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Criminal Law - New Mexico Expands the Entrapment Defense: Baca v. State

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CRIMINAL LAW—New Mexico Expands the Entrapment Defense: *Baca v. State*

I. INTRODUCTION

In *Baca v. State of New Mexico*,[1] the New Mexico Supreme Court held that the defense of entrapment is available to a criminal defendant if he can show that the government acted improperly in making the arrest *or* that he was not predisposed to commit the crime.[2] Prior to *Baca*, the only focus of the entrapment defense was the particular defendant's predisposition to commit the crime.[3] Under the new standard, a defendant raising entrapment as a defense is not required to present evidence of lack of predisposition if he can show improper governmental intervention.[4] This Note provides an overview of the entrapment doctrine, examines the rationale of *Baca*, and explores the implications of the decision.

II. STATEMENT OF THE CASE

Ruben Baca was convicted of one count of trafficking in cocaine.[5] Billy Granger, a government informer released from jail in exchange for "setting up" cases for the police,[6] arranged for Baca to sell cocaine to Officer Carl Work, an undercover agent.[7] Baca testified

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1. 106 N.M. 338, 742 P.2d 1043 (1987).

2. *Id.* at 341, 742 P.2d at 1046. Justice Sosa wrote for the Court, and Justices Scarborough and Stowers dissented in two separate opinions.

3. State v. Fiechter, 89 N.M. 74, 547 P.2d 557 (1976). *Fiechter* overruled State v. Sainz, 84 N.M. 259, 501 P.2d 1247 (Ct. App. 1972). *Sainz* held that there was entrapment when the state's actions encouraged a particular crime that would not have occurred without the governmental intervention.

The first element of the entrapment defense is governmental involvement in the crime. *See* Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163 (1976). *Fiechter* held, however, that the *extent* of governmental involvement was not determinative. The second element, defendant's lack of predisposition to commit the crime, was the crucial factor in the defense. *Fiechter* at 77, 547 P.2d at 560.

4. Improper governmental intervention occurs when the police are the actual "instigators" of the criminal activity. Baca v. State, 106 N.M. at 339, 742 P.2d at 1044 (quoting Sorrells v. United States, 287 U.S. 435, 452 (1932)).

5. *Baca*, 106 N.M. at 338, 742 P.2d at 1043 (1987).

6. *Id.* at 339, 742 P.2d at 1044. Granger had a record for felony marijuana convictions and was released early on condition he would "make" twenty cases for the police. *Id.* The New Mexico State Police used Granger as an informer from March through June 1986. *Id.* at 338, 742 P.2d at 1043. Police use informers as a means of apprehending criminals who perpetrate victimless crimes and deal only with other criminals. *See* Note, *Entrapment in the Federal Courts—Subjective Test is Reaffirmed Against Lower Court Departures*, 42 FORDHAM L. REV. 454, 457 n.20 (1973); Comment, *Elevation of Entrapment to a Constitutional Defense*, 7 U. MICH. J.L. REF. 361 (1974).

7. *Baca*, 106 N.M. at 339, 742 P.2d at 1044.

that Granger purchased the cocaine, gave it to Baca, and told him to sell it to Work on Granger's behalf.[8] Baca gave the cocaine to Work, and Work paid Baca $130.[9] Baca was arrested and charged with cocaine trafficking.[10]

At trial, Baca moved for a directed verdict, claiming that the prosecution did not rebut his defense of entrapment.[11] He appealed the denial of that motion, and the court of appeals affirmed the trial court.[12] The supreme court reversed the court of appeals, holding that Baca established entrapment as a matter of law.[13]

III. HISTORICAL AND CONTEXTUAL BACKGROUND

Federal courts first sustained the entrapment defense in 1915.[14] The entrapment concept referred to instigation of a crime by the government.[15] However, the courts were divided on whether successful assertion of the defense depended on the defendant's lack of predisposition to commit the crime,[16] or on the particular governmental conduct involved.[17] The Supreme Court has consistently held pre-

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8. *Id.* Baca and Granger procured the drug together, but Granger actually bought it, and then gave it to Baca. *Id.* The two men and Work then drove to a bar, where Baca played pool and drank beer, while Granger and Work stayed in the car. *Id.* Ultimately, Granger had to go into the bar to remind Baca to make the sale to Work. *Id.*

9. *Id.*

10. *Id.* at 338, 742 P.2d at 1043.

11. *Id.*

12. *Id.*

13. *Id.* The trial court gave the jury the following instruction on entrapment. "Evidence has been presented that the defendant was induced to commit the crime by law enforcement officers or their agents. For you to find the defendant guilty, the state must prove to your satisfaction beyond a reasonable doubt that the defendant was already willing to commit the crime and that the law enforcement officials or their agents merely gave him the opportunity." N.M. STAT. ANN. U.J.I. Crim. 14-5160 (Recomp. 1986). The jury returned a verdict of guilty, thus finding no entrapment. When reviewing the denial of the directed verdict, the supreme court had to find that the facts established entrapment as a matter of law and that the case should not have gone to the jury at all. *Baca*, 106 N.M. at 338, 742 P.2d at 1043.

14. Woo Wai v. United States, 223 F. 412 (9th Cir. 1915).

15. Sorrells v. United States, 287 U.S. 423, 453 (1937) (Roberts, J., concurring). Justice Roberts defined entrapment as "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer." 287 U.S. at 454.

16. Park, *supra* note 3, at 165. Justice Stewart labelled this approach "subjective" because it focuses on the particular defendant's mental state at the time he committed the crime. *See* United States v. Russell, 411 U.S. 423, 440 (1973) (Stewart, J., dissenting).

17. Park, *supra* note 3, at 166. Justice Stewart labelled this approach "objective" because the court examines the police conduct to determine whether it conforms to "standards to which common feelings respond, for the proper use of governmental power." *See* United States v. Russell, 411 U.S. 423, 440-41 (1973) (Frankfurter, J., concurring) (quoting Sherman v. United States, 356 U.S. 369, 380 (1958)). Other commentators call the approach "objective" because the police conduct is measured by the effect it would have on a hypothetical person. *See, e.g.*, Park, *supra* note 3, at 165 n.2. *Baca* adopts the first theory. *Baca*, 106 N.M. at 338, 742 P.2d at 1043.

Before the Supreme Court addressed the issue, courts also disagreed on the justification for entrapment. Some courts held the government was estopped from prosecuting, other courts held the defendant was simply not guilty, and others grounded the defense in public policy. *See Sorrells*, 287 U.S. at 454. *See also* DeFeo, *Entrapment As A Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F. L. REV. 243, 252-56 (1967).

disposition to be the controlling factor, favoring the former, subjective approach.[18] Many justices have disagreed, strongly advocating the latter objective approach.[19] Although technically bound by the Supreme Court, lower federal courts have found some defendants entrapped because of the nature of the governmental activity alone.[20]

State courts recognized the entrapment defense in the late 1870's.[21] Because entrapment doctrine is rooted in public policy and not the Constitution, state courts have been free to formulate their own criteria.[22] Many state legislatures have enacted statutes defining the defense.[23] The majority of states emphasize predisposition and have

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18. Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932).

19. *Hampton*, 484 U.S. at 495 (Brennan, J., dissenting); *Russell*, 411 U.S. at 439 (Stewart, J., dissenting); *Russell*, 411 U.S. at 436 (Douglas, J., dissenting); *Sherman*, 369 U.S. at 378 (Frankfurter, J., concurring); *Sorrells*, 287 U.S. at 453 (Roberts, J., concurring).

20. *See, e.g.*, United States v. Bueno, 447 F.2d 903 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973) (conviction reversed because the government furnished the contraband which formed the basis of the offense); Williamson v. United States, 311 F.2d 441 (5th Cir. 1962) (conviction reversed because informer was working on a contingent-fee basis) (*Williamson*'s per se exclusion of a paid informant's testimony was expressly overruled in United States v. Cervantes-Pacheco, 826 F.2d 310 (5th Cir. 1987)); United States v. Anderson, Cr. No. 602-71 (D.N.J. 1973) (jury instructed it could acquit predisposed defendants if the governmental conduct was so overreaching as to be fundamentally unfair and offensive to standards of decency). The *Bueno* "quasi-entrapment" defense was raised in *Baca*. *See* Park, *supra* note 3, at 184-99, for a discussion of these defenses.

21. *See, e.g.*, Michigan v. Saunders, 38 Mich. 219 (1878); O'Brien v. State, 6 Tex. App. 665 (1879). The defense appeared to be grounded in a general revulsion towards police activity which caused the commission of crime. "[T]he encouragement of criminals to induce them to commit crimes in order to get up a prosecution against them, is scandalous and reprehensible." *Saunders*, 38 Mich. at 223 (Campbell, J., concurring).

The state courts were the first to recognize the defense because most prosecutions were at the state level and were based on common law. In the late nineteenth and twentieth century, Congress began enacting legislation which criminalized certain behavior. Because most of the new offenses were consensual, police needed to use extraordinary techniques to detect the crime. The judicial recognition of entrapment at the federal level stems from an abhorrence of these methods. *See* DeFeo, *supra* note 17, at 250.

22. The entrapment defense is not based on due process, although some governmental activity may be so egregious that due process is violated. *See* United States v. Russell, 411 U.S. 423 (1973). The federal entrapment defense is grounded in statutory construction and congressional intent, estoppel, and public policy. *See Sorrells*, 287 U.S. at 448-49.

