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Proving Entrapment Under the Predisposition Test

Paul Marcus

William & Mary Law School, pxmarc@wm.edu
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I. INTRODUCTION

The United States Supreme Court and a majority of the states have chosen to focus attention in the entrapment area on the individual: his state of mind, his actions, and his relationship with government officers. This majority view rejects the objective rule sometimes applied in entrapment cases and favors a subjective test. The sense has been that the entrapment test is not based on a particular constitutional principle or a particular construction of the substantive criminal law. Yet, the subjective test was developed in response to a concern about the legislative intent of Congress in adopting its substantive criminal code sections: Congress could not have intended an innocent individual to be found guilty of a crime when a government agent improperly induced that person into committing the criminal act. The United States Supreme Court has made this point repeatedly in numerous decisions. The following excerpts are illustrative:

Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned.

... We think that this established principle of construction is applicable here. We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part

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* Paul Marcus, 1987. During the coming year, Dean Marcus will complete THE ENTRAPMENT DEFENSE (Kluwer & Co.).
** Dean and Professor of Law, University of Arizona.
1. For a good discussion of the state statutes which follow the subjective principle, see Park, The Entrapment Controversy, 60 MINN. L. REV. 163 (1976).
2. The objective test, of course, focuses its attention almost exclusively on the conduct of the Government agents; thus, the individual defendant becomes somewhat irrelevant to the determination of whether entrapment existed. For thoughtful discussions of the point, see the opinion of Justice Roberts concurring in the judgment in Sorrells v. United States, 287 U.S. 435, 453 (1932), and the concurring opinion of Justice Frankfurter in Sherman v. United States, 356 U.S. 369, 378 (1958). Both of these cases are discussed at length in Marcus, The Entrapment Defense and the Procedural Issues, 22 CRIM. L. BULL. 197 (1986).
of persons otherwise innocent in order to lure them to its commission and to punish them. . . . [T]he Government in such a case is estopped to prosecute or the courts should bar the prosecution.3;

The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. Selecting the proper time, the informer then tells the government agent. The set-up is accepted by the agent without even a question as to the manner in which the informer encountered the seller. Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this.; and

[ Entrapment is a relatively limited defense. It is rooted, not in any authority of the Judicial Branch to dismiss prosecutions for what it feels to have been “overzealous law enforcement,” but instead in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, but was induced to commit them by the government.5

Justice Rehnquist also noted in United States v. Hampton:

“[T]he entrapment defense ‘focus[es] on the intent or predisposition of the defendant to commit the crime,’ rather than upon the conduct of the Government’s agents.” 6

The lower federal courts have also stated that the principal focus in the entrapment area is on the individual defendant on trial.7 The Fifth Circuit recently stated the matter quite clearly: “The entrapment defense focuses on the intent or predisposition of the defendant to commit the crime rather than on the conduct of the government's

7. To be distinguished from the attention which would be given, under the objective test, to government conduct. As stated by Justice Frankfurter in the Sherman case,

It is surely sheer fiction to suggest that a conviction cannot be had when a defendant has been entrapped by government officers or informers because “Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations....”

The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced.

356 U.S. at 379, 380.
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agents. . . The question of entrapment goes to the basic guilt or innocence of the defendant."8

The Eighth Circuit in *United States v. Lard*9 relied on an earlier opinion of Justice Brandeis when it summarized the subjective test:

The entrapment defense is based on the assumption that Congress did not intend to punish a defendant who has committed all the elements of a proscribed offense upon the inducement or instigation of government agents. . . . "[T]he Government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature."10

II. THE ELEMENTS OF THE TEST

Given that the basis for the subjective entrapment defense is the nature of the relationship that the individual has with the government, it is not surprising that the actual test used in practice focuses on the two main elements described below. The Court in *Sorrells* explained: "[T]he issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials."11

A few statutory references also illustrate this two-part analysis. The Illinois code provides as follows:

A person is not guilty of an offense if his conduct is incited or induced by a public officer or employee or agent of either, for the purpose of obtaining evidence for the prosecution of such person. However, this Section is inapplicable if a public officer or employee, or agent of either, merely affords to such person the opportunity or facility for committing an offense in furtherance of a criminal purpose which such person has originated.12

The Missouri law is even more specific:

An "entrapment" is perpetuated [sic] if a law enforcement officer or a person acting in cooperation with such an officer,

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8. United States v. Yater, 756 F.2d 1058, 1062 (5th Cir.) (citations omitted), *cert. denied*, 106 S. Ct. 225 (1985). The court went on to explain that the defense had to show that the government agent created "a substantial risk that the offense would be committed by a person other than one ready to commit it." *Id.* at 1062 n.6 (quoting *Pierce v. United States*, 414 F.2d 163, 168 (5th Cir. 1969)).
9. 734 F.2d 1290 (8th Cir. 1984).
10. 734 F.2d at 1292 (quoting *Casey v. United States*, 276 U.S. 413, 423 (1928) (Brandeis, J., dissenting)).
12. ILL. ANN. STAT. ch. 38, par. 7-12 (Smith-Hurd 1972).
for the purpose of obtaining evidence of the commission of an offense, solicits, encourages or otherwise induces another person to engage in conduct when he was not ready and willing to engage in such conduct. 13

It is clear from Supreme Court discussions and various statutory provisions that under the subjective test for entrapment the two primary issues to be litigated at trial are: 14 (1) evidence of inducement by government agents; and (2) the state of mind of the defendant. While recognizing that these two questions are usually at issue in entrapment cases, the Fourth Circuit in United States v. Hunt 15 concluded that the predisposition element of the two-part analysis is the more important one. It explained that "the essential element of the entrapment defense is the defendant's lack of predisposition to commit the crime charged." 16 The court's conclusion that the predisposition element is the determinative one may have been correct, but that conclusion might have been reached somewhat quickly. In many cases a host of issues involved with inducement must also be considered. These issues include: (1) the impropriety of inducement as a matter of law; (2) the mechanics of proving inducement; (3) the nature of the burden of proof as to inducement; and (4) the distinction between questions of law and questions of fact with respect to government inducement.

A. Is Inducement Proper?

Courts have recognized consistently that some form of government inducement or enticement may be appropriate in seeking to engage the defendant in criminal conduct. Indeed, Chief Justice Rehnquist has indicated that such government action may be not only proper but also necessary, particularly in cases where the nature of the criminal activity is such as to avoid criminal detection. In United States v. Russell, 17 government agents supplied the defendants with an ingredient that was difficult for the defendants to obtain, but necessary to enable the defendants to manufacture an illegal drug. The government officers arrested the defendants as soon as the drug was manufactured. Justice Rehnquist responded to the defense argument that such government involvement in crime was inherently improper:

14. The matter is normally resolved at trial. Most claims cannot be disposed of pretrial. See infra text accompanying notes 31-34.
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The illicit manufacture of drugs is not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise. In order to obtain convictions for illegally manufacturing drugs, the gathering of evidence of past unlawful conduct frequently proves to be an all but impossible task. Thus in drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of investigation; if that be so, then the supply of some item of value that the drug ring requires must, as a general rule, also be permissible. For an agent will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them. Law enforcement tactics such as this can hardly be said to violate "fundamental fairness" or [be] "shocking to the universal sense of justice."\(^{18}\)

Another judge recently pointed out that "the entrapment defense has no application where the government agents merely use stealth, strategy, or deception to trap an 'unwary criminal' or merely provide the defendant with an opportunity or facility to commit the crime."\(^{19}\)

It is clear, therefore, that inducement as such is not inherently improper or unlawful under the subjective entrapment test. Inducement can, however, exceed permissible bounds and become subject to sanction. Indeed, the very judge who made the comment quoted above further remarked that the government cannot be involved in the "manufacturing of crime." Citing the majority opinion in *Sherman* the judge quoted, "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime."\(^{20}\)

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18. 411 U.S. at 432. Justice Rehnquist, writing for the majority, continued: "Nor does it seem particularly desirable for the law to grant complete immunity from prosecution to one who himself planned to commit a crime, and then committed it, simply because government undercover agents subjected him to inducement, which might have seduced a hypothetical individual who was not so predisposed." *Id.* at 434. The dissenters in the case strongly disagreed with the majority opinion.

In this case, the chemical ingredient was available only to licensed persons, and the Government itself had requested suppliers not to sell that ingredient even to people with a license. Yet the Government agent readily offered, and supplied, that ingredient to an unlicensed person and asked him to make a certain illegal drug with it. The Government then prosecuted that person for making the drug produced with the very ingredient which its agent had so helpfully supplied. This strikes me as the very pattern of conduct that should be held to constitute entrapment as a matter of law.

411 U.S. at 449 (Stewart, J., dissenting) (emphasis in original).


20. *Id.* (quoting *Sherman v. United States*, 356 U.S. 369, 372 (1958)).
The majority in Sherman emphasized that to "merely afford opportunities or facilities for the commission of the offense does not constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the creative activity' of law enforcement officials." 21

In connection with the issue of inducement in entrapment cases, two central questions arise: (1) procedurally, how does one prove sufficient inducement to have that issue submitted as a question of fact for the jury; and (2) when is inducement sufficiently proved as a matter of law.

B. Proving Inducement: The Procedural Issues

In practice, relatively few procedural problems seem to arise with respect to the inducement prong of the entrapment test. 22 The rules may be stated with succinctness and clarity. It is not enough for the defendant to show that government agents offered him an opportunity to engage in criminal activity. Something more overreaching on the part of the government is necessary. As stated by the court in United States v. Christopher: "[It is not enough] that the Government furnished the opportunity for the commission of a crime.... [There must still be] some evidence of inducement or persuasion by the Government." 23

The principal problem in this area arises with defining what is sufficient government conduct to constitute inducement, and not the mere offering of an opportunity. 24 Nevertheless, the law is now well-settled that the burden of offering evidence of inducement rests, at


22. For detailed discussion of the procedural issues involved with this question, see Marcus, supra note 2.

23. 488 F.2d 849, 850-51 (9th Cir. 1973). The court in United States v. Andrews, 765 F.2d 1491, 1499 (11th Cir.) (citations omitted), cert. denied, 106 S. Ct. 815 (1985), explained the basic point:

[E]vidence that the government agent sought out or initiated contact with the defendant, or was the first to propose the illicit transaction, has been held to be insufficient to meet the defendant's burden. The defendant must demonstrate not merely inducement or suggestion on the part of the government but "an element of persuasion or mild coercion." The defendant may make such a showing by demonstrating that he had not favorably received the government plan and the government had had to "push it" on him, or that several attempts at setting up an illicit deal had failed and on at least one occasion he had directly refused to participate. When the defendant makes such a showing, the burden shifts to the government to demonstrate beyond a reasonable doubt that the defendant was predisposed to commit the offense charged.

