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Comments

ENTRAPMENT: A CRITICAL DISCUSSION

I. INTRODUCTION

When officers or agents of the government induce a person into engaging in unlawful conduct for purposes of prosecution, the defendant may be able to avoid criminal liability by raising the defense of entrapment.\(^1\)

This defense is premised on the belief that in some circumstances even the most law-abiding citizen might engage in criminal conduct; thus, prosecution for a crime induced by police activity is unfair. While some writers have argued that entrapped defendants should not be allowed to avoid conviction,\(^2\) almost all American jurisdictions recognize the defense.\(^3\)

Moreover, other writers have contended that the defense of entrapment is constitutionally based.\(^4\) At present, entrapment is a frequently raised criminal defense, especially in prosecutions for narcotics offenses. The increased sophistication of law enforcement techniques should provide an added impetus for utilization of the defense. This comment focuses on the problems of substantive delineation and procedural fairness that confront defendants who attempt to defend on entrapment grounds. These issues are discussed within the context of the Missouri and federal courts. An exhaustive discussion of questions of constitutional compulsion \textit{vel non} is beyond the scope of this comment. Further, no attempt has been made to isolate the best theoretical basis for the defense, although the two leading rationales are identified. Rather, the profile of the defense is examined, and solutions are offered for some of its attendant problems.

II. THE ROLE OF THE UNITED STATES SUPREME COURT

In two important entrapment cases,\(^5\) \textit{Sorrells v. United States}\(^6\) and \textit{Sherman v. United States},\(^7\) the United States Supreme Court laid the present contours of the defense. In \textit{Sorrells} a prohibition agent went to defendant's home accompanied by three local residents. These residents, who were well acquainted with defendant, introduced the agent as a tourist from a nearby city. The agent, defendant and one of the accompanying local residents discovered that they had been members of the same military unit during World War I. In the ensuing conversation about their war experiences,

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3. Tennessee is possibly the only exception. However, it has been argued that the Tennessee decisions can be read as adopting the defense of entrapment when joined with the defense of consent. Working Papers of the National Commission on Reform of Federal Criminal Laws 312-13 (1970) [hereinafter cited as Working Papers].
the agent repeatedly asked the defendant if he could acquire liquor for
the agent to take to a business associate. After several denials that he dealt
in liquor or knew where to obtain it, defendant relented and obtained a
jug of whiskey, which he sold to the agent. In the resulting prosecution
for violation of the prohibition laws, the trial court ruled that no entrap-
ment existed as a matter of law. Thus, the court refused to submit this
issue to the jury. In holding this ruling to be error, the Supreme Court
distinguished between permissible strategy and unlawful entrapment:

The fact that officers or employees of the Government merely
afforded opportunities or facilities for the commission of the of-
fense does not defeat the prosecution. Artifice and stratagem may
be employed to catch those engaged in criminal enterprises. The
appropriate object of this permitted activity . . . is to reveal the
criminal design . . . and thus to disclose the would-be violators of
the law. A different question is presented 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 its commission in order that they may
prosecute.

The Court based its decision on the theory that Congress did not intend
"that [the statute's] processes of detection and enforcement should be
abused by the instigation by government officials of an act on the part of
persons otherwise innocent in order to lure them to its commission and to
punish them." The Court in Sherman agreed with this reasoning, saying,
"Congress could not have intended that its statutes were to be enforced
by tempting innocent persons into violations."

In these two cases the Court adopted what is commonly referred to as
the "origin of intent" or "subjective" test for entrapment. The inquiry

8. 287 U.S. at 438.
9. Id. at 452.
10. Id. at 441-42 (citations omitted).
11. Id. at 448.
12. 356 U.S. at 372. The facts in Sherman reveal inducement activity over
an extended period:
    Kalchinian, a government informant, first met petitioner at a doctor's
office where apparently both were being treated to be cured of narcotics
addiction. Several accidental meetings followed, either at the doctor's
office or at the pharmacy where both filled their prescriptions from the
doctor. From mere greetings, conversation progressed to a discussion of
mutual experiences and problems, including their attempts to overcome
addiction to narcotics. Finally Kalchinian asked petitioner if he knew of
a good source of narcotics. He asked petitioner to supply him with a source
because he was not responding to treatment. From the first, petitioner
tried to avoid the issue. Not until after a number of repetitions of the
request, predicated on Kalchinian's presumed suffering, did petitioner
finally acquiesce. Several times thereafter he obtained a quantity of
narcotics which he shared with Kalchinian. . . After several such sales
Kalchinian informed agents of the Bureau of Narcotics that he had another
seller for them.

Id. at 371. The court reversed Sherman's conviction, finding entrapment as a
matter of law from the undisputed facts as given above. Id. at 373.

13. Note, Entrapment, 73 Harv. L. Rev. 1333, 1335 (1960). This test has
been adopted in most jurisdictions. See generally 21 Am. Jur. 2d Criminal Law §§
under the subjective test goes beyond the fact that "the particular act was committed at the instance of government officials."14 When the defendant introduces evidence of inducement15 and contends that "the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials,"16 the inquiry turns to "the predisposition and criminal design of the defendant."17 This approach is based on the rationale that a defendant who raises this defense "cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing on that issue."18 Thus, under the subjective test the ultimate question is whether the inducement by the officers or the defendant's own predisposition caused the criminal conduct.

The concurring opinions of Justice Roberts in Sorrells19 and Justice Frankfurter in Sherman20 disagreed with the respective majorities as to the proper rationale for the entrapment defense. Justice Roberts argued that the defense was based on public policy, rather than on principles of statutory construction; the court should preserve "the purity of its own temple" from "such prostitution of the criminal law."21 Frankfurter agreed in Sherman,22 calling it "sheer fiction"23 to base the defense on statutory construction. He contended that the true basis of the defense was that in some circumstances "the methods employed on behalf of the Government to bring about conviction cannot be countenanced... Public confidence in the fair and honorable administration of justice... is the transcending value at stake."24

Of more importance, the concurring justices argued that the respective majorities had applied the wrong test for the defense. Justices Roberts and Frankfurter urged the adoption of an "objective test, whereby the court considers only the nature of the police activity involved, without reference to the predisposition of the particular defendant."25 Thus, the concurring

15. Whiting v. United States, 321 F.2d 72, 76 (1st Cir. 1963).
17. Id. This is the causation issue. If the defendant was not "predisposed" but was an "otherwise unwilling person" the defense of entrapment will lie, assuming a finding that the officers engaged in undue inducement. Sherman v. United States, 356 U.S. 369, 371 (1958).
19. Id. at 453 (concurring opinion).
20. 356 U.S. at 378 (concurring opinion).
22. 356 U.S. at 378 (concurring opinion).
23. Id. at 379.
24. Id. at 380.
opinion in *Sherman* contended that the proper consideration should be whether the police conduct "falls below standards, to which common feelings respond, for the proper use of governmental power." In[26] Inquiry into the criminal predisposition of the defendant, the origin of the intent to commit the crime and whether "creative activity" by the police caused the unlawful act are irrelevant under this formulation. Further, evidence of predisposition (which may include evidence of any past criminal activities of the type charged) may be unduly prejudicial. Finally, any test that focuses on the defendant's predisposition tends to ignore the underlying reason for the defense, police conduct.[27]

In *Sherman* Justice Frankfurter proposed a test with an appreciably different emphasis than the standard adopted by the majority:[28]

> This does not mean that the police may not act so as to detect those engaged in criminal conduct and ready and willing to commit further crimes should the occasion arise. . . . It does mean that in holding out inducements they should act in such a manner as is likely to induce to the commission of crime only those persons and not others who would normally avoid crime and through self-struggle resist ordinary temptations.[29]

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26. 356 U.S. at 382 (concurring opinion).
27. Id.

1. A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:
   (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or
   (b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.
2. Except as provided in Subsection (3) of this Section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the Court in the absence of the jury.
3. The defense afforded by this Section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.

The Proposed New Fed. Crim. Code, supra § 702 reads:

1. Affirmative Defense. It is an affirmative defense that the defendant was entrapped into committing the offense.
2. Entrapment Defined. Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other
Thus, the Frankfurter test emphasized the conduct of the police, rather than the criminal predisposition of a particular defendant. One writer has argued that the reasoning behind both tests ultimately is reduced to a judgment that an entrapped defendant is less guilty than other defendants. However, others have taken the opposite position. The latter writers contend that deterrence of wrongful conduct, not the innocence of the defendant, provides the justification for the defense.