23. Twenty-one states have codified entrapment. Fifteen of those statutes are interpreted to emphasize or incorporate predisposition: ARK. STAT. ANN. § 5-2-209 (1987) (emphasis is on police conduct, but predisposition is relevant); COLO. REV. STAT. § 18-1-709 (1973) (Repl. Vol. 1978); CONN. GEN. STAT. ANN. § 53a-15 (West 1985); DEL. CODE ANN. tit. 11 § 432 (Repl. Vol. 1987); GA. CODE ANN. § 16-3-25 (1988); ILL. ANN. STAT. ch. 38, para. 7-12 (Smith-Hurd 1972); IND. CODE ANN. § 35-41-3-9 (Burns 1985); KAN. STAT. ANN. § 21-3210 (1981); KY. REV. STAT. ANN. § 505.010(1) (Baldwin 1988); Mo. REV. STAT. § 562.060 (1986); MONT. CODE ANN. § 45-2-213 (1986); N.H. REV. STAT. ANN. § 626:5 (Repl. Ed. 1986) (focus is on police conduct, but predisposition is relevant); N.J. STAT. ANN. § 2C:2-12 (West 1982); N.Y. PENAL LAW § 40.05 (McKinney 1987); OR. REV. STAT. ANN. § 161.275 (1988). Five statutes focus solely on the police conduct: HAW. REV. STAT. § 702-237 (Repl. 1985); N.D. CENT. CODE § 12.1-05-11 (Repl. Vol. 1985); 18 PA. CONS. STAT. ANN. § 313 (Purdon 1983); TEX. PENAL CODE ANN. § 8.06 (Vernon 1974); UTAH CODE ANN. § 76-2-303 (1953). A relatively recent Florida statute has not yet been interpreted. FLA. STAT. ANN. § 777.201 (West Supp. 1988).

adopted the federal standard.[24]

New Mexico's legislature has been silent on entrapment. The courts in New Mexico initially focused on whether the governmental activity initiated the criminal act.[25] The analysis then became a balancing of the objective and subjective tests.[26] Ultimately, in *State v. Fiechter*,[27] the court rejected entirely the objective standard.[28]

An analysis of entrapment must include discussion of several procedural issues. Certain procedures differ depending on the entrapment standard a jurisdiction follows.[29] In the federal model, when a defendant raises entrapment, the burden of proof shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime and therefore not entrapped.[30] Many states, however, require the defendant to prove entrapment by a preponderance of the evidence.[31] In federal and state courts, entrapment is usually a jury issue unless the facts warrant a directed verdict.[32] A minority of states utilizing the objective standard require the judge to determine entrapment.[33]

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24. In addition to those states whose entrapment statutes focus on predisposition, *see supra* note 23, the common law of 22 states incorporates the subjective approach. *See, e.g.*, Kenney v. State, 62 Md. App. 555, 490 A.2d 738 (1985); Commonwealth v. Shuman, 371 Mass. 345, 462 N.E.2d 80 (1984); State v. Jones, 598 S.W.2d 209 (Tenn. 1980). The courts of eight states (including New Mexico in *Baca*) have adopted either an objective or dual entrapment standard. Grossman v. State, 457 P.2d 226 (Alaska 1969); People v. Barraza, 153 Cal. Rptr. 459, 591 P.2d 947 (1979); Cruz v. State, 465 So. 2d 516 (Fla.), *cert. denied*, 473 U.S. 905 (1985)(the *Cruz* standard may have been changed by a 1987 statute codifying the entrapment defense, *see supra* note 23 and *infra* note 112); State v. Mullen, 216 N.W.2d 375 (Iowa 1974); People v. Turner, 390 Mich. 7, 210 N.W.2d 336 (1973); State v. Wilkins, 144 Vt. 22, 473 A.2d 295 (1983); State v. Knight, 230 S.E.2d 732 (W. Va. 1976).

25. *E.g.*, State v. Roybal, 65 N.M. 342, 337 P.2d 406 (1959); State v. Sena, 82 N.M. 513, 484 P.2d 355 (1971).

26. "[A]s the part played by the state increases, the importance of the defendant's predisposition and intent decreases, until at some point entrapment as a matter of law is reached." State v. Sainz, 84 N.M. 259, 261, 501 P.2d 1247, 1249 (Ct. App. 1972), *overruled*, State v. Fiechter, 89 N.M. 74, 547 P.2d 557 (1976). "Indeed, the law of entrapment in New Mexico may be characterized as utilizing both tests, weighing the objective indicia of police involvement against the subjectively determined state of mind of the accused." State v. Jackson, 88 N.M. 98, 101, 537 P.2d 706, 709 (Ct. App. 1975). This statement was specifically overruled in State v. Fiechter, 89 N.M. at 77, 547 P.2d at 560.

27. 89 N.M. 74, 547 P.2d 557 (1976).

28. *Id.* at 77, 547 P.2d at 560.

29. For a complete discussion of the procedural issues, *see* Marcus, *The Entrapment Defense and the Procedural Issues: Burden of Proof, Questions of Law and Fact, Inconsistent Defenses*, 22 CRIM. L. BULL. 197 (1986). The issue of inconsistent defenses is beyond the scope of this Note.

30. *See* Park, *supra* note 3, at 264.

31. This is so regardless of whether the state follows an objective or subjective standard. *See, e.g.*, DEL. CODE ANN. tit. 11, § 432 (Repl. Vol. 1987) (subjective standard); State v. Johnson, 295 S.C. 215, 367 S.E.2d 700 (1988) (subjective standard); 18 PA. CONS. STAT. § 313 (objective standard); State v. Wilkins, 144 Vt. 22, 473 A.2d 295 (1983) (objective standard).

32. *See generally* Marcus, *supra* note 29, at 211-29. One jurisdiction allows the defendant to choose whether to have entrapment decided by the court or the jury. *See* Minnesota v. Grilli, 230 N.W.2d 445 (Minn. 1975).

33. *See* State v. Grossman, 457 P.2d 226 (Alaska 1969); Cruz v. State, 465 So. 2d 516

A. The Entrapment Defense in New Mexico

New Mexico first addressed entrapment in *State v. Roybal*.[34] The supreme court defined entrapment as the commission of a crime which would not have occurred without police intervention. The court stated it was impermissible for the police the initiate a criminal act, or for the police to use undue persuasion or enticement to induce the defendant to act.[35] The court also found no entrapment if the police had a good faith belief that the defendant was engaged in the criminal activity with which he was subsequently charged.[36] The defendant was not entrapped if the police did no more than provide an opportunity for the defendant to commit a crime he was ready and willing to commit.[37]

In later cases, the courts narrowed the test. Before the court would find entrapment, the police had to originate the criminal intent or design *and* use undue persuasion or enticement.[38] In these cases, undue persuasion or enticement was more than mere persistence, pretense, or the offering of a "liberal" price for drugs; it had to be as extreme as pretending to be in excruciating pain, pretending to have a badly suffering spouse or friend, or offering an exorbitant price.[39]

In *State v. Carrillo*,[40] the court of appeals clarified some of the procedural issues presented by the entrapment defense, and emphasized that the focus was predisposition. Once the defendant raised the affirmative defense of entrapment, the government had to prove beyond a reasonable doubt there was no entrapment.[41] Because a defendant could only be entrapped if he were not ready

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(Fla.), *cert. denied*, 473 U.S. 905 (1985) (adopting a dual approach: the judge decides objective entrapment; the jury decides subjective entrapment); People v. D'Angelo, 401 Mich. 167, 257 N.W.2d 655 (1977); State v. Knight, 230 S.E.2d 732 (W. Va. 1976) (dual approach); TEX. PENAL CODE ANN. § 8.06 (Vernon 1974); UTAH CODE ANN. § 76-2-303 (if factual question remains after pre-trial hearing, jury will hear the evidence and decide).

34. 65 N.M. 342, 337 P.2d 406 (1959). Defendants were convicted of operating games of chance and permitting games of chance on their premises, a bar. *Id.* at 343, 337 P.2d at 407. Undercover police came to the bar and eventually were invited to shoot dice. *Id.* at 344, 337 P.2d at 408. The trial court refused to instruct on entrapment, and defendants appealed. *Id.* at 342, 337 P.2d at 406.

35. *Id.* at 346, 337 P.2d at 409.

36. *Id.*

37. *Id. Roybal* upheld the lower court's refusal to instruct on entrapment because the appellants were already engaged in the criminal activity of which they were convicted, and it was reasonable for the police to suspect them. *Id.*

38. State v. Sanchez, 79 N.M. 701, 448 P.2d 807 (Ct. App. 1968).

39. *See* State v. Akin, 75 N.M. 308, 404 P.2d 134 (1965). *Akin* was the next entrapment case after *Roybal*. Defendant was convicted of selling marijuana. *Id.* at 309, 404 P.2d at 135. The court again upheld the trial court's refusal to give an entrapment instruction because the informer had a good faith belief that the defendant was engaged in or was willing to engage in selling marijuana, and the informer's persistence did not amount to undue persuasion. *Id.* at 312, 404 P.2d at 137.

40. 80 N.M. 697, 460 P.2d 62 (Ct. App.), *cert. denied*, 80 N.M. 708, 460 P.2d 73 (1969).

41. *Id.* at 698, 460 P.2d at 63.

and willing to commit the crime, the government's essential burden was to prove predisposition.[42] Thus, evidence of prior criminal history was admissible by the government to prove it did not entrap the defendant.[43] If the evidence conflicted on predisposition, entrapment was an issue for the jury.[44]

In *State v. Sainz*,[45] the court of appeals opted for a balancing test, citing no prior New Mexico authority. The court reasoned that as the state's intervention in the crime increases, the relevance of the defendant's predisposition decreases. A point is finally reached where there is entrapment as a matter of law.[46] That point occurs when: (1) except for the conduct of the state, the defendant probably would not have committed a crime; (2) the conduct of the state is likely to induce those to commit a crime who normally would not; or (3) the conduct of the state is unfair and dishonorable.[47] In effect, the court was using an objective test.[48]

The court of appeals cited the *Sainz* test in two subsequent cases. In *State v. Jackson*,[49] the court found that the governmental activity was permissible, and, therefore, the question of predisposition was properly before the jury.[50] Although the court stated that a determination of strong predisposition would permit a greater degree

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42. *Id.* at 699, 460 P.2d at 64.

43. *Id.*

44. *Id.*

45. 84 N.M. 259, 501 P.2d 1247 (Ct. App. 1972). In *Sainz*, the informer, the defendant, and the defendant's friend traveled from New Mexico to Arizona. *Id.* at 260, 501 P.2d at 1248. Defendant stayed in Prescott to attend a wedding, while his friend and the informer went on to Phoenix. *Id.* The informer purchased narcotics on the street in Phoenix and then drove back to New Mexico with the defendant and his friend. *Id.* There the informer handed the drugs to the defendant and told him to give them to the agent. *Id.* The court found these facts to constitute entrapment because the "state's 'creative activity' [had] risen to a level substantially more intense and aggressive than the level tolerated by most courts . . . [and] the government virtually supplied the *sine qua non* of the offense." *Id.* at 261, 501 P.2d at 1249 (citing People v. Strong, 21 Ill. 2d 320, 172 N.E.2d 765 (1961)).

46. *Id.*

47. *Id.*

48. It is fundamental that the basic thought behind the doctrine of entrapment is that officers of the law should not incite crime merely to punish the perpetrator. The question of accused's predisposition tends to a subjective standard which varies from case to case and person to person. The issue is better framed in ". . . the objective terms of whether persons at large who would not otherwise have done so would have been encouraged by the government's actions to engage in crime. The focus . . . [should be] on the government and their relation to the reasonable man." . . . Otherwise the doctrine of entrapment will remain as ". . . gropingly . . . [expressing] the feeling of outrage at conduct of law enforcers . . . but without the formulated basis in reason that it is the first duty of courts to construct."

Id.

49. 88 N.M. 98, 537 P.2d 706 (Ct. App. 1975).

