Marshall all agreed that Russell did not foreclose a court from barring the conviction of a predisposed defendant, on either due process principles or by exercise of the supervisory power of the court, in cases where the conduct of law enforcement officials was sufficiently offensive. Id. at 493 (Powell, J., concurring in the judgment), 497 (Brennan, J., dissenting).

Based on the language in Russell, predisposed defendants often argue that they should not be convicted, given the outrageous nature of the conduct of government agents in soliciting criminal activity from them. While the predisposed defendant may continue to raise a due process defense in entrapment cases after Hampton, the defense has been met with nearly universal rejection. If, as Justice Rehnquist says, the entrapment defense is “relatively limited,” Russell, 411 U.S. at 435, the due process defense is, in reality, virtually non-existent.

For example, the Eighth Circuit Court of Appeals stated that “police conduct becomes the proper point of inquiry only in the rare situation where it is too outrageous to be overlooked.” Gunderson v. Schlueter, 904 F.2d 407, 410 (8th Cir. 1990). The level of outrageousness required is quite high:

Granting that a person is predisposed to commit an offense, we think that it may safely be said that investigative officers and agents may go a long way in concert with the individual in question without being deemed to have acted so outrageously as to violate due process or evoke the exercise by the courts of their supervisory power so as to deny to the officers the fruits of their misconduct.

United States v. Quinn, 543 F.2d 640, 648 (8th Cir. 1976). In fact, the Eighth Circuit has never found the conduct of law enforcement officials to have reached the level of outrageousness required to support a due process violation in an entrapment case. Gunderson, 904 F.2d at 410. In a limited number of other cases, however, courts have barred the conviction of a predisposed defendant in an entrapment case on grounds that police conduct in the solicitation violated principles of due process. See, e.g., United States v. Twigg, 588 F.2d 373 (3d Cir. 1978) (Court found substantive due process violation where DEA agent gave the defendant the idea to manufacture drugs, gave him the money to buy the chemicals necessary to manufacture the drugs, provided him with technical expertise regarding the manufacturing process, and gave him a place to set up a drug laboratory.).

44. See United States v. French, 683 F.2d 1189, 1191 n.1 (8th Cir.), cert. denied, 459 U.S. 972 (1982) (reciting approved jury instruction); United States v. Sherman, 200 F.2d 880, 882 (2d Cir. 1952) (“On the ... question [of government inducement] the accused has the burden.”). But see United States v. West, 898 F.2d 1493, 1502 (11th Cir. 1990) (“To raise entrapment a defendant must prove more than that the government first solicited him ...”); United States v. Hill, 626 F.2d 1301, 1304 (5th Cir. 1980) (“If there is any evidence ... that the government's conduct created a substantial risk” of inducing an innocent actor to commit an offense, a jury issue is raised.).

Whether the defendant was in fact predisposed to commit the offense charged is a question for the jury.46

B. The Minority View—The "Objective" Test

Justice Roberts, in a separate concurring opinion in Sorrells,47 set forth the minority view which is regarded as the "objective" test of entrapment.48 In Sorrells, Justice Roberts agreed that the government had entrapped the defendant but took exception to the justification for recognizing the entrapment defense and the formulation of the entrapment standard as advanced by the majority.49 Justice Roberts argued that the majority erred in gleaning the theoretical root of the doctrine of entrapment from an "implied legislative intent."50 Justice Roberts first noted that the elements of a crime are enumerated by statute and that the actions of a defendant, even though induced, are precisely those which the statute pros-

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46. Sherman v. United States, 356 U.S. 369, 377 (1958); Sorrells, 287 U.S. at 454. But see State v. Grilli, 304 Minn. 80, 95, 230 N.W.2d 445, 455 (1975) (The defendant may choose whether the issue is to be decided by the judge or the jury, even though Minnesota applies the subjective standard of the entrapment defense.).


48. Justice Stewart referred to the standard of entrapment advanced by Justice Roberts as the "objective approach." Russell v. United States, 411 U.S. 423, 441 (1973) (Stewart, J., dissenting). The "objective" test focuses on the conduct and action of law enforcement officials in their efforts to enlist the defendant in criminal activity. See Sherman, 356 U.S. at 380 (Frankfurter, J., concurring). This formulation of the entrapment standard is also referred to as the "hypothetical-person" test of entrapment. Park, supra note 3, at 165 n.2.

49. Justice Roberts' principal concern was that, in establishing predisposition, the prosecution would introduce evidence of the accused's prior criminal conduct, bad acts, and reputation. Sorrells, 287 U.S. at 458-59 (Roberts, J., concurring); see also Park, supra note 3, at 201-02, 237. Park argues that the government should not be allowed to introduce evidence of the defendant's prior convictions or criminal reputation to establish predisposition. Rather, the government should be limited to establishing predisposition by means of other evidence, such as the defendant's quick acquiescence in the crime, the defendant's display of expert knowledge regarding the criminal activity, and the defendant's easy access to contraband goods. Id.

50. Sorrells, 287 U.S. at 454-57.
Given that the statute does nothing more than set forth the elements of the crime, the "implied legislative intent" rationale advanced by the majority is infirm. Justice Frankfurter, another proponent of the objective standard, followed Justice Roberts' lead in attacking the legislative intent rationale as "fictitious." Justice Frankfurter argued that a criminal statute is wholly directed to defining and prohibiting the substantive offense concerned and expresses no purpose, either permissive or prohibitory, regarding the police conduct that will be tolerated in the detection of the crime. Under this construction, one should not look to the statute for a policy which was clearly not within the contemplation of Congress. Accordingly, the defense of entrapment cannot be based on a theory

51. *Id.* at 456. In his concurring opinion in *Sherman*, Justice Frankfurter stated:

In these cases raising claims of entrapment, the only legislative intention that can with any show of reason be extracted from the statute is the intention to make criminal precisely the conduct in which the defendant has engaged. That conduct includes all the elements necessary to constitute criminality, ... If [the defendant] is to be relieved from the usual punitive consequences, it is on no account because he is innocent of the offense described.

*Sherman*, 356 U.S. at 379-80. Justice Stewart echoed this theme in *Russell*:

Furthermore, to say that such a defendant is "otherwise innocent" or not "predisposed" to commit the crime is misleading, at best. The very fact that he has committed an act that Congress has determined to be illegal demonstrates conclusively that he is not innocent of the offense. He may not have originated the precise plan or the precise details, but he was "predisposed" in the sense that he has proved to be quite capable of committing the crime.

*Russell*, 411 U.S. at 442.

52. Justice Roberts not only contended that it was impossible to find the legislative intent uncovered by the majority, he also argued that the legislative intent rationale advanced by the majority was, in reality, a modification of the statute, amounting to the addition of an element not contained within the terms of the statute. According to Justice Roberts, "[t]his amounts to saying that one who with full intent commits the act defined by law as an offense is nevertheless by virtue of the unspoken and implied mandate of the statute to be adjudged not guilty by reason of someone's [sic] else improper conduct." *Sorrells*, 287 U.S. at 456 (Roberts, J., concurring). As Justice Roberts also noted, the theoretical underpinning of the subjective standard, advanced by the majority in *Sorrells*, erodes when the defense of entrapment is applied to cases of common law crime. *Id.* at 455. Common law crimes are not defined by statute. Therefore, if a defendant alleged the defense of entrapment to a common law crime, there could be no examination of legislative intent because no legislation exists. *Id.* Although this point exposes a major flaw in the theoretical foundation of the subjective test, it may be a moot point since today nearly all criminal offenses are statutorily defined.


