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Criminal Law - Entrapment: Illegal Police Conduct Gets Stung by the Entrapment Defense in State v. Kummer

Doug Nesheim

CRIMINAL LAW—ENTRAPMENT: ILLEGAL POLICE CONDUCT GETS STUNG BY THE ENTRAPMENT DEFENSE IN *STATE V. KUMMER*.

State v. Kummer, 481 N.W.2d 437 (N.D. 1992)

I. INTRODUCTION

On September 17, 1990, Terry Lee Kummer was offered a chance to purchase cocaine by a telephone caller.[1] The caller was an informant for law enforcement agents from the State Bureau of Criminal Investigations and the Fargo Police Department.[2] The call was taped.[3] Kummer asked whether the cocaine was of better quality "than it had been in the past" and said he would contact the informant the next Wednesday; however, Kummer did not call.[4] The informant made another taped call to Kummer on September 21, during which Kummer agreed to purchase three ounces of cocaine at $1,200 per ounce.[5] During two calls initiated by the informant a week later, a meeting was arranged for the transaction.[6] On September 30, 1990, an exchange was made in a room at a Fargo motel.[7] Law enforcement agents, who had been listening from another room through electronic surveillance equipment, arrested Kummer and confiscated the money and the drugs.[8] The cocaine had been obtained by the officers from the evidence room of the Fargo Police Department.[9] Department regulations were not followed,[10] and it appears this use of confis-

1. State v. Kummer, 481 N.W.2d 437, 438 (N.D. 1992). The informant asked when Kummer would be in Fargo "to take advantage of a 'good deal' on cocaine." *Id.*

2. *Id.* The informant had been promised a "favorable" recommendation to the state's attorney regarding his own arrest for drug trafficking. *Id.*

3. *Id.*

4. *Id.*

5. *Kummer*, 481 N.W. 2d at 438.

6. *Id.* at 439.

7. *Id.* The rooms were rented by Special Agent Baumann of the State Bureau of Criminal Investigations. Brief for Appellant at 3, State v. Kummer, 481 N.W.2d 437 (N.D. 1992) (No. 910138).

8. *Kummer*, 481 N.W.2d at 439.

9. *Id.* The cocaine was contraband from an earlier, closed drug case. *Id.* A state agent and a Fargo policeman planned the quantity and price of cocaine which Kummer would be offered. *Id.* at 438. Special Agent Baumann of the North Dakota Bureau of Criminal Investigations-Narcotics Division testified at trial that he "supplied an amount" of cocaine to offer Kummer. Transcript on Appeal (Jury Trial) at 120, State v. Kummer, 481 N.W.2d 437 (N.D. 1992) (No. 910138) [hereinafter Transcript on Appeal.]. He also testified that he estimated three ounces to be evidence of possession with intent to deliver. *Id.* Possession with intent to deliver carries a greater penalty than does mere possession. *See* N.D. CENT. CODE § 19-03.1-23(1)(a) (Supp. 1993) (making possession of a schedule II narcotic with intent to deliver a class A felony); § 19-03.1-23(b) (Supp. 1993) (making mere possession a class C felony); § 12.1-32-01(2) (1985) (providing a maximum penalty of twenty years imprisonment and/or a $20,000 fine for a class A felony); § 12.1-32-01(4) (1995) (providing a maximum of five years imprisonment and/or a $5,000 fine for a class C felony).

10. *Kummer*, 481 N.W.2d at 443. During cross-examination, Officer Weaver quoted

cated narcotics was contrary to state law.[11]

Kummer was charged under state law for the possession of a controlled substance with intent to deliver.[12] A jury found him guilty, rejecting his entrapment defense.[13] Kummer appealed.[14] The North Dakota Supreme Court overturned the conviction, holding that law enforcement agents had entrapped Kummer "as a matter of law" when they unlawfully provided the cocaine which was used as the basis for the prosecution.[15]

II. BACKGROUND

A. INTRODUCTION

In recent decades, courts have recognized that police must sometimes use deception and trickery in order to effectively detect and apprehend certain criminals.[16] Nevertheless, these same courts have shown an unwillingness to countenance law enforcement conduct which actually manufactures crimes.[17] Merely providing unwary criminals an opportunity to commit crimes under circumstances allowing for detection is proper conduct for government agencies.[18] However, actually creating crime

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the Fargo Police Department procedures as saying, "Section C states, 'Narcotics, dangerous drugs, and drug implements will be taken to the Toxicology Lab at N.D.S.U. and destroyed in the presence of the property custodian or appropriate designee.' " Transcript on Appeal, *supra* note 9, at 146.

11. *Kummer*, 481 N.W.2d at 443 (suggesting there is no statutory authority for removing narcotics from evidentiary retention and citing § 19-03.1-36(4) of the North Dakota Century Code, which provides for district court control over the handling of confiscated narcotics).

12. *Id.* at 439. Cocaine is a schedule II narcotic under state law. N.D. CENT. CODE § 19-03.1-07(3)(d) (1991). It is a Class A felony to willfully "manufacture, deliver, or possess with intent to manufacture or deliver" a schedule II controlled substance. N.D. CENT. CODE § 19-03.1-23(1)(a)(Supp. 1993).

13. *Kummer*, 481 N.W.2d at 439.

14. *Id.*

15. *Id.* at 444.

16. *See* Jacobson v. United States, 112 S. Ct. 1535, 1540 (1992) (allowing that "there can be no dispute that the Government may use undercover agents to enforce the law"); Sorrells v. United States, 287 U.S. 435, 441 (1932) (stating that "[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises"); State v. Flamm, 338 N.W.2d 826, 829 (N.D. 1983) (finding that "[s]tratagem is needed particularly in detecting vice crimes such as illegal drug sales").

17. *Jacobson*, 112 S. Ct. at 1540 (recognizing that "[i]n their zeal to enforce the law, . . . Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute"); *Sorrels*, 287 U.S. at 441 (stating that "gross abuse of authority given for the purpose of detecting and punishing crime, and not for the making of criminals, deserves the severest condemnation"); *Flamm*, 338 N.W.2d at 828-29 (allowing that a jury may find that police have improperly influenced a defendant, or if no facts are in dispute, the court may find so "as a matter of law").

18. *See* Jacobson, 112 S. Ct. at 1541 (suggesting that if Jacobson had merely been offered an opportunity to order illegal materials through the mails, a jury instruction on entrapment would probably not have been warranted); N.D. CENT. CODE § 12.1-05-11(2)

for the purpose of making an arrest is not tolerable police conduct.[19] Entrapment law history traces the varying attempts to differentiate between the acceptable use of deception to apprehend criminals and the unacceptable creation of crime.[20]

B. SUBJECTIVE ENTRAPMENT THEORY

Entrapment law in the federal courts and most state jurisdictions follows an approach first articulated by the United States Supreme Court sixty years ago in *Sorrells v. United States,*[21] a case involving the violation of federal prohibition laws.[22] The *Sorrells* court overturned a conviction because the defendant had provided illegal liquor only to silence the persistent pleading of an

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(1993) (providing that "[c]onduct merely affording a person an opportunity to commit an offense does not constitute entrapment").

19. *See, e.g., Jacobson,* 112 S. Ct. at 1540.

20. *See* Roger Park, *The Entrapment Controversy,* 60 MINN. L. REV. 163, 164-70 (1976). Since entrapment has not been given constitutional status, states may adopt their own definitions. State v. Pfister, 264 N.W.2d 694, 696 n.2 (N.D. 1978).

21. 287 U.S. 435 (1932).

22. Sorrells v. United States, 287 U.S. 435, 442-52 (1932). Earlier, several federal circuit courts had recognized an entrapment defense. *See, e.g.,* Butts v. United States, 273 F. 35, 38 (8th Cir. 1921). The *Butts* court found fatal error in the trial court's failure to instruct the jury on entrapment and stated that the "first duties of the officers of the law are to prevent, not to punish crime." *Id.* The court anticipated the subjective standard for entrapment when it wrote:

> Here the evidence strongly tends to prove, if it does not conclusively do so, that [the law officers'] first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.

Id.

The first federal appeals court to find entrapment did so in a case involving the smuggling of Chinese aliens into the United States. Woo Wai v. United States, 223 F. 412 (9th Cir. 1915). The determining factor for the finding of entrapment in *Woo Wai* was the fact that the crime originated in the minds of the police officers. *Id.* at 415. It took a great deal of persistence by the officers to get Woo Wai to act illegally. *Id.* at 413-414.

An earlier federal entrapment case involved the laws prohibiting the sale of liquor to Native Americans. United States v. Healy, 202 F. 349 (D. Mont. 1913). In *Healy,* the court found that in hiring a Native American who lacked typical Native American features to buy liquor from an unwary seller, the officers had acted intolerably and that "a conviction for an offense so procured cannot stand." *Id.* at 351.

A case involving the use of a fictitious person to induce the illegal mailing of material pertaining to birth control inspired two opinions offering different reasons for quashing the indictment. United States v. Whittier, 28 F. Cas. 591 (E.D. Mo. 1878) (No. 16,688). The *Whittier* court found that since the illegal matter was not sent to any real person, the act of mailing it did not fall within the meaning of the statute. *Id.* at 593. This opinion anticipated the statutory approach of the *Sorrells* majority. *See* discussion at notes 26-31 and accompanying text. In a concurring opinion in *Whittier,* District Judge Treat wrote: "[t]he sense of indignation against such vocation or conduct should not permit a violation by the courts of established rules of law, or an unlawful exercise of jurisdiction, nor the countenance of unlawful contrivances to induce or manufacture crime." *Id.* at 594 (Treat, J., concurring). Judge Treat's analysis presages the integrity-of-the-courts justification for the Brandeis/Roberts approach to entrapment discussed *infra* II. D. 1.

undercover agent who had represented himself to be a fellow World War I veteran of the same division.[23] The majority of the Court, in an opinion by Chief Justice Hughes, adopted what is known as the subjective standard for entrapment.[24] Under this standard, entrapment occurs when the crime originates by the design of law enforcement officers who then "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."[25]

The *Sorrells* majority justified its entrapment finding by statutory interpretation.[26] The Court refused to apply the "letter" of the prohibition law to situations in which otherwise innocent people are lured by government officials into the commission of crimes.[27] Recognizing precedent which condemned the "[l]iteral interpretation of statutes at the expense of the reason of the law . . . producing absurd consequences or flagrant injustice[,]"[28] the Court reasoned that Congress does not enact a criminal statute with the intent that a statute's "processes of detection and enforcement" would be abused.[29] Furthermore, the *Sorrells* majority declined to construe a criminal statute to require finding the defendant guilty and yet immune from prosecution.[30] Clemency, the Court reasoned, was an executive, not a judicial, prerogative.[31]

Several times, the United States Supreme Court has reaffirmed its allegiance to the subjective approach to entrapment and its focus on the defendant's predisposition toward crime.[32] In its

23. *Sorrells*, 287 U.S. at 440-41.

24. *Id.* at 451 (stating that the defendant who pleads entrapment "cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue"). The United States Supreme Court's first use of the terms subjective and objective was in a dissenting opinion by Justice Stewart in United States v. Russell, 411 U.S. 423, 440-445 (1973) (Stewart, J., dissenting). For an analysis of these terms and citations to entrapment scholarship, see Grossman v. State, 457 P.2d 226, 228-29 (Alaska 1969).