50. *Id.* at 101-02, 537 P.2d at 709-10. The court held that setting up a known seller of heroin by claiming the informer was sick was a permissible governmental activity. *Id.* at 101, 537 P.2d at 709. The court found the facts distinguishable from those in *Sainz*. *Id.* at 102, 537 P.2d at 710.

of governmental participation, it looked at the government's conduct initially to determine whether the police persuaded or enticed the defendant to commit the crime.[51] In *State v. Fiechter*,[52] the court concluded that it should first focus on the government's activity because the rationale behind entrapment was the legitimacy of police conduct.[53]

Finally, the supreme court decided that the lower court had gone too far astray.[54] It reversed *Fiechter*,[55] overruled *Sainz*,[56] and adopted

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51. *Id.* at 101, 537 P.2d at 709. The *Jackson* court was really applying the dual standard used in Florida. *See infra* notes 112-18 and accompanying text. Once the court finds the governmental conduct permissible, the question of predisposition is given to the jury.

52. 88 N.M. 437, 540 P.2d 1326 (Ct. App. 1975), *rev'd*, 89 N.M. 74, 547 P.2d 557 (1976). In *Fiechter*, defendant was withdrawing from methadone because his clinic in Taos closed. He moved to Albuquerque and was waiting the required two weeks to enroll in a program there. To alleviate his withdrawal symptoms, defendant purchased heroin from his former supplier, who had become an informer after a drug-related arrest. The informer suggested that they sell some marijuana to raise money to purchase more heroin. Defendant was arrested for possession of marijuana. *Id.* at 437-38, 547 P.2d at 1326-27.

The court of appeals applied the *Sainz* test. First, the court decided that because the state dropped its charges against the informer after he induced the defendant to commit the crime, there was entrapment as a matter of law. The part played by the state had increased to such a high level that defendant's predisposition was not relevant. Then the court found that but for the conduct of the state, defendant would not have committed the crime he was arrested for. If allowed to continue, such police conduct would "shake the public's confidence in the fair and honorable administration of justice." The informer used undue persuasion, and defendant was susceptible and succumbed to temptation. *Id.* at 438-39, 540 P.2d at 1327-28. The court also saw the facts as very similar to those in *Sherman*, where the Supreme Court found that the defendant was entrapped. *Id.* at 438, 540 P.2d at 1327. *See infra* notes 69-81 and accompanying text.

Judge Hendley, the author of the *Sainz* opinion, dissented. *Fiechter*, 88 N.M. at 439-40, 540 P.2d at 1328-29. He found the government's conduct permissible because the defendant had a prior conviction for smuggling marijuana. *Id.* at 439, 540 P.2d at 1328. The defendant was so destitute, having pawned all his goods, he would have found a way to obtain money illegally without the informer's influence. In other words, Judge Hendley found the defendant so predisposed to commit the crime that the government activity was tolerable. *Id.* at 439-40, 540 P.2d at 1328-29. The majority, however, thought Fiechter was an honorable person for attempting to break his habit, preyed on by the government during a painful and difficult time:

> The law does not require heroic standards of conduct. It would be ignoble "doublespeak" for this state to encourage withdrawal and treatment with one hand, and alternatively punish crimes of possession with the other, when the very means of withdrawal have been eliminated through no fault of the addict, and the means of committing the crime supplied by a police informer.

Id.

53. For entrapment to attach, as a matter of law, the inducement to commit the crime alleged must come from [the] government . . . . Entrapment by someone with no connection with the state is not a defense. This is because the focus for entrapment is on the conduct of the government. The purpose of acknowledging this defense at all is our concern with the legitimacy of police conduct.

Id. at 438, 540 P.2d at 1327.

54. *See* State v. Fiechter, 89 N.M. 74, 547 P.2d 557 (1976). The court denigrated the entrapment defense, implicitly rejecting any of the objective arguments which find entrapment necessary for the court to preserve its purity and integrity. *Id.* at 76, 547 P.2d at 559. The court said:

a subjective test far stricter than that cited by *Roybal* and its progeny.[57] It approved the United States Supreme Court majority opinions and held that the only focus of entrapment is the intent or predisposition of the defendant to commit the crime.[58] Under this standard, there are few occasions where a court could find entrapment as a matter of law.[59]

B. The United States Supreme Court's Entrapment Doctrine

The Supreme Court first analyzed entrapment in *Sorrells v. United States*.[60] The Court held that the entrapment doctrine was based

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> There is nothing new about pleas of entrapment. Eve said, "The serpent beguiled me and I did eat." The results were unfortunate but scarcely unjustified. Such pleas often have a hollow ring because implicit in them is an admission by the orator of commission of the crime charged. The efficacy of the beguilment [sic], assuming the defendant is predisposed to commit the crime, is normally viewed with a healthy skepticism by courts and juries alike.

Id.

55. *Id.* at 79, 547 P.2d at 562. The supreme court, in reversing *Fiechter*, distinguished *Sherman*. *Id.* at 78, 547 P.2d at 561. The court reasoned that in *Sherman* the defendant was being treated for drug addiction and was persuaded to procure drugs for the informer, who appealed to his sympathy. The informer also encouraged the defendant to become readdicted. Fiechter, on the other hand, was already addicted and was looking for some method to get money to support his habit. The court also chastised the court of appeals for finding Fiechter entrapped because he succumbed to temptation. *Id.* at 78-79, 547 P.2d at 561-62. "The standards which the law requires of the citizenry in general is that they will comply with the law or suffer the consequences." *Id.* at 79, 547 P.2d at 562.

56. *Id.* at 77, 547 P.2d at 560. The court overruled *Sainz* because the court of appeals relied on the Ninth Circuit opinion in *Russell*, later reversed by the Supreme Court. *Id. See infra* notes 82-87 and accompanying text. The court also disapproved all the concurring Supreme Court opinions which proposed the objective approach. *Fiechter*, 89 N.M. at 77, 547 P.2d at 560.

57. Part of the *Roybal* test was whether the government initiated the criminal act or used undue persuasion or enticement. *See* State v. Sanchez, 79 N.M. 701, 448 P.2d 807 (1968); State v. Akin, 75 N.M. 308, 404 P.2d 134 (1965); State v. Roybal, 65 N.M. 342, 337 P.2d 406 (1959). Under *Fiechter*, any governmental conduct is permitted, so long as defendant is predisposed to the criminal behavior. *See Fiechter*, 89 N.M. at 78, 547 P.2d at 561.

58. *Fiechter* at 77, 547 P.2d at 560.

59. *Id.* In State v. Alvarez, 93 N.M. 761, 605 P.2d 1160 (Ct. App. 1978), decided after *Fiechter*, the defendant testified that the heroin he was accused of selling was supplied by the informer. *See id.* at 764, 605 P.2d at 1163. The informer could not be located and did not testify. *Id.* at 762, 605 P.2d at 1161. The court of appeals held that because the defendant admitted prior use of heroin, there was no entrapment as a matter of law. *Id.* at 764, 605 P.2d at 1163. Entrapment was properly submitted to the jury and it was entitled to convict. *Id.* Before *Fiechter*, the state would have had to rebut defendant's testimony in order to get the question before the jury. *See* State v. Sainz, 84 N.M. 259, 501 P.2d 1247 (Ct. App. 1972); State v. Sena, 82 N.M. 513, 484 P.2d 355 (Ct. App. 1971); State v. Carrillo, 80 N.M. 697, 460 P.2d 62 (Ct. App.), *cert. denied*, 80 N.M. 708, 460 P.2d 73 (1969).

60. 287 U.S. 435 (1932). A government agent visited the defendant's home posing as a fellow veteran. After winning the defendant's confidence, he asked him to procure liquor for him. The defendant first refused, but then relented and left the house. He returned with bootleg liquor and was arrested for violating federal liquor laws. There was ample evidence that the defendant was an honest, law-abiding citizen, but the judge refused to instruct on entrapment. *Id.* at 438-41.

Five years earlier, Justice Brandeis wrote a dissenting opinion in Casey v. United States, 276 U.S. 413 (1928), and discussed entrapment. The majority had refused to consider the

on statutory construction: a court must construe a criminal statute to avoid absurd, unjust results.[61] The statute could not apply to an innocent person, induced by the government to commit a crime.[62] The majority also found predisposition, a jury issue, to be the controlling factor in the defense.[63]

Justice Roberts, joined by Justices Brandeis and Stone, disagreed with the majority's rationale.[64] He preferred to rest the entrapment doctrine on the public policy granting the judiciary the power to protect "the purity of the government and its processes."[65] He also argued that former acts or character of the defendant was not an issue.[66] "To say that [instigation and inducement] by an official of government is condoned and rendered innocuous by the fact that the defendant had a bad reputation or had previously

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defense because it was not raised below. *Id.* at 418-19. However, Justice Brandeis stated: "This prosecution should be stopped, not because some right of Casey's has been denied, but in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts." *Id.* at 425. "[I]n my opinion, the prosecution must fail because officers of the Government instigated the commission of the alleged crime." *Id.* at 421.

61. "Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned." *Sorrells*, 287 U.S. at 446.

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

Id. at 448.

63. *Id.* at 451. According to the *Sorrells* court:

For the defense of entrapment is not simply that the particular act was committed at the instance of government officials. . . . [T]he controlling question [is] whether the defendant is a person *otherwise innocent* whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials.

287 U.S. at 451 (emphasis added). For detection purposes, however, the Court found it perfectly proper for the government to supply opportunities to commit further crime to those already engaged in criminal conduct. *Id.* at 441. The Court held that the trial court erred in not submitting the entrapment defense to the jury because there was sufficient evidence that Sorrells was "otherwise innocent." *Id.* at 452.

64. *Id.* at 453-59 (Roberts, J., concurring). Justice Roberts argued that grounding entrapment in statutory construction failed for two reasons. First, reinterpreting the statute to apply to only certain defendants amounted to judicial amendment of the statute. *Id.* at 456. The statute set forth the elements of the offense, and an entrapped defendant committed the offense, as did any other defendant. *Id.* Second, the Court might have to construe some criminal statutes differently from others because the Court hinted it distinguished between crimes mala in se and less serious statutory offenses.

Id. at 456-57. "We have no occasion to consider hypothetical cases of crimes so heinous or revolting that the applicable law would admit of no exceptions." *Id.* at 451.

65. *Id.* at 455. Some critics argue that this theory violates separation of powers. Because Congress enacted the statute and determined public policy by outlawing defendant's actions, a court may not, except on constitutional grounds, refuse to punish a guilty defendant. Note, *Entrapment in the Federal Courts—Subjective Test is Reaffirmed Against Lower Court Departures*, 42 FORDHAM L. REV. 454, 461 (1973).