54. *Id.*

55. *Id.* In recent years, dissenting opinions have echoed similar criticisms of the subjective approach. *See*, e.g., *Hampton v. United States*, 425 U.S. 484, 496 (1975) (Brennan, J., dissenting); *Russell*, 411 U.S. at 436 (Douglas, J., dissenting); *Russell*, 411 U.S. at 441 (Stewart, J., dissenting).
of implied legislative intent but must rest on public policy grounds.\textsuperscript{56} According to advocates of the objective standard, the public policy underlying the entrapment defense is protection against misconduct and overreaching by law enforcement officers.\textsuperscript{57}

Justices advocating the objective test of entrapment assert that the doctrine is based on a belief that certain "methods employed on behalf of the Government to bring about [a] conviction cannot be countenanced."\textsuperscript{58} Accordingly, the objective test focuses exclusively on the actions taken by law enforcement officials in their efforts to enlist the defendant in criminal activity rather than on the defendant's predisposition to commit the crime.\textsuperscript{59} The question a trial court must resolve when using the objective test is whether police conduct fell below an acceptable standard.\textsuperscript{60} Since the objective standard has never commanded a majority of the Supreme Court,\textsuperscript{61} a

\begin{itemize}
  \item \textsuperscript{56} See \textit{Sorrells}, 287 U.S. at 457.
  \item \textsuperscript{57} See id. at 454.
  \item \textsuperscript{58} \textit{Sherman}, 356 U.S. at 380 (Frankfurter, J., concurring). Jurisdictions applying the objective standard, like those adhering to the subjective standard, agree that merely offering the defendant an opportunity to commit a crime is not improper and does not establish entrapment. Under the objective standard, however, it is "impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, [and] importuning . . . ." \textit{People v. Barraza}, 23 Cal. 3d 675, 690, 591 P.2d 947, 955, 153 Cal. Rptr. 459, 467 (1979).
  \item \textsuperscript{59} See \textit{Russell}, 411 U.S. at 441 (Stewart, J., dissenting). "[T]he focus of this approach is not on the propensities and predisposition of a specific defendant," rather, the question is whether "governmental agents have acted in such a way as is likely to instigate or create a criminal offense." \textit{Id.} See also \textit{Mathews v. United States}, 485 U.S. 58, 66-67 (1988) (Brennan, J., concurring) (maintaining that, but for strong precedent, the entrapment defense should be focused exclusively on government conduct); \textit{Hampton v. United States}, 425 U.S. 484, 496-97 (1975) (Brennan, J., dissenting) (Basis for entrapment defense should be the elimination of unacceptable methods employed by government.); \textit{Sherman}, 356 U.S. at 384 (Frankfurter, J., concurring) (Objective test shifts attention from the defendant's predisposition to the conduct of the police.); \textit{Sorrells}, 287 U.S. at 459 (Roberts, J., concurring) ("Courts must be closed to the trial of a crime instigated by the government's own agents.").
  \item State courts adopting the objective standard follow this focus. "[U]nder this test such matters as the character of the suspect, his predisposition to commit the offense, and his subjective intent are irrelevant." \textit{Barraza}, 23 Cal. 3d at 691, 591 P.2d at 956, 153 Cal. Rptr. at 468.
  \item \textsuperscript{60} "The crucial question, not easy of answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power." \textit{Sherman}, 356 U.S. at 382.
  \item \textsuperscript{61} As the composition of the Court has become more conservative over the last fifteen years, the size of the majority advocating the subjective standard has increased. In \textit{Sorrells} (1932), \textit{Sherman} (1957), and \textit{Russell} (1972), the Court split 5/4 in favor of the subjective standard. The \textit{Hampton} (1975) case involved a 5/3 split, with Justice Stevens not participating in the decision. The most recent entrapment case before the Court was \textit{Mathews} in 1987. The \textit{Mathews} Court examined whether a defendant could alternatively plead entrapment while denying one or more elements of
\end{itemize}
A detailed statement regarding what type of police conduct is permissible has not been enunciated. The standard typically applied in jurisdictions advocating the objective test is whether the actions of the police "create a substantial risk that [the] offense will be committed by persons other than those who are ready to commit it."

The objective standard also differs from the subjective standard with respect to allocation of the burden of proof and the role of judge and jury. Under the objective standard, both the burden of production and the burden of persuasion rest with the defendant. Furthermore, the question of entrapment is typically reserved for the court rather than submitted to the jury.

The last two clear advocates of the objective standard remaining on the court prior to the *Mathews* decision were Justices Brennan and Marshall. See Hampton v. United States, 425 U.S. 484, 495-97 (1975) (Brennan, J., joined by Marshall, J., dissenting). Whether Justice Marshall continues to adhere to the objective formulation of the entrapment standard is unclear from the *Mathews* opinion. He joined the majority of the court in recognizing that a defendant can alternatively deny commission of the crime and plead entrapment. Examination of this issue did not require an inquiry into the proper standard of entrapment, and Justice Marshall did not separately state that he continues to adhere to the objective formulation. Justice Brennan's previously unshakable adherence to the objective standard seems to have eroded under the weight of precedent from an increasingly conservative bench. In his concurring opinion he states:

> Were I judging on a clean slate, I would still be inclined to adopt the view that the entrapment defense should focus exclusively on the Government's conduct. But I am not writing on a clean slate; the Court has spoken definitively on this point. Therefore I bow to stare decisis, and today join the judgment and reasoning of the Court.

*Mathews*, 485 U.S. at 67 (Brennan, J., concurring).


63. For a general discussion of burdens of proof and the role of judge and jury under the two formulations of the entrapment defense, see Marcus, The Entrapment Defense and Procedural Issues: Burden of Proof, Questions of Law and Fact and Inconsistent Defense, 22 Crim. L. Bull. 197 (1986).


65. See United States v. Russell, 411 U.S. 423, 441 (1972) ("[D]etermination of
ment is one for the court rather than the jury because of the courts' "inherent right . . . not to be made the instrument of wrong."66 The court must be responsible for the "preservation of the purity of its own temple"67 by refusing to submit to the "prostitution of the criminal law."68 Accordingly, at any point in a proceeding where facts which establish entrapment are introduced, the court should discharge the defendant.69 The question of entrapment goes to the jury only when there is doubt as to the facts.70 The opinion of the jury, however, is merely advisory since the power to dismiss the defendant ultimately rests with the court.71 Despite the fact that the

the lawfulness of the Government's conduct must be made . . . by the trial judge, not the jury."); Sherer v. United States, 356 U.S. 369, 385 (1957) (Frankfurter, J., concurring) (issue of entrapment "is appropriate for the court and not the jury."); Sorrells v. United States, 287 U.S. 435, 457 (1932) ("[P]ower and duty to act remain with the court and not with the jury."). See also Model Penal Code § 2.13(2) (1985) ("The issue of entrapment shall be tried by the court in the absence of the jury."); State v. Grossman, 457 P.2d 226, 230 (Alaska 1969) (Entrapment is to be litigated by the court.). But see State v. Mullen, 216 N.W.2d 375, 382 (Iowa 1974) (following the objective test but submitting question of entrapment to the jury when operative facts are in dispute).

