1986

The Entrapment Defense and Procedural Issues: Burden of Proof, Questions of Law and Fact, Inconsistent Defenses

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The Entrapment Defense and the Procedural Issues: Burden of Proof, Questions of Law and Fact, Inconsistent Defenses

By Paul Marcus*

Dean Marcus has produced an extremely thorough article on the intriguing and complex defense of entrapment. After analyzing the subjective and objective approaches to the defense, the author turns to the infrequently addressed question of evidence on predisposition. Included here are the recent ABSCAM cases.

Finally, the author explores the vagaries of inconsistent defenses and, on the whole, provides academics and practitioners with a refreshing and useful guide to some of the most important questions involving entrapment.

For most of this century an intense debate has raged involving practicing lawyers, judges, and law professors concerning the defense of entrapment.¹ Little question has been raised as to whether we should recognize an entrapment defense.² The controversy has, instead, focused chiefly on two questions. The first issue is the reason for having an entrapment defense. A majority of Supreme Court judges³ have taken the view that the reason for having an entrapment defense is that the legislature could never have intended to allow convictions for crimes where the accused was pressured by the government into committing the crime. The classic, and concise, statement in support of this point of view was expressed by Chief Justice Warren in Sherman v. United States: "Congress could not have

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² The defense was "firmly recognized" in Sorrells v. United States, 287 U.S. 435 (1932), and Sherman v. United States, 356 U.S. 369 (1958).

³ The view was first put forth by Chief Justice Hughes in Sorrells. 287 U.S. at 448.
intended that its statutes were to be enforced by tempting inno-
cent persons into violations.”

The contrary view was, perhaps, best stated by Justice
Frankfurter who viewed the purpose for the entrapment defense
as deterring improper police conduct. As he wrote in the Sher-
man case:

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 Govern-
ment to bring about conviction cannot be countenanced. ** Insofar
as they are used as instrumentalities in the administration of criminal
justice, the federal courts have an obligation to set their face against
enforcement of the law by lawless means or means that violate rationally
vindicated standards of justice, and to refuse to sustain such methods by
effectuating them. They do this in the exercise of a recognized jurisdic-
tion to formulate and apply “proper standards for the enforcement of the
federal criminal law in the federal courts,” an obligation that goes
beyond the conviction of the particular defendant before the court.
Public confidence in the fair and honorable administration of justice,
upon which ultimately depends the rule of law, is the transcending value
at stake.**

4 356 U.S. at 372. He explained:

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. Criminal activity is such that stealth and strategy are necessary weapons in
the arsenal of the police officer. However, “A different question is pre-
sented when the criminal design originates with the officials of the government, and they
implant in the mind of an innocent person the disposition to commit the alleged
offense and induce a commission in order that they may prosecute.” Then stealth
and strategy become as objectionable police methods as the coerced confession.

Id.

5 356 U.S. at 380 (Frankfurter, J., dissenting). He, too, explained further:

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.” In those cases raising claims of
entrapment, the only legislative intention that can with any show of reason be
extracted from the statute is the intention to make criminal precisely the conduct
in which the defendant has engaged. That conduct excludes all the elements
necessary to constitute criminality. Without compulsion and “knowingly,”
where that is requisite, the defendant has violated the statutory command. If he is
to be relieved from the usual punitive consequences, it is on no account because
he is innocent of the offense described. In these circumstances, conduct is not
less criminal because the result of temptation, whether the tempter is a private
person or a government agent or informer.

Id. at 379-380.
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The second issue is a corollary of the first. Depending on which rationale one accepts for the defense, the test utilized follows inexorably. Thus, for those judges who follow the majority view, looking to the conduct of the suspect, a "subjective" test has been generally used in which the predisposition of the defendant is of principal concern.

[We] recognize "that the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." Nor will the mere fact of deceit defeat a prosecution, for there are circumstances when the use of deceit is the only practicable law enforcement technique available. It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play.6

For those who follow the position put forth by Justice Frankfurter, an "objective" test has been used, looking to the conduct of the police as opposed to that of the suspect.

The crucial question, not easy of answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power. For answer it is wholly irrelevant to ask if the "intention" to commit the crime originated with the defendant or government officers, or if the criminal conduct was the product of "the creative activity" of law-enforcement officials. Yet in the present case the Court repeats and purports to apply these unrevealing tests. Of course in every case of this kind the intention that the particular crime be committed originates with the police, and without their inducement the crime would not have occurred. But it is perfectly clear [as] where the police [simply furnish] the opportunity for the commission of the crime, that this is not enough to enable the defendant to escape conviction.7

The debate over these two points continues.8 Some states that have traditionally followed the Supreme Court's role in the criminal procedure area have rejected the subjective view and instead look to the objective test.9 Other states have flirted with one or the other ultimately adopting a combination of the two.10

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7 Sherman v. United States, 356 U.S. at 382.
8 See generally, Park, note 1 supra.
Some of the most important issues concerning the entrapment defense have little to do with this debate, however. Many of the practice-oriented questions involving entrapment deal with the procedures utilized at trial. Surprisingly, relatively little has been written concerning this and the debate over these various questions has been mild in comparison.¹¹

For a lawyer who wishes to analyze the entrapment defense and determine its applicability in a criminal prosecution, however, the procedural issues can be paramount. In particular, issues surrounding the burden of proof, questions of law and fact, and the so-called inconsistent defense doctrine can often be determinative of the ultimate question. In this article these three areas will be analyzed, reviewing their status under both the majority-subjective defense and the minority-objective defense.

The Burden of Proof

Many courts take very different views as to the purposes of the defense of entrapment and the way in which evidence shall be presented in connection with this defense. These different views are reflected quite clearly with respect to the burden of proof as to entrapment. Courts that follow the "subjective" approach to entrapment differ considerably from those that adhere to the "objective" approach. Moreover, even courts that follow the same substantive test for entrapment may differ when it comes to formulating the standards of proof and the manner in which proof shall be offered as to this defense.

The Subjective Approach

While the U.S. Supreme Court has failed to discuss the precise burden of proof issue, in the majority of jurisdictions the matter has been resolved by reliance on a famous opinion by Judge Learned Hand. In United States v. Sherman,¹² the court discussed the burden of proof issue as involving two questions of "fact." The first of these is, Did the agent induce the accused to commit the offense charged in the indictment? The second is, If so, was the accused ready and willing without

¹¹ But see Groot, note 1 supra.

¹² 200 F.2d 800, 882 (2d Cir. 1952).
persuasion and was he awaiting any propitious opportunity to commit the offense? The first element is generally referred to as the inducement factor, the second as the accused's predisposition. Under the Hand formulation, the burden of proving the first element generally is on the defendant. The government shoulders the burden of proving predisposition.

The Hand approach has been recognized as the classic formulation and has been relied on in numerous cases. The Second Circuit in United States v. Braver\(^{13}\) pointed out that the courts had "bifurcated the defense of entrapment into two elements, inducement and propensity."\(^{14}\) As to the former, the defendant had the burden; as to the latter, the burden was on the government. The court went on to "recognize that this analysis of the entrapment defense is based upon Judge Learned Hand's opinion in United States v. Sherman."

In some ways, the standard formulated by Judge Hand, and readily accepted throughout the country, created more problems than it resolved. Several matters in particular are of importance in determining the nature of the defendant's burden in a showing of entrapment. The first relates to the concept of "inducement" in the Hand formulation. The Second Circuit had initially defined it very broadly so as to include "soliciting, proposing, initiating, broaching, or suggesting."\(^{16}\) As pointed out by Judge Friendly, however, this definition of inducement "goes simply to the government's initiation of the crime and not to the degree of pressure exerted."\(^{17}\) Hence, under the original Hand formulation, the defense could be raised simply with a showing of any government solicitation or initiation. Many courts rebelled against such a broad view either by narrowing the definition of "inducement" or by placing a burden on the defendant with respect to a showing of lack of predisposition.

As indicated above, a literal definition of Judge Hand's formulation would include almost all government contacts that

\(^{13}\) 450 F.2d 799 (2d Cir. 1971).

\(^{14}\) Id. at 801; see also United States v. Andrews, 765 F.2d 1491, 1499 (11th Cir. 1985).

\(^{15}\) 200 F.2d 800 n.5; see generally United States v. Stanley, 765 F.2d 1224, 1234-1235 (11th Cir. 1985).

\(^{16}\) In Sherman, 200 F.2d at 883.

\(^{17}\) United States v. Riley, 363 F.2d 955, 958 (2d Cir. 1966).
tended to initiate criminal activity. Many courts today, however, take a narrower view and require a much greater showing by the defendant. The experience in the Ninth Circuit is both illuminating and somewhat surprising.

In *Notaro v. United States*, the court dealt with the question of burden of proof in the area of entrapment. In its conclusion, the court very broadly noted that “if the defense of entrapment is claimed, a showing, however presented, that the commission of the offense was attended by the intervention of a government agent is sufficient.” The Ninth Circuit (by the same judge who had written the *Notaro* opinion) suggested in another case that such language should not be literally applied; otherwise the entrapment issue would arise in all cases in which government agents even attempted to make a contact for the purchase of narcotics. It is not enough, the court stated in *United States v. Christopher*, “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.” What that persuasion would be, however, has not been defined by the courts, though most are reluctant to allow the defense to be raised simply on the basis of proof of some government contact.

For those courts that have attempted to require more of the defendant than simply a showing of inducement, the approach has taken two forms. Some courts have adopted a so-called

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18 363 F.2d 169 (9th Cir. 1966).
19 Id. at 174 n.6.
20 488 F.2d 849, 850-851 (9th Cir. 1973); see also United States v. Andrews, 765 F.2d 1491, 1499 (11th Cir. 1985).
21 See, e.g., Pierce v. United States, 414 F.2d 163, 165-169 (5th Cir. 1969), cert. denied, 396 U.S. 960; see also United States v. DeVore, 423 F.2d 1069, 1071 (4th Cir. 1970), cert. denied, 402 U.S. 950: “solicitation by itself is not the kind of conduct that would persuade an otherwise innocent person to commit a crime.” This view is expressed in many of the modern jury instructions. Typical of this approach is that found in the District of Columbia Bar Association’s, *Criminal Jury Instructions No. 5.03* (3d ed. 1978), which contains a narrow definition of the term inducement:

Inducement by law enforcement officials may take many forms including persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward or pleas based on need, sympathy or friendship. A solicitation, request or approach by law enforcement officials to engage in criminal activity, standing alone, is not an inducement.

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unitary standard. See, for instance, Kadis v. United States.\textsuperscript{22} The court there centered its attention on both a showing of inducement and proof of non-predisposition.

If the defendant shows, through government witnesses or otherwise, some indication that a government agent corrupted him, the burden of disproving entrapment will be on the government; but such a showing is not made simply by evidence of a solicitation. There must be some evidence tending to show unreadiness.\textsuperscript{23}

The other approach, most prominently put forth by the Second Circuit, requires a "more cumbersome procedural mechanism."\textsuperscript{24} Under this rule, if the defendant offers some evidence of government initiation of the criminal activity, the prosecution then must demonstrate defendant's predisposition. At that point, however, if the prosecution satisfies the burden, the defendant must then come forward and demonstrate evidence of lack of predisposition. Unless such evidence of lack of predisposition is demonstrated, the defendant is not entitled to an instruction on entrapment even though the defendant previously showed some government initiation.\textsuperscript{25}

Both approaches create rather obvious difficulties. The procedures in both cases tend to be awkward, at best. Moreover, they both tend to defeat the essential point of the Hand formulation, that the defendant should have no burden with respect to the nature of the government contact, but that the government should have to prove that "the accused [was] ready and willing

\textsuperscript{22}373 F.2d 370, 374 (1st Cir. 1967).