24. This problem will be explored infra in text accompanying notes 35-88.
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least initially, on the defendant, not on the government. If the defendant offers sufficient evidence of inducement, the burden then shifts to the government with respect to the question of predisposition.

While the courts are not in agreement as to the evidentiary burden that the defense must meet, it is fair to say that the burden is a limited one. Some courts require evidence which amounts to "more than a scintilla," others discuss "any foundation in the evidence," and still others mention "some evidence" of government inducement. However, the majority of courts rely on the traditional preponderance of the evidence standard. Thus, if the defendant offers evidence sufficient to demonstrate that he has more likely than not been the victim of government inducement, the burden as to predisposition will then shift to the government.

The defendant at trial can satisfy the appropriate standard by offering evidence to demonstrate inducement, or by showing that the government’s evidence reveals its inducement. The defendant generally cannot make this showing prior to the trial. The courts have been fairly consistent in noting that the issues concerning inducement and predisposition tend to be evidentiary in nature and are thus ill-suited for pretrial decisions. In State v. Roberts the court refused to allow the defendant to raise the entrapment defense during a pretrial hearing on a motion to suppress. Similarly, most courts will hold that when a defendant seeks to enter a guilty plea, such a plea waives the defendant’s right to claim the defense of entrapment. An exception to the

25. See, e.g., United States v. Sarmiento, 786 F.2d 665, 667 (5th Cir. 1986). Some courts have adopted a "unitary standard" such that if the defendant demonstrates some act of inducement by the government the case still cannot go to the jury unless there is evidence showing "unreadiness" on the defendant's own part. See United States v. Gambino, 788 F.2d 938, 943 (3d Cir. 1986); Kadis v. United States, 373 F.2d 370, 374 (1st Cir. 1967). In some courts the procedure becomes more awkward as to this unitary standard. These cases require the defendant to respond to the government's showing of predisposition with a demonstration of lack of predisposition. See, e.g., the discussion in United States v. Burkley, 591 F.2d 903, 914 (D.C. Cir.), cert. denied, 440 U.S. 966 (1978).
26. United States v. Wollfs, 594 F.2d 77, 80 (5th Cir. 1979).
27. United States v. Timberlake, 559 F.2d 1375, 1379 (5th Cir. 1977).
28. Burkley, 591 F.2d at 914.
29. The preponderance test has been supported by the drafters of both the Model Penal Code and the proposed revised Federal Criminal Code. Though each involves the objective test (not the majority subjective test) the initial inducement burden appears similar in the Model Penal Code § 2.13(2) (1985) and the Final Report of the National Commission on Reform of Federal Criminal Laws § 702(1) (1971).
A pretrial rule may be found in cases where a motion in limine is brought. For example, in *State v. Burciaga* the government announced at a pretrial hearing its intention to introduce evidence of the defendant's prior conviction as bearing on the issue of his predisposition. The defendant's motion in limine on this point was granted and affirmed on appeal.

The element of inducement can rarely be shown to be a question of law that must be decided by the judge. Courts in almost all cases have determined that both the questions of whether inducement existed and whether it was sufficient are questions of fact. The evidentiary burden to be met in order to have the judge decide the issue as a matter of law is a high one: "[T]he evidence must clearly have indicated that a government agent originated the criminal design; that the agent implanted in 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."  

Defendants often lose their claims as a matter of law because all they can show is that a government agent afforded an opportunity or facilities for the commission of an offense. The defendant will prevail as a matter of law only "when the criminal intent originates with the officer and the defendant is lured or induced into the commission of a crime he was not ready and willing to engage in . . . ."

Under unusual circumstances the defendant may win as a matter of law. The most famous example is the United States Supreme Court case of *Sherman v. United States*. The defendant in *Sherman* had a history of selling drugs and was being treated for narcotics addiction. When a government agent approached the defendant in an attempt to buy drugs, the defendant initially was reluctant to make the sale. Ultimately he acceded to the strong wishes of the informant. The defendant was convicted of selling drugs to the government agent. The Court held that these facts showed entrapment as a matter of law and voiced strong disapproval of the government's actions:

The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but

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34. Id. at 1386-87.
35. United States v. Shaw, 570 F.2d 770, 772 (8th Cir. 1978).
36. United States v. Quinn, 543 F.2d 640, 647 (8th Cir. 1976). See also United States v. Randolph, 738 F.2d 244 (8th Cir. 1984).
39. Id. at 376.
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also into returning to the habit of use. . . . Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this.\textsuperscript{40}

\textit{Sherman} was expanded for some time to cover cases in which the evidence clearly showed that government agents "supplied all the ingredients of the offense: the plan, the marijuana, the buyer, the money for the purchase."\textsuperscript{41} Under such circumstances some courts held that "[t]he criminal conduct is clearly the product of the creative activity of the law enforcement officers."\textsuperscript{42} However, the Supreme Court sounded the death knell for this principle in \textit{Hampton v. United States}.\textsuperscript{43} In \textit{Hampton} the Court noted that the essential question in such a case of government involvement was not the degree of government activity, but rather the predisposition of the defendant.\textsuperscript{44}

Judge Gesell presented one of the most thoughtful and detailed discussions of the question of inducement as a matter of law in one of the major Abscam cases, \textit{United States v. Kelly}.\textsuperscript{45} In \textit{Kelly} the FBI created a fictitious organization, Abdul Enterprises, through which it conducted a series of negotiations that resulted in making contact with the defendant about assisting a member of the organization with an immigration problem. An arrangement was made in which the defendant, a Congressman, would receive $25,000 "as a down payment if he promised to introduce immigration legislation on behalf of one of the sheiks."\textsuperscript{46} Later the defendant was promised a total sum of $500,000 for his assistance with this problem. Additionally, millions of dollars were to be invested in the defendant's congressional district in Florida. Numerous negotiations and alterations of the arrangement occurred. The FBI videotaped the defendant as he reassured the principals that he would perform the requested services. The defendant was convicted of: (1) conspiracy to commit bribery and to defraud the United States;\textsuperscript{47} (2) bribery;\textsuperscript{48} and (3) interstate travel to engage in racketeering enterprises.\textsuperscript{49} The jury was instructed that it could acquit

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} (footnote omitted).
\item 425 U.S. 494 (1976).
\item \textit{Id.} at 488, 489.
\item 748 F.2d 691 (D.C. Cir. 1984).
\item \textit{Id.} at 693.
\item 18 U.S.C. \textsection 371 (1982).
\item 18 U.S.C. \textsection 201(c)(2) (1982).
\item 18 U.S.C. \textsection 1952 (1982).
\end{enumerate}
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the defendant based upon the entrapment claim if it found that the defendant had been induced to commit the crime and that there was a reasonable doubt concerning his predisposition.

The defendant in *Kelly* argued that inducement had been established as a matter of law; therefore, the issue should not have been submitted to the jury. The court recognized that "[i]nducement focuses on whether the government’s conduct could have caused an un­disposed person to commit a crime." The court noted that the inquiry was an objective one "measuring whether the government’s behavior was such that a law-abiding citizen’s will to obey the law could have been overborne." The defendant argued that the case should never have gone to the jury on the inducement question because the evidence was clearly sufficient on this issue. The government contended that its offer to the defendant amounted to nothing more than giving the defendant "a single opportunity to commit a crime." The court ultimately decided that this issue was a question for the jury that could not be decided as a matter of law:

Reasonable persons could differ as to whether the amount of money offered Kelly and the manner in which the offer unfolded went beyond merely offering Kelly an opportunity to commit a crime. The question of how a reasonable person would have reacted is a quintessential jury issue, and the evidence here is not so unequivocal to mandate one conclusion or another. Although the trial court had a personal view that there was some evidence of inducement, it was scrupulously correct in deciding that a reasonable juror could come to a different conclusion, and it correctly refused to find inducement as a matter of law.

The focus of the inducement issue, whether "government conduct . . . created a risk of persuading [an] unpredisposed person to commit the crime," is especially appropriate for jury determination. The type of government activity and its impact on the defendant almost always appear to be issues for the jury. The Fifth Circuit stated in

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50. 748 P.2d at 697.
51. *Id.* at 698.
52. *Id.*
53. *Id.* (citations and footnotes omitted). In People v. Boalbey, 143 Ill. App. 3d 362, 493 N.E.2d 369 (1986), entrapment was found as a matter of law. The case concerned the sale of food stamps. No evidence regarding the defendant’s predisposition was ever offered. The government’s proof of the defendant’s willingness to participate "cannot fill the evidentiary void." *Id.* at 371.
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*United States v. Yater*:55 “The government’s provision of aid, incentive, and opportunity to commit the crime does not amount to entrapment unless it appears that the ‘defendant has done that which he would never have done were it not for the inducement of Government operatives.’”56

The jury should hear most issues involving inducement.57 However, the question of inducement is usually a question of law for the judge when the defendant can only offer evidence that “a government agent has provided the accused with the opportunity or facilities for the commission of the crime.”58 This principle has been stated repeatedly and consistently in the jurisdictions that have adopted the subjective standard. For example, Georgia does not recognize an entrapment defense “when the officer merely furnishes an opportunity to a person who is ready to commit the offense.”59 In the federal courts the principle is the same. In *United States v. Kadis*60 the court stated, “[T]here must be evidence] that a government agent corrupted him . . . but such a showing is not made simply by evidence of a solicitation.”61 The First Circuit approved the district court’s charge that “entrapment means that law enforcement officials, acting either directly or through an agent, induced or persuaded an otherwise unwilling person to commit an unlawful act.”62 The court went on to say, “[M]erely affording the defendant the opportunity for commission of the offense does not constitute entrapment.”63

This theory is applied most often in cases in which the government allegations involve drug violations, fraud schemes, or the commission of sexual offenses. The government allegations in *United

56. Id. at 1062 (quoting United States v. Bower, 575 F.2d 499, 504 (5th Cir.), cert. denied, 439 U.S. 983 (1978)). The court quoted extensively from earlier decisions in elaborating on this explanation. In a footnote, the court adopted the language of Pierce v. United States, 414 F.2d 163, 168 (5th Cir. 1969), to the effect that the defense could be raised where the government conduct created “a substantial risk that the offense would be committed by a person other than one ready to commit it . . . .” The court made it clear that merely providing an opportunity to commit the crime did not create such a risk. Id. at n.6.
57. See infra text accompanying notes 74-86.
58. *Yater*, 756 F.2d at 1062 n.6.
60. 373 F.2d 370 (1st Cir. 1967). Remember that the First Circuit expressly rejected the “bifurcation” of the test for entrapment between inducement and predisposition. Id. at 373-74. That court has persisted in that view. United States v. Parisi, 674 F.2d 126, 127 (1st Cir. 1982). For a discussion of this “unitary” standard see *supra* note 25.
61. 373 F.2d at 374.
63. Id. at 621-22 (quoting United States v. Fera, 616 F.2d 590, 596 (1st Cir.), cert. denied, 446 U.S. 969 (1980)).
States v. Gunter\textsuperscript{64} involved drug violations. The defendant in Gunter offered evidence that a government agent contacted him and agreed to buy cocaine from him.\textsuperscript{65} The court was unimpressed with the claim and voiced "serious doubts as to whether there was even enough evidence of inducement . . . to raise the defense of entrapment."\textsuperscript{66} The court discussed the point further:

The only evidence of entrapment before the first sale was [the police agent's] testimony that he made contact with [the defendant] several times to set up the drug purchase, and that he paid $1,200 for what turned out to be 12.3 grams of cocaine. We are not impressed by defendant's argument that [the police agent's] admission that he made contact with [the defendant] demonstrates either a lack of predisposition or Government inducement. Drug dealers are not known to call potential clients and solicit their business, rather a dealer who expects to stay out of jail is careful about to whom he sells. That [the police agent] made several calls to arrange the sale is also not extraordinary. Drug deals often take time to arrange. We are similarly unimpressed by defendant's claim that $1,200 was such a large amount of money to pay for the cocaine that it amounted to undue inducement. This argument ignores that defendants claimed to be providing 14 grams, not 12.3 grams, and that it was only their own dishonesty that reaped them greater profit. Second, there was evidence that cocaine often sold for $100 a gram, so $1,200 for more than 12 grams was not unusual. The mere solicitation by [the police agent], and the offer of an opportunity to commit the crime, does not show entrapment.\textsuperscript{67}

The rule is also followed in fraud cases such as United States v. Randolph\textsuperscript{68} where the defendant was found guilty of unlawfully acquiring food stamp coupons. An undercover agent of the United States Department of Agriculture contacted the defendant in Ran-

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  \item \textsuperscript{64} 741 F.2d 151 (7th Cir. 1984).
  \item \textsuperscript{65} What is so troublesome in many of these cases is the "unclean hands" of the government agent who is alleged to have entrapped the defendant. As the court in Gunter noted: As with many informants, Gannon was not motivated by a fervent desire to combat crime, but rather by a promise that his work would reduce the consequences of his own criminal conduct. In return for setting up purchases from drug dealers Gannon was to receive consideration on charges that he stole a late model Corvette Stingray automobile. Gannon also received $100 for every purchase. \textit{Id.} at 152.
  \item \textsuperscript{66} \textit{Id.} at 153.
  \item \textsuperscript{67} \textit{Id.} at 153-54. Following this general principle in drug cases are these opinions: State v. Martin, 713 P.2d 60 (Utah 1986); State v. Gilman, 110 R.I. 207, 291 A.2d 425 (1972); Goss-meyer v. State, 482 N.E.2d 239 (Ind. 1985); and Gonzales v. State, 697 S.W.2d 50 (Tex. App.— Beaumont 1985, pet. ref'd).
  \item \textsuperscript{68} 738 F.2d 244 (8th Cir. 1984).
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dolph and offered to sell her food stamp coupons at a discount. The offer was to sell the food stamps for a discount of more than 50% of their face value, a clear violation of federal law. 69 This transaction was the basis of the conviction. The defendant claimed that she had been entrapped as a matter of law because of the government’s improper action. The court rejected this argument: “There was no evidence that [the agent] did anything other than offer [defendant] the opportunity to commit a crime. This does not constitute entrapment.” 70

In Verble v. State 71 the court considered the defense claim on the inducement issue in connection with various sex crimes. The police officers in Verble contacted the defendants while investigating advertisements placed in a magazine. The language in the magazine led the officers to believe that by placing the ads the defendants were advertising sex for hire. The officers contacted the defendants through a phone number listed in the ads, arranged for a meeting at a motel room, and gave money to the defendants. The defendants told the officers that in exchange for the money the men would perform sodomy on the officers. The defendants claimed that they had been entrapped into committing the crime and thus could not be found guilty. The court concluded that a guilty verdict was indeed appropriate because the evidence showed that “the officer merely furnished appellants an opportunity to solicit sodomy and that they were also guilty beyond reasonable doubt.” 72

As Sherman illustrates, it is possible for the defendant to win his inducement claim as a matter of law. However, it is more likely that the defendant will fail to offer sufficient evidence to establish inducement as a matter of law and, instead, will be able to offer evidence only of the government’s offering him an opportunity to engage in criminal activities. 73 The inducement issue is generally a jury question to be raised in connection with the issue of predisposition.

70. 738 F.2d at 246 (quoting Holmes v. United States, 709 F.2d 19, 20 (8th Cir. 1983) (per curiam) (citation omitted)). See also United States v. Quinn, 543 F.2d 640 (8th Cir. 1976) (discussing test to find entrapment as a matter of law).
72. Id. at 321-22, 323 S.E.2d at 241.
73. The very nature of some crimes may make it difficult for the defendant to use the inducement claim. For instance, in State v. Jones, 598 S.W.2d 209 (Tenn. 1980), the court noted that “where solicitation is the gist of an offense and an indispensable element thereof, the defense of entrapment is not available. One may not be solicited into soliciting. He is either the solicitor or the solicitee. If the former, he may not be the latter.” Id. at 221.
C. The True Inducement Problem: A Jury Question

In the vast majority of cases the inducement issue is submitted as a jury issue because the defendant can usually offer fairly substantial evidence of government involvement, and the prosecution does not normally contest such evidence. The traditional test for determining when the inducement matter will be submitted as a jury issue was stated by the Arizona Supreme Court in State v. Boccelli: "Entrapment is a question for the jury unless there is no evidence to support the defense, or unless uncontradicted testimony makes it patently clear that an otherwise innocent person has been induced to commit the acts." A more recent statement of the principle can be found in United States v. Yater:

The question of entrapment goes to the basic guilt or innocence of the defendant. . . . "The concern is thus that the accused is not guilty, since he had no criminal intent not implanted by the government, rather than that he is guilty but may avoid the consequences of his criminal conduct because of the government's undue inducement." Because entrapment involves the basic determination of guilt or innocence, it is a jury issue . . . .

Several cases illustrate the manner in which the inducement issue can be raised before the jury. In State v. Jones the defendant became involved in a scheme devised by government agents to secure a conviction of the defendant for violation of gun control laws. The agents worked closely with the defendant and deceived him with respect to their ultimate goal. In response to the defense argument that such conduct established entrapment as a matter of law, the court concluded that "[a]s distasteful as this may be, it is a legitimate weapon in the arsenal of law enforcement. The law does not mandate a frank, forthright or even honest approach when seeking to ferret out criminal activity." The court stressed that the record be made clear that gov-

74. The true battleground in most of these cases deals with predisposition. See infra text accompanying notes 88-126.
76. Id. at 497, 467 P.2d at 742 (citation omitted). There must exist some doubt today as to the court's ultimate holding in Boccelli concerning a finding of entrapment due to the government's involvement in manufacturing the drugs and providing a buyer. See the discussion in the Hampton case in Marcus, The Development of Entrapment Law, 33 WAYNE ST. L. REV. 5 (1987).
77. 756 F.2d 1058 (5th Cir.), cert. denied, 106 S. Ct. 225 (1985).
78. Id. at 1062 (quoting United States v. Henry, 749 F.2d 203, 210 (5th Cir. 1984) (en banc)).
79. 598 S.W.2d 209 (Tenn. 1980).
80. Id. at 212.
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government agents were closely involved with the defendant's activities, making false and fraudulent representations, but that the evidence was not sufficient to show, as a matter of law, that he had been induced into committing the crime.81

In United States v. Knight82 the defendant waived his right to a jury trial and was brought before the judge for possession and transfer of a "sawed-off" shotgun.83 The defendant's primary evidence with respect to inducement was his testimony that he offered to sell the weapon in an "unsawed-off" state, but the government agent insisted that he would buy the weapon only if the barrel of it was shortened to a length that was prohibited by law. The defendant agreed to saw the barrel off only on the second meeting, after first having refused the government request to saw it off. He stated that he ultimately sawed the barrel off because he needed the money. The trial judge held that this evidence was sufficient to demonstrate government inducement under any of the applicable standards. The court then focused its attention on the question of the predisposition of the defendant to commit the offense. The court ultimately had doubts as to the defendant's predisposition at the time of the initial contact between him and the government and found the defendant not guilty.84

Another good illustration of the way in which the inducement issue usually comes before the trier of fact can be found in United States v. Kelly,85 another case involving one of the numerous Abscam prosecutions. The defendant argued that because he had been promised such a large sum of money there was no triable issue concerning inducement. His position was that inducement had been shown as a matter of law because the offer of such a large sum of money was government conduct that "could have caused an undisposed person to commit a crime."86 The court strongly rejected this argument:

Reasonable persons could differ as to whether the amount of money offered Kelly and the manner in which the offer unfolded went beyond merely offering Kelly an opportunity to commit a crime. The question of how a reasonable person

81. Id. at 220.
83. In violation of 26 U.S.C. §§ 5861(d), (e) and 5871 (1982).
84. The judge relied heavily on the fact that it took two meetings for the defendant to be persuaded to saw off the barrel and the government's knowledge of the defendant's precarious financial condition. There appeared to be genuine reluctance on the part of the defendant which was only overcome by a relationship purposely established by the government. 604 F. Supp. at 987.
85. 748 F.2d 691 (D.C. Cir. 1984).
86. Id. at 697.
would have reacted is a quintessential jury issue, and the evidence here is not so unequivocal to mandate one conclusion or another. 87

D. Proving Predisposition

The subjective test enunciated by the Supreme Court is based upon two factors: inducement and predisposition. As has been noted previously, however, the predisposition aspect is the major concern and has been the chief source of litigation in the area. The very nature of the subjective test necessitates a showing of predisposition. As Chief Justice Rehnquist pointed out in the Russell case:

[E]ntrapment is a relatively limited defense. It is rooted, not in any authority of the Judicial Branch to dismiss prosecutions for what it feels to have been “overzealous law enforcement,” but instead in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense but was induced to commit them by the Government. 88

When the question is whether the defendant committed the crime solely because of inducement by the government, the inquiry naturally focuses on the state of mind of the defendant at the time of the inducement. The Supreme Court took this position in its first major entrapment decision, Sorrells v. United States:

The defense is available, not in the view that the accused though guilty may go free, but that the government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct. The federal courts in sustaining the defense in such circumstances have proceeded in the view that the defendant is not guilty. 89