67. Id. at 457.
Clearly entrapment is a facet of a broader problem. Along with illegal search and seizures, wire tapping, false arrest, illegal detention and the third degree, it is a type of lawless law enforcement. They all spring from common motivations. Each is a substitute for skillful and scientific investigation. Each is condoned by the sinister sophism that the end, when dealing with known criminals or the "criminal classes," justifies the employment of illegal means. The Supreme Court has responded, more or less effectively in curbing illegal search and seizures, illegal detention, and wire-tapping by federal officers and "third degree" practices by state as well as federal police officers. It has occasionally been suggested that entrapment is sustainable as a doctrine on the same constitutional grounds as the search and seizure and the confession cases . . . . Although the exclusionary rule is explained as a constitutional or statutory imperative it can be supported by the broad policy which prevents the judicial power from being employed as an instrument for the lawless enforcement of the criminal law . . . . [This] was the view of Mr. Justice Roberts in the Sorrells case. This view is preferable. Entrapment should have its footings in the policy of the courts to preserve their own integrity. Donnelly, supra note 2, at 1111-12.

68. Sorrells, 287 U.S. at 457. As Justice Holmes stated: "I think it a less evil that some criminals should escape than that the Government should play an ignoble part." Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

Advocates of the subjective approach view the weight of the interests in the balance quite differently. For them, the evil of the objective standard is that "it leads to acquittal of persons who are in fact guilty. By focusing on police conduct rather than the defendant's predisposition, it creates a risk of acquitting dangerous chronic offenders." People v. Barazza, 23 Cal. 3d 675, 694, 153 Cal. Rptr. 459, 470, 591 P.2d 947, 958 (1979) (Clark, J., dissenting).

69. Sorrells, 287 U.S. at 457.
70. Id.
71. Id.
objective test has never commanded a majority of the Court, it has been the formulation of the entrapment defense advocated by the vast majority of criminal law scholars and commentators.72

State courts are not bound by the subjective standard of entrapment adopted by the Supreme Court and applied within the federal court system.73 A number of states have—in whole or in part—adopted the objective standard of the entrapment defense and apply that standard within their courts. Some have done so legislatively,74 while others have done so judicially.75

C. Establishing Predisposition Under the Majority View

Under the subjective formulation of the entrapment defense as applied in the federal court system, the primary focus is whether the accused was "predisposed" to commit the crime charged. While the Supreme Court has not articulated an explicit list of factors to be

72. See, e.g., Goldstein, For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent and the Plea Bargain, 84 YALE L.J. 527 (1975); McClean, Informers and Agent Provocateurs, 1969 CRIM. L. REV. 527; Williams, The Defense of Entrapment and Related Problems in Criminal Prosecution, 28 FORDHAM L. REV. 399 (1959); Donnelly, supra note 2. But see Park, supra note 3. Park advocates the subjective view but agrees that the use of prior criminal convictions and hearsay evidence regarding a defendant's reputation for criminal activity or prior bad acts in order to establish predisposition should not be allowed.

73. As the Court stated in Russell, entrapment is not a defense of constitutional dimension. Therefore, Congress is free to adopt any substantive definition of the defense. United States v. Russell, 411 U.S. 423, 433 (1973). Since the defense is not constitutional in nature, states are also free to adopt their own formulations of the entrapment defense.


A few states which adhere to the subjective formulation of the entrapment defense have taken the step of excluding evidence of prior criminal activity in order to establish predisposition. See, e.g., State v. Nelsen, 228 N.W.2d 143, 147 (S.D. 1975). The same was true in the state of California before it fully abandoned the subjective approach and embraced the objective approach. People v. Benford, 53 Cal. 2d 1, 11-12, 345 P.2d 928, 935 (1959).
examined in determining predisposition, numerous factors may enter into a court's analysis of whether the defendant was predisposed.

Of all the factors typically introduced to establish the defendant's predisposition, the most common and damaging evidence relied upon by the prosecution is evidence of the defendant's prior criminal conduct. Evidence of prior criminal conduct need not be limited to prior convictions, but can include arrests, crimes for which the defendant was never prosecuted, or other hearsay evidence regarding the defendant's criminal reputation. Although introducing evidence of the defendant's prior convictions or bad acts and/or poor character is an established exception to the hearsay rule of evidence, this practice has been the most strongly criticized portion of

76. The Court has made reference to specific types of factual information that is important in respective cases, but it has never set out a list of factors to be examined in every case in which entrapment is alleged. For example, in Sherman, the court evaluated the following factors to determine whether the defendant was predisposed: (1) the defendant's hesitancy at taking part in the illegal drug sale; (2) the repeated solicitations necessary to overcome the defendant's reluctance; (3) whether the defendant stood to realize a profit on the drug transaction; and (4) the defendant's record of prior similar offenses. Sherman v. United States, 356 U.S. 369, 373-75 (1957). In Sorrells, the Court evaluated the defendant's hesitancy and the repeated solicitations of the government official, in addition to the defendant's reputation. Sorrells v. United States, 287 U.S. 435, 441 (1932).

77. Under the subjective test, predisposition can be established by evidence of the defendant's prior criminal convictions, arrests, or criminal activity which resulted neither in arrest nor conviction, by evidence showing the defendant's ready acquiescence in the crime or easy access to the illegal substance, by evidence of the defendant's expert knowledge regarding the criminal activity or by evidence of boastful statements regarding the defendant's criminal activities made by the defendant himself during the solicitation process. See Park, supra note 3, at 200-01 and the cases cited therein.

78. For example, in the few Eighth Circuit cases where the court held that a defendant was entrapped, the defendants involved had no criminal record. See United States v. Dion, 762 F.2d 674, 690 (8th Cir. 1985) (Defendant "has never been convicted of any crime, and has a good reputation as a law-abiding citizen."); United States v. Lard, 734 F.2d 1290, 1294 (8th Cir. 1984) (Defendant "had not engaged in any prior criminal conduct.").

The absence of a prior criminal record, however, is not sufficient to establish that the defendant was entrapped. See, e.g., United States v. Rodrigues, 433 F.2d 760 (1st Cir. 1970), cert. denied, 401 U.S. 943 (1971). Lack of prior record or evidence of the defendant's involvement in criminal activity is not enough to establish entrapment, for if it were, a first-offender who was predisposed to commit the offense charged could seek sanctuary in the entrapment defense. Id. at 762. On the other hand, the presence of a criminal record or evidence that the defendant engaged in prior unlawful conduct similar to the conduct for which he is charged, even though no criminal record exists, makes the success of an entrapment defense all but impossible. See infra notes 83-84 and accompanying text.