\textsuperscript{23}See also United States v. Nations, 764 F.2d 1073, 1079 (5th Cir. 1985); United States v. DeVore, 423 F.2d 1069, 1071 (4th Cir. 1970), cert. denied, 402 U.S. 950.

\textsuperscript{24}As stated by Judge McGowan in United States v. Burkley, 591 F.2d 903, 914, (D.C. Cir. 1978). The Burkley opinion is a thoughtful analysis of the procedural problems connected with the entrapment defense.

\textsuperscript{25}In the Riley case, 363 F.2d 955, 958 (2d Cir. 1966), Judge Friendly discussed the principle:

\[\text{[E]ven when inducement has been shown, submission to the jury is not required if uncontradicted proof has established that the accused was "ready and willing without persuasion" and to have been "awaiting any propitious opportunity to commit the offense." In such cases there is no real issue for the jury even though in strict theory it might create one by speculating that the agents had found the defendant less willing than they said. On the other hand, the production of any evidence negating propensity, whether in cross-examination or otherwise requires submission to the jury, however unreasonable the judge would consider a verdict in favor of the defendant to be.}\]

\textit{Id.} at 959.
without persuasion . . . to commit the offense.’’ In addition, there is a real question of how a defendant would go about to prove the negative, that he was not predisposed. As a consequence, most courts have rejected this unitary standard (whether in a single procedure or in two procedures) and have avoided the problem by requiring the defendant to make a showing as to inducement that involves more than ‘‘mere solicitation,’’ but that ultimately places the burden of predisposition on the government.

A few courts require very little in the way of a burden on the defendant with regard to evidence of entrapment. In these courts, the burden is more correctly defined as one of production of evidence rather than of persuasion. That is, these courts require the defendant only to offer evidence of governmental inducement. At that point, the burden shifts to the government to prove predisposition.26

For those courts that require more than a production of evidence, there is a host of possible approaches. Some courts speak in terms of ‘‘any foundation in the evidence’’ to demonstrate inducement.27 Others talk of evidence that amounts to ‘‘more than a scintilla.’’28 Still others refer to the requirement that the defendant must put the inducement question ‘‘in issue.’’29 The majority of state and federal courts to consider the issue have, however, selected one of three approaches concerning the defense burden. The most limited burden is requiring the


27 United States v. Timberlake, 559 F.2d 1375, 1379 (5th Cir. 1977).

28 United States v. Wolffs, 594 F.2d 77, 80 (5th Cir. 1979).

29 United States v. Woosley, 761 F.2d 445, 448 (8th Cir. 1985); but see United States v. Nations, 764 F.2d 1073, 1080 (5th Cir. 1985):

We believe that our previous references to ‘‘any evidence’’ and ‘‘more than a scintilla’’ both point in the same direction—that evidence from which a reasonable juror could derive a reasonable doubt as to the origin of criminal intent and, thus entrapment. Entrapment is not raised by special plea but, rather, by identification or production of evidence. Thus, for the defendant to obtain an entrapment instruction based on the evidence at trial, the evidence ought, at the least, provide a basis for a reasonable doubt on whether criminal intent originated with the government. This follows because, if the evidence of entrapment is sufficient to submit the issue to the jury the district court must instruct the jury to acquit unless the evidence proves beyond a reasonable doubt that the defendant was predisposed—that the criminal intent originated with the defendant.
defendant to offer "some evidence of government conduct that would create a risk of causing an otherwise unpredisposed person to commit the crime charged." The second and higher standard was recently discussed by the Florida Supreme Court in the case of Florida v. Wheeler. "The defendant has the initial burden of establishing a prima facie case of entrapment. The trial court determines the legal sufficiency of the evidence of entrapment. If the defendant has not made a prima facie case, the defense of entrapment does not go to the jury."

Probably the leading standard used is the usual civil evidentiary rule, preponderance of the evidence. This is the principle put forth by both the drafters of the Model Penal Code and the original proposed revised Federal Criminal Code. In short, the great likelihood is that in a situation where the usual subjective approach to entrapment is raised, the burden on the defendant will be to show by a fair preponderance of the evidence the issue of entrapment.

30 United States v. Burkley, 591 F.2d at 914; see also United States v. Andrews, 765 F.2d 1491, 1499 (11th Cir. 1985).
31 468 So. 2d 978 (Fla. 1985).
32 Id. at 981. The court went on to explain that once the jury is instructed on the ultimate issue of entrapment—if the defendant has made the prima facie case—the jury should not receive any additional information respecting this prima facie case burden.

If, however, a prima facie case is made, the issue of entrapment is submitted to the jury with appropriate instruction . . . but the jury is not instructed on the defendant's initial burden of establishing a prima facie case. The burden lies with the State to disprove entrapment, which is usually done by proving the predisposition of the defendant beyond a reasonable doubt. Id.; see also United States v. Alvarez, 755 F.2d 830, 856 (5th Cir. 1985).

33 Model Penal Code § 2.13(2) places the burden on the defendant to prove "by a preponderance of evidence that his conduct occurred in response to an entrapment." One should be wary of placing too much emphasis on both the Model Penal Code and the proposed Federal Criminal Code, however, as each involves the objective test, not the majority subjective test. See generally Park, "The Entrapment Controversy" 60 Minn. L. Rev. 163, 263-266 (1976). For an example of a state statute that uses both the subjective standard and the preponderance principle, see Del. Code Ann. tit. 11, § 432, 304 (1979).
34 Brown Commission Report § 702(1), dealing with the proposed code, indicates that entrapment is an affirmative defense. An earlier section of the proposal notes that affirmative defenses place the burden on the defendant "of persuasion by a preponderance of the evidence." National Commission on Reform, Federal Criminal Laws 314-317 (1970) (1 working papers).
The final point to be raised in connection with these standards is whether they are different from each other in substance. As indicated previously, the question that actually arises in most cases under the majority-subjective analysis is whether predisposition can be shown. That is, in the vast majority of cases raising the entrapment question, inducement is clear with relatively little doubt. As pointed out by the Fifth Circuit, "there is little indication, however, that these semantic discrepancies [some evidence, evidence in the record, etc.] have realistically produced disparate results." 36

For the last decade a constitutional issue has been raised with some regularity by defense counsel in the entrapment area, though with a singular lack of success. The argument traces a line of U.S. Supreme Court cases which discusses the burden of proof in criminal cases. Defense lawyers have argued that all burdens with respect to the entrapment defense should be on the government, beyond a reasonable doubt. The earliest Supreme Court case cited dealing with the broad issue of the government burden is In re Winship. There, the Court explained that each element of each offense must, under the constitution, be proved by the government and not the defendant. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 37

36 United States v. Hill, 626 F.2d 1301, 1303 n.3 (5th Cir. 1980). It is worth noting that the analysis given above applies only in the usual subjective test jurisdictions. For a discussion of the objective test jurisdictions, see text accompanying notes 52-61 infra. A few states have unusual rules that do not fit in either category. See, for instance, New Jersey v. Rockholt, 476 A.2d 1236 (N.J. 1984), where the court interpreted the recent codification of the entrapment rules as combining both the objective and the subjective tests. Hence, in New Jersey at this time, "the defendant must prove by preponderance of the evidence, that the police conduct constituted entrapment by both objective and subjective standards." Id. at 1241.

37 397 U.S. 358, 364 (1970). The Court explained further:

The requirement of proof beyond a reasonable doubt has [a] vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. . . .

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. Id. at 363, 364.
Perhaps the "high-water mark" with respect to the principle is the well-known case of *Mullaney v. Wilbur*. There, the defendant was charged with murder but evidence was offered to indicate voluntary manslaughter based on the proposition that he acted in the heat of passion on sudden provocation. Maine required that the government prove, beyond a reasonable doubt, the intentional killing but that the defendant was required to prove, by a fair preponderance of the evidence, that he acted in the heat of passion on sudden provocation. Because the factor of heat of passion was actually an element of the crime (voluntary manslaughter was defined as a killing done in the heat of passion), the Court concluded that the state had impermissibly shifted the burden of proof, as to this element, to the defendant. Under *Winship*, according to the majority, the result was impermissible because "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion. . . ."\(^{39}\)

The Court was never again to go as far as it did in *Mullaney v. Wilbur*, a case that, admittedly, involved an unusual fact pattern where an apparent "defense" was actually an element of the crime. For instance, in *Patterson v. New York*,\(^ {40}\) state law required that the defendant in a prosecution for second-degree murder prove, by a preponderance of the evidence, that she acted under the influence of extreme emotional disturbance in order to reduce the crime to manslaughter. The Court in *Patterson* distinguished the *Mullaney* holding, finding that the factor at issue in New York was not an element of the offense as it had been in Maine.\(^ {41}\)

In a number of recent entrapment cases, defense counsel has relied on this line of constitutional determination by the Court, arguing that a showing of inducement and predisposition went to the heart of the case against the defendant. Thus the burden, under the due process clause, should be on the government to prove "non-entrapment." These contentions have been systematically rejected. The court in *United States v.*

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\(^{38}\) 421 U.S. 684 (1975).

\(^{39}\) *Id.* at 704.

\(^{40}\) 432 U.S. 197 (1977).

\(^{41}\) *Id.* at 214-216.
Braver noted that the defense of entrapment simply "does not negate any of the essential elements of the crime." That is, under the traditional views of the entrapment defense, the defense is allowed as a matter of policy either because of legislative intent or because certain inducement activities on the part of the government are inherently unacceptable. In neither situation, however, does the entrapment claim go to disproving any of the essential elements of the crime. As stated by one recent New York court:

Nor contrary to defendant’s contention, is there any constitutional infirmity in imposing the burden of proving entrapment by a preponderance of the evidence upon the defendant as an affirmative defense. Establishment of an entrapment defense does not negate the commission of the crime charged or the existence of any element thereof. Rather this affirmative defense "is designed to prevent punishment for an offense which is the product of the creative activity of [the state’s] own officials "by focusing on the inducing conduct of the police and the defendant’s predisposition."

While there may be some confusion as to the defense burden under the subjective test, as indicated above, there is no confusion at all as to the government’s burden. In both the federal courts and the state courts, if the defendant satisfies the first

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42 450 F.2d 799 (2d Cir. 1971).
43 Id. at 803.
45 The leading statement of this position is probably Justice Frankfurter’s in the Sherman case, 356 U.S. at 380. See also Sorrells, 287 U.S. at 457.
46 Indeed, in some jurisdictions the defendant will have to admit the commission of the offense in order to raise the entrapment defense. See text accompanying note 168 infra.
47 New York v. Millard, 456 N.Y.S.2d 201, 203-204 (N.Y. App. Div. 1982). See also Washington v. Ziegler, 575 P.2d 723, 725 (Wash. 1978), where the court—after affirming the propriety of placing the burden of proof as to an affirmative defense on the defendant—also noted that Mullaney only dealt with the situation in which the court was "to place the burden of persuasion on the defendant and negate facts which the State is required by statute to prove beyond a reasonable doubt."
prong of the Hand test, "the burden then shifts to the prosecution to prove the defendant's predisposition beyond a reasonable doubt. At that stage, the focus shifts to a subjective inquiry about the particular defendant's state of mind."  