25. *Sorrells*, 287 U.S. at 442.

26. *Id.* at 446-51.

27. *Id.* at 448. According to Chief Justice Hughes, the Court was "not forced by the letter to do violence to the spirit and purpose of the statute." *Id.*

28. *Id.* at 446.

29. *Id.* at 448.

30. *Sorrells*, 287 U.S. at 449.

31. *Id.*

32. Jacobson v. United States, 112 S. Ct. 1535, 1543 (1992) (overturning a conviction for the illegal mailordering of child pornography); Mathews v. United States, 485 U.S. 58, 59-60 (1988) (finding it legally permissible for defendants to plead both entrapment and not guilty); Hampton v. United States, 425 U.S. 484, 488-89 (1976) (refusing to find entrapment based on the pervasive conduct of the police in a crime for which the defendant was predisposed); United States v. Russell, 411 U.S. 423, 436 (1973) (denying an entrapment finding to a defendant whom the police had supplied with a necessary ingredient for the manufacture of narcotics); Sherman v. United States, 356 U.S. 369, 373-78 (1958)

most recent entrapment case, *Jacobson v. United States*,[33] the Court overturned a conviction for the illegal purchase of child pornography because the government failed to prove that Jacobson was disposed to act illegally prior to its initiating contact with him.[34] Jacobson was charged under the Child Protection Act of 1984 for illegally purchasing child pornography through the mail.[35] Although he had purchased some child pornography prior to the effective date of the Act, Jacobson's violation of the Act occurred after more than two years of pressure from federal law enforcement agencies.[36] These agencies, through various fictitious organizations, used the mail to persuade Jacobson to purchase the illegal materials.[37] The mailings included strong suggestions that his purchase would aid in obtaining legislation to protect personal freedoms, including freedom of the press.[38] In a five to four decision, the Court held that the evidence was not sufficient to sustain the jury's finding that Jacobson was predisposed to violate the law prior to the mailings.[39]

As outlined by the Supreme Court, entrapment is an affirmative defense to be decided by the jury "unless it can be decided as a matter of law."[40] Courts analyze the subjective entrapment defense in two steps.[41] First, the defendant must show that the government induced the crime.[42] In order to justify the inducement, the government must then prove "beyond reasonable doubt" that the defendant was predisposed to commit the crime.[43]

(overturning a conviction for purchasing heroin for a government agent who played on the weakness of a recovering addict by, among other tactics, feigning withdrawal symptoms).

33. 112 S. Ct. 1535 (1992).

34. Jacobson v. United States, 112 S. Ct. 1535, 1543 (1992).

35. *Id.* at 1537.

36. *Id.* at 1538.

37. *Id.*

38. *Id.*

39. *Jacobson*, 112 S. Ct. at 1543.

40. Sherman v. United States, 356 U.S. 369, 377 (1958).

41. Mathews v. United States, 485 U.S. 58, 63 (1988).

42. *Id.*

43. *Id. See also Jacobson*, 112 S. Ct. at 1540. Thirty-six states have settled exclusively on some form of the subjective standard. They are Alabama, Lambeth v. State, 562 So. 2d 575, 577-78 (Ala. 1990); Arizona, State v. Boccelli, 467 P.2d 740, 741-42 (Ariz. 1970); Arkansas, ARK. CODE ANN. § 5-2-209(b) (Michie 1987) (describing a "normal law-abiding persons" test which is interpreted to still require inquiry into the defendant's predisposition in Spears v. State, 568 S.W.2d 492, 501 (Ark. 1978); Colorado, COLO. REV. STAT. ANN. § 18-1-709 (West 1986); Connecticut, CONN. GEN. STAT. ANN. § 53a-15 (West 1985); Delaware, DEL. CODE ANN. tit. 11, § 432(a) (1987); Georgia, GA. CODE ANN. § 16-3-25 (1990); Idaho, State v. Hansen, 673 P.2d 416, 417 (Idaho 1983); Illinois, People v. Spahr, 371 N.E.2d 1261, 1264 (Ill. App. Ct. 1978); Indiana, IND. CODE ANN. § 35-41-3-9 (Burns 1985); Kansas, KAN. STAT. ANN. § 21-3210 (1988); Kentucky, KY. REV. STAT. ANN. 505.010 (Michie 1990); Louisiana, State v. Batiste, 363 So. 2d 639, 642 (La. 1978); Maine, State v. Matheson, 363 A.2d 716, 722 (Me. 1976); Maryland, Sparks v. State, 603 A.2d 1258, 1264-65 (Md. Ct. App. 1992), *cert. denied*, 610 A.2d 797 (Md. 1992); Massachusetts, Commonwealth v. Shuman,

Courts analyzing entrapment under the subjective theory differ over whether the government is required to prove that an induced defendant was predisposed to commit the particular crime being charged or whether it must merely prove that the defendant was predisposed to commit the type of crime being charged.[44] If the court requires proof of predisposition to the particular crime being charged, the government may be restricted in the types of evidence it uses to prove predisposition.[45] If the government need only prove that the defendant was predisposed to commit a type of crime in order to justify the entrapment, evidence of the defendant's prior behavior, whether it resulted in conviction or not, may be used.[46]

C. THE OUTRAGEOUS POLICE CONDUCT DEFENSE

In *United States v. Russell*,[47] the United States Supreme Court made it clear that the entrapment defense will only succeed in the federal system when the government "implants the criminal design in the mind of the defendant."[48] However, Justice Rehnquist, writing for the majority, left open the possibility that the Court "may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invok-

462 N.E.2d 80, 84 (Mass. 1984); Minnesota, State v. Olkon, 299 N.W.2d 89, 107 (Minn. 1980), *cert. denied*, 449 U.S. 1132 (1981); Mississippi, Pulliam v. State, 592 So. 2d 24, 26 (Miss. 1991); Missouri, MO. REV. STAT. ANN. § 562.066 (Vernon 1979); Montana, MONT. CODE ANN. § 45-2-213 (1993); Nebraska, State v. Stahl, 482 N.W.2d 829, 838 (Neb. 1992); Nevada, Shrader v. State, 706 P.2d 834, 835 (Nev. 1985); New Hampshire, N.H. REV. STAT. ANN. § 626:5 (1986); North Carolina, State v. Hageman, 296 S.E.2d 433, 447 (N.C. 1982); Ohio, State v. Doran, 449 N.E.2d 1295, 1298 (Ohio 1983); Oklahoma, Davidson v. State, 621 P.2d 1166, 1168 (Okla. Crim. App. 1981); Oregon, OR. REV. STAT. § 161.275 (1991); Pennsylvania, 18 PA. CONS. STAT. ANN. § 313(a) (1983 & Supp. 1993); Rhode Island, State v. Jones, 416 A.2d 676, 679 (R.I. 1980); South Carolina, State v. Johnson, 367 S.E.2d 700, 701 (S.C. 1988); South Dakota, State v. Goodroad, 442 N.W.2d 246, 249 (S.D. 1989); Tennessee, TENN. CODE ANN. § 39-11-505 (1991); Virginia, Stamper v. Commonwealth, 324 S.E.2d 682, 687 (Va. 1985); Washington, WASH. REV. CODE ANN. § 9A.16.070 (West 1988); Wisconsin, State v. Saternus, 381 N.W.2d 290, 294-95 (Wis. 1986); Wyoming, Wright v. State, 851 P.2d 12, 14 (Wyo. 1993).

44. *See* State v. Knight 230 S.E.2d 732, 737 (W. Va. 1976) (stating that the question for the jury in entrapment cases is "whether the design of the crime originated in the mind of the accused or in the mind of the officer or agent"); COLO. REV. STAT. § 18-1-709 (1986) (requiring that the defendant "would not have conceived of or engaged in conduct *of the sort* induced") (emphasis added).

45. *See, e.g., Knight*, 230 S.E.2d at 737 (stating that "[t]he mere fact that an entrapment defense is available to the defendant is no justification for changing our recognized rules of evidence").

46. *See, e.g.*, People v. Williams, 654 P.2d 319, 322 (Colo. Ct. App. 1982) (approving of the trial court's admission of hearsay testimony about the defendant's previous dealings in stolen goods "for the limited purposes of showing the 'intent' of the detectives").

47. 411 U.S. 423 (1973).

48. United States v. Russell, 411 U.S. 423, 436 (1973).

ing judicial processes to obtain a conviction . . . ."[49] Nevertheless, the Court decided that the police conduct in supplying Russell with a hard-to-get and necessary ingredient for the manufacture of methamphetamine was not so outrageous that it violated the defendant's due process rights.[50]

Since *Russell*, several federal defendants have attempted to argue an outrageous conduct defense in entrapment-type situations in which their predisposition prevents them from succeeding on the entrapment defense.[51] In that time, however, it appears that the outrageous conduct defense has succeeded only once at the federal appeals court level.[52] In *United States v. Twigg*,[53] the United States Court of Appeals for the Third Circuit found that supplying almost all of the necessary ingredients for the manufacture of narcotics, supplying the building which housed the laboratory, supplying the know-how for the manufacturing process, and maintaining a level of control over the operation constituted outrageous government involvement.[54]

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49. *Id.* at 431-32 (citing Rochin v. California, 342 U.S. 165 (1952)).

50. *Id.* at 432.

51. *See, e.g.*, United States v. Crump, 934 F.2d 947, 957 (8th Cir. 1991). In *Crump*, the Eight Circuit Court of Appeals rejected the defendant's argument that the Drug Enforcement Agency's decision to target him for prosecution when it had no way of knowing that he continued to be involved in drugs "was so outrageous as to violate due process." *Id.* The court reasoned that due process issues only arise when constitutional rights are implicated and that Crump had no constitutional right to be free from undercover investigations. *Id.*

In an unpublished 1990 opinion found on WESTLAW®, the Ninth Circuit Court of Appeals stated that "[a]lthough this [outrageous conduct] defense has been raised numerous times, only two decisions from any circuit have dismissed indictments based on such a defense." United States v. Wegman, No. 89-10145, 1990 WL 170409 at *3 (9th Cir. Nov. 6, 1990) (unpublished at 917 F.2d 1307) (footnote omitted). Even with a diligent search, this researcher could find no other successful outrageous conduct defenses at the federal circuit court level.

However, there are examples of successful outrageous conduct defenses at the federal district court level. *See, e.g.*, United States v. Santana, 808 F. Supp. 77, 79-86 (Mass. Dist. Ct. 1992) *rev'd*, No. 93-1393, 1993 WL 345746 (1st Cir. Sept. 16, 1993). In *Santana*, the Federal District Court of Massachusetts found that when the government had given a sample of 13.3 grams of ninety-two percent pure heroin to a suspect and this heroin was not recovered, the "outrageous conduct" of the government necessitated dismissal. *Id.* at 86. In reversing the decision, the First Circuit Court of Appeals stated that "[a]lthough law enforcement officers might well profit from reading the lower court's thoughtful opinion, we conclude that the court exceeded its authority." United States v. Santana, No. 93-1393, 1993 WL 345746 (1st Cir. Sept. 16, 1993).