III. DEVELOPMENT IN MISSOURI

Recognition of a defense based on police overreaching was not a sudden step for the Missouri courts. In 1902 the St. Louis Court of Appeals in State v. Lucas refused to acknowledge the existence of such a defense. The court stated that no recognized public policy condemned official action designed to entice persons into committing crime. Rather, such deception rendered a valuable service to the community "when nothing more than the truth [was] elicited and the guilty [were] brought to justice." In 1910 strong dicta by the Missouri Supreme Court in State v. Lee indicated that the state's public policy might be other than that declared in Lucas. In Lee a detective gave money to his employee, Hutchison, with which to initiate a crap game in defendant's establishment. Hutchison entered the establishment expecting a raid in one-half hour but found a game already in progress. In the resulting prosecution, the defendant sought to rely on State v. Waghalter, which held that although the owner only consented to the taking of his goods in order to entrap an intending thief, such consent was sufficient to prevent the taking from constituting larceny. In Lee the court noted that the Waghalter decision would have controlled if the crap game had been initiated at Hutchison's request. However, because the game was already underway when the entrapper entered, "it [could not] be said . . . that but for the incitement of Hutchison the defendant might have repented . . ."
Nevertheless, in 1915 the Springfield Court of Appeals in *State v. Richie* espoused a position similar to that taken in *Lucas*. *Richie* involved a prosecution for selling whiskey in violation of a local option law. Although a deputy sheriff made the purchase in question, the trial court refused to instruct on any defense similar to entrapment. In affirming the conviction, the appellate court ignored the *Lee* dicta, but stated: "That the purchaser is an officer is immaterial in law and commendable in morals, where done to detect and suppress crime."  

However, in 1916 the St. Louis Court of Appeals decided *State v. Ebel*, the first Missouri case holding available a defense based on police over-reaching. Under Missouri law at the time the facts in *Ebel* occurred, certain private clubs could sell liquor to members without possessing a liquor license. In this case a police officer entered a club that employed defendant as a doorkeeper. Because the officer falsely represented that he was a member, defendant sold him certain liquor tickets. The officer exchanged these tickets for drinks at the bar. The appellate court overturned defendant's resulting conviction for selling liquor without a license. Although the opinion criticized the *Lucas* holding, the court distinguished the facts in that case from those in the case at bar. In *Lucas* official action enticed the defendant into committing the offense. However, in *Ebel* the police deception caused the defendant to believe that the circumstances, if true, were such that the conduct in question was innocent.

By the late 1920's the defense of entrapment in Missouri had roughly assumed its present form. Today Missouri follows a subjective test for

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40. Id. at 8.
41. 188 S.W. 1192 (St. L. Mo. App. 1916).
42. Id. at 1154.
43. Id. As the court correctly pointed out, this case did not involve the question of inducement. The facts in *Ebel* were similar to those in *Voves v. United States*, 239 F. 191 (7th Cir. 1918), where the defendant was prosecuted under a statute prohibiting the sale of liquor to Indians. The government had disguised an Indian to look like a Mexican, to whom sales of liquor were allowed. The court reversed the conviction, saying that public policy estopped the government from prosecuting for an act originating in and caused by a government agent's deception. *Id.* at 192. See *United States v. Healy*, 202 F. 349, 350 (D. Mont. 1913), where on facts almost identical to those in *Voves* the court said that the government was estopped from prosecuting because of its "fraudulent concealment and deceit."

**Working Papers, supra** note 3, at 310-11, cite the *Healy* situation as an example of a "frame-up." Although not precisely the same, the "frame-up" is analogous to the entrapment situation. However, the Working Papers state that "the proposed entrapment statute is drafted broadly enough to encompass ['frame-up'] situations..." *Id.* at 312. The Model Penal Code explicitly covers this situation. The section on entrapment includes cases where a law enforcement official or someone cooperating with him induces or encourages another to engage in conduct for the purpose of prosecution by "making knowingly false representations designed to induce the belief that such conduct is not prohibited." MODEL PENAL CODE § 2.13 (1) (a) (Proposed Official Draft. 1962).

44. In 1928 the Missouri Supreme Court wrote as dicta:
   The distinctions seem to be well defined. If a person is induced by anyone to commit a crime for the purpose of securing a conviction, the conviction will not stand. But if the purpose to commit the crime is in the mind of the defendant at the time, or suggested by him, the defense of
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Enforcement resembling that adopted by the Sorrells and Sherman majorities. Although the Missouri courts have not completely discussed either opinion, they have cited these two cases as stating the general rule of law. Further, both the Missouri courts and the United States Supreme Court have relied, in part, on the same leading case in the entrapment area. The majority in Sorrells cited Butts v. United States as the leading case recognizing the defense in the lower federal courts. In an important 1929 case, State v. Decker, the Missouri Supreme Court also relied on Butts. In Decker a conviction for violation of the prohibition laws was reversed because the trial court failed to instruct on entrapment. The court stated:

The rules applicable may be stated thus: Where the criminal intent originates in the mind of the defendant on trial, and the offense is accomplished, it constitutes no defense that an opportunity is furnished, or that an officer aids in the commission of the crime, in order to obtain evidence upon which to prosecute him. But where the criminal intent originates in the mind of the entraper, and the accused is lured into the commission of the offense charged, in order to prosecute him therefore, it is the general rule that no conviction may be had, though the criminality of the act is not affected by any question of consent.

Additional support for this proposition can be found in State v. Hammond, where the Missouri Supreme Court held that a jury instruction correctly stated the law on entrapment. The court in Hammond pointed

entrapment will not avail. Officers or other persons may make an opportunity for one to commit a crime for the purpose of securing a conviction, and a conviction so obtained will be upheld if the criminal intent originated in the mind of the accused.

State v. Murphy, 320 Mo. 219, 227, 6 S.W.2d 877, 880 (1928), relying principally on Ritter v. United States, 293 F. 187 (9th Cir. 1923).
45. See text accompanying notes 15-18 supra.
46. See, e.g., State v. Van Regenmorter, 465 S.W.2d 613 (Mo. 1971); State v. Napoliis, 436 S.W.2d 645 (Mo. 1969); State v. Taylor, 375 S.W.2d 58 (Mo. 1964); Kansas City v. Martin, 369 S.W.2d 602 (K.C. Mo. App. 1963).
47. 273 F. 35 (8th Cir. 1921). In this case the United States Court of Appeals for the Eighth Circuit reversed a narcotics conviction because the trial court had not instructed on entrapment.
48. 287 U.S. at 444.
49. 321 Mo. 1163, 14 S.W.2d 617 (1929).
50. Id. at 1169, 14 S.W.2d at 619-20, citing Butts v. United States, 273 F. 35 (8th Cir. 1921). Other Missouri cases have also cited Butts as authority. E.g., State v. Hicks, 326 Mo. 1056, 33 S.W.2d 929 (1930); State v. Decker, 326 Mo. 946, 33 S.W.2d 958 (1930).
51. 447 S.W.2d 253 (Mo. 1969).
52. Id. at 254-55. The instruction read:
The defendant offers the defense of unlawful entrapment as to the crime charged in the information.

The law recognizes two kinds of entrapment: unlawful entrapment and lawful entrapment. Where a person has no previous intent to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids a 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 no defense, but is a
out that the United States Court of Appeals for the Eighth Circuit had approved a similar instruction in *Cross v. United States.* Of course, the *Cross* instruction followed the subjective test set out in *Sorrells* and *Sherman.*

In the spring of 1971, the Board of Governors of the Missouri Bar recommended that the Missouri Supreme Court approve for use the Draft Missouri Pattern Criminal Instructions, prepared by a special committee of the bar. The proposed instructions concerning entrapment follow the subjective test. Whether the court will approve these instructions is

lawful entrapment. When, for example, the Government has reasonable grounds for believing that a person is engaged in the illicit sale of narcotics, it is not unlawful entrapment for a Government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase narcotics from such suspected person.

If, then, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit crimes such as charged in the Information, whenever opportunity was offered, and that the Government agents did no more than offer the opportunity, the defendant is not entitled to the defense of unlawful entrapment. [The preceding paragraph will hereinafter be referred to as Part One.]

On the other hand, if the jury should find from the evidence in the case that the defendant had no previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government, then the defense of unlawful entrapment is a good defense, and the jury should acquit the defendant. [The preceding paragraph will hereinafter be referred to as Part Two.]

The court in *Hammond* did not thoroughly discuss this instruction. However, the court did point out that the ultimate source of the instruction was W. C. Mathes & E. J. Devitt, *Federal Jury Practice and Instructions § 10.12 (1965),* an unofficial work. The Missouri court apparently adopted the instruction on the assumption that it squarely agreed with existing law. See text accompanying notes 99-104 infra, for a discussion that questions this assumption.