As stated by the court in *Simmons v. Maryland*, "the burden as to the second question—was the defendant's criminal conduct due to his own readiness and not to the persuasion of the police, that is, did he have a predisposition to commit the offense—is on the State. This must be established beyond a reasonable doubt."

The Objective Approach

In a minority of jurisdictions, the "objective" approach to entrapment is followed, as espoused by both the Model Penal Code and the proposed revised Federal Criminal Code of the initial Brown Commission. Since the objective approach focuses not on the defendant's attitude or state of mind but rather on the government's conduct, there is, at least ideally, no issue regarding the defendant's predisposition. Thus, under both the Model Penal Code and the proposed Federal Criminal Code, entrapment is viewed as an "affirmative defense," which must be shown by the defendant. In the comments to both these proposed codes, the rationale given for placing the burden on the defendant is that this defense does not deal with defeating an element of the crime but instead is founded on public policy. As noted by the minority in the *Sorrells* case, the entrapment defense is based on "public policy which protects the purity of government and its processes." Those courts that have adopted the objective approach have done so either because of specific statutory enactments or because of judicial decisions. A brief look at these two aspects of the approach is worthwhile.

One of the leading state cases dealing with the statutory adoption of the objective standard is *North Dakota v. Pfister*.  

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51 259 A.2d 814, 820 (Md. 1969).
52 Model Penal Code § 2.13(2).
54 287 U.S. at 455.
55 264 N.W.2d 694 (N.D. 1978).
The North Dakota Supreme Court there analyzed the North Dakota statute which is identical to the language of the original proposed Federal Criminal Code. The court noted that the final report of the Commission on the Federal Code asserted that the entrapment defense "is treated primarily as a curb upon improper law enforcement techniques, to which the predisposition of the particular defendant is irrelevant." \(^{56}\) As a consequence, the court found that the burden should be placed on the defendant, and the North Dakota legislature expressly did so by stating that it was "an affirmative defense that the defendant was entrapped into committing the offense." \(^{57}\) The court also pointed to the legislature's determination that "an affirmative defense must be proved by the defendant by a preponderance of evidence." \(^{58}\)

The case of *Michigan v. D'Angelo* \(^{59}\) is an excellent treatment of the adoption of the objective standard by judicial determination rather than statutory enactment. There, the court looked to the rationale for the various entrapment standards and determined that the objective standard was the better approach. As a consequence, it held that the defendant should have the burden of proving by a preponderance of the evidence that she was entrapped. The court stated that this was appropriate because "the defense of entrapment is not interjected to establish the absence of an essential element of the crime but to present facts collateral or incidental to the criminal act which justify acquittal on the ground of an overriding public policy to deter instigation of crime by enforcement officers in order to get a conviction." \(^{60}\) Once again, in response to the popular argument that burdening the defendant with proving the defense of entrapment raises constitutional questions, the court simply de-

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\(^{56}\) Id. at 697.

\(^{57}\) Id. at 699; see also N.D. Cent. Code § 12.1-05-11.


\(^{59}\) 257 N.W.2d 655 (Mich. 1977).

\(^{60}\) Id. at 661.
cided that the issue did not involve elements of the offense and hence the due process clause was satisfied. 61

Questions of Law and Fact

The burden of proof problem, as discussed previously, becomes particularly acute when it focuses on the individual(s) who must be satisfied by the offer of proof. In the entrapment area, courts often loosely talk about entrapment existing as a matter of law or a matter of fact. Indeed, some courts have even suggested that entrapment as a matter of law can be disposed of not by the court, but by the trier of fact, the jury. Generally, however, questions of law and fact in the entrapment area typically are resolved by looking to whether the jurisdiction employs the subjective test or the objective test. The major exception to this principle falls in those cases that would normally have the matter resolved by the jury, but the court concludes that entrapment has been shown so clearly that it can be determined as a matter of law.

The Subjective Test

The subjective test as enunciated by the Supreme Court has always been assumed, by the Court, to be typically resolved by having entrapment viewed as a question of fact to be considered by the jury. 62 The reason for this jury determination typically 63 is that "the issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused." 64 Although the burden can constitutionally be placed on the defendant—because the factors involved in entrapment do not affect the elements of the offense itself 65—the guilt or innocence consideration is foremost in the

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61 Id. at 662. See also Pfister, 264 N.W.2d at 694; Anderson, 572 P.2d at 159.


63 Though the matter is not always for the jury, as in the Sherman case itself where the Court concluded that the issue should be decided as a matter of law. 356 U.S. at 377.

64 Id.

65 The constitutional question typically involves analysis of the Supreme Court's decisions in Mullaney v. Wilbur and New York v. Patterson, concerning shifting the
subjective test jurisdiction. "The fundamental rationale of the entrapment defense, as established by the Supreme Court, is that a defendant charged with a criminal offense is not guilty if the criminal intent was implanted in him by the government." 66

This rationale is followed in most states that follow the subjective approach; they generally submit the entrapment issue to the jury. 67 The federal cases, of course, consistently follow the Supreme Court’s view in concluding that “the question of entrapment goes to his guilt or innocence of the offense charged and is to be resolved by the jury." 68

An unusual procedure with respect to questions of law and fact in the entrapment area was developed by the Minnesota Supreme Court in Minnesota v. Grillie. 69 The court analyzed the law of entrapment and concluded that it would retain the majority-subjective approach.

In the majority view, the inquiry on entrapment is concerned primarily with the element of defendant’s predisposition: whether it was his own original intent to commit the crime charged. The defense must show that the actions of the police went further than those necessary to produce evidence of the defendant’s criminality. 70


68 Pierce v. United States, 414 F.2d 163, 166 (5th Cir. 1969); see also United States v. Lentz, 624 F.2d 1280, 1286 (5th Cir. 1980) (“it is well settled that the question of entrapment, if fairly raised, is one for the jury.”); United States v. Mayo, 705 F.2d 62, 67-68 (2d Cir. 1983) (“jury determinations of this issue are favored”); See generally United States v. Rogers, 639 F.2d 438 (8th Cir. 1981); United States v. Twigg, 588 F.2d 373 (3d Cir. 1978).

69 230 N.W.2d 445 (Minn. 1975).

70 Id. at 452. The court went on to explain why it was retaining the subjective test. [W]e decline to adopt the [objective] approach suggested by defendant. To determine entrapment we must distinguish between the “trap for the unwary innocent and trap for the unwary criminal.” If the latter is the target, there is no entrapment. Where, as here, we have situations involving drug pushers, the practicalities and realities are such that convictions would be almost nonexistent if the “objective” theory of entrapment were adopted. If the evidence adduced by the prosecution is accepted, then it becomes clear that the defendant was no unwary innocent person.

Id. at 454.
The court recognized that the entrapment issue has traditionally been given to the jury for consideration after instructions from the court based on this subjective approach. While the court continued to allow the defendant to elect to have this defense decided by the jury, it also offered future defendants an option. In its view, "entrapment should no longer be left in all instances as a defense to be determined by the jury ... [so] that a proper balance may be struck between the obligations of law enforcement and the rights of the accused who raises the defense of entrapment." According to Minnesota v. Grillie, therefore, the defendant can either have the matter resolved by the jury or can, prior to the commencement of trial, elect to have the claim of entrapment heard and decided by the court as a matter of law. After giving notice of this election to the court and the prosecution and setting forth the basis for the claim, the defendant can present the argument at a pretrial evidentiary hearing similar to a motion to suppress evidence. The trial judge then makes findings of fact and conclusions of law on the record.

If the court decides that defendant was entrapped into the commission of the crime charged, this will be a bar to further prosecution for that charge. The state may appeal this decision. If the court holds that there was no entrapment, the issue is closed and defendant may not present the defense to the jury.

The Minnesota approach is an unusual one, giving the defendant an option in determinations of questions of law and fact. No empirical evidence has been offered to indicate how often the process is utilized and whether a significant number of defendants elect to have a court determination instead of the more usual jury decision. The decision has not, however, been broadly followed throughout the United States. In the vast majority of states, the defendant is given no option concerning these questions.

In determining whether the entrapment issue gets to the jury in jurisdictions that utilize the subjective approach, the trial judge normally must view the evidence on the two separate questions: inducement by the government, and predisposition.

71 Id. at 455.
72 Id.
73 Id.
of the defendant. If, of course, the defendant offers no evidence of inducement, the entrapment defense will not come before the jury. Thus, as indicated above, in most jurisdictions simply demonstrating that an opportunity was created by the government for the commission of the crime will be insufficient to satisfy the burden as to inducement.\textsuperscript{74} The defendant, however, rarely loses on this point. As noted by the Second Circuit, the "defendant bears a 'relatively slight' burden in showing inducement. He need demonstrate only that the government initiated the crime."\textsuperscript{75} The Ninth Circuit characterization was similar. It referred to the fact that "only slight evidence is needed to create a factual issue and get the defense to the jury."\textsuperscript{76}

A few recent cases will demonstrate the ease with which the defendant normally will sustain his burden. See, for instance, \textit{United States v. Knight}\textsuperscript{77} where the defendant was charged with possession of a "'sawed-off shotgun.'"\textsuperscript{78} Defendant claimed that he had been entrapped into selling the sawed-off shotgun. On the matter of inducement, the court had little difficulty determining that sufficient evidence had been offered.

The defendant's testimony [was] that he offered to sell the weapon in unsawed-off state, but that the government agent indicated on both the first and second contact with the Defendant, that he would buy the weapon only if it were sawed-off; the Defendant finally agreeing on the second contact, after having first refused the agent's request to saw off the barrel of the weapon, because he needed the money.\textsuperscript{79}

\textit{Gobin v. Texas}\textsuperscript{80} presents another interesting view of the amount of evidence necessary to demonstrate inducement. The defendant there was convicted of delivering amphetamines. The contention for the defense was entrapment. The only evidence offered to demonstrate inducement which the court con-

\textsuperscript{74} See text accompanying notes 27-35 \textit{supra}.
\textsuperscript{75} United States v. Mayo, 705 F.2d 62, 67 (2d Cir. 1983).
\textsuperscript{76} United States v. Fleishman, 684 F.2d 1329, 1342 (9th Cir. 1982).
\textsuperscript{78} In violation of 26 U.S.C. §§ 5861(d), 5861(e), 5871.
\textsuperscript{79} 604 F. Supp. at 986.
\textsuperscript{80} 684 S.W.2d 802 (Tex. 1985).
sidered was the government agent’s threat to withhold rent money if the defendant did not sell the amphetamines to another individual, an undercover officer. The court concluded that this threat, while “far from conclusive evidence,” was sufficient proof of entrapment to raise the issue.

If there is a difficulty with the showing of inducement, it is almost always because of a court’s reliance on the “unitary” approach to the entrapment determination. That is, in a few jurisdictions it is not enough for the defendant simply to demonstrate governmental inducement. Instead—assuming the government has satisfied its burden—the defendant must offer some “evidence negating the defendant’s propensity to commit the crime.” As the court in United States v. Mayo noted:

While jury determinations of this issue are favored, the defendant is not automatically entitled to have the defense go to the jury whenever inducement is shown. If the government’s evidence of propensity stands uncontradicted, there is no factual issue for the jury to resolve and the defense will not be submitted.

It is also true, however, that very little is needed even to raise some doubt as to the predisposition, for the trial court must examine the record of the case “in the light most favorable to the defendant.” In addition, “any evidence negating propensity, whether in cross-examination or otherwise, requires submission to the jury however unreasonable the judge would consider a verdict in favor of defendant to be.”