52. United States v. Twigg, 588 F.2d 373 (3d Cir. 1978).

53. 588 F.2d 373 (3d Cir. 1978).

54. *Twigg*, 588 F.2d at 380-81. In a case decided the year before *Russell*, the Ninth Circuit Court of Appeals held that a government agent's reinstatement and operation of a once shut down bootlegging syndicate constituted *"creative activity"* requiring reversal of convictions. Greene v. United States, 454 F.2d 783, 787 (9th Cir. 1971).

D. THE OBJECTIVE THEORIES OF ENTRAPMENT

1. *Entrapment theory as described in minority United States Supreme Court opinions (hereinafter the Brandeis/Roberts approach)*

The *Jacobson* case marked the first time that all nine justices of the United States Supreme Court relied on the subjective standard for entrapment.[55] Prior to *Jacobson*, strong minorities on the Court rejected the majority's focus on the predisposition of the defendant and advocated a theory of entrapment which focused on the conduct of the police.[56] Indeed, the first Supreme Court opinion to advocate using entrapment theory to overturn a conviction came in a dissent five years before the *Sorrells* decision.[57] In *Casey v. United States,*[58] Justice Brandeis advocated dismissal based on government misconduct.[59] He wrote that an obstacle to prosecution arose when "the alleged crime was instigated by officers of the Government."[60]

Casey, a lawyer, was convicted of purchasing morphine for a prisoner whom he had been asked by the jailer to visit.[61] The money that the prisoner gave Casey for the purchase of morphine was provided by federal narcotics officers.[62] The majority, in an opinion by Justice Holmes, reasoned that there was ample evidence for the jury to find that the government had probable cause to entrap Casey.[63] The majority was "not persuaded that the conduct of the officials was different from or worse than ordering a

55. Jacobson v. United States, 112 S. Ct. 1535, 1540 (1992) (requiring that the prosecution "prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents"); *Id.* at 1543 (O'Connor, J., dissenting) (agreeing with the government's contention that "a reasonable jury could permissibly infer beyond a reasonable doubt that [Jacobson] was predisposed to commit the crime").

56. Hampton v. United States, 425 U.S. 484, 498-99 (1976) (Brennan, J., dissenting) (suggesting that when the subjective test for entrapment allows government agents to both sell to and buy back the same contraband from a suspect, it is essentially allowing the rounding up and jailing of all "predisposed" individuals); United States v. Russell, 411 U.S. 423, 440-41 (1973) (Stewart, J., dissenting) (rejecting the subjective approach to entrapment in favor of the objective approach of Justice Roberts in *Sorrells* and Justice Frankfurter in *Sherman*); Sherman v. United States, 356 U.S. 369, 383 (1958) (Frankfurter, J., concurring) (arguing against the subjective standard adopted by the majority because "[p]ermissible police activity does not vary according to the particular defendant concerned"); Sorrells v. United States, 287 U.S. 435, 453-59 (1932) (Roberts, J., concurring); Casey v. United States, 276 U.S. 413, 421-25 (1928) (Brandeis, J., dissenting).

57. *Casey*, 276 U.S. at 421-25 (Brandeis, J., dissenting).

58. 276 U.S. 413 (1928).

59. *Casey* 276 U.S. at 421-25 (Brandeis, J., dissenting).

60. *Id.* at 423 (Brandeis, J., dissenting).

61. *Id.* at 422 (Brandeis, J., dissenting).

62. *Id.*

63. *Id.* at 419.

drink of a suspected bootlegger."[64]

In dissent, Justice Brandeis argued that "[i]f Casey is guilty of the crime of purchasing 3.4 grains of morphine, . . . it is because he yielded to the temptation presented by the officers."[65] According to Justice Brandeis, the conduct of the officers was no defense for Casey.[66] "But," he argued, "it does not follow that the court must suffer a detective-made criminal to be punished."[67] To Brandeis, the prosecution should not have been allowed because the purity of the courts must be preserved and the government must be protected "from illegal conduct of its officers."[68]

Five years later, in *Sorrells v. United States*,[69] Justice Brandeis joined Justice Roberts in a special concurrence which rejected the majority's reliance on the defendant's lack of predisposition.[70] Instead, it proposed an approach to entrapment that focused on the conduct of government agents.[71] In his concurrence, Justice Roberts found fault with the Court's addition of the implied element of entrapment to criminal statutes, stating that it amounted to a "strained and unwarranted construction" and to "judicial amendment."[72] The result of the Court's finding, he reasoned, was that some defendants who commit crimes by acting directly contrary to the express provisions of a statute were, nevertheless, not guilty by reason of the same statute.[73] By further construing the statute "as removing the defense of entrapment" from the predisposed defendant, Justice Roberts argued, the Court was allowing convictions based, not on the actual statutory violation charged, but on prior reputation.[74] He reasoned that the proof of predisposition would necessarily rest on the defendant's reputation prior to his being induced to commit the crime.[75] Thus, Justice Roberts suggested, the guilt or innocence of the entrapped defendant would be decided based on past wrongs or percep-

64. *Casey*, 276 U.S. at 419.
65. *Id.* at 423 (Brandeis, J., dissenting).
66. *Id.*
67. *Id.*
68. *Id.* at 425 (Brandeis, J., dissenting).
69. 287 U.S. 435 (1932).
70. Sorrells v. United States; 287 U.S. 435, 453-59 (1932) (Roberts, J., concurring).
71. *Id.*
72. *Id.* at 456 (Roberts, J., concurring). According to Justice Roberts, adding an implied element of entrapment to a statute "amounts to saying that one who with full intent commits the act defined by law as an offense is nevertheless by virtue of the unspoken and implied mandate of the statute to be adjudged not guilty by reason of someone's else [sic] improper conduct." *Id.*
73. *Id.*
74. *Id.* at 458 (Roberts, J., concurring).
75. *Sorrells*, 287 U.S. at 459 (Roberts, J., concurring).

tions.[76] He argued that entrapment "[v]iewed in its true light" is no defense to those whose actions and intent fall within the definition of criminal statutes.[77] According to Justice Roberts, the Court had adopted "a form of words to justify action which ought to be based on the inherent right of the court not to be made the instrument of wrong."[78]

Entrapment occurs, according to Justice Roberts, when a law officer conceives and plans an offense and then procures its commission by someone "who would not have [committed] it except for the [officer's] trickery, persuasion, or fraud . . . ."[79] Using this theory of entrapment, the guilt of the defendant is not relevant because the sole reason for quashing the indictment is that the crime was brought about by police misconduct.[80] This approach to entrapment, in which the focus of inquiry is on the conduct of the police rather than on the predisposition of the defendant, has become known as the objective standard.[81]

Although the majority in *Sorrells* considered entrapment to be an affirmative defense for the jury,[82] Justice Roberts would have required that prosecution end and a defendant be released whenever entrapment was found to have occurred.[83] Public policy, according to Justice Roberts, required a court to preserve "the purity of its own temple" and to "protect itself and the government from such prostitution of the criminal law."[84] He analogized the duty of the courts in entrapment cases to the duty of the courts in civil actions to refuse to "tolerate the use of their process to consummate" wrongs.[85]

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76. *Id.* at 456 (Roberts, J., concurring). *See also* United States v. Russell, 411 U.S. 423, 443-44 (Stewart, J., dissenting). In his *Russell* dissent, Justice Stewart argues that "this subjective test means that the Government is permitted to entrap a person with a criminal record or bad reputation, and then to prosecute him for the manufactured crime, confident that his record or reputation itself will be enough to show that he was predisposed to commit the offense anyway." *Id.*

77. *Sorrells*, 287 U.S. at 456 (Roberts, J., concurring).

78. *Id.*

79. *Id.* at 454 (Roberts, J., concurring). For similar reasoning, see United States v. Russell, 411 U.S. 423, 445 (1973) (Stewart, J., dissenting) (stating that entrapment occurs when government conduct induces "a crime by one not ready and willing to commit it"); Sherman v. United States, 356 U.S. 369, 384 (1958) (Frankfurter, J., concurring) (reasoning that the "power of government is abused . . . when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law").

80. *Sorrells*, 287 U.S. at 457-59 (Roberts, J., concurring).

81. United States v. Russell, 411 U.S. 423, 441 (1973) (Stewart, J., dissenting).

82. *Sorrells*, 287 U.S. at 451-52.

83. *Id.* at 457 (Roberts, J., concurring) (suggesting further that the jury should be used only in determining the facts).

84. *Id.* at 457 (Roberts, J., concurring).

85. *Id.* at 455 (Roberts, J., concurring).

Following the reasoning of Justice Roberts, Justice Stewart declared over forty years later that the important question regarding entrapment is "whether the Government's conduct in inducing the crime was beyond judicial toleration."[86] In his dissent in *United States v. Russell,*[87] Justice Stewart argued that "the institutional integrity of the system of federal criminal justice" required protection by the federal courts.[88] Therefore, under the objective theory, entrapment would not be a matter for the jury unless there was a factual dispute concerning the officers' conduct.[89]

To summarize, the Brandeis/Roberts objective approach to entrapment would be a matter for the court, not the jury.[90] If the court decides that law enforcement officers manufactured a crime by instigating it and then inducing its commission by someone "who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer,"[91] the court must refuse to allow prosecution.[92] The underlying reason for this refusal is to protect the integrity of the judicial system.[93]

Although no jurisdiction in the United States completely relies on the Brandeis/Roberts definition of entrapment,[94] at least two jurisdictions recognize it as one definition of entrapment. In *State v. Talbot,*[95] the New Jersey Supreme Court found that the "manufacture or creation of a crime by law enforcement authorities cannot be tolerated."[96] For the New Jersey court, if the "criminal conduct, from beginning to end, was the product of the creative activity of the police[,]" entrapment has occurred as a matter of law.[97] In *Cruz v. State,*[98] the Florida Supreme Court established as a first prong of its objective standard for entrapment that police show that their activity had "as its end the interruption of a spe-

86. United States v. Russell, 411 U.S. 423, 443 (1973) (Stewart, J., dissenting).
87. 411 U.S. 423 (1973).
88. United States v. Russell, 411 U.S. 423, 445 (1973) (Stewart, J., dissenting).
89. *Id.*
90. *See supra* notes 82-89 and accompanying text.
91. Sorrells v. United States, 287 U.S. 434, 454 (1932) (Roberts, J., concurring).
92. *Id.* at 457 (Roberts, J., concurring) (concluding that "[p]roof of entrapment, at any stage of the case, requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty").
93. *Id.* at 457 (Roberts, J., concurring).
94. Although the Virginia Supreme Court "adopted the definition of entrapment given by the concurring opinion of Justice Roberts in *Sorrells*[,]" its analysis of the entrapment defense included consideration of the defendant's "predisposition and propensity to commit [a crime]." Stamper v. Commonwealth, 324 S.E. 2d 682, 687 (Va. 1985).
95. 364 A.2d 9 (N.J. 1976)
96. State v. Talbot, 364 A.2d 9, 13 (N.J. 1976).
97. *Id.*
98. 465 So. 2d 516 (Fla. 1985).

cific ongoing criminal activity."[99] The justification for this prong was that although "[p]olice must fight this war" on the criminal classes, they must "not engage in the manufacture of new hostilities."[100] Courts in both Florida and New Jersey recognize objective entrapment defenses to be decided as a matter of law along with subjective entrapment defenses to be decided as a matter of fact.[101]

2. *The "Hypothetical Person"*[102] *Objective Approach to Entrapment Law*

Another type of objective approach to entrapment is one in which the acceptability of the police conduct is measured by its effect on a hypothetical person.[103] This approach was anticipated by Justice Frankfurter in a special concurrence in *Sherman v. United States*.[104] Justice Frankfurter argued for an entrapment theory based on illegal police activity, stating that "certain police conduct to ensnare . . . is not to be tolerated by an advanced society."[105] But, he reasoned:

> [t]his does not mean that the police may not act so as to detect those engaged in criminal conduct and ready and willing to commit further crimes should the occasion arise. Such indeed is their obligation. It does mean that in holding out inducements they should act in such a manner as is likely to induce to the commission of crime only these persons and not others who would normally avoid crime and through self-struggle resist ordinary temptations.[106]

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99. Cruz v. State, 465 So. 2d 516, 522 (Fla. 1985) *superseded by statute as recognized in* Munoz v. State, No. 78,900, 1993 WL 406367, at *9 (Fla. Oct. 14, 1993).