66. *Sorrells*, 287 U.S. at 457-59.

transgressed is wholly to disregard the reason for refusing the processes of the court to consummate an abhorrent transaction."[67] Justice Roberts also believed entrapment was an issue for the court, not the jury.[68]

A second entrapment case, *Sherman v. United States*,[69] reached the Supreme Court in 1958. Chief Justice Warren, writing for the majority, found entrapment to be a two-pronged defense.[70] "Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials [but] the line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."[71] The Court refused to re-examine

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67. *Id.* at 459. Furthermore, by basing entrapment on former acts or reputation of the defendant, the court is, in effect, convicting the defendant of prior crimes and not those mentioned in the indictment. *Id.*

68. *Id.* at 457. If, however, there were doubt as to the relevant facts, the judge could submit the issue to the jury. *Id.*

69. 356 U.S. 369 (1958). Sherman and a government informer met at a doctor's office where both were ostensibly going through a cure for narcotics addiction. The informer alleged he was not responding to treatment and was suffering withdrawal. He begged Sherman to find him a source for drugs. *Id.* After several requests, Sherman agreed. The two shared expenses; Sherman became readdicted. The informer told government agents he had a seller for them. The agents then observed Sherman giving drugs to the informer in return for money they had supplied to the informer. They arrested Sherman for selling narcotics. *Id.* at 371, 373.

At trial, the focus was Sherman's predisposition. The question for the jury was whether Sherman's initial hesitancy was caused by unwillingness to commit a crime, or was the natural hesitancy of a person engaged in buying and selling narcotics. Sherman was convicted. The issue on appeal was whether the conviction should be set aside because Sherman established entrapment as a matter of law. The Supreme Court held that he had and reversed the conviction. *Id.* at 371-73.

70. This rationale was based entirely upon *Sorrells*. "On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on this claim of innocence." *Id.* at 373.

71. *Id.* at 372 (quoting *Sorrells*, 287 U.S. at 451; emphasis added by the Court). The Court held that Sherman met this test and had established entrapment as a matter of law. The Court found that the undisputed testimony of the informer, the Government's witness, provided enough evidence to substantiate entrapment. The informer testified he had played upon Sherman's sympathy, and that he had made repeated requests which were met by refusal and evasion. *Id.* at 373. There was no evidence Sherman had been engaged in dealing drugs. The Government offered evidence of Sherman's two past convictions, nine and five years prior to his meeting the informer. The court held that these convictions, coupled with Sherman's apparent desire to be cured of addiction, were not enough to establish predisposition to commit the *current* offense. *Id.* at 375-76.

Chief Justice Warren seemed to be outraged by the particular governmental conduct in the case:

> 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.

Id. at 376.

the rationale of the *Sorrells* majority,[72] and declined to consider adopting the principles announced by Justice Roberts.[73] The Chief Justice cited both concerns for law enforcement and unanimity among the lower courts after *Sorrells*.[74]

Justice Frankfurter, writing for himself and Justices Douglas, Harlan, and Brennan, argued forcefully for the adoption of Justice Roberts' objective approach.[75] He argued that the court's primary responsibility was to protect the public against "overzealous law enforcement"[76] and give guidance to lower courts and police.[77] *Sorrells*, Justice Frankfurter maintained, did not do this.[78] He also disagreed with the *Sorrells* focus on predisposition.[79]

Justice Frankfurter proposed an objective standard: "[I]n holding out inducements [police] should act in such a manner as is likely to induce to the commission of crime only [those engaged in criminal conduct] . . . ."[80] Frankfurter believed this broad outline of permissible activity would give sufficient guidance to the police and the courts. It would be refined by the court, not the jury, on a case-by-case basis.[81]

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72. *Id.* The Court restated its statutory construction argument. "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations." *Id.* at 372.

73. *Id.*

74. *Id.* at 378.

75. *Id.*. at 378-85 (Frankfurter, J., concurring in result only). Justice Frankfurter chose not to ground the entrapment defense in public policy, but in the courts' supervisory power to fairly administer criminal justice. *Id.* at 381. He may have changed the doctrinal basis to overcome objections rooted in separation of powers. *See* Note, *supra* note 65, at 461.

76. *Sherman*, 356 U.S. at 381. Justice Frankfurter argued that the court would lose sight of this responsibility by grounding entrapment in statutory construction, and not the court's supervisory power. *Id.* "The reasons that actually underly the defense of entrapment can too easily be lost sight of in the pursuit of a wholly fictitious congressional intent." *Id.*

77. *See id.* at 385.

78. *Id.* at 378-79.

79.

> The crucial question . . . 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. . . . [I]t is wholly irrelevant to ask if the 'intent' 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.

Id. at 382.

Justice Frankfurter highlighted the problems of focusing on the defendant's predisposition. *Id.* at 382-83. First, the danger of prejudice is substantial when the jury must determine entrapment by focusing on the defendant's character and former crimes. *Id.* at 382. Second, our society should not tolerate police conduct which forces a defendant into further crime. *Id.* at 383. Third, there should be one standard for the police, and that standard should not vary according to the characteristics of particular defendants. *Id.*

80. *Id.* at 383-84. "This test shifts attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime." *Id.* at 384.

81. *Id.* The Justice identified particular examples of impermissible police conduct. "Appeals to sympathy, friendship, the possibility of exorbitant gain . . . can no more be tolerated when directed against a past offender than against an ordinary law-abiding citizen." *Id.* at

The Court reexamined entrapment for a third time in *United States v. Russell.*[82] The majority opinion, written by Justice Rehnquist, reaffirmed both *Sorrells* and *Sherman.*[83] The Court found entrapment to be a limited defense, rooted in a judicial determination of Congressional intent,[84] and available "only when the Government's deception actually implants the criminal design in the mind of the defendant . . . ."[85] The Court would only subject law enforcement techniques applied to predisposed defendants to independent scrutiny if they were so outrageous as to violate due process.[86] Justice Rehnquist found no such due process violation before him in *Russell.*[87]

383.

Justice Frankfurter stated that judicial scrutiny was appropriate for two reasons. First he quoted from the *Sorrells* concurring opinion. " '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.' " *Id.* at 385 (quoting 287 U.S. at 457). Second, a jury verdict gives no guidance for the future. "Only the court, through the gradual evolution of explicit standards in accumulated precedents, can do this with the degree of certainty that the wise administration of criminal justice demands." *Id.*

82. 411 U.S. 423 (1973). The Court addressed entrapment in two prior cases, Masciale v. United States, 356 U.S. 386 (1958), and Lopez v. United States, 373 U.S. 427 (1963). In neither case, however, did the Court conduct a searching inquiry into the doctrinal rationale.

Russell involved a defendant who participated in the illegal manufacture of methamphetamine. 411 U.S. at 424. A government agent supplied a chemical which was necessary for the manufacture of the drug but was difficult to obtain. *Id.* Defendant then sold the agent a portion of the drug manufactured with the government's help. *Id.* at 426.

83. *Id.* at 433.

84. *Id.* at 435.

85. *Id.* at 436. To find entrapment, a court may never examine the governmental conduct without a concurrent inquiry into the defendant's mental state. Because Russell was already involved in an ongoing criminal activity, the manufacture of methamphetamine, he could not successfully assert entrapment. *Id.* at 431. The Court found that Russell had procured the chemical himself before and after the Government intervened. *Id.* In dissent, Justice Stewart pointed out that the court of appeals found the defendant could not have gotten the chemical which lead to the offense without the agent's help. *Id.* at 447. He also argued common sense dictated that if defendant were getting the ingredient himself, the agent could simply have waited until he did so, manufactured the drug, and sold it to the agent. *Id.* at 448-49. The majority may have ignored this approach because it decided the government might have to supply something of value to illegal drug manufacturers to gain their confidence when infiltrating their operations. Infiltration, the Court stated, is "a recognized and permissible means of investigation." *Id.* at 432.

86. *Id.* at 431-32 (citing Rochin v. California, 342 U.S. 165 (1952)). In *Rochin* the Supreme Court overturned a conviction for possession of morphine on due process grounds. 342 U.S. at 168-74. The defendant had swallowed two capsules of morphine after three law enforcement officers entered his house without a warrant. The officers then forcibly handcuffed the defendant and took him to a hospital, where doctors "pumped his stomach" against his will. The defendant then vomited up the two capsules. *Id.* at 166.

87. *Russell,* 411 U.S. at 432-33. The court of appeals had rested its holding on due process grounds, finding an intolerable degree of governmental participation in the crime. United States v. Russell, 459 F.2d 671 (9th Cir. 1972).

In the Supreme Court, Russell argued that entrapment should be grounded in due process in one of two ways. 411 U.S. at 430-31. First, entrapment was analogous to the exclusionary rules. *Id.* at 430. The Court distinguished the exclusionary rule cases because in those cases the government had acted illegally in such a way as to independently violate the defendant's

Four justices dissented.[88] Justice Stewart argued that the purpose of the entrapment defense is to prohibit the government from manufacturing or instigating crime,[89] and not to protect the "otherwise innocent."[90] Because the government agent in *Russell* supplied the critical ingredient for the purpose of prosecution, there should be entrapment as a matter of law.[91]

Hampton v. United States[92] is the Court's latest analysis of the entrapment doctrine. In light of the Court's decision in *Russell*,

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constitutional rights. *Id.* (citing Mapp v. Ohio, 367 U.S. 643 (1961), and Miranda v. Arizona, 384 U.S. 436 (1966)). In *Russell*, the government acted legally in purchasing and possessing the chemical in question. *Russell*, 411 U.S. at 430.

Second, Russell proposed a rule of due process violation whenever the criminal conduct would not have been possible without the government's intervention. *Id.* at 431. The Court declined to adopt such a rule because of "the difficulties attending the notion that due process of law can be embodied in fixed rules . . . ." *Id.*

88. *Id.* at 436-50. There were two separate dissenting opinions. Justice Douglas, joined by Justice Brennan, wrote a short dissent arguing that the government should be barred from prosecuting whenever it participates in an illegal scheme. *Id.* at 437-39. Justice Stewart, joined by Justices Brennan and Marshall, wrote the longer dissent. *Id.* at 439-43.

Although both dissents adopted the view of Justice Frankfurter in *Sherman*, the test set forth in that opinion might not have led to affirmance. "[I]n holding out inducements [police] should act in such a manner as is likely to induce to the commission of crime only [those engaged in criminal conduct] . . . ." *Sherman*, 356 U.S. at 384. *See supra* notes 75-81 and accompanying text. Because Russell was already engaged in criminal conduct, the government, in Frankfurter's view, may have been acting properly.

89. "It is the Government's duty to prevent crime, not to promote it." *Russell*, 411 U.S. at 449.

90. *Id.* at 441-42. If the focus of entrapment were truly on the defendant's "innocence," the doctrine should apply when either the government or private persons induce others to commit crime. Moreover, Justice Stewart argued, the defendant is not innocent; he committed the crime in question. Otherwise he would not be in court. *Id.* at 442.

91. *Id.* at 449.

> The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy . . . .

Id. at 450 (citing Sorrells v. United States, 287 U.S. 435, 459 (1932)). Thus Justice Stewart returned to the public policy of preserving the integrity of the court as the doctrinal basis for entrapment, turning away from Justice Frankfurter's theory of supervisory powers. *See* Note, *supra* note 65, at 464.

Justice Stewart agreed with the federal cases which found entrapment as a matter of law whenever government agents supplied the contraband. *Russell*, 411 U.S. at 449 n.4. *See supra* note 20 and accompanying text.

92. 425 U.S. 484 (1976). Petitioner was convicted of distributing heroin. *Id.* at 485. He claimed the government informer told him of a pharmacist friend who produced a non-narcotic drug which gave the same effect as heroin. The informer proposed selling this drug as heroin to gullible friends. After doing so once, petitioner decided to keep up the enterprise for further profit. He contended that he did not know he was dealing with heroin, and that all the drugs he sold were supplied by the informer. The informer directly contradicted this story, testifying that he merely arranged a sale between petitioner, who supplied the heroin, and the government. The jury was instructed that to find the defendant guilty, it had to find he intended to do an unlawful act. *Id.* at 485-87. The jury was not given an entrapment instruction. Defendant requested an instruction whereby the jury would have to find entrapment if it found the informer supplied the heroin "because the law as a matter of policy forbids his conviction in such a case." *Id.* at 487-88. The trial court refused the give the instruction. The jury found the defendant guilty and the court of appeals affirmed, relying on *Russell*.

the petitioner did not argue he was entrapped, but relied on the due process discussion in that case. He argued that the governmental action was so "outrageous" that it violated his due process rights.[93] Notwithstanding petitioner's argument, the Court concentrated on entrapment, stating that Hampton's only remedy was entrapment.[94]

Justice Rehnquist, in an opinion joined by Chief Justice Burger and Justice White, stated that *Russell* "ruled out the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case . . . where the predisposition of the defendant to commit the crime was established."[95] He further argued that the Court must define entrapment narrowly because the judiciary has no inherent supervisory power to veto law enforcement practices of which it did not approve.[96]

The concurring Justices, Powell and Blackmun, agreed with the plurality that entrapment focuses solely on predisposition.[97] However, Justice Powell advocated leaving the door open for a due process defense or for a court to invoke its supervisory powers in appropriate circumstances.[98]

Id. at 488.

Hampton was the Court's last attempt to clarify entrapment. The Court addressed only a procedural issue in Mathews v. United States, 485 U.S. 58, 108 S. Ct. 883 (1988). In that case, a plurality held that a defendant may deny commission of a crime and, where the evidence warrants, the court may also instruct the jury on entrapment. *Id.* Justice Brennan joined in the opinion, but wrote a separate concurrence to state his belief that the entrapment defense should focus solely on the government's conduct. He acknowledged, however, that the Court had found predisposition to be the controlling factor for entrapment in *Sorrells*, *Sherman*, and *Hampton*. He therefore "bow[ed] to *stare decisis*" and joined in both the judgment and reasoning of the Court. *Id.* at ___, 108 S. Ct. at 888-89.

93. *Hampton*, 425 U.S. at 489.

94. *Id.* at 489-90. Justice Rehnquist suggested that another remedy might be an action against the police. *Id.* at 490.

Many commentators believed that *Russell* left the door open for entrapped defendants to argue that their due process rights had been violated by overzealous police. *See, e.g., Elevation of Entrapment to a Constitutional Defense*, 7 U. MICH. J.L. REF. 361 (1974). In *Hampton*, Justice Rehnquist attempted to limit due process violations to situations where police violated some constitutionally protected right of the defendant. Id. at 490-91. He was unable to garner a majority on this point. Therefore Hampton does not fully delineate the boundary between entrapment and due process.

95. *Id.* at 488-89. In *Russell*, the jury found the defendant was predisposed to commit the crime. *Russell*, 411 U.S. at 427. In *Hampton*, defendant's counsel conceded on appeal that defendant was predisposed. *Hampton*, 425 U.S. at 487 n.3. Therefore, Justice Rehnquist reasoned, Hampton correctly recognized he could not argue he was entrapped. *Id.* at 489. However, Hampton could not distinguish his case from *Russell*, and since there was no due process violation in *Russell*, there was none in *Hampton*. *Id.* at 489-90. In both cases defendant was predisposed, and the government was acting in concert with the defendant. *Id.* Therefore, the only defense would be entrapment, and the defendant's conceded predisposition rendered even entrapment unavailable. *Id.*

96. *Id.* at 490.

97. *Id.* at 492.

98. *Id.* at 493-95. Due process, he reasoned, means fundamental fairness. Although there can be no sharp test for such an amorphous concept, the Court should still have the power to make the determination, in light of all the circumstances, whether there has been a violation, or a reason to invoke the court's supervisory power. *Id.* at 494-95. Justice Powell cited

Justice Brennan, with Justices Stewart and Marshall, dissented.[99] He again argued for the adoption of the objective standard.[100] In the alternative, the dissent argued that even under the subjective approach a court should find entrapment as a matter of law whenever the "subject of the criminal charge is the sale of contraband provided to the defendant by a Government agent."[101]

C. Relevant State Entrapment Standards

State courts are not bound by the Supreme Court's entrapment standard. Each state is free to develop its own criteria.[102] Nevertheless, most states focus on predisposition and mirror the federal approach.[103] In *Baca*, New Mexico expanded the criteria for entrapment beyond the federal subjective standard. Thus it is useful

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Greene v. United States, 454 F.2d 783 (9th Cir. 1971), where a government agent helped establish and sustain an illegal still operation and was the only customer of the operation. *Id.* Although the defendants argued there was entrapment as a matter of law, the court found entrapment unavailable because there was predisposition. *Id.* at 786. Nonetheless, the court found the governmental activity even more intense and aggressive than in entrapment cases and reversed the convictions. *Id.* at 787. "[A]lthough this is not an entrapment case, when the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative." *Id.*

99. *Hampton*, 425 U.S. at 495-500.

100. *Id.* at 495-96. Justice Brennan focused on the particular police conduct, found it to be egregious, and declared that defendant's predisposition was not at issue. Under the objective view, the trial judge should have found entrapment as a matter of law. *Id.* at 497.

101. *Id.* at 500. Justice Brennan grounds his rule in the court's supervisory powers, "leav[ing] it to another day whether it ought to be made applicable to the States under the Due Process clause." *Id.* at 500 n.4.

The dissent gives cogent reasons for finding this type of governmental conduct entrapment. Government agents have purposefully created the crime. *Id.* at 500. Police could not merely "round up and jail all 'predisposed' individuals, yet that is precisely what set-ups like the instant one are intended to accomplish." *Id.* at 499. Justice Brennan argued that this type of conduct is not designed to discover ongoing drug traffic, but to deliberately entice a particular individual to commit a crime. *Id.* at 498. As Justice Stewart stated in *Russell*, if the police believe a person is a seller, they could easily offer to "buy" without having to supply the contraband they buy. *Id.* at 499 n.3. Justice Brennan made an additional judgment on law enforcement techniques, however, when he stated, "the putative pusher is worth the investigative effort only if he has ready access to a supply." *Id.*

Justice Brennan also distinguished the facts before him from *Russell*. *Id.* at 497-98. In *Russell*, the chemical provided by the government was legal. In *Hampton*, the government supplied heroin, an illegal substance. In *Russell*, the defendant was participating in the illegal activity both before and after the government agent arrived on the scene and was prosecuted for his participation in that activity. In *Hampton*, the defendant was prosecuted for selling heroin which the government supplied and then bought. "The beginning and end of this crime thus coincided exactly with the Government's entry into and withdrawal from the criminal activity . . . ." *Id.* at 498.

102. *See supra* note 22. Most police overreaching may not even violate the fourteenth amendment's due process clause. *See* Hampton v. United States, 425 U.S. 484 (1976), and *supra* notes 93-97 and accompanying text. However, a state court may find that police have violated the defendant's due process rights under the state's own constitution. *See* People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978).

103. *See, e.g.*, State v. Bocian, 226 Neb. 613, 413 N.W.2d 893 (1987); State v. Jones, 416 A.2d 676 (R.I. 1980).

to examine entrapment in other jurisdictions whose courts have also expanded the defense in a manner similar to *Baca*.

Mississippi follows the majority rule that the entrapment defense is only available to a defendant not predisposed to commit the crime.[104] However, the supreme court has carved out one exception to this rule which applies only to violations of narcotics laws.[105] The court finds entrapment in every case where a defendant is convicted of the sale of,[106] or conspiracy to possess,[107] contraband supplied by the government, regardless of predisposition.[108] The rationale is that the defendant proved the criminal design originated with the informer, not with the defendant.[109] In other words, the defendant was "otherwise innocent" and not predisposed to commit the crime. The burden is on the government to rebut the defendant's testimony that the government furnished the narcotics.[110] If the

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104. Pace v. State, 407 So. 2d 530 (Miss. 1981). In 1988, a supreme court plurality held that a defendant, regardless of predisposition, may alternatively plead that "the state has employed methods of persuasion or inducement which create a substantial risk that the criminal offense will be created by persons other than those ready and willing to commit it" (adopting language from the Model Penal Code, *see infra* note 131), or that the "state officials engage[d] in conduct outrageous or shocking to common sensibilities . . . ." Moore v. State, 534 So. 2d 557, 560 (1988). In other words, the plurality decided, as did the *Baca* court, that both objective and subjective entrapment exist.

105. *See, e.g.*, Jones v. State, 285 So. 2d 152 (Miss. 1973); Sylar v. State, 340 So. 2d 10 (Miss. 1976).

The court first hinted at the rule when it stated: "It is only where the accused is lured into an unlawful sale of drugs by a state official and is a mere passive instrument in their hands that entrapment would bar prosecution." *See* Smith v. State, 248 So. 2d 436, 438 (Miss. 1971). Later, in *Jones*, the court found defendant was entitled to a directed verdict when the contraband he was convicted of selling was supplied by an informer. 285 So. 2d at 160.

106. Gamble v. State, 543 So. 2d 184 (Miss. 1989); Daniels v. State, 422 So. 2d 289 (Miss. 1982); Epps v. State, 417 So. 2d 543 (Miss. 1982); Torrence v. State, 380 So. 2d 248 (Miss. 1980); Sylar v. State, 340 So. 2d 10 (Miss. 1976) (government supplied contraband which defendant sold or gave back to the government).

In *Torrence* the court stated, in a footnote, that there might be certain situations where the police are forced to supply contraband and then buy it back in order to "flush out criminal activity." 380 So. 2d at 250 n.1. No subsequent cases upheld convictions on these grounds.