81 The defendant also argued that the government agent threatened to withhold drugs that the defendant needed for his own addiction unless he would sell drugs to the undercover officer. The court, relying on prior precedent, held that such threats to withhold drugs could not constitute evidence that would raise the issue of entrapment.

A promise to get a person high on dope is so unlikely to induce a person not already so disposed, to commit the criminal offense charged as to not even raise the issue of entrapment.

82 The court asked the obvious question, “[why] didn’t the appellant simply tell the informant to sell his own drugs to his own friend?” 684 S.W.2d at 805.

83 See text accompanying notes 22-26 supra.

84 United States v. Watson, 489 F.2d 504, 509 (3d Cir. 1973); United States v. Jannotti, 673 F.2d 578, 597 (3d Cir. 1982).

85 705 F.2d 62, 67-68 (2d Cir. 1983).

86 United States v. Anglada, 524 F.2d 296, 298 (2d Cir. 1975).

87 United States v. Riley, 363 F.2d 955, 959 (2d Cir. 1966).
Cases do arise, though, where the defendant may be able to demonstrate some government initiation, but may not be able to show any negative evidence as to his preexisting intent to commit the crime. See, for example, *United States v. Armocida*\(^{88}\) where the defendant was convicted of various drug offenses.\(^{89}\) The court conceded that the facts arguably showed that government agents initiated the crime, but concluded “there was no evidence negating any propensity on the part of [the defendant] to deal in narcotics.”\(^{90}\) All the evidence in the case indicated the defendant was “a knowing and willing participant in the transactions from the start.”\(^{91}\) In all conversations the defendant readily replied that he would be able to obtain narcotics, that deadlines could be met, and that further meetings with the government agents would solve any difficulties as to the sale of the drugs. While there were numerous delays in connection with the sale of drugs, the evidence indicated the delays were “not due to any reluctance on [defendant’s] part.” The defendant in that case did not take the stand but still “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.”\(^{92}\)

The Second Circuit set forth the “minimal” rule under the unitary approach for preserving the defense.

> [T]o contradict the government’s evidence of propensity, defendant must offer some evidence that is on target, some evidence that raises an issue of fact, however slight, concerning his propensity to commit the crime. A shot in the dark will not do. We will not . . . require submission of the defense despite overwhelming uncontradicted evidence of predisposition. While the accused need not meet the government’s showing with evidence of equal quantity and quality, he must at a minimum address the government’s showing.\(^{93}\)

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\(^{88}\) 515 F.2d 49 (3d Cir. 1975).

\(^{89}\) Conspiring to distribute, distributing, and using a telephone to facilitate distribution of heroin.

\(^{90}\) 515 F.2d at 55.

\(^{91}\) Id. at 56. The facts here are to be contrasted with those in *United States v. Anglada*, 524 F.2d 296, 297 (2d Cir. 1975), where predisposition was established in the government officer’s testimony of the defendant’s ready response to the inducement. There, however, the defense was preserved because the defendant cast doubt on the credibility of the agent; he “offered a different version of the transaction.”

\(^{92}\) 515 F.2d at 56.

\(^{93}\) *United States v. Mayo*, 705 F.2d 62, 70 (2d Cir. 1983).
The entrapment issues properly raised in a criminal trial are particularly appropriate for jury consideration because so often the issue of predisposition is one of credibility. In essence, many entrapment cases are disputes concerning who to believe, the defendant or the government agent. Because the jury is traditionally seen as the best judge of credibility, jurors properly are given the determination concerning the question of predisposition in most courts. The trial court in *United States v. Lentz* gave a fairly standard instruction dealing with this issue.

Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment, and the law of matter of policy forbids his conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is not entrapment. If, then, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred regarding the offenses charged in the indictment, the defendants . . . were ready and willing to commit the crime as charged in the indictment, whenever the opportunity was afforded, and that law enforcement officers or their agents did no more than offer the opportunity, then the jury should find that the defendants . . . are not victims of entrapment.

On the other hand, if the evidence in the case should leave you with a reasonable doubt as to whether the defendants had the previous intent or purpose to commit the offense as charged, apart from the inducement or persuasion of some law enforcement officers or agent of the government, then it is your duty to find the defendants . . . not guilty.95

Ultimately, as is readily apparent, "the key to an entrapment defense is the accused's predisposition to commit the crime."96 There will be cases, however, in which the trial court cannot allow the entrapment issue to go before the jury because a finding in favor of the defendant must be made as a matter of law.

In jurisdictions that utilize the subjective test, if there is sufficient evidence to get to the jury, when the defendant raises

94 See generally United States v. Rogers, 639 F.2d 438 (8th Cir. 1981); United States v. Lentz, 624 F.2d 1280 (5th Cir. 1980); United States v. Twigg, 588 F.2d 373 (3d Cir. 1978).

95 624 F.2d at 1286-1287 & n.8.

96 Id. at 1286.
the entrapment defense, the judge can nevertheless decide the matter as a question of law. This decision of law normally arises in one of two contexts: the evidence is indisputable with respect to a lack of predisposition, or the government conduct is so extreme as to require a verdict on the entrapment issue for the defendant. Because the issues are so very different under these two approaches, they will be treated separately.

**Indisputable Evidence of Lack of Predisposition**

Two recent cases have set forth the standard for a decision of law on behalf of the defendant. The Ninth Circuit in *United States v. Hsieh Hui Mei Chen*[^97] made clear that such a decision required uncontested evidence as to lack of predisposition. “In order to show that entrapment exists as a matter of law, there must be undisputed testimony making it patently clear that an otherwise innocent person was induced to commit the act complained of by trickery, persuasion, or fraud of a government agent.”[^98]

The state approach is illustrated by a recent opinion of the Arizona Court of Appeals: “Entrapment is a question for the jury unless there is no evidence to support the defense or unless

[^97]: 754 F.2d 817 (9th Cir. 1985).

[^98]: Id. at 821. See also United States v. Rangel, 534 F.2d 147 (9th Cir. 1976), cert. denied, 429 U.S. 854; United States v. Abushi, 682 F.2d 1289 (9th Cir. 1982). In some recent cases from the Eleventh Circuit, mention has been made, in dicta, “that the doctrine of entrapment as a matter of law did not survive the Supreme Court’s opinion in *Hampton v. United States*...” *United States v. Andrews*, 765 F.2d 1491, 1499 (11th Cir. 1985). The difficulty with this statement is that it simply is not a correct construction of the law. The statement in *Andrews* relies on a similar statement in *United States v. Struuf*, 701 F.2d 875, 877 n.6 (11th Cir. 1983), which in turn relies on a footnote in *United States v. Rodriguez*, 585 F.2d 1234, 1240 n.5 (5th Cir. 1978). The court in *Rodriguez*, however, was much more careful in its characterization of the Supreme Court’s holding in *Hampton*:

In *Bueno*, this court held that entrapment is established as a matter of law whenever the contraband in question is supplied to the defendant by a government agent, even where the defendant is predisposed. *Bueno* was effectively overruled by *Hampton v. United States*.

Thus, the *Rodriguez* court merely noted that the supply of drugs as such would not constitute entrapment as a matter of law, not that the entire doctrine of entrapment as a matter of law was no longer valid. The correct view of the principle was stated by the Fifth Circuit in *United States v. Nations*, 764 F.2d 1073, 1077 (5th Cir. 1985):

In essence, the jury must find that the defendant’s culpable intent originated with the defendant and was not the result of acts of government agents. Thus, to declare entrapment as a matter of law requires the conclusion that a reasonable jury could not find that the government discharged its burden of proof.
uncontradicted testimony makes it clear that an otherwise innocent person has been induced to commit criminal acts."

The defense motion with respect to entrapment as a matter of law can only be resolved by a thorough and careful review of the evidence concerning inducement, the degree of pressure utilized, and predisposition. The process is a difficult but important one.

Defense Motion Granted

In United States v. McLernon, the defendants were convicted of conspiracy in connection with cocaine sales. One defendant contended that the evidence as to lack of predisposition was beyond dispute. The court began by noting that the issue of entrapment normally is properly submitted to the jury. "If, [however,] the facts pertaining to that issue are not in real dispute, the question of entrapment may be taken from the jury [and decided 'as a matter of law']."

In order for the entrapment case to reach the jury, the government must present evidence from which the jurors could decide that the defendant was predisposed to break the law prior to the time that he received the opportunity given by the government officers. The court stated that in determining the question as a matter of law it would have to view the evidence "in the light most favorable to the prosecution and resolve all reasonable inferences therefrom in its favor." The question then becomes whether any reasonable juror could conclude beyond a reasonable doubt that the defendant was predisposed

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100 746 F.2d 1098 (6th Cir. 1984).

101 Id. at 1111.

102 Id. (citing, among other cases, United States v. Hodge, 539 F.2d 898 (6th Cir. 1976), cert. denied, 429 U.S. 1091; United States v. Jones, 575 F.2d 81 (6th Cir. 1978); United States v. Ambrose, 483 F.2d 742 (6th Cir. 1973)). The court also referred to the Sherman case where the Supreme Court concluded that the government's predisposition evidence had not been sufficient and that entrapment could be determined as a matter of law. Another construction of the Sherman case is also possible, focusing on the outrageous behavior of the government officers. See text accompanying notes 123-126 infra.

103 746 F.2d at 1111.
to commit the crime. In relying on cases from other courts, the court stated that the key question is whether the defendant was predisposed to commit the crime "before coming into contact with the government." 

[The factors relevant to determining a defendant's prior disposition include] the character or reputation of the defendant, including any prior criminal record; whether the suggestion of the criminal activity was initially made by the Government; whether the defendant was engaged in the criminal activity for profit; whether the defendant evidenced reluctance to commit the offense, overcome only by repeated Government inducement or persuasion; and the nature of the inducement or persuasion supplied by the Government.

In the *McLernon* case, the government presented no evidence of the character or reputation of the defendant, no showing of a prior criminal record, and the evidence demonstrated quite clearly that the government officer initiated the contact. The defendant was resistant at first and then an unrelated profit-motivating "inducement" was created by the government agent, finally persuading the defendant to go along with the criminal activity. It was only after repeated personal contacts that the defendant, a "hard working" delivery man who had volunteered his time in numerous public activities, committed the crime. The court concluded that the defendant was entrapped as a matter of law.

On the record before us, we find no evidence that [defendant's] character or reputation inclined him toward criminal activity, no evidence that [he] initiated the criminal activity, no evidence that [he] readily accepted the opportunity presented by [the] government agent, and no evidence

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104 See, e.g., United States v. Kaminski, 703 F.2d 1004 (7th Cir. 1983); United States v. Reynoso-Ulloa, 548 F.2d 1329 (9th Cir. 1977), cert. denied, 436 U.S. 926.

105 746 F.2d at 1112; see also United States v. Townsend, 555 F.2d 152 (7th Cir. 1977), cert. denied, 434 U.S. 897.

106 Id.

107 The Court was particularly troubled by the government officer's establishment of an extremely close relationship with the defendant so as to later use that relationship to exert influence in causing the criminal behavior.

Yaqui and Hamlin became so close that they performed the Indian ritual of becoming "blood brothers." Agent Hamlin and Yaqui frequently called each other "blood brother." Hamlin, in fact, introduced Yaqui to his family by stating, "here's my blood brother; he's going to be one of the family; treat him just like the family."