100. *Id.*

101. *Id.* at 521; *Talbot*, 364 A.2d at 12-13. Jurisdictions which apply a hybrid of the subjective and objective theories of entrapment are discussed *infra* Part II. E.

102. The term " 'hypothetical-person' approach" was taken from Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 165-66 (1976).

103. *Id.* at 171-176. States using this type of objective standard for entrapment are: Alaska, ALASKA STAT. § 11.81.450 (1989); California, People v. Barraza, 591 P.2d 947, 955 (Cal. 1979); Hawaii, HAW. REV. STAT. § 702-237 (1985); Iowa, State v. Mullen, 216 N.W.2d 375, 382 (Iowa 1974); Michigan, People v. Juillet, 475 N.W.2d 786, 793-94 (Mich. 1991); Texas, TEX. PENAL CODE ANN. § 8.06(a) (West 1989); Utah, UTAH CODE ANN. § 76-2-303(1) (1990); Vermont, State v. George, 602 A.2d 953, 955 (Vt. 1991).

104. 356 U.S. 369, 383-84 (1958). *See also* 1 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 316-17 (1970).

105. Sherman v. United States, 356 U.S. 369, 383 (1958) (Frankfurter, J., concurring).

106. *Id.* at 383-84 (Frankfurter, J., concurring). It should be noted that Justice Frankfurter voted to reverse Sherman's conviction. *Id.* at 378. Also, the hypothetical person approach, as practiced in some jurisdictions, would be of doubtful aid to a defendant similar to Sherman since someone with a history of heroin addiction may not be as able to resist inducement as well as a normally law-abiding person. *Cf.* State v. Boushee, 284

The hypothetical person is usually described as either a person not ready to commit the offense,[107] an average person,[108] or a normal law-abiding person.[109] For courts applying this standard, the focus is on the activity of the police,[110] just as it is with the Brandeis/Roberts approach to entrapment.[111] However, this standard differs from the Brandeis/Roberts approach in that it defines police conduct as intolerable only if that conduct would induce the hypothetical person to commit the crime for which the defendant is charged.[112]

The hypothetical person objective standard was conceived as a standard to be applied by the court, not the jury.[113] Although in several jurisdictions the court applies the hypothetical person standard,[114] in some, including North Dakota while it used the hypothetical person standard, juries apply the standard.[115] In North

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N.W.2d 423, 432-33 (N.D. 1979) (discussing the denial of a request to have the jury instructed to use a " 'normally law-abiding drug user' " instead of a normal law-abiding person standard).

According to one commentater:

> "It seems unlikely that the "average person" language. . . and the Brown commission commentary really intended to endow the hypothetical person with the strength of character possessed by an average person. Such an interpretation would seem to require conviction in *Sherman v. United States*, where all of the Justices agreed that entrapment had been conclusively established.

Park, *supra* note 102, at 173-74.

107. MODEL PENAL CODE § 2.13 (Proposed Official Draft 1962). *See also* People v. Jamieson, 461 N.W.2d 884, 891 (Mich. 1990).

108. Grossman v. State, 457 P.2d 226, 229 (Alaska 1969).

109. N.D. CENT. CODE § 12.1-05-11(2) (1985).

110. *E.g.*, State v. Mees, 272 N.W.2d 284, 289 (N.D. 1978) (amended by § 12.1-05-11 (Supp. 1993)).

111. *See supra* notes 79-93 and accompanying text for a discussion of the focus of the Brandeis/Roberts approach to entrapment.

112. *See* City of Bismarck v. Nassif, 449 N.W.2d 789, 796 (N.D. 1989) (finding that officers had not induced the crime of disorderly conduct because their conduct was not of the type "which would cause a 'normally law-abiding person to commit the offense' "); WORKING PAPERS, *supra*, note 104, at 306 (defining the entrapment issue as "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").

113. WORKING PAPERS, *supra* note 104, at 325.

114. *See, e.g.*, Cruz v. State, 465 So. 2d 516, 521 (Fla. 1985) *superseded by statute as recognized in* Munoz v. State, No. 78,900, 1993 WL 406367, at *9 (Fla. Oct. 14, 1993).

115. State v. Pfister, 264 N.W.2d 694, 700 (N.D. 1978). North Dakota adopted the objective standard for entrapment by legislative action in 1973. N.D. CENT. CODE § 12.1-05-11 (1985) (amended by § 12.1-05-11 (Supp. 1993)). That statute defined entrapment as follows:

> 1. It is an affirmative defense that the defendant was entrapped into committing the offense.
> 2. Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.
> 3. In this section "law enforcement agent" includes personnel of federal and local law enforcement agencies as well as state agencies, and any person cooperating with such an agency.

Dakota at the time of the *Kummer* decision, entrapment was by statute an affirmative defense which required the defendant to prove by a preponderance of the evidence[116] that a law enforcement agent induced the commission of a crime by using methods that would induce a normally law-abiding person to commit the offense.[117]

Generally, the North Dakota Supreme Court articulated the test for objective entrapment as a two-part process.[118] The first inquiry under this test was whether law enforcement agents induced the commission of a crime.[119] The second element in the objective entrapment equation required a finding that the law enforcement conduct in question would have induced a "normal law-abiding person" to commit the crime at issue.[120] It is unclear whether the first of the articulated elements of this test, that the defendant was induced, was really a separate element because the North Dakota Supreme Court only defined inducement in terms of the second element.[121] For example, in a 1989 case, *City of Bismarck v. Nassif*, the supreme court found no evidence that the defendant was induced to commit the crime because the actions of

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Id.

Prior to the statute, the only reported North Dakota law relating to entrapment was in a case in which the state supreme court recognized the possibility of denying a conviction when a law enforcement agent has prompted, urged, or led "in the commission of the offense." State v. Currie, 102 N.W. 875, 877 (N.D. 1905). However, the court found that the defendant had participated fully and willingly in all the elements of the crime of burglary in a Minto, North Dakota, store and that the undercover detective, although feigning complicity, had not made any of the important decisions toward carrying the crime forward. *Id.*

116. *Pfister*, 264 N.W.2d at 699. The *Pfister* court found that entrapment must be proved by a preponderance of the evidence because it is an affirmative defense. *Id.* at 699. *See* N.D. CENT. CODE § 12.1-05-11(1) (1985) (defining entrapment as an affirmative defense); N.D. CENT. CODE § 12.1-01-03(3) (1985) (amended by § 12.1-05-11 (Supp. 1993)) (requiring that affirmative defenses be proved by a "preponderance of evidence").

In *Pfister*, the North Dakota Supreme Court reversed and remanded a conviction for new trial because the trial judge had erroneously instructed the jury on the subjective standard for entrapment when he stated that the defense "involved the issue of 'whether the defendant was ready and willing to commit the crime without persuasion.' " *Pfister*, 264 N.W.2d at 698.

117. N.D. CENT. CODE § 12.1-05-11(2)(1985) (amended by § 12.1-05-11 (Supp. 1993)). A "law enforcement agent" includes anyone cooperating with a federal or local law enforcement agency. *Id.* at § 12.1-05-11(3).

118. *See Kummer*, 481 N.W.2d at 441; State v. Pfister, 264 N.W.2d 694, 698 (N.D. 1978). The *Pfister* court explained:

> Under this statute, entrapment exists when two factors occur: (1) a law enforcement agent induces the commission of a crime; and (2) the method by which the law enforcement agent induces the commission of the crime is a method "likely to cause normally law-abiding persons to commit the offense."

Id. See also State v. Mees, 272 N.W.2d 284, 289 (N.D. 1978) (overturning a bench trial verdict because the defendants had not "received the benefits of the two-part test").

119. *See, e.g., Pfister*, 264 N.W.2d at 698.

120. *Id.*

121. City of Bismarck v. Nassif, 449 N.W.2d 789, 796 (N.D. 1989).

the police officers were not of "the type of conduct which would cause 'normally law-abiding persons to commit the offense.' "[122] The court's definition of entrapment in *State v. Berger*, a 1979 case, also suggested that there really was no separate element of inducement in North Dakota's objective entrapment law.[123] According to *Berger*, the test for entrapment was "what a normally law-abiding person would do under the circumstances, with the focus being on the conduct of the law enforcement agents."[124]

E. HYBRID SUBJECTIVE/OBJECTIVE APPROACHES TO ENTRAPMENT LAW

Recognizing different policy reasons for the differing approaches to entrapment law, some courts choose to apply a combination of the subjective and objective theories.[125] In two jurisdictions, the hybrid approach was generated completely from the courts.[126] Three jurisdictions, however, now utilize the hybrid approach because the courts have considered their own objective tests for entrapment along with subjective standards provided by statute.[127]

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122. *Id.* The defendant had called 911 because his car had been vandalized. *Id.* at 791. When the police arrived, the defendant was "upset, shouting, loud, and aggressive." *Id.* Unable to calm the defendant, the police eventually arrested him for disorderly conduct. *Id.* The court rejected an entrapment claim based on the police officers' unresponsiveness to a man they knew to be "in an emotional state." *Id.* at 796. The court reasoned that police failure to give names or badge numbers would not induce " 'normally law-abiding persons to commit' " disorderly conduct. *Nassif*, 449 N.W.2d at 796 (quoting N.D. CENT. CODE § 12.1-05-11 (1985)).

123. State v. Berger, 285 N.W.2d 533, 539 (N. D. 1979).

124. *Id.*

125. Jurisdictions found to have some form of hybrid subjective/objective approaches to entrapment law are: Florida, Munoz v. State, No. 78,900, 1993 WL 406367, at *13 (Fla. Oct. 14, 1993); New Jersey, State v. Johnson, 606 A.2d 315, 320 (N.J. 1992); New Mexico, Baca v. State, 742 P.2d 1043, 1045-46 (N.M. 1987); New York, People v. Isaacson, 378 N.E.2d 78, 83-85 (N.Y. 1978); West Virginia, State v. Knight, 230 S.E.2d 732, 736-37 (W. Va. 1976). In *Isaacson*, the New York Court of Appeals examined police conduct under state constitutional due process, expressly distinguishing it from entrapment theory. 378 N.E.2d at 84-85. Nevertheless, the court began its analysis by considering whether police were involved in "the manufacture and creation of crime." *Id.* at 83. Because entrapment law historically has been concerned with government creating crime for the purposes of prosecution, the New York court's due process analysis appears to provide an objective theory of entrapment.