107. Kemp v. State, 518 So. 2d 656 (Miss. 1988); Barnes v. State, 493 So. 2d 313 (Miss. 1986). These cases involved state-owned marijuana the police arranged to sell to the defendants. In *Kemp* the court gave no reason for reversing the conviction except that such operations were found to be entrapment as a matter of law in *Barnes*. The *Kemp* court berated the police for using the technique. *See Kemp*, 518 So. 2d at 656. *Kemp* was questioned, but not overruled, by a plurality of the supreme court in Moore v. State, 534 So. 2d 557 (Miss. 1988).

108. If the contraband were not supplied by the government, the lower court must submit the issue of entrapment to the jury for a determination of whether the defendant was predisposed to commit the crime. Ervin v. State, 431 So. 2d 130 (Miss. 1983); Tribbett v. State, 394 So. 2d 878 (Miss. 1981).

109. *Jones*, 285 So. 2d at 159.

110. Gamble v. State, 543 So. 2d 184 (Miss. 1989); Epps v. State, 417 So. 2d 543 (Miss. 1982); Torrence v. State, 380 So. 2d 248 (Miss. 1980); Jones v. State, 285 So. 2d 152 (Miss. 1973).

defendant's testimony is uncontradicted, the court must find entrapment as a matter of law.[111]

Florida utilizes a dual approach to entrapment.[112] The supreme court decided that the objective and subjective views of entrapment were not mutually exclusive.[113] The court reasoned that not only does society need protection from criminals, but individuals need protection from impermissible police conduct.[114] Pursuant to the dual standard, the trial court must first determine whether the police conduct is proper and applies a threshold test. "Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity;[115] and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity."[116] If the court finds en-

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111. *Gamble*, 543 So. 2d at 185; *Epps*, 417 So. 2d at 545; *Torrence*, 380 So. 2d at 250; *Jones*, 285 So. 2d at 157-58. This was the result in *Baca*. *Baca*, 106 N.M. at 338, 742 P.2d at 1043.

112. Cruz v. State, 465 So. 2d 516 (Fla.), *cert. denied*, 473 U.S. 905 (1985). *See also* Casenote, *Criminal Law—Florida Adopts a Dual Approach to Entrapment*, 13 FLA. ST. U.L. REV. 1171 (1986). Florida's legislature recently enacted a statutory entrapment defense. *See* FLA. STAT. ANN. § 777.201 (West Supp. 1988). However, the courts have yet to interpret the statute, which appears to be an amalgam of statutes from other jurisdictions. One court, without discussion, has applied both the *Cruz* standard and the statutory standard to reach the same result. *See* Huff v. State, 544 So. 2d 1143 (Fla. Dist. Ct. App. 1989).

Prior to 1979 the majority of Florida courts focused on predisposition when confronted with the entrapment defense. *See, e.g.*, Lashley v. State, 67 So. 2d 648 (Fla. 1953); Story v. State, 355 So. 2d 1213 (Fla. Dist. Ct. App.), *cert. denied*, 364 So. 2d 893 (1978). A minority of courts, however, found entrapment regardless of the defendant's predisposition when they perceived egregious governmental conduct. *See, e.g.*, Spencer v. State, 263 So. 2d 282 (Fla. Dist. Ct. App.), *cert. denied*, 267 So. 2d 531 (1972); Dupuy v. State, 141 So. 2d 825 (Fla. Dist. Ct. App.), *cert. denied*, 147 So. 2d 531 (Fla. 1962). In State v. Dickinson, 370 So. 2d 762 (Fla. 1979), the supreme court adopted the subjective standard.

Cruz involved a decoy operation set up because there were unsolved crimes in the area. An officer, posing as a drunk, leaned against a wall with his back facing the sidewalk. The officer had $150 protruding from his back pocket. The lower court found none of the unsolved crimes involved this type of scenario; the police were not looking for anyone in particular and were not aware of any prior criminal acts by the defendant. *Cruz*, 465 So. 2d at 517. The supreme court found that such police activity constituted entrapment as a matter of law, reversing the court of appeal's order remanding the case for a jury determination. *Id.* at 523.

113. *Cruz*, 465 So. 2d at 520.

The Supreme Court of Appeals of West Virginia also decided that the two views can coexist. State v. Knight, 230 S.E.2d 732 (W. Va. 1976). In *Knight* the court stated the test for objective entrapment to be: "[T]he officer or agent conceived the plan and procured or directed its execution in such an unconscionable way that he could only be said to have created a crime for the purpose of making an arrest and obtaining a conviction." *Id.* at 737.

114. *Cruz*, 465 So. 2d at 517. The court succinctly stated the problem with the subjective standard. "The subjective view recognizes that innocent, unpredisposed, persons will sometimes be ensnared by otherwise permissible police behavior. However, there are times when police resort to impermissible techniques. In those cases, the subjective view allows conviction of predisposed defendants. The objective view requires that all persons so ensnared be released." *Id.* at 520.

115. *Id.* at 522. This aspect of the test focuses on whether the police manufactured the crime. *Id.*

116. *Id.* This part of the test measures the appropriateness of the police conduct. *Id.*

trapment occurred, it orders the charges dismissed.[117] If the court does not find entrapment, the jury may still apply the subjective test, and determine whether the defendant was entrapped because he was not predisposed to commit the crime.[118]

Michigan adopted the objective standard as the sole test for entrapment.[119] The supreme court grounded the defense in policy espoused by prior Michigan case law[120] and the positions of Justices Roberts, Frankfurter, and Stewart of the United States Supreme Court.[121] The standard articulated by the court was "whether the actions of the police were so reprehensible under the circumstances that the Court should refuse, as a matter of public policy to permit a conviction to stand."[122]

Subsequent case law put flesh on the bones of this very broad standard. The court focused on the particular government conduct to see whether it went beyond merely offering a defendant an opportunity to commit a crime, and whether the government actually induced or instigated the commission of the crime.[123] Courts found

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117. *Id.* at 521. The court dismissed the charges against Cruz, finding the decoy operation failed both aspects of the threshold test. *Id.* at 522-23. First, the technique was not aimed at a specific ongoing activity since there was no evidence that the crimes committed in the area involved drunks. *Id.* at 522. Second, $150 protruding from the back pocket of a partially conscious drunk is too tempting and creates "substantial risk that such an offense will be committed by persons other than those who are ready to commit it." *Id.* (citing MODEL PENAL CODE § 2.13).

Under the new Florida statute, entrapment may always be a jury question. FLA. STAT. ANN. § 777.201(2) (West Supp. 1988).

118. *Id.* at 522 n.4.

119. People v. Turner, 390 Mich. 7, 210 N.W.2d 336 (1973). Turner was convicted for sale and possession of heroin. The court of appeals reversed the sale conviction. Turner had procured legal caffeine pills for an informer. Subsequently a police investigation of Turner revealed no illicit dealing in drugs. *Id.* at 8, 210 N.W.2d at 337. The informer, however, told Turner he had an addicted girlfriend and persuaded Turner to obtain heroin for her. *Id.* at 9, 21 N.W.2d at 338. Turner once did so and was arrested. *Id.*

120. As far back as 1878, Michigan supreme court justices had stated that the courts should not condone police conduct that encouraged or helped people to commit crimes. *Id.* at 9-10, 210 N.W.2d at 338-339 (citing People v. Sinclair, 387 Mich. 91, 194 N.W.2d 878 (1972), and Saunders v. People, 38 Mich. 218 (1878)).

121. *Id.* at 12, 210 N.W.2d at 342. The court specifically cited as persuasive authority Justice Stewart's dissenting opinion in *Russell*. *Id.* at 11-12, 210 N.W.2d at 341-42. *See supra* notes 89-91 and accompanying text.

122. *Id.* at 13, 210 N.W.2d at 342. In the case before it, the court found the government impermissibly overreached by playing on Turner's sympathy and friendship, and there was no evidence he had ever dealt drugs before; he was therefore entrapped and his conviction reversed. *Id.* at 14, 210 N.W.2d at 343.

One justice, finding entrapment on the facts before him, argued for a subjective standard, construing the phrase "otherwise innocent" narrowly to mean innocent of the specific crime charged. *Id.* at 14-15, 210 N.W.2d at 343-44 (Williams, J., concurring). Thus, the defendant's behavior would always be scrutinized in concert with the police conduct. *Id.* Two dissenting justices, in separate opinions, argued the objective standard would unduly hamper law enforcement. *Id.* at 15-23, 210 N.W.2d at 344-52 (Brennan, J. and Coleman, J., dissenting).

123. *E.g.*, People v. Harding, 163 Mich. App. 298, 413 N.W.2d 777 (1987), *vacated and remanded*, 430 Mich. 859, 420 N.W.2d 826 (1988); People v. D'Angelo, 401 Mich. 167, 257 N.W.2d 655 (1977).

entrapment when the informer pressured the defendant to do the criminal act,[124] when the informer appealed to the defendant's sympathy and friendship,[125] and when the informer planned and organized the crime.[126] The court will not find entrapment if the idea for the crime, and the method and operation, originated with the defendant,[127] or if the defendant instigated an illegal sale.[128]

In Michigan, the trial court decides the entrapment issue, not the jury.[129] When the defendant raises the defense, the judge holds an evidentiary hearing out of the jury's presence.[130] The burden of proof is on defendant to show improper governmental conduct by a preponderance of the evidence.[131] The court makes specific

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124. *See, e.g.*, People v. Harding, 163 Mich. App. 298, 413 N.W.2d 777 (1987), *vacated and remanded*, 430 Mich. 859, 420 N.W.2d 826 (1988); People v. Larcinese, 108 Mich. App. 511, 310 N.W.2d 49 (1981); People v. Duis, 81 Mich. App. 699, 265 N.W.2d 794 (1978).

125. *See* People v. Harding, 163 Mich. App. 298, 413 N.W.2d 777 (1987), *vacated and remanded*, 430 Mich. 859, 420 N.W.2d 826 (1988); People v. Duis, 81 Mich. App. 699, 265 N.W.2d 794 (1978).

126. *See* People v. Jamieson, 168 Mich. App. 332, 423 N.W.2d 655, *appeal granted*, 431 Mich. 904, 433 N.W.2d 75 (1988); People v. Jones, 165 Mich. App. 670, 419 N.W.2d 47 (1988).