746 F.2d at 1113.
that [he] would have committed this crime absent the overwhelming strength of [the] agent’s inducement. We find instead that [the] agent induced an unwary and innocent man into committing crimes he was not predisposed to commit by becoming his "blood brother" and preying upon the love and loyalty of that special relationship. . . . [W]e conclude that the government presented no evidence from which a reasonable juror could have concluded that [defendant] was predisposed to conspire to violate the narcotics laws. 108

The defendants in United States v. Dion 109 were Indians living in one of the poorest parts of the United States with an extremely high unemployment rate and a very low annual income. They were convicted of selling government agents such protected birds as eagles. The government offered no evidence that one of the defendants, Fool Bull, was predisposed to commit the crime other than the fact that the government made an offer to purchase a bird from the defendant and that he accepted the offer with little hesitation. The defense, however, pointed to the fact that the government’s undercover operation continued in this impoverished area for over two years and involved government agents on numerous occasions making extremely profitable offers of illicit activity to very poor residents of the area. Moreover, the defendant had but one transaction with the government and “the tape of this transaction reflects that Fool Bull had never sold a protected bird before and was quite naive as to the proper price for an eagle and what the ‘traders’ would do with it.” 110 The court recognized that the entrapment defense is “relatively limited” and does not give the federal judiciary a “chancellor’s foot” veto over disagreeable law enforcement practices. 111 On the nature of the evidence, however, it expressed real concern over whether the defendant’s “actions

108 Id. at 1114.
109 762 F.2d 674 (8th Cir. 1985).
110 Id. at 691.
111 Id. (quoting Justice Rehnquist’s opinion in the Russell case, 411 U.S. at 435). The court went on, however, to quote an earlier decision.

[T]he line must be drawn where, as here, a government agent lures the unwary innocent and then implants a law-breaking disposition that was not theretofor present. In such cases the government takes on the unwholesome appearance of the consummate manufacturer of crime. The continuing vitality and integrity of our “government of laws” would be imperiled if we sanctioned the manufacturing of crime by those responsible for upholding and enforcing the law.

762 F.2d at 691.
were completely the result of a government undercover operation which had carried on too long.” Ultimately, the court held that “the evidence shows that Fool Bull was entrapped as a matter of law. No reasonable juror could have found beyond reasonable doubt that Fool Bull was ready and willing to commit the crimes, and that the agents did no more than afford him an opportunity to do so.”

**Defense Motion Denied**

Perhaps the leading case in this area—and one of the leading cases on the entire law of entrapment—is *United States v. Jannotti*. There, the Third Circuit, en banc, considered one of the actions resulting from the government operation known as ABSCAM where FBI agents posed as employees of a fictional corporation and created opportunities “for illicit conduct by public officials predisposed to political corruption.” The particular defendants involved in the case were found guilty of conspiring to obstruct interstate commerce and conspiring to violate the Racketeer Influence and Corrupt Organization statute. The two defendants were members of the Philadelphia City Council and were shown to have taken this “sting” money in exchange for promises of exerting influence on behalf of the givers of the money. One of the principal issues on appeal was the defense’s entrapment argument. The district court had submitted the issue of entrapment to the jury following the usual jury instructions dealing with the subjective approach. After the jury decided that the defendants had not been entrapped, the district court nevertheless granted the defendant’s motion for acquittal, finding that the evidence was, “as a matter of law, insufficient to establish the defendants’ predisposition beyond a reasonable doubt.”

The basic question in *Jannotti* was whether the government may show predisposition simply by the acceptance of the

112 *Id.* at 692.
114 *Id.* at 581.
117 *Jannotti*, 673 F.2d at 598.
money itself, a proposition denied by the trial judge. By focusing on several factors, the appeals court concluded that the government had proved precisely this, beyond a reasonable doubt. The court determined that the sizes of the payments ($30,000 to one defendant and $10,000 to another) were not so large "in today's inflationary times . . . as to overcome an official's natural reluctance to accept a bribe." Thus, these figures were not so high as to weigh against predisposition in favor of entrapment. Moreover, the two defendants, both public officials, clearly knew that the payments were bribes to be used in exchange for exerting improper influence on the rest of the Philadelphia council. As a consequence, the majority determined that the defense could not prevail as a matter of law.

The ultimate factual decisions in an entrapment case must be left to the jury. Where, as here, the jury was uniquely equipped to inquire into the calculus of human interaction, the court should not interfere with its conclusions, We conclude that in determining that the defendants were entitled to a judgment of acquittal on the ground of entrapment as a matter of law the district court impermissibly substituted its own determination of the credibility of witnesses, the weight of the evidence and the inferences to be drawn from the evidence for that of the jury.

**Extreme Government Conduct**

This branch of the legal question is quite different from the usual entrapment claimed resolved as a matter of law. It is often linked closely to the due process concerns discussed else-

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118 Id. at 599.

119 Id. at 606. Judge Aldisert wrote a lengthy dissent challenging a number of the fundamental premises of the majority. In particular, he questioned the deference to be given to the jurors as fact finders in entrapment cases.

The majority all allow the entrapment question in this case to be resolved by a lay jury. As staunchly as I believe the jury, reflecting the conscience of the community, should be society's instrument for resolving controverted facts once a minimum legal threshold has been established, I stoutly believe also that the jury, untrained in the law, should never be called upon to design and construct that threshold . . . Defining the precise division of authority in the judge-jury relationship is always a sensitive and delicate responsibility. Where the defense of entrapment is interposed, however, responsibility is appreciably intensified. The mere submission to the jury may present the jury with a Hobson's choice as to the defendant, because the entrapment defense requires the defendant to admit the commission of deeds which, but for their inducement by the government, would constitute the commission of a crime.

Id. at 614; see generally United States v. Nations, 764 F.2d 1073, 1077-1078 (5th Cir. 1985).
where.\textsuperscript{120} For instance, the Eighth Circuit noted that where the government's conduct is so outrageous or fundamentally unfair the defendant may be deprived of due process of law, or the courts may be moved "in the exercise of their supervisory jurisdiction over the administration of criminal justice to hold that the defendant was 'entrapped' as a matter of law."\textsuperscript{121} The court in that case went on to note that such an entrapment argument involving outrageous government involvement simply presents no issue of fact for the jury to decide, it is entirely a question of law for the court. Because the legal question here is necessarily linked to the due process considerations, an extended discussion of the subject is not appropriate.\textsuperscript{122} Still, it is important to note that there is much in the famous \textit{Sherman}\textsuperscript{123} case to provide a basis for a ruling of entrapment as a matter of law.

The defendant in \textit{Sherman} was convicted of the sale of narcotics. The government agent\textsuperscript{124} first met him at a doctor's office where both were being treated for narcotics addiction. After numerous requests were denied for the purchase of narcotics, the defendant finally succumbed to the request of the agent. Chief Justice Warren had little doubt that the defendant had been induced to commit the crime and that the evidence with respect to predisposition was marginal.\textsuperscript{125} Thus, one reading of the case is that the Court decided that the government simply had not shouldered its burden of proving predisposition beyond a reasonable doubt. Nevertheless, much of the language in the case appears to be connected to the due process, outrageous conduct argument discussed above. One of the most often quoted paragraphs from the case is right on point.

\textsuperscript{120} See generally Park, note 1 supra.

\textsuperscript{121} United States v. Quinn, 543 F.2d 640, 648 (8th Cir. 1976); see generally United States v. McCaghen, 666 F.2d 1227, 1230 nn.5-7 (8th Cir. 1981).

\textsuperscript{122} For an excellent discussion of this point, see Cruz v. Florida, 465 So. 2d 516, 518-520 (Fla. 1985).

\textsuperscript{123} 356 U.S. 369 (1958).

\textsuperscript{124} The government agent was apparently operating as a "free agent" but the court made clear that the government could not "disown" him or "insist it is not responsible for his actions." \textit{Id}. at 373. There were numerous instances of involvement by the government official with this agent connecting the two together.

\textsuperscript{125} The evidence of predisposition was weak. The defendant was reluctant and slow to respond to the agent's offers, and the only prior convictions in the area were a nine-year-old sales conviction and a five-year-old possession conviction. \textit{Id}. at 375.
The case at bar illustrates an evil that 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.\textsuperscript{126}

\textbf{The Objective Test}

The traditional view of the objective test for entrapment involves a judicial determination of the key questions. Most courts have taken this view based on the notion that the purpose of the doctrine of entrapment is not to determine the individual's culpability, but rather to apply public policy so as to preserve the purity of the judicial system. Justice Frankfurter, dissenting in the \textit{She rman} case, put the matter forcefully:

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. . . . Insofar as they are used as instrumentalties in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and refuse to sustain such method by effectuating them. . . . Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake.\textsuperscript{127}

Because of this idea of an entrapment defense linked to public policy and the preservation of the propriety of the judicial system, the principal Supreme Court opinions espousing the objective view consistently declare that the courts, not the juries, should consider the entrapment issue. Justice Roberts in \textit{Sorrells}:

The doctrine rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and

\textsuperscript{126} \textit{Id.} at 376.

\textsuperscript{127} 356 U.S. at 380 (Frankfurter, J., dissenting).
of the court alone to protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention.¹²⁸

Justice Frankfurter in Sherman:

[S]uch a judgment, aimed at blocking off areas of impermissible police conduct, is appropriate for the court and not for the jury. . . . [A] jury verdict, although it may settle the issue of entrapment in the particular case, cannot give significant guidance for official conduct for the future. Only the court, through the gradual evolution of explicit standards in accumulated precedence, can do this with a degree of certainty that the wise administration of criminal justice demands.¹²⁹

Justice Stewart dissenting in the Russell case:

[T]he question is whether—regardless of the predisposition of the particular defendant involved—the government agents have acted in such a way as is likely to instigate or create a criminal offense. Under this approach, the determination of the lawfulness of the Government’s conduct must be made—as it is on all questions involving the legality of law enforcement methods—by the trial judge, not the jury.¹³⁰

Several of the state courts that follow the objective standard also rely on the principle that the determinations are properly for the judge, not the jury. As stated by the Alaska Supreme Court in Grossman v. Alaska,¹³¹ the issue is a question to be determined by the court and not the jury. “[I]t is obvious that the issue of entrapment can be litigated either before or during trial and should be determined by the court and not the jury.”

Perhaps the leading state case advocating the judicial determination of the entrapment question is Michigan v. D’Angelo.¹³² There, the Michigan Supreme Court reaffirmed the view that the objective standard is based on the position that the court, not the jury, ought to consider the broad policy questions involved in an entrapment defense. This determination was said to transcend the particular guilt or innocence of the defen-

¹²⁸ 287 U.S. at 457.
¹²⁹ 356 U.S. at 385.
¹³⁰ 411 U.S. at 441 (Stewart, J., dissenting).
The court went on, however, to point to the practical reason why the judge, not the jury, should consider the entrapment issue. The court was concerned preliminarily with a lack of guidance given by jury verdicts:

A jury verdict of guilty provides no evaluation of the challenged police conduct in the case and gives no guidance by which to measure the propriety of future official conduct. Similarly, a verdict of not guilty fails to disclose whether the police conduct challenged in the case was found to be impermissible or that the prosecution simply failed to prove the defendant's guilt beyond a reasonable doubt.

A judicial resolution, of course, may "through an accumulation of cases, [provide] a body of precedent which will stand as a point of reference both for law enforcement officials and the courts." Ultimately, however, the court's chief concern was that a jury simply could not at the same time consider evidence establishing the guilt for a given crime and determine that entrapment occurred with respect to such evidence.