126. *See* State v. Sheetz, 825 P.2d 614, 617 (N.M. Ct. App. 1991); State v. Knight, 230 S.E.2d 732, 736-37 (W. Va. 1976).

127. *See* Cruz v. State, 465 So. 2d 516, 521 (Fla. 1985) *superseded by statute as recognized in* Munoz v. State, No. 78,900, 1993 WL 406367, at *9 (Fla. Oct. 14, 1993); State v. Johnson, 606 A.2d 315, 320 (N.J. 1992); People v. Isaacson, 378 N.E.2d 78, 83-85 (N.Y. 1978). Interestingly, North Dakota's new subjective entrapment statute contains language similar to the language of the statutes in two of these states, New Jersey and Florida. *Compare* N.D. CENT. CODE § 12.1-05-11 (Supp. 1993) *with* N.J. STAT. ANN § 2C:2-12 (West 1982) and FLA. STAT. ANN § 777-201 (West 1992). Indeed, the legislative history for the new North Dakota statute indicates an interest in "[enacting] an entrapment statute that codifies the subjective theory of entrapment such as those interpreted in Colorado and Florida." *Hearings on Senate Bills 2171 and 2058, Testimony prepared by the North*

In spite of common law which required lack of predisposition for entrapment, the New Jersey Supreme Court held that entrapment as a matter of law occurs when police furnish narcotics to a defendant and then buy back those same narcotics.[128] Subsequently, the New Jersey legislature enacted a statute requiring the subjective standard for the affirmative entrapment defense.[129] Nevertheless, the New Jersey Supreme Court continues to recognize an objective entrapment defense based on "due process and fundamental fairness."[130] The New Jersey objective entrapment defense was founded in the New Jersey state constitution.[131] New York's highest court also found due process entrapment on state constitutional grounds.[132] In *People v. Isaacson,*[133] the New York Court of Appeals exhibited concern for fairness and for the integrity of the courts and the police.[134]

Policy considerations and fairness guided the Florida Supreme Court to a finding "that the subjective and objective entrapment doctrines can coexist."[135] That court adopted a two-part "threshold objective test" for entrapment to be decided by the court

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Dakota Legislative Council staff for Senator Nelson 3, (March 1992). Florida courts have interpreted its statute to continue the viability of an objective entrapment defense. Munoz v. State, No. 78,900, 1993 WL 406367, at *13 (Oct. 14, 1993). Thus, it is not completely certain that North Dakota's new subjective entrapment defense precludes North Dakota courts from applying their own objective entrapment analysis in accordance with the *Kummer* decision. *See Kummer*, 481 N.W.2d at 444 (finding illegal police conduct was entrapment as a matter of law). At the same time the legislature enacted the new entrapment law, it enacted a law making it legal for the police to use forfeited narcotics to facilitate drug enforcement. N.D. CENT. CODE § 19-03.1-36(5)(e) (Supp. 1993). That the legislature found it necessary to legalize the use of narcotics found to be illegal in *Kummer* could suggest that it did not consider its new entrapment law to overrule the underlying basis for the *Kummer* holding, that illegal police activity in manufacturing crime is entrapment as a matter of law. *Kummer*, 481 N.W.2d at 441.

128. State v. Talbot, 364 A.2d 9, 13 (N.J. 1976).

129. N.J. STAT. ANN. § 2c:2-12 (West 1982).

130. State v. Johnson, 606 A.2d 315, 320 (N.J. 1992).

131. *Id.* at 322. *See also* N.J. CONST., art. I, para. 2. ("All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right at all times to alter or reform the same, whenever the public good may require it.").

According to *Johnson*, the relevant factors to consider in due process entrapment are:

> (1) whether the government or the defendant was primarily responsible for creating and planning the crime, (2) whether the government or the defendant primarily controlled and directed the commission of the crime, (3) whether objectively viewed the methods used by the government to involve the defendant in the commission of the crime were unreasonable, and (4) whether the government had a legitimate law enforcement purpose in bringing about the crime.

Johnson, 606 A.2d at 323.

132. People v. Isaacson, 378 N.E.2d 78 (N.Y. 1978).

133. 378 N.E. 2d 78 (N.Y. 1978).

134. People v. Isaacson, 378 N.E. 2d 82 (N.Y. 1978).

135. Cruz v. State, 465 So. 2d 516, 520-21 (Fla. 1985) *superseded by statute as recognized in* Munoz v. State, No. 78,900, 1993 WL 406367, at *9 (Fla. Oct. 14, 1993).

before the defendant may be required to prove a subjective theory of entrapment to the trier of fact.[136]

F. REVERSE STINGS AND ENTRAPMENT LAW

Courts generally recognize that police must use deceptive tactics in order to effectively discover and apprehend certain criminals.[137] An accepted tactic is the sting operation in which police pose as potential victims or willing co-participants in crime.[138] The typical example of a sting has law enforcement agents posing as drug buyers in order to ferret out the sources and sellers of narcotics.[139] However, when the police actually supply the narcotics, or other criminal means, this is called a reverse sting, and some courts are more wary of enforcing the results of the police operation.[140] The typical reverse sting has the police offering illegal drugs for sale and then arresting the willing purchasers.[141]

Although reverse stings are recognized as ordinary police conduct in some localities,[142] several courts have shown that there are limits to the amount of police involvement in crime which will be tolerated.[143] Some courts have found that when one law enforcement agent supplies the contraband to a suspect and then another

136. *Id.* at 521-22. The first part of the Florida court's objective standard required the court to decide whether the police intended "the interruption of a specific ongoing criminal activity" and that their means were "reasonably tailored to apprehend those involved." *Id.* at 522. The second prong of this objective test asked the court to consider whether the inducement " 'create[d] a substantial risk that such an offense [would] be commited by persons other than those who are ready to commit it.' " *Id.* (quoting Model Penal Code § 2.13 (1962)).

Since *Cruz*, the Florida legislature revised its entrapment statute. FLA. STAT. ANN. § 777.201 (West 1992). Although Florida maintains some form of objective standard based on the state constitution, it is unclear how much of the *Cruz* test remains viable. *See* Munoz v. State, No. 78,900, 1993 WL 406367, at **9-13 (Fla. Oct. 14, 1993).

137. *See, e.g.*, State v. Overby, 497 N.W.2d 408, 414 (N.D. 1993).

138. *See* State v. James, 484 N.W.2d 799, 800-01 (Minn. Ct. App. 1992).

139. Jacobson v. United States, 112 S. Ct. 1535, 1541 (1992).

140. *See* Moore v. State, 534 So. 2d 557, 559-60 (Miss. 1988) (recognizing that the state's participation may be evidence of a lack of predisposition in the defendant and suggesting that sometimes police involvement may be so outrageous that it requires discharging the defendant); State v. Talbot, 364 A.2d 9, 13 (N.J. 1976) (holding that when police provide the defendant with heroin "for the purpose of then arranging a sale of the heroin by the defendant to an undercover officer[,] . . . defendant has been entrapped as a matter of law even though predisposition to commit the crime may appear").

141. *See, e.g., James*, 484 N.W.2d at 800-01 (describing drug busts in which police officers posed as drug dealers and "only 'sold' to those who approached them").

142. *James*, 484 N.W.2d at 800-03. *See* Patrick Springer, *Fargo drug arrest conviction overturned*, THE FORUM, Feb. 27, 1992, at A1, A12 (quoting the Fargo Chief of Police to say that reverse stings were in use "quite awhile"); Rob Johnson, *Narcotics team busts 34 on drug charges; Sting nabs suspected crack buyers*, THE ATLANTA JOURNAL AND CONSTITUTION (Gwinnett Extra), Dec. 14, 1991, at J16 (reporting the frequency of reverse stings for at least one law enforcement jurisdiction).

143. *See, e.g., Talbot*, 364 A.2d at 13.

agent buys that same contraband from the suspect, entrapment has occurred as a matter of law.[144] Nevertheless, it appears that prior to the North Dakota Supreme Court decision in *State v. Kummer*,[145] the Mississippi Supreme Court was the only highest state court to find that the typical reverse sting constituted entrapment as a matter of law.[146]

III. ANALYSIS

State v. Kummer[147] is the first case in which the North Dakota Supreme Court found entrapment despite a contrary trial court ruling.[148] Prior to *Kummer*, the court's scope of review was limited to an examination of the reasonableness of the trial courts' findings of fact and of the inferences to be drawn from those findings.[149] Nevertheless, prior statements of the supreme court recognized that when the facts "or the inferences to be drawn from

144. *Id.*

145. 481 N.W. 2d 437, 444 (N.D. 1992).

146. Barnes v. State, 493 So. 2d 313, 315-16 (Miss. 1986). *But see* Moore v. State, 534 So. 2d 557, 559 (Miss. 1988) (limiting the *Barnes* holding to mean only that the state's furnishing of the contraband is merely evidence of a lack of predisposition).

147. 481 N.W.2d 437 (N.D. 1992).

148. State v. Kummer, 481 N.W. 2d 437, 444 (N.D. 1992). Prior to *Kummer*, the court remanded cases in which the jury instruction had erroneously applied the subjective test by placing the defendant's predisposition at issue. *E.g.*, State v. Pfister, 264 N.W.2d 694 (N.D. 1978). Also, the court overturned a bench trial verdict which found entrapment had not occurred because the defendants were predisposed. State v. Mees, 272 N.W.2d 284, 288 (N.D. 1978). The trial judge had erroneously admitted evidence of the defendants' pasts. *Id.* at 289.

149. *See, e.g.*, State v. Kluck, 340 N.W.2d 446, 447 (N.D. 1983) (citing precedents which required the court to defer to the trial court's findings of fact and those inferences which are reasonable).

A survey of pre-*Kummer* entrapment case law in North Dakota shows a great deal of deference to trial court findings of fact. For example, the supreme court upheld a conviction in which a police informant had pressured the defendant by stressing that the two of them were friends, that the defendant owed the informant a favor, and that the informant's other friend (really a special agent from the Minnesota Bureau of Criminal Apprehension) "desperately needed marijuana." *Id.* at 447. The *Kluck* court decided that the trial court, the proper trier of fact, had "properly considered the elements of entrapment." *Id.*

Also, the court has consistently refused to find that undue psychological pressure required a finding of entrapment in cases in which the factfinder had rejected the argument. *See* State v. Bartkowski, 290 N.W.2d 218, 220 (N.D. 1980). The court, in *Bartkowski*, found that even if the jury had believed the defendant's testimony regarding the number of times he was contacted by the informant, it could have "concluded that a normally law-abiding person would not have been persuaded to sell drugs." *Id. See also* State v. Hoffman, 291 N.W.2d 430 (N.D. 1980). In *Hoffman*, the agent befriended the defendant and developed his trust. *Id.* at 431. The court found that elements of "trickery and deception" did not always rise to the level of outrageousness or unacceptability which the entrapment statute was "designed to prevent." *Id.* at 432. The issue had been properly weighed by the jury. *Id.* at 433.