127. People v Roy, 80 Mich. App. 714, 265 N.W.2d 20 (1978); People v. Duke, 87 Mich. App. 618, 274 N.W.2d 856 (1978).

128. People v. Forrest, 159 Mich. App. 329, 406 N.W.2d 290 (1987).

129. People v. D'Angelo, 401 Mich. 167, 257 N.W.2d 655 (1977). The policy driving the objective entrapment standard is to deter unlawful government activity by withholding judicial approval of impermissible law enforcement conduct. *Id.* at 170, 257 N.W.2d at 658. Therefore, the question must be decided by the court itself, not the jury. *Id.* Pragmatically, judicial determination will give guidance for future police conduct and build a body of precedent for the courts. *Id.* at 171, 257 N.W.2d at 659. In addition, evidence pertaining to guilt might prejudice a jury when the jury considers the entrapment defense. *Id.*

130. *Id.* at 172, 257 N.W.2d at 660. The defendant is not forced to admit all the elements of the crime to raise entrapment. *Id.* His testimony is not admissible for substantive purposes at trial, except for impeachment purposes if inconsistent with his trial testimony on a material issue. *Id.*

131. *Id.* at 173-75, 257 N.W.2d at 661-63. The court justified this procedure by noting that the defendant is not required to prove the absence of an element of the crime. *Id.* at 173, 257 N.W.2d at 661. He is essentially accusing the government of improper conduct irrespective of his guilt or innocence. *Id.* The government has the burden of proof in jurisdictions applying the subjective standard. *Id.* at 173-74, 257 N.W.2d at 661-62. The court also noted, citing Patterson v. New York, 432 U.S. 197 (1977), that burdening the defendant with proving an affirmative defense by a preponderance does not violate due process. *D'Angelo*, 401 Mich. at 174, 257 N.W.2d at 662. The Model Penal Code, which adopted the objective standard, also shifts the burden to defendant. *Id.* at 175, 257 N.W.2d at 663 n.13. *See* MODEL PENAL CODE § 2.13 (Official Draft 1962):

> (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

findings of fact, subject to appellate review on a clearly erroneous standard. If the judge finds no entrapment, the issue is not raised again until appeal.[132]

IV. RATIONALE OF THE *BACA* COURT

In *Baca*, the court of appeals relied on *Fiechter*[133] and upheld Baca's conviction.[134] The supreme court decided that Baca was entrapped and expanded the entrapment defense.[135] In *Fiechter*, the government did not supply the defendant with the illegal drug, but merely provided the opportunity for the defendant to consummate a sale.[136] In *Baca*, the government provided cocaine to the defendant which he in turn sold to the government agent.[137] Baca was "'nothing more than a conduit, conveying cocaine from a police informant to a policeman.'"[138]

The supreme court applied an entrapment standard from *Sorrells v. United States*.[139] "'[T]he Government cannot be permitted to contend that [a defendant] is guilty of a crime where government officials are the instigators of his conduct.'"[140] The informant in *Baca* participated so extensively in the cocaine transaction, by buying the cocaine and arranging the sale, that he instigated the

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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.

132. *D'Angelo*, 401 Mich. at 175, 257 N.W.2d at 663.

133. 89 N.M. 74, 547 P.2d 557 (1976). *See supra* notes 54-59 and accompanying text.

134. *See* State v. Baca, No. 9956 (N.M. Ct. App. filed June 18, 1987).

135. Baca v. State, 106 N.M. 338, 742 P.2d 1043 (1987). The court did not overrule *Fiechter*, but it is unclear what precedential value *Fiechter* continues to have. *Fiechter* clearly stated that predisposition was the *only* focus for entrapment. *Baca* holds that the jury may focus either on predisposition or government conduct. *Baca*, 106 N.M. at 341, 742 P.2d at 1046.

Chief Justice Scarborough and Justice Stowers dissented. *Id.* at 341-42, 742 P.2d at 1046-47. The Chief Justice misapplied entrapment law by stating that because Baca admitted all the elements of the offense, there could be no entrapment. *Id.* at 341, 742 P.2d at 1046. In many states, including New Mexico, a defendant may claim entrapment only if he admits committing the crime. *See* Marcus, *supra* note 29, at 229; State v. Garcia, 79 N.M. 367, 443 P.2d 860 (1968). Both Justices preferred to uphold Baca's conviction, finding *Fiechter* good law, and properly applied by the jury. *Baca*, 106 N.M. at 341-42, 742 P.2d at 1046-47.

136. *See Fiechter*, 89 N.M. at 75, 547 P.2d at 558.

137. *See Baca*, 106 N.M. at 338, 742 P.2d at 1043.

138. *Id.* at 340, 742 P.2d at 1045.

139. *Id.* New Mexico is not obliged to follow the Supreme Court's entrapment criteria. The federal doctrine is not rooted in the Constitution, but in statutory construction. *See* United States v. Sorrells, 287 U.S. 434 (1932). Nonetheless, the court chose to analyze the Supreme Court's entrapment line of cases, concluding, erroneously, there is still debate in the federal courts as to the entrapment standard. *Baca*, 106 N.M. at 340, 742 P.2d at 1045. *See* discussion of *Hampton v. United States* at *supra* notes 92-101 and accompanying text.

140. *Baca*, 106 N.M. at 339, 742 P.2d at 1044 (citing *Sorrells*, 287 U.S. at 452).

criminal conduct. Therefore, the police conduct was improper, and although Baca may have been predisposed to commit the crime, he was entrapped.[141] The court held that the police improperly induced Baca's criminal conduct.[142]

The court cited with approval *United States v. Bueno*,[143] a Fifth Circuit Court of Appeals case with facts similar to *Baca*.[144] In *Bueno*, the Fifth Circuit held that there was entrapment as a matter of law whenever an informer supplied illegal goods to a prospective seller.[145] The court found such governmental activity objectionable because there would have been no contraband to sell without the creative intervention of the informer.[146] In that situation, the defendant's predisposition was not an issue.[147]

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141. *Id.* at 340, 742 P.2d at 1045.

> Such detailed involvement on the part of the police in the cocaine transaction exceeds proper investigative procedure and puts the police into the category of "instigators" of the criminal conduct, as defined by the Supreme Court in *United States v. Sorrells*: "It is not [the duty of the police] to incite to and create crime for the sole purpose of prosecuting and punishing it."

Id.

There was testimony that the police mistrusted the informer. *Id.* at 339, 742 P.2d at 1044. Although not mentioned in the court's rationale, this fact may have had some bearing on the court's finding of entrapment.

142 ."Under the objective standard adopted in this opinion we hold that Baca was improperly induced by the police into such criminal conduct as he was found to have committed, and that, as a matter of law, he was entrapped." *Id.* at 340-41, 742 P.2d at 1045-46.

143. 447 F.2d 903 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973). Although New Mexico is free to rely on *Bueno*, that case is no longer good law in the federal system. In Hampton v. United States, 425 U.S. 484 (1976), the Supreme Court effectively reversed *Bueno*. The facts of both cases were similar. *See supra* notes 92-101 and accompanying text.

The court cited four other cases where courts found entrapment on similar facts, stating that those states have adopted the *Bueno* rule: People v. Martin, 124 Ill. App. 3d 590, 464 N.E.2d 837 (1984); People v. Stanley, 68 Mich. App. 559, 243 N.W.2d 684 (1976); Sylar v. State, 340 So. 2d 10 (Miss. 1976); State v. Branam, 161 N.J. Super. 53, 390 A.2d 1186 (1978), *aff'd per curiam*, 79 N.J. 301, 399 A.2d 299 (1979).

Only Mississippi actually follows the *Bueno* rule. *See supra* notes 104-11 and accompanying text. Illinois uses the federal subjective entrapment standard. *Martin*, 124 Ill. App. 3d at 592, 464 N.E.2d at 839. In *Martin*, the court held that the state did not prove beyond a reasonable doubt that defendant was predisposed to commit the crime in question. *Id.*

New Jersey enacted a statute embodying both subjective and objective entrapment in 1979. N.J. STAT. ANN § 2C:2-12, interpreted in State v. Rockholt, 96 N.J. 570, 476 A.2d 1236 (1984). However, a "*Bueno*" defense, based on due process and fundamental fairness, may exist independent of the statute. *See* State v. Medina, 201 N.J. Super. 565, 570, 493 A.2d 623, 628 (App. Div.), *cert. denied*, 102 N.J. 298, 508 A.2d 185 (1985).

Michigan follows an objective standard. *See supra* notes 119-32 and accompanying text. The court may not, however, find entrapment in all cases where a defendant proves a *Baca* "take-back" sale. *See* People v. Jamieson, 168 Mich. App. 332, 423 N.W.2d 655, *appeal granted*, 431 Mich. 904, 433 N.W.2d 75 (1988).

144. In *Bueno*, the government did not rebut the defendant's testimony that the informer purchased heroin in Mexico, imported it to the United States, and then told the defendant to sell that heroin to a government agent. *Bueno*, 447 F.2d at 904-06. The court held that where such testimony by a defendant is uncontradicted by the government, and there is no additional evidence showing the testimony to be untrue, the government has not met its burden to prove guilt beyond a reasonable doubt. *Id.* at 906.

145. *Id.* at 905-06.

146. *Id.* at 906.

147. *Id.* at 905.

However, *Baca* goes beyond a holding limited to *Bueno* facts.[148] The court proposed a new, expanded entrapment rule for the state.[149] After *Baca*, both subjective and objective entrapment are available defenses. A defendant may show either that he lacked predisposition to commit the crime *or* that the police "exceeded the standards of proper investigation."[150]

V. ANALYSIS AND IMPLICATIONS

The *Baca* court clearly disapproved of the police procedure where the police create a crime by targeting a suspect, supplying him with contraband, coercing a sale to a state agent, and then arresting the suspect. The court's decision prevents the state from utilizing this particular law enforcement technique. The decision also indicates that a defendant may be acquitted whenever a jury finds that the government instigated the crime or induced the defendant to act.[151]

However, *Baca* does not clearly delineate the bounds of proper police conduct.[152] The court did not show police how far they can go in apprehending criminals. Trial courts and police need guidelines for the objective entrapment defense because the focus of that defense is on proper police procedure.[153]

The goal of police investigation must be the interruption of specific, ongoing, criminal activity.[154] Thus, the first inquiry should be whether the particular crime would have occurred without the

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148. *Baca* concludes by holding that a defendant may show "that the police exceeded the standards of proper investigation, *as here*, where the government was both the supplier and the purchaser of the contraband and defendant was recruited as a mere conduit." *Baca*, 106 N.M. at 341, 742 P.2d at 1046 (emphasis added). This holding implies that the facts before the court provide only one example of police misconduct. Thus, *Baca*, unlike *Bueno*, may apply to factual situations other than where the defendant is a middleman in a drug transaction.

149. *Id.*

150. *Id.*

151. *Id.* at 340, 742 P.2d at 1045.

152. The court's standards are: (1) police may not instigate the criminal conduct; (2) police may not improperly induce the criminal conduct; and (3) police may not provide contraband which becomes the basis of an arrest for the sale of the same contraband. *Id.* at 340-41, 742 P.2d at 1045-46.

153. A court can establish guidelines on a case-by-case basis. Michigan used this approach. *See supra* notes 123-28 and accompanying text. Alternatively, as Florida did, the court might set forth a standard with determining factors, leaving little for trial court discretion. *See* Cruz v. State, 465 So. 2d 516 (Fla.), *cert. denied*, 473 U.S. 905 (1985), and *supra* notes 112-18 and accompanying text.