53. *Id.* at 255.
54. 347 F.2d 827, 832 (8th Cir. 1965).
55. 27 J. Mo. B. 591 (1971).
56. Draft Mo. Pattern Crim. Instr. Nos. 3.28 & 3.30 (1969). These instructions read:

No. 3.28 (recommended):

Even if you find and believe from the evidence beyond a reasonable doubt that the defendant engaged in the conduct submitted in Instruction No.______, nevertheless you are instructed that unless you also find and believe from the evidence beyond a reasonable doubt:

First, that the defendant was ready and willing to engage in the conduct, and

Second, that the officer(s) only provided the defendant with the opportunity to engage in the conduct,
you must find the defendant not guilty. . . .

No. 3.30 (only if requested by defendant):

Even if you find and believe from the evidence beyond a reasonable doubt that the defendant engaged in the conduct submitted in Instruction No.______, nevertheless if you further find and believe from the evidence:

First, that the defendant was not ready and willing to engage in such conduct, and
unknown. However, the court has indicated that consideration probably will be on a case by case basis.67 Thus, some time may elapse before the proposed entrapment instruction is considered. Approval of this instruction would have little impact on present Missouri law. However, the Committee for a Modern Criminal Code, which is currently preparing a comprehensive revision of Missouri's criminal law, has an opportunity to alter the development of the state's law in the entrapment area.68

The development of entrapment as a defense in Missouri includes one notable idiosyncrasy. Based on "origin of intent" language of the subjective test, the Missouri courts have held, at times, that entrapment offers no defense to a liquor offense prosecution.69 Because liquor offenses do not require mens rea, these courts reason that the origin of the "intent" to commit the crime is irrelevant.60 The logic of this position is questionable. Under the subjective test, the crucial inquiry should be whether the defendant would engage in unlawful conduct of the type charged solely on his own or only in response to undue persuasion.61 If evidence in a case indicates that the police or their collaborators offered persuasive inducements, the absence of a mens rea element in the crime should not foreclose the defense. In any event, "origin of intent" inquiry focuses on "a general intent or predisposition"62 rather than on a specific criminal intent. Adoption of an objective test would eliminate this idiosyncrasy, because the mental state of the defendant is not pertinent to the inquiry under such a test.

IV. Participation of a Government Agent

In order for the defense of entrapment to be available, the inducement to commit the crime must come from a government agent or someone

Second, that the officer(s) induced him to do so, and
Third, that he would not have done so except for such inducement,
then you must acquit the defendant.


58. The Committee for a Modern Criminal Code anticipates completion of a draft in time for submission to the 1974 General Assembly. This draft will consist of a complete revision of Missouri criminal law. Interview with Gary L. Anderson, Executive Secretary of the Committee for a Modern Criminal Code, in Columbia, Missouri, Sept. 20, 1972.

59. See, e.g., State v. Varnon, 174 S.W.2d 146 (Mo. 1943); State v. Sheeler, 320 Mo. 173, 7 S.W.2d 340 (1928); State v. Broaddus, 315 Mo. 1279, 289 S.W. 792 (1926), State v. Seidler, 267 S.W. 424 (St. L. Mo. App. 1924). But see State v. Hicks, 326 Mo. 1056, 33 S.W.2d 923 (1930); State v. Decker, 321 Mo. 1163, 14 S.W.2d 617 (1929). In the latter two cases, the court allowed the defense of entrapment in liquor offenses. Further, the court in Seidler pointed out that the general proscription against use of the defense in this type of prosecution did not extend to the "frame-up" situation. See note 48 and accompanying text supra. Missouri is not the only jurisdiction with cases that refused to allow the defense of entrapment in a liquor offense prosecution. See generally Annor., 55 A.L.R.2d 1323, 1333-34 (1957).

60. State v. Sheeler, 320 Mo. 173, 178, 7 S.W.2d 340, 341 (1928); State v. Broaddus, 315 Mo. 1279, 1285, 289 S.W. 792, 795 (1926).


working under his direction; 63 inducement by a private citizen normally will not satisfy the requirements of the defense. 64 Language in some early Missouri opinions indicates that the defense can be established regardless of the entrapper's nonofficial status. 65 However, because Missouri presently follows federal law in this area, 66 the entrapper probably must be an officer or informer for the defense to be available today at the state level.

The instruction approved as accurately stating Missouri law in State v. Hammond 67 referred to inducement and persuasion "by some agent of the Government." On the basis of this language, it might be argued that inducement by a mere informer or special government employee will not satisfy the requirements of the defense. Nevertheless, as previously stated, Missouri follows the federal law on entrapment rather closely, and in the federal courts "special Government employees, as well as regular enforcement officers, are forbidden to engage in unlawful entrapment." 68 For


In this section "law enforcement agent" includes personnel of state and local law enforcement agencies as well as of the United States, and any person cooperating with such an agency.

64. Carbajal-Portillo v. United States, 396 F.2d 944 (9th Cir. 1968); Pearson v. United States, 378 F.2d 555 (5th Cir. 1967); United States v. Lavercik, 348 F.2d 708 (3rd Cir.), cert. denied, 382 U.S. 940 (1965). Model Penal Code § 2.10, Comment (Tent. Draft No. 9, 1959), points out reasons for not recognizing the defense of entrapment where the alleged entrapper is a private citizen, and instead limiting it to situations where conduct of the police or their associates is in question:

It is the attempt to deter wrongful conduct on the part of the government that provides the justification for the defense of entrapment. . . .

The harm done by increasing the risk of offending on the part of the innocent is great. Some persons will thus turn to crime and risk the pain of punishment at the call of law enforcement. When officers are engaged in persuading citizens to criminal acts, they are absent from their proper task of apprehending those offenders who act without encouragement. Such tactics spread suspicion in the community and can easily be employed as the expression of personal malice on the part of a police officer. Perhaps most important of all is the injury to the reputation of law enforcement institutions which follows the employment of methods shocking to the moral standards of the community.


65. See, e.g., State v. Murphy, 320 Mo. 219, 227, 6 S.W.2d 877, 880 (1929): "If a person is induced by anyone to commit a crime for the purpose of securing a conviction, the conviction will not stand." (emphasis added).

66. See text accompanying notes 45-54 supra.

67. 447 S.W.2d 253, 254 (Mo. 1969).

68. Carson v. United States, 310 F.2d 558, 561 (9th Cir. 1962); see Proposed New Fed. Crim. Code § 702 (3) (1971). A Delaware case said: "It is . . . necessary for the person luring an unsuspecting defendant into the commission of a crime to be connected in some fashion with the active enforcement of the law." Halko v. State, 209 A.2d 895, 899 (Del. 1965). Halko involved a prosecution for giving
example, in Sherman v. United States,\(^6\) where the entrapper was an informer named Kalchinian, the Court wrote:

The Government cannot disown Kalchinian and insist it is not responsible for his actions. Although he was not being paid, Kalchinian was an active government informer who had but recently been the instigator of at least two other prosecutions. Undoubtedly the impetus for such achievements was the fact that in 1951 Kalchinian was himself under criminal charges for illegally selling narcotics and had not yet been sentenced.\(^7\)

As one observer pointed out, "the courts have treated . . . paid informers and those acting under promises of immunity as government agents."\(^7\)

Under certain circumstances in Missouri, permitting the state to withhold the identity of its undercover employee on the ground of privilege, after the defendant has raised the defense of entrapment, may constitute prejudicial error. In State v. Davis\(^7\) the defendant alleged that he was inveigled into selling drugs to an agent named Dixon by a man whose identity the prosecution refused to reveal before trial. Not until the cross-examination of Dixon at trial did the prosecution disclose the identity of the alleged entrapper. The court emphasized that the informer "was the

false information on a driver's license application. The defense of entrapment was held inapplicable, because the alleged entrapper was an examiner for operators' licenses and had no enforcement duties.

70. Id. at 373-74. A footnote by the Court indicated that in 1952 Kalchinian received a suspended sentence, after the United States Attorney informed the District Judge that the entrapper had cooperated with the government. Id. at 374 n.8.
71. Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs, 60 YALE L.J. 1091, 1109 (1951).

The "contingent fee" type of pay arrangement with informers has troubled at least one court:

Without some such justification or explanation [i.e., "certain knowledge"], we cannot sanction a contingent fee agreement to produce evidence against particular named defendants as to crimes not yet committed. Such an arrangement might tend to a "frame up," or to cause an informer to induce or persuade innocent persons to commit crimes which they had no previous intent or purpose to commit. The opportunities for abuse are too obvious to require elaboration.