The “controlling question [thus is] whether the defendant is a person otherwise innocent . . . .” 90 Given that reliance on the defendant’s state of mind is the controlling question, it is impossible for the defendant to complain when the evidence in the case centers on proving his predisposition:

[I]f the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has

87. Id. at 698 (footnotes omitted).
89. 287 U.S. 435, 452 (1932).
90. Id. at 451.
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brought it upon himself by reason of the nature of the defense.\footnote{91}

In applying the predisposition analysis, courts have stated the problem in a variety of ways. The Seventh Circuit in United States v. Fields\footnote{92} noted that predisposition "refers to whether the defendant had a readiness and willingness to commit the offenses charged, or whether the government implanted in the mind of an innocent person the disposition to commit the offense."\footnote{93} Similarly, the Sixth Circuit commented that the issue is whether the defendant exhibited "a predisposition to commit an offense, [because] the governmental participation in the commission of an offense by itself cannot be the basis of an entrapment defense.\footnote{94}

The state courts have followed a similar pattern. In State v. Duncan\footnote{95} the court stated that entrapment is "the inducement of one to commit a crime not contemplated by him, for the mere purpose of instituting a criminal prosecution against him."\footnote{96} One Ohio court put the matter rather neatly:

Where the criminal design for an offense originates with government agents and they implant in the mind of an innocent person the disposition to commit the act and induce its commission, the defendant has been entrapped; likewise, there is no entrapment when an agent merely affords the opportunity for the offense and the accused had a predisposition to commit the offense.\footnote{97}

While the subjective test is simply stated, it is still the case that "[p]redisposition is necessarily a nebulous concept . . . ."\footnote{98} Numerous

\footnotesize{\begin{itemize}
\item 91. Id. at 451-52.
\item 92. 689 F.2d 122 (7th Cir.), cert. denied, 459 U.S. 1089 (1982).
\item 93. Id. at 124 (quoting Sorrells, 287 U.S. at 442).
\item 94. United States v. Leja, 563 F.2d 244, 245 (6th Cir. 1977), cert. denied, 434 U.S. 1074 (1978).
\item 95. 75 N.C. App. 23, 330 S.E.2d 481 (1985).
\begin{quote}
The defense of entrapment consists of two elements: (1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, (2) when the criminal design originated in the minds of the government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities.
\end{quote}
\textit{Id.} (citations omitted).
\item 98. United States v. Hunt, 749 F.2d 1078, 1085 (4th Cir. 1984), cert. denied, 105 S. Ct. 3479 (1985). The court explained the difficult nature of the predisposition test:
\begin{quote}
The standard jury instruction on entrapment, as given here, asks whether the defendant was "ready and willing" to commit crimes such as charged whenever the op-}

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Statutes have been adopted to provide guidance in the area of proving predisposition. The Missouri statute is fairly typical:

An "entrapment" is perpetuated [sic] if a law enforcement officer or a person acting in cooperation with such an officer, for the purpose of obtaining evidence of the commission of an offense, solicits, encourages or otherwise induces another person to engage in conduct when he was not ready and willing to engage in such conduct.99

Both federal and state courts have followed the standard rule with respect to proving predisposition. Where the defendant has presented sufficient evidence of inducement by government authorities,100 "the burden rests on the government to overcome an entrapment defense."101 The court in United States v. Gunter102 explained the matter even more clearly: "Once a defendant accomplishes this [evidence of inducement], the burden shifts to the Government to prove beyond a reasonable doubt that the defendant was predisposed or that there was no Government inducement."103

The predisposition issue is almost always a question of fact for the jury. In essence the question centers on the individual's state of mind at the time of the government inducement, a matter naturally given to the trier of fact.104

The question of predisposition will not be an issue


[When the criminal intent originates with the officer and the defendant is lured or induced into the commission of a crime he was not ready and willing to engage in, then, as a general rule an entrapment has occurred and no conviction may be had. On the other hand, if the criminal intent originates in the mind of the defendant, it is no defense to the charge that an opportunity is furnished or that an officer aids in the commission of the crime.

100. On the question of the sufficiency of the evidence regarding inducement, see supra text accompanying notes 35-53.

101. Hunt, 749 F.2d at 1085.

102. 741 F.2d 151 (7th Cir. 1984).

103. Id. at 153. See also United States v. Perez-Leon, 757 F.2d 866, 871-72 (7th Cir.), cert. denied, 106 S. Ct. 99 (1985).

104. The court in Hunt noted that the predisposition concept was a nebulous one and that the instructions regarding predisposition were based upon the naive view that defendants could be divided between "the pure of heart and those with a 'criminal' outlook." The court found that the situation thus called for jury determinations generally. "As it would appear, however, to be
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for the jury when either "the undisputed facts establish the entrapment defense as a matter of law, . . . or where the evidence is simply insufficient to submit the issue to the jury . . . ." 105

One case in which the "undisputed evidence demonstrate[d] a clear absence of predisposition" 106 was Sherman v. United States. 107 The issue of predisposition, therefore, was not submitted to the jury. The Sherman Court concluded from the undisputed testimony of the government's own witness that the defendant was induced to sell drugs by the government agent and that he would not have otherwise attempted to do so. The government agent had made persistent requests of the defendant and had finally succeeded in overbearing the defendant's will. The Supreme Court decided that entrapment had occurred because the criminal act of the defendant was the product of the creative activity of a law enforcement agent. 108

A case in which "the evidence [was] plainly insufficient as a matter of law" 109 to present the predisposition issue as a question of fact for the jury was United States v. Armocida. 110 The defendant in Armocida was convicted of distributing and conspiring to distribute heroin. The government agent contacted the defendant and offered to provide him with quinine if the defendant could provide heroin in return. Although it took several months of discussion before the defendant provided this heroin, the evidence was clear that "the delay was not due to any reluctance on [the defendant's] part. Rather, [the defendant] attributed the delay entirely to problems getting heroin from 'his people.'" 111 The court concluded that there was simply no evidence negating the propensity of the defendant's part to sell the heroin; he had offered no affirmative evidence demonstrating a lack of intent to sell the narcotics.

impossible to formulate a more coherent definition of predisposition consistent with the Supreme Court's decisions, the whole matter is best left to the discretion of juries, constrained only perhaps in the use of unreliable character evidence . . . ." 749 F.2d at 1085 n.9.

108. Id. at 372 (citing Sorrells, 287 U.S. at 441, 451). The Court was willing to find entrapment as a matter of law because they were "not choosing between conflicting witnesses, nor judging credibility . . . . Aside from recalling . . . the Government's witness, the defense called no witnesses. [They reached their] conclusion from the undisputed testimony of the prosecution's witnesses. 356 U.S. at 373.
110. 515 F.2d 49 (3d Cir. 1975).
111. Id. at 56.
[T]he evidence suggests that he was completely willing to provide it once he could obtain it from "his people." [The defendant] could have presented evidence negating propensity either through his own testimony, by cross-examining Government witnesses or by any other means, but he failed to do so. At most, the evidence to which [the defendant] directs us falls short of creating a jury question on the issue of propensity.112

Because the primary focus in entrapment cases is on the defendant's predisposition to commit the crime, and not on the actions of the government,113 some courts today follow what has been labeled the "unitary standard."114 In these courts, the defendant must offer sufficient evidence of the inducement and "at least suggest that the defendant was initially unwilling to commit the crime, or that Government involvement planted the criminal design in the defendant's mind."115 Thus, in the case in which the defendant is not apparently reluctant to engage in the criminal conduct, the mere "fact that a Government informant made the initial contact is overshadowed by [defendant's] uninduced willingness to conclude a deal."116

Most courts, however, have not moved to the unitary standard of requiring defense evidence on both inducement and lack of predisposition. Instead, the standard rule has been that if the defendant offers adequate evidence of inducement, the burden then shifts to the government to prove lack of predisposition beyond a reasonable doubt.117 Many courts hold that if the defendant "has presented substantial evidence of entrapment, the State must produce evidence to show the defendant's predisposition to commit the crime. Failure to do so subjects the State to the adverse direction of a judgment of acquittal."118

Periodically, courts applying the subjective test have held that certain types of government conduct constitute entrapment, wholly apart from consideration of the evidence regarding predisposition.

112. Id. (citation omitted).
114. For a detailed discussion of the standard, see Marcus, supra note 2, at 203.
115. Fleishman, 684 F.2d at 1342.
116. Id. at 1343.
117. See United States v. Sarmiento, 786 F.2d 665, 667 (5th Cir. 1986).

When the defendant introduces sufficient evidence of inducement to raise the question of entrapment but the state adduces no evidence of predisposition in rebuttal, the trial justice must find as a matter of law that entrapment has occurred. However, if the state introduces evidence of defendant's predisposition, the jury must resolve the question of entrapment.
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Therefore, if a certain kind of inducement is demonstrated in these courts, the government will not be given an opportunity to show predisposition because the defendant has sustained the entire burden with respect to entrapment.119 Perhaps the now discredited opinion in United States v. Bueno120 best illustrates a court's application of this rule. In Bueno a government agent provided the defendant with heroin, and the defendant then sold this heroin to another government agent. The court stated: "The story takes on the element of the government buying heroin from itself, through an intermediary, the defendant, and then charging him with the crime."121

The court in Bueno held that if this evidence were to be believed the defendant could not, as a matter of law, be convicted of a drug offense.122 This reasoning was overwhelmingly rejected by the United States Supreme Court in Hampton v. United States.123 The facts of Hampton were similar to those in Bueno. However, the defense in Hampton requested a specific instruction dealing with the issue:

If you find that the defendant's sales of narcotics were sales of narcotics supplied to him by an informer in the employ of or acting on behalf of the government, then you must acquit the defendant because the law as a matter of policy forbids his conviction in such a case.

Furthermore, under this particular defense, you need not consider the predisposition of the defendant to commit the offense charged, because if the governmental involvement through its informer reached the point that I have just defined in your own minds, then the predisposition of the defendant would not matter.124

Justice Rehnquist, writing for the majority of the Court, rejected this position. Relying on the traditional predisposition test, the Court noted that the defendant had not been entrapped as a matter of law and that none of his constitutional rights had been violated:125

119. It has also been suggested that "[t]he greater the inducement, the heavier the government's burden of proving predisposition." Jannotti, 673 F.2d at 619-20 (Aldisart, J., dissenting).

See also United States v. Watson, 489 F.2d 504, 511 (3d Cir. 1973).

120. 447 F.2d 903 (5th Cir. 1971), cert. denied, 411 U.S. 949 (1973).