79. See Park, supra note 3, at 200-01.

80. See, e.g., Osborn v. United States, 385 U.S. 323, 331 (1966). See also 29 AM. JUR. 2D Evidence § 321, n.17 (1967 & Supp. 1990) (citing cases which support the rule
the subjective standard. 81

In determining whether entrapment exists, federal courts conduct the predisposition analysis in a manner which practically guarantees conviction of a defendant who has previously been involved in criminal activity. Evidence that the defendant engaged in prior illegal conduct which is similar to that for which the defendant is charged is nearly insurmountable evidence of predisposition. 82 Arguably, if a

that introduction of evidence of other criminal acts committed by the defendant is allowed when offered to rebut a defense such as entrapment). 81. In a separate concurring opinion in Sorrells v. United States, Justice Roberts, while supporting the majority's recognition that the defendant had been entrapped, soundly criticized introducing evidence of the defendant's prior criminal activity to establish predisposition and rebut a claim of entrapment:

Whatever may be the demerits of the defendant or his previous infractions of law these will not justify the instigation and creation of a new crime, as a means to reach him and punish him for his past misdemeanors. [The defendant] has committed the crime in question, but, by supposition, only because of instigation and inducement by a government officer. To say that such conduct by an official of government is condoned and rendered innocuous by the fact that the defendant had a bad reputation or had previously transgressed is wholly to disregard the reason for refusing the processes of the court to consummate an abhorrent transaction. It is to discard the basis of the doctrine and in effect to weigh the equities as between the government and the defendant when there are in truth no equities belonging to the latter, and when the rule of action cannot rest on any estimate of the good which may come of the conviction of the offender by foul means. The accepted procedure, in effect, pivots conviction in such cases, not on the commission of the crime charged, but on the prior reputation or some former act or acts of the defendant not mentioned in the indictment.

The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy. Sorrells v. United States, 287 U.S. 435, 458-59 (1932). Commentators echo this critical theme:

It is a strange doctrine that makes guilt or innocence depend upon whether a defendant has committed other similar offenses. However bad a person may be, however guilty of crime, it is nevertheless a principle of our system of criminal law administration that conviction and punishment must be for some specific act or crime proved against an accused by competent evidence compelling an inference of guilt as to a specific act, and not for a general depravity or wickedness. The admission of this kind of evidence invariably prejudices the jury against the accused and diverts their attention from an impartial consideration of the evidence of the particular crime charged. It is difficult to justify the injection into a trial for a specific offense hearsay complaints or officer's suspicions about other offenses. And even if proved, prior transgressions do not compel a logical inference that the defendant did in fact commit the particular offense.

Donnelly, supra note 2, at 1108.

82. See Annot., Admissibility of Evidence of Other Offenses in Rebuttal of Defense of Entrapment, 61 A.L.R.3d 293 (1982) (collection of cases in which evidence of prior criminal convictions was used to establish predisposition and defeat the entrapment defense).

Since the test is predisposition to commit the type of crime charged, rather than
defendant has previously engaged in similar illegal conduct, a presumption arises that the defendant remains forever predisposed. Therefore, it is practically impossible for a defendant who was previously involved in similar criminal activity to establish entrapment, regardless of the extreme conduct or methods employed by law enforcement officials in their efforts to enlist the defendant in criminal activity.\(^8\)

In applying the predisposition test in this manner, the “rehabilitation” goal of the criminal justice system is ignored.\(^8\) Advocates of the objective standard of entrapment criticize the subjective test because it seems to allow law enforcement officials to play by a different set of rules when dealing with persons known to have previously engaged in illegal conduct.\(^8\) This dilemma for prior offenders was seemingly not envisioned by the architects of the subjective standard of entrapment.

The Court, in *Sherman v. United States*,\(^8\) indicated its displeasure predisposition to commit the specific action for which the defendant is charged, evidence of prior illegal acts similar in nature to that for which the defendant is charged is extremely strong evidence of predisposition. *See supra* note 34 and accompanying text.

83. Under the subjective standard, the conviction of a predisposed defendant will not be overturned on an entrapment theory on the grounds that law enforcement officers engaged in outrageous conduct. *See supra* note 42. The only possible defense available to a predisposed defendant is a due process argument. *See supra* note 43 and accompanying text.

84. Since the focus of the objective test is on police conduct, courts applying this test are apt to be more sensitive to cases in which past drug offenders or users were trying to reform themselves only to eventually have their resistance worn down by “overzealous” law enforcement agents. *See People v. Barraza,* 23 Cal. 3d 675, 691, 591 P.2d 947, 956, 153 Cal. Rptr. 459, 468 (1979).

85. As Justice Frankfurter stated in his concurring opinion in *Sherman v. United States:* “Permissible police activity does not vary according to the particular defendant concerned; surely 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.” *Sherman v. United States,* 356 U.S. 369, 383 (1958).

Justice Stewart repeated this strain of criticism in his dissenting opinion in *United States v. Russell,* stating that focusing on the defendant’s predisposition “has the direct effect of making what is permissible or impermissible police conduct depend upon the past record and propensities of the particular defendant involved.” *United States v. Russell,* 411 U.S. 423, 443 (1973). *See also* 1 NATIONAL COMM’N ON REFORM OF FED. CRIM. LAWS, WORKING PAPERS 303, 306-07 (July 1970) (“One of the most serious shortcomings of the [subjective] entrapment law is that the predisposition element tends to encourage or tempt law enforcement into a ‘devil-may-care’ or ‘anything goes’ attitude toward persons of a known criminal reputation.”).

Some commentators express doubt that police officers specifically “target” past offenders in drug sale cases since an informer typically determines who the solicited “seller” will be, and this determination usually is not predicated on whether the solicited seller has a prior criminal record. *See, e.g., Park, supra* note 3, at 259-60.

with relying on evidence of the defendant's prior criminal activity as the primary indication of the defendant's predisposition. The defendant in Sherman was charged and convicted of selling illegal narcotics. A government informant repeatedly asked Sherman to sell him heroin. At the time of these solicitations, Sherman was undergoing treatment for his own drug addiction. In response to Sherman's claim of entrapment, the government introduced evidence of the defendant's prior criminal record—a nine-year old conviction for selling illegal narcotics and a five-year old conviction for possessing illegal narcotics. The Court determined that evidence of these prior convictions, even though for similar offenses, was insufficient to prove that Sherman was predisposed to sell illegal narcotics.