The policy considerations which moved us to adopt the objective test of entrapment compel with equal force the conclusion that the judge and not the jury must determine its existence. The thesis is that law enforcement conduct which essentially manufactures crime is a corruptive use of governmental authority which, when used to obtain a conviction, taints the judiciary which tolerates its use. It is a practice which relies for its success upon judicial indifference, if not approval, and it must be deterred. Its deterrence is a duty which transcends the determination of guilt or innocence in a given case and stands ultimately as the responsibility of an incorruptible judiciary.

Id. at 658.

Aside from the forceful policy considerations which dictate judicial vigilance in guarding against and precluding the use of improper law enforcement tactics in the judicial process, there are pragmatic reasons why the duty should not be passed along to the jury.

Id. at 659.

Id.

Id.; but see Park, note 1 supra, at 226-227:

Supporters of the [objective] test usually advocate that the defense of entrapment be tried before the judge instead of the jury, so that a set of detailed standards can develop as judges write opinions dealing with specific fact situations.

Even with time and experience, development of detailed rules will probably prove to be quite difficult. . . . [I]t is . . . difficult to establish standardized procedures for the delicate process of investigation and detection. Officers and informers need to be able to respond differently to the multifarious situations with which they will be presented.
Evidence pertaining to guilt is likely to infect a jury determination of the voluntariness of a confession [and] has an equal and analogous application to jury determination of entrapment.

Just as in the determination of the voluntariness of an alleged confession, determination by the trial court of the entrapment issue will insure that the jury's verdict is free from the taint of undue and unnecessary prejudice which might well be generated by the concomitant duty to decide voluntariness in the confession case or the propriety of police conduct in the entrapment case. 137

Given the chief rationale for the objective entrapment test as being one of public policy, it is not surprising that the minority Justices of the U.S. Supreme Court and a number of courts following this approach have determined that the matter is properly heard by the judge and not the jury. 138 Some states, however, that have adopted the objective test have decided that the entrapment question should be given to the jury and not to the judge. 139 In these courts, the judges focus on the objective test as evaluating the sort of conduct that might cause the average citizen to become a lawbreaker. With that in mind, the determination can properly be viewed as a jury matter. Perhaps the leading case on point is Iowa v. Mullen. 140

It has been persuasively urged courts must strike down "the use of their process to consummate a wrong" [citing Justice Roberts opinion in

137 D'Angelo, 257 N.W.2d at 659 (referring to the procedure for determining voluntariness of a confession stated by the U.S. Supreme Court in Jackson v. Denno, 378 U.S. 368 (1964)).

The jury, however, may find it difficult to understand the policy forbidding reliance upon a coerced, but true confession, a policy which has divided this Court in the past and an issue which may be reargued in the jury room. That a trustworthy confession must also be voluntary if it is to be used at all, generates natural and potent pressure to find it voluntary. Otherwise the guilty defendant goes free. Objective consideration of the conflicting evidence concerning the circumstances of the confession becomes difficult and the implicit findings become suspect.

378 U.S. at 382-383.

138 The Model Penal Code position on this is clear because it refers to the burden being on the defendant to prove, by a preponderance of the evidence, that the conduct complained of occurred in response to entrapment. "The issue of entrapment shall be tried by the Court in the absence of the jury." Model Penal Code § 2.13 (Proposed Official Draft 1962). The position is the same in the proposed revised Federal Criminal Code, see text accompanying note 53 supra.

139 Except, of course, in cases where the judge can resolve the matter as a question of law because the facts are so clear.

140 216 N.W.2d 375, 382 (Iowa 1974).
PROCEDURAL ISSUES OF ENTRAPMENT DEFENSE

Sorrells, supra]. Others have observed the defense will frequently pose evidentiary conflicts peculiarly suited to jury determination. Certainly the jury can weigh conduct which might induce "a normally law abiding person" to commit a crime as surely as it can weigh (in a tort case) the required conduct of a "reasonably prudent person."

The court noted that while there may be instances in which the trial judge should make the determination of entrapment as a matter of law, generally the issue will be submitted to the jury.

Inconsistent Defenses

The traditional, and prevailing, view has been that a defendant cannot raise inconsistent defenses in the entrapment area. Courts consistently hold that "it would be inconsistent and confusing to allow a defendant to contend in one breath that he did not commit the crime, and in the next breath that he was entrapped into committing it."

A number of jurisdictions do not, however, accept this view. Moreover, even in those jurisdictions that do accept this view, there has been considerable confusion as to creating "exceptions" to the rule and also as to defining when it is that an inconsistent defense is raised. This article turns first to the

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141 We hold the trial court shall determine the question as a matter of law where there is no dispute as to the facts or the inferences to be drawn from them but shall submit the issue to the jury where the defense is properly raised and there is a dispute in the evidence relating to the operative facts where the inferences to be drawn therefrom.

Id.

142 For other states that utilize an objective test (typically based on the Model Penal Code) but give the basic question to the jury, see Hawai'i v. Kelsey, 566 P.2d 1370 (Hawai'i 1970); California v. Barraza, 591 P.2d 947, 956 n.6 (Cal. 1979); New Hampshire v. Bacon, 319 A.2d 636 (N.H. 1974).

143 United States v. Sears, 343 F.2d 139, 143 (5th Cir. 1965).

144 The practical impact of the inconsistent defense rule is somewhat unclear. As pointed out by Professor Groot, in many cases:

[T]he defendant would be ill-advised as a matter of tactics to deny that the act was done. To make that denial in the face of overwhelming proof simply destroys whatever credibility the defendant might have had when he gave his version of the entrapment facts. This is not to say that the present application of the inconsistency rule to single-element crimes is legally supportable; it is merely to say that the class of cases in which it would be practical for the defendant to use both the defenses is so miniscule as to be unimportant.

Groot, note 1 supra, at 254, 263.
rejection of the inconsistent defense, then to those courts that accept the principle, and finally to the situations in which the principle may not apply even in the majority of jurisdictions.

It is not too surprising that courts that have adopted the objective test have been more likely to reject the inconsistent defense notion. There are several explanations for this. First, this principle of allowing inconsistent defenses is in accord with the prevailing view in civil procedure and the commonly accepted view in criminal cases as well. More important, however, is the basic foundation for the objective defense. As noted by one court, the objective view has as its purpose a policy "to discourage untoward government involvement in the manufacture of crime; entrapment excuses the commission of acts that would otherwise constitute a crime. Thus, entrapment is a special defense addressed to the court, the function of which is akin to that of the exclusionary rule." Because the basis of the objective principle is a focus on government conduct, the defendant's conduct becomes somewhat irrelevant. The Brown Commission made this point clearly. "The [defense] is designed to permit the defendant simultaneously to deny that he committed the offense and to claim an entrapment. The section, therefore, allows the defendant to plead inconsistent defenses." A broader explanation was given in perhaps the most famous opinion justifying the rejection of the inconsistent defense "doctrine."

In California v. Perez, Chief Justice Traynor rejected the government's position that in order to invoke the defense of entrapment the defendant would have to admit committing the criminal acts charged. In some detail, he explained his position.

Although the defense is available to a defendant who is otherwise guilty, it does not follow that the defendant must admit guilt to establish the defense. A defendant, for example, may deny that he committed every

145 Groot, note 1 supra, at 259.
146 See generally C.A. Wright & A. Miller, Federal Practice and Procedure § 1283, at 368, 372.
147 Groot, note 1 supra, at 259.
148 United States v. Demma, 523 F.2d 981, 983 n.1 (9th Cir. 1975).
149 Brown Commission, note 34 supra, working papers at 325.
150 401 P.2d 934 (Cal. 1965).
element of the crime charged, yet properly allege that such acts as he did commit were induced by law enforcement officers. Moreover, a defendant may properly contend that the evidence shows unlawful police conduct amounting to entrapment without conceding that it also shows his guilt beyond a reasonable doubt. When the evidence does show such conduct, the court has a duty to root its effects out of the trial upon its own initiative if necessary. Entrapment is recognized as a defense because "the court refuses to enable officers of the law to consummate illegal or unjust schemes designed to foster rather than prevent and detect crime." A rule designed to deter such unlawful conduct cannot properly be restricted by compelling a defendant to incriminate himself as a condition to invoking the rule. Thus, the defendant may challenge the legality of a search and seizure without admitting that the property seized was taken from him and without asserting a proprietary interest in the premises entered. To compel a defendant to admit guilt as a condition to invoking the defense of entrapment would compel him to relieve the prosecution of its burden of proving his guilt beyond a reasonable doubt at the risk of not being able to meet his burden of proving entrapment. To put the defendant in that dilemma would frustrate the assertion of the defense itself and would thus undermine its policy.\textsuperscript{151}

The rejection of the inconsistency defense idea in objective test jurisdictions is not surprising. What is, however, somewhat more surprising is its rejection in some courts that follow the subjective test for entrapment. Perhaps the leading case on point is United States v. Demma.\textsuperscript{152} There, the Ninth Circuit, en banc, considered the basic question, noting that the theory behind it was that it is "factually inconsistent for defendant to deny the crime charged and, at the same time, to claim entrapment."\textsuperscript{153} The court gave two reasons for its rejection of the inconsistent defense rule. The first was its view that such a rule conflicted with the Supreme Court's cases enforcing the en-

\textsuperscript{151} Id. at 937-938. The California Supreme Court reaffirmed this view in California v. Barraza, 591 P.2d 947, 956 (Cal. 1979): "[A] defendant need not admit his guilt, or even commission of the act, to raise a defense of entrapment." The court went on in Barraza to make clear that the proper test of entrapment in California would be the objective principle: "Was the conduct of the law enforcement agent likely to induce a normally law abiding citizen to commit the offense?" Id. at 955.

\textsuperscript{152} 523 F.2d 981 (9th Cir. 1975) (en banc).

\textsuperscript{153} Id. at 982. The court cited its principal prior holding in the area which explained the previous rule. "Appellants, to say the least, take a very inconsistent position in this respect. Appellants have maintained throughout that they did not commit a crime. It logically follows that absent the commission of a crime there can be no entrapment. The trial court understood this situation and very properly refused to inject into the case a question which could have no other result than to confuse."
trapment doctrine. In particular, the court looked to the opinion in the Sorrells case. It found that the theory of the Supreme Court there was that "the acts necessary to constitute any federal crime must be non-entrapped acts; non-entrapment is an essential element of every federal crime which is put in issue whenever evidence is introduced suggesting that an unpredisposed defendant was induced by the government to commit the acts charged." By requiring the defendant to concede the state of mind at issue, the court concluded, the government would be relieved of the burden of proving that the defendant had the mental element necessary under the statute. "[The inconsistent defense rule] relieves the Government of this burden whenever the crime charged involves a mental element which the defendant refuses to concede. [Thus], relieving the Government of the burden of proving that the necessary acts were nonentrapped conflicts fundamentally with the Sorrells conception of entrapment."

The court recognized that the government may not only have induced the acts required, but also the "scienter." More broadly, however, the court went on to find that there was no rationale for the inconsistent defense doctrine in entrapment cases where it would not be present in other cases.

It is well established that a defendant in a criminal prosecution may assert inconsistent defenses. The rule in favor of inconsistent defenses reflects the belief of a modern criminal jurisprudence that a criminal defendant should be accorded every reasonable protection in defending himself against governmental prosecution. That established policy bespeaks a healthy regard for circumscribing the Government's opportunities for invoking the criminal sanction.