121. Id. at 905.

122. Id.


124. Id. at 488 (quoting Brief for Petitioner at 9).

125. The court relied principally on the due process argument of the defendant.

The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the defendant. . . . But the police conduct here no more deprived defendant of any right secured to him by the United States Constitution than did the police conduct in Russell deprive Russell of any rights.
The statutory defense of entrapment was not available where it was conceded that a Government agent supplied a necessary ingredient in the manufacture of an illicit drug. . . . 

The entrapment defense "focus[es] on the intent or predisposition of the defendant to commit the crime," rather than upon the conduct of the Government's agents. We ruled out the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established. 126

III. THE PROOF PRINCIPLES STATED: TOTALITY OF CIRCUMSTANCES

For some time the courts provided little assistance to lawyers and trial judges concerning the kind of evidence or the principles of application to be used in demonstrating predisposition. The following statement taken from an opinion of the Tennessee Supreme Court was typical:

Predisposition may be established by evidence of prior crimes of a similar character . . . or by evidence, direct or circumstantial, that the accused was ready and willing to engage in the illegal conduct in question. Evidence of the defendant's reputation bears upon the issue. A finding of predisposition should be based on the totality of the circumstances. 127

Although the courts have attempted to use this "totality of circumstances" approach, more recently they have identified specific factors to be weighed by both trial judges and juries. The court in United States v. Navarro 128 began its discussion of this area by noting the difficulty in "divining" a defendant's predisposition once the crime has been committed. 129 It then enunciated guidelines which it thought would be helpful in determining the defendant's state of mind:

(1) the character or reputation of the defendant;
(2) whether the suggestion of criminal activity was originally made by the Government;

Id. at 490-91 (emphasis in original).
126. Id. at 488-89 (quoting Russell, 411 U.S. at 429).

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(3) whether the defendant was engaged in criminal activity for a profit;

(4) whether the defendant evidenced reluctance to commit the offense, overcome by Government persuasion;

(5) the nature of the inducement or persuasion offered by the Government. 130

These guidelines have been widely employed by courts throughout the country. 131 However, some courts have gone beyond the principles stated in Navarro in their attempts to identify the type of evidence that should be considered by the trier of fact. 132 The court in United States v. Dian 133 identified a total of ten factors to be considered in determining predisposition:

(1) whether the defendant readily responded to the inducement offered;

(2) the circumstances surrounding the illegal conduct;

(3) the state of mind of a defendant before government agents make any suggestion that he shall commit a crime;

(4) whether the defendant was engaged in an existing course of conduct similar to the crime for which he is charged;

(5) whether the defendant had already formed the "design" to commit the crime for which he is charged;

(6) the defendant's reputation;

(7) the conduct of the defendant during the negotiations with the undercover agent;

(8) whether the defendant has refused to commit similar acts on other occasions;

(9) the nature of the crime charged;

(10) the degree of coercion present in the instigation law officers have contributed to the transaction relative to the defendant's criminal background. 134

130. Id. (quoting United States v. Thoma, 726 F.2d 1191, 1197 (7th Cir.), cert. denied, 104 S.Ct. 2683 (1984)).


132. Such a conclusion may be in response to the statement of several judges that an "apparent willingness" on the part of the defendant may not be sufficient. See, e.g., United States v. Becker, 62 F.2d 1007, 1009 (2d Cir. 1933) ("[W]e do not wish to commit ourselves to the doctrine that mere readiness is enough . . . .").

133. 762 F.2d 674 (8th Cir. 1985), rev'd on other grounds, 106 S. Ct. 2216 (1986).

134. Id. at 687-88 (citations omitted).
A. The Time Factor

Usually, the time factor concerning the defendant's state of mind does not present a major difficulty because "the time of [the government] contact is usually simultaneous with, or very close to, the time the crime is committed." Hence, it is not surprising that many courts give only slight consideration to the time element in determining predisposition. Indeed, the standard rule is that "predisposition refers to the state of mind of a defendant before government agents make any suggestion that he should commit a crime." Stated another way, predisposition refers to "the defendant's state of mind and inclinations before his initial exposure to government agents."

In other cases, however, the matter is more complex and far more significant. For example, in United States v. Lasuita government agents contacted the defendant regarding the sale of marijuana. The defendant called the agent several times after that initial contact to request additional information. Three weeks later the defendant agreed to purchase the marijuana and did so. The trial judge instructed the jury that the key issue in the case was whether the defendant had "a prior intent or a predisposition to commit the offense... or was the Defendant induced by law enforcement officers and their agents to commit the offense when he had no prior intent or disposition to do so?" After deliberating for a while the jury returned with a question for the court: "Does the government have to prove, beyond a reasonable doubt, that prior to contact with the U.S. Government or its agents, that the Defendant was ready and/or willing to enter into an illegal act?" (emphasis added by the court). The trial judge answered the question, "No."

The Sixth Circuit considered Lasuita on appeal and found that the trial court's negative response meant, in essence, that the jury had been informed that the government did not have to prove that the defendant was willing to commit the crime prior to contact with the government agents. Therefore, the real question for the court was whether the predisposition of the defendant to commit the crime would have to exist at the time of his contact with the agents, or "just

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138. 752 F.2d at 252.
139. Id.
140. Id. at 253.
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before committing the offense,” which was three weeks after the initial contact. 141 The court explored case decisions in the area and decided that the case law suggested, although it did not expressly state, that the government’s burden related to the defendant’s state of mind at the time of the initial contact, rather than to any disposition which might thereafter develop:

[T]he prosecution must show that the defendant was willing to commit the offense at the time when the government agents initially contacted the defendant to propose the wrongful conduct. The agents may not take a defendant who is initially truly unwilling to commit the offense and then induce him to become a criminal. 142

The negative response of the Lasuita trial court to the jury’s question may have led the jurors to conclude that it made no difference that the defendant had no criminal predisposition at the time of the government contact. The appellate court found, therefore, that the trial judge “should have advised the jury that the predisposition has to exist at the time of the initial contact.” 143 The defendant’s conviction was reversed.

The Supreme Court of Delaware reached a different conclusion regarding the time element in Harrison v. State. 144 The defendant in Harrison was charged with taking drugs into a state prison. Her argument was that she was not predisposed to commit the crime at the time of the initial government contact but developed this state of mind only after a series of discussions with a police officer. The court recognized that most judges had focused their attention on the state of mind of the defendant “just before a government agent enlisted his participation in the venture.” 145 The Harrison court was troubled, however, by the focus being “wholly on the issue of predisposition to the time period ‘just before’ the police solicited defendant to participate in the criminal scheme.” 146

The application of the rule . . . would provide an entrapment defense to every individual who establishes an unblemished personal record prior to being approached to commit a crime. Furthermore, it is often the case that “the sole proof of predisposition consists of evidence as to what the defend-

141. Id.
142. Id.
143. Id. at 254.
144. 442 A.2d 1377 (Del. 1982).
145. Id. at 1385 (quoting United States v. West, 511 F.2d 1083 (3d Cir. 1975)).
146. Id. at 1386.
ant did on the occasion in question, in response to the over-
tures of the government agents.”

Thus, the Harrison court refused to rely exclusively on consideration
of the time period before the initial contact:

[T]he interval between the solicitation and the actual com-
mission of the offense is highly significant on the question of
predisposition because it is within that time period that an
accused may exhibit manifestations of his propensity for a
specific crime which might not appear were it not for the
State's initial enlistment of the defendant's participation.

Thus, we hold that the point of reference for ascertaining
the predisposition of a defendant to commit a particular
crime is the time period extending from just before the
State's solicitation to just before the defendant's commission
of the crime.148

B. Evidence of Predisposition: The Many Forms

The government can offer a variety of types of evidence and testi-
mony to demonstrate predisposition on the part of the defendant. The
types most commonly offered will be discussed below.

1. Defendant's Conduct in Response to Inducement.—It has been
said repeatedly in the entrapment area that perhaps the most revealing
evidence of the defendant's state of mind is the manner in which he
responds to the government inducement. A North Carolina court
stated: "Predisposition may be shown by a defendant's ready compli-
ance, acquiescence in, or willingness to cooperate in the criminal plan
where the police merely afford the defendant an opportunity to com-
mitt the crime."149 A few courts have stated the matter somewhat dif-
frently. The Eleventh Circuit in United States v. Andrews150 noted
that the defendant may prevail by showing "that he had not favorably
received the government plan, and the government had had to 'push it'
on him, . . . or that several attempts at setting up an illicit deal had
failed and on at least one occasion he had directly refused to partici-
pate."151 The reasonable question, as still another court pointed out,
is whether "the defendant expressed reluctance to commit the offense

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147. Id. (quoting Jannotti, 501 F. Supp. at 1191).
148. Harrison, 442 A.2d at 1386. See United States v. Khubani, 791 F.2d 260, 264-65 (2d
Cir. 1986). See also United States v. North, 746 F.2d 627, 630 (9th Cir. 1984), cert. denied, 105
150. 765 F.2d 1491 (11th Cir. 1985).
151. Id. at 1499 (citations omitted).
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which was overcome only by repeated government inducement or persuasion . . .”

In a large number of entrapment cases there is only a showing of slight reluctance on the part of the defendant; therefore, the jury easily concludes that the entrapment defense has not been made. One illustrative case is *United States v. Hunt* in which the defendant was a judge who was charged with accepting a pay-off. The facts demonstrated that once the pay-off proposal was clarified to the judge, “no significant pressure or cajoling was required to secure the judge’s assent.” Indeed, the evidence showed no real reluctance on the part of the judge: “[T]here was nothing to prevent him from breaking off relations at that point, yet he chose to proceed along the path to corruption.” The evidence also showed that after the initial contact the defendant never demonstrated any desire to step back from the criminal activity, at least not until his name had been disclosed to the public.

Probably the most common case involving limited reluctance of the defendant in entrapment matters arises in drug prosecutions. A few cases are especially illustrative. In *United States v. Perez-Leon* the defendant, in response to an inquiry for a drug sale by the government, initially indicated that he would not become involved. The testimony demonstrated, however, that the reason for this “reluctance” was not a lack of interest in the transaction, but rather the nature of the defendant’s own prior drug dealing experience. The defendant later asked the government agent to leave his phone number and soon thereafter the defendant urged the government agent to continue the transaction. He demonstrated his knowledge and sophistication in the drug business by pointing out specifics with respect to prices, asking for a sample, and bragging that he was well known in the business. The defendant subsequently provided a large quantity of cocaine “within a few weeks time.” The court had little difficulty conclu-

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152. United States v. Perez-Leon, 757 F.2d 866, 871 (7th Cir.), cert. denied, 106 S. Ct. 99 (1985). But see People v. Boalbey, 143 Ill. App. 3d 362, 493 N.E.2d 369 (1986) where the court held that lack of reluctance was not enough. The government had to offer additional evidence as to predisposition.