Williamson v. United States, 311 F.2d 441, 444 (5th Cir. 1962), cert. denied, 381 U.S. 950 (1965). The WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 310 (1970) [hereinafter cited as WORKING PAPERS], points out that the manual of instructions for Internal Revenue agents interprets the "certain knowledge" requirement as being similar to probable cause. However, in 1964 the same court that decided Williamson, defined "certain knowledge" as the equivalent of "prior knowledge." The court commented that the accused's record of past convictions for the same offense plus the neighbor's complaints about his activities satisfied the requirement. Thus, the court upheld the contingent fee arrangement on the facts of this particular case. Hill v. United States, 328 F.2d 988 (5th Cir.), cert. denied, 379 U.S. 851 (1964). In 1965 the same court again refused to condemn a contingent fee arrangement in a case involving prosecution of a county sheriff for operating a liquor "protection" racket. The court emphasized the federal agents' prior knowledge of the defendant's dealings and the difficulty of detecting the criminal activity of a state law enforcement officer. Sears v. United States, 343 F.2d 139 (5th Cir. 1965).

72. 450 S.W.2d 168 (Mo. 1970).
only person who could confirm appellant's claim of innocence and help establish his defense of entrapment.”

Further, the two basic reasons for allowing the privilege (the security of the informer and the preservation of channels of information to the state) could not have concerned the prosecutor, who tacitly waived the privilege by consenting to the disclosure at trial. Because the record strongly suggested a conscious effort by the prosecution to suppress evidence favorable to the defense until too late to be of benefit, the court reversed the conviction.

As a general rule, if the defendant knew that he was dealing with an officer, the defense of entrapment will be unavailable. However, an exception is made in cases of official bribery: “Entrapment may lie where a government officer demands a bribe, and an otherwise innocent person who fears official retaliation might yield to such a demand.”

V. INDUCEMENT OR OVERREACHING

Mere presentation of an opportunity to commit crime will not satisfy the requirements of the defense. Entrapment “has no application to a situation where enforcement officers merely permit a violation to occur in order to get sufficient facts to insure conviction.” For example, a simple offer by an officer or agent to buy drugs will not warrant an instruction on entrapment. In State v. Varnon, state agents tried to buy intoxicating beverages from defendant, who did not have a liquor license. After being refused, the agent persuaded Creasey, a friend of defendant, to approach him about purchasing liquor. Upon Creasey's request, the defendant sold him liquor. In affirming the resulting conviction for selling

73. Id. at 172.
74. Id. at 173. The court added that upon defendant's request, the state had a duty to make a good faith effort to locate the entrapper and inform the defendant of his whereabouts. Id.
75. See, e.g., Reid v. United States, 334 F.2d 915 (9th Cir. 1964); People v. Estrada, 211 Cal. App. 2d 722, 27 Cal. Rptr. 605 (1963). In one Missouri case, the evidence indicated that defendant knew that he was obtaining marijuana for a plainclothes officer. In discussing the entrapment issue, the Missouri Supreme Court did not mention the effect this knowledge might have on the availability of the defense. Neither party's brief raised this point on appeal. See Brief for Appellant, Brief for Appellee, State v. Stock, 463 S.W.2d 869 (Mo. 1971).
77. Sherman v. United States, 356 U.S. 369 (1958); United States v. DeVore, 423 F.2d 1069 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971); State v. Decker, 325 Mo. 946, 33 S.W.2d 958 (1930); State v. Murphy, 320 Mo. 219, 6 S.W.2d 877 (1928).
78. Murray v. United States, 250 F.2d 498, 492 (9th Cir. 1957), cert. denied, 357 U.S. 932 (1958); see Stein v. United States, 166 F.2d 851 (9th Cir.), cert. denied, 334 U.S. 844 (1948).
79. Kibby v. United States, 372 F.2d 598 (8th Cir.), cert. denied, 387 U.S. 931 (1967); State v. Napolis, 436 S.W.2d 645 (Mo. 1969). But cf. Kansas City v. Martin, 369 S.W.2d 602 (K.C. Mo. App. 1963), where a vice squad officer informed a bellhop that he desired to engage the services of a prostitute. When the prostitute appeared and gave her price, she was arrested and subsequently prosecuted.
80. 174 S.W.2d 146 (Mo. 1943).
liquor without a license, the court commented that the trial judge had properly refused to instruct on entrapment; Creasey’s collaboration with the officers merely “afforded appellant an opportunity to violate the law.”

State v. Taylor may be profitably compared with the above situations. In that case, a defendant convicted of selling marijuana appealed on the ground that the trial court erred in failing to instruct on entrapment. An undercover agent, with no apparent reason for believing defendant to be a narcotics violator, initiated conversations and visited with defendant on five occasions within a three or four month period. Each time, the agent asked defendant to sell him marijuana. Defendant always replied that he neither had marijuana nor knew anyone who did. On at least one of these visits, the agent took beer to defendant’s home. On the sixth visit, at a time when defendant was unemployed, the agent repeated his persistent offer of $5 for each can of marijuana the defendant could secure. Defendant finally yielded and, after considerable effort, obtained marijuana for the agent. In holding that this evidence of entrapment should have gone to the jury, the court emphasized that the agent did more than merely present an opportunity:

The jury had a right to find that the government agent initiated the idea of purchasing the narcotics; that the crime was the “product of the creative activity” of [the agent], that the intention to commit this crime did not originate in the mind of defendant but was planted there by the agent, who, through misrepresentation and deceit, imposition, persistent and repeated solicitation, inducement and promises of money consideration to one in reduced financial circumstances, finally engineered defendant’s participation in criminal activity which but for the pressures applied would never have been undertaken by him.

It should be noted that Taylor did not hold that the evidence showed entrapment as a matter of law, but only that an instruction was required.

The Missouri and federal courts have held that numerous types of action by government officers, agents or informers warrant a jury instruction on entrapment: Purchasing beer for defendant immediately prior to commission of the offense; promising defendant extravagant amounts of

81. Id. at 148. The court also pointed out that entrapment is generally not available “where the statute prohibits the act of selling intoxicating liquor (as distinguished from a sale with a specific intent) . . . .” Id.; see note 59, and accompanying text supra.
82. 375 S.W.2d 58 (Mo. 1964).
   Perhaps, neither the persistent solicitation, the use of an alias, the misrepresentation of the purposes for which [the agent] wanted to acquire the marijuana nor the use of friends of appellant for an entree, standing alone, would have been sufficient to raise a fact question as to entrapment, but when taken together along with the total lack of evidence that Peters had possessed or sold marijuana before, there was such an issue.
money;\textsuperscript{85} feigning illness in order to gain defendant’s sympathy;\textsuperscript{86} urging defendant to commit the crime “for old times’ sake”;\textsuperscript{87} providing defendant with narcotics to sell.\textsuperscript{88} Although not entrapment in the classical sense, some courts have required an instruction on entrapment where the officers deceived the defendant by causing him to believe that the conduct in question was not illegal.\textsuperscript{89}

VI. PREDISPOSITION

Under an objective test for entrapment only the nature of the police activity is considered. However, under the subjective test, the inquiry does not focus solely upon the conduct of the alleged entrapper; “the accused will be subjected to an ‘appropriate and searching inquiry into his own conduct and predisposition’. . .”\textsuperscript{90} Thus, the subjective test distinguishes “between the trap for the unwary innocent and the trap for the unwary criminal.”\textsuperscript{91} This language permits the argument that a trap for an “unwary criminal” is always permissible, because a finding that the defendant was predisposed to commit acts similar to those charged will nullify evidence of government inducement.\textsuperscript{92} The comments to the Model Penal Code section on entrapment adhere to the majority view under the subjective formulation: if an informer or agent “makes overreaching appeals to compulsion and friendship and thus moves D to sell narcotics, D has no defense if he is predisposed to narcotics peddling.”\textsuperscript{93}

The Missouri law on this point is unclear; the cases refer to both “predisposition”\textsuperscript{94} and to a “readiness and willingness to break the law.”\textsuperscript{95}

Court said: “The suggestion that the evidence that [the officer] supplied the appellant with his favorite brand of whiskey would support a finding of undue inducement is without merit.” The trial court’s refusal to instruct on entrapment was upheld.

\textsuperscript{85} Morel v. United States, 127 F.2d 827 (6th Cir. 1942).
\textsuperscript{86} State v. Hicks, 226 Mo. 1056, 33 S.W.2d 923 (1930).

Defendant’s evidence . . . tends to show further that the officers not only originated the intent, but they schemed to procure defendant to obtain whiskey by obtaining defendant’s confidence and playing upon his sympathy, in that they drank with him in the role of comrades and feigned illness and the necessity of whiskey to quiet their nerves.

\textsuperscript{87} See Sorrells v. United States, 287 U.S. 435 (1932).