In *State v. Flamm*, the defendant alleged that the informant threatened him with a gun. 338 N.W.2d 826, 827 (N.D. 1983). The court found that Flamm's willing participation in criminal activity did not directly result from the alleged threat. State v. Flamm, 338 N.W.2d 826, 829 (N.D. 1983). The court rejected an argument that the jury had "arbitrarily disregarded" Flamm's entrapment evidence. *Id.*

the facts" are not disputed, the court "may determine the existence of entrapment as a matter of law."[150] The *Kummer* court was faced with no factual disputes,[151] so it was free to decide whether Mr. Kummer was entrapped as a matter of law.[152]

The supreme court started by explaining the requirements for the affirmative defense of entrapment as provided by statute and explained by precedent.[153] It ended its explication of entrapment law by simply stating that "[p]olice use of unlawful means is entrapment."[154] Although no precedent was cited for this statement, at a later point the court cites the Final Report of the National Commission on Reform of Federal Criminal Laws, which drafted the statute, to suggest that North Dakota's entrapment defense was meant to deter " 'improper law enforcement techniques.' "[155] In finding that the reverse sting which snared Kummer was illegal, the *Kummer* court cited case law from several jurisdictions which suggested that entrapment as a matter of law occurs whenever contraband is provided by one law enforcement agent to a defendant who then sells it to another law enforcement agent.[156] The *Kummer* court went further than the cited case law

150. *Kummer*, 481 N.W.2d at 441. *See* State v. Rehling, 426 N.W.2d 6, 7 (N.D. 1988) (recognizing a factual dispute which precluded a finding of entrapment "as a matter of law"); State v. Pfister, 264 N.W.2d 694, 700 (1978) (finding that when there is no dispute "as to the facts and the inferences to be drawn from them," the court determines the entrapment issue as a matter of law).

151. Brief for Appellant at 11, State v. Kummer, 481 N.W.2d 437 (N.D. 1992) (No. 910138); The *Kummer* opinion itself stated "that the *undisputed* facts of this case show that the police used unlawful means to induce the crime." *Kummer*, 481 N.W.2d at 438 (emphasis added).

152. *Kummer*, 481 N.W.2d at 441.

153. *Id.*

154. *Id.*

155. *Id.* at 443-44 (quoting State v. Pfister, 264 N.W. 2d 694, 697 (N.D. 1978)).

156. *Kummer*, 481 N.W.2d at 441. *See* State v. Talbot, 364 A.2d 9, 13 (N.J. 1976) (finding entrapment as a matter of law when an informer furnishes heroin to a defendant "for the purpose of then arranging a sale" to an undercover police officer); State v. Overmann, 220 N.W.2d 914, 917 (Iowa 1974) (finding that if no fact issue exists and the evidence discloses that one government agent supplied drugs to a defendant and another government agent "reappropriate[s] any of those drugs," then a " 'take-back entrapment' " has been shown, requiring "dismissal as a matter of law").

Several of the cases which the *Kummer* court cited are from federal jurisdictions in which the precedential value was abrogated by the United States Supreme Court. *Kummer*, 481 N.W.2d at 442. The *Kummer* court reasoned that although the precedential value had been lost to the federal courts, "the rule announced in those cases is 'quite compatible with the existing law of entrapment' in jurisdictions, like ours, that employ the 'objective' theory." *Id.*

Among the federal cases cited is *United States v. Bueno*, 447 F.2d 903, 906 (5th Cir. 1971) (finding that when a government informant had purchased the heroin, had imported it into the United States from Mexico, and then had worked with the defendant to cut the heroin before inducing defendant to sell the drug to another government agent, entrapment had occurred as a matter of law), *cert. denied*, 411 U.S. 949 (1973). The court also cited *United States v. West*, 511 F.2d 1083 (3d Cir. 1975). The *West* court found that the government's role had "passed the point of toleration" when the informant, attempting to mitigate his own troubles with the law, coaxed an old friend whom he knew was in need

by finding the "typical reverse sting" unacceptable, stating that "[i]t is the conduct of the government agent in furnishing the illegal drugs to the accused, rather than the accused's subsequent sale to another government agent, that is the improper governmental inducement."[157]

Also, according to the *Kummer* court, the rationalization for using extraordinary law enforcement measures, i.e., necessity, is

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of money to join him in the selling of drugs to another law enforcement agent. *Id.* at 1085. In *West*, the prosecutor admitted in closing argument that West had no history of drug trafficking. *Id.* "Moreover," the court said:

> such conduct does not facilitate discovery or suppression of ongoing illicit traffic in drugs. It serves no justifying social objective. Rather, it puts the law enforcement authorities in the position of creating new crime for the sake of bringing charges against a person they had persuaded to participate in wrongdoing.

Id. These and other federal cases which found entrapment as a matter of law when the law enforcement agents provided the contraband were later abrogated by the United States Supreme Court. Hampton v. United States, 425 U.S. 484, 490 (1976). Writing for the *Hampton* majority, Justice Rehnquist stated that "[t]he remedy of the criminal defendant with respect to the acts of Government agents, which, far from being resisted, are encouraged by him, lies solely in the defense of entrapment." *Id.* Justice Rehnquist then noted that "petitioner's conceded predisposition rendered this defense unavailable to him." *Id.*

The Court had previously left open the possibility of finding meritorious defenses if law enforcement conduct "is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . ." United States v. Russell, 411 U.S. 423, 431-32 (1973). That possibility survives because Justice Rehnquist's *Hampton* opinion was joined by only two other members of the Court. *Hampton*, 425 U.S. at 485. In a concurring opinion, Justice Powell, joined by Justice Blackmun, while agreeing with Justice Rehnquist's entrapment analysis, refused to join the plurality's conclusion that the "concept of fundamental fairness inherent in the guarantee of due process would never prevent the conviction of a predisposed defendant, regardless of the outrageousness of police behavior in light of surrounding circumstances." *Id.* at 492-93 (Powell, J. concurring). Powell declined to go beyond the opinion in *Russell*, seeing no distinction between the police providing a necessary ingredient in the manufacture of narcotics and the police providing the finished product. *Id.*

157. *Kummer*, 481 N.W.2d at 442. *But see* United States v. Perez, 959 F.2d 164, 170 (10th Cir. 1992) (displaying a rather cursory acceptance of reverse stings even when no "reasonable suspicion" of the particular target existed) *vacated in part on other grounds*, 989 F.2d 1574 (10th Cir. 1993); United States v. Huff, 959 F.2d 731, 737 (8th Cir.) (finding no reason for an entrapment instruction in a reverse sting case in which the police involvement was quite pervasive) *cert. denied*, 113 S. Ct. 162 (1992); State v. Gessler, 690 P.2d 98, 104 (Ariz. Ct. App. 1984) (refusing to find entrapment as a matter of law in a reverse sting case in which officers provided free samples of marijuana, seeing a need for undercover agents to be able to develop the trust of those groups which they infiltrate).

For a post-*Kummer* decision, see Rivera v. State, 846 P.2d 1 (Wyo. 1993). The *Rivera* court, using the subjective approach, rejected an entrapment defense based on law enforcement officers obtaining four hundred pounds of marijuana from the Colorado Springs (Colorado) Police Department, setting up shop at a Jackson, Wyoming motel, and using an informant to lure buyers into the room where they could be filmed by hidden video equipment. *Id.* at 2-4. In an emphatic dissent in which *Kummer* is cited, Justice Urbigkit recommends that Wyoming adopt a hybrid subjective/objective standard for entrapment. *Id.* at 7-37 (Urbigkit, J., dissenting). Justice Urbigkit begins his dissent in *Rivera* by expressing a major concern for allowing reverse stings with the following bit of sarcasm: "It was 'dry' in Jackson, Wyoming — meaning the availability of marijuana or other illegal drugs for purchase around town was limited. Knowing this, the local police set about curing the problem." *Id.* at 7. While inviting a careful reexamination of Wyoming entrapment law, Justice Urbigkit includes throughout his opinion a thorough list of current authorities on the subject. *Id.* at 7-37.

lacking when the police supply the contraband.[158] The court reasoned that a rule forbidding the police supplying of contraband would eliminate only an unnecessary enforcement technique because persons dealing in narcotics would have their own supplies.[159]

The *Kummer* court also listed a number of public policy arguments against allowing police to supply contraband.[160] Initially, the court suggested that a rule against the police furnishing contraband in sting operations would be easy to explain to the police.[161] Moreover, the court reasoned, forbidding the police from supplying the contraband would protect innocent people.[162] The court recognized the chance that recipients of the police action would actually use the drugs and recognized the danger that some law enforcement agents would divert the drugs "to illegal channels."[163] The court suggested that police corruption can more easily be avoided by making sure that seized drugs are

158. *Kummer*, 481 N.W.2d at 442. *See also* Case Comment, *Criminal Procedure: Entrapment Rationale Employed to Condemn Government's Furnishing of Contraband*, 59 MINN. L. REV. 444, 457-58 (1974) (allowing that the conventional sting, in which police officers use deception to buy contraband, is arguably an essential means to expose "'persons otherwise willing to sell" and allowing that, in some cases, providing the contraband might arguably be necessary to prevent future crime, but realizing the danger of innocent people being "vulnerable to manipulation by the government").

159. *Id.* at 443 (quoting Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 191 (1976)). Note that since the *Kummer* decision the North Dakota legislature has expressly authorized the use of seized narcotics in reverse sting operations. N.D. CENT. CODE § 19-03.1-36(5)(e) (Supp. 1993).

160. *Kummer*, 481 N.W.2d at 443.

161. *Id.*

162. *Id.* The court quotes Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 191 (1976). Park's analysis was in the context of federal cases which had applied the "furnishing contraband" ban. *Id.* at 190-95. He suggested that the ban was centered in the predisposition element of the federal entrapment law, that "the furnishing of contraband could be treated as a form of government leadership that will normally raise a reasonable doubt about the defendant's predisposition." *Id.* at 194. At any rate, the "furnishing-contraband" defense has since been rejected by the United States Supreme Court. Hampton v. United States, 425 U.S. 484, 489-90 (1976).