154. Id. at 1086.

155. Id.

156. Id.


158. The defendant’s reluctance was explained by his comment, “I’ve been burned before.” Id. at 872.

159. Id.
ing that predisposition had been shown although the defendant ini-
tially had "expressed slight hesitation." The court stated that this
hesitation was not sufficient to refute predisposition:

[It] may have been caused by the very nature of drug trans-
actions in that a new buyer is usually checked and cross-
checked to the best of his supplier's ability. "Drug dealers
are not known to call potential clients and solicit their busi-
ness, rather a dealer who expects to stay out of jail is careful
about to whom he sells."160

The defendant in State v. Duncan161 had obtained cocaine for an
undercover government officer on numerous occasions with speed and
efficiency. The fact that there was no delay or hesitation on the de-
fendant's part was a major reason for the affirmation of his
conviction.162

A showing of general reluctance will constitute powerful proof of
an unpredisposed mind, and the government under such circum-
stances will experience difficulty in prevailing on the predisposition
issue. Such circumstances are found in United States v. Knight.163 The
defendant in Knight was convicted of transferring a "sawed-off" shot-
gun.164 The testimony revealed that the defendant was willing to sell a
shotgun with a legal barrel length to the government agent. The
agent, however, claimed that he would purchase the gun only if the
barrel were "sawed-off." Defendant clearly indicated reluctance to
sell such a weapon. This reluctance, however, was "overcome by re-
peated Government inducements and the Defendant's precarious fi-
nancial condition. Furthermore, the evidence also revealed that the
Defendant did not cut the barrel until repeated Government impor-
tuning overcame his reluctance to do so."165 After reviewing this evi-
dence, the trial court held that reasonable doubt existed as to
predisposition and found the defendant innocent of the charges.

2. The Defendant's Ability to Perform the Illegal Acts.—The ideal
hypothetical case for defense counsel is one in which government
agents first contact the defendant and ask him to sell them illegal nar-
cotics for a very high price. The defendant agrees to do so and then
spends a great deal of time contacting numerous individuals before he
is able to find his supplier. The sale to the government agent is then

160. Id. (quoting United States v. Gunter, 741 F.2d 151, 154 (7th Cir. 1984)).
162. Id. at 44, 330 S.E.2d at 487. See also United States v. Busby, 780 F.2d 804, 808 (9th
Cir. 1986); Fleishman, 684 F.2d at 1343.
164. In violation of 26 U.S.C. §§ 5861 (d), (e) and § 5871 (Supp. III 1985).
165. 604 F. Supp. at 987.
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finalized after a fair amount of time, and the defendant is arrested. This sequence of events may well demonstrate that the defendant was not predisposed to commit the crime; instead, the idea for the crime was implanted in his mind by government inducement. Considering the time lags and the defendant's inability to perform the illegal act quickly, the jury may well find that no predisposition has been shown. Unfortunately for defense counsel, however, most cases that raise the issue involve precisely the opposite fact pattern, one in which the defendant is ready, willing and quite able to perform the illegal act on relatively short notice.

The well-known case of United States v. Gunter is one of the numerous cases on this issue. The defendants in Gunter were convicted of various narcotics offenses. Within a relatively short period of time after having been contacted by government agents the defendants arrived at the apartment of one of the agents with a large quantity of cocaine. The defendants' ability to deliver this quantity of drugs without any apparent difficulty was strong evidence on the issue of predisposition:

Properly viewed, the evidence was sufficient to prove defendants' predisposition. Defendants were able to acquire large quantities of cocaine on short notice and exhibited no reluctance in selling the drug to [the police agent]. Defendants' ability to obtain the drug provided sufficient basis for the jury to infer that defendants were well versed in the drug trade.

Indeed, the evidence in Gunter was made even more persuasive by the defendants' ability to obtain more cocaine than necessary for the police agent, leading to the inference that the agent was not the defendants' only customer. As noted by the court, such actions are hardly those of "unwary innocents induced by the Government into selling drugs. Rather, defendants were ready and willing to sell cocaine and did so repeatedly."168

3. The Defendant's Prior Background.—Focusing on the criminal background of the defendant is one of the standard methods of demonstrating predisposition. This form of proof is rarely challenged. The underlying notion has always been that one who has committed the

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166. 741 F.2d 151 (7th Cir. 1984).
167. Id. at 154.
168. Id. See also Perez-Leon, 757 F.2d at 872 n.5, where the court found the evidence to be even more compelling than in Gunter. In the Gunter case the transactions took about two months. In Perez-Leon, the transaction took place less than two weeks later and the defendants supplied two kilograms of cocaine, or approximately 180 times the amount supplied by the defendant in Gunter. See also Busby, 780 F.2d at 808.
criminal act before is more likely to be disposed to do so again. This notion comes dangerously close to the forbidden rule that prior crimes cannot be used to show "criminal propensity." Yet, the key issue in an entrapment case is precisely whether the accused, at the time of the government inducement, had a propensity to commit crimes of the nature charged; that is, whether he was predisposed to do so.\footnote{169} As one military court stated in a drug case, "Persons who possess and use a controlled substance are logically more likely to have considered distributing it than someone who has no familiarity with drugs."\footnote{170}

Many serious problems arise from the use of prior acts of the defendant to prove his state of mind. The first relates to the need to distinguish between prior acts as opposed to prior crimes. The former involves far more dangerous possibilities than the latter. Perhaps the most extreme case of the government attempting to use prior unproved crimes to demonstrate state of mind occurred in \textit{State v. Jones}.\footnote{171} The defendant in \textit{Jones} was convicted of various drug offenses. He claimed that he was entrapped by the government. The trial judge allowed the State to introduce evidence that the defendant had been \textit{indicted} for delivering cocaine on another occasion. Indeed, the prosecutor questioned the defendant about this nineteen-month old indictment at some length. The appellate court strongly condemned this practice and noted that the evidence of the indictment "was probative of nothing more than official suspicion of Jones's wrongdoing."\footnote{172} The defendant's conviction was vacated because it was very likely that the evidence of the prior indictment had seriously prejudiced the jury.

The more common approach regarding prior acts of the defendant is to focus on prior convictions of the defendant for similar offenses. The argument is that these prior convictions show a predisposition on the part of the defendant to commit the crime in question; therefore, any claim of entrapment is defeated. The issue arises in the federal courts most often under rule 404(b) of the Federal Rules of Evidence.\footnote{173} Rule 404(b) provides:


\footnote{170} United States v. Bailey, 21 M.J. 244, 246 n.3 (C.M.A.), \textit{mandate issued}, 22 M.J. 21 (1986).

\footnote{171} 416 A.2d 676 (R.I. 1980).

\footnote{172} \textit{Id.} at 683.

\footnote{173} Admission of evidence under Rule 404(b) must also satisfy Rule 403 dealing with prejudice to the defendant. The trial judge must determine that the probative value outweighs the potential for prejudice. In entrapment cases, however, the defense argument is somewhat problematic as "the defendant cannot claim he is prejudiced by evidence indicating that at the rele-
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Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Though rule 404(b) does not refer explicitly to predisposition and entrapment, it is obviously a rule of inclusion rather than exclusion; only the use of such evidence to show propensity is prohibited, while other uses are not. Perhaps the leading decision on application of the Rule in the entrapment area is United States v. Burkley. In that case Judge McGowan carefully explained that evidence of other crimes was not offered to show that the defendant acted in conformity with those crimes, "but that he was disposed to act in this manner." The defendant had not been entrapped because he had the necessary predisposition. In a case such as Burkley there is little difficulty in demonstrating proper admissibility of evidence of other crimes under rule 404(b). The other crimes previously committed by the defendant in Burkley related to large sales of narcotics, and the defendant was presently charged with selling narcotics. Moreover, the period of time between the two crimes was relatively short; it was only a matter of months.

The real question in determining the applicability of rule 404(b) in the entrapment area is whether the prior crimes are truly relevant to proving the predisposition of the defendant with respect to the present crime. As stated in a nonentrapment matter, "[w]here the evidence sought to be introduced is an extrinsic offense, its relevance is a function of its similarity to the offense charged." In many prosecutions where entrapment concerns arise the crimes are truly of a similar nature and few problems arise. The most common example is the case in which the defendant charged with the sale of drugs has prior convictions for the purchase or sale of drugs. The problem is more acute in other types of cases.

In United States v. Blankenship the defendant was found guilty of unlawfully dealing in firearms. His only defense claim was one of time he had a propensity to commit crimes such as those he is accused of committing.

Burkley, 591 F.2d at 922.

175. Id. at 921 (emphasis in original).
176. Though in Burkley the "other" crime was a subsequent offense, not a prior one. Id.
178. 775 F.2d 735 (6th Cir. 1985).
entrapment. At trial, tape recordings were offered in which the defendant stated that he had also purchased stolen lawn equipment and lumber. The court began its inquiry by noting that the other criminal acts must "deal with conduct substantially similar and reasonably near in time to the offenses for which the defendant is being tried." The court conceded that the use of such other offenses "is a reliable method of proving the criminal predisposition needed to rebut the allegation or inference of entrapment." The ultimate question, however, is whether these other crimes were "substantially similar to the offenses charged." The court decided that the other offenses, theft of property offenses, were not substantially similar to the crime of unlawful dealing in firearms and that they merely demonstrated the defendant's general criminal character:

Proof that the defendant has committed thefts in the past and is willing to share in the proceeds of a projected burglary has little if any probative value with respect to the issue of his predisposition to receive, possess, or deal in firearms. On the other hand, this evidence is fraught with danger of undue prejudice. Thus it fails both tests for the admissibility of other crimes evidence.

A similar result was reached in State v. Burciaga where the defendant was charged with attempted trafficking in stolen property. The State announced its intention to offer in evidence the defendant's prior conviction for theft in order to rebut the defense of entrapment. The court began its analysis by repeating the limitation that the past conduct "must be of a sufficiently similar nature to the crime charged to show a predisposition to commit that crime." It stated that the trial court did not abuse its discretion in ruling that theft was not similar enough to trafficking in stolen property to demonstrate a predisposition.

4. Other Evidence. — In most entrapment cases the predisposition question can be resolved by looking either to prior acts of the defend-

179. Id. at 739. The court also considered, and gave some weight to, the defense's argument that under Rule 403 the probative value was outweighed by the prejudice inherent in the admission of the evidence.
180. Id. (quoting United States v. Salisbury, 662 F.2d 738, 741 (11th Cir. 1981), cert. denied, 457 U.S. 1107 (1982)).
181. Id.
182. Id. at 740.
184. Unlike some states, Arizona allows the entrapment matter (or at least the evidence regarding entrapment) to be offered and resolved pretrial in the form of a motion in limine. Id. at 334, 705 P.2d at 1385.
185. Id. at 1386-87 (emphasis in original).
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ant, typically crimes, or to the manner in which the defendant responded to the government inducement. In some cases, however, such evidence is not dispositive and other forms of evidence are offered.