The [entrapment] inconsistency theory is an exception to the rule in favor of inconsistent defenses. But it is an exception without any justification. There is no conceivable reason for permitting a defendant to assert inconsistent defenses in other contexts but denying him that right in the context of entrapment. Indeed, there is a compelling reason for

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154 Id. at 983. The court went on to quote Chief Justice Hughes' opinion in Sorrells, which appeared to expressly reject the inconsistency defense notion.

The defense is available not in the view of 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.

Id.

155 Id. at 983-984.
not making an exception of the entrapment defense. The primary function of entrapment is to safeguard the integrity of the law enforcement and prosecution process.\textsuperscript{156}

The most recent major case rejecting the inconsistent defense principle is the Fifth Circuit’s decision, en banc, in \textit{United States v. Henry}.\textsuperscript{157} There, the court focused on the “usual” inconsistent defense case. That is, the case in which the defendant does not truly contest that certain acts were taken,\textsuperscript{158} but instead contends that the government never proved that he had the appropriate state of mind under the statute, wholly apart from any entrapment contention. The court concluded:

[It would be] entirely consistent with the nature of the jury function and with the nature of the entrapment defense to require the jury to consider both the existence and the quality of the defendant’s alleged intent. Nor do we believe that in the light of values thereby advanced that it is impermissibly inconsistent for an accused both to claim that his admitted acts were without criminal intent, but that nevertheless any act he so committed was induced by governmental entrapment.\textsuperscript{159}

It focused its attention on the principle of entrapment being linked to the question of predisposition, “the origin of the criminal intent in issue.”\textsuperscript{160} That issue would consistently be one for the jury “whether he was predisposed to commit the charged crime, i.e., whether, focusing on the period before the commencement of the charged criminal episode, one can say that the criminal intent or design originated with government agents, is also a jury issue.”\textsuperscript{161}

The court noted that entrapment asks one key question, “What was in the defendant’s mind \textit{before} he did the charged acts?” The other key question, however, in most cases, is what was in the defendant’s mind at the time he committed the acts?

It is, then, not too inconsistent for a defendant to testify that he did not have the criminal intent required for conviction and then, through his

\begin{itemize}
\item \textsuperscript{156} \textit{Id.} at 985.
\item \textsuperscript{157} 749 F.2d 203 (5th Cir. 1984) (en banc).
\item \textsuperscript{158} It would be the rare case, indeed, where the defendant would claim that he did not commit \textit{any} of the acts alleged in the indictment. Such a case would normally involve misidentification, hardly the chief basis of most entrapment claim cases.
\item \textsuperscript{159} 749 F.2d at 211.
\item \textsuperscript{160} \textit{Id.} at 213.
\item \textsuperscript{161} \textit{Id.}
\end{itemize}
lawyer's argument and the court's instruction on the law, to urge the jury, in the event it rejects his personal view concerning intent, to find that the evidence requires acquittal on the basis of the entrapment doctrine. . . . Our holding is rooted in the fact that criminal intent is a "subjective determination," an "issue for the jury to resolve on the basis of circumstantial evidence under the totality of the circumstances." . . . Intent necessarily has an amorphous and subjective quality that permits reasonable people, even the defendant and the jurors, fairly to disagree over whether his intent was criminal at the time the act was committed. Accordingly, it is not inconsistent with a criminal trial's "moral content and . . . ultimate concern with guilt or innocence," to instruct the jury to evaluate the entrapment issue, should it disbelieve a defendant's denial of criminal intent.162

The historical precedent of the inconsistency rule is not entirely clear. Probably, the earliest use occurred a century ago in *People v. Murn*163 where the defendant was accused of selling whiskey to government officers. The court explicitly denied consideration of the entrapment defense—offered alternatively by the defendant. "Defendant is in no position to urge that the act complained of was induced by entrapment of the officers, for he claims he made no sale. . . . If it be found that he made the sale he cannot urge the defense of entrapment in exculpation of his act."164

Another early case is *Nutter v. United States*.165 There, the defendant not only denied that he provided morphine to a government informer, but also asserted the entrapment argument. The court did not hesitate to reject this view.

Such contention ignores, not only his own testimony that all of Williams' story was false, but the evidence of Williams that he bought drugs from

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162 Henry, 749 F.2d at 213-214. The dissenting judges focused primarily on the majority's view that the two defenses were not inconsistent.

To have sustained that defense in Henry's case then, the jury would have been required, not only to disbelieve Henry's sworn testimony that he acted without the specific intent that forms the core and crucial element of the offense with which he was charged, but to believe instead, not only that Henry acted with precisely the specific intent that he swore he did not harbor, but that the intent which he swore he did not have, originated with the government. In short, Henry claims the right to swear that he had no criminal intent and in the same breath to argue that he had one that did not originate with him.

*Id.* at 214.

163 190 N.W. 666 (1882).

164 *Id.*

165 289 Fed. 484 (1923).
the defendant a hundred times before. Under such circumstances there was nothing of illegitimate entrapment or procurement in the government inspector's sending him to make the 101st purchase under conditions which would enable the United States to offer corroborative proof that the sale had been made.\textsuperscript{166}

The majority of cases consistently takes the view that if the defendant has denied the commission of the acts constituting the crime, he cannot raise the entrapment defense.\textsuperscript{167} One recent case made the point forcefully.

[O]ne may not claim he was entrapped into a criminal act without first admitting that, he did, in fact commit it. A criminal prosecution such as this is not a game. It incorporates a moral content and an ultimate concern with guilt or innocence that are inconsistent with permitting the accused to say, "I didn't do it, but if I did, the government tricked me into it."\textsuperscript{168}

In response to the argument that the inconsistent defense doctrine should not be applied in the entrapment area, as it is generally not applied elsewhere in the criminal area, some courts have gone out of their way to find that the entrapment context is different. See, for example, \textit{United States v. Smith}\textsuperscript{169} where the point was discussed.

The doctrine facilitates the truth-finding function of a criminal trial and saves the prosecutor from presenting essentially two cases against the defendant, one relating to the offense and the other relating to predisposition prior to the offense . . . the unusual nature of the entrapment defense, focusing on the state of mind of the defendant prior to commission of the offense justifies this requirement.

Some courts still follow closely the traditional view regarding inconsistent defenses in criminal cases where the key defense is entrapment. In these courts, the defendant may be

\textsuperscript{166} Id. at 485.


\textsuperscript{168} \textit{United States v. Rey}, 706 F.2d 145, 147 (5th Cir. 1983), \textit{cert. denied}, 764 U.S. 1038. This ruling, of course, would no longer appear to have significant precedential value as a result of the Fifth Circuit's \textit{en banc} decision in the \textit{Henry} case, 749 F.2d 203 (5th Cir. 1984) (\textit{en banc}).

\textsuperscript{169} 757 F.2d 1161, 1167-1168 (11th Cir. 1985).
required to affirmatively make admissions\textsuperscript{170} and these admissions will have to go to \textit{all} key elements of the offenses charged. Several recent cases demonstrate the point. In \textit{United States v. Ranzoni},\textsuperscript{171} the defendant was charged with receiving liquor that had been stolen from an interstate shipment.\textsuperscript{172} He made two claims regarding the charge. First, he said that he did not know the goods were stolen. Second, he claimed he had been entrapped into committing the crime by a government agent. The court rejected the defense contention summarily.

We finally have no difficulty in disposing of [his] entrapment argument. [He] failed to admit each and every element of the § 2315 violation with which he was charged, a necessary prerequisite to raising an entrapment defense. Since [he] did not admit that he knew the liquor was stolen, he could not assert his entrapment defense at trial and cannot raise it on appeal.\textsuperscript{173}

The Third Circuit made the statement even more explicit by noting that the entrapment "defense requires admission of guilt of the crime charged and all of its elements, including the required mental state."\textsuperscript{174}

Perhaps the court to most strictly follow the inconsistent defense principle is the Arizona Supreme Court. In \textit{Arizona v. Nilsen},\textsuperscript{175} the court noted that it had "consistently held that to avail himself of the defense of entrapment, a defendant must admit all the elements of the offense."\textsuperscript{176} Presumably recognizing the Fifth Amendment self-incrimination implications of a requirement that the defendant take the stand and admit guilt, the court nevertheless made an admission requirement.

We agree that the defendant need not take the stand in order to assert the defense of entrapment, but we cannot see how one can passively admit to the elements of the offense. This admission must be made in some affirmative manner and cannot be assumed from a defendant's silence. If

\textsuperscript{170} Thus raising some significant questions under the Fifth Amendment Self-Incrimination Clause. See text accompanying notes 177, 191 \textit{infra}.

\textsuperscript{171} 18 U.S.C. § 2315.

\textsuperscript{172} 732 F.2d 555 (6th Cir. 1984).

\textsuperscript{173} 732 F.2d at 560.


\textsuperscript{175} 657 P.2d 419 (Ariz. 1983).

\textsuperscript{176} \textit{Id.} at 420.
the defendant does not wish to take the stand, he may, for example, offer
to stipulate to the admission . . . if, as here, the state refuses the offered
stipulation the defendant can have his admission of the elements read
into evidence . . . [no entrapment defense will be allowed, however,
where the defendant] sat mute and made no active admission of the
elements.\textsuperscript{177}

Most courts today, though, which follow the inconsistent
defense principle do not apply the rule as strictly as these
opinions. In particular, three chief "limitations" or "exceptions" consistently are used to lessen the impact of the in­
sistent defense doctrine.

The first limitation applies to the case in which the defendant
admits that he committed certain acts made unlawful under the
statute (selling the drugs, receiving the stolen goods, etc.) but
that he did not have the requisite state of mind required by the
law. In addition, he argues that if the jury disagrees with his
position, it should at least find that he could not be held for the
crime because he was unlawfully induced into selling the drugs
or receiving the goods by government agents. This limitation is
a popular one. As noted in one recent Pennsylvania case, the
supposed "inconsistency is, in fact, illusory."\textsuperscript{178} That is, the
jury is simply being asked to find two things. One, that the
government did not prove beyond a reasonable doubt that the
defendant had the necessary intent; two, that even if the intent
was present, the government entraped the defendant into
committing the acts necessary for the crime. Where the defen­
dant admits the commission of the acts, but disputes the evi­
dence as to intent, most courts do not apply the inconsistent
defense doctrine and instead allow the entrapment question to
go to the jury.\textsuperscript{179} A case illustrative of the point is California v.

\textsuperscript{177} \textit{Id.}

\textsuperscript{178} Pennsylvania v. McGuire, 488 A.2d 1144, 1150 (Pa. 1985). The result would, of
course, be different if the other "defense" was not lack of intent but something which
became a clearly inconsistent position. The example given in the \textit{McGuire} case was
alibi. These defenses would seem always to be inconsistent. See generally Martinez

\textsuperscript{179} [A]ppellant’s testimony is susceptible to several interpretations which would
support an acquittal: (1) he did not possess the requisite legal intent, i.e., knowl­
edge of the package’s contents, and (2) regardless of any knowledge the appellant
may have had concerning the package’s contents, the agents’ conduct was "de­
signed to induce [his] belief" that delivery of the parcel then was lawful. Whether
he did or did not know, or whether he was entrapped into committing the crimes,
are both reasonable conclusions based upon legitimate inferences supported by
the testimony. Because both constructions may be valid, there is no logical
Barraza\(^{180}\) where the defendant was convicted of selling heroin. He conceded that he had sold the heroin, but challenged the government’s proof with respect to the intent requirement. The court allowed the additional entrapment defense.