In addition to relying on evidence of the defendant's prior criminal conduct, the government often seeks to establish the defendant's predisposition by showing that the defendant readily acquiesced in the criminal act. For example, in Sherman, the government also sought to establish Sherman's predisposition by showing that he readily complied with the informant's requests that Sherman sell him narcotics. The Court found this argument unpersuasive, noting that Sherman did not acquiesce in the illegal transaction until after the informant had made a number of requests. Similarly, in Sorrells

87. Id. at 371-72.
88. Id. at 373.
89. Id.
90. Evidence of prior convictions which are not similar in nature to the offense with which the defendant is charged is generally not competent evidence for establishing predisposition. Park, supra note 3, at 176-77.
91. The Court stated that these "conviction[s] . . . are insufficient to prove [the defendant] had a readiness to sell narcotics at the time [the government informer] approached him . . . ." Sherman v. United States, 356 U.S. 369, 375 (1958). It is unclear from this language whether the Court is focusing on the defendant's predisposition at the time the government agent originally approached the defendant or at the time the illegal transaction finally took place. The rule seems to be that the relevant time period for examining the defendant's predisposition is the time the government agent originally approached the defendant. See, e.g., United States v. Lasuita, 752 F.2d 249, 253 (6th Cir. 1985) (The government must prove predisposition "at the time of the initial contact" between the government and the defendant, rather than at the time the offense is actually committed.).
92. Park, supra note 3, at 200.
93. Sherman, 356 U.S. at 375.
94. "One request was not enough, for [the government informer] tells us that additional ones were necessary to overcome, first, [the defendant's] refusal, then his evasiveness, and then his hesitancy in order to achieve capitulation." Id. at 373. In overturning Sherman's conviction, the Court noted that his case "illustrates an evil which the defense of entrapment is designed to overcome." Id. at 376. The "evil" the Court was concerned with was the fact that

[i]the government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit . . . . Thus the Government plays on the weaknesses of an innocent
v. United States, the Court prominently noted that Sorrells' acquiescence in the illegal liquor sale was achieved only after repeated and persistent solicitation by the government agent.

Various circuit courts of appeals afford more substance to the predisposition analysis by enunciating specific factors that are relevant to determining the defendant's predisposition. For example, the Seventh Circuit Court of Appeals, in United States v. Perez-Leon, lists five relevant factors in determining the defendant's predisposition. These factors are:

1. assessing the character or reputation of the defendant, including any prior criminal record;
2. whether the suggestion of criminal activity was made by the government;
3. whether the defendant was engaged in criminal activity for profit;
4. whether the defendant expressed reluctance to commit the offense which was overcome only by repeated government inducement or persuasion; and
5. the nature of the inducement or persuasion applied by the government.

The fourth factor, whether the defendant expressed reluctance to commit the offense which was overcome only after repeated solicitation and persuasion by the government, is considered the most important of the five factors. Unlike other circuits, the Eighth Circuit has not formulated a clear set of factors to be examined when determining a defendant's predisposition.

party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this.

Id. (citation omitted).

95. 287 U.S. 435 (1932).
96. Id. at 441.
97. 757 F.2d 866 (7th Cir. 1985).
98. Id. at 871. The trier of fact must examine these five factors in determining whether the defendant was predisposed to commit the crime. Id. These five factors were first enunciated in United States v. Reynosa-Ulloa, 548 F.2d 1329, 1336 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978). Other circuit courts subsequently adopted these factors as the boundaries for inquiring into the defendant's predisposition. See, e.g., United States v. Kaminski, 703 F.2d 1004, 1008 (7th Cir. 1983).
99. Perez-Leon, 757 F.2d at 871. See also infra text accompanying note 126.
100. In United States v. Dion, the Eighth Circuit Court of Appeals listed the following ten factors which other courts have looked to in determining predisposition:
1. whether the defendant readily responded to the inducement offered;
2. the circumstances surrounding the illegal conduct;
3. "the state 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 [the defendant] is charged;
5. whether the defendant had already formed the "design" to commit the crime for which [the defendant] is charged;
II. United States v. Hinton: The Facts

In United States v. Hinton, Robert Grover, Jr., knew the defendant Delecia Hinton. The defendant had used drugs with him and located cocaine sources for him in the past. On March 4, 1989, Grover was arrested and charged with possession with intent to distribute cocaine. A few days after his arrest, police officers approached Grover and requested his cooperation in locating and arresting other cocaine sources. The police told Grover that they would bring his cooperation to the attention of the court slated to determine his sentence. With this assurance in hand, Grover agreed to cooperate.

Not long after Grover and the authorities made their agreement, Grover called Hinton and engaged in some small talk. Grover called Hinton again the next day and asked if she was “doing anything,” a cryptic way of asking if she was selling drugs. She replied that she “didn’t do that kind of stuff anymore.” The next night Grover telephoned Hinton again, but he hung up after she again stated she was no longer involved in drugs. For the next

(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."

United States v. Dion, 762 F.2d 674, 687-88 (8th Cir. 1985) (quoting federal cases to support each factor).

Citing the Supreme Court's articulation of a flexible, multi-factor analysis of predisposition, the court in Dion declined the government's suggestion that it "eschew an examination of the myriad factors used by the courts to determine predisposition . . . ." Id. at 685. While the court did examine some of the ten factors cited for purposes of determining whether each of the involved defendants was predisposed, the court did not examine each of the ten factors, and it did not expressly adopt these ten factors as the standard by which predisposition is to be analyzed in future decisions.

101. 908 F.2d 355 (8th Cir. 1990).
102. Hinton had located cocaine suppliers for Grover on three occasions. The last transaction took place approximately four months before Hinton's arrest. Id. at 356.
103. Id.
104. Id. Enlisting the cooperation of charged or convicted criminal offenders to aid in police investigations in return for the possibility of a reduced sentence is a standard and long-standing law enforcement practice. See Donnelly, supra note 2, at 1092-94.
105. During this conversation Grover told Hinton about his arrest. Hinton, 908 F.2d at 356.
106. See id.
107. Both Hinton and Grover understood this to mean that she was no longer involved in selling drugs. Id.
108. Id.
few days, Hinton stopped taking any phone calls. 109 Several days later, Grover called Hinton again to ask if she knew of a source from which he could get some cocaine. Again she told him that she did not. After this call, Hinton left her home to visit her sister and left her cordless telephone with a neighbor. The neighbor testified that the next day, while she still had Hinton's cordless telephone, she received eight to ten urgent calls from Grover asking for Hinton. 110

Hinton returned home later that day and retrieved the telephone from her neighbor. At seven o'clock the next morning, she received yet another call from Grover. 111 Grover told Hinton he had some friends visiting from out of town and asked her if she could locate some cocaine for them; Hinton again told him she could not. 112 Later that day Grover inundated Hinton with telephone calls. He telephoned her at noon and again at three o'clock that afternoon. 113 After the three o'clock call, Grover began calling Hinton every fifteen minutes until Hinton finally relented and agreed to locate a drug source for Grover. 114

Hinton and Grover arranged a drug transaction to take place in a restaurant parking lot later that evening. 115 Hinton and the drug source arrived at the parking lot, as did Grover accompanied by police officers posing as Grover's out-of-town friends. 116 Once the transaction was consummated, Hinton was arrested. 117 A jury tried and convicted Hinton of one count of aiding and abetting the distribution of cocaine 118 and one count of conspiracy to distribute cocaine. 119 On appeal, Hinton argued that she had been entrapped as a matter of law. 120

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109. The court's opinion does not indicate whether Grover stopped calling or whether he was unable to speak with Hinton because she was avoiding him. See id.
110. Id.
111. Id.
112. Id.
113. The opinion does not discuss the exact substance of these conversations. Presumably they were similar to the preceding calls: Grover asking Hinton if she would find him drugs, and Hinton declining to do so. See id. at 356.
114. Again, the court does not discuss the substance of these conversations or specify when Hinton finally agreed to find drugs for Grover. Therefore, there is no way to calculate exactly how many phone calls Grover placed to Hinton after three o'clock before she agreed to locate a drug source for him. Id.
115. Apparently, Grover made all the telephone calls to Hinton from the Office of the Hennepin County Sheriff. See id. at 356-57.
116. Id. at 357.
117. Id.
120. Hinton, 908 F.2d at 357. If a jury rejects the entrapment defense and convicts the defendant, on appeal the defendant must establish entrapment as a matter of law:

To make that showing the evidence must clearly have indicated that a government agent originated the criminal design; that the agent implanted in
III. THE HINTON DECISION

At trial, Hinton testified that she stopped her involvement with drugs three months prior to the drug transaction which resulted in her arrest. Hinton, 908 F.2d at 356. Grover, who at the time was an agent of the government, initially suggested that Hinton return to her old ways and become involved in an illegal drug transaction with him. Id. at 357. Hinton was clearly reluctant to coordinate a drug transaction for Grover, declining numerous requests to procure cocaine for him. Grover had to make repeated and persistent attempts to overcome Hinton’s continued reluctance before he ultimately succeeded in engaging Hinton in a drug transaction.