154. The public generally approves of police encouragement of crime in order to gather evidence and arrest those people engaged in the criminal activity for which they are arrested. If police were never allowed to infiltrate criminal enterprises, many perpetrators of victimless criminal enterprises would remain unpunished. The public would lose confidence in the judicial system, and courts would limit the use of the entrapment defense. *See generally* Park, *supra* note 3.

police intervention.[155] If the crime would not have occurred, the police instigated the crime and entrapped the defendant. The second inquiry should focus on the inducement. Persistent solicitation of an unwilling defendant, appeals to humanitarian instincts,[156] promises of exorbitant profit, and false representations[157] are all examples of improper inducement.[158] Applying these standards would ensure that the police do not use unfair techniques to create a crime for the purpose of obtaining convictions.[159]

Baca relegates both objective and subjective entrapment to the jury.[160] However, good reason exists for the court to decide whether the police acted improperly in a given case.[161] Objective entrapment is based on public policy, not the guilt or innocence of the particular defendant.[162] A jury decides whether a defendant is guilty, not whether an arrest or conviction conforms with principles of jus-

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155. *See* Cruz v. Florida, 465 So. 2d at 522; People v. Isaacson, 44 N.Y.2d 511, 521, 406 N.Y.S.2d 714, 719, 378 N.E.2d 78, 83 (1978) (conviction for sale of controlled substance reversed on due process grounds; defendant predisposed, therefore not entrapped under New York law). The *Cruz* entrapment test parallels a due process analysis. *See* Morris v. State, 487 So. 2d 291, 293 (Fla. 1986).

156. Examples of humanitarian instincts are sympathy and past friendship. *Isaacson*, 44 N.Y.2d at 521, 406 N.Y.S.2d at 719, 378 N.E.2d at 83.

157. For example, the police might make false representations to induce the belief that conduct is not prohibited. *Cruz*, 465 So. 2d at 522.

158. Improper inducements "create a substantial risk that [the] offense will be committed by persons other than those who are ready to commit it," MODEL PENAL CODE § 2.13(1)(b) (Official Draft, 1962), or "are likely to cause normally law-abiding persons to commit the offense," U.S. NATIONAL COMMISSION ON REFORM OF FEDERAL LAWS, A PROPOSED NEW FEDERAL CRIMINAL CODE § 702(2) (Brown Commission Proposal).

159. An additional factor in *Isaacson* is "whether the record reveals simply a desire to obtain a conviction with no reading that the police motive is to prevent further crime or protect the populace." If there was no ongoing criminal activity interrupted by the arrest, then the police merely set someone up for a conviction, distorting legitimate goals of law enforcement, prevention, and protection. *See Isaacson*, 44 N.Y.2d at 521, 406 N.Y.S.2d at 719, 378 N.E.2d at 83.

160. The court characterizes the objective standard as where "the trier of fact, in determining whether there was entrapment, considers any misconduct of the police." *Baca*, 106 N.M. at 339, 742 P.2d at 1044. However, if, as in *Baca*, there is no factual dispute, the court may find entrapment as a matter of law. *Id.* at 339-41, 742 P.2d at 1044-46.

161. *See generally* Marcus, *supra* note 29, at 225-29.

Baca focused mainly on United States v. Bueno, 447 F.2d 903 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973), because the facts were analogous to those before the court. The *Bueno* defense, the only exception in a jurisdiction applying the subjective test, goes to the jury. The United States Supreme Court justices who advocate the objective approach, however, believe entrapment is an issue for the court. *See, e.g.*, *Sorrells*, 287 U.S. at 457 (Roberts, J., concurring).

162. 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.

People v. D'Angelo, 401 Mich. 167, 170, 257 N.W.2d 655, 658 (1977).

tice.[163] If the police have exceeded the bounds of proper investigation, there is nothing for the jury to decide.[164] Some jurisdictions using the objective standard give the question to the jury, but in many of those states the relevant inquiry is whether the police conduct would have tempted an average person to commit a crime.[165] The *Baca* inquiry is whether the police instigated or induced the particular criminal activity.[166]

Thus, the question of police conduct may properly be one for the court to decide at a hearing prior to trial. From a practical standpoint, prejudicial evidence of guilt would not permeate such a hearing as it would a trial.[167] Therefore, a judicial determination would be more reliable than a jury verdict and would better evaluate the police conduct.[168] To counter any possible prejudice of a particular judge, a defendant should then have the option of bringing the subjective entrapment defense to the jury.[169]

Since both defenses remain jury questions in New Mexico, a defendant should argue improper police conduct rather than lack of predisposition. If the jury finds no police misconduct, it is also likely to find the defendant predisposed to commit the crime. If the police acted properly, the defendant would have committed the crime without their help or interference. Therefore, the defendant would be predisposed, and not entrapped.[170]

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163. The jury may, however, "perform the function of ameliorating the strictness of the law by making it conform to community mores." Park, *supra* note 3, at 269.

164. "A claim of outrageous government involvement does not present any question for a jury to decide but solely a question of law for the court." United States v. Quinn, 543 F.2d 640, 648 (8th Cir. 1976).

165. This is a proper jury matter. *See, e.g.*, People v. Barraza, 153 Cal. Rptr. 459, 591 P.2d 947 (1979); Hawaii v. Kelsey, 566 P.2d 1370 (Haw. 1970); Iowa v. Mullen, 216 N.W.2d 375 (Iowa 1974). *See also* Marcus, *supra* note 29, at 228-29. These states employ the "hypothetical person" entrapment standard—there is entrapment when police conduct would have induced a hypothetically law-abiding person to commit a crime. *See* Park, *supra* note 3. This is not the *Baca* standard.

166. *See Baca*, 106 N.M. at 340, 742 P.2d at 1045.

167. *See D'Angelo*, 401 Mich. at 171, 257 N.W.2d at 659.

168. Park argues a contrary position: If objective entrapment is before the jury, the judge can screen inadmissible evidence out of the presence of the factfinder; whereas if the judge must determine both admissibility and determine entrapment, the evidence may have a prejudicial effect. *See* Park, *supra* note 3, at 270.

169. The court might initially decide whether the police conduct was permissible. If the court determines the conduct was permissible, then the court could submit the issue of defendant's predisposition to the jury. West Virginia utilizes this approach, State v. Knight, 230 S.E.2d 732 (W. Va. 1976), as did Florida under *Cruz*, 465 So. 2d 516. The new Florida statute, however, provides: "The issue of entrapment shall be tried by the trier of fact." FLA. STAT. ANN. § 777.201(2) (West Supp. 1988).

In Utah and Vermont, a jury will decide entrapment using an objective standard only after the judge determines there is a factual dispute. *See* State v. Wilkins, 144 Vt. 22, 473 A.2d 295 (1983); UTAH CODE ANN. § 76-2-303 (1953).

170. Evidentiary rules also favor objective entrapment. Evidence of other crimes, wrongs, or acts would be admissible only to prove whether the government instigated or induced the criminal activity. Specifically, only acts indicating ongoing criminal activity would be relevant. *See* N.M. R. EVID. 11-404(b) (Recomp. 1986). Under subjective entrapment, any acts tending

The current New Mexico jury instruction incorporates the subjective test.[171] It focuses on the defendant and his willingness to commit the crime. However, the objective test under *Baca* incorporates a subtle change. The defendant's willingness is irrelevant. The important inquiries are whether the crime would have been committed without the police conduct and whether the police used improper methods to induce the defendant to act. A new jury instruction must reflect this shift.[172]

For the court or jury to scrutinize the police conduct, the testimony of the informant will be relevant, particularly if he or she participated in, or instigated, the commission of the crime.[173] If the state refuses to disclose the informant's identity,[174] the charge may be dismissed. The judge must dismiss the charges if (1) the defendant makes a showing that the informant's testimony is relevant to his defense; (2) the state still refuses to disclose his identity; and if (3) there is a reasonable probability that the informant's testimony will be beneficial to the defendant.[175] Therefore, when

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to prove predisposition would arguably be relevant. *See* State v. Carrillo, 80 N.M. 697, 460 P.2d 62 (Ct. App.), *cert. denied*, 80 N.M. 708, 460 P.2d 73 (1969), *cert. denied*, 397 U.S. 1079 (1070).

171. *See* N.M. STAT. ANN. U.J.I. Crim. 14-5160 (Recomp. 1986) and note 13, *supra*.

172. The jury instruction should mirror the suggested guidelines for police and courts. The instruction might be: "For you to find the defendant guilty, the state must have proven to your satisfaction beyond a reasonable doubt that the crime would have occurred without the police activity. The state must have proven that the police did nothing to cause the defendant to commit a crime he would not otherwise have committed. You may consider whether the police in this case talked the defendant into committing the crime, or presented an unusual temptation to the defendant."

173. Although entrapment is applicable to decoy operations, the typical entrapment situation involves a government informer or undercover officer. *See generally* Rotenburg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871 (1963).

174. N.M. R. EVID. 11-510 gives the state a privilege to so refuse:

> 11-510. Identity of Informer.
>
> A. Rule of privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer. . . .

175. C. Exceptions:

> . . .
>
> (2) Testimony on merits. If it appears from the evidence in the case or from other showing by a party that an informer will be able to give testimony that is relevant and helpful to the defense of an accused, or is necessary to a fair determination of the issue of guilt or innocence in a criminal case . . ., and the state . . . invokes the privilege, the judge shall give the state . . . an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if he finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and that the state . . . thereof elects not to disclose his identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which testimony would relate, and the judge may do so on his own motion.

N.M. R. EVID. 11-404(b) (Recomp. 1986).

a defendant raises the objective defense, he should move to dismiss if the state refuses to disclose an informant's identity, rather than rely on his own testimony to show entrapment.[176]

VI. CONCLUSION

Baca has expanded the defense of entrapment in New Mexico. In so doing, the court has attempted to ensure that people in New Mexico, regardless of their background or reputation, are treated fairly by police. To utilize this objective approach successfully, the court must give clear guidelines to the criminal justice community. Standards should allow police to interrupt ongoing criminal activity without using manipulative techniques designed to induce commission of crime.

In *Baca*, the supreme court held that a defendant may assert either subjective or objective entrapment. The defendant may claim he was not predisposed to commit the crime charged or that the police instigated the commission of the crime or improperly induced him to act. Because many defendants will claim police misconduct, the court should propose a new jury instruction incorporating this new test. Alternatively, a pretrial determination of entrapment may be more consistent with the policy underlying the objective approach. Although *Baca* leaves several procedural questions unanswered, it sends a clear message to lower courts that police may not create crime in their zeal to enforce the law.

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176. When the government does not produce the informer, the defendant might also claim that the state has not met its burden to rebut the defendant's claim of entrapment and therefore has not proved beyond a reasonable doubt that the defendant was not entrapped. *See* United States v. Bueno, 447 F.2d 903 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973).