\textsuperscript{89} See note 43 supra.
\textsuperscript{91} Id. at 372.
\textsuperscript{92} Orfield, supra note 76, at 59 n.122.
\textsuperscript{93} Model Penal Code § 2.10, Comment (Tent. Draft No. 9, 1959). The Working Papers, supra note 71, at 319-20, point out that predisposition of a defendant gives officers “carte blanche” for their conduct. See State v. Marquardt, 139 Conn. 1, 6-7, 89 A.2d 219, 222 (1950). But see United States v. Klosterman, 248 F.2d 191 (3rd Cir. 1957), where the court found entrapment, although the evidence indicated that the defendant initiated the overtures directed at bribing a federal agent. The court emphasized that the agent continued his inducements after the defendant stated his desire to dissociate himself from these dealings.

\textsuperscript{94} E.g., State v. Taylor, 375 S.W.2d 58, 61 (Mo. 1964).
\textsuperscript{95} E.g., State v. Hammond, 447 S.W.2d 253, 254 (Mo. 1969).
Because the essential question under the subjective test is whether the criminal conduct was the product of creative activity by officers or the defendant's own predisposition, the real issue is causation. The Missouri Supreme Court phrased the standard as whether officers "engineered defendant's participation in criminal activity which but for the pressures applied would never have been undertaken by him." Thus, a predisposed defendant cannot be entrapped, because it cannot be said that such a defendant engaged in the criminal conduct solely as a result of police inducement. However, the instruction approved by the Missouri Supreme Court in State v. Hammond does not clearly convey this idea. Under Part One of that instruction, the jury must find both that the defendant was predisposed and that the government agent did no more than present an opportunity in order to find the defendant guilty. Thus, the defendant appears to have an advantage not available under the general rule. Under Part One a finding of predisposition alone will not neutralize the defense of entrapment. However, Part Two of the instruction more clearly reflects the general rule. Under Part Two, the jury is told to acquit if they find from the evidence in the case that the defendant had no previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government. 

If Part Two of the instruction is read in conjunction with Part One, neither conviction nor acquittal could result in cases where the jury found both predisposition and police inducement. However, because Part One requires that predisposition and mere opportunity be found beyond a reasonable doubt in order to warrant conviction, this problem of logic is less serious than it may appear. Absent such a finding, acquittal would necessarily result. Thus, a literal application of this instruction dictates that the jury acquit even a predisposed defendant if they find that the police activity extended beyond mere presentation of an opportunity; that result is contrary to the traditional subjective test. Considering the authorities generally discussed by the Missouri cases, the discussions in those cases of the impact of a finding of predisposition, and the failure of the Hammond court to state that its decision altered the law, that result was probably not intended. Moreover, taken in conjunction, the two parts of the instruction probably are confusing to a jury. The Draft Missouri Pattern Criminal Instructions on entrapment resemble the Hammond instruction and, thus, fail to solve this problem.

By straining the language of the Hammond instruction, one can argue that Part One does, in fact, cover the situation where both predisposition

97. State v. Taylor, 275 S.W.2d 58, 61 (Mo. 1954) (emphasis added).
99. 447 S.W.2d 253, 254 (Mo. 1969).
100. See instruction quoted note 52 supra.
101. Id.
102. Id.
103. See instruction quoted note 56 supra.
and police inducements are found. If a defendant is predisposed to commit offenses similar to that charged, any persuasion by an officer will merely constitute presentation of an opportunity. However, this argument (that opportunity is relative) ignores the fact that in the doctrine of entrapment "opportunity" has become a term of art that generally encompasses official activity not reaching the level of inducement. Moreover, even assuming the validity of this argument as an abstract proposition, a jury instruction that does not mean what it says cannot be justified.

The Hammond instruction could easily be altered to conform with the general rule under the subjective test, that a finding of predisposition alone defeats the defense of entrapment. By changing the conjunctive "and" in Part One to the disjunctive "or," acquittal on entrapment grounds would be precluded if the jury found either predisposition or mere presentation of opportunity. Query: whether this change would make the instruction easier for the jury to understand?

Problems in drafting entrapment instructions are easier to avoid in objective test jurisdictions. The objective test only examines whether police conduct is "likely to induce to the commission of crime ... persons who would normally avoid crime and through self-struggle resist ordinary temptations." Because causation is not at issue, the jury is instructed to consider only the impact of the police conduct on the reasonable man. Thus, confusing sorties into considerations of predisposition are avoided.

VII. EVIDENCE OF PRIOR CRIMINAL ACTIVITY

In some jurisdictions predisposition can be demonstrated by the defendant's "readiness complaisance" with the solicitation of an officer. Of more importance, predisposition may also be shown by evidence of the defendant's prior similar criminal activity. Although no Missouri case has discussed the problem, the courts have assumed the admissibility of such evidence on this issue. For example, in State v. Taylor, while summarizing the evidence of entrapment produced at trial, the court noted that the prosecution had failed to show that defendant had previously handled narcotics "or that he had ever been convicted of any violation of the narcotics laws. . . ."

The danger to the defendant of undue prejudice at trial resulting from evidence of prior criminal activity of the type charged is obvious.

105. See, e.g., United States v. Wallace, 269 F.2d 394, 397 (3rd Cir. 1959); Kivette v. United States, 250 F.2d 749 (5th Cir. 1956), cert. denied, 355 U.S. 935 (1958). This method of showing predisposition has been challenged on due process grounds. This argument states that police should not be able to justify an arrest resulting from their own overreaching by pointing out that the defendant responded to official inducement. Note, The Serpent Beguiled Me and I Did Eat: The Constitutional Status of the Entrapment Defense, 74 YALE L.J. 942, 945 (1965).
106. See, e.g., Carson v. United States, 310 F.2d 558 (9th Cir. 1962); Ryles v. United States, 183 F.2d 944 (10th Cir.), cert. denied, 340 U.S. 877 (1950); see Orfield, supra note 76, at 59. But see People v. Benford, 53 Cal. 2d 1, 345 P.2d 928 (1959).
107. 375 S.W.2d 58, 60 (Mo. 1964).
One state supreme court accurately pointed out that admission of such evidence to show predisposition, in effect, places the defendant on trial for his past offenses and character.\(^\text{108}\) This problem is especially acute if the question goes to the jury. As Justice Frankfurter pointed out, under the subjective test "[t]he defendant must either forego the claim of entrapment or run the substantial risk that . . . the jury will allow a criminal record or bad reputation to weigh in its determination of guilt of the specific offense of which he stands charged."\(^\text{109}\) Sherman v. United States\(^\text{110}\) graphically illustrates the problem. In that case the Court commented that "a nine-year-old sales conviction and a five-year-old possession conviction [were] insufficient to prove petitioner had a readiness to sell narcotics at the time [the informer] approached him. . . ."\(^\text{111}\) Yet, the trial court had submitted the entrapment issue to the jury, which, undoubtedly prejudiced by the evidence of the prior convictions, returned a verdict of guilty.\(^\text{112}\)

In an effort to mitigate the danger of undue prejudice under the subjective test, the Model Penal Code argues that "the most urgent considerations" dictate that the issue of entrapment be tried by the court without a jury.\(^\text{113}\) This position is based on the rationale that a judge is more capable than a jury of evaluating the evidence. Thus, the court is less likely to misuse evidence of the defendant's prior criminal activity.\(^\text{114}\)

As a related problem, officers sometimes employ unfair law enforcement tactics against past offenders. As Justice Frankfurter wrote:

\begin{quote}
Past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing his repeated conviction, from which the ordinary citizen is protected. The whole ameliorative hopes of modern penology and prison administration strongly counsel against such a view.\(^\text{115}\)
\end{quote}

Under the subjective test, Justice Frankfurter's ideal is not attained:

One of the most serious shortcomings of the present entrapment law is that the predisposition element tends to encourage or tempt law enforcement officers into a "devil-may-care" or "anything goes" attitude toward persons of a known criminal reputation.\(^\text{116}\)

Officers can easily direct inducements at a person with a record of prior criminal activity. Then, if the past offender succumbs, the officers can point to his criminal record as evidence of predisposition. Most juries would probably regard such evidence as conclusive that defendant was


\(^{111}\) Id. at 375. One federal case held that an officer's testimony that the defendant sold him narcotics while riding in the officer's car some nine months prior to the offense charged "was so prejudicial to the accused . . . as to outweigh [its] probative value . . . on the issue of predisposition." Hansford v. United States, 303 F.2d 219, 225 (D.C. Cir. 1962).

\(^{112}\) 356 U.S. at 372.

\(^{113}\) MODEL PENAL CODE § 2.10, Comment (Tent. Draft No. 9, 1959).


\(^{115}\) Sherman v. United States, 356 U.S. 369, 383 (concurring opinion).