C. Hearsay

Predisposition analysis focuses primarily on the defendant and her personal background to determine "where [s]he sits on the continuum between naive first offender and the street-wise habitue." By sharpening this focus in entrapment cases, the courts have necessarily paid close attention to this individual and her activities prior to the contact by the government. Hence, it should not be surprising that in numerous cases statements are found to the effect that "[e]vidence of the defendant's reputation bears upon the [predisposition] issue." Indeed, in some cases it is the defendant who may use this reputation testimony to her advantage. For example, the court in Shrader v. State went well beyond usual entrapment law and held: "When the police target a specific individual for an undercover operation, they must have reasonable cause to believe that the individual is predisposed to commit the crime." Thus, two separate questions are involved: (1) was there evidence of predisposition; and (2) did the government have reasonable cause to believe that the defendant possessed such predisposition. In Shrader the defendant argued that even though he had a reputation for having used drugs in the past, he had no previous criminal record and he had no reputation with respect to having sold narcotics in the past. Consequently, the court held that the defendant had been entrapped as a matter of law.

However, in most cases where reputation evidence is offered it is offered to bolster the government's claim that the defendant had the predisposition to commit the crime at the time the contact was made with him. Evidence regarding the defendant's reputation usually falls in one of three categories: (1) statements made by an informant to a police officer about the defendant's general reputation for being a criminal; (2) statements made to a police officer about specific criminal

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189. Id. at 502, 706 P.2d at 836.
190. Id. at 502, 504, 706 P.2d at 837, 839.
activities of the defendant; and (3) statements made by various sources about the defendant and recorded in police reports. 191

When offered in evidence, such statements are hearsay because they are being offered to prove the truth of the matter asserted, the matter asserted being that the defendant was predisposed. 192 The federal courts vigilantly restricted the use of such hearsay statements to prove general reputation or specific instances of misconduct by the defendant. 193 Perhaps the leading opinion on this issue is United States v. Webster, 194 decided by the Fifth Circuit en banc. In rebuttal, the prosecution offered the testimony of a government agent that he had been told by an informant that the defendant had sold the informant illegal narcotics on several prior occasions. The government argued, among other points, that the evidence should be admissible because it directly refuted the defendant's claim that he lacked predisposition. The court found that such hearsay was extremely prejudicial to the defendant and of little value to the trier of fact.

Our creation of a rule that allows gross hearsay evidence to be used to prove predisposition has resulted in the very evils that the rule against hearsay was designed to prevent. The jury is free to believe the unsworn, unverified statements of government informants, sometimes unidentified, whose credibility is not subject to effective testing before the jury and whose motivations may be less than honorable. We are hard pressed to envision a situation where the disparity between the probative value and the prejudicial effect of evidence is greater. Finding inapplicable the exceptions to the rule against hearsay enumerated in the Federal Rules of Evidence, we hold that hearsay evidence is never admissible for the purpose of proving the defendant's predisposition. 195

Hearsay statements constituting evidence of reputation may be admissible in limited situations, even in federal courts where such evi-

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191. These categories are taken from the United States v. Webster, 649 F.2d 346, 350 (5th Cir. 1981).
192. The government has argued in some of these cases that the evidence of the defendant's reputation is not hearsay, being admissible to show "a pertinent trait of his character" under Fed. R. Evid. 404(b)(1). The courts have rather consistently rejected this position, finding that predisposition "is a state of mind, not a character trait." Webster, 649 F.2d at 350.
193. Prior crimes which are offered under Fed. R. Evid. 404(b) may be admitted for purposes other than proof of predisposition.
194. 649 F.2d 346 (5th Cir. 1981).
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dence is rejected in the “run-of-the-mill entrapment case.”\textsuperscript{196} The cases which raise the issue are ones in which the defendant argues that wholly apart from the subjective standard, the governmental misconduct has been so egregious that the claim against him should be dismissed. As noted by the dissenters in \textit{Webster}, the defendant’s argument that the inducements of the government were too strong to resist was “an attacking defense that puts the prosecution on trial.”\textsuperscript{197} Since it is “on trial,” the government can respond to these attacks by discussing the defendant’s reputation:

Since the accused’s attack, as here, necessarily impugns both the methods employed by the government and its motives and actions—implicating innocents in contrived crimes—the government often seeks to show that the accused was not an innocent at all. And since its motives and tactics are attacked as well, it offers proof that its belief in the accused’s predisposition was a reasonable one. . . . Necessarily, such a response will often rest in large part on hearsay: the reports on which the government acted in deciding to provide the opportunity.\textsuperscript{198}

While this position did not prevail in \textit{Webster},\textsuperscript{199} it did persuade the court in \textit{United States v. Hunt}.\textsuperscript{200} Prior to trial the defendant in \textit{Hunt} moved to dismiss the indictment on the ground of “outrageous government investigative conduct” that violated his due process rights. Part of this argument was based upon the claim that the government had “no evidence of the defendant’s illegal conduct other than initiated by its own operatives.”\textsuperscript{201} The court held that government testimony regarding the defendant’s reputation was proper in response to the claim that the defendant had previously made. The court conceded that this evidence could not have been offered had the question of the government’s basis for the investigation not been raised by the defense:

It is evident that the defense simultaneously sought to develop both its entrapment and due process claims, which are analytically distinct though relying to some extent on the

\textsuperscript{196} This is the court’s language in \textit{Webster}, 649 F.2d at 351.
\textsuperscript{197} \textit{Id.} at 353 (Gee, J., dissenting).
\textsuperscript{198} \textit{Id.} (footnote omitted).
\textsuperscript{199} The majority in \textit{Webster} did allow such evidence to be offered, but in a much narrower context than would have been allowed either by the majority in \textit{Hunt} or by the dissenters in \textit{Webster}. The court indicated that “governmental good faith, motive, and reasonableness” would be at issue in entrapment cases under the objective standard, but only in “rare circumstances.” 649 F.2d at 351.
\textsuperscript{200} 749 F.2d 1078 (4th Cir. 1984), \textit{cert. denied}, 105 S. Ct. 3479 (1985).
\textsuperscript{201} \textit{Id.} at 1083.
same facts. Though only the entrapment claim was for the jury to resolve, the government was nevertheless entitled to develop its rebuttal to the due process theory as well, once the defense called the government's conduct into question. Having "opened the door" the defendant may not be heard to complain of testimony which proved adverse to his position that the government had no reason to investigate him. 202

D. Expert Testimony

The question of expert testimony in entrapment cases rarely arises. In advancing an entrapment defense, the defendant in State v. Woods 203 made a pretrial motion for permission to introduce psychiatric testimony as to traits which were relevant to the predisposition element of entrapment. 204 Although the matter was complicated somewhat by the fact that Ohio does not recognize the claim of diminished capacity, the court nevertheless allowed the testimony to be admitted. The opinion noted that Ohio had adopted the subjective test of entrapment as an affirmative defense. 205 The court concluded that expert psychiatric testimony as to the defendant's "susceptibility to influence may be relevant to an entrapment defense and an expert's opinion on the susceptibility issue may aid the jury in its determination of critical issues of inducement and predisposition . . . ." 206 Because the basic issue in entrapment deals with the "origin of the criminal intent," testimony concerning the defendant's susceptibility to inducement was an important factor which should be viewed by the trier of fact. 207 The major restriction the court placed on this testimony 208 was that the expert could not testify concerning "the actions of the government agents or their effect upon the defendant's susceptibility nor as to the ultimate issue of the existence of entrapment," all of which was viewed as invading the province of the jury. 209

202. Id. at 1084.
203. 20 Ohio Misc. 2d 1, 484 N.E.2d 773 (Ct. C.P. 1984).
204. 484 N.E.2d at 774.
205. The court stated the Ohio subjective test as follows:
Where the criminal design for an offense originates with government agents and an implant in the mind of an innocent person the disposition to commit the act and induce its commission, the defendant has been entrapped; likewise, there is no entrapment when an agent merely affords the opportunity for the offense and the accused had a predisposition to commit the offense.

Id.
206. Id.
207. Id. at 775.
209. 484 N.E.2d at 775.
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E. Subsequent Acts

The evidence in cases raising the predisposition issue usually focuses on conduct of the defendant prior to the government contact, or conduct of the defendant that occurs simultaneously with the contact and in response to it. In some cases, however, acts or statements of the defendant after the initial contact by the government may be relevant to show predisposition. The courts have consistently admitted such evidence of "post-crime actions."\textsuperscript{210} The real issue in these cases is whether these subsequent acts are relevant to the question of predisposition. The relevance issue with respect to subsequent acts is more difficult than it is with prior acts because the focus is on the predisposition of the defendant, as opposed to the state of mind which may develop after the government takes the challenged actions. Nevertheless, there are cases in which such later conduct may well be relevant. The two most famous cases in the area demonstrate different fact patterns in which similar principles were applied.

\textit{United States v. Jannotti}\textsuperscript{211} was one of the famous Abscam cases. One aspect of the case involved the defendant Criden, a Philadelphia attorney who allegedly gave money to Schwartz, the president of the Philadelphia City Council, in return for Schwartz's introducing him to Jannotti, the majority leader of the City Council. Payment of money to this fund, a "finders fee,"\textsuperscript{212} was made after it had been put forth by the government agents. The court held that the acceptance of this payment could be considered by the jury on the question of predisposition, even though it occurred after the initial contact of the government, because it would tend to "demonstrate that he was disposed to wrongdoing."\textsuperscript{213} Similarly, in \textit{United States v. Jenkins},\textsuperscript{214} a case involving the distribution of heroin, the court admitted evidence of a subsequent act on the issue of predisposition. The defendant claimed that he was an unwary and innocent person who had been entrapped by the government into committing the narcotics offense. The defendant had no prior conviction, there was no evidence that he had a reputation as a dealer in narcotics, and there was no evidence that he had made any prior sales. Nevertheless, willingness to engage in criminal

\textsuperscript{210} See, e.g., United States v. Roland, 748 F.2d 1321, 1327 (2d Cir. 1984); United States v. Meyers, 21 M.J. 1007, 1015 (A.C.M.R. 1986); Harrison v. State, 442 A.2d 1377, 1386 n.8 (Del. 1982).

\textsuperscript{211} 673 F.2d 578 (3d Cir. 1982).