Initial reluctance, overcome only by repeated government solicitation, is considered by the Supreme Court to be strong evidence that the defendant was not predisposed to commit the crime, and was

the mind of an innocent person the disposition to commit the offense; and that the defendant then committed the criminal act at the urging of the government agent.

United States v. Shaw, 570 F.2d 770, 772 (8th Cir. 1978). To establish entrapment as a matter of law, the defendant’s lack of predisposition to commit the crime must be apparent from the uncontradicted evidence. United States v. Lazcano, 881 F.2d 402, 405 (7th Cir. 1989); United States v. Navarro, 737 F.2d 625, 634, cert. denied sub nom. Mugercia v. United States, 469 U.S. 1020 (1984). Not all jurisdictions recognize entrapment as a matter of law. See, e.g., United States v. Markovic, 911 F.2d 613, 616 (11th Cir. 1990) (“Entrapment as a matter of law is no longer a viable defense in this Circuit.”).

121. Hinton, 908 F.2d at 356.
122. Id. at 357. The court did not analyze this point. Apparently, the court readily concluded that since the government enlisted the services of Grover, he was, therefore, its agent. See supra note 5 and accompanying text.

The defense of entrapment cannot be raised when the defendant is induced into committing a crime by a private person. The person soliciting the defendant’s participation in a criminal act must be an agent of the government for the entrapment defense to arise. See United States v. Russell, 411 U.S. 423, 442 (1972) (Stewart, J., dissenting). See also Holloway v. United States, 432 F.2d 775, 776 (10th Cir. 1970); Carbajal-Portillo v. United States, 396 F.2d 944, 948 (9th Cir. 1968); Henderson v. United States, 237 F.2d 169, 175 (5th Cir. 1956).

Given that the entrapment defense is not available to a defendant induced into committing a crime by a private person, advocates of the objective formulation of the entrapment defense conclude that the focus of the entrapment defense must be on the government’s conduct and not on the defendant’s predisposition. As Justice Stewart stated:

That [the defendant] was induced, provoked or tempted [to commit the crime] by government agents does not make him any more innocent or less predisposed than he would be if he had been induced, provoked, or tempted by a private person—which of course, would not entitle him to cry “entrapment.” Since the only difference between these situations is the identity of the tempter, it follows that the significant focus must be on the conduct of the government agents, and not on the predisposition of the defendant.

Russell, 411 U.S. at 442 (Stewart, J., dissenting).
123. Hinton, 908 F.2d at 356.
124. Id.
therefore entrapped. The Eighth Circuit itself has acknowledged that reluctance, worn-down only by repeated solicitation or inducement, is the most important factor in determining the defendant’s predisposition. In Hinton, the court acknowledged that Grover “telephoned Hinton ad nauseam” in an attempt to involve her in an illegal drug transaction. Nonetheless, without discussing the extent of her continued reluctance and the repeated efforts that were necessary to overcome this reluctance, the court determined that the record established that Hinton was predisposed to commit the crime for which she was charged. Other than noting that the informant Grover phoned Hinton unceasingly until she relented and agreed to find him a supplier of cocaine, the court did not address the issue of governmental conduct in this sting operation.

125. In Russell, the Supreme Court noted that in both Sherman and Sorrells “it appears that the Government agent gained the confidence of the defendant and, despite initial reluctance, the defendant finally acceded to the repeated importunings of the agent to commit the criminal act.” Russell, 411 U.S. at 429 (emphasis added).

Numerous other courts discuss the importance of reluctance and the repeated solicitation by police necessary to overcome the defendant’s reluctance. The Eleventh Circuit stated that the defendant can prevail with an entrapment defense by showing “[t]hat he had not favorably received the government plan, and the government had to ‘push it’ on him, or that several attempts at setting up an illicit deal had failed and on at least one occasion [the defendant] had directly refused to participate.” United States v. Andrews, 765 F.2d 1491, 1499 (11th Cir. 1985) (citations omitted). Furthermore, the Seventh Circuit found the crucial factor to be whether a defendant expressed reluctance to commit the offense which was overcome only by repeated government inducement or persuasion. United States v. Perez-Leon, 757 F.2d 1098, 1103-14 (7th Cir. 1985) (citations omitted). See also United States v. McLernon, 746 F.2d 1098, 1113-14 (6th Cir. 1984) (Entrapment found where drug transaction was committed only after agent became close friends with the defendant and repeatedly solicited his involvement.); United States v. Knight, 604 F. Supp. 984 (S.D. Ohio 1985) (Entrapment found when agent had to ask defendant twice to saw off shotgun that defendant was selling before defendant agreed to do so.).

Likewise, state courts are sensitive to the importance of the efforts required to overcome a defendant’s reluctance. As stated by a California court: “What we do care about is how much and what manner of persuasion, pressure, and cajoling are brought to bear by law enforcement officials to induce persons to commit crimes.” People v. Barraza, 23 Cal. 3d 675, 688, 591 P.2d 947, 954, 153 Cal. Rptr. 459, 466 (1979).

126. United States v. Dougherty, 810 F.2d 763, 769 (8th Cir. 1987); United States v. Lard, 734 F.2d 1290, 1294-95 (8th Cir. 1984).

127. Hinton, 908 F.2d at 358.

128. See id.

129. Id. This is no doubt due to the fact that the subjective test formulated by the Supreme Court and followed by the Eighth Circuit focuses on the defendant’s predisposition to commit the offense charged and places little or no emphasis on the conduct or actions of the government. Therefore, Eighth Circuit decisions concerning entrapment are generally devoid of any analysis of police conduct. See, e.g., United States v. Williams, 873 F.2d 1102, 1104 (8th Cir. 1989) (summarily upholding defendant’s conviction despite defendant’s contention that informant used appeals to friendship to induce the defendant into selling cocaine).
The court did, however, cite two factors which formed the basis for its legal determination that Hinton was predisposed. First, Hinton had located drug sources for Grover in the past. Second, the court was troubled by the fact that Hinton would have realized a profit on the transaction if she had not been arrested. While these two factors no doubt bear on whether Hinton was predisposed to commit the crime, the court failed to critically examine the most crucial fact—the repetitive solicitation necessary to overcome Delecia Hinton's persistent refusal to participate in the illegal drug transaction. This type of review stops short of the level of mutual examination originally envisioned by the architects of the subjective standard.