\(^{116}\) Working Papers, supra note 71, at 306-07.
"predisposed" to commit such an offense. It is difficult to conceive a situation in which an habitual criminal could successfully raise entrapment as a defense, when prosecuted for commission of his specialty.\textsuperscript{117} Although the evidence of prior criminal activity is not conclusive on the predisposition issue and the particular police activity calls for acquittal of a nonpredisposed defendant, the practical effect of admitting such evidence will usually be conviction. On this basis, a plausible argument can be made that the subjective test denies equal protection of the law to defendants with police records.\textsuperscript{118}

Adoption of an objective test for entrapment would alleviate this basic unfairness. Because this test focuses on the police activity in question, all individuals brought before a court have an equal opportunity to challenge unfair official conduct. The possibility is eliminated that official overreaching can be ignored solely because the defendant's record justifies a finding of predisposition.

\textbf{VIII. Reasonable Suspicion}

Some courts impose an additional requirement closely related to the predisposition issue:\textsuperscript{119} Before officers may engage in conduct directed at soliciting commission of an offense, they must have "reasonable grounds to believe that [the defendant] is engaged in unlawful activities or intends to engage therein."\textsuperscript{120} Although this requirement is usually referred to as "reasonable suspicion,"\textsuperscript{121} the term is not clearly defined. Further, "the application of this additional test has been haphazard, irregular, and contradictory."\textsuperscript{122} At a minimum, one court allowed reasonable suspicion to be inferred from the mere fact that the officer engaged in conduct designed to produce criminal activity by the defendant.\textsuperscript{123} In essence, this is not a reasonable suspicion requirement at all. One court described the test as probable cause, but did not clarify whether this meant probable cause to arrest or to search, or some independent probable cause standard.\textsuperscript{124} Other cases have not required reasonable suspicion with respect to merely "offering the opportunity to commit crime."\textsuperscript{125}

\begin{enumerate}
\item[117] Id. at 306.
\item[118] Cf. Orfield, supra note 76, at 56 n.103.
\item[119] See e.g., Whiting v. United States, 321 F.2d 72, 77 (1st Cir.), cert. denied, 375 U.S. 884 (1963).
\item[120] Lunsford v. United States, 200 F.2d 237, 239 (10th Cir. 1952). The court in Lunsford indicated that evidence of "reasonable grounds" could replace evidence of predisposition and, thus, negate any police overreaching. The dangers of such a position are obvious. "Reasonable grounds" are often derived from the defendant's past record and hearsay statements by other persons (e.g., defendant's neighbors), Cf. Hill v. United States, 323 F.2d 988 (5th Cir.), cert. denied, 379 U.S. 851 (1964). Such a rule fails to restrict the sort of inducements that police may offer where the object has a past record and suspicious minded neighbors.
\item[121] See Weathers v. United States, 126 F.2d 118 (5th Cir.), cert. denied, 316 U.S. 681 (1942).
\item[123] People v. Benford, 53 Cal. 2d 1, 345 P.2d 923 (1959).
\end{enumerate}
Although in 1969 one writer observed that the Missouri cases have not expressed a reasonable suspicion requirement,\(^{126}\) this assessment may be partially incorrect. In \emph{State v. Taylor}\(^{127}\) the court stated: "From the evidence of entrapment favorable to defendant the jury could have found that the narcotics agent did not have \textit{reasonable cause} to suspect that defendant was an actual or potential violator of the narcotics laws."\(^{128}\) Further, the instruction approved in \emph{State v. Hammond}\(^{129}\) gave as an example of "lawful entrapment":

When . . . the Government has \textit{reasonable grounds} for believing that person is engaged in the illicit sale of narcotics, it is not unlawful entrapment for a Government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase narcotics from such suspected person.\(^{130}\)

Finally, in the 1971 case, \emph{State v. Stock},\(^{131}\) the Missouri Supreme Court stated the general rule on determination of entrapment as a matter of law:

[W]here an informer or undercover agent has been given money by the police and instructed to make a "buy" of narcotics from a person whom the officer had \textit{reason to believe} was engaging in such activity, the defense of unlawful entrapment is not available; at least such facts do not constitute entrapment as a matter of law.\(^{132}\)

These cases do not clarify whether Missouri has a reasonable suspicion requirement.\(^{133}\) The Draft Missouri Pattern Criminal Instructions contain

\(^{127}\) 375 S.W.2d 58 (Mo. 1964).
\(^{128}\) \textit{Id.} at 61 (emphasis added).
\(^{129}\) 447 S.W.2d 253 (Mo. 1969); see note 52 supra.
\(^{130}\) 447 S.W.2d at 255 (emphasis added).
\(^{131}\) 465 S.W.2d 889 (Mo. 1971).
\(^{132}\) \textit{Id.} at 892 (emphasis added).
\(^{133}\) In the most recent Missouri case dealing with entrapment, \emph{State v. Van Regenmorter}, 465 S.W.2d 613 (Mo. 1971), the defendant argued on appeal that a "reasonable suspicion" or "reasonable grounds" requirement exists in Missouri, based on the quote from \emph{Hammond} accompanying note 130 supra. However, the court sidestepped the issue. Brief for Appellant at 7-8, \emph{State v. Van Regenmorter}, 465 S.W.2d 613 (Mo. 1971). The case involved a soldier stationed at Ft. Leonard Wood, Missouri. At the request of an undercover narcotics agent, the soldier left the base with marijuana in his possession in order to make a sale at a nearby truck stop. The defendant argued that the agent had induced him to commit a crime against the State of Missouri, pointing out that he had already committed an offense under the Uniform Code of Military Justice, by possessing the marijuana on the base. The defendant implied that the agent had lured him into the jurisdiction of the state courts in order to make available a higher maximum sentence. \textit{Id.} at 8-9. The court said that because the charge was possession of marijuana and no basis existed for contending that the agents brought about defendant's initial possession, "classical entrapment \[was\] not . . . involved and the question of reasonable suspicion \[was\] not material." 465 S.W.2d at 617.

In raising entrapment, the defendant in \emph{Van Regenmorter} relied on Carbajal-Portillo v. United States, 596 F.2d 944 (9th Cir. 1968), where the court found entrapment because a government agent lured a reluctant Mexican citizen
no provision on this point. Further, neither the Model Penal Code nor the Proposed New Federal Criminal Code provides for such a requirement. However, a comment to the Proposed Federal Code points out the possibility of adding a reasonable suspicion requirement as a supplementary standard for the conduct of law enforcement officers.

Any version of the reasonable suspicion requirement endangers the defendant with undue prejudice in jurisdictions that follow the subjective test and submit the entrapment issue to the jury. Evidence on the reasonable suspicion question will undoubtedly include hearsay respecting defendant's prior activities. Thus, the danger arises that the jury will misuse such evidence. However, this danger can be mitigated by leaving the determination of reasonable suspicion to the judge, as when evidence is challenged on illegal search and seizure grounds.

Regardless of the test for entrapment followed by a particular jurisdiction, a reasonable suspicion requirement helps assure that police will only seek to induce criminal acts when they have a good basis to believe that the object of their solicitations will respond. However, if adopted, the nature of the requirement should be clarified. Further, either decision or statute should outline the results flowing from the presence or absence of reasonable suspicion. A stringent rule foreclosing all solicitation (even mere presentation of opportunity) absent reasonable suspicion could be adopted. Or, the requirement could be made inapplicable unless the police activity warrants an instruction on entrapment. In the latter instance in a subjective test jurisdiction, the law could be formulated so that a finding of police overreaching requires acquittal, unless predisposition and reasonable suspicion are also found. Query: whether a prior criminal record should constitute reasonable grounds?

into the United States, in order to arrest and prosecute him for smuggling narcotics. The defendant was only hired to carry a quantity of heroin to the border. Carbajal acknowledgedly displayed a reluctance to bring narcotics into this Country. So long as that reluctance endured without being overcome, Carbajal would not be engaging in the illicit narcotics traffic that our laws are designed to prevent. [H]ere the agent affirmatively persuaded Carbajal to commit the crime in order that he might arrest him.

Id. at 947. However, the Missouri court said that the facts of Van Regenmorter were closer to those of United States v. Becker, 62 F.2d 1007 (2d Cir. 1933), and United States v. Edwards, 366 F.2d 853 (2d Cir. 1966), cert. denied, 386 U.S. 908 (1967), in which the court refused to find entrapment because the defendants were willing to travel from one jurisdiction to another with contraband in their possession to make interstate sales when presented with the opportunity. State v. Van Regenmorter, supra at 616-17 (Mo. 1971).