\textsuperscript{212} These are the words of the court. \textit{Id.} at 605.

\textsuperscript{213} \textit{Id.}

\textsuperscript{214} 480 F.2d 1198 (5th Cir.), \textit{cert. denied}, 414 U.S. 913 (1973).
conduct was demonstrated by a statement he made after the sale: "[I]f you need more, I'll be here."215

As both of these cases demonstrate, subsequent actions and statements may be relevant on the issue of predisposition and, under such circumstances, the evidence is properly admissible. However, the central entrapment issue does not change: "[P]redisposition refers to the state of a mind of a defendant before government agents make any suggestion that he should commit a crime."216 The determinative question on the admissibility of evidence of subsequent acts and statements will be whether the evidence helps the jury in assessing the defendant's prior state of mind regarding particular criminal activity.217

IV. THE PRINCIPLES APPLIED

The preceding sections of this Article have focused upon the general principles used in determining predisposition. In this final section, these principles will be applied so as to offer some idea of the way in which prosecutions are actually resolved on this issue.

A. Where Predisposition Is Shown

"The defense of entrapment focuses upon whether the Government's actions implanted the criminal design in the mind of an otherwise unpredisposed person."218 In many cases there is little doubt that the totality of the evidence presented by the state shows predisposition to the satisfaction of all. Some illustrative cases are those in which the defendant eagerly, and with little reluctance, participates in the criminal venture. As stated earlier, the defendant in United States v. Perez-Leon,219 was convicted for various narcotics offenses despite his claim that he was not predisposed. The appellate court noted that the defendant's initial "reluctance" had little to do with predisposition. Instead, this reluctance was due to his prior bad drug dealing experience as reflected in the defendant's comment, "I've been burned before."220 The defendant asked the government agent to leave his phone number, and then urged the government agent to go forward with the drug

215. Id. at 1200.
220. Id. at 872.
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The defendant further demonstrated sophistication and knowledge of the drug business by offering opinions as to prices for narcotics. Additionally, the defendant was able to come forward with a large quantity of illegal drugs within a very short period of time. In short, the defendant was no “naive person exploited by the government . . . .” [Defendant] expressed slight hesitation, which may have been caused by the very nature of drug transactions in that a new buyer is usually checked and cross-checked to the best of his supplier’s ability.\(^2\)

The predisposition of the defendant may also be shown when the defendant’s conduct throughout a series of events is consistent over a period of time. Government agents approached the defendant in *Harrison v. State*\(^2\) to engage her participation in the sale and delivery of drugs. Over a period of time the defendant was twice given the opportunity to withdraw from the arrangement; however, she had grown more relaxed with the situation during this time and ultimately smuggled the drugs.\(^2\) The defendant in *Schneider v. Commonwealth*\(^2\) was convicted of distributing narcotics. The evidence at trial demonstrated that the defendant was a heavy marijuana user and expected to receive some marijuana as compensation for his participation in the transaction. During the course of the transaction he made three separate trips to arrange the sale and assisted in weighing the marijuana and counting the money.\(^2\)

Predisposition may also be demonstrated where the defendant not only expresses no reluctance toward participating in the transaction, but actually expresses eagerness and actively pursues the government agents involved in the transaction. In *State v. Arnold*\(^2\) the government agent was not able to find the defendant at home for a third meeting regarding a narcotics deal. At that point “defendant . . . sin-

\(^{21}\) Id.
\(^{22}\) 442 A.2d 1377 (Del. 1982) (en banc).
\(^{23}\) The court in *Harrison* did express real concern over the extent to which the police officers had involved themselves in manufacturing the offense. The court found, however, that the statute providing the defense of entrapment was clear, and that the jury had had ample evidence to decide the inducement issue. *Id.* at 1388. One judge, in dissent, went beyond expressing concern with respect to the state of law on this point:

> I confess shock at the absence of a clear federal constitutional restriction on the material inducement that a law enforcement officer or his agent can offer to another to get the other to commit a crime. While some of the same considerations are present, the question of a constitutional restriction is necessarily entirely separate from any legislative or common law intent as to the defense of entrapment.

*Id.* (Quillen, J., dissenting) (footnotes omitted).

\(^{24}\) 337 S.E.2d 735 (Va. 1985).
\(^{25}\) *Id.* at 737.
\(^{26}\) 676 S.W.2d 61 (Mo. Ct. App. 1984).
gly pursued [the agent] to consummate the sale and . . . produced a portable scale to demonstrate the accuracy of the weight of his commodity."

Perhaps the most striking recent case in which many of the above elements were present is United States v. Roland. The defendant in Roland was convicted of paying unlawful gratuities to agents of the Immigration and Naturalization Service. The court's somewhat detailed description of the facts demonstrates the way in which the prosecution can assimilate these various elements in showing predisposition:

The evidence overwhelmingly established that Roland, an attorney at the time of the offenses, eagerly participated in a scheme to pay money to I.N.S. agents who were cooperating with the Government. Over the course of 10 months, Roland paid approximately $43,000 to the agents to obtain alien registration documents for his clients. Though obviously sensitive to the risk of apprehension ("none of us is wired right?") and expressing concern about "[t]hat Abscam case," Roland was tape recorded on 65 occasions discussing and making his illegal payments and eagerly planning for more of them. Not surprisingly, the jury rejected his preposterous defense that the payments were part of what he thought was a lawful fee-sharing arrangement. Among the numerous items of evidence refuting this claim was an episode at which Roland showed the agents a newspaper article concerning a lawyer who was paying bribes to I.N.S. agents and arranging fictitious marriages in order to secure "green cards" for his clients; as Roland told the agents whom he was paying, "It's exactly what we're doing." He also told the agents to deny receiving any payments from him if anyone ever asked any questions.

B. Where No Predisposition Is Shown

The burden of disproving entrapment can be a heavy one for the government to meet in jurisdictions using the subjective test. Once the defendant has offered sufficient evidence of inducement, the government must prove, beyond a reasonable doubt, that the defendant was

227. Id. at 63.
228. 748 F.2d 1321 (2d Cir. 1984).
230. 748 F.2d at 1323.
231. On the question of the sufficiency of evidence of inducement, see Marcus, supra note 2.
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predisposed to commit the offense. There are many cases that demonstrate the difficulty that the government has in meeting its burden with respect to the state of mind of the defendant. Some courts focus on the defendant’s resistance to the criminal endeavor as well as other factors in finding no predisposition. In State v. Devine the defendant initially refused to engage in the proposed criminal activity and for a while successfully resisted the inducements of the government agents. Additionally, there was no evidence that the defendant had ever been involved in any prior narcotics transactions, or was even generally “prone towards criminality.” As a result, the court held that the evidence showed no predisposition: “The defendant withstood the constant pressure until the offer became so attractive that he was no longer able to resist.” The court in United States v. Knight reached a similar result. The defendant in Knight was convicted of possession of a “sawed-off” shotgun. The court could not find predisposition beyond a reasonable doubt, given that the defendant was initially only willing to sell a shotgun with a legal barrel length to the government agent. He was reluctant to saw the barrel off and did so only after “repeated Government inducements and [consideration of] the Defendant’s precarious financial condition.” The court concluded there was simply no evidence of predisposition to commit the offense.

In United States v. McLernon the defendant had no prior criminal record relevant to the matter, he had previously served in the military and was honorably discharged, and he devoted himself to various charitable activities. There was “absolutely no propensity for criminal involvement prior to governmental inducement.” Moreover, the evidence was clear that the government agent initiated the unlawful activities and demonstrated to the defendant that his involvement would be profitable; the defendant expressed considerable reluctance to participate in the drug transactions. The government agent “continually

233. 554 S.W.2d 442 (Mo. Ct. App. 1977).
234. Id. at 449.
237. Id. at 987.
238. 746 F.2d 1098 (6th Cir. 1984).
239. Id. at 1112.
increased the pressure until [the defendant] finally acquiesced in his demands.\textsuperscript{240}

The defendant in \textit{United States v. Lard}\textsuperscript{241} reacted negatively to numerous requests by the government and had no relevant prior criminal record. Yet he was ultimately convicted of transferring a pipe bomb. The court strongly condemned the government action in the case:

While law enforcement officials may use strategy, stealth, and even deception to catch the "unwary criminal," they may not arbitrarily select an otherwise law abiding person, gain his confidence, and then proceed to beguile or lure him to commit a crime he would not have otherwise attempted. It is the government's duty to prevent crime, not to instigate or create it.\textsuperscript{242}

One of the strongest cases refuting the predisposition claim is found in an unusual prosecution that involved the sale of protected eagles. In \textit{United States v. Dion}\textsuperscript{243} the defendant was a Native American who lived in an isolated area of South Dakota on one of the poorest Indian reservations. According to trial witnesses, "life [there] is for many Indians, a mere question of simple survival."\textsuperscript{244} The facts evidenced in the \textit{Dion} case truly were egregious. The government "sting" at issue existed over two years.\textsuperscript{245} The defendant had never killed a protected bird before, had never been involved in making or selling protected bird crafts, and believed it was against his Native American religious beliefs to shoot an eagle. Indeed, the government agents referred to him not as a "street-wise criminal," but instead as a "naive first offender." Moreover, the offer of a relatively substantial sum of money weighed heavily against a showing of predisposition in this case, even though poverty alone would normally not be sufficient:

However, in some cases, it may be that the unusual poverty of the defendant or other problems peculiar to the de-
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Defendant must be considered in determining predisposition. . . . In this case, the government agents came upon an extremely impoverished Indian reservation in a desolate area of South Dakota where, according to some of the witnesses at the trial below, life is for many Indians, a mere question of simple survival. The risk for the government in offering so much money to these individuals over a nearly two-and-one-half year period was that many who would never have shot a protected bird would be enticed into doing so.246

V. CONCLUSION

The majority subjective test for entrapment, in sharp contrast to the minority objective test,247 focuses primarily on the actions and state of mind of the defendant, rather than on the actions of the government.248 This focus requires the courts to carefully scrutinize the evidence as to both the inducement of the government and, more critically, the predisposition of the defendant. In many prosecutions the most difficult problems arise with the attempts of the government to prove the predisposition of the defendant. Various forms of proof are used in showing this state of mind. Ultimately, however, the determinative question is often simply whether the defendant was disposed to commit a criminal offense prior to government contact. Alas, the answer to this question is not so simple and is often clouded by criminal records of the defendants, substantial government involvement, and rather questionable evidence with respect to the defendant and his criminal propensity or reputation.

246. Id. at 689-90.
248. In the objective test, the key inquiry is whether—in the abstract—the government’s involvement was too overreaching. Id. at 379-81. See Park, supra note 1.