163. *Kummer*, 481 N.W.2d at 443. Several cases of police mishandling contraband which was provided to them for reverse sting operations have been documented in the press. *See Officials look for inmates convicted in illegal sting*, UPI, March 1, 1992, *available in* LEXIS, Nexis Library, UPI file (describing a case in which the sheriff's office cooked its own crack cocaine and then set up shop near schools in order to lure drug buyers into charges carrying a mandatory three-year prison term). A state appeals court ruled that even prisoners who had not protested their convictions must be released if their prosecution relied on this "outrageous" set up. *Id. See also* Kelly v. State, 593 So.2d 1060, 1062 (Fla. Dist. Ct. App. 1992) (reversing a conviction on due process grounds because of the police manufacture of "crack"). *See* Mike Clary, *Sheriff skirts the legal limits; Florida lawman says he will fight court to reopen his department's crack lab*, L.A. TIMES, Jan. 16, 1992, at A5 (noting that the Florida appeals court was "troubled by the sheriff's inability to account for all of the cocaine rocks" and noting the sheriff's denial of an accountability problem). Moreover, a grand jury in Texas investigated the police mishandling of drugs supplied for reverse stings and the use of such stings as cover for illegal moneymaking operations. *Reverse stings probed*, UPI, Jan. 28, 1992, *available in* LEXIS, Nexis Library, UPI File.

immediately locked into the evidence room.[164]

In deciding that reverse narcotic stings are illegal, the *Kummer* court considered that the police handling of the cocaine in this case was not authorized in writing by any supervisory personnel and that it was directly contrary to the Fargo Police Department's Standard Operating Procedures.[165] The court found no statutory authority for allowing resale by the police of confiscated evidence, but found that, under state law, the evidence is to be held " 'subject only to the orders and decrees of the district court.' "[166] The court refused to countenance the "[s]ubversion of statutes, rules, or regulations by law enforcement officers, in order to induce a criminal violation."[167]

In summary, the court found that reverse stings in which the police supply the contraband are illegal and, therefore, constitute entrapment as a matter of law.[168] In doing so, the court decided that some illegal police conduct constitutes entrapment whether or not it would have induced a normal law-abiding person to commit a crime.[169]

IV. IMPLICATIONS

A. *KUMMER*'S EFFECT ON CASES DECIDED UNDER THE FORMER "NORMAL LAW-ABIDING PERSON" ENTRAPMENT STATUTE.

Although the court unanimously concurred in the result, a count of votes and a careful look at two special concurrences is necessary to evaluate the possible ramifications of the *Kummer* opinion on future North Dakota entrapment law. Justice Meschke's opinion garnered a majority;[170] however, one member of that majority, Surrogate Judge Pederson, specially concurred to express frustration because the then current entrapment statute improperly kept the government from providing evidence of why

164. *Kummer*, 481 N.W.2d at 443.

165. *Id.*

166. *Id.* (quoting N.D. CENT. CODE § 19-03.1-36(4) (1991)). Note that the legislature has since acted to give police the authority to offer confiscated narcotics for sale in reverse sting operations. N.D. CENT. CODE § 19-03.1-36(5)(e) (Supp. 1993).

167. *Kummer*, 481 N.W.2d at 443 (citations omitted).

168. *Id.* at 442-44.

169. *Id.* at 444. The court found that the police provided the cocaine "that formed the basis for Kummer's prosecution" and, therefore, "Kummer has established entrapment as a matter of law." *Id.*

170. *Id.* Justice Meschke's opinion was joined by Chief Justice Erickstad and Surrogate Judge Pederson. *Id.* However, Judge Pederson wrote a separate opinion. *Id.* at 445-46. Justice Levine concurred in the result. *Id.* at 444. Justice VandeWalle wrote a special concurring opinion. *Id.*

an individual is targeted by a reverse sting in the first place.[171] He suggested that the legislature reexamine its position and redefine entrapment to benefit the normal law-abiders and to give police "authority to engage the 'predisposed' professional criminal in a battle of 'no holds barred.' "[172]

In another special concurrence, Justice VandeWalle rejected the majority's reliance on the entrapment law and recommended that the court simply refuse to sustain a conviction gained by the "intolerable conduct" of the police.[173] He found it absurd to differentiate between the defendant who buys contraband from a professional drug dealer and the defendant who buys contraband from an undercover police officer whom he believes is a professional drug dealer.[174] He suggested that the majority and the cited jurisdictions had "cast their opinions in more traditional and, perhaps, more tenable forms such as entrapment" when they should have confronted the issue and declared that "as a matter of public policy [the court] will not sustain a conviction obtained by intolerable conduct on the part of law enforcement agents."[175] He recognized that a majority in *Hampton*[176] had concluded "that outrageous police conduct may bar [a] conviction as a matter of law" even while rejecting an outrageous police misconduct element to an entrapment defense.[177] He reasoned that recognizing "intolerable conduct" as the basis for reversal of this conviction would avoid confusing "what heretofore has been a clear judicial exposition of a clear legislative statute on the law of entrapment."[178]

However the votes are counted in *Kummer*, the result is that a unanimous court refused to uphold a conviction based on evidence

171. *Id.* at 445 (Pederson, Surrogate Judge, concurring specially). *Compare* State v. Overby, 497 N.W.2d 408, 414 (N.D. 1993) (finding "sufficient basis" for targeting defendant).

172. *Kummer*, 481 N.W.2d at 445-46 (Pederson, Surrogate Judge, concurring).

173. *Kummer*, 481 N.W.2d at 444-45 (VandeWalle, J., concurring). However, a year later, Justice VandeWalle wrote for a unanimous court and directly quoted the *Kummer* majority opinion's finding that unlawful conduct by police is entrapment. *Overby*, 497 N.W.2d at 411.

174. *Kummer*, 481 N.W.2d at 444-45 (VandeWalle, J., concurring).

175. *Id.* at 445.

176. *Id. See also* Hampton v. United States, 425 U.S. 484, 499 (1976) (Brennan, J., dissenting). Brennan accepted the due process defense recognized in a concurrence by Justice Powell. *Id.*

177. *Kummer*, 481 N.W.2d at 445 (VandeWalle, J., concurring).

178. *Id. Compare* Kelly v. State, 593 So. 2d 1060, 1062 (Fla. Dist. Ct. App. 1992) (finding a due process violation in a reverse sting in which the sheriff manufactured crack because the law enforcement officers acted illegally and because the police could not account for all of the "crack" — suggesting that some had escaped "into the community").

gained from a rather routine reverse sting.[179] The decision effectively outlawed the use of reverse stings by North Dakota law officers acting to enforce North Dakota statutes.[180] Consider, in contrast, that since the *Russell* decision by the United States Supreme Court,[181] only one federal appeals court has reversed a conviction from a reverse sting because of "outrageous" police involvement in the crime.[182] In *United States v. Twigg*,[183] the law enforcement agents supplied almost all of the necessary ingredients for the manufacture of narcotics, supplied the building which housed the laboratory, supplied the know-how for the manufacturing process, and maintained a level of control over the operation.[184] These facts set this case apart from other reverse sting cases in which the police simply supplied the contraband.[185] When the police have simply provided the contraband, the federal courts have not shown a willingness to find that the police have acted outrageously.[186]

This tolerance of reverse stings by the federal courts invites North Dakota law enforcement officials to cooperate with federal agents and prosecute narcotics violations under federal law.[187] At least one police officer suggested that the *Kummer* decision simply required a procedural change for the Fargo Police Department to pursue convictions in federal court.[188] He said, "It's just another

179. *See supra* notes 147-157 and accompanying text.

180. *See* Dale Wetzel, *Fargo police broke law in drug bust Court rules for Anamoose man*, GRAND FORKS HERALD, Feb. 27, 1992, at A3 (quoting Cass County State's Attorney John Goff, Kummer's prosecutor, as saying that the decision prohibits reverse stings).

181. United States v. Russell, 411 U.S. 423 (1976). For a discussion of *Russell*, *see supra* Part III. C.

182. United States v. Twigg, 588 F.2d 373 (3d Cir. 1978).

183. 588 F.2d 373 (3d Cir. 1978).

184. *Twigg*, 588 F.2d at 375-76.

185. *See* United States v. Gonzales, 927 F.2d 139, 144 (3d Cir. 1991) (rejecting the outrageous conduct defense when the informant in a reverse sting was guaranteed a percentage of the value of the money forfeited by drug buyers); United States v. Walther, 867 F.2d 1334, 1338-39 (11th Cir.) (rejecting an outrageous conduct defense in a case in which law enforcement agents initiated the negotiations for the narcotics transactions, provided the location for the transfer of narcotics, provided transportation for the narcotics, and supplied the narcotics) *cert. denied*, 493 U.S. 848 (1989); United States v. Huff, 959 F.2d 731, 734 (8th Cir.) (summarily rejecting an outrageous conduct defense where police exchanged a one kilogram brick of cocaine for $20,000 and immediately arrested the purchasers) *cert. denied*, 113 S. Ct. 162 (1992).

186. *See supra* note 185.

187. Betsy Gerboth, *U.S. attorney vows to keep using 'reverse sting'*, THE FORUM, Feb. 28, 1992, at B1. *See also*, Tom Pantera, *Fargo to run 'reverse stings' through federal system*, THE FORUM, Feb. 28, 1992, at B1 (quoting Fargo Police Lt. Pete Mariner as saying that the Department "no longer keeps cocaine in its evidence room" and that "reverse stings will have to be operated through federal drug agents 'if we're going to get anything accomplished' ").

188. *See* Tom Pantera, *Fargo to run 'reverse stings' through federal system*, THE FORUM, Feb. 28, 1992, at B1 (quoting Lt. Pete Mariner).

office we have to deal with."[189]

While recognizing that *Kummer* effectively outlawed reverse narcotic stings in state prosecutions,[190] one must be aware of the limited effect of this decision. The conduct of the police which resulted in this finding was contrary to state law and to police department regulations.[191] The illegal conduct of the police was a simultaneous and necessary adjunct to the defendant's criminal behavior.[192] Thus, this fact-specific decision still leaves the police with a great deal of freedom in their pursuit of criminals.

B. *KUMMER* AND NORTH DAKOTA'S NEW SUBJECTIVE STANDARD FOR ENTRAPMENT

In 1993, the North Dakota Legislature reacted to the *Kummer* decision in two ways.[193] It legalized the use of forfeited narcotics for law enforcement purposes.[194] It also added a subjective ele-

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189. *Id.*

190. Wetzel, *supra* note 180 (quoting Kummer's prosecutor as saying that the *Kummer* decision outlaws reverse stings).

191. State v. Kummer, 481 N.W.2d 437, 443 (N.D. 1992). Concluding a description of the law enforcement agents' violations of the law, Justice Meschke wrote that "[s]ubversion of statutes, rules, or regulations by law enforcement officers, in order to induce a criminal violation, cannot be sanctioned." *Id.*

The North Dakota Supreme Court's decision just four years earlier in State v. Erban, 429 N.W.2d 408 (N.D. 1988), suggests that the restrictions the court wishes to place on police conduct are limited. In *Erban*, the court saw no reason to find entrapment as a matter of law in a case in which the law enforcement agents initiated the idea of manufacturing "kitchen crank," supplied the defendant with money to produce a sample of the drug, and accompanied the defendant to various stores to purchase the necessary ingredients. *Id.* at 413-14. *Erban* is distinguishable from *Kummer* in at least two ways: Erban's illegal act, attempting to manufacture a narcotic, was effectuated apart from his contact with the police. *Id.* at 409. Second, there was no evidence that the police violated a statute or regulation. *Id.* 409-14. Also, in a 1978 case, State v. Mees, 272 N.W.2d 284 (N.D. 1978), the court was presented with some questionable police conduct when an undercover informant claimed he was a pimp in order to solicit an act of prostitution in the hotel room of another undercover agent. *Id.* at 285-87. The *Mees* court chose not to find entrapment as a matter of law. *Id.* at 290. *Mees* can be distinguished from *Kummer* because there was a factual question concerning the amount of affirmative criminal conduct by the defendants apart from any police conduct. *Id.* Another factor in *Kummer*, not existent in previous cases, was the public policy concern about whether the police were exercising enough control and supervision over dangerous narcotics. 481 N.W.2d at 441-43.