155. See note 29 supra.
156. Id.
158. The Missouri cases indicate that if reasonable suspicion is required, its existence is a jury question. See text accompanying note 128 supra.
159. See note 120 supra.
160. A reasonable suspicion requirement serves primarily as a protection against civilian informers working for the government. In contrast to the police, civilian informers are more likely to select the objects of their inducements at random. WORKING PAPERS, supra note 122, at 323.
IX. TRIAL OF THE ISSUE

A. Entrapment as a Matter of Law

Where defendant's evidence indicates that official overreaching induced the crime in question, the issue of entrapment normally is submitted to the jury. This rule prevails in both the Missouri and federal courts.141 However, under some circumstances, the court may find entrapment as a matter of law.142 There is apparently no "magic word" test for determining when a court will find entrapment as a matter of law. In Sherman v. United States143 an informant testified that he had to engage in repeated requests before defendant would supply him with narcotics and that defendant resisted these entreaties for quite some time. The defendant was trying to overcome his drug addiction at the time. Further, two narcotics convictions (the most recent being five years old) constituted the only evidence of predisposition. The United States Supreme Court held that, in combination, these facts indicated entrapment as a matter of law. Thus, the issue should not have been submitted to the jury. Carbajal-Portillo v. United States144 also presented a situation where the testimony of the alleged entrapper indicated the defendant's reluctance to commit the offense charged, coupled with entrapping tactics that amounted to deceitful inducement. The court held this to be entrapment as a matter of law.145 A few cases have held that entrapment is a jury question, unless "as a matter of law the defendant has established beyond a reasonable doubt that he was entrapped".146 However, this language is only additional verbiage indicating the same process involved in Sherman and Carbajal-Portillo. As the court in Washington v. United States147 said, the determination whether entrapment has been established as a matter of law involves balancing the predisposition of the accused against the conduct of the government agents.148 In some cases the police activity will be so unfair under the totality of the circumstances that a court will refuse to allow a conviction based on such conduct to stand. Such cases only arise where the prosecution's evidence reveals inducement or at least fails to controvert this fact. A court will not find entrapment as a matter of law solely from evidence presented by the defendant, if the prosecution's evidence shows different circumstances.149

142. See, e.g., Sherman v. United States, 356 U.S. 369 (1958); Carbajal-Portillo v. United States, 396 F.2d 944 (9th Cir. 1968); United States v. Klosterman, 248 F.2d 191 (3rd Cir. 1957).
144. 396 F.2d 944 (9th Cir. 1968).
145. Id. at 946.
147. 275 F.2d 687 (5th Cir. 1960).
148. Id. at 689.
B. Should Entrapment Be a Jury Question?

Because unduly prejudicial evidence can be admitted to show predisposition under the subjective test, some writers do not agree with the general view that entrapment should be a jury question.150 However, argument for court determination of the issue initially occurred in conjunction with advocacy for the objective test, where the danger of undue prejudice did not enter consideration. For example, Justice Roberts, concurring in Sorrells v. United States,151 urged adoption of an objective test and set out policy considerations for placing the determination in the hands of the judge:

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 of the court alone to protect itself and the government from such prostitution of the criminal law.152

Justice Frankfurter later added to this statement by pointing out that a jury determination "cannot give significant guidance for official conduct for the future," but a court, through the development of precedents and explicit standards, "can do this with the degree of certainty that the wise administration of criminal justice demands."153 Although the Model Penal Code154 provides for court determination of the entrapment issue, another objective formulation, the Proposed New Federal Criminal Code,155 mainly contemplates jury consideration. Nevertheless, the comments to the Proposed Federal Code include this proposal:

[S]ince the propriety of the prosecution depends upon the propriety of the law enforcement techniques, the defense could be stated as a bar to prosecution. This would have the effect of removing the issue from jury consideration, even though the court, in order to avoid the duplication of effort, may defer hearing evidence on the issue until trial.156

Persuasive arguments exist on both sides of the issue whether entrapment should be a jury question in an objective test jurisdiction. On the one hand, Justices Roberts and Frankfurter argued that a court should have power to determine whether its processes would be corrupted by allowing conviction based on the police conduct in question.157 Juries

150. See text accompanying notes 108-17 supra.
151. Id. at 457 (concurring opinion).
153. Id.
154. See note 29 supra.
156. The "corruption" rationale for the defense of entrapment should be compared with the "imperative of judicial integrity" rationale that has appeared in United States Supreme Court decisions in connection with excluding the fruits of unlawful searches and seizures. Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960). One writer stated: "[T]he Court has impliedly rejected the theory of 'judicial integrity' and identified the exclusionary rule's primary purpose as that of controlling police behavior." Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 670-71 (1970). Deterring police activity that would lead an otherwise law-abiding citizen into crime is a better rationale for the entrapment defense than that of preventing corruption of the judicial processes.
are not likely to understand or respect the rights of an accused and "are apt to give great latitude to the police at least in relation to an otherwise guilty defendant." Further, as Justice Frankfurter observed, court determinations may provide desirable consistency that will aid enforcement agencies in developing workable standards. On the other hand, under an objective test "an alleged entrapment presents a question of evaluating police behavior and determining whether it might have created too great a temptation for the ordinary law-abiding citizen." This "judgment about the motivations of ordinary people" probably falls within the special competence of the jury.

C. Raising the Defense

The defense of entrapment may be raised under a general plea of not guilty. No jurisdiction requires special pleading of the defense. Indeed, under Justice Roberts's theory the defense should be raised on the court's own motion in conjunction with the power to prevent corruption of the judicial processes, "no matter by whom or at what stage of the proceedings the facts are brought to its attention."

In Missouri a trial court must instruct on entrapment if evidence in the case presents the issue, irrespective of the defendant's failure to make such a request. However, this rule does not go as far as that advocated by Justice Roberts. In Missouri a defendant may not challenge on appeal the failure to instruct on entrapment, if this point was not properly preserved in his motion for a new trial.

D. Burden of Proof

Currently, in Missouri a jury to which the entrapment issue is submitted must find beyond a reasonable doubt that the defendant was not entrapped in order to convict. Draft Missouri Pattern Criminal In-

158. Model Penal Code § 2.10, Comment (Tent. Draft No. 9, 1959). Cf. Jackson v. Denno, 378 U.S. 368, 383 (1964), where Mr. Justice Jackson observed with regard to jury determination of the voluntariness of confessions: There is a "danger that matters pertaining to the defendant's guilt will infect the jury's findings of fact bearing upon voluntariness, as well as its conclusion upon that issue itself. . . .' This observation is equally true of jury determination of entrapment, no matter which test a jurisdiction follows.


160. Id.


162. Working Papers, supra note 122, at 326.


164. State v. Decker, 321 Mo. 1163, 14 S.W.2d 617 (1929); accord, State v. Hicks, 326 Mo. 1056, 33 S.W.2d 923 (1930). § 4025, RSMo 1919 [now § 546.070, RSMo 1969], in force at the time of these decisions, reads in part: "[F]ourth, whether requested or not, the court must instruct the jury in writing upon all questions of law arising in the case which are necessary for their information in giving their verdict; which instructions shall include, whenever necessary, the subjects of good character and reasonable doubt; and a failure to so instruct in cases of felony shall be good cause, when the defendant is found guilty, for setting aside the verdict of the jury and granting a new trial. . . ."


166. State v. Hammond, 447 S.W.2d 253 (Mo. 1969).
struction Number 3.28\textsuperscript{167} maintains this position. However, the alternate draft instruction, to be submitted at the defendant's request, calls for acquittal if the jury should “find and believe from the evidence” that the defendant was not ready and willing to engage in the conduct but did so only because of official inducement.\textsuperscript{168} The Model Penal Code, having adopted an objective test, requires a defendant seeking acquittal to prove by a preponderance of the evidence that entrapment induced his criminal conduct.\textsuperscript{169} The Proposed New Federal Criminal Code, which also follows the objective rule, calls entrapment an “affirmative defense.”\textsuperscript{170} Thus, the defendant must establish entrapment by a preponderance of the evidence,\textsuperscript{171} as under the Model Penal Code. Because the objective test is not concerned with the defendant's conduct or predisposition, the two immediately preceding formulations do not place any burden on the defendant with regard to his own actions. Instead, they require a defendant seeking acquittal on entrapment grounds to show by a preponderance of the evidence that the officer or informer's conduct falls within the proscription.\textsuperscript{172}

X. Denying the Crime but Raising the Defense: Inconsistency?

Because the entrapment doctrine is based on the assumption “that the act charged was committed,”\textsuperscript{173} a number of cases have held that a defendant may not both deny committing the act that constitutes the offense charged and raise the defense.\textsuperscript{174} This position is based on the reasoning that a subjective test for entrapment focuses on determining whether the conduct of the officers or the defendant's turn of mind caused commission of the crime; there could be little logic to such an inquiry if defendant denies committing the offense.\textsuperscript{175}

Two older Missouri cases\textsuperscript{176} discussed the entrapment issue, despite the fact that defendant also denied committing the act, without mentioning the possible inconsistency. However, the more recent cases adhere to the general view that the defendant may not both deny the act and

\textsuperscript{167} Draft Mo. Pattern Crim. Instr. No. 3.28 (1969); see instruction quoted note 56 supra.