A. Mutual Examination of Conduct

In Sorrells, the Court stated that there must be a mutual examination of the parties' conduct. The trial court is to consider the government's conduct on one hand and the defendant's conduct and predisposition on the other. As the Court stated: The Government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused, and 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 on that issue.

Hinton is only one in a long line of federal cases which, subsequent to Sorrells, lost sight of the scope of the inquiry envisioned under the subjective formulation of the entrapment defense. In decisions

130. The last such transaction took place about four months prior to Hinton's arrest. Id. at 358.
131. The drug source that Hinton located testified that he charged Hinton $8,000 for the eight ounces of cocaine involved in the transaction. Hinton sold the cocaine to the undercover police officers for $8,800. Hinton would have realized a $800 profit on the transaction had she not been arrested. Id. at 358. In contrast, the Supreme Court in Sherman noted that there was no evidence that Sherman made a profit on the drug transaction which lead to his arrest. Sherman v. United States, 356 U.S. 369, 375 (1958).
132. See supra text accompanying notes 97-98.
133. One must keep in mind that in early entrapment cases, the Supreme Court spoke of mutual examination. Mutual examination included an evaluation of government conduct on one hand and the defendant's predisposition on the other. See Sherman, 356 U.S. at 373; United States v. Sorrells, 287 U.S. 435, 451 (1932).
135. Id.
136. Id.
137. In decisions subsequent to Sorrells and Sherman, the Supreme Court indicated that a mutual examination of conduct is no longer required and that the scope of the inquiry is now exclusively on the defendant. In Russell, the Court noted that the entrapment defense focuses on the intent or predisposition of the defendant to commit the crime. To support its point, the Court lifted a partial quote from Sorrells, stating
prior to *Hinton*, the Eighth Circuit seriously examined the repetitive efforts employed by law enforcement officers and their informants in the solicitation of criminal conduct. The watershed case addressing this issue is *United States v. Lard*.138

**B. The Lard Decision**

In *Lard*, a friend of Lard's unwittingly introduced Lard to an undercover agent of the Federal Bureau of Alcohol, Tobacco and Firearms.139 Lard's friend had previously indicated to the agent that Lard might have a shotgun for sale. When introduced to Lard at Lard's apartment, the agent asked Lard if his shotgun was for sale; Lard said it was not. The agent then asked Lard if he had any other firearms for sale. Lard said he had a small detonator for sale. Lard showed the agent a small detonator and offered to sell it for $100. The agent told Lard the price was too high and that he needed something more powerful. Lard then presented shotgun shells which could be taped to the detonator to produce a more powerful effect. The agent again stated that the price was too high.

At this point it was suggested that a pipe bomb might be most effective for the agent's stated purpose of blowing up a car.140 After
this suggestion was broached, Lard again offered to sell the agent the detonator and shotgun shells. The agent again declined the offer. Then, after reflecting for a few minutes, Lard agreed to make a pipe bomb for the agent. He told the agent the bomb would be ready in three hours.141 When the agent returned to retrieve the bomb, Lard showed the agent how the bomb could be attached to a car’s radio, hot wire, engine coil or gasoline tank.142 As a result of this transaction, Lard was charged, tried, and convicted of making and possessing a destructive device, conspiracy to transfer, and transferring an unregistered firearm.143 On appeal, Lard claimed he had been entrapped as a matter of law.144

C. Lard and Hinton: A Comparison

A comparison of Lard and Hinton suggests a disparate application of the entrapment theory. Applying the federal standard of entrapment,145 the Lard court stated that resolution of a defendant’s entrapment claim under the subjective standard requires an “examination of the defendant’s personal background” and an examination of “the extent to which the government agent has endeavored to instigate, importune, or induce the commission of the criminal act” by the defendant.146 In Lard, the court examined the conduct of both Lard and the government agent during the encounter and held that Lard had been entrapped.147 In reaching its conclusion, the court focused on two factors: Lard’s reluctance to participate in the illegal transaction and his lack of a criminal record.

First, the court noted that Lard did not initially suggest making a pipe bomb, and that he was hesitant about undertaking the illegal

141. The agent and Lard’s friend left the apartment and returned later to pick up the bomb. Id.
142. Id.
143. Id. at 1291. The term “firearm” includes, within its definition, “a destructive device.” 26 U.S.C. § 5845(a) (1988). A “destructive device” is defined in part as “any explosive incendiary or poison gas . . . bomb.” Id. § 5845(f). If a person makes a destructive device, the person violates 26 U.S.C. § 5861(f). Possession of such a device is a violation of 26 U.S.C. § 5861(c). Transferring a destructive device is a violation of 26 U.S.C. § 5861(e). Conspiracy to transfer such a device is a violation of 18 U.S.C. § 371.
144. Lard, 734 F.2d at 1291.
145. The Lard decision sets forth the language of the subjective test for determining entrapment, but the court also quotes extensive portions of Justice Frankfurter’s concurring opinion in Sherman which advocates the objective standard. Id. at 1295-96.
146. Id. at 1293.
147. Id. at 1292-96.
Like Lard, Hinton was not the one who proposed the illicit drug transaction, and she expressed reluctance to become involved in the illegal plan. In contrast, Lard was faced with only one solicitation and expressed only mild and fleeting reluctance, agreeing to participate in the illegal act only moments after the opportunity to do so was first presented to him. The court noted that Lard's reluctance was not as sustained or substantial as the reluctance exhibited by the defendant in Sherman v. United States, but characterized this distinction as unimportant, calling it a "difference of degree, not kind." The court in Hinton reasoned that Hinton's ability to locate a drug source indicated her predisposition to commit a drug offense. Yet, the Lard court was not willing to draw the same inference from Lard's ability to construct a pipe bomb in three hours or from his display of expertise in this illegal craft as shown by his demonstration.

The Lard court's application of the subjective standard to the particular facts may justify criticism. Lard is, at best, a very weak entrapment case. In Lard, the government agent contacted the defendant on only one occasion and made only one solicitation of the defendant. Lard demonstrated minimal and fleeting reluctance before he agreed to make a pipe bomb. Lard made the bomb quickly and displayed his expertise at the craft by showing the agent how the bomb had been constructed, how the bomb worked, and how the bomb could be rigged to a car in various ways to make the car explode. Id. at 1292. All of this conduct is very strong evidence of predisposition. See supra note 77. On these weak facts, the court found entrapment as a matter of law. Moreover, the court stated that the case very nearly constituted a due process violation which would bar the defendant's conviction. Lard, 734 F.2d at 1296. The court seemed particularly disturbed by the testimony of a defense witness who stated that the government agent smoked marijuana during this encounter. Apparently this evidence was not disputed by the prosecution. Id. at 1297. The Lard facts do not add up to much of an entrapment case, much less a case constituting a violation of due process principles. Cf. United States v. Twigg, 588 F.2d 373 (3d Cir. 1978) (Overreaching nature of police involvement barred prosecution of defendants for illegal manufacture of illicit drugs.).