Further, such a defense is not inconsistent with the defendant’s theory. . . . His defense of denial did not extend to the inculpatory act alleged—providing the agent with a note to facilitate her heroin purchase transaction with another—but only to the intent with which such act was committed. He claimed only that he did not intend to participate in a heroin sale when he provided the agent with the note. He does not subvert his position in arguing, “and irrespective of my intent, the overzealous law enforcement conduct directed at me constitutes entrapment.”\(^{181}\)

Perhaps the leading case in the area is the Fifth Circuit’s decision in *United States v. Greenfield*.\(^{182}\) There, the defendant was charged with dispensing narcotics for improper purposes. He admitted that he dispensed the drugs but denied any criminal intent. He further made the standard argument that any improper intent that he might have had resulted from entrapment on the part of the government agent who had purchased the drugs. The court addressed the argument in some detail.

The sole contested issue at trial was the intent with which the acts were committed. The defendant strenuously asserted that the prescriptions . . . were for a legitimate medical purpose and within the course of his professional practice. Necessarily, the issue of criminal intent or guilty knowledge was a factual issue for the jury to resolve on the basis of circumstantial evidence under the totality of the circumstances. It was a subjective determination.

We do not believe that it is impermissibly inconsistent under these circumstances for a defendant also to argue that to the extent that the jury may find culpability on his part, he was entrapped. The defendant may say, “I did not go so far as to prescribe drugs without a legitimate medical purpose, but to the extent that you find that I did, I was entrapped.” . . . [I]t is permissible for the defendant to argue to the jury that he was entrapped. That is, he may argue he did not knowingly reason to prefer one to the total exclusion of the other; the appellant is entitled to have the issue submitted to and decided by a jury.

McGuire, 488 A.2d at 1151.

\(^{180}\) 591 P.2d 947 (Cal. 1979).

\(^{181}\) Id. at 956.

\(^{182}\) 554 F.2d 179 (5th Cir. 1977), cert. denied, 439 U.S. 860.
dispense the drugs without a legitimate medical purpose or, alternatively, he may argue that to the extent that he may have prescribed without a legitimate medical purpose, he was not predisposed to do so.\textsuperscript{183} The strict inconsistent defense theory traditionally has applied whether the defendant testified or not, so long as the defendant did not admit to all the elements of the crime charged.\textsuperscript{184} Many courts today, however, are willing to allow the entrapment defense to be raised even if the defendant did not make such an admission as long as substantial evidence regarding entrapment enters the case through the prosecution’s evidence. In such a case, a number of courts say that there simply is no inconsistency of defenses being alleged by the defendant; rather, the government has raised the issue.

In that situation a defendant may assert his or her own defense and still ask that the jury consider the possibility of entrapment as raised by the government itself. The availability of both defenses does not result from inconsistent statements made by the defendant and does not unduly burden the government, because the prosecution brings the issue into the case.\textsuperscript{185}

The Fifth Circuit in \textit{Sears v. United States}\textsuperscript{186} explained the rationale for this rule, a rationale that at least hints at a due process basis.

We do not think it is impermissibly inconsistent for defendant to deny the acts charged, yet urge the court on motion for acquittal that the government’s own evidence establishes entrapment as a matter of law. Similarly, the defendant is entitled to have a charge adjusted to the evidence, and if the government injects evidence of entrapment into the case, the defendant is entitled to have the jury instructed that if they find that he committed the acts charged, they must further consider whether he was entrapped into committing them. We feel that the ultimate goal of the criminal trial, the ascertainment of truth, permits no other course. A criminal defendant should not forfeit what may be a valid defense, nor should the court ignore what may be improper conduct by law enforce-

\textsuperscript{183} \textit{Id.} at 183.

\textsuperscript{184} United States v. Nicoll, 664 F.2d 1308, 1314 (5th Cir. 1982), \textit{cert. denied}, 457 U.S. 1118.

\textsuperscript{185} United States v. Smith, 757 F.2d 1161 (11th Cir. 1985); see also United States v. Haimowitz, 752 F.2d 1561, 1573-1574 (11th Cir. 1984), \textit{cert. denied}, \textunderscore\textunderscore\textunderscore\textunderscore\textunderscore\textunderscore\textunderscore U.S.

\textsuperscript{186} 343 F.2d 139 (5th Cir. 1965).
ment officers, merely because the defendant elected to put the government to its proof.\textsuperscript{187}

Although not common today, some courts continue to adhere to the view that the entrapment defense can only be raised by admission of the defendant, affirmatively, of the commission of the offense.\textsuperscript{188} See, for instance, the statement by the Sixth Circuit in \textit{United States v. Whitley}:\textsuperscript{189} "Whitley did not testify, admit the acts or present any evidence whatsoever. To rely on the defense of entrapment, the defendant must admit all elements of the offense."\textsuperscript{190}

Such a strong adherence to the inconsistent defense doctrine raises serious policy and constitutional questions. On the policy side, it is difficult to understand why some courts absolutely insist that the defendant affirmatively raise evidence for the defense when the government's evidence raises a triable issue concerning entrapment. There is no other area of the law regarding affirmative defenses that is treated accordingly. Moreover, with respect to the constitutionality of such a requirement, it would seem as if two concerns would be most acute: Does the requirement shift the burden of proof impermissibly from the government to the defendant with respect to the state-of-mind requirement, and under the due process clause can such a restriction apply if it requires the defendant to offer testimony? The court in \textit{United States v. Henry} stated the concerns very well:

\begin{quote}
The defendant is not required to testify or to concede guilt in order to pursue the entrapment theory. . . . Any other holding would "raise a serious Fifth Amendment question." In no other area of law does the defendant lose the right to put the government to its proof solely because he wishes the jury to determine whether he should be acquitted based on relevant evidence in the record. If the defendant does not testify, it is not his admission of criminality that triggers the jury's obligation to consider the entrapment defense. It is triggered by the presence of sufficient evidence of inducement and predisposition in the record to raise an
\end{quote}

\textsuperscript{187} \textit{Id.} at 143-144; see also Young v. Alabama, 469 So. 2d 683, 690 (Ala. 1985).

\textsuperscript{188} The view, of course, would be very strong in a state such as Arizona which is so stringent with regard to its requirement that the defendant affirmatively offer evidence (either as testimony or a stipulation) on the entrapment issue. See Arizona v. Nilsen, note 175 supra, 657 P.2d at 424.

\textsuperscript{189} 734 F.2d 1129 (6th Cir. 1984).

\textsuperscript{190} \textit{Id.} at 1139.
entrapment issue. If this were not so, the defendant’s right to have the jury evaluate all the relevant evidence and to consider every issue controlling the guilt-innocence determination would depend on his willingness to confess in whole or part.\textsuperscript{191}

The final limitation applies in cases where, at first blush, it appears there are inconsistent defenses involving entrapment; upon analysis, however, the defenses do not turn out to be truly inconsistent or contradictory. In such cases, almost always involving conspiracy, the entrapment claim is normally allowed. There are a few principal cases in the area which will demonstrate the point. The first is \textit{Henderson v. United States}\textsuperscript{192} where the defendant was charged with conspiracy. He denied any participation in conspiracy but admitted committing certain overt acts that were charged in the indictment. His claim was that he had been entrapped into committing the overt acts, though he denied that he had actually participated in the illicit agreement. A court could thus view the defendant as not being guilty, either because he did not agree to commit a crime or because he was entrapped into committing the charged overt acts. These two defenses simply were not inconsistent, as they did not “necessarily disprove” one another. “The defendant could admit operating the illicit still, deny being a party to the conspiracy charged, and still defend on the ground that such overt acts as he did commit were done as a result of entrapment.”\textsuperscript{193}

In \textit{United States v. Smith},\textsuperscript{194} the defendant was convicted of selling narcotics unlawfully. Here, the claim was a bit different. He admitted participating in the unlawful scheme, but asserted that he had purchased the narcotics as an agent for another person and thus was not an unlawful “seller” under the statute.\textsuperscript{195} The defendant was permitted to make the entrapment

\begin{itemize}
\item[\textsuperscript{191}] 749 F.2d 203, 211 (5th Cir. 1984); see also \textit{United States v. Stanley}, 765 F.2d 1224, 1234 (11th Cir. 1985).
\item[\textsuperscript{192}] 237 F.2d 169 (5th Cir. 1956).
\item[\textsuperscript{193}] Id. at 173.
\item[\textsuperscript{194}] 407 F.2d 202 (5th Cir. 1969), \textit{cert. denied}, 397 U.S. 949.
\item[\textsuperscript{195}] Under the statute, there was no liability if the defendant purchased as an agent for another, as opposed to purchasing for himself in order to sell to others. The law technically dealt with the sale of narcotics without making demand of a written purchase order.
\end{itemize}
defense because it did not disprove or conflict with the agency defense under the statute.

By the defense in the instant case the appellant was in effect saying that, although he participated in the transaction, his role was that of buyer's agent, but whatever his role was he performed it as a result of entrapment. Under these circumstances the defenses of not guilty and entrapment are not so inconsistent that entrapment clearly would not be available, and the circumstances here could reasonably have been considered by the trial judge as a departure from the normal situation where the two defenses would be wholly inconsistent.\footnote{407 F.2d at 204.}

The chief difficulty with the defense of a lack of conflict is that in most cases, as a matter of fact, the claim cannot be sustained. That is, apart from the other exceptions listed above, the defenses are indeed in conflict or are inconsistent. See, for instance, an Eleventh Circuit case, \textit{United States v. Smith}.\footnote{757 F.2d 1161 (11th Cir. 1985).} The defendant was convicted of conspiracy to distribute cocaine. He raised two very different defenses. The first was that he did not conspire with anyone other than the government agents, thus not creating an illegal conspiracy.\footnote{In the majority of jurisdictions, a "true" agreement must be present with two or more persons actually intending to commit a crime and agreeing to do so. The presence of government agents will defeat the agreement requirement if only one individual actually intends to commit the crime. See P. Marcus, \textit{The Prosecution and Defense of Criminal Conspiracy Cases} § 2.04 (1978).} The second defense was that if he did conspire with persons other than the government agents, he was induced by those government agents to do so. As stated by the court, a clear conflict existed and entrapment would not be allowed as a defense.

It is difficult to imagine two defenses more inconsistent than these two relied upon by Smith. If the jury were to believe that Smith did not conspire with non-agents, it could not simultaneously find that agents had entrapped him into conspiring with others. In addition, since the alleged offense in this case, conspiracy, looks to a state of mind, agreement, as its \textit{actus reus}, Smith has not even admitted the criminal act as alleged by the government, much less the criminal intent.\footnote{757 F.2d at 1169.}

In spite of cases such as \textit{Smith}, considerable policy and constitutional arguments can be raised against strict enforce-
ment of the inconsistent defense rule. Particularly, in states that have adopted the objective theory of entrapment, judges may well be willing to allow inconsistent defenses involving entrapment to be asserted. Still, even in those jurisdictions that purport to apply the inconsistent defense limitation, few apply the rule strictly. As a general matter, there are numerous exceptions to the rule which have eliminated the harshness of the rule in most situations.

**Conclusion**

The three problems discussed in this article—burden of proof, questions of law/fact, inconsistent defenses—are procedural in nature. Nevertheless, they are often crucial in the determination of entrapment cases. Particularly in jurisdictions that have adopted the subjective-predisposition test, courts may consider these problems in order to look to government conduct in resolving entrapment questions. These three procedural devices create opportunities for prosecutors, defense counsel, as well as trial judges to explore the relationship between the two entrapment tests in ways that are often crucial to the outcome of important cases.