\textsuperscript{168} Draft Mo. Pattern Crim. Instr. No. 3.30 (1969); see instruction quoted note 56 supra.


\textsuperscript{171} Id., Comment.

\textsuperscript{172} See Note, Entrapment, 73 Harv. L. Rev. 1333, 1344-45 (1960), for a discussion of the constitutionality of placing a burden of proof on the defendant with regard to the entrapment issue. The final draft of one criminal code revision project requires only that the defendant inject the issue of entrapment into the case; the burden of proving that the defendant was not entrapped then falls on the prosecution. Mich. Rev. Crim. Code §§ 640, 645 (Final Draft, 1967).

\textsuperscript{173} State v. Taylor, 375 S.W.2d 58, 62 (Mo. 1964).

\textsuperscript{174} E.g., United States v. Johnston, 426 F.2d 112 (7th Cir. 1970); Chisum v. United States, 421 F.2d 207 (9th Cir. 1970); United States v. Roviaro, 379 F.2d 911 (7th Cir. 1967); Marko v. United States, 314 F.2d 595 (5th Cir. 1963).

\textsuperscript{175} See Ortega v. United States, 348 F.2d 874, 876 (9th Cir. 1965); Ramirez v. United States, 294 F.2d 277 (9th Cir. 1961).

\textsuperscript{176} State v. Decker, 321 Mo. 1163, 14 S.W.2d 617 (1929); State v. Murphy, 320 Mo. 219, 6 S.W.2d 877 (1928).
defend on entrapment grounds. Of more importance, the Missouri Supreme Court has recognized an exception to this general view. This exception was first acknowledged by a federal court in the 1956 case of Henderson v. United States. In that case the trial court refused to instruct on entrapment, because the defendant denied involvement in the charged offense, conspiracy to violate the liquor laws. On appeal, the court approved this ruling to a certain extent:

[T]he fact that Henderson had committed illegal acts which furthered the object of the conspiracy did not constitute him a conspirator unless he did so with some knowledge of the conspiracy, and, hence ... Henderson, denying that he was a party to or knew of the conspiracy, could not with entire consistency claim that he was entrapped into committing that offense.

However, the appellate court went on to state that the entrapment doctrine might have broader application than merely as a defense to the specific crime charged:

[T]he 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; he could say "I did not go so far as to become a party to the conspiracy, but to the extent that I did travel down the road to crime, I was entrapped." The two defenses do not seem to us so repugnant that proof of the one necessarily disproves the other.

In a 1964 case, State v. Taylor, the Missouri Supreme Court relied principally on Henderson to hold that under the circumstances, the defendant could both deny selling narcotics and raise the defense of entrapment. Ample evidence in the case indicated overreaching by an undercover narcotics agent. The court stated, in regard to both denying the offense and raising entrapment:

[A]dmitting that he was there; that he searched for and found a source of marijuana and a willing seller, arranged for a sale and was present when the narcotics were transferred, defendant argues that in legal contemplation his acts did not, technically, constitute a "sale" or joint action with the seller, but that if he is wrong as to the legal effect of what he did, he nevertheless should be exonerated on the ground of entrapment. Under these circumstances both defenses are available.

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177. E.g., State v. Stock, 463 S.W.2d 889 (Mo. 1971) (dictum); State v. Taylor, 375 S.W.2d 58 (Mo. 1964); State v. Varnon, 174 S.W.2d 146 (Mo. 1945); State v. Egan, 272 S.W.2d 719 (Spr. Mo. App. 1954).
178. 257 F.2d 169 (5th Cir. 1956).
179. Id. at 171.
180. Id. at 173.
181. 375 S.W.2d 58 (Mo. 1964).
182. Id. at 62.
183. See text accompanying note 83 supra.
These cases appear to hold that both denial and entrapment are available where there is no factual issue whether defendant committed certain acts, but there is a question as to the legal effect of these acts.

Some courts recognize a different exception. Although a defendant may not normally both deny committing the offense and raise entrapment, this rule does not apply where the prosecution’s evidence indicated that even if defendant committed the crime, he did so only in response to entrapment.185

The general rule has been criticized: “[E]ven if entrapment and [denial of commission of the offense] are inconsistent, still the demands of justice in a criminal case are such that both should be allowed as alternative defenses.”186 It is unfair to protect the police from censure and deprive the defendant of a defense, merely because he has decided as a matter of strategy to make the prosecution prove the offense beyond a reasonable doubt.187 Moreover, one writer has argued that the rule against alternative defenses is unconstitutional.188 In order to assert the defense of entrapment, the defendant might be forced to forego his constitutional rights to have the crime proven beyond a reasonable doubt and not to be a witness against himself.189 This writer draws analogy to Simmons v. United States,190 where the Supreme Court held that the defendant’s testimony at a pretrial hearing in order to establish his standing to challenge the admissibility of evidence on fourth amendment grounds could not be used as direct evidence at trial. The Court commented that a defendant cannot be forced to forfeit his right against self-incrimination in order to assert the constitutional right to freedom from illegal search and seizure.191 Even if the defense otherwise foregone is not constitutionally based, application of the Simmons rationale should not be precluded192 where this defense is important to the defendant’s case.

On balance, it is better to give a criminal defendant the opportunity to defend by both denying commission of the offense and pleading entrapment. A defendant probably will not hesitate to raise the defense where the prosecution’s own evidence shows entrapment.193 However, as a practical matter, the defendant probably will not want to present the finder of fact with two obviously incongruous theories of his own. Although this position allows a defendant to plead the alternative defenses of entrapment and denial, the principle should not be extended to give

185. Sears v. United States, 343 F.2d 139 (5th Cir. 1965); Hansford v. United States, 303 F.2d 219 (D.C. Cir. 1962). In United States v. Pickle, 424 F.2d 528 (5th Cir. 1970), the court incorrectly stated that Sears held substantially the same as Henderson v. United States. See text accompanying notes 178-80 supra. The facts recited in the Pickle opinion are insufficient to indicate what effect this had on the defendant’s case.

186. WORKING PAPERS, supra note 122, at 326.


189. Id. at 690.


191. See id. at 394.

192. Comment, supra note 188, at 691.

193. See text accompanying note 185 supra.
him a license to commit perjury or an immunity from impeachment by his prior inconsistent statements.

XI. Conclusion

Assuming that a given jurisdiction recognizes the defense of entrapment, is the subjective test or the objective test preferable? Although pointed criticisms have been leveled at the subjective test (e.g., the danger of undue prejudice, and the difficulty in formulating workable jury instructions), its proponents also make persuasive arguments. Presented with the opportunity in Sherman v. United States, the Supreme Court refused to adopt the objective test, saying that the prosecution would be unduly handicapped if not allowed to show that defendant’s readiness rather than police overreaching caused commission of the offense. The argument can be made that the police should be allowed to engage in inducement whenever they have good reason to believe that a certain person is engaged in criminal activity and afterwards can demonstrate the basis for this belief and a continuing source of unlawful conduct. Because a person engaged in such activity is naturally wary and fearful of detection, a great deal of persuasion and reassurance might be required before he will commit the offense.

On balance, however, the objective test more effectively deters undesirable police tactics and at the same time is easier to apply. Of equal importance, under the objective test those with criminal records are not as vulnerable to police inducements that would call for acquittal of an ordinary citizen. If the police activity was such that it would probably cause a normally law-abiding person to commit the offense, any defendant could gain acquittal.

If a jurisdiction decides to follow the objective test, adoption by a statute based on the language of the Model Penal Code or the Proposed New Federal Criminal Code is preferable to judicial decision. However, it can be argued that because the defense was judicially created, any changes should be left to the courts. Nevertheless, the substantial public policy questions involved dictate that such determinations should be made by the elected representatives of the people. For example, a statute can clearly spell out whether reasonable suspicion is required, what this requirement entails and whether this question is determined by the court or the jury. Irrespective of how the statute handles these collateral matters, adoption of an objective test would alleviate much of the confusion and unfairness in this currently muddled area of the criminal law.

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194. See pt. VI of this comment.
195. See text accompanying notes 99-104 supra.
197. Id. at 376-77.
198. See text accompanying note 104 supra.
199. See pt. VI of this comment.
200. See note 29 supra.
201. Id.
202. Draftsmen of a statute on entrapment should consider modifying either of these proposed codes to follow the Michigan revision committee’s view on the burden of proof. See note 172 supra.