The case of United States v. Pfeffer, 901 F.2d 654 (8th Cir. 1990), bears striking similarities to the Lard case, and as in Lard, the court dismissed many facts which clearly indicated the defendant's predisposition to commit illegal acts. Id. at 655-57. The court characterized the Pfeffer case as one where the efforts of the government "brought it perilously near" to a case of entrapment as a matter of law. Id. at 656-57.

When first asked to build a pipe bomb, Lard did not say "no." Lard merely repeated his offer to sell the agent a detonator and some shotgun shells. After the agent did not accept Lard's offer, Lard "paus[ed] for a few minutes" and then agreed to make the pipe bomb. Lard, 734 F.2d at 1292.
of four alternative methods to rig the bomb to cause a car explosion.155

The Lard court was also impressed by the fact that Lard had no prior criminal record or known dealings in illegal firearms.156 In Hinton, the prosecution did not introduce any evidence of a criminal record to establish Hinton's predisposition.157

When analyzed in light of the principles set forth in Lard, the court's analysis in Hinton is incomplete. The only material distinction between Lard and Hinton is the existence of evidence establishing that Hinton had been involved in illegal drug transactions in the past.158 Delecia Hinton never denied her past involvement with illegal drugs.159 She testified only that she had divorced herself from the world of drugs to benefit herself and her children.160 One cannot judge the truth of this claim or the sincerity of her effort. One can, however, examine the efforts employed to enlist her participation in the drug sale which ultimately led to her conviction. Hinton refused the advances of her former friend, turned informant, on at least seven occasions before she conceded to find him a drug source.161 She testified that Grover's constant demands pushed her into participating in the illegal transaction because she had no way to escape his demands.162 Perhaps Hinton never sincerely tried to clean up her life.163 On the other hand, perhaps she was trying to change her ways, and perhaps she would have succeeded if not for the repeated cajoling and persistent solicitation undertaken by the

155. Lard, 734 F.2d at 1294-95.
156. Id. at 1294.
157. The opinion in Hinton does not expressly state that no evidence of a criminal record was presented at trial. See Hinton, 908 F.2d at 356-57. Presumably, however, if Hinton had a prior conviction or arrest record, that record would have been introduced and used at trial. Since the prosecution relied on evidence that Hinton had previously been involved in drug transactions, rather than relying on evidence of past convictions or arrests for drug offenses, the reasonable conclusion is that no past convictions or arrests existed. Id.
158. Compare Hinton, 908 F.2d at 358, with Lard, 734 F.2d at 1294.
159. Hinton, 908 F.2d at 356.
160. Id.
161. Id.
162. Id. at 357.
163. Under the Hinton facts, a jury could reasonably find that Delecia Hinton was an "unwary criminal," rather than an "unwary innocent." Hinton knew Grover had been arrested. Id. at 356. She communicated to her sister her concern that something might go wrong with the drug transaction prior to meeting Grover. Id. at 357. Given these facts, Hinton's reluctance could have exhibited her fear of being set up, rather than a lack of predisposition. The court did not, however, base its finding of no entrapment on these facts. See id. at 358.

In any case, the court departed from past principles by failing to apply a critical portion of entrapment analysis: the effect of the repeated solicitations used to overcome Hinton's ongoing reluctance to participate in the illegal transaction.
government's agent, Robert Grover.  

**CONCLUSION**

Given the present manner in which courts apply the subjective standard of entrapment, a defendant who has committed prior illegal acts involving drugs is forever labeled "predisposed" and is essentially foreclosed from successfully invoking the entrapment defense. Regardless of whether a person's past drug involvement resulted in conviction or arrest, evidence of drug activity\(^{165}\) is admissible. For all practical purposes, this evidence automatically defeats any claim that the government entrapped the defendant. Virtually any evidence of prior bad acts, similar to the crime charged, dooms the defendant to being labeled "predisposed." Under the subjective test, the court does not meaningfully examine police conduct in encouraging the defendant's criminal conduct. By focusing on the prior misdeeds of the accused, the police may establish predisposition and pursue prior drug offenders overzealously, confident that proof of prior criminal activity will defeat any claim of entrapment.\(^{166}\)

A serious disparity exists between what is permissible police conduct in soliciting criminal activity from "innocent" and "predisposed" individuals. A defendant with a clean record and good reputation, such as Lard, can establish entrapment where the government engages in minimal efforts to elicit criminal conduct.\(^{167}\) On the other hand, a defendant with a tainted reputation, such as Hinton, cannot establish entrapment when government officials exhibit extended and repeated efforts to persuade the defendant to commit an illegal act.\(^{168}\) One must ask: What societal objective is served by undertaking persistent efforts to induce so-called "predisposed" individuals into committing crimes when these individuals claim to be trying to overcome and avoid the type of conduct which

\(^{164}\) *See id. at 356. Justice Frankfurter stated that the immense power of government is misdirected "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." Sherman v. United States, 356 U.S. 369, 384 (1958) (Frankfurter, J., concurring).*

\(^{165}\) *Few courts discuss the impact of the subjective test and the admission of evidence of prior convictions on the goal of rehabilitation. Justice Frankfurter is one of the few to have addressed this issue. In his concurring opinion in Sherman v. United States, Justice Frankfurter stated that past convictions do not "open [the defendant] to police practices, aimed at securing his repeated conviction, from which the ordinary citizen is protected. The whole ameliorative hopes of modern penology and prison administration strongly counsel against such a view." Sherman, 356 U.S. at 383.*

\(^{166}\) *See Park, *supra* note 3, at 212.*

\(^{167}\) *See United States *v.* Lard, 734 F.2d 1290, 1992 (8th Cir. 1984).*

\(^{168}\) *See Hinton, 908 F.2d at 356-57.*
gave rise to their "predisposition"?\(^{169}\) At the very least, the court should examine the efforts that law enforcement officials and agents undertook to elicit the defendant's illegal conduct.

For a defendant labeled "predisposed," the last gasp defense is that the government agents went too far in soliciting and inducing the criminal conduct and that due process principles should bar the defendant's conviction. Within the Eighth Circuit, however, this defense presently exists on a theoretical level only.\(^{170}\) This circuit has not determined the standard for establishing governmental conduct so outrageous as to bar conviction of a predisposed defendant.\(^{171}\) The type of repeated solicitation and badgering which took place in *Hinton* would most likely not meet this standard.

In *Hinton v. United States*, the Eighth Circuit bypassed a prime opportunity to critically examine the application of the subjective formulation of the entrapment defense in cases involving the repeated and persistent solicitation of individuals who have engaged in prior illegal drug transactions. More importantly, the court in *Hinton* failed to give weight to the legal principle enunciated in *Lard*, that a defendant's initial reluctance to commit an illegal act is of paramount importance in the entrapment analysis. In casting aside the use of this critical factor, the court signalled that it will limit the scope of the entrapment defense even more severely in the future.

*Troy A. Wolf*

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169. The Second Circuit stated that the entrapment doctrine originates from a revulsion against using the powers of government "to beguile innocent, though duc
tile, persons into lapses which they might otherwise resist." United States v. Becker, 62 F.2d 1007, 1009 (2d Cir. 1933).

170. *See supra* note 43.

171. *Id.*