192. *Kummer*, 481 N.W.2d at 441 (stating that the "law enforcement officers furnished the controlled substance that *brought about* the prosecution and conviction . . . .") (emphasis added).

193. 1993 N.D. Laws ch. 221 (enacting section 19-03.1-36(5)(e) to the North Dakota Century Code to allow police to use forfeited narcotics to enforce the drug laws); *id.* ch. 117 (revising North Dakota's affirmative defense of entrapment to provide the subjective standard).

194. *See* N.D. CENT. CODE § 19-03.1-36(5)(e) (Supp. 1993). The Uniform Controlled Substances Act now includes the following:

> When property is forfeited under this chapter the board or a law enforcement agency may:
>
> . . .
>
> Use the property, including controlled substances, imitation controlled substances, and plants forfeited . . . in enforcement of this chapter. However, in

ment to the entrapment statute.[195]

Although these legislative actions are far-reaching in their effect on entrapment law and the legality of reverse stings, they do not clearly overrule *Kummer*. It is true that the legislative action makes it legal for the police to use drugs in the enforcement of narcotics laws as long as they do not provide the contraband which forms the basis for a conviction in a case of mere possession.[196] It is also true that, in reaching its holding, the *Kummer* court relied partly on the lack of any legislative permission for the police to remove seized contraband from an evidence room for resale.[197] Nevertheless, other foundation was provided for the court's decision. For example, the court quoted due process language from *State v. Talbot*, the case in which the New Jersey Supreme Court recognized an "entrapment as a matter of law" defense based on its state constitution.[198] Public policy considerations also contrib-

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> a case involving the delivery of a forfeited controlled substance by a law enforcement officer or a person acting as an agent of a law enforcement officer, no prosecution or conviction for simple possession of a controlled substance . . . may be based upon the forfeited controlled substances supplied by the law enforcement officer or the officer's agent.

Id.

195. *See* N.D. CENT. CODE § 12.1-05-11 (Supp. 1993) (requiring an entrapment defendant to prove that the police caused the criminal conduct). The new entrapment law reads:

> 1. It is an affirmative defense that the defendant was entrapped into committing the offense.
> 2. A law enforcement agent perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, the law enforcement agent induces or encourages and, as a direct result, causes another person to engage in conduct constituting such a crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.
> 3. In this section "law enforcement agent" includes personnel of federal and local law enforcement agencies as well as state agencies, and any person cooperating with such an agency.

Id.

196. N.D. CENT. CODE § 19-03.1-36(5)(e) (Supp. 1993). Although this provision allows police to use forfeited narcotics for enforcement purposes, it does not delineate the manner in which the drugs may be used. *Id.* Thus, a court could conclude that it is lawful for police to offer drugs for sale to lure unwary criminals while still finding it unlawful for police to seek out an individual, initiate a drug sale, and provide the means for the sale's consummation. For example, a case in which the defendant approaches the undercover agent to purchase narcotics may be acceptable because of § 19-03.1-36(5)(e) and because the police did not step beyond the bounds of court-approved conduct. *See* State v. James, 484 N.W.2d 799, 800 (Minn. Ct. App. 1992). However, a case like *Kummer*, in which the police seek out an individual not already taking steps to commit a crime, may still meet the disapproval of the court.

197. *Kummer*, 481 N.W.2d at 443.

198. *Id.* at 444 (quoting State v. Talbot, 364 A.2d 9, 13 (N.D. 1976)). It is interesting to note that the state constitutional provision in which the New Jersey court based its due process entrapment finding is also included in the North Dakota Constitution. *Compare* N.J. CONST. art. I, ¶ 2 with N.D. CONST. art. I, § 2.

uted to the *Kummer* decision.[199]

The legislative history of the new statute contains an expressed desire to legalize reverse stings in North Dakota,[200] yet it contains no clear intention to legalize all reverse stings.[201] Thus, a reverse sting might still be illegal if it is facilitated with too much police involvement or police involvement which is outrageous. Legislators also expressed sympathy for the *Kummer* court's public policy concerns and a desire to keep addictive personalities from "being tempted by the government."[202]

The legislature considered the wording of the entrapment statutes of Colorado and Florida.[203] Colorado courts apply only a subjective standard.[204] Although one Colorado court acknowledged the existence of a due process, outrageous conduct defense, it approvingly cited the United States Supreme Court plurality opinion in *Hampton* which suggested that the defense would be unavailable to a predisposed defendant.[205] Florida courts continue to apply a court determined threshold objective test for entrapment along with the subjective test provided by statute.[206] North Dakota's new statute is more like Florida's than Colorado's.[207] Thus, the wording of the new entrapment statute does not precisely overrule the *Kummer* decision.

Entrapment is still an affirmative defense.[208] In North Dakota, affirmative defenses must be proved by a preponderance of the evidence.[209] Thus, entrapment defendants may now have to prove both inducement and lack of predisposition by a prepon-

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199. *Kummer*, 481 N.W.2d at 442-44.

200. *See, e.g.*, Hearings on Senate Bills 2171 and 2058, Senate Judiciary Committee, Legislative Council Report for Senator Nelson 3 (Mar. 1992).

201. It suggests an intention to allow police to "sell[] drugs to a drug dealer." *See, e.g.*, Hearings on Senate Bills 2171 and 2058, Senate Judiciary Committee, Testimony of U.S. Attorney Steve Easton 1 (Jan. 13, 1993).

202. Hearings on Senate Bills 2171 and 2058, Senate Judiciary Committee 2 (Jan. 13, 1993) (containing dialogue between Senators Maxson and Stenejhem).

203. Hearings on Senate Bills 2171 and 2058, Senate Judiciary Committee, Legislative Council Report for Senator Nelson 2-3 (Mar. 1992). *See also* COLO. REV. STAT. 18-1-701 (1986); FLA. STAT. ANN. § 777.201 (West 1992).

204. *See, e.g.*, Bailey v. People, 630 P.2d 1062, 1067 (Colo. 1981).

205. *In re* M.N., 761 P.2d 1124, 1127 (Colo. 1988).

206. *See supra* notes 135-136 and accompanying text for a discussion of Florida's hybrid approach to entrapment.

207. N.D. CENT. CODE § 12.1-05-11 (Supp. 1993). *See also* COLO. REV. STAT. 18-1-701 (1986) (defining a person who lacks predisposition as one "who, but for the inducement, would not have conceived of or engaged in conduct *of the sort* induced") (emphasis added); FLA. STAT. ANN. § 777.201 (West 1992) (providing that entrapment occurs when "a law enforcement officer . . . for the purpose of obtaining evidence of the commission of a crime, . . . induces . . . a person other than one who is ready to commit [*such crime*].") (emphasis added).

208. N.D. CENT. CODE § 12.1-05-11(1) (Supp. 1993).

209. N.D. CENT. CODE § 12.1-01-03(3) (1985).

derance of the evidence. This requirement would differ from the federal subjective approach which requires the government to prove beyond a reasonable doubt that the defendant was predisposed.[210] However, the Florida Supreme Court construes its entrapment statute to require the defendant to prove both elements of entrapment.[211]

V. CONCLUSION

Even though the *Kummer* court's holding was limited, it acknowledged a form of entrapment outside the statutory definition.[212] Prior to this, the North Dakota Supreme Court had not found it necessary to find entrapment not defined by the statute's normal law-abiding person standard.[213] When the Kummer court was presented with police conduct that the court did not wish to countenance but which probably would not have induced a normal law-abiding citizen to commit crime, the court found it necessary to look beyond the statute to its original inspiration.[214] In doing so, the court acknowledged the Brandeis/Roberts theory of entrapment.[215] North Dakota courts may now find entrapment in cases in which the police acted illegally even if their conduct would not have induced the normal law-abiding person to commit crimes.[216] Ironically, it will be the North Dakota Supreme Court

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210. *See Jacobson*, 112 S. Ct. 1535, 1540 (1992) (stating that "[w]here the Government has induced an individual to break the law and the defense of entrapment is at issue, . . . the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents"). *Compare* Bailey v. People, 630 P.2d 1062, 1065 (Colo. 1981) (stating that "[o]nce the defendant has presented credible evidence on the issue, the prosecution must prove beyond a reasonable doubt that no entrapment has occurred").

211. Herrera v. State, 594 So. 2d 275, 278 (Fla. 1992).

212. State v. Kummer, 481 N.W.2d 437, 441 (N.D. 1992) (stating that "[p]olice use of unlawful means is entrapment").

213. *See generally* cases listed *supra* note 149.

214. *Kummer*, 481 N.W.2d at 443-44 (quoting precedent which stated that North Dakota's "entrapment defense 'is treated primarily as a curb upon improper law enforcement techniques' ").

215. For a discussion of the Brandeis/Roberts approach and its concern for improper law enforcement techniques, *see supra* Part II D.

216. Compare this to Florida's entrapment law as explained in Cruz v. State, 465 So. 2d 516 (Fla. 1985) *superseded by statute as recognized in* Munoz v. State, 78,900, 1993 WL 406367, at *9 (Fla. Oct. 14, 1993). By statute, Florida allows a defendant to argue subjective entrapment theory to a jury. *See* FLA. STAT. ANN. § 777. 201 (West 1992). Nevertheless, the Florida Supreme Court ruled that a defendant who could satisfy either of two threshold, objective entrapment tests need not present the statutory defense. *Cruz*, 465 So. 2d at 522-23. These two tests are much like the two forms of entrapment now recognized in North Dakota. The first test asked whether the police activity in question was intended to interrupt "specific ongoing criminal activity." *Id.* at 522. This test, like the "unlawful means" entrapment discussed in *Kummer*, was meant to discourage the police from manufacturing crime. *Id. See also Kummer*, 481 N.W.2d at 442-43 (discussing the lack of need for police to furnish contraband to catch criminals). The other objective test recognized in *Cruz* contained the hypothetical person standard. 465 So. 2d at 522. Unlike

that decides how the revisions to the entrapment statute affect its own ruling in *Kummer*. The court may decide that North Dakota now has a hybrid approach to entrapment;[217] it may decide that North Dakota is now a purely subjective jurisdiction and add an outrageous conduct defense for those cases where police misconduct requires dismissal despite predisposition;[218] or the court may decide, like the federal court, that police misconduct will not likely provide a defense for the predisposed, entrapped criminal.[219]

Doug Nesheim

North Dakota's hypothetical person standard which required measuring the police conduct according to its effect on a normal law-abiding person, Florida measured the conduct according to its risk of inducing an offense to " 'be committed by persons other than those who are ready to commit it.' " *Id.* (citation omitted). Thus, the subjective affirmative defense protects "innocent, unpredisposed, persons" from being "ensnared by otherwise permissible police behavior." *Id.* at 520. Moreover, the two-pronged objective test guarded against the police creation of crime and criminals. *Id.* at 522-23. However, the Florida Supreme Court has now recognized that *Cruz* was overruled by statute. Munoz v. State, No. 78,900 WL 406367 (Fla. Oct. 14, 1993). *See also* supra note 136.

217. *See* discussion *supra* Part II. E.

218. *See* discussion *supra* Part II. C.

219. *See* discussion at notes 51-53 and accompanying text.